BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)))))	Case No. 17-2474-EL-RDR
In the Matter of the Review of the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37	))))))	Case No. 17-974-EL-UNC

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA MOTIONS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL REGARDING HOUSE BILL 6

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I. INTRODUCTION

The Commission should deny all four of the motions made by the Office of the Ohio Consumers' Counsel ("OCC") regarding expenditures allegedly made by FirstEnergy Corp. in the form of donations or contributions to 501(c)(4) social welfare organizations. The federal criminal complaint that forms the basis for OCC's motions contains no allegations of any wrongdoing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies"). To the contrary, the allegations involve past political activity by a social welfare organization, a state office holder and lobbyists regarding House Bill ("H.B.") 6, **not** the provision of retail electric service by the Companies.

By filing four motions in two separate proceedings (one of which is closed) involving unrelated audits of the Companies, OCC exposes the obvious lack of a legal basis for the Commission to investigate the history of FirstEnergy Corp.'s or the Companies' spending decisions. Despite the lack of legal support, OCC has asked the Commission to do something because OCC claims that "FirstEnergy" – confusingly used by OCC in its filing at various times to mean either FirstEnergy Corp. or the Companies – may have violated an unidentified provision of Ohio utility law. None of the four motions establish a basis for the Commission to open a new investigation of FirstEnergy Corp. or the Companies in these two dockets.

The Commission lacks jurisdiction to review the expenditures allegedly made by FirstEnergy Corp. that are referenced in OCC's motions. The Commission has limited jurisdiction over non-utility companies that are part of an electric utility holding company system, and OCC has not set out facts implicating that jurisdiction with respect to FirstEnergy Corp. Plus, the Commission lacks jurisdiction over political expenses and donations to 501(c)(4) entities, whether made by public utilities or their parent companies, unless those expenses are included in rates charged to customers. The mere fact that FirstEnergy Corp. – but not the Companies – may be

associated with a federal investigation unrelated to ratemaking does not give the Commission jurisdiction to examine FirstEnergy Corp. or the Companies.

OCC also has not shown a valid basis for reopening the Companies' Rider DMR audit proceeding (Case No. 17-2474-EL-RDR) or expanding the Companies' corporate separation audit proceeding (Case No. 17-974-EL-UNC). The Commission recently elected to address a specific H.B. 6 question in Case No. 20-1502-EL-UNC,[1] but there is no basis for conducting the fishing expedition requested by OCC in either the Rider DMR audit proceeding or the corporate separation audit proceeding. The Rider DMR proceeding is closed, and OCC lacks good cause to reopen it. The corporate separation proceeding has been extensively litigated by OCC and others, with multiple rounds of comments and reply comments, and is awaiting a Commission decision. It would be unreasonable to further prolong this proceeding given that OCC has not shown how FirstEnergy Corp.'s alleged contributions to social welfare organizations are relevant to an audit of the Companies' compliance with the corporate separation rules set forth in O.A.C. Chapter 4901:1-37. While OCC wants an independent auditor to investigate H.B. 6 activities in these proceedings, OCC has not identified a statutory basis for the appointment of an auditor to conduct such an investigation. The Commission is a creature of statute, and it simply lacks a legal and factual basis for undertaking the investigation OCC wants.

II. ARGUMENT

A. The Commission Should Deny OCC's Motions for Lack of Jurisdiction.

OCC's concern with the allegations in a federal criminal complaint involving H.B. 6 is not a legal basis for invoking this Commission's jurisdiction. The Ohio Supreme Court has held

[1] In opening that docket, the Commission noted OCC's motions filed in these dockets. *See In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Entry ¶ 4 (Sept. 15, 2020).

repeatedly that the Commission is a creature of the General Assembly and can exercise only the powers and jurisdiction expressly conferred by statute. *See, e.g., In re Application of Ohio Edison Co.*, 158 Ohio St.3d 27, 2019-Ohio-4196, 139 N.E.3d 875, ¶ 13; *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 5, 1995-Ohio-282, 647 N.E.2d 136 (1995); *Ohio Public Interest Action Group v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E. 2d 730 (1975); *Akron & Barberton Belt Rd. Co. v. Pub. Util. Comm.*, 165 Ohio St. 316, 135 N.E. 2d 400 (1956). OCC has not identified any statute that empowers the Commission to commence an investigation of FirstEnergy Corp. or the Companies related to alleged H.B. 6 spending.

OCC states in its Motion that FirstEnergy Corp. is understood to be the "Company A" referenced in the criminal complaint that allegedly contributed to one or more 501(c)(4) social welfare organizations. OCC Motion, pp. 1-2 and Attachment A at ¶ 18. The criminal complaint does not allege, and OCC does not claim, that the Companies made any payments. However, OCC confusingly uses the term "FirstEnergy" in its filing to sometimes refer to FirstEnergy Corp. and sometimes to refer to the Companies. Thus, it is unclear whether OCC is asking the Commission to investigate FirstEnergy Corp. or the Companies, or both. Regardless, the Commission lacks jurisdiction to grant OCC the relief it requests.

1. The Commission lacks jurisdiction to examine expenditures made by FirstEnergy Corp.

The Commission lacks any statutory basis to conduct an investigation of FirstEnergy Corp. with respect to the alleged expenditures or to order FirstEnergy Corp. to show cause that it has not violated Ohio utility law. OCC cites R.C. 4905.05 and 4905.06 as possible authority for the Commission to examine FirstEnergy Corp.[2] OCC Motion, p. 3 fn. 8; OCC Memo. in Sup., pp. 1,

[2] OCC also cites R.C. 4909.154 and O.A.C. 4901-1-12, but both are clearly inapplicable to FirstEnergy Corp. R.C. 4909.154 applies to regulated public utilities when fixing rates for utility service. FirstEnergy Corp. is not a regulated

6. According to OCC, R.C. 4905.06, in combination with R.C. 4905.05, authorize the Commission to examine owners of public utilities for compliance with Ohio utility law and Commission orders. OCC Memo. in Sup., pp. 1, 6. OCC misreads these statutes.

R.C. 4905.05 defines the Commission's jurisdiction as extending primarily to public utilities operating in Ohio as defined in R.C. 4905.03. The Companies are public utilities; FirstEnergy Corp. is not. Notably, OCC's ability to file a complaint with the Commission is limited to complaints against public utilities relating to utility charges or utility service. *See* R.C. 4905.26. FirstEnergy Corp. is not a public utility, and it does not charge for or provide utility service. As recently emphasized by the Ohio Supreme Court, the General Assembly has confined the PUCO's jurisdiction to the supervision of public utilities when acting as public utilities. *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020). Thus, to the extent OCC's motions are a disguised complaint against FirstEnergy Corp., they should be denied.

While the Commission also may have jurisdiction and general supervisory powers over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and 4905.06, those circumstances do not apply here. The Commission has authority to examine the records and accounts of only those holding companies and their affiliates that are exempt from federal regulation under the Public Utilities Holding Company Act of 1935 ("PUHCA") if those records and accounts relate to a regulated public utility's cost of service:

> The jurisdiction, supervision, powers, and duties of the public utilities commission extend to . . . the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and

public utility and does not provide utility service. O.A.C. 4901-1-12 is simply a procedural rule permitting the filing of a motion.

> the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system.

R.C. 4905.05. The PUHCA was repealed by the Energy Policy Act of 2005, effective February 2006, and, thus, no companies currently are exempt under sections 3(a)(1) or (2) thereof. *See* Pub. L. No. 109-58, 119 Stat. 594, 974, Sec. 1263 (2005). Prior to the repeal of the PUHCA, sections 3(a)(1) and (2) of the PUHCA permitted the Securities and Exchange Commission ("SEC") to exempt holding companies and subsidiaries from the provisions of the PUHCA if the holding company and its subsidiaries were predominantly intrastate in character. 15 U.S.C. § 79c(a)(1), (2). While the PUHCA was in effect, FirstEnergy Corp. became a non-exempt registered holding company operating across multiple states. Thus, its records and accounts have not been subject to the Commission's jurisdiction under R.C. 4905.05 for many years.[3]

Moreover, OCC's proposed investigation is unrelated to "the costs associated with the provision of electric utility service by any public utility" in this state. The allegations in the federal complaint are not related to the Companies' costs of providing retail electric service in Ohio. The Companies have no charge or rider designed to recover the costs of any of FirstEnergy Corp.'s political or charitable expenses. Thus, R.C. 4905.05 is doubly inapplicable.

R.C. 4905.06 applies to regulated public utilities and "all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section." R.C. 4905.06. Because FirstEnergy Corp. is not one of the companies referenced in R.C. 4905.05,

[3] When the PUHCA was still in effect, the Commission stated that it "is well aware of the limitations of its jurisdiction imposed by Section 4905.05, Revised Code, and it does not intend to manage the affairs of holding companies." *In re Financial Condition of Ohio's Regulated Public Utilities*, Case No. 02-2627-AU-COI, Entry at p. 1 (Oct. 10, 2002).

the Commission lacks authority to examine it under R.C. 4905.06 for compliance with all laws and orders of the Commission.

2. The Commission lacks jurisdiction to investigate the Companies as OCC has failed to show a case or controversy meriting an investigation.

While the Commission generally has jurisdiction to examine the Companies' compliance with Ohio utility law and orders of the Commission, the scope of that jurisdiction is not unlimited. Typically, the Commission will examine a public utility's provision of utility service and the reasonableness of rates charged for that service. However, the Commission cannot usurp the management role. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953) (utility "is subject to extensive control and regulation" but "is still an independent corporation and possesses the right to regulate its own affairs and manage its own business"); id. at 448 (Commission's "powers do not include the right to manage utilities or dictate their policies"); *West Ohio Gas Co. v. Pub. Util. Comm.*, 128 Ohio St. 301, 381 (1934) ("It is a matter of common sense, as well as law, that the members of the Public Utilities Commission of Ohio cannot substitute themselves as managers of the gas company or dictate its policies"); *City of Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714 (1921), syllabus para. 2 (a public utility "has the right to control its own affairs and manage its own business, so long as it does not injuriously affect the public or exceed its charter powers."). Here, OCC has not established a basis for the Commission to exercise jurisdiction over the Companies related to FirstEnergy Corp.'s alleged expenditures.

In addition, as with other judicial tribunals, the Commission's jurisdiction is limited to cases or controversies. *See In the Matter of the Complaint of Ohio Power Company v. Consolidated Electric Cooperative, Inc.*, Case No. 06-890-EL-CSS, Opinion and Order at p. 16 (July 25, 2007). *See generally Lake Ski I-80, Inc. v. Habowski*, 11th Dist. No. 2015-T-0002, 2015-

Ohio-5535, 57 N.E.3d 215, ¶ 10 ("The legal term 'jurisdiction' denotes the authority conferred by law on a court to exercise its judicial power in a case or controversy before it."). Thus, a complainant filing a complaint under R.C. 4905.26 must show "reasonable grounds for complaint" – i.e., show that a public utility has done something that, if proven to be true, violates a statute or Commission rule or order that causes legal injury to the complainant and entitles the complainant to relief. "Broad, unspecific allegations are not sufficient to trigger" a lengthy process of discovery and hearing. *In the Matter of the Complaint of the Office of Consumers' Counsel v. The Dayton Power & Light Company*, Case No. 88-1085-EL-CSS, Finding and Order at p. 7 (Sept. 27, 1988). A complaint that does not allege inadequate service but, instead, merely requests an investigation fails to trigger the Commission's jurisdiction. *In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems, v. FirstEnergy Corporation*, Case No. 98-1616-EL-CSS, Entry at pp. 3-4 (May 19, 1999). OCC has not shown there is a case or controversy concerning the Companies' provision of public utility service.

First, OCC's motions simply lack any evidence that the Companies may have violated a provision of Ohio utility law or a Commission order. OCC's filing is devoid of any citation to a statute or Commission order that the Companies may have violated. OCC asks the Commission to investigate whether the Companies have improperly used "money collected from consumers . . . for any activities in connection with House Bill 6 instead of for electric utility service," but OCC has no facts suggesting the Companies may have used retail customer revenues for that purpose. The criminal complaint that is the basis for OCC's motions makes no such allegation. Indeed, OCC makes no such allegation. Plus, OCC has not identified why or how the Companies' use of funds for that purpose would be improper. Without any evidence, the Commission lacks jurisdiction to initiate an investigation of the Companies.

Second, even if there were evidence of the Companies making contributions or donations, the Commission has found that the basis for political contributions and donations made by public utilities falls outside the Commission's jurisdiction. *See In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004). In that proceeding, OCC sought an amendment to corporate separation rules prohibiting electric distribution utilities from making political contributions or donations that might give them a competitive advantage. *Id.* at p. 13. The Commission rejected OCC's request. As the Commission explained, "As for prohibiting and/or restricting political contributions and donations (the last item listed above), **that issue is a matter outside of our jurisdiction**." *Id.* at p. 14 (emphasis added). The likely basis for this jurisdictional finding is that contributions and donations cannot be included in utility rates. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus. There is no legal prohibition on public utilities using their income for non-utility purposes (such as making donations to the United Way), and the Commission has no jurisdiction over such use of funds.

Therefore, OCC's motions did not trigger the Commission's jurisdiction to investigate the Companies because (1) there is no factual basis upon which to commence an investigation; and (2) the purpose of political contributions and donations made by public utilities is outside the Commission's jurisdiction.

B. Each of OCC's Motions Lacks Factual and Legal Support for the Relief Requested.

OCC's filing includes four motions, none of which should be granted by the Commission. The lack of factual and legal support for each motion is addressed sequentially below.

1. OCC's motion for an independent management audit and investigation

There is no statute or rule authorizing OCC to seek an "independent management audit and investigation" in these proceedings of "FirstEnergy's corporate governance, its corporate relationships including its utility relationships with other FirstEnergy affiliated entities, and whether any money collected from consumers, including but not limited to distribution modernization charge money, was improperly used for any activities in connection with House Bill 6 instead of for electric utility service." OCC Motion, pp. 3-4. Since OCC's concern is "money collected from consumers," its use of "FirstEnergy" in this context necessarily means the Companies. However, even if we put to one side the obvious jurisdictional problems created by OCC's failure to offer any evidence that the Companies used retail revenues on H.B. 6 activities or to show that any such spending is prohibited by Ohio utility law or Commission order, OCC's reliance on R.C. 4909.154 as a statutory basis for conducting this investigation is misguided.

R.C. 4909.154 is one of several Revised Code sections that establish the requirements and procedures for base rate cases. *See* R.C. 4909.15 through R.C. 4909.19. R.C. 4909.154 authorizes the Commission to "consider the management policies, practices, and organization of the public utility" when "fixing the just, reasonable, and compensatory rates, joint rates, tolls, classifications, charges, or rentals to be observed and charged for service by" the utility. Notably, all cases cited by OCC in which R.C. 4909.154 was applied are rate cases. *See* OCC Memo. in Supp., pp. 1-2. This should not be surprising, because R.C. 4909.154 applies only in rate cases. *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at p. 16 (June 20, 2002) ("Section 4909.154, Revised Code, clearly applies to a rate case"); *In the Matter of the Application*

of the City of Cleveland for the Initiation of an Investigation and/or Rulemaking Proceeding to Implement Amended Section 4909.154, Revised Code, Case No. 83-790-AU-UNC, 1987 WL 1466574 at *1, Entry (Feb. 10, 1987) (finding that R.C. 4909.154 "refers to the Commission's consideration during a rate case proceeding of the management policies, practices, and organization of a public utility"); *In the Matter of the Complaint of Randustrial Corporation v. The Ohio Bell Telephone Co.*, Case No. 82-921-TP-CSS, *et al*., 1984 WL 992121 at *13, Attorney Examiner's Report (June 25, 1984) ("it is clear that the grant of authority [in R.C. 4909.154] given to allow the Commission to review management policies and practices of a utility is therein restricted to rate proceedings."). Because neither the Rider DMR audit proceeding nor the corporate separation proceeding is a rate case or otherwise involves the fixing of rates, R.C. 4909.154 is inapplicable in these two proceedings.

OCC wrongly claims that R.C. 4909.154 applies outside of a rate case, and it misrepresents the two Commission decisions it cites for this proposition. The Commission did not apply R.C. 4909.154 outside of a rate case in *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of the Dayton Power & Light Company and Related Matters*, Case No. 87-107-EL-EFC, Entry on Rehearing (Mar. 15, 1988). Instead, the Commission found that R.C. 4909.154 did not limit the Commission's authority to review DP&L's oil inventory planning in DP&L's next EFC proceeding. *Id.* No R.C. 4909.154 investigation took place in that case. With respect to *In the Matter of the Application of Ohio American Water Company to Increase its Rates for Water and Sewer Services Provided to its Entire Service Area*, Case No. 09-391-WS-AIR, Opinion and Order (May 5, 2010), OCC's description of the Commission's decision as "ordering management audit outside of a rate case with results to be considered in next rate case" is simply false. That decision was issued in a water utility's rate case (the title of the

proceeding and the AIR designation for "Application to Increase Rates" should give this away), and the discussion of "management and operations review" under R.C. 4909.154 occurred in the context of that rate case. *Id.* at pp. 55-62. The Commission concluded its discussion by noting that the utility's budgeting might be scrutinized in its next rate case. *Id.* at p. 62. The *Ohio American Water Company* case is simply one of many examples of the Commission applying R.C. 4909.154 in a base rate case consistent with the clear statutory language.

Under R.C. 4909.154, the Commission may exclude from base rates any operating and maintenance ("O&M") expenses that result from imprudent management practices. *See* R.C. 4909.154. But, again, these two proceedings do not involve the establishment of base rates or any determination of the amount of O&M expense to be included in the Companies' base rates. The Companies current base rates were set in Case No. 07-551-EL-AIR, *et al*. based on a test year of the twelve months ended February 2008. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Case No. 07-551-EL-AIR, et al., Opinion and Order at p. 3 (Jan. 21, 2009). Any expenses outside the test year – such as expenditures that OCC imagines may have occurred in 2019 – are irrelevant.

Moreover, the Companies have no mechanism designed to collect from customers in rates donations made by FirstEnergy Corp. to social welfare organizations. Additionally, even if donations or contributions were made at the public utility level, it has long been established that charitable donations and lobbying expenses are not recoverable by public utilities in rates. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus; *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to*

Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same, Case No. 84-1272-TP-AIR, *et al*., Opinion and Order, 1985 WL 1172159 (Oct. 29, 1985); *In the Matter of the Application of Ohio Edison Company for an Increase in Rates to be Charged and Collected for Electric Service*, Case No. 81-1171-EL-AIR, *et al*., Opinion and Order, 1982 WL 974571, at *27 (Nov. 3, 1982).

OCC also cites *In the Matter of the Investigation into the Gas Purchasing Practices and Policies of Columbia Gas of Ohio*, Case No. 83-135-GA-COI, Opinion and Order at 43 (Oct. 8, 1985), as an example of the Commission investigating corporate governance (OCC Memo. in Supp., pp. 2-3), but OCC makes no attempt to explain why that case is relevant here. The Commission's management review of Columbia Gas was performed pursuant to R.C. 4905.302 and O.A.C. 4901:1-14-07, which are applicable only to gas companies with gas cost recovery rates. The Companies, of course, are not gas companies and are not subject to audit under R.C. 4905.302. In addition, the basis for the Commission ordering Columbia Gas, as the regulated public utility, to reorganize its board of directors was that its purchases of higher priced gas from Columbia Gas Transmission Corporation ("TCO") suggested that the utility's board was "overly influenced" by TCO. There's no allegation here that the Companies are overpaying for supplies from an affiliate and passing those higher costs through to customers, as was the case in *Columbia Gas*. As such, the *Columbia Gas* case lends no support to OCC's motion for an investigation and management audit.

Accordingly, OCC's motion for an investigation and management audit should be denied.

2. OCC's motion to hire an independent auditor for an investigation and management audit

OCC moves for the Commission to hire an independent auditor as part of its management audit. OCC Motion, p. 4. Given the lack of any basis to conduct a management audit, this second motion is superfluous.

OCC suggests that hiring an independent auditor is consistent with Commission practice because the Commission hired auditors in these two proceedings several years ago. OCC Memo. in Supp., p. 9. But OCC overlooks that the Commission had a firm legal basis for retaining auditors in these audit proceedings. The Commission also had a defined scope of work for the auditor to achieve: (1) in the Rider DMR audit, the auditor was charged with assisting Staff in the review of Rider DMR consistent with the Commission's directives in the Companies' ESP IV proceeding; and (2) in the corporate separation audit, the auditor was retained to assist the Commission with review of the Companies' compliance with O.A.C. Chapter 4901:1-17. *See* Case No. 17-2474-EL-RDR, Entry at ¶ 6 (Jan. 24, 2018); Case No. 17-974-EL-UNC, Entry at ¶ 5 (May 17, 2017). OCC has not offered an equivalent legal basis, nor has it set out an equivalent scope of work for an auditor to perform. Further, OCC has made no showing that an auditor is necessary at all.

Notably, the corporate separation audit is limited to auditing the Companies' compliance with the Commission's corporate separation rules. Yet OCC has not alleged any specific provision of the Commission's corporation separation rules the Companies may have violated as a result of FirstEnergy Corp.'s alleged donations to social welfare organizations. OCC merely says that information in the criminal complaint "raises utility regulatory issues." OCC Memo. in Supp., p. 8. By failing to rationally link the information in the criminal complaint to any actual corporate separation requirements, OCC effectively concedes that its motion is baseless.

Additionally, the Commission already has determined, specifically in the context of corporate separation rules, that utility contributions and donations are outside the Commission's jurisdiction. *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004). The corporate separation audit has been fully briefed, by participants including OCC, and it should be allowed to run its course without further interference and delay from OCC.

Therefore, OCC's motion to hire an independent auditor should be denied.

3. OCC's motion to reopen the Rider DMR audit case

OCC fails to justify reopening a proceeding that was dismissed and closed on February 26, 2020. *See* Case No. 17-2474-EL-RDR, Entry at ¶¶ 1, 9, 12 (Feb. 26, 2020). OCC suggests that the Rider DMR audit is not closed (OCC Motion, p. 4), but the Commission's February 26, 2020 Entry tells a different story. According to that Entry, the case is "dismissed and closed of record." Entry ¶ 12. OCC insinuates that action by Staff is required to make this Commission Entry final (OCC Motion, p. 4), but that would be contrary to R.C. 4903.15. *See Kanally v. Ameritech Ohio Co.*, 8th Dist. Cuyahoga No. 89472, 2008-Ohio-4446, ¶ 16 (citing R.C. 4903.15), *app. not allowed*, 121 Ohio St.3d 1426, 2009-Ohio-1296, 903 N.E.2d 325. And to suggest that the proceeding remains open because it says so on the docketing information system is simply an insult to the Commission's authority.

OCC relies on O.A.C. 4901-1-34, but that rule applies only "prior to the issuance of a final order," which is not the case here. In actuality, OCC's attempt to reopen the Rider DMR audit proceeding is an improper and untimely application for rehearing, and the Commission cannot waive the requirement of R.C. 4903.10 that an application for rehearing be filed within thirty days of an order. The Commission has no power to entertain an application for rehearing – even one styled as a motion to reopen – filed after the expiration of the 30-day period in R.C. 4903.10.

Greer v. Pub. Util. Comm., 172 Ohio St. 361, 362, 176 N.E.2d 416, 417 (1961); *Pollitz v. Pub. Util. Comm.*, 98 Ohio St. 445, 445, 121 N.E. 902 (1918). This is not a question of the Commission waiving a rule, as OCC suggests (OCC Memo. in Supp., pp. 5-6), but a question of OCC failing to comply with statutory requirements that cannot be waived. *See In re Ohio Edison Co.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 48. *See also In the Matter of the Application of The East Ohio Gas Company d/b/ a Dominion East Ohio for Authority to Increase Rates for its Gas Distribution Service*, Case No. 07-829-GA-AIR, *et al*., Entry on Rehearing, pp. 4-5 (Sept. 23, 2009) (rejecting OCC's request to reopen proceeding after final order was issued, and rejecting OCC's waiver argument based on O.A.C. 4901-1-38(B)); *In the Matter of the Application of Verizon North Inc. for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case No. 08-989-TP-BLS, Entry on Rehearing at p. 19 (June 3, 2009) (rejecting OCC's motion to reopen proceeding after issuance of final order because O.A.C. 4901-1-34 only applies prior to issuance of final order). OCC's motion is contrary to R.C. 4903.10 and O.A.C. 4901-1-34.

Further, the Commission dismissed and closed the Rider DMR audit proceeding because "elimination of the provisions for Rider DMR [by the Ohio Supreme Court] necessarily eliminated all terms and conditions of Rider DMR, including the provisions for a final review of Rider DMR." Entry ¶ 9. As the Commission explained, citing *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, at ¶¶ 14-29, the Ohio Supreme Court reversed in part the Commission's order in the Companies' ESP IV proceeding as it related to Rider DMR and remanded with instructions to remove Rider DMR from the Companies' ESP. Nothing remained for the Commission to do in the Rider DMR audit proceeding, which is why it

was closed. OCC has not shown how FirstEnergy Corp.'s alleged donations to social welfare organizations justify further investigation of an expired rider in a closed proceeding.

Accordingly, OCC's motion to reopen the Rider DMR audit proceeding should be denied.

4. OCC's motion for FirstEnergy to show cause that it has not done anything wrong

OCC's last of its four motions is its kitchen-sink motion. OCC asks that the Commission order the Companies to prove that they have done nothing wrong, have not used retail revenues improperly, and have not violated Ohio utility law or a Commission order. OCC Motion, p. 5; OCC Memo. in Supp., pp. 9-10. This motion is improper.

OCC notes that the Commission has used show cause orders in the past where it appeared that utilities were billing customers for unauthorized charges. OCC Memo. in Supp., p. 9. While true, the Commission has now opened Case No. 20-1502-EL-UNC and directed the Companies to show cause that the costs of political or charitable spending in support of H.B. 6 were not included in the Companies' rates or charges to retail customers. Thus, this motion is now moot.

To the extent that OCC wants the Companies to prove they are in compliance with all laws, such an order would be unreasonable and unlawful for the reasons provided in Section II.A.2., above. Indeed, as discussed above, even if OCC had filed a complaint seeking this relief, the Commission would be compelled to dismiss the complaint. *See, e.g., In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems, v. FirstEnergy Corporation*, Case No. 98-1616-EL-CSS, Entry at pp. 3-4 (May 19, 1999). There simply is no basis in Ohio law, in OCC's filing, or in the federal complaint that is the source for OCC's filing, to require the Companies to prove a negative.

Thus, OCC's motion for the Companies to show cause should be denied.

III. CONCLUSION

For the foregoing reasons, the Companies respectfully request that the Commission deny all four of OCC's motions.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 23rd day of September, 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ *James F. Lang*
One of the Attorneys for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

Summary: Memorandum Contra Motions by the Office of the Ohio Consumers' Counsel electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company