

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the )  
Political and Charitable Spending by Ohio ) Case No. 20-1502-EL-UNC  
Edison Company, The Cleveland Electric )  
Illuminating Company, and the Toledo )  
Edison Company. )

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**MEMORANDUM CONTRA FIRSTENERGY'S MOTION FOR PROTECTIVE ORDER  
TO DENY DISCOVERY INFORMATION FOR OCC  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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Date: November 2, 2020

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The public transparency and authority of state utility regulation have been put on trial by FirstEnergy in its filing of a motion for a protective order against OCC's use of discovery to investigate it. The backdrop for this regulatory dispute includes the extraordinary<sup>1</sup> events alleged in the U.S. government's Criminal Complaint, apparently involving FirstEnergy, regarding corruption in the passage of House Bill 6. While FirstEnergy's alleged legislative activities to obtain the billion dollar subsidies of its (former) nuclear power plants and its recession-proofing (decoupling) charge at public expense are extraordinary, the motion FirstEnergy filed against OCC's investigative efforts is about mere *ordinary* discovery procedures that it wrongly challenges. The PUCO should not be misled by FirstEnergy's efforts to get in the way of OCC's discovery rights for consumer protection that exist under law and rule. The PUCO should deny FirstEnergy's motion.

<sup>1</sup> On October 29, 2020, FirstEnergy Corp. announced the termination of its Chief Executive Officer (Charles E. Jones), its Senior Vice President of Product Development, Marketing and Branding (Dennis Chack), and its Senior Vice President of External Affairs (Michael Dowling). FirstEnergy announced that the Independent Review Committee of its Board of Directors determined that these executives violated certain FirstEnergy policies and its code of conduct.

The PUCO's review in this case was initiated in response to the September 8<sup>th</sup> consumer protection motions filed by the Office of the Ohio Consumers' Counsel ("OCC") for a regulatory investigation regarding the alleged federal claims of corruption in the passage of House Bill 6.<sup>2</sup> In those motions OCC asked the PUCO to investigate, among other things, any violations of regulatory principles and practices by FirstEnergy<sup>3</sup> in the passage of House Bill 6 ("HB 6"). It should be noted that the inquiry FirstEnergy complains of pales in comparison to OCC's assertions by Interlocutory Appeal of what should be done for consumer protection.

But instead of cooperating with the PUCO's review, FirstEnergy instead seeks to hamper it. FirstEnergy filed a motion for protection asking that OCC not be allowed to depose Mr. Fanelli, an executive with FirstEnergy Service Co. whose affidavit provides the sole evidence of FirstEnergy's asserted position. To thwart the truth-finding process, FirstEnergy challenges (among other things) the jurisdiction of the PUCO to review FirstEnergy's spending and the jurisdiction of OCC to represent residential customers in this case.

FirstEnergy is wrong. FirstEnergy's assertions on lack of jurisdiction fly in the face of Ohio law. Jurisdiction over FirstEnergy's spending lies with both the PUCO and the OCC. And FirstEnergy's attempt to clamp down on discovery is contrary to the well-established principles in Ohio law, PUCO rules and Supreme Court of Ohio precedent that allows a party "ample discovery" in proceedings before the PUCO. FirstEnergy's motion for protection should be denied outright.

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<sup>2</sup> OCC filed its motions in both Case 17-2474-EL-RDR and Case 17-974-EL-UNC. OCC's motions were prompted by a Criminal Complaint filed by the U.S. Attorney for the Southern District of Ohio, where it is alleged that "Company A" entities paid \$60 million to "Householder's Enterprise" in exchange for a billion dollar bailout for two failing nuclear plants in Ohio affiliated with Company A. (Company A is widely known to be FirstEnergy Corp.).

<sup>3</sup> The FirstEnergy Utilities ("FirstEnergy") are the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.

FirstEnergy should be held accountable to OCC, the PUCO, and ultimately their customers if they **spent** money collected from customers on illegal activities (and not on providing utility service to customers). OCC and others should be able to pursue discovery into the *spending* of FirstEnergy on HB 6 activities and whether customers provided the funds for such spending. That discovery should not be limited to written discovery but should extend to a deposition of Mr. Fanelli, the FirstEnergy executive who has denied all wrongdoing. Deposing Mr. Fanelli is a necessary first step to providing answers to Ohioans.

**I. THE PUCO HAS JURISDICTION, ON BEHALF OF FIRSTENERGY'S CONSUMERS, TO REVIEW FIRSTENERGY'S HB 6 SPENDING**

FirstEnergy argues that it is outside the scope of the PUCO's jurisdiction to conduct a review to determine whether they spent customer money on items such as "political contributions and donations."<sup>4</sup> But this self-serving claim is not true.

The PUCO has broad statutory authority under R.C. §§ 4905.05, 4905.06, and 4909.154 to investigate FirstEnergy and FirstEnergy's affiliates. First, the express language of R.C. § 4905.05 grants the PUCO expansive jurisdiction which includes jurisdiction over public utilities **AND** over "persons or companies" "owning" such public utilities. Specifically, R.C. § 4905.05 states:

**The jurisdiction, supervision, powers, and duties of the public utilities commission extend to every public utility** and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state; **to the persons or companies owning, leasing, or operating such public utilities** and railroads; to the records and accounts of the business thereof done within this state; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section

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<sup>4</sup> *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, FirstEnergy Motion for Protective Order, Memo in Support at 6 (Oct. 16, 2020).

3(a)(1) or (2) of the "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79c, and 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.

(Emphasis added.)

Similarly, R.C. § 4905.06 grants the PUCO general supervision over public utilities and “all other companies referred to under R.C. 4905.05 ... “and their compliance with all laws, orders of the commission, franchises, and charter requirements.” And, the PUCO has the authority to require a public utility to “supply information regarding its management policies, practices, and organization[.]” under R.C. §4909.154. All three statutes demonstrate that the PUCO has jurisdiction in this matter because the FirstEnergy Utilities are public utilities, as defined under R.C. § 4905.02, and FirstEnergy Corp. owns and operates the FirstEnergy Utilities.

The PUCO has jurisdiction and authority over FirstEnergy’s spending as it relates to HB 6. The PUCO stated as much when it acknowledged in its Entry it was reviewing “*the political and charitable spending* by FirstEnergy in support of H.B.6 and the subsequent referendum effort.” To conclude that the PUCO has no jurisdiction over illegal use of customers’ funds collected for the provision of utility service but not used for that purpose is contrary to public integrity and public policy (in addition to contrary to law). *See, e.g., In the Matter of the Complaint of the Manchester Group v. Columbia*, Case No. 08-360-GA-CSS, Entry, (June 3, 2009) (finding that the PUCO had jurisdiction over a complaint against Columbia alleging unfair practices related to an unregulated service offering (warranty service) by the utility).

Again, FirstEnergy claims that the PUCO has no jurisdiction to consider whether rates charged to consumers for utility service subsidized HB 6 political and charitable spending.<sup>5</sup> That is wrong, and the cases cited in the motion do not support FirstEnergy Utilities' argument.

FirstEnergy cites *In re Complaint of Direct Energy Business LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, but that case is factually distinguishable and does not control here. In the *Direct Energy* case, the Supreme Court of Ohio ("Court") held that the PUCO did not have jurisdiction over Duke Energy in its role in providing "meter-data-management" services (providing electric usage data about Direct Energy's customers to the market operator (PJM) from whom Direct Energy purchased wholesale electricity) to Direct Energy.<sup>6</sup> The Court found that Duke Energy was not acting as a public utility within the meaning of R.C. 4905.03(C) when it provided the meter-data-management services to Direct Energy.<sup>7</sup> Thus, the PUCO had no jurisdiction over the dispute between Duke Energy and Direct Energy in that case.<sup>8</sup> The *Direct Energy* case says nothing about the PUCO's jurisdiction to consider the issue in this case, *i.e.* whether a public utility can use the revenues it receives from consumers for providing electric distribution utility service to fund political or charitable activities.

FirstEnergy also cites *Cleveland Electric Illuminating Co. v. Public Utilities Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982).<sup>9</sup> That case also does not support FirstEnergy's claim. *Cleveland Electric* stands for the proposition that a public utility cannot collect the costs of its

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<sup>5</sup> *Id.*, FirstEnergy Motion for Protective Order, Memo in Support at 6, note 12.

<sup>6</sup> *In re Complaint of Direct Energy Business LLC*, 2020-Ohio-4429, ¶11.

<sup>7</sup> *Id.* at ¶¶11-15.

<sup>8</sup> *Id.* at ¶25.

<sup>9</sup> *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, FirstEnergy Motion, Memo in Support at 6, note 12.

charitable contributions through rates charged to consumers because doing so would “disproportionately benefit the utility and its owners, not the [customers].”<sup>10</sup> Contrary to FirstEnergy’s claim that the PUCO has no jurisdiction, *Cleveland Electric* suggests that the PUCO does have the authority – and that it should use that authority – to review FirstEnergy’s HB 6 political and charitable spending to make sure that it was not funded through rates to consumers.<sup>11</sup>

FirstEnergy’s reliance on the PUCO’s decision in *In re Chapter 4901:1-20 Ohio Adm. Code*, Case No. 04-48-EL-ORD, Finding and Order (July 28, 2004) is also misplaced.<sup>12</sup> In that case, the PUCO held that it lacked jurisdiction to adopt proposed corporate separation rules that would *prohibit* political and charitable contributions by electric distribution utilities and their competitive retail electric service supplier affiliates.<sup>13</sup> That issue (a prohibition on political and charitable spending) is different from the PUCO’s inquiry in this case as to whether the rates consumers paid for utility service funded alleged illegal political and charitable spending related to HB 6. The PUCO should therefore reject FirstEnergy’s claim that the PUCO has no jurisdiction to consider HB 6 political spending in this case.

## **II. THE DEPOSITION OF MR. FANELLI IS WITHIN THE SCOPE OF THE PUCO’S REVIEW OF FIRSTENERGY’S HB 6 SPENDING**

FirstEnergy argues that the deposition notice of Mr. Fanelli would allow OCC to inquire into matters “well outside the scope” of the PUCO’s Entry.<sup>14</sup> In this regard, FirstEnergy appears

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<sup>10</sup> *Cleveland Electric Illuminating Co. v. Public Utilities Comm.*, 69 Ohio St.2d 258, 261-62, 431 N.E.2d 683 (1982).

<sup>11</sup> *Cleveland Electric Illuminating Co.* at 262 (“Allowing such contributions as an expense would disadvantage ratepayers by forcing them to pay for the contributions.”)

<sup>12</sup> FirstEnergy Motion for Protective Order, Memo in Support at 6, note 12.

<sup>13</sup> *In re Chapter 4901:1-20 Ohio Adm. Code*, Case No. 04-48-EL-ORD, Finding and Order at 13-14 (July 28, 2004).

<sup>14</sup> FirstEnergy Motion for Protective Order at 2 (Oct. 16, 2020).



to believe (as seen in its non-responses to OCC’s written discovery) that discovery should be strictly limited to the scope of the show cause order, where it was required to demonstrate that the costs of HB 6 activities was not included in customer charges.<sup>15</sup> FirstEnergy also claims that OCC’s pleadings (its interlocutory appeal) and its written discovery, show that OCC is attempting to delve into discovery that involves “the Companies’ political and charitable spending over the course of many years.”<sup>16</sup>

The PUCO should resist FirstEnergy’s efforts to derail its review of FirstEnergy’s spending on HB 6 activities. The PUCO should not let FirstEnergy redefine the subject matter of this proceeding, restricting it to rate impacts and not utility expenditures. Restricting the PUCO’s review is inconsistent with the broader subject matter of this proceeding, which the PUCO defined as a “review [of] *the political and charitable spending* by FirstEnergy in support of H.B.6 and the subsequent referendum effort.”<sup>17</sup>

Additionally, the mere fact that a FirstEnergy executive claims there is no rate or rider that collects the distinct political and charitable charges from customers for political and charitable spending is beside the point. Even if there is not a designated rate component for political and charitable spending, that does not mean that FirstEnergy did not use customer charges (supposed to be used for providing electric service) for political and charitable contributions that funded the illegal activities alleged by federal prosecutors. If it did so that would be unjust and unreasonable.

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<sup>15</sup> *Id.*, Memorandum in Support at 5, 6.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *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 at ¶5 (Sept. 15, 2020).

The PUCO has jurisdiction and authority over FirstEnergy's spending as it relates to HB 6, as it acknowledged in its Entry when it opened a review of First Energy's spending. The PUCO should exercise that jurisdiction.

### **III. OCC HAS AUTHORITY TO REPRESENT OHIO RESIDENTIAL CUSTOMERS IN THIS PROCEEDING**

FirstEnergy claims that OCC does not have jurisdiction in this case because its authorizing statutes do not give it that authority.<sup>18</sup> They point to two of the statutes in Chapter 4911 as constraining OCC's authority – R.C. 4911.14 and 4911.15. FirstEnergy argues that these two statutes preclude OCC from participating in this case because the statutes limit OCC's jurisdiction to a case that OCC or another party brings before the PUCO, an application that is made by a utility, or a complaint case. Because the PUCO review proceeding is not any one of these, FirstEnergy argues that OCC has no jurisdiction to participate in this PUCO review. Again, FirstEnergy's argument is without merit and stems from its overly narrow view of Ohio's statutes.

This strained reading of two of OCC's enabling statutes fails to consider that OCC's "powers and duties" are more broadly defined under a preceding and controlling enabling statute, R.C. 4911.02(B)(2). There OCC's authority is described as "[w]ithout limitation because of enumeration." The PUCO has conceded that this phrase in OCC's enabling statute "conveys the intent of the legislators that the provisions of Section 4911.02 should be construed as broadly as possible." *In the Matter of the Complaint of the Office of Consumers Counsel on Behalf of the Residents of Copley Village Condominium Association v. Ohio Edison Company*, Case No. 89-1032-EL-CSS, Entry at ¶11 (Oct. 6, 1989).

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<sup>18</sup> FirstEnergy Motion for Protective Order, Memorandum in Support at 6-7.

And the PUCO has correctly determined that when a statute includes a listing, preceded by words such as “including” or “without limitation” the list that follows does not create an exhaustive list.<sup>19</sup> When that rule of statutory interpretation is applied to OCC’s general statutory grant of authority under R.C. 4911.02, FirstEnergy’s argument fails once again. OCC’s general statutory authority under R.C. 4911.02 is described as “without limitation because of enumeration” so the conditions that follow ((a) through (d)) must be construed as examples of matters that OCC may participate in, not limits on matters that OCC can participate in. For this very reason, the PUCO has in several cases rejected parties’ attempts to limit OCC’s participation in PUCO hearings, using the same arguments FirstEnergy now offers.<sup>20</sup>

Additionally, under that general grant of statutory authority to OCC, there is also a more specific grant of authority allowing OCC to represent residential customers in this proceeding: R.C. 4911.02(B)(2)(b). There, the Ohio General Assembly gave OCC the power to “take appropriate action with respect to residential customer complaints concerning quality of service, service charges, and *the operation of the public utilities commission.*” (emphasis added). Here where the PUCO is operating in a manner that does not serve the public’s interest (by failing to adequately examine FirstEnergy’s HB 6 activities)<sup>21</sup> OCC has discrete authority to act.

OCC’s intervention and participation in this proceeding is also permitted under other provisions of Ohio law (and PUCO rules).<sup>22</sup> Under R.C. 4911.02, OCC “shall have the rights

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<sup>19</sup> *In the Matter of the Application of Aqua Ohio, Inc. for Authority to Assess a System Improvement Charge*, Case No. 18-337-WW-SIC, Entry at ¶33 (Feb. 6, 2019).

<sup>20</sup> *In the Matter of the Commission Investigation Into the Operations and Services of Ohio Utilities Company*, Case No. 92-550-WS-COI, Entry (June 2, 1992). *See also, In the Matter of the Complaint of the Office of the Consumers’ Counsel on Behalf of the Residents of Copley Village Condominium Association I and Copley Village Condominium Association v. Ohio Edison Company*, Case No. 89-1031-EL-CSS, Entry (Oct. 6, 1989).

<sup>21</sup> *See* OCC Interlocutory Appeal (Sept. 21, 2020).

<sup>22</sup> *See* Ohio Admin. Code 4901-1-11.

and powers of any party and interest appearing before the public utilities commission.” R.C. 4903.221 allows “any person who may be adversely affected by a public utilities commission proceeding” to intervene provided certain conditions are met. OCC filed its motion to intervene explaining how it met these conditions. In fact, OCC is one of few parties in this proceeding whose intervention was not been opposed by FirstEnergy. FirstEnergy’s failure to object to OCC’s intervention at this time should be considered a late-filed memorandum contra OCC’s intervention, which should be denied as untimely filed (and filed without leave of the PUCO).

Moreover, this proceeding was initiated to allow a PUCO “review” of FirstEnergy’s HB 6 spending. The review is akin to a PUCO investigation. OCC has been permitted to intervene in numerous cases where the PUCO has initiated a review or investigation of utilities’ activities. *See, e.g., In the Matter of the Commission Investigation of the Suburban Fuel Gas Inc., Relating to the Establishment of Rates*, Case No. 90-1285-GA-COI, Entry (Sept. 5, 1991); *In the Matter of the Commission’s Investigation of Services Provided by Columbia Gas of Ohio, Inc.*, Case No. 89-1586-GA-COI, Entry (Apr. 5, 1990); and *In the Matter of the Investigation into the Management Practices and Policies of GTE North Inc.*, Case No. 85-1969-TP-COI, Entry (Oct. 28, 1988).

FirstEnergy’s arguments to limit OCC’s participation in this proceeding should be denied.

#### **IV. OCC IS ENTITLED TO AMPLE RIGHTS OF DISCOVERY UNDER OHIO LAW, OHIO SUPREME COURT PRECEDENT AND PUCO RULES**

According to the PUCO “the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side’s

industry or efforts.”<sup>23</sup> The PUCO’s rules on discovery “*do not create an additional field of combat to delay trials or to appropriate the Commission’s time and resources*; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”<sup>24</sup>

The PUCO rules allow parties to obtain “discovery on any matter, not privileged, which is relevant to the subject matter of the proceeding.” Ohio Adm. Code 4901-1-16(B). The PUCO rule setting the scope of discovery is similar to Civ.R. 26(B)(1) which governs the scope of discovery in civil cases. Civ.R.26(B)(1) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661, 1994 Ohio 324.

The PUCO rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under Ohio law. Under Ohio law, R.C. § 4903.082, “[a]ll parties and intervenors shall be granted ample rights of discovery.” *See OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789. The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Yet all these years later, FirstEnergy is impeding OCC’s discovery efforts. The PUCO should not allow FirstEnergy’s obstructionist tactics being used to deny OCC the ample discovery rights allowed under Ohio law and PUCO rules.

OCC has moved to intervene in this proceeding, which was unopposed by FirstEnergy. Under PUCO rules the OCC is a party in this proceeding,<sup>25</sup> R.C. § 4911.02(B)(2)(a) confers the

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<sup>23</sup> *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

<sup>24</sup> *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76 (emphasis added).

<sup>25</sup> *See* Ohio Admin. Code § 4901-1-16(H). OCC filed a Motion to intervene on September 21, 2020.

OCC with the rights and powers of any party before the PUCO. Those rights and powers include the ability to seek discovery in proceedings before the PUCO including through depositions.<sup>26</sup> FirstEnergy's proposal to limit OCC's ability to conduct Mr. Fanelli's deposition is contrary to the PUCO's rules (Ohio Adm. Code 4901-1-21) allowing any party to take the testimony, by deposition, of any other party or person, "with respect to any matter within the scope of discovery."

Furthermore, the PUCO has established that "discovery may begin immediately after a proceeding is commenced."<sup>27</sup> This proceeding was commenced when the PUCO opened the docket to "*review the political and charitable spending by FirstEnergy in support of H.B. 6 and the subsequent referendum effort.*"

OCC filed a notice to take the deposition of Mr. Fanelli ("Notice of Deposition"). Mr. Fanelli's affidavit was attached to the FirstEnergy's Response to the PUCO show cause order and is presently the sole evidence submitted by the FirstEnergy Utilities as proof of their innocence.

And yet, FirstEnergy contends that OCC should not be able to depose Mr. Fanelli and should instead rely on written discovery because: (a) they believe that discovery in general is not necessary for the PUCO's review; and (b) the deposition of their sole affiant (who does not work for any of the FirstEnergy Utilities but works for a FirstEnergy affiliate named in the Criminal Complaint) is unnecessary and inappropriate because OCC's written discovery requests should be good enough for OCC, making the deposition of Mr. Fanelli "redundant" and

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<sup>26</sup> See Ohio Admin. Code §§4901-1-16 to 4901-1-24.

<sup>27</sup> Ohio Admin. Code § 4901-1-17 (A). *Accord*, Ohio Civ. R. 33 (A) (interrogatories may be served by any party without leave on the plaintiff "after commencement of the action.")

“oppressive” and causing “undue burden and expense” on FirstEnergy.<sup>28</sup> And FirstEnergy alleges that the scope of OCC’s discovery, inquiring into whether consumers funded HB 6 activities, is beyond the scope of the PUCO’s review. These arguments are without merit and should be denied.

**A. Discovery is needed to shed light on FirstEnergy’s potential spending of customer-collected funds on HB 6.**

FirstEnergy correctly states, within its Motion, that the PUCO has determined that there are proceedings before the PUCO in which discovery is not necessary. However, FirstEnergy incorrectly postulates that this proceeding is one of those cases. FirstEnergy bases its belief on: (a) the fact that the PUCO did not immediately call for a hearing in this matter; and (b) over reliance on *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI.

FirstEnergy’s argument that this is not a “proceeding” worthy of discovery relies heavily upon the fact that the PUCO has not set a hearing in this matter. But, the PUCO has broad discretion on how to conduct its proceedings. This discretion, however, belongs to the PUCO, not FirstEnergy.

The PUCO can allow and has allowed discovery in a number of cases even without a scheduled hearing. This is consistent with its rules that allow discovery to commence “immediately after a proceeding is commenced.” Ohio Adm. Code 4909:1-17(A). The PUCO has also affirmed that a parties’ right to ample and timely discovery exists whether a proceeding is set for comments or an evidentiary hearing. For example, in a 2012 Entry in PUCO Case No.

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<sup>28</sup> FirstEnergy Motion for Protective Order, Memorandum in Support at 5.

11-5351-GA-UNC<sup>29</sup> the PUCO denied the utility's request to stay OCC's discovery rights. There the PUCO rejected the utility's argument that discovery was improper and premature, given that the PUCO had not set a procedural schedule. The PUCO found that that the discovery process is required under law and PUCO rule, may begin immediately after a proceeding commences, and is beneficial because it assists the PUCO in being better informed in its review. *Id.* at 3.

Additionally, in a 2014 review of the PUCO rules in PUCO Case No. 11-776-AU-ORD, the PUCO again confirmed that discovery is not just for proceedings in which a hearing is scheduled.<sup>30</sup> In that case, several stakeholders offered comments on Ohio Adm. Code 4909:1-16(B) that advocated for limiting discovery to those proceedings in which a hearing had been scheduled, or in the alternative, requiring a party to obtain PUCO approval to conduct discovery in those proceedings in which there was no hearing. The PUCO rejected those recommendations, stating in part, "The Commission also notes that not all proceedings result in a hearing. Thus, discovery is sometimes necessary to obtain sufficient information regarding an application or other pleading in order to provide substantive comments."<sup>31</sup>

And again in 2017, the PUCO affirmed OCC's right to discovery in an audit proceeding, prior to the audit report being issued, with no hearing scheduled. *In the Matter of the Audit of the Transportation Migration Rider et al.*, Case No. 17-219-GA-EXR, Entry ¶13 (Sept. 28, 2017). There the PUCO denied the utility's motion for an indefinite stay of discovery citing

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<sup>29</sup> *In the Matter of the Application Not for An Increase in Rates of Columbia Gas of Ohio Inc. for Approval of a Capital Expenditure Program and for Approval to Change Accounting Methods*, Case No. 11-5351-GA-UNC, Entry (Jan. 27, 2012).

<sup>30</sup> *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure*, Case No. 11-776-AU-ORD, Finding and Order at 22-24 (Jan. 22, 2014).

<sup>31</sup> *Id.* at 23.



numerous reasons why OCC should be permitted to proceed with its discovery. It found that there is no statute or PUCO rule that prohibits or limits OCC's discovery, instead citing to both the law (R.C. 4903.082) and PUCO rules (4901-1-16 and 4901-1-17(A)). And the PUCO concluded that the discovery process "will assist OCC and any other interested parties in the preparation of their comments and reply comments, which will better inform the Commission's review." *Id.* That is the exact situation in this proceeding where OCC seeks discovery from FirstEnergy that will assist it in preparing its comments and reply comments.

But FirstEnergy ignores this PUCO precedent in their zeal to shut down the fact-finding process that OCC seeks to pursue. FirstEnergy uses Case No. 03-2040<sup>32</sup> as proof that discovery is not always granted to parties in a PUCO proceeding, and in fact can be limited. Yet, FirstEnergy ignores the facts in Case No. 03-2040 that clearly show the PUCO did not ban discovery but instead exercised its discretion to modify the discovery process for judicial efficiency. Specifically, the PUCO expressly adopted a "Commission managed discovery process" *in lieu* of party initiated discovery.<sup>33</sup> Notably, in that case, even under the PUCO's managed discovery process, the PUCO still permitted depositions to be conducted on named witnesses.<sup>34</sup>

FirstEnergy also presumes that there will not be a hearing in this proceeding. Again, it is up to the PUCO to determine if a hearing is necessary. The PUCO's Entry, dated October 20, 2020 ("October Entry"), sets up the first steps of this proceeding. The utility was directed to file a response to the PUCO's show cause order. Parties will be permitted to file comments and reply

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<sup>32</sup> *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing (Oct. 28, 2003).

<sup>33</sup> *Id.* at ¶ 8.

<sup>34</sup> *Id.*

comments. The PUCO in its Entry made no determination that a hearing was not necessary. It is premature to assume, as does FirstEnergy, that a hearing will not be held and thus, discovery should not be had. Indeed, the PUCO in a later Entry expressly scheduled a **pre-hearing conference** to discuss FirstEnergy's Motion.<sup>35</sup> That in itself implies that a hearing is forthcoming in this matter.

**B. Depositions are fundamental to the fact-finding process.**

FirstEnergy claims that a deposition of Mr. Fanelli would be “unduly burdensome” and an “annoyance.” FirstEnergy reasons that OCC already has asked enough questions on the issues and deposing Mr. Fanelli would be redundant. Once again, FirstEnergy's position is without merit.

First, Ohio Admin. Code § 4901-1-21 expressly permits parties to take depositions in PUCO proceedings. Second, the purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts of a case – not just partial knowledge that the entity feels like imparting. The different methods of discovery exist, in part, to reveal inconsistencies and/or falsehoods in a party's position.

Depositions are often considered the most important discovery tool in an attorney's toolbox. They allow for much more information to be gleaned, as compared to written discovery. Depositions can be used in a number of ways. They can be used to ask questions of witnesses to compare actual responses, to public statements or statements that may be drafted by that party's attorneys. Depositions allow attorneys to judge the demeanor, truth telling, and responsiveness of a potential witness. Depositions allow instantaneous follow-up to questions that are posed but

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<sup>35</sup> *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 at ¶¶ 8 and 14 (Oct. 20, 2020).

perhaps misunderstood (or better yet dodged). Written discovery, while allowing follow-up, does not provide for instantaneous responses. Instead, under the PUCO rules, parties must wait 21 days to see if the questions will be answered or objected to. And depositions allow attorneys to press for more information if answers are not detailed or forthcoming. Another important distinction in a deposition is that the witness must answer even if the questions are objected to, so long as the answer does not involve privileged matters. Not so for written discovery.

FirstEnergy wants to replace the tried and tested process of depositions with a system that allows them to choose the form of discovery FirstEnergy must respond to. Of course, written discovery, under which FirstEnergy controls whether answers are given or objected to, serves their purposes well. Written discovery allows game playing that can ultimately frustrate truth finding. FirstEnergy can simply not answer or object to the written discovery, frustrating or delaying another party from developing evidence to be used to assist the trier of fact.

One need only look at FirstEnergy's discovery responses to OCC's First and Second Set of discovery to see that tactic is from a page of their playbook. While FirstEnergy is telling the PUCO that they should limit OCC to written discovery, they are refusing to provide answers to most of OCC's written discovery. FirstEnergy did provide cursory responses to OCC's written discovery requests. However, those responses amount to nothing more than a list of rote objections. (FirstEnergy's responses (or non-responses) to OCC's written discovery will be the subject of a soon to be filed Motion to Compel.)

**V. ALLOWING OCC TO DEPOSE MR. FANELLI IS NOT OPPRESSIVE AND WILL NOT IMPOSE AN UNDUE BURDEN OR EXPENSE UPON FIRSTENERGY.**

Finally, FirstEnergy claims that it would cause undue burden and expense on them to respond to OCC's Notice of Deposition.<sup>36</sup> This is at best an unsupported, conclusory statement. The law requires that FirstEnergy must do more than simply repeat the familiar litany that the discovery is burdensome. Federal and state case law<sup>37</sup> both demonstrate that when a party seeks a motion for a protective order (or a motion to quash) based on oppressiveness or undue burden, it is that party's burden to show specifically how the request for a deposition is overly broad, burdensome, or oppressive.<sup>38</sup> An undue burden is defined as a burden that is "exceeding or violating propriety or fitness; excessive, immoderate, unwarranted, \*\*\* contrary to justice, right, or law; unlawful."<sup>39</sup> The party must submit affidavits or offer evidence revealing the nature of the burden in its objections.<sup>40</sup> General objections without specific support are generally considered to be without merit.<sup>41</sup>

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<sup>36</sup> FirstEnergy Motion for Protection, Memorandum in Support at 4.

<sup>37</sup> Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Admin. Code § 4901-1-24 allows a protective order to limit discovery to protect against "undue burden and expense." C.R. 26(c) similarly allows a protective order to limit discovery "to protect against undue burden and expense." *Cf., In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters\*\*\*will be unduly burdensome."

<sup>38</sup> *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

<sup>39</sup> *Insulated Unlimited v. Two J's Props., Ltd.*, 95 Ohio Misc. 2d 18, 705 N.E. 2d 754 at p.21.

<sup>40</sup> *Rosenberg v. Johns-Manville*, (M.D.Pa 1980), 85 RR.D. 292,297.

<sup>41</sup> *Id.*, citing *In re Folding Carton Anti-Trust Litigation*, (N.D. HI. 1978), 83 F.R.D. 251, 264.

In this case, FirstEnergy has failed to show how the Notice of Deposition creates an undue burden upon FirstEnergy or Mr. Fanelli. FirstEnergy has therefore failed to meet their burden because they failed to clarify, explain, and provide support to their objections.<sup>42</sup>

OCC cannot conceive what is burdensome about a single deposition (by telephone) on matters that include the deponent's sworn statement that was attached to FirstEnergy's response to the PUCO's show cause orders. The alternative, as suggested by FirstEnergy is that we are forced to blindly accept its evidence –Mr. Fanelli's affidavit, without the opportunity to challenge that evidence. That is fundamentally unfair and inconsistent with parties' ample discovery rights under Ohio law. OCC and others should be able to conduct Mr. Fanelli's deposition especially because his sworn statement will be used as evidence in this proceeding. It's that simple.

## **VI. CONCLUSION**

FirstEnergy's Motion asks the PUCO to ignore the discovery process established by the Ohio law and PUCO rules to permit them to avoid releasing potentially harmful evidence against it and its affiliate companies. The PUCO should put a stop to FirstEnergy's tactics.

The public deserves to hear the full story. That story should include finding out if funds collected from them by FirstEnergy were used to fund alleged illegal HB 6 activities, instead of being used to provide utility service. The PUCO should facilitate, not prevent, the fact-finding process. FirstEnergy's Motion for Protection should be denied.

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<sup>42</sup> *Gulf Oil Corp, v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra FirstEnergy's Motion for Protective Order to Deny Discovery Information for OCC was provided electronically to the persons listed below this 2nd day of November 2020.

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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Memorandum Memorandum Contra FirstEnergy's Motion for Protective Order to Deny Discovery Information for OCC by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.