

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA TO THE FIRSTENERGY UTILITIES'
MOTION FOR A PARTIAL PROTECTIVE ORDER ON OCC'S FOURTH SET OF
DISCOVERY REQUESTS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The FirstEnergy Utilities' Motion for Protection is the latest delaying and obstructing tactic to stymie discovery (and the public interest) in this case. Upon the Attorney Examiner summarily rejecting the FirstEnergy Utilities' claims (in a related case),¹ and after OCC filing a Motion to Compel in this case, it took five months for FirstEnergy Utilities to "supplement" their unacceptable original discovery responses. Despite the five-month delay, we were not surprised when the FirstEnergy Utilities' discovery "supplement" contained more objections and non-answers accompanied with a Motion for Protection.

In essence, this investigation related to tainted House Bill 6 ("H.B. 6") will be a charade unless the Public Utilities Commission of Ohio ("PUCO") enforces its rules and Ohio law for a fair case process. Ohio is approaching the criminal complaint's one-year anniversary.² Yet, the

¹ See Request Re-scheduling of the Prehearing Conference by Office of the Ohio Consumers' Counsel and FirstEnergy Utilities (Apr. 29, 2021).

² Horn, D. *Ohio House Speaker Larry Householder arrested in \$60 million bribery case*. The Cincinnati Enquirer (July 31, 2020).

state of this investigation remains stalled by diversions such as FirstEnergy refusing even to admit it was the “Company A” described in the criminal complaint.³ So much for FirstEnergy’s promises of “fostering trust and transparency at all levels”⁴ after the H.B. 6 scandal broke. (It did admit making payments to Generation Now on the same dates and in the same amounts as Company A is alleged to have done.)⁵

FirstEnergy admitted collecting improper costs from customers over a ten-year period.⁶ But the FirstEnergy Utilities, when asked by OCC, won’t identify what the charges were for or provide the amount of those charges (and we have seen no refund offers). FirstEnergy admitted paying an Ohio regulator \$4.3 million in “consulting fees” for “services other than as represented in the consulting agreement.”⁷ But it hasn’t identified the regulator or explained the real purpose of the \$4.3 million payment.

This brings us to the FirstEnergy Utilities’ motion asking the PUCO to “protect” them from having to respond to approximately half of OCC’s discovery requests in OCC’s Fourth Set of discovery. But it is Ohio consumers who need the protection. And they are not getting protection based on the case process to date.

In their Motion, the FirstEnergy Utilities assert that OCC’s requests seek information beyond the PUCO’s jurisdiction to investigate and OCC’s own authority to investigate, seek

³ *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (U.S. Dist. S.D.) (July 17, 2020).

⁴ FirstEnergy News Release, “FirstEnergy names Hyun Park Senior Vice President & Chief Legal Officer” (Jan. 5, 2021).

⁵ *Smith v. FirstEnergy Corp. and FirstEnergy Serv. Co., Hudock, et al. v. FirstEnergy Corp., et al. and Buldas v. FirstEnergy Corp., et al.*, Case Nos. 2:20-cv-03755, 03954 and 03987 (S.D. Ohio) Answer of FirstEnergy Corp., *et al.* (Mar. 10, 2021).

⁶ Tobias, A., *FirstEnergy says it charged customers for improper expenses, pledges to end its dark money political spending*, Cleveland.com (Feb. 19, 2021).

⁷ FirstEnergy Corp., Quarterly Report (Form 10-Q) at 36 (Nov. 19, 2020).

information outside the scope of this proceeding and are vague, ambiguous and overbroad.⁸ The FirstEnergy Utilities then allege the requests are not reasonably calculated to lead to the discovery of admissible or relevant evidence and would cause them “undue burden and expense.”⁹

The PUCO should summarily reject the FirstEnergy Utilities’ arguments on the disputed discovery requests. And it should allow OCC to conduct discovery now, not wait months from now until an audit is completed. The PUCO should hold the FirstEnergy Utilities to FirstEnergy’s claim of transparency and cooperation.¹⁰ But more importantly, the PUCO should hold the FirstEnergy Utilities to the law and rules of Ohio that they are obstructing for cases involving the public and public utilities at the PUCO.

II. ARGUMENT

A. The PUCO should uphold OCC’s broad right to discovery.

OCC withdraws the following discovery requests at this time: **INT-04-002, INT-04-04 through INT-04-008, INT-04-009, INT-04-010(a),(b) & (c), INT-04-011, INT-04-015 and INT-04-018; RFA-04-001, RFA-04-002 and RFA-04-004; and RPD-04-007.** To some extent, these discovery requests go to issues presented in Case No. 20-1502-EL-UNC. OCC notes that the two cases have not been consolidated, which has forced OCC at times to ask for the same discovery in different cases. OCC reserves the right to re-submit these discovery requests and to ask the PUCO take administrative notice of FirstEnergy’s responses to any corresponding discovery in Case No. 20-1502-EL-UNC.

⁸ FirstEnergy Utilities’ Motion for Partial Protective Order, Memorandum in Support at 4 (May 13, 2021).

⁹ *Id.*

¹⁰ FirstEnergy Press Release, “FirstEnergy names Hyun Park Senior Vice President & Chief Legal Officer” (Jan. 5, 2021).

That leaves the PUCO to consider the FirstEnergy Utilities’ Motion for Protective Order related to the following OCC discovery: **INT-04-003, INT-04-010(e), INT-04-016, INT-04-017, INT-04-019, INT-04-021, INT-04-023, INT-04-24, INT-04-025; and RFA-04-003 and RFA-04-013, RFA-04-014, RFA-04-015; RFP-04-004 and RFP-04-016.**

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.”¹¹ 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.”¹² These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

R.C. 4903.082 states that “[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, the FirstEnergy Utilities are impeding OCC’s discovery efforts. The PUCO should not allow the FirstEnergy Utilities’ to use obstructing and delaying tactics to deny OCC the ample discovery rights it is allowed under Ohio law and PUCO rules. OCC, as a party in this proceeding, is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the PUCO to make certain that parties are allowed “full and reasonable discovery” under

¹¹ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

¹² *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (Emphasis added).

its rules. OCC's right to discovery is assured by law, rule and Supreme Court of Ohio ("Court") precedent.¹³ OCC is entitled to timely and complete responses to its discovery inquiries.

B. The information OCC seeks is within the scope of this corporate separation proceeding.

OCC's discovery requests are well within the scope of this investigation into FirstEnergy's compliance with corporate separation laws and rules. The general scope of discovery in PUCO proceedings is quite broad. The PUCO has also adopted rules that specifically define the scope of discovery. O.A.C. 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The PUCO's rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.¹⁴ This scope of discovery also applies to requests for production. Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under O.A.C. 4901-1-20.

Despite this broad scope of discovery under the PUCO rules, the FirstEnergy Utilities claim that the information OCC seeks is outside the scope of this proceeding. The FirstEnergy Utilities assert that R.C. 4928.17 does not reach either the FirstEnergy Utilities or their affiliates'

¹³ *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

¹⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

political spending.¹⁵ And while admitting that the PUCO has expanded the scope of this proceeding to include review of the Companies' corporate separation plan, they nonetheless assert that all questions about political and charitable spending are "out of bounds."¹⁶

What remains of OCC's discovery for the PUCO to resolve, is well within the scope of this proceeding. The PUCO should deny the FirstEnergy Utilities' motion that is based on an overly narrow and simplistic view of scope of this proceeding. First, the scope proposed by the FirstEnergy Utilities is inconsistent with the express purpose of the periodic PUCO-ordered audits of the FirstEnergy Utilities' corporate separation plans: to vigilantly monitor the FirstEnergy Utilities and their affiliates compliance with Ohio law (R.C. 4928.17), Ohio policies (including R.C. 4928.02(h), and PUCO rules (O.A.C. 4901:1-37).¹⁷ Second, the FirstEnergy Utilities' proposed scope of this proceeding fails to acknowledge why the PUCO ordered an additional corporate separation audit to cover the time period of H.B. 6 activities. The PUCO's order was prompted by the October 29, 2020 FirstEnergy Corp. news release¹⁸ and Form 8-K filing with the Securities and Exchange Commission,¹⁹ revealing that terminated FirstEnergy executives violated certain FirstEnergy Corp. policies and its code of conduct.²⁰ Third, the narrow scope the FirstEnergy Utilities seek to tie OCC to is inconsistent with purpose and scope

¹⁵ FirstEnergy Utilities' Motion for Partial Protective Order, Memorandum in Support at 7-8 (May 13, 2021).

¹⁶ *Id.* at 9.

¹⁷ *In re Commission Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI , Finding and Order at 16-17 (Mar. 26, 2014).

¹⁸ FirstEnergy Press Release, *FirstEnergy Announces Leadership Transition. Board of Directors Terminates Charles E. Jones; Appoints Steven E. Strah Acting CEO Christopher D. Pappas Named Executive Director of the Board; Donald T. Misheff Remains Non-Executive Chairman* (Oct. 29, 2020).

¹⁹ FirstEnergy Corp., Form 8-K (Oct. 29, 2020).

²⁰ Entry at ¶ 6-17.

of the audit, as set forth in the PUCO-approved Request for Proposal (“RFP”) for an independent third-party audit.

As explained below, the PUCO rules, Ohio law, and PUCO Entries define a broad scope of the issues for discovery in this case. The disputed discovery requests are either directly relevant to these issues, or reasonably calculated to lead to the discovery of admissible evidence. The FirstEnergy Utilities’ request for a protection order should therefore be denied.

1. The scope of discovery includes whether the FirstEnergy Utilities and their affiliates violated Ohio law, PUCO rules and state policy prohibiting cross-subsidization.

Ohio's corporate separation laws, rules and state policy prohibit an electric utility from using its status as a monopoly service provider to confer a competitive advantage to a competitive service provided by the FirstEnergy Utilities’ affiliate.²¹

A key corporate separation principle prohibits a utility from cross-subsidizing its competitive affiliate and vice versa.²² As a corollary, the PUCO’s rules require the FirstEnergy Utilities to keep detailed cost allocation manuals (“CAM”) that specify the policies and practices the FirstEnergy Utilities follow to avoid cross-subsidization.²³ The CAM must also show how costs charged to the utility are traceable to the corporate entity that incurred the costs.²⁴

One issue in this case is whether the FirstEnergy Utilities’ affiliates, including FirstEnergy Service Company, improperly allocated H.B. 6 costs to the FirstEnergy Utilities (regardless of whether the FirstEnergy Utilities charged customers for these costs), resulting in cross-subsidies for other FirstEnergy affiliates, including FirstEnergy Solutions. If so, then the

²¹ R.C. 4928.17; O.A.C. Chapter 4901:1-37; R.C. 4928.02.

²² R.C. 4928.02(H).

²³ O.A.C. 4901:1-37-08(C).

²⁴ O.A.C. 4901:1-37-08(E).

FirstEnergy Utilities may have been violating Ohio law and PUCO rules that prohibit cross-subsidization. The following disputed discovery requests go to this issue, as explained below:

<u>Request</u>	<u>Summary</u>	<u>Relevance</u>
INT-04-003	Payments by Service Company or Corp. to Generation Now	Could lead to admissible evidence that H.B. 6 costs were allocated by the Service Company to the FirstEnergy Utilities and that conferred an unfair competitive advantage on FirstEnergy Solutions and may have been a form of unlawful cross-subsidization to the detriment of the FirstEnergy Utilities customers who depend on the market for greater innovation and low prices. .
INT-04-010(e)	Accounting detail for FirstEnergy Utilities' state affairs costs	Same
INT-04-016	Whether the FirstEnergy Utilities used revenues from customers for H.B. 6 activities	Same
INT-04-017	Whether the FirstEnergy Utilities used revenues from customers under riders approved in Case No. 14-1297-EL-SSO for H.B. 6 activities	Same
INT-04-019	Identify corporate policy violations that led to Chuck Jones' termination	Corporate policies can include many issues that are germane to corporate separation, including business transactions between the FirstEnergy Utilities and their affiliates. Could lead to admissible evidence that the termination was due to improperly allocating H.B. 6-related costs to the FirstEnergy Utilities that cross-subsidized the H.B. 6 nuclear subsidy for the benefit of FirstEnergy Solutions
INT-04-021	Identify corporate policy violations that led to Dennis Chack's termination	Same
INT-04-023	Identify corporate policy violations that led to Michael Dowling's termination	Same

INT-04-024	Identify corporate policies that were part of the independent board of directors' review	Same
INT-04-025	Whether the independent board of directors' review led to any changes in corporate policies relating to corporate separation	Same
RFA-04-003	Admit the FirstEnergy Utilities engaged in political and charitable spending in support of H.B. 6	Could lead to admissible evidence that the FirstEnergy Utilities engaged in spending on H.B. 6 that conferred an unfair competitive advantage on FirstEnergy Solutions and may have been a form of unlawful cross-subsidization to the detriment of the FirstEnergy Utilities customers who depend on the market for greater innovation and low prices.
RFA-04-013	Admit the independent board of director's review found that FirstEnergy violated its corporate separation plan	Same
RFA-04-014	Admit that Chuck Jones was terminated for violating FirstEnergy's corporate separation plan	Could lead to admissible evidence that the termination was due to improperly allocating H.B. 6-related costs to the FirstEnergy Utilities that cross-subsidized the H.B. 6 nuclear subsidy for the benefit of FirstEnergy Solutions
RFA—04-015	Admit that Dennis Chack was terminated for violating FirstEnergy's corporate separation plan	Same
RFA-04-016	Admit that Michael Dowling was terminated for violating FirstEnergy's corporate separation plan	Same
RPD-04-004	Documents relating to communications with the PUCO regarding this case	Same
RPD-04-016	Documents used to prepare answers	Same

2. The scope of discovery includes FirstEnergy's public statements that it fired executives for violating company policies and the code of conduct.

The corporate separation rules also require the FirstEnergy Utilities and their employees to follow a code of conduct governing the relationship between the FirstEnergy Utilities and their affiliates.²⁵ The code of conduct provides that “[t]he electric utility shall ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.”²⁶

The PUCO ordered an audit as to whether FirstEnergy's H.B. 6-related activities violated Ohio corporate separation requirements.²⁷ The Entry came within days of FirstEnergy's news release and Form 8-K filing announcing that the fired executives violated FirstEnergy's code of conduct. The Entry opening the case states:

The Commission believes that the information supplied by FirstEnergy Corp. in the Form 8-K requires that we take additional action to ensure compliance by the Companies and their affiliates with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans.²⁸

The Entry stated that the specific information causing the PUCO to open the corporate separation audit specific was FirstEnergy's admission in the Form 8-K that it violated the code of conduct:

The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government

²⁵ O.A.C. 4901:1-37-04(D).

²⁶ O.A.C. 4901:1-37-04(D)(6).

²⁷ Entry directing the Staff to issue the attached RFP for audit services to conduct an additional corporate separation audit which includes examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum (Nov. 4, 2020).

²⁸ *Id.* at 1.

investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

* * * [W]e believe that the information supplied by FirstEnergy Corp. in the Form 8-K requires that we take additional action to ensure compliance by the Companies and its affiliates with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans. Therefore, the Commission directs the Staff to issue the attached RFP for audit services to conduct an additional corporate separation audit for the period between November 1, 2016 and October 31, 2020, which includes examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum.²⁹

The PUCO opened this corporate separation investigation after FirstEnergy's disclosures of code of conduct violations. FirstEnergy said it fired Messrs. Jones, Chack and Dowling for violating company policies and its code of conduct, as follows:

The Independent Review Committee of the Board of Directors of FirstEnergy Corp. (NYSE: FE) today announced a leadership transition, including the termination of the Company's Chief Executive Officer, Charles E. Jones, effective immediately. FirstEnergy today also announced the termination of two other executives: its Senior Vice President of Product Development, Marketing, and Branding; and its Senior Vice President of External Affairs, effective immediately.

During the course of the Company's previously disclosed internal review related to the government investigations, the Independent Review Committee of the Board determined that these executives violated certain FirstEnergy policies *and its code of conduct*.³⁰

FirstEnergy's own press release and Form 8-K filing publicly admitted that the terminated executives violated its code of conduct. By definition, this violates the PUCO's corporate separation rules. The disputed discovery requests are intended to get this information

²⁹ *Id.* at 4-5.

³⁰ FirstEnergy Press Release, *FirstEnergy Announces Leadership Transition. Board of Directors Terminates Charles E. Jones; Appoints Steven E. Strah Acting CEO Christopher D. Pappas Named Executive Director of the Board; Donald T. Misheff Remains Non-Executive Chairman* (Oct. 29, 2020) (Emphasis added).

into the record of this case and to elicit additional information about the code of conduct violations, as explained below:

<u>Request</u>	<u>Summary</u>	<u>Relevance</u>
INT-04-019	Identify corporate policy violations that led to Chuck Jones' termination	Could lead to admissible evidence that the termination was due to violating the PUCO's code of conduct rules (O.A.C. 4901:1-37-04(D))
INT-04-021	Identify corporate policy violations that led to Dennis Chack's termination	Same
INT-04-023	Identify corporate policy violations that led to Michael Dowling's termination	Same
INT-04-024	Identify corporate policies that were part of the independent board of directors' review	Same
INT-04-025	Whether the independent board of directors' review led to any changes in corporate policies relating to corporate separation	Same
RFA-04-014	Admit that Chuck Jones was terminated for violating FirstEnergy's corporate separation plan	Same
RFA-04-015	Admit that Dennis Chack was terminated for violating FirstEnergy's corporate separation plan	Same
RFA-04-016	Admit that Michael Dowling was terminated for violating FirstEnergy's corporate separation plan	Same

3. The scope discovery includes the corporate separation matters raised in the Entry that established a scope of work for the independent auditor.

In this case, the PUCO ordered an audit as to whether FirstEnergy's H.B. 6-related activities violated Ohio corporate separation requirements.³¹ The Entry came within days of FirstEnergy's press release and Form 8-K filing announcing that the fired executives violated FirstEnergy's code of conduct.

The RFP the PUCO approved laid out the scope of the audit in the broadest possible terms: a full review of whether FirstEnergy's activities between November 1, 2016 through October 31, 2020 violated R.C. 4928.17 or any of the corporate separation rules contained in O.A.C. Chapter 4901:1-37.³² Those rules apply to the activities of the electric utility and its transactions or other arrangements with its affiliates and any shared services of the electric utility with any affiliates.³³

The PUCO corporate separation rules are detailed as they should be. The rules address the code of conduct required of the utility and its affiliates and include provisions (1) that the utility shall ensure effective competition in the provision of retail electric service by avoiding anti-competitive subsidies; and (2) that the electric utility shall not give its affiliates preferential treatment or advantages over nonaffiliated competitors of retail electric service.³⁴ The PUCO corporate separation rules require a utility's corporate separation plan to include, among other things, a list identifying and describing the financial arrangements between the electric utility

³¹ Entry directing the Staff to issue the attached RFP for audit services to conduct an additional corporate separation audit which includes examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum (Nov. 4, 2020).

³² *Id.* Request for Proposal No. RA20-CA-X, A Compliance Audit of the First Energy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio at 1-2.

³³ O.A.C. 4901:1-37-03(A).

³⁴ O.A.C. 4901:1-37-04(D)(6), (10)(c).

and its affiliate; provisions related to maintaining a cost allocation manual; and a description of internal compliance monitoring procedures and methods for corrective action for compliance.³⁵

And the PUCO corporate separation rules require utilities that receive products or services from an affiliate or that provide products or services to an affiliate to maintain a cost allocation manual documenting how costs are allocated between the electric utility and affiliates and the regulated and non-regulated operations.³⁶ And importantly, under the cost allocation manual, the costs shall be traceable to the books of the applicable corporate entity.³⁷

The disputed discovery requests go directly to the underlying information that prompted FirstEnergy's statements and to the provisions of the PUCO corporate separation rules.

<u>Request</u>	<u>Summary</u>	<u>Relevance</u>
INT-04-019	Identify corporate policy violations that led to Chuck Jones' termination	Could lead to admissible evidence regarding FirstEnergy's public statements that the termination resulted from violations of FirstEnergy's code of conduct (4901:1-37-04(D))
INT-04-021	Identify corporate policy violations that led to Dennis Chack's termination	Same
INT-04-023	Identify corporate policy violations that led to Michael Dowling's termination	Same
INT-04-024	Identify corporate policies that were part of the independent board of directors' review	Same
INT-04-025	Whether the independent board of directors' review led to any changes in corporate policies relating to corporate separation	Same
RFA-04-014	Admit that Chuck Jones was terminated for violating	Same

³⁵ O.A.C. 4901:1-37-05(B)(4),(7),(10).

³⁶ O.A.C. 4901:1-37-08(A).

³⁷ O.A.C. 4901:1-37-08(F).

	FirstEnergy's corporate separation plan	
RFA—04-015	Admit that Dennis Chack was terminated for violating FirstEnergy's corporate separation plan	Same
RFA-04-016	Admit that Michael Dowling was terminated for violating FirstEnergy's corporate separation plan	Same

C. The information OCC seeks is within the PUCO's jurisdiction and OCC's authority to investigate.

The FirstEnergy Utilities claim they are entitled to a protective order because OCC seeks information outside the PUCO's and OCC's jurisdiction to investigate.³⁸ The PUCO should reject this claim, as it has rejected similar claims before.³⁹ Additionally, this claim has no merit.

OCC seeks information relating to FirstEnergy's public disclosures that the terminated executive violated FirstEnergy's code of conduct. The PUCO noted that these disclosures prompted it to open the corporate separation investigation. The PUCO's Entry lists the statutes that confer jurisdiction for the investigation: R.C. 4928.17, along with "the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under RC. 4928.02, 4928.03, 4928.06, 4928.15, and 4928.16."⁴⁰

OCC also seeks information relating to an independent investigation by the FirstEnergy Board of Directors. FirstEnergy disclosed that the investigation found that FirstEnergy

³⁸ FirstEnergy Utilities' Motion for Partial Protective Order, Memorandum in Support at 5-7 (May 13, 2021).

³⁹ *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, Revised Motion to Compel Responses to Discovery and Memorandum in Support, Attachments 1 and 2 (Nov. 10, 2020); *Id.*, Transcript for Hearing Held on January 7, 2021 (Jan. 19, 2021).

⁴⁰ *Id.* at 5-6.

improperly charged costs to the FirstEnergy Utilities over a ten-year period and improperly collected these costs from customers.

In the course of the internal investigation, we did identify certain transactions, which, in some instances, extended back 10 years or more, including vendor services that were either improperly classified, misallocated to certain of utility or transmission companies or lacked proper supporting documentation. *These transactions result in amounts collected from customers that were immaterial to FirstEnergy, and our utility and transmission companies will be working with the appropriate regulatory agencies to address these amounts.*⁴¹

When FirstEnergy disclosed the improper charges, it promised to “work with regulatory authorities to address these amounts.” But now FirstEnergy claims these matters are outside the PUCO’s and OCC’s authority to investigate. FirstEnergy is wrong. Here is another example of FirstEnergy’s approach that it will agree to investigate itself on H.B. 6-related matters but will resist the PUCO’s and OCC’s efforts to investigate. So much for “greater transparency.”

The information on the ten years of misallocated costs is in the possession of the FirstEnergy Utilities because they reported it to FERC in their FERC Form 1’s filed on April 6, 2021, as follows:

Also, in connection with the internal investigation, FirstEnergy recently identified certain transactions, which, in some instances, extended back ten years or more, including vendor service, that were either improperly classified, misallocated to certain FirstEnergy utility and transmission companies, or lacked proper supporting documentation. These transactions resulted in amounts collected from customers that were immaterial to FirstEnergy and OE. *These utility and transmission companies will be working with the appropriate regulatory agencies to address these amounts.*⁴²

⁴¹ FirstEnergy Corp. (FE) Q4 2020 Earnings Call Transcript, The Motley Fool (Feb. 18, 2021) (Emphasis added), available at: <https://www.fool.com/earnings/call-transcripts/2021/02/18/firstenergy-corp-fe-q4-2020-earnings-call-transcri/>

⁴² Ohio Edison, FERC Form 1 at 123.12 (Apr. 6, 2021).

Given that this information rests with the FirstEnergy Utilities (as reported on their FERC Form 1's), the information is well within the PUCO's and OCC's jurisdiction to investigate.

The PUCO also has jurisdiction over these matters under R.C. 4905.05, which authorize the PUCO to inspect the records of FirstEnergy Corp. and all its holding company affiliates that “in any way affect or relate to the costs associated with the provision of electric utility service.”⁴³

The PUCO's jurisdiction is also authorized by R.C. 4928.18(B), which provides:

The commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of section 4928.17 of the Revised Code or an order issued or rule adopted under that section. For this purpose, the commission may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code, and may investigate such utility or affiliate operations *as may relate to those businesses and investigate the interrelationship of those operations*. Any such examination or investigation by the commission shall be governed by Chapter 4903. of the Revised Code.⁴⁴

And we can look to the PUCO corporate separation rules to see that they are applicable in accordance with R.C. 4928.17 and 4928.18.⁴⁵ The PUCO rules, promulgated to help the PUCO carry out the law, allow extensive access to the “books, accounts, and/or other pertinent records kept by an electric utility *or its affiliates* as they may relate to the businesses for which corporate separation is required.”⁴⁶ Further provisions in the corporate separation rules allow the PUCO

⁴³ R.C. 4905.05.

⁴⁴ R.C. 4928.18(B) (Emphasis added).

⁴⁵ O.A.C. 4901:1-37-03(A).

⁴⁶ O.A.C. 4901:1-37-07(A) (Emphasis added).

Staff to “investigate such electric utility *and/or affiliate operations and the interrelationship of those operations.*”⁴⁷

The records OCC seeks relate to FirstEnergy’s public disclosures of code of conduct violations and ten years of misallocated costs of utility service – costs that the FirstEnergy Utilities admit were wrongfully charged to the FirstEnergy Utilities. OCC seeks these records to determine the full extent of the code of conduct violations and misallocated charges. FirstEnergy cannot reasonably dispute the PUCO’s and OCC’s jurisdiction to investigate these matters.

D. The information OCC seeks is neither overbroad nor vague.

Finally, FirstEnergy makes a flawed claim that “many” of OCC’s discovery requests are overbroad and vague. This statement is conclusory at best. The FirstEnergy Utilities must do more than simply repeat the familiar litany that the discovery is overbroad and vague. Federal case law⁴⁸ has held that, when a party objects to an interrogatory based on being overly broad or an undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.⁴⁹ Here, other than offering conclusory statements, FirstEnergy has failed to show how the discovery requests are overly broad or vague. Because the burden falls upon the party

⁴⁷ O.A.C. 4901:1-37-07(B) (Emphasis added).

⁴⁸ 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 Adm. 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.”

⁴⁹ *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

resisting discovery to clarify and explain its objections and to provide support⁵⁰ and the FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection.

The only specific discovery requests that FirstEnergy identifies as overbroad and vague are INT-04-008 and RPD-04-008. OCC asks in INT-04-008 for the FirstEnergy Utilities to identify all travel and entertainment expenses in support of H.B. 6 activities. FirstEnergy complains this is overbroad and vague because OCC asked for the travel and entertainment expenses “including but not limited to” H.B. 6-related activities. OCC agrees to limit this request to travel and entertainment expenses related to H.B. 6-related activities. With this limitation, FirstEnergy cannot reasonably object to this request because the PUCO’s entries opening the investigations and audits describe the scope of the cases as arising out of FirstEnergy’s H.B. 6-related activities.

FirstEnergy makes the same argument regarding RPD-04-008. Here OCC asks for all invoices for lobbying services for the FirstEnergy Utilities or any of their affiliates from 2017 through the present. OCC agrees to narrow the time frame for this request to the period specified in the PUCO’s Entry ordering the audit – November 1, 2016 through October 31, 2020.⁵¹ OCC is unwilling to narrow this request to H.B. 6-related activities because FirstEnergy consistently uses its own tortured definition of “H.B. 6-related activities” that has no bearing to reality. For example, the criminal complaint centers on the \$60 million in bribery payments to Generation

⁵⁰ *Gulf Oil Corp, v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

⁵¹ Entry directing the Staff to issue the attached RFP for audit services to conduct an additional corporate separation audit which includes examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum at ¶17 (Nov. 4, 2020).

Now,⁵² which pled guilty,⁵³ but FirstEnergy still refuses to concede that its payments to Generation Now were a H.B. 6-related activity.⁵⁴ So in lieu of requiring FirstEnergy to produce all of its lobbying invoices, OCC agrees to travel to FirstEnergy's office to inspect the records and identify certain ones for copying, under O.A.C. 4901-1-20(A)(2). This would lessen any burden on FirstEnergy and would work around FirstEnergy's unfairly narrow definition of H.B. 6-related activities.

III. CONCLUSION

Based on the foregoing, OCC requests that the PUCO overrule the FirstEnergy Utilities' Motion for Protective Order and require the FirstEnergy Utilities to fully respond to its discovery requests, post haste.

⁵² *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (U.S. Dist. S.D.) (July 17, 2020).

⁵³ Caniglia, J., *Generation Now, the nonprofit that prosecutors say received millions in bribes, pleads guilty to racketeering charge involving House Bill 6*, Cleveland.com (Feb. 19, 2021).

⁵⁴ *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, Deposition of Santino L. Fanelli at 129-137 (Mar. 9, 2021).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 28th day of May 2021.

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Summary: Memorandum Memorandum Contra to the FirstEnergy Utilities' Motion for a Partial Protective Order on OCC's Fourth Set of Discovery Requests by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Finnigan, John