

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY'S REPLY IN SUPPORT OF
THE MOTION FOR A PARTIAL PROTECTIVE ORDER ON OCC'S
FOURTH SET OF DISCOVERY REQUESTS**

In light of the Companies' supplemental responses to the Office of the Ohio Consumer's Counsel's ("OCC") Fourth Set of Discovery and OCC's recent withdrawal of several more requests, only the following requests remain at issue in the Companies' Motion for a Partial Protective Order: **Interrogatories 3, 10 (only as to subpart e), 16, 17, 19, 21, 23, 24, 25; Requests for Admission 3, 13, 14, 15; and Requests for Production 4 and 16.** OCC, in its Memorandum Contra, raises a handful of arguments as to why the Commission should allow discovery on all of these requests. First, despite substantial collaboration between the Companies and OCC to resolve disagreements and narrow the issues in dispute, OCC argues the Companies engage in improper obstructionist and delay tactics, denying OCC its right to discovery. Second, OCC argues the requests at issue are within the Commission's jurisdiction and OCC's authority to investigate. Third, according to OCC, the requests are within the bounds of this proceeding. Fourth, and finally, OCC insists the requests are not overly broad and unduly burdensome.

Each argument is without merit. The Companies have worked in good faith with OCC to respond to relevant and reasonable requests. But what OCC ultimately seeks is a limitless investigation of FirstEnergy Corp. that far exceeds the scope of this case and, in some instances,

even the Commission’s jurisdiction. For the reasons explained below, the Commission should reject OCC’s arguments and grant the Companies’ Motion.

I. The Companies Have Worked in Good Faith With OCC Throughout Discovery.

To begin, the Companies have not engaged in obstructionist and delay tactics. (*See* OCC’s Memorandum Contra (“OCC Opp.”), at 1, 4). The timeline of relevant events should be clarified for the Commission. When OCC first served its discovery, the Commission had not yet set a deadline for the final audit report. Nor, of course, had the final audit report been filed. The Companies therefore objected to OCC’s discovery on the grounds that the requests were premature. But shortly after the April 8 ruling in Case No. 17-2474-EL-RDR, where the Attorney Examiners resolved a similar discovery issue, counsel for the Companies reached out to counsel for OCC, indicating that the Companies planned to follow the Attorney Examiners’ recent guidance in Case No. 17-2474-EL-RDR in this case as well. Specifically, the Companies offered to supplement certain of their responses and move for a protective order on any remaining requests. The Companies and OCC then jointly agreed to this approach and filed a letter with the Commission in this case on April 29. (*See* Case No. 17-974-EL-UNC, Letter (April 29, 2021)). Two weeks later, the Companies supplemented their responses to OCC’s Fourth Set of Discovery (“Set 4”) and filed a motion for a protective order on the remaining requests. In sum, the Companies raised their initial objections in good faith, and then—following the Attorney Examiners’ April 8 ruling—proactively worked with OCC in an attempt to head off unnecessary discovery disputes.

Moreover, the final audit report has not yet been submitted, and there is no comment deadline set. *See* Case No. 17-2474-EL-RDR, Hr’g Tr., at 24, 28 (April 8, 2021). There is, in short, still plenty of time for discovery in this case, rendering OCC’s arguments that its rights have been somehow prejudiced misplaced. (*See* OCC Opp., at 1, 3-4).

Beyond all this, while R.C. 4903.082 grants certain rights to discovery in Commission cases, those rights are not unqualified and unfettered. Rather, discovery is limited to information that is reasonably calculated to lead to the discovery of admissible evidence, and the Companies, like all other parties to Commission proceedings, have a right to object when the discovery sought is, among other things, irrelevant or unduly burdensome. O.A.C. 4901-1-16. For the reasons stated below, and those explained more fully in the Companies’ opening memorandum, the Companies respectfully request that the Commission sustain the Companies’ objections on the following requests: Interrogatories 3, 10 (only as to subpart e), 16, 17, 19, 21, 23, 24, 25; Requests for Admission 3, 13, 14, 15; and Requests for Production 4 and 16.

II. Several Of OCC’s Discovery Requests Fall Outside The Commission’s Jurisdiction Over the Companies’ Provision of Retail Electric Service, As Well As Outside OCC’s Own Authority.

OCC’s characterization of the Companies’ argument that some requests in Set 4 fall outside the Commission’s and OCC’s authority should also be corrected for the Commission. For some of the requests that remain at issue, the Companies argued in their opening memorandum (and continue to maintain) that those requests fall outside the scope of *this* proceeding¹—not the Commission’s jurisdiction altogether. The requests the Companies maintain fall outside the Commission’s and OCC’s authority include **Interrogatories 3, 19, 21, 23, 24, 25; Requests for Admission 13 to 15; and Request for Production 16**. For example, Interrogatory 24 asks the

¹ *See supra* Section III.

Companies to “[i]dentify the specific corporate policies that were discovered to be violated as part of the independent board of directors’ review concerning the Criminal Complaint.” This request seeks information about a privileged and confidential internal investigation conducted by *FirstEnergy Corp.*—not the Companies. Moreover, this Request seeks information “concerning the Criminal Complaint.” Again, that complaint does not allege any wrongdoing by the Companies, and the Attorney Examiners have repeatedly made clear that the Commission is not the United States Attorney’s Office and is not interested in attempting to replicate any ongoing criminal investigation. *See, e.g.*, Case No. 20-1502-EL-UNC, Hr’g Tr., at 23 (March 25, 2021).²

To argue its requests are “within the PUCO’s jurisdiction and OCC’s authority to investigate,” OCC turns to FirstEnergy Corp.’s public filings and various statutes and regulations. OCC claims grant broad authority to investigate the books and records of the Companies’ affiliates. (OCC Opp., at 15-18). OCC’s arguments are without merit.

OCC cites to FirstEnergy Corp.’s 2020 Q4 Earnings Call Transcript, stating FirstEnergy Corp. “identif[ied] certain transactions . . . that were either improperly classified, misallocated . . . or lacked proper supporting documentation.” (OCC Opp., at 16). OCC then claims that when “FirstEnergy disclosed the improper charges, it promised ‘to work with regulatory authorities to address these amounts’” and goes on to argue that “now FirstEnergy claims these matters are outside the PUCO’s and OCC’s authority to investigate.” (*Id.*). OCC’s argument is simply not true. The Companies did not argue, in the present Motion for a Protective Order or elsewhere, that the transactions referenced are outside the Commission’s jurisdiction. Indeed, those transactions

² OCC has not withdrawn Requests for Production 10 and 11 through 15, (OCC Opp., at 3), nor does OCC state that these Requests for Production are at issue, (OCC Opp., at 4). In any event, these Requests have already been ruled out of bounds. Case No. 20-1502-EL-UNC, Hr’g Tr., at 23–28 (March 25, 2021).

are the subject of a separate Commission proceeding. *See* Case No. 20-1629-EL-RDR, Entry (March 10, 2021).

Second, the statutes and regulations OCC cites—namely, R.C. 4928.18, 4905.05, and O.A.C. 4901:1-37-07(A)—do not grant it broad authority to “seek[] information relating to an independent investigation by the FirstEnergy Board of Directors.” (OCC Opp. at 15). OCC cites to R.C. 4928.18(B), but R.C. 4928.18(B) is limited by its own terms to an examination of “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. R.C. 4928.18(B) (emphasis added). So too is O.A.C. 4901:1-37-07(A). For its part, R.C. 4928.17 is directed at ensuring that no affiliate “in the business of providing competitive retail electric service” is unfairly advantaged by its corporate relationship to a regulated utility. R.C. 4928.17 is not a grant of authority to investigate criminal matters or privileged board investigations.

Likewise, R.C. 4905.05 does not have an expansive reach to allow OCC to examine, without limitation, the books and records of FirstEnergy Corp. 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—it does not charge for or provide utility service. Further, while the Commission 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 R.C. 4905.06, those circumstances do not apply here.³ Moreover, OCC’s desired probe into an internal board investigation is unrelated to “the costs associated with the provision of electric utility service by any public utility” in this state.

³ *See* Case No. 17-0974, 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 (September 23, 2020), at 4-6.

R.C. 4905.05. Neither the allegations in the criminal complaint nor anything in Interrogatories 3, 19, 21, 23, 24, 25; Requests for Admission 13 to 15; and Request for Production 16 relate to the Companies' costs of providing retail electric service in Ohio. Simply put, nothing OCC cites creates plenary authority over all the records of all the Companies' corporate affiliates.

III. OCC's Requests Are Outside The Scope Of This Proceeding.

Interrogatories 3, 8,⁴ 10, 17, 19, 21, 23, 24, 25, Requests for Admission 3, 13 to 15, and Request for Production 16 are outside the scope of this corporate separation proceeding. OCC raises two main arguments for why its requests are in bounds. Neither carries weight.

First, OCC argues, by providing separate charts, that Interrogatories 3, 10(e), 16, 17, 19, 21, 23, 24, 25, Requests for Admission 3, 13, 14, 15, 16, and Requests for Production 4 and 16 would lead to the discovery of admissible evidence under R.C. 4928.17 and O.A.C. 4901:1-37. (See OCC Opp., at 7-9, 13-14). But OCC's attempts to explain how their requests would lead to the discovery of admissible evidence show that its discovery requests are mere fishing expeditions. For example, in Interrogatory 3, OCC seeks "all payments made by FirstEnergy Service Co. or FirstEnergy Corp. to Generation Now." This request is clearly outside the bounds of this proceeding (and even outside the bounds of the Case No. 20-1502-EL-UNC, given that it does not seek information about costs incurred by or allocated to the Companies).⁵ In Interrogatory 19, OCC asks the Companies to "identify the specific corporate policies that former CEO Charles Jones violated that led to his termination on or about October 29, 2020." OCC explains that this request "[c]ould lead to admissible evidence that the termination was due to violating PUCO's code of conduct rules," but this request (and others like it) is, yet again, an improper attempt by

⁴ OCC has neither withdrawn Interrogatory 8 nor stated that it is still at issue. For completeness, the Companies include it in their discussion in this Reply.

⁵ See Case No. 20-1502-EL-UNC, Hr'g Tr., at 37:19-24 (Jan. 7, 2021); see also Mem., at 8.

OCC to invade the internal investigation conducted on behalf of FirstEnergy Corp.—not the Companies.

Second, OCC cites to FirstEnergy Corp.’s public filings as a reason OCC’s requests are within the scope of this proceeding, arguing that the Commission opened this proceeding following FirstEnergy Corp.’s disclosure that “the Board determined that these executives violated certain FirstEnergy policies and its code of conduct.” (OCC Opp., at 11). To start, FirstEnergy Corp.’s public filings have no bearing on interpreting the scope of R.C. 4928.17 and O.A.C. 4901:1-37. Further, OCC makes unsupported assumptions about the internal investigation based on FirstEnergy Corp.’s public filings. OCC states that FirstEnergy Corp.’s filings “[by] definition” show that there were violations of the corporate separation rules. But this assumes that the “code of conduct” OCC references, (*see* OCC Opp., at 11), is the one enumerated in O.A.C. 4901:1-37-04(D). OCC’s assumptions are wrong: the reference is to FirstEnergy Corp.’s internal code of *business* conduct.

IV. OCC’s Requests Are Overbroad And Unduly Burdensome

OCC’s requests, listed above, are by definition overbroad and unduly burdensome because they seek information beyond either the scope of this proceeding or the Commission’s jurisdiction and OCC’s authority. OCC addresses why two requests in particular are not overbroad or vague—specifically, Interrogatory 8 and Request for Production 8. (*See* OCC Opp., at 19). However OCC withdrew Interrogatory 8, (OCC Opp., at 3), and OCC did not list Request for Production 8 as one that is still at issue for the Commission to consider, (*id.*, at 4). In any event, the Companies will briefly address both requests.

Limiting Interrogatory 8 to “travel and entertainment expenses related to H.B. 6-related activities” does not cure the request from being overbroad and vague. The Companies argued that OCC’s definition of “House Bill 6 activities” is facially overbroad because OCC’s definition

expressly states that the activities “are not limited to” even those alleged in the Criminal Complaint. So limiting the request to “H.B. 6-related activities” when the definition is still overbroad does not save the request from its deficiencies. As for Request for Production 8, it impermissibly seeks “all invoices in the custody and control of FirstEnergy Utilities that are associated with Ohio lobbying efforts on matters affecting FirstEnergy Utilities or a FirstEnergy affiliate.” Limiting the request to the time period November 1, 2016 through October 31, 2020 does not change the fact this request is outside the scope of this proceeding and even the Commission’s jurisdiction and OCC’s authority to investigate. This request seeks information “on matters affecting . . . a FirstEnergy affiliate”—unrelated to whether that information concerns the Ohio Companies. Further, this request impermissibly seeks information on political spending—which, as already discussed above, is the subject of a separate Commission proceeding and not within the scope of this corporate separation proceeding. *See* Mem., at 7–8.

V. Conclusion

For these reasons and those explained in the Companies’ opening Memorandum in Support, the Companies respectfully request that the Commission grant the Companies’ Motion for a Partial Protective Order.

Dated: June 4, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

Brian J. Knipe (0090299)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 384-5795
bknipe@firstenergycorp.com

Michael R. Gladman (0059797)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
mdengler@jonesday.com

Ryan A. Doringo (0091144)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
radoringo@jonesday.com

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/s/ Ryan A. Doringo

Attorney for the Companies

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Summary: Reply in Support of Motion for a Partial Protective Order electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company