

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MOTION TO COMPEL RESPONSES TO
FIFTH AND SEVENTH SETS OF DISCOVERY
AND
REQUEST FOR EXPEDITED RULING ON MOTION TO COMPEL
AND
MOTION FOR *IN-CAMERA* HEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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June 29, 2021

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The Office of the Ohio Consumers’ Counsel (“OCC”) files this Motion to Compel as part of its investigating of whether the FirstEnergy Utilities charged their two million customers for any political activities associated with tainted House Bill 6 (“H.B. 6”). FirstEnergy reportedly paid \$60 million toward the passage of the scandalous bill. H.B. 6 was tailor-made for FirstEnergy Corp. with a billion-dollar nuclear bailout and the consumer rip-off of the “recession-proofing” (decoupling) charge – not to mention the FirstEnergy Utilities’ profits enhancement slipped into the 2019 budget bill (House Bill 166). Thankfully, there was a legislative repeal.

Related events include but are not limited to FirstEnergy Corp.’s firing of its CEO and other personnel. That includes its “separating” another employee recently¹ for reasons relating to the mysterious contract between a FirstEnergy entity and “an entity associated with an individual

¹ FirstEnergy Corp. Form 8-K, Item 8.01 (May 27, 2021).

who in 2019 was appointed to a full-time role as an Ohio government official directly involved in regulating FirstEnergy's Ohio electric utility subsidiaries.”² The FirstEnergy Utilities objected to OCC's request for the contract.³

Against this stark background we file this Motion to compel the FirstEnergy Utilities to give OCC our requested information. At nearly every turn, the FirstEnergy Utilities have blocked or delayed our investigatory discovery efforts and exerted a control over our inquiry that state law and rules do not allow. The FirstEnergy Utilities' efforts to control even include seeking to deny two million consumers their voice (OCC) in this case by claiming that OCC lacks the right to investigate key issues. It seems incredible with the background of H.B. 6 that there could be so much FirstEnergy Utilities' delay and obstructing of OCC's investigatory discovery requests.

This brings us to the need to file a motion to compel seeking answers to our Fifth and Seventh Sets of Discovery. The Fifth Set contained three interrogatories and thirteen requests for production, while the Seventh Set contained one request for production. The FirstEnergy Utilities did not provide a single answer to OCC. Only objections. OCC seeks this information to determine how the tainted H.B. 6 scheme may have impacted the FirstEnergy Utilities and the rates their customers paid.

Accordingly, OCC moves the PUCO for an order compelling FirstEnergy Utilities to expeditiously respond to OCC's Fifth and Seventh Sets of Discovery (Attachments 1 and 2).⁴ Based on rulings by the PUCO's Attorney Examiner, OCC requests that the PUCO compel FirstEnergy Utilities to fully respond to Interrogatories No. 5-001 (limited to information relating to Case No. 20-1502) and Requests for Production Nos. 5-001 (limited to communications from

² *Id.*

³ Attachment 1 at 6-10 and 13-14.

⁴ *See* O.A.C. 4901-1-12 and 4901-1-23.

the FirstEnergy Utilities to FERC's Division of Audits and Accounting relating to FERC Docket No. FA19-1-000), 5-006 (limited to information relating to Case No. 20-1502), 5-007 through 5-012 (except not for 5-009) and 7-001.).

OCC requests an expedited ruling on this motion to compel. An expedited ruling could potentially allow resolution of the discovery conflict more quickly, given the upcoming deadline for comments. OCC is unable to certify that no party objects to the issuance of an expedited ruling.

In addition, OCC moves the PUCO for an *in-camera* hearing to resolve issues pertaining to discovery the FirstEnergy Utilities are withholding on the basis of attorney-client privilege and/or work product. An *in-camera* hearing is necessary to allow the Attorney Examiner to ascertain whether the responsive documents related to OCC RPD 5-006 are truly subject to a privilege such that they should not be turned over to OCC in discovery. OCC does not seek an expedited ruling on this Motion for *In-Camera* Hearing.

At this time, OCC is not seeking to compel other information it requested in its Fifth Set of Discovery. Consistent with the Attorney Examiner's previous discovery rulings, OCC narrowed the time frame for compelling discovery requests, to January 1, 2017 through December 31, 2019.

The affidavit at Attachment 3 describes the efforts of OCC since April 15, 2021, to resolve differences between it and the FirstEnergy Utilities, consistent with O.A.C. 4901-1-23(C)(3). FirstEnergy Utilities and OCC were unable to reach a mutually satisfactory resolution to discovery disputes.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 21, 2020, OCC intervened in this proceeding (that OCC requested be opened by earlier motion). As allowed under Ohio law and the PUCO's rules, OCC has served multiple sets of discovery on the FirstEnergy Utilities to investigate on behalf of millions of consumers.

OCC served its Fifth Set of Discovery on February 19, 2021. This set primarily seeks information regarding disclosures FirstEnergy Corp. made in a Form 8-K filed with the SEC on February 16, 2021. OCC served its Seventh Set of Discovery on April 2, 2021. This set sought one item – the IRS Form 990-PF's filed at the Internal Revenue Service by FirstEnergy Foundation for 2017 through 2019. Form 990-PF is supposed to publicly disclose information about a private foundation's use of funds. While Form 990-PF is supposed to be made publicly available by the filer,⁵ it seems that the FirstEnergy Foundation did not file the Form's schedules for grants and contributions that are supposed to be attached to the Form 990-PF, per IRS regulations.⁶ OCC seeks information identifying the grantees and the amounts of the grants.

⁵ 26 CFR § 301.6104(d)-1, *Public inspection and distribution of applications for tax exemption and annual information returns of tax-exempt organizations.*

⁶ 26 CFR § 1.6033-2, *Returns by exempt organizations and returns by certain nonexempt organizations.*

On March 18, 2021, the FirstEnergy Utilities served their response to OCC's Fifth Set of Discovery. (Attachment 1). On April 22, 2021, the FirstEnergy Utilities served their response to OCC's Seventh Set of Discovery. (Attachment 2).

The FirstEnergy Utilities' responses were nearly identical at every turn. They objected to the discovery as not reasonably calculated to lead to the discovery of relevant and admissible evidence, based on their reading of the show cause order.

Additionally, the FirstEnergy Utilities alleged that "expenditures made by the Companies are outside OCC's jurisdiction and thus, unlawful for OCC to investigate." And the FirstEnergy Utilities complained that OCC's discovery is "overly broad, unduly burdensome, harassing, oppressive, vague, ambiguous and seeks to impose an undue expense."⁷

Even after the Attorney Examiner's rulings, the FirstEnergy Utilities are still trying to limit the PUCO's review to a much narrower scope. That narrow scope would shield the FirstEnergy Utilities from answering relevant discovery. An example of this is that the FirstEnergy Utilities won't abide by OCC's definition of H.B. 6 activities—a definition that the Attorney Examiner accepted in granting OCC's earlier Motion to Compel, when the Attorney Examiner largely overruled the FirstEnergy Utilities' objections to OCC's First and Second Sets of Discovery.

To this day, the FirstEnergy Utilities are unwilling to concede that 2017 payments by FirstEnergy Service Company to Generation Now are H.B. 6 activities. Their standard answer, as pronounced repeatedly at Mr. Fanelli's deposition, is that "no conclusion has been reached on

⁷ Attachment 1 at 5.

that.”⁸ And when pressed for further explanation as to who must reach that conclusion, they invoke privilege!⁹

The FirstEnergy Utilities espouse this untenable position even though the U.S. Criminal Complaint describes Generation Now as the vehicle “Company A” used to pay bribes to Ohio’s Former House Speaker.¹⁰ And FirstEnergy Corp. and FirstEnergy Service Company admitted (in civil litigation) making payments to Generation Now on the same dates and in the same amounts that “Company A” is alleged to have done.¹¹ Additionally, two individual defendants and Generation Now have pled guilty to the criminal complaint.¹²

OCC has detailed in the attached Affidavit, consistent with O.A.C. 4901-1-23(C)(3), the efforts that it undertook to resolve differences between it and the FirstEnergy Utilities. Without the PUCO’s action (compelling responses) that OCC seeks, there will be no resolution of this discovery dispute.

⁸ Fanelli Deposition at 207.

⁹ *Id.*

¹⁰ *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes and Generation Now*, Case No. 1:20-cr-77 (S.D. Ohio).

¹¹ *Smith v. FirstEnergy Corp., et al.*, Case No. 2:20-cv-03755 Answer of Defendants FirstEnergy Corp., et al. at 34, 52(m), 64, and 69 (S.D. Ohio) (Mar. 10, 2021).

¹² *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes and Generation Now*, Case No. 1:20-cr-77, Plea Agreement as to Juan Cespedes (Oct. 29, 2020) [Dkt. No. 67]; *Id.* Plea Agreement as to Jeffrey Longstreth (Oct. 29, 2020) [Dkt. No. 68]; and *Id.* Plea Agreement as to Generation Now Inc. (Feb. 5, 2021) [Dkt. No. 78].

II. ARGUMENT

A. The information OCC seeks is within the permissible scope of discovery and is necessary for OCC to protect Ohio consumers, under the Ohio Administrative Code.

The FirstEnergy Utilities claim that OCC's discovery is not relevant and/or not reasonably calculated to lead to the discovery of admissible evidence. As the objecting party, they bear the burden to establish that the requested information is not relevant and/or would not reasonably lead to the discovery of admissible evidence.¹³ They failed that burden. And their objections are wrong.

"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."¹⁴ 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."¹⁵ The rules are also intended to "minimize commission intervention in the discovery process."¹⁶ 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

¹³ *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

¹⁴ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

¹⁵ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

¹⁶ Ohio Admin. Code 4901-1-16(A).

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 after the 1983 reform law, the FirstEnergy Utilities impeding OCC's discovery efforts. The PUCO should not allow the FirstEnergy Utilities to obstruct and delay this process.

O.A.C. 4901-1-16(B) provides for the scope of discovery:

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.¹⁷ 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.

OCC served its Fifth Set of Discovery on February 19, 2021. This set primarily seeks information regarding disclosures FirstEnergy Corp. made in a Form 8-K filed with the SEC on February 16, 2021. OCC served its Seventh Set of Discovery on April 2, 2021. This set sought one item – the Form 990-PF's filed by FirstEnergy Foundation for 2017 through 2019, and related schedules.

Contrary to the FirstEnergy Utilities' argument, this discovery seeks information that is relevant and is reasonably calculated to lead to the discovery of admissible evidence. The

¹⁷ *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.

contract disclosed in the Form 8-K could lead to information that a FirstEnergy entity paid a regulator under a contract in exchange for actions to be taken while the regulator was in a “role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates.”¹⁸

The Form 990-PF’s and the schedules that should have accompanied these forms would show the grantees of FirstEnergy Foundation show that FirstEnergy made additional payments to Generation Now or other organizations associated with political activity to secure passage of H.B. 6. It appears there were large, unprecedented increases in contributions in 2018 by the FirstEnergy Utilities to the FirstEnergy Foundation, as summarized by an investigative reporter:

Reports filed with the Federal Energy Regulatory Commission show a huge jump in donations from FirstEnergy’s Ohio utilities last year.

‘In 2018, we found a massive uptick in total ‘donations’ reported by FirstEnergy subsidiaries in Ohio, during the same year that a wave of dark money political spending by murky social welfare 501(c)(4) groups crashed over the state,’ Anderson said. ‘Where exactly did those donations go? We asked, and so far, FirstEnergy won’t say.’

The largest jump among those utilities’ donations is shown on Ohio Edison’s 2018 annual report to FERC. That year’s donations of approximately \$15 million in 2018 were more than 250 times the amount reported for 2017. The FERC forms don’t provide details on who gets such donations.¹⁹

This PUCO case is a review of “the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B. 6 and the subsequent referendum effort.” OCC’s discovery satisfies the aforementioned standards in the Ohio Administrative Code.

¹⁸ FirstEnergy Corp. Form 8-K (Feb. 16, 2021).

¹⁹ Kowalski, K.M., *Report links utilities’ charitable giving to organizations’ political support* Energy News Network (Dec. 10, 2019).

B. The FirstEnergy Utilities failed to show that OCC's discovery is outside its jurisdiction.

In tainted H.B. 6, Ohioans lost as FirstEnergy Corp. reportedly secured outcomes in the legislature against stakeholders (that would include OCC) by using money – and lots of it. Per OCC's September 2020 Motions and case interventions, OCC seeks to investigate the FirstEnergy Utilities at the PUCO. Specifically, in many of the responses to OCC's discovery, the FirstEnergy Utilities claim that the "expenditures made by the Utilities are outside OCC's jurisdiction and thus, unlawful for OCC to investigate." The FirstEnergy Utilities have in essence claimed here and in other pleadings that OCC lacks authority to represent residential customers in an investigation that is initiated by the PUCO into possible utility wrongdoing.²⁰ The FirstEnergy Utilities cite no PUCO rulings to support their position.

Note that the FirstEnergy Utilities did not object to OCC's intervention in this case. Ohio law required the PUCO to consider criteria for OCC's intervention, including that OCC would "significantly contribute to full development and equitable resolution of the factual issues."²¹ The PUCO rightly granted OCC's intervention. In essence, the PUCO already dispensed with the FirstEnergy Utilities' objections, when it properly granted OCC's motion to intervene.

The FirstEnergy Utilities certainly did not cite R.C. 4911.02(B)(2). That's where the legislature said that OCC's powers and duties are "without limitation because of enumeration...." OCC has exercised those powers and duties innumerable times for consumer protection over the decades, often in PUCO cases to protect consumers from the FirstEnergy Utilities and their predecessors.

²⁰ See, e.g., FirstEnergy Utilities' Motion for Protective Order, Memorandum in Support at 6 (Oct. 16, 2020).

²¹ R.C. 4903.221(B)(4).

Further, the PUCO already overruled the FirstEnergy Utilities' argument at the pre-hearing conference it held on March 25, 2021. At that time, the FirstEnergy Utilities had raised the same objections. And the Attorney Examiner required them to produce discovery responses despite their objections. The PUCO's ruling is the rule of the case. The FirstEnergy Utilities' objections should not even be entertained again or otherwise should be overruled again.

C. The FirstEnergy Utilities have failed to justify their claim that OCC's consumer requests are overly broad and/or unduly burdensome.

The FirstEnergy Utilities' objection that it is overly burdensome to respond to OCC's discovery has not been justified. Such objections appear to be conclusory at best.

The reality is that a scheme as complex as that described in the U.S. Attorney's Criminal Complaint will involve some burden to unravel for consumer protection. But there is nothing "undue" about any such burden. Indeed, it's absurd for the FirstEnergy Utilities to claim that, with at least one FirstEnergy affiliate apparently participating in the overall scheme described in the Criminal Complaint, the PUCO should call it a day on investigating them so as to avoid burdening the FirstEnergy Utilities.²² Under these incredible circumstances, the threshold for an undue burden on the FirstEnergy Utilities should be virtually unreachable.

Federal case law is contrary of the FirstEnergy Utilities' claims. When a party objects to an interrogatory based on oppressiveness or 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.²³

²² To OCC's knowledge, there has not been a criminal charge filed against a FirstEnergy entity to date involving H.B. 6. FirstEnergy did disclose that it is involved in a potential deferred prosecution agreement. FirstEnergy Corp. Form 8-K, Attachment at 5 (Apr. 23, 2021).

²³ *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

Here, the FirstEnergy Utilities have failed to show how the requests for production of information are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support²⁴ and the FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection.

D. The FirstEnergy Utilities should not be permitted to use the design of the FirstEnergy Corp. corporate structure to cloak utility-related information from being discovered for protection of the public.

OCC is seeking information relating to disclosures FirstEnergy Corp. made in a Form 8-K filed with the SEC on February 16, 2021, which is essentially the same information the FirstEnergy Utilities disclosed in FERC Form 1's on April 6, 2021. The information sought relates to the FirstEnergy Utilities' involvement with H.B. 6, such as costs allocated to the FirstEnergy Utilities, rates charged by the FirstEnergy Utilities and supporting documentation for the costs.

The FirstEnergy Utilities objected on the grounds that this information is not in the possession, custody, or control of the FirstEnergy Utilities. This objection should be overruled. The FirstEnergy Utilities should be ordered to produce the information. There are several reasons why the PUCO should rule this way.

Common utility corporate structures include the use of holding companies and service companies. In these structures, personnel who are doing the work of the utilities are in reality often employees of the service company. In modern times utilities may have relatively few actual employees, given that their personnel are housed in other affiliated entities. But utilities and their affiliates should not be allowed to use their corporate structure as a cloaking device to keep

²⁴ *Gulf Oil Corp. v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

information from utility regulators. That is especially so considering they use their corporate structure to achieve utility objectives when they deem it beneficial to them.

For example, the FirstEnergy Utilities provided Mr. Fanelli for filing the earlier affidavit about any FirstEnergy Utilities' H.B. 6 charges to consumers. And the FirstEnergy Utilities provided him for OCC's deposition. But in actuality he is an employee of the FirstEnergy Service Company, not the FirstEnergy Utilities.²⁵

Similarly, Eileen Mikkelsen (the former VP Rates & Regulatory Affairs, and Acting Vice President External Affairs for FirstEnergy Corp.)²⁶ was an officer of FirstEnergy Corp. and an employee of the FirstEnergy Service Company, even though she was very active in state regulatory functions for the FirstEnergy Utilities.²⁷ FirstEnergy recently "separated" (in its vernacular) Ms. Mikkelsen from employment. The FirstEnergy Corp. SEC filing explained that she was "separated" due to:

... her inaction regarding the amendment in 2015 of a previously disclosed purported consulting agreement with an entity associated with an individual who in 2019 was appointed to a full-time role as an Ohio government official directly involved in regulating FirstEnergy's Ohio electric utility subsidiaries, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, including with respect to distribution rates.²⁸

This further demonstrates the obvious unified interrelationship among FirstEnergy Corp., the FirstEnergy Service Company, and the FirstEnergy Utilities.

²⁵ Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Response to Show Cause Entry, Affidavit of Santino L. Fanelli at ¶2 (Sept. 30, 2020).

²⁶ FirstEnergy Corp. 8-K (May 27, 2021).

²⁷ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen at 1 (July 25, 2016).

²⁸ FirstEnergy Corp. 8-K (May 27, 2021).

Additionally, the FirstEnergy Utilities' objection is inconsistent with reporting by the FirstEnergy Utilities. If the FirstEnergy Utilities don't have this information in their possession, custody, or control, then how could they have reported it to FERC in their FERC Form 1's filed on April 4, 2021? In addition, federal regulations require that the FirstEnergy Utilities must maintain records of services performed by affiliated companies:

(i) Records of services performed by associated companies.

Public utilities and licensees must assure the availability of records of services performed by and for associated or affiliated companies with supporting cost information for the periods indicated in § 125.3 as necessary to be able to readily furnish detailed information as to the nature of the transaction, the amounts involved, and the accounts used to record the transactions.²⁹

This provision reflects that, for consumer protection, regulators should not permit utilities to use their corporate structures (such as in creating service companies) to avoid providing information needed for their regulation.

The PUCO's jurisdiction extends not only to the FirstEnergy Utilities but also to the "records and accounts of any companies which are part of an electric utility holding company system."³⁰ The PUCO has jurisdiction over the records of FirstEnergy Corp. and all its affiliates that "in any way affect or relate to the costs associated with the provision of electric utility service."³¹ This statute means that even if the records are in the custody and control of FirstEnergy Corp. or FirstEnergy Service Company, the PUCO can reach those holding company system records. Other provisions of the Revised Code, Chapter 49, also permit the PUCO to

²⁹ 18 CFR § 125.2(i).

³⁰ R.C. 4905.05.

³¹ *Id.*

examine books, accounts, or other records kept by an electric utility or their affiliate as it relates to the utility business requiring corporate separation.³²

In addition to the PUCO's statutory jurisdiction over these records, the guidance under the Ohio Rules of Civil Procedure indicates that the FirstEnergy Utilities' objection is without merit. Ohio Civ. Pro. Rule 34 permits litigants to discover certain items "in the responding party's possession, custody, or control." A litigant "may obtain discovery from a subsidiary of a party from whom discovery is sought if the party from whom discovery is sought has control of the subsidiary."³³ This means that courts may require parent corporation litigants to provide in discovery information of subsidiaries they control and vice versa.

In *Sedgwick v. Kawasaki Cycleworks, Inc.*,³⁴ the court noted that a subsidiary can be required to provide this type of discovery if nominally separate corporate entities "are in fact a single unit."³⁵ To determine whether related corporations are a single unit, a court must find "(1) control of one by another; (2) that one was the mere conduit of the business of the other; and (3) the recognition of their separate existence would sanction a fraud, permit oppression and injustice."³⁶

OCC's discovery request meets this "single unit" standard. Chuck Jones was the chief executive officer and a director of each individual FirstEnergy Utility company, so they were under common control. Additionally, as can be seen by the internal investigation being run by the FirstEnergy Corp. Board of Directors, decisions about the utilities are being made at the top,

³² R.C. 4928.18.

³³ 36 Ohio Jur.3d Discovery and Depositions § 10, citing *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 660 N.E.2d 765 (C.P. 1993).

³⁴ 24 Ohio App.3d 109, 111, 493 N.E.2d 308, 311 (10th Dist.1985).

³⁵ *Id.*

³⁶ *Id.*

(i.e., reform of political spending, corporate governance) with the FirstEnergy Utilities merely falling in line because they are under common control.

Also, the FirstEnergy Utilities depend on the services provided by FirstEnergy Service Company. Contributing to the single unit concept is the fact that the FirstEnergy Utilities are considered business segments of the holding company, FirstEnergy Corp., and do not have their own separate shareholders. The above explanation of the unified relationship between FirstEnergy Service Company personnel and the FirstEnergy Utilities also shows the single-unit concept is applicable.

It seems that FirstEnergy Corp. and its affiliates (FirstEnergy Service Company and FirstEnergy Solutions) might have used the FirstEnergy Utilities as a conduit to advance the H.B. 6 scheme. FirstEnergy Service Company, acting at the behest of its executives Michael Dowling and Joel Bailey, allocated political payments to Generation Now and Hardworking Ohioans in 2017 and 2018 to the FirstEnergy Utilities.³⁷ This allowed some H.B.6 activities to be funded.

As described in *Sedgwick*, it could perpetuate an “injustice” (or even worse) if OCC and state regulators are denied access to information based on the notion that FirstEnergy Corp. and FirstEnergy Service Company are separate business units, unrelated to the FirstEnergy Utilities. The information OCC seeks is important for determining if and to what extent there was a misallocation of H.B. 6-related costs to the FirstEnergy Utilities (and consumers) and what they knew about it and did about it, if so. And it would be contrary to the transparency needed in the wake of one of the biggest scandals in Ohio history.

Courts outside of Ohio have similarly assessed the underlying business relationship between parent and subsidiary to determine whether a subsidiary may be required to provide its

³⁷ See the FirstEnergy Utilities’ Response to OCC INT-006-004.

parent's documents in discovery. In *Dri-Steem Corp. v. NEP, Inc.*,³⁸ the court summarized the approach that courts have taken nationwide, noting that there are certain circumstances under which a subsidiary may be required to turn over information in the possession of the parent:

Where the relationship is such that the subsidiary can secure documents of the parent to meet its own business needs, courts have not permitted the subsidiary to deny control for purposes of discovery by an opposing party. *See e.g., First National City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir. 1959) (where there is access to the documents when the need arises in the ordinary course of business, there is sufficient control when the need arises because of governmental requirements); *Cooper Industries v. British Aerospace Corporation*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (where wholly-owned defendant subsidiary was the marketer and servicer of parent's aircraft in the United States, it was found "inconceivable" that subsidiary could not obtain aircraft manuals and related documents); *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984) (agent organization should be required to produce documents held by its principals). District courts in this circuit have found that a wholly-owned subsidiary has access and control over documents in the possession of its parent corporation when it markets the products of the parent company, when the two companies share databases dealing with a variety of documents and records, and when the subsidiary is able to obtain high-level documents from the parent company when it requests them. *See Choice-Intersil Microsystems, Inc. v. Agere Sys., Inc.*, 224 F.R.D. 471, 473 (N.D. Cal. 2004).³⁹

Following these standards, the PUCO should require the FirstEnergy Utilities to turn over information being held by FirstEnergy Corp. and its affiliates. We presume that the FirstEnergy Utilities can secure documents from FirstEnergy Corp. and its affiliates when the need arises in the ordinary course of business. This is obvious because the FirstEnergy Utilities made the same disclosures in their FERC Form-1 filings regarding the H.B. 6 incident and the \$4.3 million

³⁸ 2014 WL 12776884 (D. Or. 2014).

³⁹ *Id.* at *2.

“consulting agreement” payment that FirstEnergy Corp. made in its Form 10-K.⁴⁰ And it is presumed that the FirstEnergy Utilities share databases dealing with a variety of documents and records with FirstEnergy Service Company and with FirstEnergy Corp. We also presume that when the FirstEnergy Utilities request documents from the parent company or the service company, the documents are produced. The FirstEnergy Utilities have not made any claims to the contrary, and indeed, this is required under the Uniform System of Accounts for Utility Service Companies:

§ 367.14 Transactions with associate companies.

Each [service company](#) must keep its accounts and records so as to be able to furnish accurately and expeditiously statements of all transactions with associate companies. The statements may be required to show the general nature of the transactions, the amounts involved in the transactions and the amounts included in each account prescribed in this part with respect to such transactions.⁴¹

As demonstrated above, the FirstEnergy Utilities should be required to provide information that FirstEnergy Corp. and other affiliates possess. That is because OCC has demonstrated that parent and subsidiary operated as one, rather than as separate entities, based on Chuck Jones’ role as chief executive officer and a director of each individual company. Similarly, Ms. Mikkelsen, the former FirstEnergy Service Company employee and officer of FirstEnergy Corp. was separated for a matter related to a contract associated with the former PUCO chair.

⁴⁰ Cf. Ohio Edison FERC Form 1 at 123.10-123.12 (Apr. 6, 2021) and FirstEnergy Corp. Form 10-K at 124-125 (Feb. 18, 2021).

⁴¹ 18 CFR § 367.14 – Transactions with associate companies.

E. The FirstEnergy Utilities' objection – that information the FirstEnergy Entities provided to FERC in connection with FERC's audit of the FirstEnergy Entities must be kept secret under federal law – is wrong.

OCC sought (in RPD-05-001) discovery on what documents FirstEnergy Corp., FirstEnergy Service Company and the FirstEnergy Utilities provided to FERC in FERC's audit of these FirstEnergy entities. As background, on February 6, 2019, FERC advised FirstEnergy Corp. that it was initiating a financial audit of FirstEnergy Corp., including its affiliates (FirstEnergy Service Company and the FirstEnergy Utilities).⁴² The scope of the financial audit is set forth in the FERC letter. In its financial audit, FERC will evaluate, among other things, the FirstEnergy Service Company's accounting, record keeping and FERC Form 60 reporting (annual reporting of centralized service companies). And the FERC audit will cover accounting and reporting requirements for franchised public utilities for their transactions with associated companies (like FirstEnergy Service Company). The audit will cover January 1, 2015 to the present.⁴³

There seems little or no question, given what little OCC discovery has been answered, that FirstEnergy Service Company employees were allocating their time to the FirstEnergy Utilities for work performed on H.B. 6 activities. We know that FirstEnergy Service Company charged the FirstEnergy Utilities for political and charitable activities in 2017 and 2018, including payments to Generation Now and Hardworking Ohioans.⁴⁴ We don't know if that is the extent of the political and charitable spending that was allocated to the FirstEnergy Utilities by FirstEnergy Service Company (or any other FirstEnergy Corp. affiliate). We intend to discover this information.

⁴² See Attachment 3.

⁴³ *Id.*

⁴⁴ Deposition of Santino Fanelli at 129-137 (Mar. 9, 2021).

Transactions between FirstEnergy Service Company and the FirstEnergy Utilities are germane to the PUCO's investigation here (and its investigation in the corporate separation proceeding). Allocation of expenditures by FirstEnergy Service Company to the FirstEnergy Utilities will be audited by FERC and that audit includes the period related to H.B. 6 activities (Jan. 1, 2017 to Dec. 31, 2019).

Because of the connection between the FERC audit and the PUCO's investigation, OCC asked for (in RPD-5-001) documents relating to the FERC audit into FirstEnergy Corp., FirstEnergy Service Company and the FirstEnergy Utilities' H.B. 6-related lobbying and governmental affairs activities, which FirstEnergy Corp. disclosed in its February 16, 2020 Form 8-K.

The FirstEnergy Utilities objected as follows:

The Companies further object on the ground that the information requested is confidential, non-public, and protected from disclosure under the Federal Power Act, including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC's regulations, including 18 C.F.R. Part 388. Consistent with these statutes and regulations, FERC makes clear that its Audit process "is subject to the confidentiality provisions of [section 301 of the Federal Power Act]" and that "[d]ocuments and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files." *See* "Audit Authority – Electric Audit Authority" description at <https://www.ferc.gov/enforcement-legal/enforcement/audits>.⁴⁵

OCC subsequently narrowed its request to copies of the documents that the FirstEnergy entities provided to FERC audit staff. The FirstEnergy Utilities' position is unfounded that a document automatically becomes confidential when it is provided to FERC staff.

⁴⁵ Attachment 1, response to OCC RPD-5-001.

The FirstEnergy Utilities can cite no cases supporting their claim that FERC's rules prohibit OCC from discovering information just because the FirstEnergy entities gave that information to FERC in an audit. On the contrary, the case law indicates that FERC holds the privilege and FERC can invoke it when a third party seeks information from FERC.

The fact that FirstEnergy Utilities did not cite to any rulings by public utility commissions or state courts is telling. The laws cited by the FirstEnergy Utilities pertaining to the confidentiality of FERC audits only govern when FERC, rather than a litigant, is asked to divulge information.

Furthermore, the plain language of the statutes and rules that the FirstEnergy Utilities cite supports OCC's position that confidentiality restrictions apply to FERC staff only, rather than to the FirstEnergy Utilities' discovery obligations. The FirstEnergy Utilities first cite 16 U.S.C. 825 and 42 U.S.C. 16452, which both prohibit only disclosure of utility information by a "member, officer, or employee of the Commission." Neither of these statutes apply to the present case. OCC is not asking a "member, officer or employee of the Commission" to divulge the information that the FirstEnergy entities gave to the FERC during its audit.

Rather, OCC is asking the FirstEnergy entities themselves to provide what they disclosed to FERC. The FirstEnergy Utilities' citation to FERC's website, which states that "documents that the Commission staff obtains during an audit will be placed in nonpublic files," does not govern here, either. Again, OCC is not requesting that the FERC staff deviate from its recordkeeping practices; OCC is simply requesting the FirstEnergy entities to provide documents within their control that FERC also happens to have.

Finally, the FirstEnergy Utilities rely on C.F.R. 388.107 to establish confidentiality of the information OCC seeks. C.F.R. 388.107 provides only a list of records that are "exempt from

disclosure.” The substance of the rule provides no guidance as to what party the disclosure exemption applies too. However, the title of the rule is “Commission records exempt from public disclosure.” OCC seeks from the FirstEnergy entities copies of documents they sent to FERC, not records that are in the control of the Commission. As a result, the documents OCC seeks are not “Commission records.”

If the FirstEnergy Utilities’ objection had merit, then state public utility commissions would be limited in conducting investigations into any area that FERC was also investigating. The utility would provide copies of documents to FERC and this would magically endow the original documents with a cloak of privilege. The original records would then become unavailable to the state public utility commission or interested stakeholders.

The FirstEnergy Utilities’ claim of a so-called “FERC privilege” should be denied regarding the discovery at issue.

F. The FirstEnergy Utilities’ objection that the Schedules supposed to be attached to the Form 990-PF’s (charitable grants) filed by the FirstEnergy Foundation are not in the possession, custody or control of the FirstEnergy Utilities lacks merit.

OCC seeks the Form 990-PF’s filed by the FirstEnergy Foundation because these reports list the charitable grants made to non-profits in the service area of the FirstEnergy Utilities. One non-profit in their service area was Generation Now. OCC seeks information on whether the FirstEnergy Foundation made contributions to organizations identified in the U.S. Criminal Complaint.

Once again, the FirstEnergy Utilities object on the ground that this information is not in its control. As discussed above, this objection has no merit.

In addition, key executives of the FirstEnergy Utilities held executive positions with the FirstEnergy Foundation and so would have had access to this information. Steve Strah was

Senior Vice President and Chief Financial Officer for the FirstEnergy Utilities; he was also Treasurer of the FirstEnergy Foundation.⁴⁶ Ebony Yeboah-Amankaweh was Vice President and General Counsel for the FirstEnergy Utilities; she was also Secretary of the FirstEnergy Foundation.⁴⁷

The FirstEnergy Utilities' objection that this information was not in their custody is without merit.

G. The PUCO should grant an *in-camera* hearing to resolve the FirstEnergy Utilities' claims of attorney-client and work product privilege.

As discussed above, OCC moves for an *in-camera* hearing to resolve the FirstEnergy Utilities' claims of attorney-client and work product privilege asserted in response to OCC RPD 5-006. OCC does not seek an expedited hearing on this motion.

OCC asks that the FirstEnergy Utilities produce a privilege log identifying which documents exist that are response to OCC's discovery request. Once the privilege log (which OCC requested for each set of discovery it served), is produced, OCC seeks an *in-camera* review of the discovery documents listed on the privilege log at a pre-hearing conference, consistent with Ohio practice.⁴⁸

An *in-camera* hearing will allow both OCC and the FirstEnergy Utilities to present their respective positions on the documents responsive to OCC discovery, but that the FirstEnergy seek to withhold from OCC. An *in-camera* review is needed to evaluate the validity of the

⁴⁶ Ohio Edison FERC Form 1 (Apr. 6, 2021); FirstEnergy Foundation Form 990-PF (2018).

⁴⁷ *Id.*

⁴⁸ See, e.g., *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167; *In the Matter of the Application of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶18 (Jan. 27, 2011) (recognizing that an *in-camera* inspection of documents is appropriate).

FirstEnergy privilege claims. The PUCO uses these *in camera* reviews to balance the parties' competing interests.⁴⁹

H. OCC undertook reasonable efforts to resolve the discovery dispute.

As detailed in the attached Affidavit, OCC undertook reasonable efforts to resolve this discovery dispute as described in the attached affidavit.

OCC has exhausted all other reasonable means to resolve differences between it and the FirstEnergy Utilities.

III. CONCLUSION

At issue here are justice, protection of the public, and a fair process at the PUCO for investigating the FirstEnergy Utilities (that are in dire need of investigating with regard to H.B. 6 and consumer protection). These expectations for good government are at serious risk the longer the FirstEnergy Utilities continue to delay and obstruct what Ohio's consumer advocate (OCC) can obtain through discovery. Accordingly, the PUCO should grant the Consumers' Counsel's Motion to Compel discovery responses from the FirstEnergy Utilities.

⁴⁹ *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel Fifth and Seventh Sets was served on the persons stated below via electronic transmission, this 29th day of June 2021.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Regulatory Counsel

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

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**RESPONSES AND OBJECTIONS OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO
THE FIFTH SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF
DOCUMENTS BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Pursuant to Rules 4901-1-16 through 4901-1-22 of the Ohio Administrative Code and in accordance with Ohio Rules of Civil Procedure 26, 33, and 34, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) submit their responses and objections to the Office of Ohio Consumers’ Counsel’s (“OCC”) Fifth Set of Interrogatories and Requests for Production (collectively, “Discovery Requests”).

GENERAL OBJECTIONS

The Companies incorporate the following objections into each response below, as if fully restated therein:

1. The Companies object to OCC’s attempt to provide definitions and “instructions for answering” that are broader than, or inconsistent with, the rules of the Ohio Administrative Code or the Ohio Rules of Civil Procedure. The Companies will respond in accordance with their obligations under those rules.
2. The Companies object to the definition of “Documents” and “Documentation” to the extent it seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. The Companies construe the term “documents” to be synonymous in meaning

and equal in scope to the usage of the term “documents” in Rule 34(A) of the Ohio Rules of Civil Procedure.

3. The Companies object to the definition of “Communication(s)” as overbroad, unduly burdensome, and vague and ambiguous, and the Companies further object to the extent that the definition seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. For example, OCC defines “Communication(s)” to include the transmission of information by “oral” or “otherwise perceptible means” and therefore unreasonably purports to require the Companies to describe in detail communications that are not contained in any document. Further, the definition states that a request “seeking the identity of a communication . . . encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication” and therefore unreasonably purports to place an undue burden on the Companies to identify any documents or communications having any “nexus” or containing any “explicit or implicit” reference to the subject matter of a communication.
4. The Companies object to the definition of “You,” and “Your,” or “Yourself” as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide information on behalf of any “present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer” and is unlimited as to time. The Companies construe the terms “You,” “Your,” and “Yourself” to refer only to the Companies.
5. The Companies object to the definition of “Identify,” or “the identity of,” or “identified” as overbroad, unduly burdensome, vague, and ambiguous. For example, this definition

- unreasonably purports to obligate the Companies to provide information outside of their personal knowledge, to identify all persons “in the presence” of parties to communications, and to describe an “act” and the persons in the presence of the “actor.”
6. The Companies object to the definition of “FirstEnergy Service Co.” as vague and ambiguous in its use of the phrase “controlled by the Board of Directors of FirstEnergy Corp.”
 7. The Companies object to the definition of “Political and Charitable Spending” as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this definition to the extent it purports to state a legal conclusion regarding the scope of the Commission’s jurisdiction.
 8. The Companies object to the definition of “House Bill 6 activities” as overbroad, unduly burdensome, vague, and ambiguous. The “Criminal Complaint” to which this definition refers does not contain any allegations of any conduct by the Companies or any allegations that the Companies engaged in any so-called “activities” in connection with House Bill 6.
 9. The Companies object to the instruction “to produce responsive materials and information” in the possession of persons “purporting to act on [the Companies’] behalf” because this instruction on its face calls for the production of materials that are not within the Companies’ possession, custody, or control.
 10. The Companies object to the instruction in numbered paragraph 8 of the “Instructions for Answering” as overbroad, unduly burdensome, vague, and ambiguous. For example, this instruction unreasonably purports to require the Companies to search for and produce “information and tangible materials” over a 13-year period of time.
 11. The Companies object to the “instructions” for invoking privilege to the extent they seek to impose requirements on the Companies that are broader than, or inconsistent with, those imposed by the Ohio Administrative Code or by the Ohio Rules of Civil Procedure. Should

- the Companies withhold any document on the basis of any applicable privilege, immunity, or protection, the Companies will provide the information required by Ohio Rule of Civil Procedure 26(B)(8)(a).
12. The Companies object to OCC's "instructions" in numbered paragraphs 11 and 12 of the "Instructions for Answering" because they unreasonably purport to require the Companies to treat interrogatories as requests for production of documents or requests for production of documents as interrogatories under certain circumstances. The Companies will treat interrogatories as interrogatories and requests for production of documents as requests for production of documents.
 13. The Companies object to OCC's "instruction" in numbered paragraph 13 of the "Instructions for Answering" as vague and ambiguous because this instruction appears to have been copied and pasted from OCC's requests in another proceeding. The Companies have filed no "Application" in this case.
 14. The Companies object to each request to the extent that it seeks production of information that is confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties.
 15. The Companies object to OCC's Discovery Requests to the extent any Request is duplicative of a previous request to which OCC has sought to compel a response in its pending Motion to Compel. Case No. 20-1502, OCC Motion to Compel (Nov. 6, 2020). The Commission has not yet ruled on the scope and propriety of those earlier requests.
 16. The Companies object to OCC's Discovery Requests to the extent they seek information or documents protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable doctrine.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

INT-05-001. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy “is taking proactive steps to resolve a range of regulatory proceedings affecting its Ohio utilities by pursuing holistic and transparent discussions with key stakeholders.”

- a. Please provide complete details of all the “holistic and transparent discussions” that (i) are being pursued; (ii) have occurred.
- b. Please describe what is meant by “holistic and transparent.”
- c. Please identify the “key stakeholders” referred to in this statement and the individual persons representing the key stakeholders with whom FirstEnergy has had discussions or intends to have discussions with;
- d. Please identify the proactive steps FirstEnergy is taking.
- e. Please identify the regulatory proceedings referenced in the statement.
- f. For each of the discussions identified in subsection (a)(i) of this interrogatory, please identify:
 - (i) the person(s) taking part in the discussion;
 - (ii) the date of the discussion(s); and
 - (iii) the proceedings being discussed.(iv) any documents pertaining to the discussion that were provided to persons or shown to persons attending the discussions.

RESPONSE: The Companies object to this Request because it seeks information not relevant to the subject matter involved in this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence. The information sought does not concern, nor is it reasonably calculated to lead to information concerning, whether the costs of any political or charitable spending

in support of Am. H.B. 6—either supporting enactment of the bill or opposing the subsequent referendum effort (hereinafter, “H.B. 6 Spending”)—were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control.

INT-05-002. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC describing: “a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement. The matter is a subject of the ongoing internal investigation related to the government investigations.”

- a. Please identify the counterparty referred to in this statement.
- b. What date was the consulting agreement entered into?
- c. Please state dates and amounts of all payments made to the counterparty pursuant to this agreement.
- d. Please identify the stated purpose of the consulting agreement.
- e. Please identify the deliverables of that consulting agreement.
- f. Please identify the date the consulting agreement was terminated

- g. Please identify the persons who decided to terminate the consulting agreement.
- h. Please describe what actions FirstEnergy Utilities took to help the counterparty become appointed to his or her position as a regulator of the Ohio companies.
- i. Please explain what facts led FirstEnergy to believe that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.
- j. Please explain how FirstEnergy initially became aware that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.
- k. Please explain what FirstEnergy believes may have been the true purpose of the payments related to the consulting agreement.
- l. Which FirstEnergy corporate entity issued the payments under the consulting agreement?
- m. Who signed the consulting agreement on FirstEnergy's behalf?
- n. Who approved the consulting agreement on FirstEnergy's behalf?
- o. Who at FirstEnergy knew that the true purpose of the consulting agreement was other than as represented in the

agreement?

- p. To which FERC account were the consulting payments recorded?
- q. What amount of the consulting payments were allocated, assigned or distributed to the FirstEnergy Utilities?
- r. What amount of the consulting agreement was reflected in customer rates for the FirstEnergy Utilities?
- s. What amount of the consulting payments were reflected in the FERC Form No. 1's filed by the FirstEnergy Utilities as Non-Power Goods or Services Provided by Affiliate?
- t. Will FirstEnergy revise its or its FirstEnergy Utilities' financial statements as a result of its discovery that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement?
- u. What information has FirstEnergy reported to its outside auditor regarding FirstEnergy's discovery that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. Indeed, information concerning payments to a "government official"

are not within the scope of this proceeding, nor is the information reasonably calculated to lead to admissible evidence—as the Attorney Examiner already decided. *See* Case No. 20-1502, Fanelli Deposition Transcript at 253 (Mar. 10, 2021). The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies. The Companies further object to this Request as overbroad and unduly burdensome.

INT-05-003. On FirstEnergy’s Fourth Quarter earnings call on February 18, 2021, FirstEnergy executives disclosed that they had uncovered various charges relating to consulting agreements, political advocacy and/or other matters that were improperly charged to FirstEnergy Utilities or improperly substantiated over a period of several years.

Regarding this statement, please provide the following information:

- a. The date, amount and description of each charge.
- b. The amount of each charge that was included in customer rates for the FirstEnergy Utilities.
- c. The persons who authorized each charge.
- d. The supporting documentation for each charge.
- e. Please explain how FirstEnergy determined each charge was improper.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. Also, the Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence because, following the Commission’s March 10, 2021 Entry in Case Number 20-1629-EL-RDR adopting Staff’s

recommendation to expand the audit, this information is now the subject of that separate proceeding—as already determined by the Attorney Examiner. *See* Case No. 20-1502, Fanelli Deposition Transcript at 250–51 (Mar. 10, 2021). The Companies further object to this Request as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to identify “each charge” over “a period of several years” that concerns “consulting agreements, political advocacy and/or other matters.” The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control.

**RESPONSES AND OBJECTIONS TO
REQUESTS FOR PRODUCTION OF DOCUMENTS**

RPD-05-001. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC disclosing an investigation by FERC's Division of Audits and Accounting that includes activities relating to HB 6 lobbying and governmental affairs activities. Please produce all documents reflecting (i) communications from FERC's Division of Audits and Accounting relating to the investigation; (ii) communications from FirstEnergy to FERC's Division of Audits and Accounting relating to this investigation.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. The Companies also object to this Request as overbroad and unduly burdensome because it unreasonably purports to require the Companies to provide copies of "all documents reflecting [] communications" between FirstEnergy and FERC's Division of Audits and Accounting concerning the FERC investigation. The Companies also object to this Request on the ground that it is vague and ambiguous because the matter conducted by FERC's Division of Audits and Accounting is an audit and not an "investigation." The Companies further object on the ground that the information requested is confidential, non-public, and protected from disclosure under the Federal Power Act, including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC's regulations, including 18 C.F.R. Part 388. Consistent with these statutes and regulations, FERC makes clear that its Audit process "is subject to the confidentiality provisions of [section 301 of the Federal Power Act]" and that "[d]ocuments and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files." See "Audit Authority – Electric Audit Authority" description at <https://www.ferc.gov/enforcement-legal/enforcement/audits>. The Companies also object to this Request because OCC has no

jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies. Lastly, the Companies object to this Request because it seeks the production of documents that are not within the Companies' possession, custody, or control.

RPD-05-002. Please produce copies of all documents relating to any communication between FirstEnergy and Sam Randazzo relating to (i) the PUCO's elimination in November 2019 of the requirement that the FirstEnergy Utilities file a distribution rate case by May 31, 2024;(ii)FirstEnergy and the Public Utilities Commission of Ohio relating to the elimination of the rate case filing requirement.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. The Companies further object to this Request as overbroad, unduly burdensome, vague, and ambiguous because the Request seeks "all documents relating to any communication" concerning the topics referenced by the Request.

RPD-05-003. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC disclosing a partial settlement between the Ohio Attorney General and other parties. Please produce a copy of the partial settlement agreement including any side agreements reached

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio.

RPD-05-004. Please produce a copy of all documents relating to FirstEnergy's decision whether to enter into a partial settlement agreement with the Ohio Attorney General and other parties.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. The Companies further object to this Request because it seeks the production of documents that are not within the Companies' possession, custody, or control. The Companies also object to this Request to the extent it seeks information protected from disclosure by the attorney client privilege or attorney work product doctrines.

RPD-05-005. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC describing "a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement. The matter is a subject of the ongoing internal investigation related to the government investigations."

- a. Please produce all documents relating to communications with the counterparty referred to in this statement.
- b. Please produce all documents relating to payments made to the counterparty pursuant to this agreement.
- c. Please produce all documents relating to actions FirstEnergy took to help the counterparty become appointed to his or her position as a regulator of the Ohio companies

- d. Please produce all documents relating to the facts that led FirstEnergy to believe that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.
- e. Please produce all documents relating to what FirstEnergy believes may have been the true purpose of the payments related to the consulting agreement.
- f. Please provide all documents relating to the consulting agreement in the form of books of account, and all other books, records, and memoranda which support the entries in such books of account.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. Indeed, information concerning payments to a "government official" are not within the scope of this proceeding, nor is the information reasonably calculated to lead to admissible evidence—as the Attorney Examiner already decided. *See* Case No. 20-1502, Fanelli Deposition Transcript at 253 (Mar. 10, 2021). The Companies further object to this Request as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide copies of "all documents" concerning broad categories of issues such as those "relating to communications with the counterparty referred to in this statement." The Companies further object to this Request because it seeks the production of information that is not within the Companies' possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-006. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press

release stating that FirstEnergy “is taking proactive steps to resolve a range of regulatory proceedings affecting its Ohio utilities by pursuing holistic and transparent discussions with key stakeholders.” Please produce a copy of all documents relating to such discussions.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous, especially in its ambiguous use of the phrase “such discussions.” Further, the Companies object to this Request to the extent it seeks information protected from disclosure by the attorney client privilege or attorney work product doctrines.

RPD-05-007. Please produce copies of all documents relating to any communication by or among FirstEnergy directors, executives or employees relating to the possibility of FirstEnergy’s Internal Audit department performing any audit relating to FirstEnergy’s activities in connection with H.B. 6.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide copies of “all documents relating to any communication by or among FirstEnergy directors, executives or employees” concerning any potential audit of “activities in connection with H.B. 6.” The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control. The Companies also object to this

Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-008. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy “has made significant changes to its approach to governmental affairs engagement and is limiting participation in the political process. This also includes ensuring that the disclosures around the company’s political advocacy are more robust going forward so that it is clear what efforts the company appropriately supports.”

- a. Please produce all documents relating to the “significant changes” described in this statement.
- b. Please produce all documents relating to any new disclosures that FirstEnergy plans to make regarding its political advocacy.
- c. Please produce all documents relating to discussions among FirstEnergy directors, executives and employees regarding these changes.
- d. Please produce all documents relating to limiting participation in the political process.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-009. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy “has initiated FE Forward, a comprehensive project focused on improving business practices and policies; fostering trust, transparency and integrity and enabling FirstEnergy to become a more nimble organization.”

- a. Please produce all documents relating to FE Forward.
- b. Please produce all documents relating to discussions among FirstEnergy directors, executives and employees relating to FE Forward.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks the production of information that is not within the Companies’ possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-010. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy’s Independent Review Committee of the Board is overseeing various matters. Please produce a copy of all documents provided to or produced by the Independent Review Committee relating to political or charitable spending.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies’ ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly

burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks the production of documents that are not within the Companies' possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-011. On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy has established a Compliance Oversight Sub-Committee of the Audit Committee. Please produce a copy of all documents provided to or produced by the Compliance Oversight Sub-Committee of the Audit Committee relating to political or charitable spending.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks the production of documents that are not within the Companies' possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-012. Please produce copies of all documents provided to or produced by the FirstEnergy Audit Committee relating to FirstEnergy's activities relating to H.B. 6.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks

the production of documents that are not within the Companies' possession, custody, or control. The Companies also object to this Request because OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.

RPD-05-013. On FirstEnergy's Fourth Quarter earnings call on February 18, 2021, FirstEnergy executives disclosed that they had uncovered various charges relating to consulting agreements, political advocacy and/or other matters that were improperly charged to FirstEnergy Utilities or improperly substantiated over a period of several years. Regarding this statement, please provide the following documents:

- a. All documents relating to the improper charges.
- b. All documents relating to information that FirstEnergy has provided to others regarding these charges.
- c. All documents relating to FirstEnergy's efforts to reverse these charges.
- d. All documents relating to the amount of these charges that were assigned, allocated or distributed to the FirstEnergy Utilities.
- e. All documents relating to the amount of these charges that were placed in customer rates for the FirstEnergy Utilities.

RESPONSE: The Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence. This Request does not concern whether the costs of any H.B. 6 Spending were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio. Also, the Companies object to this Request as not relevant or reasonably calculated to lead to the discovery of relevant or admissible evidence because, following the Commission's March 10, 2021 Entry in Case Number 20-1629-EL-RDR adopting Staff's recommendation to expand the audit, this information is now the subject of that separate proceeding—as already determined by the Attorney Examiner. *See* Case No. 20-1502, Fanelli

Deposition Transcript, at 250–51 (Mar. 10, 2021). The Companies also object to this Request as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this Request because it seeks the production of information that is not within the Companies' possession, custody, or control.

Dated: March 18, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for all parties by email on
March 18, 2021:

/s/ Margaret M. Dengler
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S RESPONSES AND
OBJECTIONS TO THE SEVENTH SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Pursuant to Rules 4901-1-16 through 4901-1-22 of the Ohio Administrative Code and in accordance with Ohio Rules of Civil Procedure 26, 33, and 34, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”), hereby submit these Objections and Responses to the Seventh Set of Requests for Production of Documents (the “Discovery Requests”) served by the Office of the Ohio Consumers’ Counsel (“OCC”).

GENERAL OBJECTIONS

As used herein, the following definitions apply:

1. The Companies object to OCC’s attempt to provide definitions and “instructions for answering” that are broader than, or inconsistent with, the rules of the Ohio Administrative Code or the Ohio Rules of Civil Procedure. The Companies will respond in accordance with their obligations under those rules.
2. The Companies object to the definition of “Documents” and “Documentation” to the extent it seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. The Companies construe the term “documents” to be

synonymous in meaning and equal in scope to the usage of the term “documents” in Rule 34(A) of the Ohio Rules of Civil Procedure.

3. The Companies object to the definition of “Communication” as overbroad, unduly burdensome, and vague and ambiguous, and the Companies further object to the extent that the definition seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. For example, OCC defines “Communication(s)” to include the transmission of information by “oral” or “otherwise perceptible means” and therefore unreasonably purports to require the Companies to describe in detail communications that are not contained in any document. Further, the definition states that a request “seeking the identity of a communication . . . encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication” and therefore unreasonably purports to place an undue burden on the Companies to identify any documents or communications having any “nexus” or containing any “explicit or implicit” reference to the subject matter of a communication.
4. The Companies object to the definition of “You,” and “Your,” or “Yourself” as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide information on behalf of any “present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer” and is unlimited as to time. The Companies construe the terms “You,” “Your,” and “Yourself” to refer only to the Companies.

5. The Companies object to the definition of “Identify,” or “the identity of”, or “identified” as overbroad, unduly burdensome, vague, and ambiguous. For example, this definition unreasonably purports to obligate the Companies to provide information outside of their personal knowledge, to identify all persons “in the presence” of parties to communications, and to describe an “act” and the persons in the presence of the “actor.”
6. The Companies object to the definition of “FirstEnergy Service Co.” as vague and ambiguous in its use of the phrase “controlled by the Board of Directors of FirstEnergy Corp.”
7. The Companies object to the definition of “Political and Charitable Spending” as overbroad, unduly burdensome, vague, and ambiguous. The Companies further object to this definition to the extent it purports to state a legal conclusion regarding the scope of the Commission’s jurisdiction.
8. The Companies object to the definition of “House Bill 6 activities” as overbroad, unduly burdensome, vague, and ambiguous. Further, the “Criminal Complaint” to which this definition refers does not contain any allegations of any conduct by the Companies or any allegations that the Companies engaged in any so-called “activities” in connection with House Bill 6.
9. The Companies object to the instruction “to produce responsive materials and information” in the possession of persons “purporting to act on [the Companies’] behalf” because this instruction on its face calls for the production of materials that are not within the Companies’ possession, custody, or control.

10. The Companies object to the instruction in numbered paragraph 8 of the “Instructions for Answering” as overbroad, unduly burdensome, vague, and ambiguous. For example, this instruction unreasonably purports to require the Companies to search for and produce “information and tangible materials” over a 13-year period of time.
11. The Companies object to the “instructions” for invoking privilege to the extent they seek to impose requirements on the Companies that are broader than, or inconsistent with, those imposed by the Ohio Administrative Code or by the Ohio Rules of Civil Procedure. Should the Companies withhold any document on the basis of any applicable privilege, immunity, or protection, the Companies will provide the information required by Ohio Rule of Civil Procedure 26(B)(8)(a).
12. The Companies object to OCC’s “instructions” in numbered paragraphs 11 and 12 of the “Instructions for Answering” because they unreasonably purport to require the Companies to treat interrogatories as requests for production of documents or requests for production of documents as interrogatories under certain circumstances. The Companies will treat interrogatories as interrogatories and requests for production of documents as requests for production of documents.
13. The Companies object to OCC’s “instruction” in numbered paragraph 13 of the “Instructions for Answering” as vague and ambiguous because this instruction appears to have been copied and pasted from OCC’s requests in another proceeding. The Companies have filed no “Application” in this case.
14. The Companies object to each request to the extent that it seeks production of information that is confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties.

15. The Companies object to OCC's Discovery Requests to the extent any Request is duplicative of a previous request from OCC Sets 1 and 2 that either (1) OCC did not seek to compel an answer on in its November 10 Motion to Compel, or (2) was denied by the Attorney Examiner in his March 25 ruling on OCC's November 10 Motion to Compel.
16. The Companies submit the following responses in accordance with the Attorney Examiner's March 25 ruling on the Office of the Ohio Consumers' Counsel's Motion to Compel. *See generally* Case No. 20-1502, Transcript ("March 25 Tr.") (March 25, 2021). Therefore, the Companies submit these responses with the understanding that the relevant time period is January 1, 2017 to December 31, 2019 and that "political and charitable spending" in this proceeding does not include (a) "labor and shared service employee expenses and capital related to labor and shared employee expenses" or (b) inside lobbyists' time. March 25 Tr., at 10:6-11:5.
17. The Companies object to OCC's Discovery Requests to the extent they seek information or documents protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable doctrine.
18. A statement that documents will be produced is not intended to suggest that responsive documents exist within the Companies' possession, custody, or control; nor is it intended to suggest that the Companies will search every electronic and paper file within their possession, custody, or control, because that exercise would be unduly burdensome and prohibitively expensive and is not required under the rules. A statement that documents will be produced means that the Companies will search for documents in those places where the Companies reasonably anticipate they may be located and, if located and not

subject to any privilege, the Companies will make them available for inspection and copying at a mutually agreeable time and place.

19. The Companies object to OCC's Discovery Requests to the extent they seek information or documents protected from disclosure by the First Amendment. The Supreme Court has recognized that the forced disclosure of political associations raises First Amendment concerns, because the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). Compelled disclosure of campaign-related communications in civil discovery can deter activities protected under the First Amendment "by chilling participation and by muting the internal exchange of ideas." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1163 (9th Cir. 2010). Thus, courts "have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 1160 (citing *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003)); *see also Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981), *vacated on other grounds*, 458 U.S. 1118 (1982).

**RESPONSES AND OBJECTIONS TO
REQUESTS FOR PRODUCTION OF DOCUMENTS**

RPD-07-001: Please produce the Form 990's for the FirstEnergy Foundation for tax years 2017-2019, including all related schedules.

RESPONSE: The Companies object to this Request on the grounds that the FirstEnergy Foundation is not within the Commission's nor OCC's jurisdiction to investigate. The Companies also object to this Request because it seeks information not relevant to the subject matter involved in this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Further, the Companies object on the grounds that the information OCC seeks is not within the Companies' possession, custody, or control.

Dated: April 22, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for all parties by email on
April 22, 2021:

/s/ Margaret M. Dengler
Attorney for the Companies

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**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.)

**AFFIDAVIT OF JOHN FINNIGAN IN SUPPORT OF
MOTION TO COMPEL RESPONSES TO
FIFTH AND SEVENTH SETS OF DISCOVERY
AND REQUEST FOR EXPEDITED RULING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I, John Finnigan, attorney for the Office of the Ohio Consumers' Counsel ("OCC") in the above-captioned case, submit this affidavit in support of OCC's Motion to Compel Responses to Discovery.

1. OCC served its Fifth Set of Discovery on February 19, 2021.
2. On March 18, 2021, FirstEnergy Utilities served their objections (with no substantive responses) to OCC's Fifth Set of Discovery. (Attachment 1).
3. OCC served its Seventh Set of Discovery on April 2, 2021.
4. On April 22, 2021, FirstEnergy Utilities served their objections (with no substantive responses) to OCC's Seventh Set of Discovery. (Attachment 2).
5. OCC and FirstEnergy participated in a prehearing conference on March 25, 2021 relating to two earlier sets of OCC's discovery, OCC's First and Second Sets of Discovery. The Attorney Examiner largely granted OCC's Motion to Compel and

in doing so, provided guidance on the scope of discovery. This provided parties with direction and resolved numerous disputed discovery issues.

6. OCC sent a letter to FirstEnergy on April 15, 2021 seeking to resolve the discovery disputes over OCC's Fifth Set of Discovery. OCC agreed to limit its discovery requests as described in the letter, a copy of which is attached.
7. The parties held a conference call to discuss OCC's Fifth and Seventh Sets of discovery requests. This occurred on May 5, 2021 but the parties were unable to reach agreement on the scope of discovery. OCC has exhausted all reasonable means of resolving any differences, leading to the filing of this Motion to Compel.

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

The undersigned, being of lawful age and duly sworn on oath, hereby certifies, deposes and states the following:

I have caused to be prepared the attached written affidavit for OCC in the above-referenced docket. This affidavit is true and correct to the best of my knowledge, information and belief.

/s/ John Finnigan
John Finnigan, Affiant

Subscribed, sworn and witnessed by me in a videoconference using Microsoft Teams this 29th day of June 2021.



DEBRA JO BINGHAM
Notary Public
State of Ohio
My Comm. Expires
June 13, 2025

Debra Jo Bingham
Notary Public

This foregoing document was electronically filed with the Public Utilities

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in

Case No(s). 20-1502-EL-UNC

Summary: Motion Motion to Compel Responses to Fifth and Seventh Sets of Discovery and Request For Expedited Ruling on Motion to Compel and Motion for In-Camera Hearing by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.