

**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 Illuminating Company, and The
Toledo Edison Company.**

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Case No. 20-1502-EL-UNC

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
MOTION TO COMPEL RESPONSES TO THE FIFTH AND SEVENTH SETS OF
DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

TABLE OF CONTENTS

I.	INTRODUCTION	- 1 -
II.	ARGUMENT	- 2 -
A.	The Companies’ Objections To Each Request At Issue In Sets 5 And 7 Should Be Sustained For Several, Independent Reasons.....	- 2 -
B.	Every Request At Issue In Sets 5 And 7 Seeks Information Outside The Scope Of This Proceeding.	- 4 -
C.	Several Requests Urge The Commission to Exceed Its Jurisdiction And Seek Information Outside the Companies’ Possession, Custody, Or Control.	- 9 -
1.	Outside the Statutory Scope of Permissible Discovery Under the Commission’s Jurisdiction.....	- 9 -
2.	Outside the Companies’ Possession, Custody, or Control.....	- 11 -
D.	OCC Improperly Seeks To Conduct An Investigation That Is Outside Of Its Statutory Authority.	- 13 -
E.	Information Provided to FERC In Connection With FERC’s Audit Of FirstEnergy Corp. Is Protected From Disclosure Under Federal Law.....	- 15 -
III.	CONCLUSION.....	- 22 -

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") Motion to Compel Responses to the Fifth and Seventh Sets of Discovery ("Mot.") should be denied. Because these requests fall outside the scope of this proceeding, as well as outside OCC's authority, ask the Commission to exceed its jurisdiction, and impermissibly seek to interfere with an ongoing federal audit of the Companies' affiliate—each request that remains at issue in OCC's Fifth Set of Discovery ("Set 5") and Seventh Set of Discovery ("Set 7") poses an undue burden on the Companies. OCC argues 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," and that "[u]nder these incredible circumstances, the threshold for an undue burden on the FirstEnergy Utilities should be virtually unreachable."¹ The existence of a criminal complaint—not to mention, a criminal complaint that does not involve the Ohio Companies—does *not* alter the Ohio Companies' rights and protections with respect to discovery, as governed by the Ohio Revised Code, the Ohio Administrative Code, and informed by the Ohio Rules of Civil Procedure.

OCC's statements, in fact, embody the deficiencies in its Set 5 and 7 requests for discovery. OCC continues to attempt to probe into the criminal investigation conducted by the United States Attorney for the Southern District of Ohio. Indeed, none of OCC's Set 5 and 7 requests at issue seek information on the relevant issue of political and charitable spending by the Companies during the time period January 1, 2017 to December 31, 2019. Accordingly, OCC's motion to

¹ OCC Memorandum in Support ("Mem."), at 8.

compel responses to INT-05-001, RPD-05-001, -006, -007, -008, -010, -011, -012, and RPD-07-001 should be denied.²

II. ARGUMENT

A. The Companies' Objections To Each Request At Issue In Sets 5 And 7 Should Be Sustained For Several, Independent Reasons.

The requests that remain at issue in OCC's Motion to Compel Responses to Sets 5 and 7 suffer multiple deficiencies, as outlined in the table below and as explained more fully in the sections that follow:

Discovery Request	Objections
<p>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."</p> <p>(a) Please provide complete details of all the "holistic and transparent discussions" that (i) are being pursued; (ii) have occurred;</p> <p>(b) Please describe what is meant by "holistic and transparent.";</p> <p>(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;</p> <p>(d) Please identify the proactive steps FirstEnergy is taking;</p> <p>(e) Please identify the regulatory proceedings referenced in the statement;</p> <p>(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</p> <p>(Limited to information relating to Case No. 20-1502, <i>see</i> Mot. at 2).</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
<p>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</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p>

² The Companies reserve their right to file separately a memorandum contra OCC's Motion for an *In-Camera* Hearing on Sets 5 and 7. OCC expressly stated that it was not seeking expedited treatment of its Motion for an *In Camera* Hearing on Sets 5 and 7. *See* Mot., at 3. Accordingly, the Companies' deadline to file any memorandum contra the OCC's Motion for an *In-Camera* Hearing is July 14.

<p>FERC’s Division of Audits and Accounting relating to this investigation. (Limited to communications from the FirstEnergy Utilities to FERC’s Division of Audits and Accounting relating to FERC Docket No. FA19-1-000, <i>see</i> Mot. at 2–3).</p>	<p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Protected under federal law, <i>see</i> Section II.E.</p>
<p>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. (Limited to information relating to Case No. 20-1502, <i>see</i> OCC Mot. at 3).</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
<p>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.</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
<p>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.”</p> <p>(a) Please produce all documents relating to the “significant changes” described in this statement.</p> <p>(b) Please produce all documents relating to any new disclosures that FirstEnergy plans to make regarding its political advocacy.</p> <p>(c) Please produce all documents relating to discussions among FirstEnergy directors, executives and employees regarding these changes.</p> <p>(d) Please produce all documents relating to limiting participation in the political process.</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
<p>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.</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
<p>RPD-05-011: On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC including a press release stating that FirstEnergy has</p>	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p>

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.	<p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
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.	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p> <p>Seeks information protected by the attorney client privilege and work product doctrines.</p>
RPD-07-001: Please produce the Form 990’s for the FirstEnergy Foundation for tax years 2017-2019, including all related schedules.	<p>Outside the scope of this proceeding, <i>see</i> Section II.B.</p> <p>Outside statutory scope of permissible discovery, <i>see</i> Section II.C.</p> <p>Outside OCC’s authority to investigate, <i>see</i> Section II.D.</p>

B. Every Request At Issue In Sets 5 And 7 Seeks Information Outside The Scope Of This Proceeding.

The Commission opened this case to “review the political and charitable spending by the *FirstEnergy Utilities* in support of Am. Sub. H.B.6 and the subsequent referendum effort.”³ In later rulings, the Attorney Examiners have clarified the scope of this proceeding. The relevant date range is January 1, 2017 to December 31, 2019.⁴ And, importantly, the Attorney Examiners have stressed this is a review of the political and charitable spending by the *Companies*.⁵ So while

³ Case No. 20-1502-EL-UNC, Entry, at ¶ 5 (Sept. 15, 2020) (emphasis added)

⁴ See Case No. 20-1502-EL-UNC, Hr’g Tr., at 10:4–13 (March 25, 2021); Mot., at 3.

⁵ Case No. 20-1502-EL-UNC, Hr’g Tr., 37:19–23 (Jan. 7, 2021).

this case involves a review of the costs of political and charitable spending incurred by or allocated to the Companies, this proceeding is decidedly not a broad and unlimited review of all political and charitable spending by FirstEnergy Corp. or any affiliate.⁶ Yet OCC again attempts to probe into the political activities of FirstEnergy Corp., its recent decisions surrounding its involvement in the political process, and even the decisions of various Committees and Sub-Committees of the FirstEnergy Corp. Board. All of the requests that remain at issue in OCC's motion to compel responses to Sets 5 and 7 are outside the scope of this proceeding.

INT-05-001 and **RPD-05-006** seek information and documents relating to a recent statement in FirstEnergy Corp.'s February 16 Form 8-K regarding proactive steps to resolve a range of regulatory proceedings affecting the Ohio utilities. Information about these proactive steps and recent discussions with stakeholders are outside the time period of this proceeding, as these steps and discussions have all taken place after December 31, 2019. More to the point, information about the resolution of a range of regulatory proceedings is not reasonably calculated to lead to admissible evidence of whether the costs of any political and charitable spending in support of House Bill 6 were included, directly or indirectly, in any rates or charges paid by Ohio ratepayers. This information remains irrelevant, regardless of OCC's newly-announced limitation on this request to matters regarding this docket, *see* Mot., at 2. Further, any external communications would already be in OCC's possession, and, moreover, these discussions have been characterized as confidential settlement discussions.

RPD-05-001 seeks all communications from the Companies to FERC's Division of Audits and Accounting relating to FERC Docket No. FA19-1-000, *see* Mot. at 2–3. Apart from the many

⁶ *See* Case No. 20-1502-EL-UNC, Hr'g Tr., 18:20-19:10, 23:14-18 (June 30, 2021) (limiting production to information about the Companies or costs allocated to the Companies; "[w]ith the caveat that this is spending by the Companies, not necessarily spending by an affiliate or FirstEnergy Corp. The documents need to be tied to what is ultimately charged back to the Companies").

deficiencies this request suffers described below in Section II.E., this request is not tailored to any issue regarding the Companies' political and charitable spending. FERC's audit concerns FirstEnergy Corp.'s compliance with FERC rules, not the Companies' compliance with Ohio law or Commission regulations. It follows that OCC's request for wholesale discovery of FERC's audit falls squarely beyond the scope of the Commission's review here.

RPD-05-007 seeks 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."⁷ Setting aside for now the clear jurisdictional concerns and the fact that this request seeks documents plainly outside the Companies' control, *see* Section II.C., communications regarding any decision to conduct an internal audit relating to House Bill 6, to the extent those communications occurred, are outside the time period of this proceeding—as those decisions would necessarily have occurred after December 31, 2019. Moreover, OCC made no attempt in drafting this request to seek information about the political and charitable spending by the *Companies*.

RPD-05-008 seeks information about FirstEnergy Corp.'s February 16 Form 8-K statement that, with its Board's oversight, the FirstEnergy Corp. management team has made significant changes to its approach to governmental affairs engagement and is limiting participation in the political process. First, any information regarding these recent decisions fall far outside the relevant time period of this proceeding—as these are changes and decisions that occurred after December 31, 2019. Second, OCC's attempt to examine *FirstEnergy Corp.'s*

⁷ For clarification, the Companies assume that OCC is referring to FirstEnergy Corp. in this request—as OCC's use of "FirstEnergy" is ambiguous.

decisions regarding its participation in the political process *now* is not reasonably calculated to lead to evidence of whether House Bill 6 spending *was* included, directly or indirectly, in rates. OCC, here, seeks to monitor FirstEnergy Corp.’s political decisions going forward. And, in any event, this request raises jurisdictional concerns and seeks documents outside the Companies’ control. *See* Section II.C.

RPD-05-010, -011, and -012 impermissibly seek all documents provided to or produced by the Independent Review Committee, the Compliance Oversight Sub-Committee, and the Audit Committee of the FirstEnergy Corp. Board. Apart from the clear jurisdictional and document custody issues here too, *see* Section II.C., these requests are impermissibly overbroad and not relevant to the Commission’s review in this case. OCC instead desires to audit the ongoing processes of two Committees and a Sub-Committee of the FirstEnergy Corp. Board. Additionally, there are not any documents “produced by” the Independent Review Committee and the Compliance Oversight Sub-Committee that fall within the relevant time period—January 2017 to December 2019. The Independent Review Committee and the Compliance Oversight Sub-Committee were both formed in 2020.

RPD-07-001 seeks information about FirstEnergy Foundation, which OCC now attempts to investigate. However, FirstEnergy Foundation is not a utility regulated by the Commission, *see* Section II.C., and OCC has no authority to investigate FirstEnergy Foundation. But, apart from that, FirstEnergy Foundation functions separate and apart from both the Companies and FirstEnergy Service Company. Therefore, costs incurred by FirstEnergy Foundation are not charged or allocated to the Companies. So, by definition, any information regarding spending by FirstEnergy Foundation is outside the scope of this proceeding. Beyond that, the Companies have no possession or control over FirstEnergy Foundation’s records, *see* Section II.C.

Every request at issue in Sets 5 and 7 is therefore outside the scope of this proceeding. And OCC's arguments otherwise fail. OCC contends that Set 5 primarily seeks information regarding disclosures FirstEnergy Corp. made in a Form 8-K filed with the SEC on February 16.⁸ And to argue these requests are within the scope of this proceeding, OCC claims that "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"⁹ The Attorney Examiners in this proceeding have already ruled that information relating to this contract and the aforementioned regulator are not within the bounds of this proceeding.¹⁰ Besides this, the Companies discern no other attempt by OCC to show how the information it requests in Set 5 is reasonably calculated to lead to the discovery of admissible evidence. On a motion to compel, the burden of doing so falls on OCC.¹¹

As for Set 7, OCC argues that RPD-07-001 requests relevant information because it seeks information related to a purported "jump in donations from FirstEnergy's Ohio utilities."¹² While the Companies may be in a position to respond to a properly tailored request specifically asking for this information in a particularized manner from the Companies, OCC instead requests "Form 990's for the FirstEnergy Foundation for tax years 2017-2019, including all related schedules." Allowing such broad discovery of FirstEnergy Foundation runs afoul of jurisdictional limits, *see*

⁸ Mem., at 5–6.

⁹ *Id.* at 6.

¹⁰ *See*, Case No. 20-1502-EL-UNC, Dep. Tr., at 253:8–17 (March 10, 2021) (Attorney Examiner: "I definitely do not believe that payments to the regulator were in any part considered by the Commission to be political or charitable contributions or spending as part of House Bill 6 nor do I believe they are reasonably calculated to lead to admissible information regarding those and so that line of questioning would not be appropriate for this proceeding.").

¹¹ *In the Matter of the Application of Columbus & S. Ohio Elec. Co. for Auth. to Amend & Increase Certain of Its Rates & Charges for Elec. Serv.*, No. 83-314-EL-AIR, 1983 WL 887841, at *1 (Sept. 19, 1983) (finding that the burden is on the party serving discovery to craft appropriately tailored requests).

¹² Mem., at 6.

Section II.C., and mandates production of information outside the scope of this proceeding and the Companies' control. There is no need to reach outside these limits to accomplish OCC's stated goal of obtaining information regarding the Companies.

C. Several Requests Urge The Commission to Exceed Its Jurisdiction And Seek Information Outside the Companies' Possession, Custody, Or Control.

OCC's requests that fall outside the statutory realm of permissible discovery under the Commission's jurisdiction fall primarily into two buckets: requests seeking (a) the wholesale production of documents from FirstEnergy Corp.'s executives, Board, and committees of the Board (RPD-05-007, RPD-05-008, RPD-05-010, RPD-05-011, RPD-05-012) and (b) information from FirstEnergy Foundation (RPD-07-001). In addition, this information is outside the Companies' possession, custody, or control.

1. Outside the Statutory Scope of Permissible Discovery Under the Commission's Jurisdiction.

By requesting broad discovery into FirstEnergy Corp. and FirstEnergy Foundation, OCC is asking the Commission to exceed its jurisdiction. As the Ohio Supreme Court recently recognized, the General Assembly has conferred the Commission with jurisdiction to supervise public utilities when acting as public utilities.¹³ FirstEnergy Corp. and FirstEnergy Foundation are not public utilities, and do not charge for or provide utility service. While the Commission may have jurisdiction and general supervisory powers over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and R.C. 4905.06, those circumstances do not apply here.¹⁴ Additionally, FERC's audit involves many utilities in other

¹³ *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020).

¹⁴ The Commission has authority to examine the records and accounts of only those holding companies and their affiliates that are exempt from federal regulation under the Public Utilities Holding Company Act of 1935 ("PUHCA") if those records and accounts relate to a regulated public utility's cost of service. R.C. 4905.05. The PUHCA was

states—Jersey Central Power & Light, four Pennsylvania utilities, and Potomac Edison in Maryland—that the Commission does not regulate. It follows that OCC’s demands implicate the production of information from out-of-state utilities that are subject to the jurisdiction of their respective state’s utilities commissions. The Commission should resist OCC’s requests, which lack any statutory basis, to compel disclosure of information from a confidential federal proceeding involving entities that the Commission does not regulate.

Yet OCC asks the Commission to exceed that jurisdiction and permit unlimited discovery into FirstEnergy Corp., its Board, and FirstEnergy Foundation. *See* RPD-05-007 (requesting information from FirstEnergy Corp. directors, executives, or employees regarding FirstEnergy Corp.’s “Internal Audit department”); RPD-05-008 (requesting information about FirstEnergy Corp. decision regarding its participation in the political process); RPD-010, -011, and -012 (requesting documents from the Independent Review Committee, the Audit Committee, and the Compliance Oversight Sub-Committee of the FirstEnergy Corp. Board); RPD-07-001 (requesting information from FirstEnergy Foundation). The Commission should decline to entertain these requests, which lack any statutory basis.

repealed by the Energy Policy Act of 2005, effective February 2006, and, thus, no companies currently are exempt under sections 3(a)(1) or (2) thereof. *See* Pub. L. No. 109-58, 119 Stat. 594, 974, Sec. 1263 (2005). Prior to the repeal of the PUHCA, sections 3(a)(1) and (2) of the PUHCA permitted the Securities and Exchange Commission (“SEC”) to exempt holding companies and subsidiaries from the provisions of the PUHCA if the holding company and its subsidiaries were predominantly intrastate in character. *See* 15 U.S.C. §§ 79c(a)(1), (2). While the PUHCA was in effect, FirstEnergy Corp. became a non-exempt registered holding company operating across multiple states. Thus, its records and accounts have not been subject to the Commission’s jurisdiction under R.C. 4905.05 for many years. When the PUHCA was still in effect, the Commission stated that it “is well aware of the limitations of its jurisdiction imposed by Section 4905.05, Revised Code, and it does not intend to manage the affairs of holding companies.” *In re Financial Condition of Ohio’s Regulated Public Utilities*, Case No. 02-2627-AU-COI, Entry at p. 1 (Oct. 10, 2002).

2. Outside the Companies' Possession, Custody, or Control

It is a foundational principle of the discovery rules that a party may demand production of information only within the possession, custody, or control of a request's recipient.¹⁵ And both state and federal courts have held that a party must have "control"—meaning "the legal right to obtain the documents required on demand"—over records before it can be compelled to produce them.¹⁶ It is not enough that the Companies are subsidiaries of FirstEnergy Corp. "A subsidiary, by definition, does not control its parent corporation" and cannot be made to produce records held by its parent "except in rare circumstances."¹⁷ For example, evidence that one company operates as the other's alter ego or that one company acted as the agent of the other company in a transaction giving rise to a claim may support a finding of legal "control."¹⁸ But a sweeping assertion that the companies "operate under the same corporate umbrella" is insufficient.¹⁹ And vague claims that an agency relationship exists between two companies or that the two operate as a unified entity

¹⁵ See Ohio R. Civ. P. 34(A); Ohio Adm. Code 4901-1-20(A)(1).

¹⁶ See *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 179, 660 N.E.2d 765, 768 (Ohio Com. Pl. 1993) ("In order to obtain discovery from the subsidiary, the party seeking discovery must show that the party from whom the discovery is sought has control of said subsidiary."); *In re Porsche Cars N. Am., Inc.*, No. 2:11-MD-2233, 2012 WL 4361430, at *4 (S.D. Ohio Sept. 25, 2012) (defining "control" as "the legal right to obtain the requested documents on demand"); *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2011 WL 13078603, at *11 (S.D. Ohio Aug. 8, 2011) ("Documents are deemed to be within the 'possession, custody or control' for purposes of [Federal] Rule 34 if the party has actual possession, custody or control, or has the *legal right* to obtain the documents on demand."); *Genentech, Inc. v. Trs. of Univ. of Pa.*, No. C 10-2037 PSG, 2011 WL 5373759, at *2-3 (N.D. Cal. Nov. 7, 2011) (holding that a party failed to meet its burden to show that a wholly-owned subsidiary had legal control over the parent's documents when there was no evidence that parent was obliged to disclose documents to the subsidiary); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254-56 (D.C. Cir. 2005) (refusing to find the subsidiary had control over the parent corporation's documents as a matter of law); *Playboy Ent. Grp., Inc. v. United States*, No. CIV. A. 96-94-JJF, 1997 WL 873550, at *3-4 (D. Del. Dec. 11, 1997) (denying a motion to compel because the subsidiary did not control the parent corporation's documents).

¹⁷ *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145 (D. Del. 2005); see also *In re Porsche*, 2012 WL 4361430, at *5.

¹⁸ *Id.*

¹⁹ See *id.* at *5.

likewise fail to justify disregard of the corporate form.²⁰ Moreover, it is the party seeking production of documents who bears the burden of establishing the opposing party's control over them.²¹

Here, OCC essentially argues that all the records kept by all FirstEnergy entities are subject to the Companies' control.²² To prove such an extraordinary claim—and to compel disregard of the corporate form—OCC was required to make a showing tantamount to “justifying the application of the alter ego doctrine to pierce the corporate veil of the subsidiary.”²³ OCC comes nowhere near clearing that high bar, which requires, among other things, that a parent's control “was so complete that the [subsidiary] has no separate mind, will, or existence of its own.”²⁴ Instead, OCC relies primarily on the contentions that the Companies shared an officer and director with FirstEnergy Corp. and that certain FirstEnergy Service Company employees provided services to the Companies.²⁵ As Ohio courts expressly recognize, those entirely ordinary facts fall far short of demonstrating the level of control required by Ohio's exacting veil-piercing standard.²⁶

What's more, OCC's claim that the Companies have control over all of their affiliates' records certainly cannot be squared with Ohio's corporate separation laws, which mandate formal separation between the Companies and their unregulated affiliates. As OCC well knows, Ohio's

²⁰ *Id.*

²¹ See *In re Porsche*, 2012 WL 4361430, at *4 (“The party seeking documents bears the burden of establishing control.”); *Union Home Mortg. Corp. v. Jenkins*, No. 1:20-CV-2690, 2021 WL 1110440, at *9 (N.D. Ohio Mar. 23, 2021) (“The burden of establishing control over the documents sought is on the party seeking production.”); *Princeton Digital Image Corp. v. Konami Digital Ent. Inc.*, 316 F.R.D. 89, 90 (D. Del. 2016).

²² Mem. at 15 (the Companies “should be required to provide information that FirstEnergy Corp. and other affiliates possess.”).

²³ *Power Integrations*, 233 F.R.D at 145.

²⁴ *Dombroski v. WellPoint, Inc.*, 2008-Ohio-4827, ¶ 18, 119 Ohio St. 3d 506, 511.

²⁵ See Mem. at 15.

²⁶ See, e.g., *Meinert Plumbing v. Warner Indus., Inc.*, 2017-Ohio-8863, ¶ 47, 90 N.E.3d 966, 977 (8th Dist.) (“Sharing of management, directors, or employees alone is not sufficient justification for piercing the corporate veil[.]”).

corporate separation rules (O.A.C. 4901:1-37 *et seq.*) require that “[e]ach electric utility and its affiliates that provide services to customers within the electric utility’s service territory shall function independently of each other” and mandate the separation of a utility’s and its affiliates’ books, records, and accounts. Far from having “no separate mind, will, or existence” of their own, the Companies operate under stringent separation requirements, in accordance with their Commission-approved corporate separation plan.

In short, OCC cannot reasonably argue here either that the Companies should have access to all the documents and communications of their affiliates or that the Companies have somehow “use[d] [FirstEnergy Corp.’s] corporate structure” to restrict access to information to, among other things, the highly sensitive work of FirstEnergy Corp.’s Board and its committees. Fundamental precepts of corporate law and Ohio regulation instead require that the legal distinctions between the Companies and their affiliates be respected.

D. OCC Improperly Seeks To Conduct An Investigation That Is Outside Of Its Statutory Authority.

OCC itself does not have the investigatory powers to pursue the questions it poses,²⁷ since its authority “is linked to the rights and powers in the context of a party appearing before the Commission in an official proceeding.”²⁸ “[T]he General Assembly did not intend or imply that

²⁷ *In re Amendment of Certain Rules of the Ohio Administrative Code to Implement Sections 4905.261 and 4911.021, Revised Code*, Case No. 05-1350-AU-ORD, 2006 WL 193640, Opinion and Order and Entry on Rehearing (Jan. 4, 2006) (emphasis added) (“The authority enumerated for OCC is not unlimited; it is linked to rights and powers in the context of a party appearing before the Commission in an official proceeding.”); *In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, Case No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997) (“[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities, only to represent the interest of residential customers in such proceedings before the Commission.”); *Tongren v. D&L Gas Mktg., Ltd.*, 149 Ohio App. 3d 508, 511, 2002-Ohio-5006, 778 N.E.2d 76 (10th Dist. 2002).

²⁸ *In re Amendment of Certain Rules of the Ohio Administrative Code to Implement Sections 4905.261 and 4911.021, Revised Code*, Case No. 05-1350-AU-ORD, 2006 WL 193640, Opinion and Order and Entry on Rehearing (Jan. 4, 2006).

the OCC should monitor or supervise the operations and/or performance of public utilities”—not to mention FirstEnergy Corp.²⁹

Despite these clear limitations, OCC argues it has authority to investigate (1) the Independent Review Committee’s internal investigation (RPD-05-010), (2) all documents produced by or provided to the Audit Committee of the FirstEnergy Corp. Board relating to House Bill 6 activities (RPD-05-012), (3) all documents “provided to or produced by the Compliance Oversight Sub-Committee of the Audit Committee relating to political or charitable spending” (RPD-05-011), and (4) documents related to FirstEnergy Corp.’s “changes to its approach to governmental affairs engagement” and limitation of its “participation in the political process,” among other far-reaching requests (*see also* RPD-05-001 and RPD-05-007).

To claim it has such authority, OCC offers two primary arguments: (1) that the Companies did not object to OCC’s intervention in this proceeding and (2) that Ohio R.C. 4911.02(B)(2) provides “that OCC’s powers and duties are ‘without limitation because of enumeration’ . . . ”³⁰ Neither argument carries any weight. The first point is irrelevant. Whether or not the Companies objected to OCC’s intervention does not affect the legal bounds of OCC’s authority. And on the second point, R.C. 4911.02(B)(2) does not endow OCC with unlimited power. R.C. 4911.02(B)(2) provides that OCC “may intervene in . . . proceedings in administrative agencies on behalf of the residential consumers,” but that it “*shall* have all the rights and powers of any party in interest appearing before the public utilities commission.”³¹ OCC is not granted powers or rights *greater*

²⁹ *In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, Case No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997).

³⁰ *See* OCC’s Mem. in Supp. at p. 9–10.

³¹ R.C. 4911.02(B)(2)(a), (c).

than other parties.³² Allowing OCC to probe into an internal investigation and the inner-workings the Audit Committee and Sub-Committee of FirstEnergy Corp.—a non-party to this case which is not a public utility regulated by the Commission—would grant OCC unfettered power to “monitor” and “supervise” (i) the operation and performance of certain Committees of the *FirstEnergy Corp.* Board and (ii) FirstEnergy Corp.’s recent decisions surrounding its participation in the political process.³³ Such a result is untenable and finds no basis in the governing law, and the Commission has noted its concerns with allowing such broad discovery unrelated to the Companies.³⁴

E. Information Provided to FERC In Connection With FERC’s Audit Of FirstEnergy Corp. Is Protected From Disclosure Under Federal Law.

OCC additionally moves the Commission to compel the production of “all documents reflecting communications” between the Companies and FERC’s Division of Audits and Accounting concerning an ongoing FERC audit of FirstEnergy Corp.³⁵ As noted above, OCC’s request is fundamentally flawed. It is not tailored to any relevant issues, but instead seeks a full scale review of FERC’s audit work to evaluate FirstEnergy Corp.’s compliance with federal rules that do not bear on the Commission’s review here.

³² *In re Amendment of Certain Rules of the Ohio Administrative Code to Implement Sections 4905.261 and 4911.021, Revised Code*, Case No. 05-1350-AU-ORD, 2006 WL 193640, Opinion and Order and Entry on Rehearing (Jan. 4, 2006).

³³ *Cf. In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997) (“[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities”—not to mention, the utilities’ affiliates).

³⁴ *See* Case No. 20-1502-EL-UNC, Hr’g Tr., 18:20-19:10, 23:14-18 (June 30, 2021) (limiting production to information about the Companies or costs allocated to the Companies; “[w]ith the caveat that this is spending by the Companies, not necessarily spending by an affiliate or FirstEnergy Corp. The documents need to be tied to what is ultimately charged back to the Companies.”).

³⁵ *See* RPD-05-001; Mot., at 2–3 (limiting communications to those from the Companies).

Beyond this, OCC's request is improper for another reason: Federal law establishes that documents connected with an ongoing FERC audit are confidential and thus protected from disclosure.³⁶

On February 6, 2019, FERC's Division of Audits and Accounting commenced an audit of FirstEnergy Corp. to evaluate compliance with various accounting, recordkeeping, and reporting requirements from June 1, 2015 until present.³⁷ The letter, consistent with longstanding FERC regulations and policy, noted that all materials produced by FirstEnergy for the audit are "subject to the confidentiality provisions" of "section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2012), and section 1265(d) of the Energy Policy Act of 2005 (EPA), 42 U.S.C. § 16452 (2012)." ³⁸ And to place the matter beyond debate, the letter continues, "Documents and information Commission staff obtains during the audit, as well as all working papers developed, will be placed in nonpublic files."³⁹ In reliance on the protection afforded by federal law, FirstEnergy cooperated with FERC and produced the requested confidential information.

These confidentiality protections are of no small import. In order for FERC to carry out its audit duties with efficiency, companies must be able to provide their business information freely with an expectation of confidentiality and without fear of that information becoming a matter of

³⁶ See 16 U.S.C. § 825(b); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a).

³⁷ FERC Docket No. FA19-1-000, Letter from L. Parkinson, Director, Officer of Enforcement, FERC (Feb. 6, 2019) (FERC Audit Letter).

³⁸ *Id.* Those federal statutes (as well as FERC regulation 18 C.F.R. § 3c.2(a)) provide, "No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts." 16 U.S.C. § 825(b).

³⁹ FERC Audit Letter at 1. FERC has also noted the role of confidentiality in its audit process on its webpage describing the rules and policies governing audits: "Electric Audit Authority – DAA's authority to perform audits of electric public utilities is found in section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2018), and is subject to the confidentiality provisions of that section. Documents and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files." See <https://www.ferc.gov/audits>.

public record. The Federal Power Act, The Energy Policy Act, and FERC's implementing regulations provide the protection that is critical to that exchange.

OCC's requests therefore threaten to undermine the confidentiality and candor of the audit process here and in future proceedings. If, as OCC suggests, the confidentiality protections of federal law are to be ignored, there will be scant protection for FirstEnergy and future, similarly-situated companies under FERC audit. Requests made in future audits will be assumed to be subject to the ordinary rules of discovery in collateral state regulatory proceedings. And OCC's requests risk undermining the integrity of FERC's current audit by threatening FirstEnergy with the release of sensitive information it provided to FERC in confidence.⁴⁰

And, should any doubt remain, the enforcement of state law is invalid to the extent that it "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴¹ Thus, when state action "presents [even] the prospect of interference with the federal regulatory power" of FERC, such "state law may be pre-empted even though collision between the state and federal regulation may not be an inevitable consequence."⁴² Put succinctly, "state action is preempted if it interferes with, or even potentially interferes with, federal authority."⁴³

Here, there is little doubt that a breach of the confidentiality of FERC's audit of FirstEnergy would compromise the integrity of FERC proceedings and would discourage candid and

⁴⁰ Moreover, while the Federal Power Act provides for intervention and rights of discovery in matters set for hearing by FERC, including ratemaking proceedings, 16 U.S.C. §§ 824e, 825g, it provides no such thing for FERC-led audits or investigations, 16 U.S.C. §§ 825, 825f. OCC should not be allowed to use the Commission to end-run the Federal Power Act's limits on party access to information and data that is subject to FERC audit or investigation.

⁴¹ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 298 (1988).

⁴² *Id.* at 310.

⁴³ *In re California Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1082 (S.D. Cal. 2003).

transparent cooperation with FERC audits in the future. Indeed, one place to look for the “purposes and objectives of Congress” is the Congress’s own handiwork, including the federal Freedom of Information Act, which includes an exemption for information that “could reasonably be expected to interfere with enforcement proceedings.”⁴⁴ For that reason, FOIA requests for materials connected to potential FERC investigations are regularly rejected.⁴⁵ It is entirely backwards to suggest, as OCC must, that Congress would intend for FERC audit materials to be exempt from its own federal public disclosure law but readily available through broad discovery requests in state regulatory proceedings.⁴⁶

OCC raises the specter of FirstEnergy’s audit-related materials forever remaining in a shroud of secrecy if the Commission does not compel their production this very instance. The truth could not be any further. Both the commencement letter and the final FERC audit report are released to the public as a matter of course, along with the audited entity’s response to the final report.⁴⁷ At that time, both OCC and the Commission will have access to the results of FERC’s audit. As is clear from even a quick review of these public audit reports, which are easily available on FERC’s website, FERC’s audit reports provide significant detail into the factual and legal issues raised in the audit, the process followed in the audit, the views and concerns of the company about

⁴⁴ 5 U.S.C. § 552(b)(7).

⁴⁵ See, e.g., *STS Energy Partners LP v. Fed. Energy Regul. Comm’n*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015) (“It is therefore irrelevant in this case that FERC’s investigation of Oceanside has come to a close. The investigation—writ large—continues, and that is enough under Exemption 7(A).”).

⁴⁶ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S. Ct. 1504, 1509, 44 L. Ed. 2d 29 (1975).

⁴⁷ Audits, Enforcement, FERC (June 8, 2021), <https://www.ferc.gov/audits> (“The results of completed audits are also published on the eLibrary system, along with the order issuing their release and the comments of the audited entity. Through these means, audit staff provides audited entities and the industry with insight into areas of emphasis and concern.”).

the audit, and FERC's response to those views and concerns.⁴⁸ The public has the ability to learn a great deal about the nature of an audit from the audit report, and that will be true here as well. OCC's motion to compel the details of FERC's audit, while that audit is still underway, is nothing more than an effort to short-circuit that careful, detailed process, impermissibly interfering with the proceedings of a federal agency.

OCC next argues that the federal statutes and regulations, by their terms, apply only to FERC and its staff, not FirstEnergy. OCC, however, ignores—and asks the Commission to ignore—that these laws and regulations establish an important federal interest in the confidentiality of the audit materials. State regulators should take great care to avoid needlessly undermining such confidentiality. Thus, while the federal statutes and regulation expressly apply to FERC, they reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission.

It is not as if OCC has identified a particularized need for a specific document that just happens to be one of the records that FirstEnergy turned over to FERC as part of its audit. Nor, contrary to OCC's misplaced claims, have the Companies anywhere argued that documents become forever protected by mere virtue of their provision to FERC. Instead, OCC itself has defined the relevant set of documents *solely by reference to the FERC audit*: the relevant request for production asks for FirstEnergy's "responses to formal or informal data requests from FERC," "documents provided to FERC Staff associated with site visits," and "transcripts, notes, recordings or other documents pertaining to interviews with the FERC Staff."⁴⁹

⁴⁸ See <https://www.ferc.gov/audits> (providing links to "all final audit reports issued since Fiscal Year 2015 below" and noting that "The audit reports detail audit findings of noncompliance and audit staff recommendations for corrective actions in which jurisdictional companies developed robust compliance plans to implement").

⁴⁹ RPD-06-008.

To reflexively allow wholesale discovery of FERC audit material in this fashion would interfere with FERC's ability to proceed in a considered and orderly fashion and would render FERC's guarantee of confidentiality meaningless. Why would federal law guarantee the confidentiality of FERC audit materials, and why would FERC premise their investigations upon such confidentiality, if any outside party could simply compel the very same materials in a collateral proceeding? Respect for the Federal Power Act, The Energy Policy Act, and FERC's regulatory architecture demands more.

This is not the first time a party has tried an end run of this sort. The Supreme Court of Texas's decision in *Eli Lilly & Co. v. Marshall* is instructive.⁵⁰ That case addressed information that Eli Lilly had gathered from patients who had adverse reactions to their drug, Prozac. Federal law requires a drug manufacturer to submit any such reports it receives to the FDA.⁵¹ However, FDA regulations provide that the agency must keep confidential the identities of the patient and of the person or institution that reported the adverse reaction.⁵² In a products liability suit brought against Eli Lilly, a trial court ordered the disclosure of this confidential information through discovery.

The Supreme Court of Texas, recognizing that the FDA regulation spoke to agency disclosures, held that the regulation did not "preempt the trial court's order."⁵³ But that conclusion was academic, the Court added, because "[t]he FDA regulations clearly embody a vital public interest in confidential voluntary reporting that is eviscerated as equally by a manufacturer's

⁵⁰ 850 S.W.2d 155 (Tex. 1993).

⁵¹ 21 U.S.C. § 355(k)(1).

⁵² 21 C.F.R. § 314.430(e)(4).

⁵³ 850 S.W.2d at 160.

compelled disclosure as by the FDA's disclosure."⁵⁴ The Court stressed that "the congressional objective of fostering post-approval reporting of possible adverse reactions for all FDA-approved drugs [was] severely compromised by the trial court's order of wholesale disclosure of reporters' identities."⁵⁵ And the Court noted that Eli Lilly, the FDA, and the general public all have a strong interest "in maintaining the free flow of information derived from adverse reaction reports."⁵⁶ Because the trial court "ordered full disclosure . . . without a showing of particularized relevance and need," the Court vacated the discovery order.⁵⁷

So too here. There is no doubt that protecting the confidentiality of FirstEnergy's FERC audit serves a "vital public interest" in promoting disclosure to FERC, which would be "eviscerated as equally by [FirstEnergy's] compelled disclosure as by [FERC's] disclosure."⁵⁸ And because OCC indiscriminately asks for "full disclosure" of all FERC audit materials "without a showing of particularized relevance and need," the Commission should deny its requests.⁵⁹

FERC's empowering statutes and governing regulations leave no room for OCC's requested relief. Indeed if OCC can obtain the data it seeks, then any party in any Commission case would be able to expose the details of any ongoing FERC proceeding under the Federal Power Act. Such an outcome is simply incompatible with Congress's clear intent to honor the confidentiality of FERC audits. The results of FERC's audit of FirstEnergy will be reported to the public once the audit is complete, and OCC has no warrant to cut the line in the meantime.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

III. CONCLUSION

OCC's Motion should be denied in its entirety, as the requests that remain at issue fall outside the bounds of permissible discovery.

Dated: July 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 9, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo

Attorney for the Companies

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

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel Responses to the Fifth and Seventh Sets of Discovery electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company