

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the 2020 Review of the ) Case No. 20-1629-EL-RDR  
Delivery Capital Recovery Rider of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo Edison )  
Company. )

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**MEMORANDUM CONTRA MOTION OF FIRSTENERGY CORP. AND  
FIRSTENERGY SERVICE COMPANY TO QUASH SUBPOENAS  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") moved for subpoenas of papers and documents from FirstEnergy Corp. and FirstEnergy Service Company (FirstEnergy) because the FirstEnergy Utilities have claimed (among other things) that the records are not in their possession.<sup>1</sup> OCC's subpoenas are for key H.B. 6-related documents alluded to in FirstEnergy Corp.'s SEC filings.<sup>2</sup>

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<sup>1</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Motion to Compel Responses to Fifth and Seventh Sets of Discovery, Attachment 1 at 18 (June 29, 2021).

<sup>2</sup> Motion for Subpoena (June 25, 2021).

But FirstEnergy wants to block the state's consumer advocate from obtaining the papers and documents. FirstEnergy has failed to show that the subpoenas are unlawful, unreasonable or oppressive under the PUCO rules that govern quashing of subpoenas, O.A.C. 4901-1-25(C). Additionally, OCC has demonstrated a substantial need for the documents. For transparency and to allow for justice for consumers, the Public Utilities Commission of Ohio ("PUCO") should enforce OCC's subpoenas and compel FirstEnergy to produce the subpoenaed documents.

## **II. ARGUMENT**

- A. "The Commission's subpoena power, found in Section 4901.18, Revised Code, and Rule 4901-1-21(F) and 4901-1-25, O.A.C., is not limited to subpoenas directed at entities over which the Commission has general supervisory jurisdiction," as the PUCO held in Duke Energy Ohio, Inc., Rate Stabilization Plan.<sup>3</sup>**

FirstEnergy Corp. and FirstEnergy Service Company (FirstEnergy) claim that OCC's subpoenas exceed the limits of the PUCO's authority. Citing to R.C. 4905.05, they claim that the PUCO authority extends primarily to public utilities operating in Ohio. And they claim that the entities OCC seeks documents from are not public utilities and do not provide public utility service.<sup>4</sup> FirstEnergy further claims that the subpoenaed documents are outside the limits of the PUCO's authority and have no statutory basis.

Contrary to FirstEnergy's claims, the PUCO has broad statutory authority under R.C. 4905.05 and R.C. 4905.06 to investigate the FirstEnergy Utilities and their owner, FirstEnergy Corp. And the PUCO has authority under R.C. 4909.154 to "consider the management policies, practices, and organization" of a public utility. Under this law, the PUCO can require a public utility to supply information about its policies, practices, and organization.

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<sup>3</sup> *Duke Energy Ohio, Inc., Rate Stabilization Plan*, Case No. 06-1085-EL-UNC, Entry at 3-4 (Jan. 2, 2007).

<sup>4</sup> FirstEnergy Corp. and FirstEnergy Service Company Motion to Quash, Memorandum in Support at 8.

To be clear, the express language of R.C. 4905.05 – which FirstEnergy misconstrues – grants the PUCO expansive jurisdiction which includes jurisdiction not just over public utilities, but also to “persons or companies” “owning” such public utilities. That language is as follows:

The jurisdiction, supervision, powers, and duties of the public utilities commission extend to ***every public utility*** and railroad, the plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property that lies within this state; ***to the persons or companies owning, leasing, or operating such public utilities*** and railroads; ***to the records and accounts of the business thereof done within this state***; and to the records and accounts of any companies which are part of an electric utility holding company system exempt under section 3(a)(1) or (2) of the “Public Utility Holding Company Act of 1935,” 49 Stat. 803, 15 U.S.C. 79c, and the rules and regulations promulgated thereunder, insofar as such records and accounts may in any way affect or relate to the costs associated with the provision of electric utility service by any public utility operating in this state and part of such holding company system. (emphasis added)

FirstEnergy Corp. is a company that *owns* the FirstEnergy utilities and thus is subject to the PUCO’s jurisdiction.

The first two clauses of R.C. 4905.05 provide the PUCO jurisdiction over FirstEnergy and FirstEnergy Corp.: “The jurisdiction, supervision, powers, and duties of the public utilities commission extend to “***every public utility***” whose plant or property lies wholly or partly in the state and “***to the persons or companies owning, leasing, or operating such public utilities*** \*\*\*.” And R.C. 4909.154 adds to this authority by allowing the PUCO to consider the management policies, practices and organization of FirstEnergy Utilities, which appear to be closely linked to its parent, FirstEnergy Corp.

FirstEnergy also disregards other Ohio law that allows the PUCO to exercise authority over FirstEnergy. R.C. 4905.06 grants the PUCO general supervision over public utilities and over “all other companies referred to under R.C. 4905.05” – companies which include

FirstEnergy Corp. (because it owns a public utility with property in this state.). Here are the words under R.C. 4905.06, which allow the PUCO to exert its general supervisory jurisdiction over FirstEnergy Corp.:

The public utilities commission ***has general supervision over all public utilities within its jurisdiction as defined in section 4905.05 of the Revised Code, and may examine such public utilities*** and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the commission, franchises, and charter requirements. ***The commission has general supervision over all other companies referred to in section 4905.05 of the Revised Code to the extent of its jurisdiction as defined in that section, and may examine such companies*** and keep informed as to their general condition and capitalization, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, ***and their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with such companies.*** (emphasis added)

Again, the FirstEnergy Utilities are “public utilities” within the PUCO’s scope of jurisdiction under R.C. 4905.05 and FirstEnergy Corp. is among the “other companies referred to in section 4905.05 \*\*\*.” And the PUCO also has authority under R.C. 4909.154 to consider the management policies, practices and organization of FirstEnergy utilities, which appears to be closely linked to, if not controlled by, FirstEnergy Corp.

Thus, the PUCO, as a creature of statute, has authority to examine both FirstEnergy and FirstEnergy Corp. The PUCO may “examine such public utilities” with respect to “their compliance with all laws [and], orders of the commission.” And the PUCO may “examine such companies” (FirstEnergy Corp.) with respect to “their compliance with all laws and orders of the commission, insofar as any of such matters may relate to the costs associated with the provision of electric utility service by public utilities in this state which are affiliated or associated with



such companies.” These laws expressly allow the PUCO to examine whether the “costs associated with the provision of electric utility service” to Ohio consumers were used directly or indirectly to fund activities to support House Bill 6 or to prevent a referendum on House Bill 6. There is nothing unlawful about OCC’s subpoenas.

Further, Ohio law and the PUCO rules permit parties to conduct discovery by using the PUCO’s subpoena power. Under Ohio law, Attorney examiners are authorized to issue subpoenas.<sup>5</sup> “A party may \*\*\* in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested”<sup>6</sup> and “[a] subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code.”<sup>7</sup>

The PUCO addressed this issue in a Duke Energy rate stabilization plan case. On remand from the Supreme Court, OCC sought discovery from Duke Energy Retail Services (“DERS”), the Competitive Retail Electric Supplier affiliate of Duke Energy. DERS sought to quash the subpoena, but the Attorney Examiner overruled the motion to quash. The Entry states:

DERS attempts to argue that, because the Commission has only limited jurisdiction over DERS, the Commission has no power to issue subpoenas directed at DERS. This is incorrect. The Commission's subpoena power, found in Section 4901.18, Revised Code, and Rule 4901-1-21(F) and 4901-1-25, O.A.C., is not limited to subpoenas directed at entities over which the Commission has general supervisory jurisdiction.<sup>8</sup>

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<sup>5</sup> R.C. 4901.18.

<sup>6</sup> O.A.C. 4901-1-21(F).

<sup>7</sup> O.A.C. 4901-1-25.

<sup>8</sup> *Duke Energy Ohio, Inc., Rate Stabilization Plan*, Case No. 06-1085-EL-UNC, Entry at 3-4 (Jan. 2, 2007).

The PUCO should follow its own precedent and overrule FirstEnergy’s motion to quash because the PUCO clearly has the power to issue subpoenas to affiliates of a public utility.

Another case on point is *In re Centerior Energy Rate Cases*.<sup>9</sup> In 1988, Centerior sought an emergency rate increase to collect costs for its \$4 billion investment in the Davis-Bessie and Perry nuclear plants, which were finishing construction. OCC sought subpoenas from various financial institutions (non-parties) to investigate Centerior’s claimed financial emergency.<sup>10</sup> Centerior sought to quash the subpoenas.<sup>11</sup> The PUCO allowed the subpoenas to stand.<sup>12</sup>

More recently, the PUCO confirmed its ability to issue subpoenas for documents held by non-parties.<sup>13</sup> In the *FirstEnergy ESP IV* case, the PUCO denied interlocutory appeals filed by FirstEnergy and Duke that sought to overturn an Attorney Examiner ruling that upheld subpoenas for documents sought by a party (IGS) against a non-party (Duke).

Further, the subpoenas are necessary to obtain the information sought because the FirstEnergy Utilities have asserted in discovery that the information is not in their possession, custody, or control.<sup>14</sup> The PUCO should exercise its lawful jurisdiction over the FirstEnergy

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<sup>9</sup> *In the Matter of Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase its Filed Schedules for Electric Service*, Case Nos. 88-170-EL-AIR and 88-171-EL-AIR.

<sup>10</sup> *Id.*, OCC Motion for issuance of subpoenas and subpoenas duces tecum (June 22, 1988); Subpoenas filed on behalf of OCC to Great American Life Insurance Company, Hunter Savings Association and First Federal Savings Bank (May 19, 1988); Subpoena to American Financial Corporation (May 24, 1988); Subpoena to Price Waterhouse (May 25, 1988); and Subpoena to Arthur Andersen & Company (May 25, 1988).

<sup>11</sup> *Id.*, Motion to quash subpoenas and request for expedited ruling (June 23, 1988).

<sup>12</sup> *Id.*, Entry (June 15, 1988); Entry (June 22, 1988).

<sup>13</sup> *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*, Case No. 14-1297-EL-SSO, Entry (July 22, 2015) (upholding Attorney Examiner Price’s ruling that refused to quash subpoenas issued to a non-party) (“*FirstEnergy ESP IV*”).

<sup>14</sup> Case No. 20-1502-EL-UNC, FirstEnergy Utilities’ Responses to OCC’s Seventh Set of Discovery Requests at 7 (Apr. 22, 2021).

Utilities' affiliates to enforce OCC's subpoenas requiring them to produce the relevant information in their possession.

**B. OCC's request for all documents related to FirstEnergy Corp.'s internal investigation is reasonably calculated to lead to the discovery of admissible evidence on code of conduct violations between the utilities and their affiliates, which is well within the scope of the corporate separation proceeding.**

FirstEnergy claims that the documents under subpoena are not within the scope of the DCR proceeding and the corporate separation proceeding.<sup>15</sup> Specifically, FirstEnergy claims that the OCC subpoenas have nothing to do with any unfair competitive advantage afforded to an affiliate in the provision of competitive retail electric service.<sup>16</sup> And FirstEnergy claims the subpoenas are not related to any "other legitimate corporate separation issue."

The scope of discovery is defined as follows:

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.<sup>17</sup>

The PUCO 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.<sup>18</sup>

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<sup>15</sup> FirstEnergy Motion to Quash, Memorandum in Support at 9.

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

<sup>17</sup> O.A.C. 4901-1-16(B) (emphasis added).

<sup>18</sup> *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.

And while FirstEnergy claims that OCC must show a “substantial need” for the information<sup>19</sup> consistent with Civil Rule 45(C), the PUCO has advised that Civil Rule 45(C) is persuasive but not binding authority.<sup>20</sup> Rather the PUCO’s own rules (O.A.C. 4901-1-25(C)), set the standards for quashing subpoenas –upon a finding that the subpoena is “unreasonable or oppressive.”<sup>21</sup>

Even assuming that OCC must show substantial need for the documents (it does not need to under PUCO rules), it has met this showing. The documents OCC seeks relate to the Board’s internal investigation and the purported consulting agreement between an entity associated with the former PUCO chair and a FirstEnergy entity. All of these documents are reasonably calculated to lead to the discovery of admissible evidence. And there is no way that the information, held by FirstEnergy, can be obtained through other sources. The information held pertaining to the consulting agreement and the internal investigation is unique and cannot be replicated by OCC. There is no comparable information available to OCC.<sup>22</sup>

The internal investigation led to a number of findings that relate to the corporate separation investigation that the PUCO extended to cover the H.B. 6 time period. Under the internal investigation, FirstEnergy discovered that some of its internal policies and its code of conduct were violated by executives who served both FirstEnergy Corp. and the FirstEnergy

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<sup>19</sup> FirstEnergy Motion to Quash, Memorandum in Support at 5, quoting *Lambda Research v. Jacobs*, 170 Ohio App.3d 750, 756-757. Even assuming the case is binding (it’s not because it is merely an appellate court- Hamilton County and is applying Ohio Civil Rules and not PUCO Rules), OCC has demonstrated a substantial need to subpoena the documents from a non-party. The FirstEnergy Utilities have advised the documents are not in their possession.

<sup>20</sup> *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*, Case No. 14-1297-EL-SSO, Entry at ¶14 (July 22, 2015) (upholding Attorney Examiner Price’s ruling that refused to quash subpoenas issued to a non-party).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

Utilities.<sup>23</sup> FirstEnergy has not divulged the specific violations found, but they may be connected to issues that are live in the corporate separation proceeding.

Ohio corporate separation law and rules require the FirstEnergy Utilities to follow a code of conduct between affiliates that, among other things, prohibits “anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.”<sup>24</sup> And the corporate separation rules provide for adherence to a cost allocation manual to ensure that no cross-subsidization is occurring between the electric utility and its affiliates.<sup>25</sup> The internal investigation documents will presumably identify conduct that its former executives engaged in that may have violated the no benefit rule or cost allocation standards that are in place to prevent anti-competitive subsidies.

In fact, less than a week after FirstEnergy Corp. announced the firing of its Chief Executive Officer (and others), the PUCO expanded its corporate separation audit to include examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum.<sup>26</sup> The PUCO explained that the information provided by FirstEnergy Corp. pertaining to its terminated executives required that it “take additional action to ensure compliance by the Companies and its affiliates with the corporate separation provision of R.C.

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<sup>23</sup> FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2021).

<sup>24</sup> O.A.C. 4901:1-37-04(D)(4).

<sup>25</sup> O.A.C. 4901:12-37-08(C).

<sup>26</sup> *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Entry at ¶4-5 (Nov. 4, 2020).

4928.17 and with the Companies' Commission-approved corporate separation plans.”<sup>27</sup> We agree. The subpoena should be enforced.

**C. OCC's request for the purported consulting agreement and related documents, including the ten years of misallocated costs, is reasonably calculated to lead to the discovery of admissible evidence.**

FirstEnergy's disclosures relating to the “purported consulting agreement” state that the \$4.3 million payment was in exchange for the individual taking action “for the benefit of FirstEnergy\*\*\* during the time period *after* such payment during which the Individual was acting in any governmental or regulatory capacity.”<sup>28</sup> The “individual” in question apparently is the former PUCO Chair, per FirstEnergy Corp.'s admissions contained in the Deferred Prosecution Agreement.<sup>29</sup>

FirstEnergy also disclosed that through its internal investigation it had discovered there were a number of transactions, dating back ten years or more, that were improperly classified, misallocated, or lacking supporting documentation that were charged to FirstEnergy Utilities, including the Ohio utilities.<sup>30</sup> FirstEnergy admitted that the transactions included payments for “vendor services.” In this regard, Santino Fanelli is an employee of FirstEnergy Service Company and is responsible for the FirstEnergy Utilities' regulatory matters in Ohio. At OCC's

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<sup>27</sup> *Id.*, Entry at ¶17 (Nov. 4, 2020).

<sup>28</sup> FirstEnergy Corp., Waiver and Amendment No. 2 to Credit Agreement dated as of November 17, 2020 among FirstEnergy Corp., *et al.*, as Borrowers, the Lenders Named Herein, as Lenders, Mizuho Bank, Ltd., as Administrative Agent, the Fronting Banks Named Herein, as Fronting Banks and the Swing Line Lenders Named Herein, as Swing Line Lenders, and MUFG Bank, Ltd. as Joint Lead Arranger, Schedule 1 (Nov. 17, 2020) (Emphasis added).

<sup>29</sup> *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 34-43 (S.D. Ohio) (July 22, 2021).

<sup>30</sup> FirstEnergy Corp., Form 10-K (Feb. 18, 2021).

deposition of Mr. Fanelli,<sup>31</sup> counsel for the FirstEnergy Utilities asserted that the transactions that were either improperly classified, misallocated, or lacked supporting documentation are “one and the same” as the payments made to the former Ohio government official.<sup>32</sup>

These disclosures raise important issues for the PUCO to consider within the context of both the corporate separation case and the audit of the FirstEnergy Utilities’ delivery capital recovery rider. In the corporate separation case, misallocations of costs implicate the cost allocation manual, which is supposed to ensure that no cross-subsidization is occurring between the electric utility and its affiliates. Questions that should be answered include, but are not limited to, how did the misallocations happen, what was the effect of the misallocations, was the cost allocation manual being followed, and is the cost allocation manual sufficient to prevent a repeat of what occurred.

In the DCR case, as recognized by the PUCO Staff,<sup>33</sup> and the PUCO itself;<sup>34</sup> the annual audit of the DCR should include an examination of the ten years of misallocated costs, including the consulting agreement payments, to determine whether funds collected from customers were used to pay for the vendor services. And the PUCO ruled that it would also examine if funds should be returned to customers.<sup>35</sup>

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<sup>31</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Deposition Transcript of Santino Fanelli (Mar. 9, 2021) (“Fanelli Transcript”) at 195:25-196:2 (cited portions are attached hereto as Attachment A).

<sup>32</sup> *Id.* at 252:25-253:7.

<sup>33</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of FirstEnergy*, Case No. 20-1629-EL-RDR, Request to Expand Audit Scope (Mar. 8, 2021).

<sup>34</sup> *Id.*, Entry at ¶8 (Mar. 10, 2021).

<sup>35</sup> *Id.*

OCC's Motions for Subpoenas seek documents related to the vendor payments including the payments to an entity affiliated with the former PUCO chair and documents related to misallocated expenses (vendor payments) that FirstEnergy Utilities (and their consumers) may have been charged for. These documents are reasonably calculated to lead to the discovery of admissible evidence.

**D. The FirstEnergy Utilities committed to make affiliates' records available to the PUCO and OCC.**

When Ohio Edison merged with Centerior Energy Corporation, the FirstEnergy Utilities promised to make all relevant records of its affiliates available to the PUCO and OCC. The merger commitment states:

2. That in any proceeding before the PUCO, the Companies will make available to the PUCO and OCC all relevant books, records, employees and officers of the Companies, and any affiliates or majority-owned subsidiaries of the Companies.<sup>36</sup>

The FirstEnergy Utilities' previous objections that the documents should not be produced because they are beyond the PUCO's jurisdiction violates this merger commitment. The PUCO should enforce the subpoenas and require the FirstEnergy Utilities to honor their merger commitment to produce records from affiliates.

**E. The PUCO can require the release of internal investigation records which FirstEnergy Corp. and FirstEnergy Service Company claim are privileged.**

FirstEnergy **claims that** most of the records related to its internal investigation are unduly burdensome and are covered by a blanket attorney-client privilege and work product

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<sup>36</sup> *In the Matter of the Commission's Review of the Merger of Ohio Edison Company and Centerior Electric Corporation*, Case No. 96-1322-EL-MER, Comments of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 2 (Feb. 18, 1997).



doctrines because the investigation was “led by counsel for FirstEnergy Corp.”<sup>37</sup> FirstEnergy’s position is inconsistent with PUCO precedent. There is nothing burdensome or oppressive about subpoenaing documents that are already on hand and merely need to be turned over. The burden, if any on FirstEnergy, is limited.

**1. FirstEnergy’s claim of undue burden has no merit; OCC’s subpoenas are not oppressive.**

FirstEnergy claims that it would be unduly burdensome to respond to OCC’s subpoenaed documents. FirstEnergy’s claim of undue burden is conclusory only and is not supported by PUCO precedent. FirstEnergy’s use of “undue burden” is the wrong standard to use when arguing against a subpoena issued by the PUCO. This is the standard under Ohio civil rules, not the standard under the PUCO rules. FirstEnergy’s claim of “undue burden” does not equate to “oppressive” which are grounds for quashing subpoenas under PUCO rules. *See* O.A.C. 4901-1-25(C). In fact, “undue burden” is a lesser standard, which explains why FirstEnergy would be asking to apply it instead of the PUCO’s “oppressive” standard.

In any event, FirstEnergy does not elaborate on why it would be an oppressive or present an undue burden for them to produce the internal investigation related documents. OCC is not asking FirstEnergy to do an internal investigation. Rather, OCC is simply asking FirstEnergy to produce copies of the internal investigation and related documents it has already performed and assembled. This is not a case where a nonparty’s confidential and proprietary information has been subpoenaed for use in some proceeding in a faraway court. Presumably, FirstEnergy has already provided this information to the U.S. Attorney and others involved in civil litigation.

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<sup>37</sup> Motion to Quash at 10 (July 19, 2021).

The Deferred Prosecution Agreement<sup>38</sup> required FirstEnergy to cooperate with the ongoing criminal investigation, and FirstEnergy should also cooperate with this PUCO investigation by producing these documents. Certainly, the PUCO should not accept FirstEnergy's unsupported claim of undue burden.

The undue burden cases that FirstEnergy cites are not on point. For example, FirstEnergy cites *Lister v. Hyatt Corp.*<sup>39</sup> for the proposition that the subpoenas pose an undue burden. Yet that case does not apply here. In *Lister*, a party sought a subpoena to obtain documents that, under the facts of that case, were deemed irrelevant. The court held it would be an undue burden to produce irrelevant documents.<sup>40</sup> In the present case, OCC is not seeking irrelevant documents or discovery not relevant nor calculated to lead to the discovery of admissible evidence. Moreover, *Lister* was about a person subpoenaed to testify who had no relevant testimony to provide and was not a witness to any event in the case. OCC is not seeking testimony from a person who has no relevant testimony or documents related to that testimony.

FirstEnergy has not established that it would be oppressive for it to produce the internal investigation and related documents. Because this is the standard for quashing subpoenas under the PUCO rules, the PUCO should reject FirstEnergy's arguments. FirstEnergy has argued the

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<sup>38</sup> *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (S.D. Ohio) (July 22, 2021).

<sup>39</sup> Case No. C18-0961JLR, 2020 WL 419454, at \*3 (W.D. Wash. Jan. 24, 2020).

<sup>40</sup> *Id.*, (quoting *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335 (N.D. Cal. 1995) (“[I]f the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed would be by definition ‘undue.’”).

wrong standard --“undue burden” (the civil rules standard) and has failed to even meet that lesser standard.<sup>41</sup>

**2. To the extent FirstEnergy claims privilege it must produce a discovery log setting out the facts to establish the privilege.**

While there might be some communications that meet the definition of attorney-client privilege, the burden rests with FirstEnergy to establish this through a discovery log, which the Attorney Examiner can review at an *in camera* hearing. This is how the PUCO resolves privilege claims. FirstEnergy tries to turn this established process on its head by claiming that it has no duty to produce a privilege log. FirstEnergy’s position is contrary to PUCO precedent<sup>42</sup> and Ohio Supreme Court precedent<sup>43</sup> and should be rejected.

**3. The PUCO has authority to order the release of an internal investigation report, as it did in *In re Dominion Purchased Gas Adjustment Case*.<sup>44</sup>**

The PUCO has ruled that an internal investigation report and company records that were part of the investigation are not automatically shielded from discovery under a privilege.<sup>45</sup>

In *In re Dominion Purchased Gas Adjustment Case*, the PUCO ruled that OCC was entitled to

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<sup>41</sup> And though FirstEnergy argues for adherence to Ohio Civil Rule 45(C), it has not complied with that rule. Under Ohio Civil Rule 45(C)(4) a person resisting discovery on the basis of undue burden, must attempt to resolve a claim of undue burden through discussions with the issuing party. The motion to quash then must be accompanied by an affidavit indicating the parties’ efforts to resolve the claim of undue burden. FirstEnergy failed to comply with these provisions of Civil Rules. It cannot have it both ways- rely on the rules and yet disregard the rules.

<sup>42</sup> See, e.g., *In the Matter of the Application of Ohio Edison Company, 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-RDR, Entry (Jan. 3, 2011); Pre-hearing conference held, transcript filed (Jan. 21, 2011).

<sup>43</sup> *Peyko v Frederick*, (1986), 25 Ohio St.3d 164, 167 (finding that if a party asserts the attorney client privilege, the trial court before ordering disclosure, “shall” determine by *in camera* inspection if any of the materials are privileged).

<sup>44</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (July 28, 2006).

<sup>45</sup> *Id.*

obtain a copy of the utility's internal investigation report that it prepared in response to a civil lawsuit alleging improper interstate cost-shifting of gas supply contracts, as discussed below:

(17) Nevertheless, the examiner would agree with Dominion that conversations between Dominion and its legal counsel as to legal advice given and associated notes, correspondence, and email created in anticipation of litigation or for trial would be the type of information that would ordinarily be protected from disclosure under attorney-client privilege and attorney work product doctrines. *The examiner believes that the actions taken by Dominion employees, such as investigations to discern whether the events alleged in a lawsuit have occurred and, if they occurred, the actions taken by Dominion to stop, correct, and report such activities, would be relevant to determine whether Ohio GCR customers were impacted and whether Dominion's management oversight of its gas purchasing activities. Therefore, OCC's motion to compel should be granted with respect to Interrogatories 182 and 183. Similarly, OCC's requests for production of documents Nos. 62 and 63 seek documents related to those internal investigations.* To the extent that investigative documents were compiled in the course of any investigation of straddle transactions and actions taken by Dominion in response to such transactions, [\*14] the motion to compel related to these document requests should similarly be granted. Answers to these interrogatories and document requests should be provided to OCC within six days of this entry.<sup>46</sup>

Consistent with existing precedent, the PUCO should order FirstEnergy to produce the internal investigation report and all related records. To the extent that FirstEnergy claims attorney-client privilege for any specific documents, it has the burden to establish this and the initial step would be for FirstEnergy to produce a privilege log to establish the grounds for any privilege claim for each specific document.

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<sup>46</sup> *Id.* at 7 (emphasis added).

**4. Even if the internal investigation report was privileged (which OCC disagrees), FirstEnergy waived the privilege by discussing the document in public statements.**

To the extent a privilege shielded the internal investigation documents from discovery, FirstEnergy waived any privilege by its public discussion of the results of the internal investigation report.

FirstEnergy has discussed the internal investigation extensively in SEC filings and other public statements. FirstEnergy's 2020 Annual Report contains this representative statement:

*Internal Investigation Relating to United States v. Larry Householder, et al.*

As previously disclosed, a committee of independent members of the Board of Directors is directing an internal investigation related to ongoing government investigations. In connection with FirstEnergy's internal investigation, such committee determined on October 29, 2020, to terminate FirstEnergy's Chief Executive Officer, Charles E. Jones, together with two other executives, Dennis M. Chack, Senior Vice President of Product Development, Marketing, and Branding, and Michael J. Dowling, Senior Vice President of External Affairs. Each of these terminated executives violated certain FirstEnergy policies and its code of conduct. These executives were terminated as of October 29, 2020. Such former members of senior management did not maintain and promote a control environment with an appropriate tone of compliance in certain areas of FirstEnergy's business, nor sufficiently promote, monitor or enforce adherence to certain FirstEnergy policies and its code of conduct. Furthermore, certain former members of senior management did not reasonably ensure that relevant information was communicated within our organization and not withheld from our independent directors, our Audit Committee, and our independent auditor. Among the matters considered with respect to the determination by the committee of independent members of the Board of Directors that certain former members of senior management violated certain FirstEnergy policies and its code of conduct related to 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. Immediately following these terminations, the independent members of its Board appointed Mr. Steven E. Strah to the position of Acting Chief Executive Officer and Mr. Christopher D. Pappas, a current member of the Board, to the temporary position of Executive Director, each effective as of October 29, 2020. Mr. Donald T. Misheff will continue to serve as Non-Executive Chairman of the Board. Additionally, on November 8, 2020, Robert P. Reffner, Senior Vice President and Chief Legal Officer, and Ebony L. Yeboah-Amankwah, Vice President, General Counsel, and Chief Ethics Officer, were separated from FirstEnergy due to inaction and conduct that the Board determined was influenced by the improper tone at the top. The matter is a subject of the ongoing internal investigation as it relates to the government investigations.<sup>47</sup>

This extended discussion of the results of the internal investigation waives any privilege that FirstEnergy otherwise might have had. FirstEnergy cannot use the internal investigation as both a sword, to assure investors that it has acted diligently in investigating the corruption allegations, but also as a shield, to block OCC, the PUCO and other stakeholders, from obtaining relevant information. Under these circumstances, FirstEnergy has waived any privilege for the internal investigation documents.<sup>48</sup>

**F. FirstEnergy’s claim that the subpoenas should be quashed to the extent that they seek documents already produced in discovery has no merit.**

FirstEnergy claims that the subpoenas should be quashed to the extent that they seek documents already produced in discovery. This claim has no merit and should be rejected.

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<sup>47</sup> FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2021).

<sup>48</sup> *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St.3d 488, syllabus.

The documents in question were disclosed in FirstEnergy's SEC filings. One set of documents consists of a consulting agreement between FirstEnergy and a company controlled by an individual who later became FirstEnergy's regulator. The second set of documents contain records of costs that were improperly charged to the FirstEnergy Utilities.

FirstEnergy forced OCC to issue the subpoenas because, when OCC sought to obtain these documents from the FirstEnergy Utilities in discovery, the FirstEnergy Utilities claimed that they could not produce the documents because the documents were not in their possession, custody or control.<sup>49</sup> After OCC issued the subpoenas, the FirstEnergy Utilities produced the documents in Case No. 20-1629-EL-RDR. FirstEnergy Corp. and FirstEnergy Service Company should nevertheless produce the documents in response to the subpoena for two reasons.

First, the subpoenas were issued in Case No. 20-1629-EL-RDR and Case No. 17-974-EL-UNC. The FirstEnergy Utilities only produced the documents in the former case, and the subpoenas are needed to obtain the documents for the record in the second case.

Second, and more importantly, FirstEnergy's discovery objections have raised an issue regarding how the records are maintained. OCC is entitled to review the records in the possession of FirstEnergy Corp. and FirstEnergy Service Company to determine whether there are any discrepancies between these records and those already produced by the FirstEnergy Utilities. FirstEnergy Corp. and FirstEnergy Service Company may produce additional or different documents than what the FirstEnergy Utilities produced. Or they may produce different versions of the documents already produced by the FirstEnergy utilities. The documents already

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<sup>49</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 20-1502-EL-UNC, Motion to Compel Responses to Fifth and Seventh Sets of Discovery, Attachment 1 at 18 (June 29, 2021).

produced contain various handwritten notations, and the handwritten notations may be different on the documents in the control of FirstEnergy Corp. and FirstEnergy Service Company. This could lead to the discovery of relevant evidence. As the PUCO has noted in the past, “[t]he test is whether ‘the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’ The test is one of reasonable calculation, not certainty.” (citations omitted).<sup>50</sup> Having raised this issue in the first place of who controls the documents and how many sets of the documents exist, the FirstEnergy Utilities cannot now pretend that no issue exists with respect to who controls the documents.

Based on the foregoing, the PUCO should reject FirstEnergy’s claim that the subpoenas are moot to the extent they seek documents already produced in discovery.

### **III. CONCLUSION**

The PUCO has emphasized its “commitment to act in a reasoned and methodical manner, based upon facts rather than speculation, in light of the recent allegations surrounding FirstEnergy Corp.” related to H.B. 6.<sup>51</sup> As such, developing the facts is of paramount importance. And developing the facts requires broad discovery as permitted by the rules, so long as a party can show that the discovery is reasonably calculated to lead to the discovery of admissible evidence.

OCC’s subpoenas seeking documents from the FirstEnergy Utilities’ affiliates should be granted as consistent with the scope of discovery and necessitated by the FirstEnergy Utilities’ claims that the information is not within their possession, custody, or control. FirstEnergy has

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<sup>50</sup> *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of the Cleveland Electric Illuminating Company and Related Matters*, Case No 84-18-EL-EFC (Subfile A), Entry (Apr. 9, 1985).

<sup>51</sup> *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider*, Case No. 20-1629-EL-RDR, Entry at ¶8 (Mar. 10, 2021).



failed to show that the subpoenaed documents are “unreasonable or oppressive,” the basis under the PUCO rules for a motion to quash to be granted. And OCC has proven a substantial need for the documents. The PUCO should enforce OCC’s subpoenas and overrule FirstEnergy Corp. and FirstEnergy Service Company’s motion to quash.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers’ Counsel

*/s/ Maureen R. Willis*

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## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Memorandum Contra was served upon the persons listed below by electronic transmission this 3rd day of August 2021.

/s/ Maureen R. Willis  
Maureen R. Willis  
Assistant Consumers' 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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1           BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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8 CONTINUED DEPOSITION

9 of Santino L. Fanelli, taken before me, Karen Sue  
10 Gibson, a Notary Public in and for the State of Ohio,  
11 via Microsoft Teams, on Wednesday, March 10, 2021, at  
12 10:01 a.m.

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14 VOLUME II

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7 Jones Day  
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22 and Mr. John Finnigan,  
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Interstate Gas Supply, Inc.  
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On behalf of the Interstate Gas Supply,  
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On behalf of the Environmental Law &  
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8 Dickerson Wright PLLC  
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12 On behalf of the Citizens Utility Board  
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14 Dave Yost, Ohio Attorney General  
15 Mr. John Jones, Section Chief  
16 By Mr. Werner L. Margard, III,  
17 Assistant Attorney General  
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21 On behalf of the Staff of the PUCO.

- - -

22 ALSO PRESENT:

23 Ms. Tammy Turkenton.  
24 Ms. Lindsey Molter.  
25 Mr. Mike Haugh.

- - -

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1 Wednesday Morning Session,  
2 March 10, 2021.

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4 SANTINO L. FANELLI

5 being by me previously duly sworn, as hereinafter  
6 certified, deposes and says further as follows:

7 CROSS-EXAMINATION (Continued)

8 By Mr. Finnigan:

9 Q. Mr. Fanelli, do you understand you are  
10 still under oath from yesterday?

11 A. Yes.

12 Q. And, Mr. Fanelli, is there anything that  
13 you would like to change from the testimony that you  
14 gave yesterday?

15 A. Nothing that comes to mind at this time.

16 Q. Okay. Now, who at the Ohio utilities is  
17 responsible for managing the relationship with the  
18 Chair of the Public Utilities Commission?

19 A. Could you please rephrase the question,  
20 Mr. Finnigan?

21 Q. Yes. Who at the Ohio utilities is  
22 responsible for managing the relationship with the  
23 Chair of the Public Utilities Commission?

24 A. I don't know.

25 Q. Now, you are responsible for regulatory

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1 matters in Ohio, isn't that right?

2 A. Yes.

3 Q. And who do you deal with at the  
4 Commission?

5 A. Commission Staff.

6 Q. Okay. And do you ever have the need to  
7 contact Commissioners?

8 A. That's not part of my job duties.

9 MR. GLADMAN: John, sorry to interrupt.  
10 Someone is typing, and we're getting a lot of noise.  
11 If you could go on mute, that would be great.

12 MS. WILLIS: If I could interrupt real  
13 quick, Mike, we do -- I cannot see you on the video.  
14 I would love to see your video and see you -- see  
15 your appearance on the video.

16 MR. GLADMAN: Yeah. I am not going to do  
17 that because I can't see John. I can't see you, so I  
18 am left with a giant image of my own face, so I'm  
19 just going to go -- to go video off.

20 MR. KELTER: Can everybody else see  
21 Sonny.

22 MR. FINNIGAN: I can't see him either.

23 MS. WILLIS: I can see him if you pin  
24 him.

25 I would rather have us try to work this

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1 know.

2 EXAMINER PRICE: What questions would you  
3 ask regarding payments to a regulator?

4 MR. FINNIGAN: What I had intended to ask  
5 was, you know, some background information of -- all  
6 we know is what's in the SEC disclosure but what was  
7 the entity that those payments were made to, what  
8 FERC account they were classified to, what was the  
9 FirstEnergy entity that made those payments, were any  
10 of those costs allocated to the Ohio utilities.  
11 There's a statement in the SEC filing that the  
12 Company has reason to believe that the payments were  
13 for purposes other than stated in the consulting  
14 agreement.

15 I have a number of questions as to why  
16 the Company believes that and what it believes the  
17 payments were really for and so that's something we  
18 did want to ask during the deposition. And, you  
19 know, if this witness doesn't have information, then  
20 we would try to find out who the appropriate witness  
21 would be.

22 MR. GLADMAN: May I respond very briefly,  
23 Examiner Price?

24 EXAMINER PRICE: You may.

25 MR. GLADMAN: Statements that you just

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1 ruled on, these vendor payments, subsume the second  
2 issue. This is one and the same. This is part of  
3 the same series of payments that were discussed in  
4 the SEC filings, that were discussed on the earnings  
5 call, and are the subject of Staff's recommendations.  
6 So to me the ruling that you have already made I  
7 think should cover this as well.

8 EXAMINER PRICE: I don't have any  
9 information to confirm that representation,  
10 Mr. Gladman, but I definitely do not believe that  
11 payments to the regulator were in any part considered  
12 by the Commission to be political or charitable  
13 contributions or spending as part of House Bill 6 nor  
14 do I believe they are reasonably calculated to lead  
15 to admissible information regarding those and so that  
16 line of questioning would not be appropriate for this  
17 proceeding.

18 MR. FINNIGAN: Okay. Thank you.

19 MS. BOJKO: Your Honor, may I ask what  
20 that conclusion is based on? Because if we don't ask  
21 the questions, how do we know that it wasn't related  
22 to HB6 spending?

23 EXAMINER PRICE: Well, it was relate --  
24 it was not related to political or charitable  
25 contributions so certainly unless you have a good

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**8/3/2021 4:19:24 PM**

**in**

**Case No(s). 17-0974-EL-UNC, 20-1629-EL-RDR**

Summary: Memorandum Memorandum Contra Motion of FirstEnergy Corp. and FirstEnergy Service Company to Quash Subpoenas by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.