

**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.**

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) respectfully submit this Memorandum per the Attorney Examiner’s order for parties to brief “the narrow question of once [a] FERC audit report has been released whether the confidentiality provisions [of federal law] are still in place.”¹ At issue is the Office of the Ohio Consumers’ Counsel’s (“OCC”) discovery request seeking “communications from FirstEnergy to FERC’s Division of Audits and Accounting relating to [the] investigation” of FirstEnergy Corp. in FERC Docket No. FA19-1-000.² While OCC has limited its demand to only those communications involving the Companies,³ OCC’s request still seeks to impermissibly invade the confidentiality of FERC’s investigation under federal statute and regulations.⁴

⁴ In the event that OCC abandons the limitation of its discovery request to “Ohio documents,” the Companies note that OCC has raised no legal basis for the Commission to assert jurisdiction over information involving non-jurisdictional entities, including but not limited to FirstEnergy Corp. subsidiaries operating in New Jersey, Pennsylvania, Maryland, and West Virginia.

Indeed, the publication of the Audit Report by the Division of Audits and Accounting (the “Audit Report”) in no way compromises the non-public nature of the confidential documents and communications exchanged with FERC. The applicable law and regulations provide for no such exception. Nor is there anything in FERC’s statements about its audit process that would lead to the conclusion that confidential information is any less worthy of protection following an audit report’s publication. This alone is reason enough to reject OCC’s motion to compel. But in addition, FERC’s audit of FirstEnergy Corp. is ongoing, as is a related FERC investigation. The risk of intruding upon ongoing investigations is therefore as real today as it was when the Attorney Examiner initially denied OCC’s discovery request last August. For these reasons and those further explained below, OCC’s attempt to compel production of the protected FERC materials should again be denied.

I. ARGUMENT

A. The Publication Of The Audit Report Does Not Alter The Protected Nature Of The Documents.

OCC’s contention that the Audit Report’s publication means that all information exchanged during the FERC audit “become[s] public” is misplaced and unsupportable.⁵ Rather, black letter federal law broadly protects from disclosure the confidential information exchanged with FERC. *See* 16 U.S.C. § 825(b) (“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.”) (emphasis added); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a) (Federal law “*prohibit[s] any employee*, in the absence of Commission or court direction, from divulging *any fact or information* which may come to his or her knowledge during the course

⁵ Case No. 20-1502-EL-UNC, Hr’g Tr. (Feb. 10, 2022), at 11:6-16.

of examination of books or other accounts.”) (emphasis added). There simply is no temporal limitation under the Federal Power Act or FERC regulations permitting the disclosure of audit communications following the publication of a final report or any other event.

FERC’s own pronouncements about its audit process further reinforce this point. As FERC has explained in no uncertain terms, “[a]udited persons provide information to the audit staff on a non-public basis.” *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 43 (Feb. 17, 2006). FERC’s Policy Statement on Enforcement echoes this position: “Although the commencement letter is a public document, all information and documentation gathered during the audit fieldwork, with the exception of the company’s written response to the draft audit report, is treated as non-public information.” *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, 2008 WL 2067393, at ¶ 15 (May 15, 2008). And the very letter opening the FirstEnergy Corp. audit recognized that “documents and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files.” FERC Docket No. FA19-1-000, Letter from L. Parkinson, Director, Officer of Enforcement, FERC (Feb. 6, 2019), at 1.⁶

What’s more, FERC has clearly spelled out that there are specific, discrete procedural moments when certain aspects of an audit are made public: the publication of the commencement letter; the publication of the final report with comments from the audited person; and briefs in, and FERC’s resolution of, disputed audit proceedings. *See Procs. for Disposition of Contested Audit*

⁶ Contrary to OCC’s past contentions, the fact that Ohio R.C. 4901.16 may permit disclosure of Commission audit materials following the filing of an audit report in a Commission proceeding is of no moment. At risk of stating the obvious, R.C. 4901.16 is entirely inapplicable to the FERC audit process, and the interpretation of R.C. 4901.16 in no way informs the interpretation of FERC’s governing statutes and regulations. Further, R.C. 4901.16 and the relevant FERC statutes, regulations, and governing policies are substantively different. R.C. 4901.16 on its face contemplates the disclosure of information, while applicable FERC law and policy do not. *Compare* R.C. 4901.16 *with* 16 U.S.C. §§ 825, 825f.

Matters, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 38 (Feb. 17, 2006). Beyond these instances, however, nowhere does FERC contemplate the release of information about its confidential audits.

In short, there is nothing in federal law or regulation providing that the confidentiality of FERC’s audit process is or should be extinguished by the filing of the Audit Report. The applicable federal statutes and rules provide for no such exception. *See Wholesale Competition in Regions with Organized Elec. Markets*, 125 FERC ¶ 61,071, 2008 WL 4686146, Order No. 719, at ¶ 465 (Oct. 17, 2008) (“By Commission rule, all information and documents obtained during the course of an investigation are non-public.”). And the cases—particularly those arising in the context of Freedom of Information Act requests—cut just the other way. *See STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015) (“It is . . . irrelevant . . . that FERC’s investigation . . . has come to a close. The investigation—writ large—continues, and that is enough under [FOIA] Exemption 7(A).”); *Williston Basin Interstate Pipeline Co. v. FERC*, No. CIV. A. 88-0592-LFO, 1989 WL 44655, at *1 (D.D.C. Apr. 17, 1989) (finding that audit reports, as well as the identities of FERC employees named in those reports, were excepted from FOIA disclosure because producing such documents “would disclose techniques used by field auditors to determine if plaintiff was in compliance with federal statutes and regulations,” and “techniques and procedures for law enforcement investigations or prosecutions,” and “could reasonably be expected to risk circumvention of the law”).

In particular, the decision in *Reliant Energy Power Generation, Inc. v. FERC* is instructive. 520 F. Supp. 2d 194 (D.D.C. 2007). Following California’s energy crisis in the early 2000s, FERC “conducted a fact-finding investigation” of Reliant Energy. *Id.* at 198. Once FERC issued its final report, “Reliant submitted a FOIA request to FERC seeking any documents either relied on by

Staff in preparing . . . the Report or related to its conclusion, . . . [including] copies of the workpapers, input data and other documents that comprise or explain the ‘econometric analysis’ relating to or underlying Staff’s [work].” *Id.* While FERC, of its own volition, provided certain economic analyses described in the report itself, it “withheld other documents, including memoranda and emails.” *Id.* at 199. The court sided with FERC, noting that even though FERC withheld factual information which may not have been “deliberative,” the information was illustrative of FERC’s “decisions about how to look at the data, how to select portions of the data to examine, and how to interpret the data.” *Id.* at 206 (“The parameters used in these spreadsheets and tables were exercises of judgment on the part of the investigators.”). Thus, FERC’s documents, data, and communications were exempted from public disclosure, despite the publication of the final report detailing FERC’s conclusions. *Id.*

At bottom, federal laws and regulations concerning the confidential treatment of information obtained by FERC in its audits should not be lightly considered or interpreted to mean something other than what they say. There are sound policy reasons for these broad confidentiality rules, which promote efficiency and candor in the audit process and safeguard the confidential information of businesses subject to comprehensive FERC compliance investigations. Nowhere has FERC read an exception into the Federal Power Act or its own regulations that would permit the disclosure of confidential audit information upon the filing of an audit report. And the Companies are unaware of any instance in which any court or regulator has found such an exception to exist. The Companies respectfully submit that the Commission should reject OCC’s invitation to find an exception here.

The Companies reiterate that it is not now—and never was—their position that documents become forever protected by mere virtue of their provision to FERC. The problem has always

been that OCC has defined its discovery requests solely by reference to the FERC audit, expressly seeking the Companies' protected, confidential communications with FERC during the investigation. Indeed, in a final meet-and-confer with OCC just days before this filing, the Companies offered to compromise this dispute by producing to OCC on a confidential basis the underlying documents relating to the Companies that were produced to FERC during the audit. OCC rejected that proposal, insisting instead that the Companies should produce all their communications with FERC's audit staff. But this is exactly the type of information federal law protects from disclosure to preserve the integrity of FERC investigations.

B. FERC's Confidential Investigation Is Ongoing.

It also wrong for OCC to suggest that the publication of the Audit Report has ended "any need for confidentiality."⁷ As detailed above, there is nothing about the Audit Report's publication that eliminates the non-public nature of the audit communications under federal law or regulation. Beyond this, however, FERC's confidential audit and investigation processes are ongoing.

At the August 31, 2021 prehearing conference, the Attorney Examiner recognized the "paradox" that granting OCC's motion to compel would create by permitting OCC to "have access to information and be able to disclose information that . . . the FERC itself cannot disclose."⁸ The Attorney Examiner then denied OCC's motion in order to "let FERC proceed with their investigation in a confidential matter."⁹ The same concern expressed by the Attorney Examiner last August still exists today. FERC's audit process is ongoing, as is FERC's related, non-public

⁷ Case No. 20-1502-EL-UNC, Correspondence by Office of the Ohio Consumers' Counsel (Feb. 7, 2022), at 2.

⁸ Case No. 20-1502-EL-UNC, Hr'g Tr., at 14:19-24 (Aug. 31, 2021).

⁹ Case No. 20-1502-EL-UNC, Hr'g Tr., at 18:6-11 (Aug. 31, 2021).

investigation of FirstEnergy Corp. It follows that any disclosure of confidential FERC materials entails a risk of interfering with FERC's investigations in confidential matters.

As the Audit Report itself demonstrates, FERC's audit continues; it has now just moved into the compliance and review phase.¹⁰ FirstEnergy Corp. largely accepted the findings and recommendations in the report but also proposed that certain findings be revised consistent with FirstEnergy Corp.'s response to the Audit Report.¹¹ As part of the compliance phase, FirstEnergy Corp. must submit its implementation plan to comply with the uncontested recommendations within 30 days of issuance of FERC's February 4 letter order. It must also submit various other reports. Further, pursuant to FERC regulations, FirstEnergy Corp. may, within 30 days of issuance of the letter order, notify FERC whether it (i) requests FERC review of certain findings through a shortened procedure or (ii) contends that there are material facts in dispute which require cross-examination, "a trial-type hearing."¹² In sum, the audit, writ large, continues.

In addition to the audit proceedings, FERC's related investigation must be taken into account. Staff of FERC's Division of Investigations notified FirstEnergy Corp., in letters dated January 26 and February 22, 2021, that the Division is conducting an investigation of FirstEnergy Corp.'s lobbying and governmental affairs activities concerning HB 6. Staff also directed FirstEnergy Corp. to preserve and maintain all documents and information related to those issues as they have been developed *as part of the ongoing audit being conducted by FERC's Division of Audits and Accounting*.¹³ FERC's non-public investigation continues today and is directly tied to

¹⁰ FERC Audit Report, Director Office of Enforcement Letter, at 1-2, Docket No. FA19-1-000 (Feb. 4, 2022) ("Audit Report Letter").

¹¹ FERC Audit Report, Docket No. FA19-1-000, at 67 (Feb. 4, 2022).

¹² Audit Report Letter, at 2 (citing 18 C.F.R. § 41.2 (2021)).

¹³ FirstEnergy Corp., Form 10-Q, filed April 22, 2021, available at <https://sec.report/Document/0001031296-21-000047/>.

the audit. And FERC itself has previously made clear that it believes it has an important interest in ensuring the integrity of investigations that follow from FERC audits.¹⁴

So even should the Commission view the confidentiality of FERC investigations on a case-by-case basis (setting aside the intentionally broad rules protecting the communications sought by OCC), the circumstances here—where there is an ongoing investigation related to an audit—strongly militate in favor of protecting confidentiality. Put another way, breaching the confidentiality of the audit materials would risk compromising not only the ongoing audit, but also the investigation flowing from that audit.

II. CONCLUSION

For these reasons and those explained in past memoranda,¹⁵ the Companies respectfully ask the Commission to deny OCC's request. FERC's empowering statutes and governing regulations leave no room for OCC's requested intrusion into FERC's confidential investigations.

¹⁴ See *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 44 (Feb. 17, 2006) (noting that information is shared between audit staff and enforcement staff to promote efficiency and stating, "the knowledge that an audit may lead to an investigation should encourage entities subject to the Commission's jurisdiction to volunteer the existence of violations and to cooperate to the maximum extent practicable to expose and remedy misconduct promptly.").

¹⁵ Case No. 20-1502-EL-UNC, Memorandum Contra OCC Motion to Compel Responses to the Sixth Set of Discovery Requests, at 2-8 (July 9, 2021); Case No. 20-1502-EL-UNC, Memorandum Contra OCC Motion to Compel Responses to the Fifth and Seventh Sets of Discovery, at 15-21 (July 9, 2021).

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Respectfully submitted,

/s/ Ryan A. Doringo

Michael R. Gladman (0059797)
Shalini B. Goyal (0096743)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
sgoyal@jonesday.com
mdengler@jonesday.com

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

On behalf of the Companies

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I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on February 18, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Shalini B. Goyal

Attorney for the Companies

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