

**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)	Case No. 20-1502-EL-UNC
Electric Illuminating Company, and The)	
Toledo Edison Company.)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S INTERLOCUTORY APPEAL
CONCERNING DISCOVERY OF NON-PUBLIC AUDIT MATERIALS PRODUCED TO
THE FEDERAL ENERGY REGULATORY COMMISSION**

Pursuant to Ohio Administrative Code 4901-1-15(A)(1), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) respectfully seek interlocutory appeal of the Attorney Examiners’ March 11, 2022 ruling compelling the production of confidential FERC audit materials in response to the Office of the Ohio Consumers’ Counsel (“OCC”) Motion to Compel.¹ In granting OCC’s motion, the Attorney Examiners erred in two respects. First, the Attorney Examiners did not address whether OCC met its burden to show the compelled materials are relevant to this case. And, in fact, the materials subject to the Attorney Examiners’ ruling far exceed the scope of the Commission’s review in this docket. Second, the compelled materials remain confidential under black letter federal law, and there is no sound basis in law or policy for permitting third parties to invade FERC’s confidential audits and disrupt its deliberative review and process. That is especially true here, given FERC’s ongoing investigation related to the audit. Moreover, OCC has now requested to intervene in the audit proceedings before FERC, who will itself soon determine what rights, if

¹ Case No. 20-1502-EL-UNC, Motion to Compel Responses to Fifth and Seventh Sets of Discovery and Request For Expedited Ruling on Motion to Compel and Motion for In-Camera Hearing (June 29, 2021) (“OCC Mot. to Compel”).

any, OCC has under federal law with respect to the audit of FirstEnergy Corp. and its subsidiaries (together “FirstEnergy”).

For these reasons and those explained in the attached Memorandum in Support, the Companies respectfully request that the Commission grant this Interlocutory Appeal and overturn the Attorney Examiners’ decision to compel discovery of certain FERC-related documents and communications.

Dated: March 16, 2022

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I. INTRODUCTION

The comprehensive compliance audits regularly conducted by the Federal Energy Regulatory Commission are subject to strict confidentiality rules crafted by Congress and reinforced by federal regulation. These rules encourage, among other things, candor and efficiency in the audit process and protect FERC's investigations from intrusion by third parties. The rules are intentionally broad. And the protections they provide do not end when FERC publicly discloses the results of its audits.

The Attorney Examiners' March 11 oral ruling compelling production of certain documents and communications related to the Companies, provided by FirstEnergy Corp. to FERC during its ongoing audit, cannot be squared with these confidentiality rules or the policy aims they support. The ruling threatens to undermine the integrity of FERC's compliance reviews by setting a precedent that would allow third parties to end-run the unambiguous protections afforded by federal law. There is no authority supporting this outcome, and the policy implications of diminishing the safeguards of federal law over FERC audits are far-reaching.

Further, neither OCC nor any other party has demonstrated that much of the material exchanged with FERC during its audit is relevant here. To the contrary, even a cursory review of FERC's final audit report ("Audit Report", attached hereto as Exhibit A), which covered a period of over six years, shows that FERC's review explored a number of topics that have no relationship to political and charitable spending by, or allocated to, the Companies. Despite this objective fact, the Attorney Examiners compelled production of all materials submitted to FERC during the audit, so long as those documents concerned the Companies. This, too, was error.

In addition, other circumstances here militate in favor of avoiding any potential interference with federal law and FERC's confidential audit. That audit relates to an ongoing investigation of FirstEnergy Corp. currently being conducted by FERC. And OCC has now

attempted to intervene before FERC, seeking “all the rights belonging to a party” in the audit.² FERC itself will therefore soon determine under its governing laws and rules whether OCC should have any rights to participate in the audit of FirstEnergy Corp.

For these reasons and as explained below, the Companies respectfully request that the Commission reverse the Attorney Examiners’ ruling and deny OCC’s Motion to Compel.

II. BACKGROUND

A. FERC’s Audit And Related Investigation.

In February 2019, FERC’s Division of Audits and Accounting (“DAA”) initiated a non-public audit of FirstEnergy Corp. and many of its subsidiaries, including utilities operating in Maryland, Ohio, Pennsylvania, New Jersey, and West Virginia. In all, sixteen entities are party to the audit, which covers the period from January 1, 2015 to September 30, 2021. FERC’s audit is broad in scope and evaluates FirstEnergy’s compliance with federal regulations on a range of topics. These include without limitation the allocation of overhead costs for construction work in progress, accounting for vegetation management costs, accounting for amortization of regulatory assets, accounting for lobbying expenses, donations, and other vendor payments, allowance for funds used during construction, service company billing procedures, and accounting for fuel.

During the audit, FERC also opened a related, confidential investigation into FirstEnergy Corp. In letters dated January 26 and February 22, 2021, staff of FERC’s Division of Investigations notified FirstEnergy Corp. that the Division would be investigating lobbying and governmental affairs activities concerning House Bill 6. Investigation staff directed FirstEnergy Corp. to preserve and maintain all documents and information related to these issues—including the information developed as part of DAA’s audit. FERC’s investigation remains ongoing today.

² See FERC Docket No. FA19-1-000, #20220224-5140 (Feb. 24, 2022).

On February 4, 2022, DAA filed its final Audit Report, detailing numerous findings and recommendations. While FirstEnergy Corp. does not dispute the findings and recommendations of the Audit Report, the audit process has not concluded. Rather, the audit has moved into the “compliance phase,” during which FirstEnergy will continue to submit materials to and engage in discussions with the DAA regarding the implementation of the Audit Report’s recommendations.³ On February 24, OCC moved to intervene in the FERC audit proceeding.⁴ That motion has been opposed and is pending resolution.

B. OCC’s Discovery Request And The Attorney Examiners’ Rulings.

On February 19, 2021 and March 24, 2021, OCC served its fifth and sixth sets of discovery, respectively, on the Companies in this case. These requests included broad demands for materials concerning FERC’s confidential audit. One request—OCC RPD-05-001—sought “all documents reflecting (i) communications from FERC’s Division of Audits and Accounting relating to the investigation; (ii) communications from FirstEnergy to FERC’s Division of Audits and Accounting relating to this investigation.”⁵ The Companies objected to the requests on grounds that, among other things, OCC sought material protected from disclosure by federal law and not relevant or reasonably calculated to lead to the discovery of admissible evidence in this case.⁶ A few months later, OCC moved to compel the Companies to respond to RPD-05-001. OCC did, however, expressly modify its request to limit it to “communications from the FirstEnergy Utilities to FERC’s Division of Audits and Accounting relating to FERC Docket No. FA19-1-000.”⁷ In

³ See Ex. A, Audit Report at 43, n.35.

⁴ See FERC Docket No. FA19-1-000, #20220224-5140 (Feb. 24, 2022).

⁵ Ex. B, Case No. 20-1502-EL-UNC, Responses to OCC’s Fifth Set of Discovery Requests, RPD-05-001 (attached hereto as Exhibit B).

⁶ Ex. B, Response to OCC RPD-05-001.

⁷ Case No. 20-1502-EL-UNC, OCC Motion to Compel Responses to Fifth and Seventh Sets of Discovery (June 29, 2021), at 2-3.

their memorandum contra, the Companies continued to object to the request on the same grounds noted above.

At an August 31, 2021 prehearing conference, the Attorney Examiners denied OCC's FERC-related discovery requests, including RPD-05-001. There, the Attorney Examiners noted the potential "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" under federal law.⁸ The Attorney Examiners then decided they would let FERC "proceed with their investigation in a confidential matter," but that the bench would revisit the issue if and when the public Audit Report was released.⁹

After the filing of DAA's final Audit Report, the Attorney Examiners, at a February 10, 2022 prehearing conference, ordered additional briefing on the "narrow question of once the FERC audit report has been released whether the confidentiality provisions are still in place."¹⁰ Interested parties were ordered to submit their briefs by February 18.

Before that deadline—and in a final attempt to resolve the dispute related to the FERC materials—the Companies offered to produce to OCC underlying documents and data concerning the Companies and produced to FERC during the audit.¹¹ The Companies explained that their position was not now, and never was, that the underlying documents become forever protected by mere virtue of their provision to FERC.¹² But OCC rejected the Companies' offer, insisting instead that the Companies and their affiliates should produce all their communications with FERC

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

⁹ *Id.* at 18:6-11.

¹⁰ Case No. 20-1502-EL-UNC, Hr'g Tr., at 14:17-25 (Feb. 10, 2022).

¹¹ Case No. 20-1502-EL-UNC, Hr'g Tr., at 47:16-48:8 (Mar. 11, 2022) (attached hereto as Exhibit C).

¹² *Id.*

audit staff. And so, on February 18, the Companies, OCC, and another party submitted supplemental briefing as directed by the Attorney Examiners.

On March 11, the Attorney Examiners granted OCC's motion to compel with respect to RPD-05-001. The Attorney Examiners ordered the Companies to produce FirstEnergy's written responses to DAA's data requests and the underlying documents produced to FERC to the extent those materials concern the Companies.¹³ The Attorney Examiners did, however, exclude from the compelled production communications from FERC Staff to FirstEnergy and the internal workpapers, draft reports, and internal communications of FERC's audit Staff.¹⁴

In so ruling, the Attorney Examiners noted that—while they had denied OCC's FERC-related discovery requests to allow FERC to conclude its audit without interference from the discovery process in this proceeding—the audit had been completed.¹⁵ Further, the Attorney Examiners found Ohio R.C. 4901.16 to be analogous to the FERC rules at issue, and that R.C. 4901.16, which precludes Commission employees and agents from prematurely divulging information during the course of an investigation, ultimately serves the same purpose as the FERC rules.¹⁶ The Attorney Examiners also concluded that compelling the production of FERC audit materials would not improperly interfere with FERC's ongoing, non-public investigation of FirstEnergy Corp.'s lobbying and governmental affairs activities, noting that most parties have executed a confidentiality agreement with the Companies and that confidentiality disputes could be handled through the routine mechanisms in place of Commission proceedings.¹⁷ Finally, the

¹³ Ex. C, Case No. 20-1502-EL-UNC, Hr'g Tr., at 52:19-25, 55:3-22 (Mar. 11, 2022).

¹⁴ *Id.*

¹⁵ *Id.* at 53:9-15.

¹⁶ *Id.* at 54:6-12.

¹⁷ *Id.* at 54:22-56:9.

Attorney Examiners instructed the Companies to produce the compelled documents in 30 days, though they left open the possibility that this deadline may need to be extended.¹⁸

III. COMMISSION REVIEW

The Attorney Examiners' ruling is subject to immediate interlocutory review by the Commission. Under O.A.C. 4901-1-15, any "party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any . . . oral ruling issued during a public hearing or prehearing conference that" "[g]rants a motion to compel discovery." O.A.C. 4901-1-15(A)(1). By oral ruling on March 11, the Attorney Examiners compelled the Companies to produce certain FERC materials in response OCC's motion to compel. Accordingly, the Companies' appeal based "upon the Attorney Examiners' oral ruling granting . . . [OCC's] motion to compel . . . is an appeal as of right and" is therefore appropriate for Commission review.¹⁹ And, specifically, the Companies respectfully ask the Commission to review and reverse the Attorney Examiners' ruling compelling production of responses to data requests and underlying documentation concerning the Companies provided by FirstEnergy to FERC Staff during the audit.

IV. APPLICABLE LAW

Under Rule 4901-1-15, the Commission is empowered to review Attorney Examiners' decisions for legal error and resulting prejudice to the appealing party.²⁰ In its review, the Commission considers where the burden of persuasion lies, and whether that party—in either seeking to compel documents or protect documents—has met its burden.²¹

¹⁸ Ex. C, Case No. 20-1502-EL-UNC, Hr'g Tr., at 59:11-23 (Mar. 11, 2022).

¹⁹ *In the Matter of the 1990 Long-Term Forecast Rep. of Columbus S. Power Co.*, No. 90-659-EL-FOR, 1991 WL 11813563, at *1 (P.U.C.O. Jan. 30, 1991).

²⁰ O.A.C. 4901-1-15.

²¹ *In the Matter of the 1990 Long-Term Forecast Rep. of Columbus S. Power Co.*, No. 90-659-EL-FOR, 1990 WL 10654842, at *3 (P.U.C.O. Nov. 20, 1990) (considering whether party seeking a protective order met its burden); *In*

Here, the Companies respectfully submit that the Attorney Examiners erred in two respects when ordering the Companies to produce the FERC-related materials at issue. First, the Attorney Examiners did not consider whether OCC had met its burden in showing the materials requested are relevant to this proceeding. For a motion to compel, the moving party has the burden to show the materials are relevant to the case.²² Second, the Attorney Examiners erred as a matter of law in compelling the disclosure of FERC audit materials. Questions such as these—including whether the “information sought is confidential and privileged from disclosure is a question of law that is reviewed de novo.”²³

V. ARGUMENT

A. The Attorney Examiners Did Not Address Whether OCC Carried Its Burden To Prove Relevance—Which OCC Did Not, And Cannot, Do.

Though the Companies objected to RPD-05-001 on relevance grounds and briefed that issue,²⁴ the Attorney Examiners’ oral ruling assumes, without deciding, that the FERC audit documents concerning the Companies are—in *their entirety*—relevant to this proceeding.²⁵ Yet nowhere in their briefing, nor during oral argument, did OCC put forth arguments demonstrating their Motion to Compel sought documents and communications relevant or reasonably calculated to lead to admissible evidence as to the subject matter of this case—whether the costs of any

the Matter of the Complaint of the Off. of the Consumers Couns. on Behalf of the Residential Customers of the Dayton Power & Light Co., Complainant, No. 90-455-GE-CSS, 1990 WL 10646140, at *2 (P.U.C.O. Aug. 16, 1990).

²² *Baynard v. Oakwood Vill.*, No. 71711, 1997 WL 638807, at *3 (Ohio Ct. App. Oct. 16, 1997) (“Customary motion practice dictates that the burden is on the moving party to persuade the court of the merits of its position and overcome the objections of its opponent. It is not enough to simply point out that the opponent has resisted the discovery.”). Unreported decisions are attached, collectively, as Exhibit D.

²³ *Edwards v. Edwards*, 2019-Ohio-5413, ¶ 9, 151 N.E.3d 6, 9 (Ohio Ct. App. 2019).

²⁴ See Case No. 20-1502-EL-UNC, Companies’ Memorandum Contra OCC’s Motion to Compel Responses to the Fifth and Seventh Sets of Discovery (July 9, 2021), at 2-3, 5-6.

²⁵ Ex. C, Case No. 20-1502-EL-UNC, Hr’g Tr., at 52:19-56:11 (Mar. 11, 2022).

political or charitable spending in support of House Bill 6 were included in any rates or charges paid by Ohio consumers. This alone is grounds to reverse.

But more to the point, FERC's audit concerns FirstEnergy's compliance with FERC rules, not the Companies' compliance with Ohio law or Commission regulations. Beyond that, the audit covers over a dozen other FirstEnergy entities that are not regulated by this Commission and encompasses a period from January 1, 2015 to September 30, 2021, which is broader than the time period at issue here.²⁶ And only a portion of FERC's comprehensive audit concerns issues of any conceivable relevance to this case, *i.e.*, lobbying expenses, donations, and certain costs that lacked proper supporting documentation. Indeed, as explained above and as is evident in the Audit Report itself, FERC's compliance review of FirstEnergy covers a number of topics that have nothing to do with political and charitable spending. Where there is overlap between the raw data (as opposed to communications) relevant to this proceeding and the data that was provided to FERC, that data exists independent of FERC's audit, and the Companies have either produced it in response to the multitude of other requests from OCC or have offered to provide it here.

In short, OCC's request for wholesale discovery of FERC's audit falls squarely beyond the scope of this proceeding, and OCC has not, and cannot, show otherwise. It follows that the Attorney Examiners' ruling granting OCC's ill-supported motion should be reversed.

B. The FERC Materials Are Protected From Disclosure By Federal Law.

In addition to not addressing OCC's failure to carry its burden on a motion to compel, the Attorney Examiners erred as a matter of law in compelling the disclosure of the FERC audit materials. These materials are protected from disclosure by federal law, and the publication of the final Audit Report does not change that.

²⁶ See Ex. A, Audit Report at 1.

1. Federal Law Unambiguously Prohibits Disclosure Of FERC Audit Materials.

Black letter federal law broadly protects information exchanged with FERC during an audit. Specifically, section 301 of the Federal Power Act provides, “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) (emphasis added); *see also* 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 of examination of books or other accounts.”) (emphasis added). And, as FERC explained in its letter to FirstEnergy Corp. opening the audit, “Documents and information Commission staff obtains during [an] audit, as well as all working papers developed, will be placed in nonpublic files.”²⁷

These confidentiality protections are of no small import. 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 later being disclosed. The Federal Power Act and FERC regulations provide the protection that is critical to that exchange. And FERC’s own pronouncements about its audit process further reinforce the point—it has explained in no uncertain terms that “[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

²⁷ FERC Docket No. FA19-1-000, Letter from L. Parkinson, Director, Officer of Enforcement, FERC (Feb. 6, 2019).

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).

OCC has contended that the federal statutes and regulations apply only to FERC and its Staff, not the entities subject to a FERC audit.²⁸ But this line of argument and the Attorney Examiners' ruling ignore that these laws and regulations establish an important federal interest in the confidentiality of the audit materials. That interest would be severely undermined by permitting disclosure of confidential audit communications just because a party did not seek them directly from FERC. 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 and FERC's regulatory architecture demands more, and the Attorney Examiners' ruling must therefore be reversed.

2. The Publication Of The Audit Report Does Not Extinguish These Protections.

There is also nothing about the issuance of the final Audit Report that eliminates the non-public nature of the audit communications under federal law or regulation. Indeed, in their February 18 supplemental memoranda on this very question, neither OCC nor OMAEG cited to *any authority* in *any jurisdiction* finding that FERC audit materials are no longer worthy of protection following the publication of an audit report. Nor are the Companies aware of any such authority.

²⁸ See Case No. 20-1502-EL-UNC, Memorandum Renewing OCC's 2021 Request for Disclosure of FirstEnergy Communications to FERC, at 9-11 (Feb. 18, 2022).

There is good reason for this. FERC itself has clearly spelled out the specific, discrete procedural moments when certain aspects of an audit are made public. *See Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 38 (Feb. 17, 2006) (e.g., 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). Beyond these instances, FERC does not contemplate the release of information about its confidential audits.

Moreover, the fact that Ohio R.C. 4901.16, cited by the Attorney Examiners in granting OCC's request, may permit disclosure of Commission audit materials following the filing of an audit report in a Commission proceeding is inapposite. R.C. 4901.16 is not applicable 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. *Compare* R.C. 4901.16 *with* 16 U.S.C. §§ 825, 825f. On its face, R.C. 4901.16 contemplates that information obtained during an audit *will be disclosed* when Staff or an auditor submits a "report to the public utilities commission" or "when called on to testify." The laws and rules governing FERC's confidential audits have no similar caveats.

Simply put, 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 Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 199, 206 (D.D.C. 2007) (finding that even where FERC has issued a final report, FERC's decision to produce certain economic analyses described in the report itself, while "with[olding] other documents, including memoranda and emails," was

proper since the withheld 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”); *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 fact, the Attorney Examiners’ grant of OCC’s motion to compel here would give OCC discovery rights far exceeding those provided in FERC’s own proceedings. For starters, while the Federal Power Act provides for intervention and rights of discovery in matters set for hearing by FERC, 16 U.S.C. §§ 824e, 825g, it provides no such thing for FERC-led audits or investigations, 16 U.S.C. §§ 825, 825f. And even in contested audit proceedings—where interested parties are

permitted by FERC to intervene upon a proper showing—parties have *no rights* to discovery of materials submitted during the audit process.²⁹

In sum, federal laws and regulations concerning the confidential treatment of information obtained by FERC in its audits should not be lightly considered or interpreted. Compelling discovery of FERC audit materials as the Attorney Examiners have done prejudices the Companies by requiring them to produce protected materials—materials which if disclosed could impact their standing in FERC’s ongoing investigation. *See infra* at Section V.B.3. For instance, compelling production of all FERC communications here runs the risk of re-litigating issues in this case that FERC has already disposed of. It also interferes with FERC’s ability to proceed in a considered and orderly fashion and severely undermines FERC’s—and Congress’s—guarantees of confidentiality.

3. FERC’s Audit and Investigation of FirstEnergy Corp. Remain Ongoing.

Although the Companies do not contest that the findings phase of FERC’s audit is complete, FERC’s audit of FirstEnergy Corp. and its subsidiaries continues in the compliance phase, which could last for another year or more. It is therefore incorrect to deem FERC’s audit “completed,” as the Attorney Examiners did when issuing their ruling.

It also wrong to suggest that the publication of the Audit Report has ended “any need for confidentiality.”³⁰ As detailed above, there is nothing about the publication of the final Audit Report that eliminates the non-public nature of the audit communications under federal law or regulation. At the August 31, 2021 prehearing conference, the Attorney Examiners noted the

²⁹ *See Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 12 (Feb. 17, 2006) (“The Final Rule defines the shortened procedure as consisting of the filing of two rounds of memoranda, and thus there will be no opportunity in this procedure for any interested entity to use the discovery process to obtain information from the audited person.”).

³⁰ Case No. 20-1502-EL-UNC, Correspondence by Office of the Ohio Consumers’ Counsel (Feb. 7, 2022), at 2.

“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.”³¹ The Attorney Examiners then denied OCC’s motion in order to “let FERC proceed with their investigation in a confidential matter.”³² The same concern expressed by the Attorney Examiners last August still exists today. It follows that any disclosure of confidential FERC materials entails a risk of interfering with FERC’s investigations in confidential matters.

In addition to the audit proceedings, FERC’s related investigation must be considered. Staff of FERC’s Division of Investigations notified FirstEnergy Corp., in letters dated January 26 and February 22, 2021, that the Division is investigating of FirstEnergy Corp.’s lobbying and governmental affairs activities concerning House Bill 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 audit conducted by FERC’s Division of Audits and Accounting.³³ FERC’s non-public investigation continues today and is tied to the final Audit Report. 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.³⁴ 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.

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

³² Case No. 20-1502-EL-UNC, Hr’g Tr., at 18:6-11 (Aug. 31, 2021).

³³ FirstEnergy Corp., Form 10-Q, filed April 22, 2021, available at <https://sec.report/Document/0001031296-21-000047/>.

³⁴ 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.”).

C. Other Considerations Warrant Reversal Of The Attorney Examiners' Ruling.

Beyond the errors discussed above, two other considerations militate in favor of avoiding intrusions into FERC's confidential audit. First, OCC has now placed itself before FERC. Since the parties filed their respective briefs on the issue of confidentiality on February 18, 2022, OCC has moved to intervene in the ongoing FERC audit, seeking "all the rights belonging to a party." *See* FERC Docket No. FA19-1-000, #20220224-5140 (Feb. 24, 2022).³⁵ FERC—who is best positioned to consider the scope of its own rules—will itself soon decide what, if any, rights OCC has with respect to the confidential audit. A Commission ruling granting OCC's request for documents and communications submitted to FERC in relation to its audit of FirstEnergy Corp. and its subsidiaries is thus premature at best.

Second, the Companies note that the Commission has now ordered an audit in this case to "determine whether the show cause demonstration submitted by [the Companies] is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state."³⁶ The Commission has instructed the Companies to "provide any and all documents or information requested" by the auditor or Staff during the audit.³⁷ And the RFP attached to the Entry indicates that the auditor's comprehensive review will broadly cover matters related to the Companies' political and charitable spending and the costs booked to a number of

³⁵ In considering interlocutory appeals, the Commission often takes into consideration new or intervening pieces of information the Attorney Examiners did not have the benefit of considering. *In the Matter of the Joint Application of Bell Atl. Corp. & Gte Corp. for Consent & Approval of A Change of Control.*, No. 98-1398-TP-AMT, 1999 WL 35217462 (P.U.C.O. Apr. 8, 1999) (granting applicants' interlocutory appeal where Attorney Examiners' entry was premised on an incorrect or incomplete belief). It should do so here as OCC's motion to intervene in the FERC proceedings was filed after the parties initially briefed this issue for the Attorney Examiners.

³⁶ Case No. 20-1502-EL-UNC, Entry (Mar. 9, 2022), at ¶ 1.

³⁷ *Id.* at ¶ 20.

relevant FERC Accounts.³⁸ Given this further independent review by the Commission and the absence of a sound legal basis for compelling production of the FERC audit materials, any potential intrusion into FERC's confidential processes should be even more disfavored.

VI. CONCLUSION

For these reasons and those explained in past memoranda,³⁹ the Companies respectfully ask the Commission to overturn the Attorney Examiners' decision and deny OCC's request for FERC-related discovery. FERC's empowering statutes and governing regulations leave no room for OCC's intrusion into FERC's confidential investigations. The Attorney Examiners erred in granting OCC's Motion to Compel.

³⁸ *Id.* at RFP, p. 3-4.

³⁹ 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).

Dated: March 16, 2022

Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on March 16, 2022. 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

EXHIBIT A

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

In Reply Refer To:
Office of Enforcement
Docket No. FA19-1-000
February 4, 2022

Jason Lisowski
Vice President, Controller and Chief Accounting Officer
FirstEnergy Corporation
76 South Main Street
Akron, OH 44308

Dear Mr. Lisowski:

1. The Division of Audits and Accounting (DAA) within the Office of Enforcement (OE) of the Federal Energy Regulatory Commission (Commission) has completed an audit of FirstEnergy Corporation and its subsidiaries (collectively, FirstEnergy). The audit covered the period January 1, 2015 to September 30, 2021.
2. The audit evaluated FirstEnergy's compliance with: (1) cross-subsidization restrictions on affiliate transactions under 18 C.F.R. Part 35; (2) service company accounting, recordkeeping, and FERC Form No. 60 reporting requirements under 18 C.F.R. Parts 366, 367, and 369; (3) accounting and reporting requirements prescribed for public utilities pertaining to transactions with affiliated companies under 18 C.F.R. Parts 101 and 141; and (4) preservation of records requirements for holding companies and service companies under 18 C.F.R. Part 368. The enclosed audit report contains seven findings of noncompliance and 38 recommendations that require FirstEnergy and its subsidiaries to take corrective action.
3. On January 24, 2022, FirstEnergy notified DAA that it largely accepts the findings and recommendations. FirstEnergy also proposed that Finding No. 1, Allocation of Overhead Costs to CWIP, and its associated Recommendation Nos. 1, and 7 through 11 be revised consistent with FirstEnergy's response to the audit report. A verbatim copy of FirstEnergy's response is included as Section V to the accompanying audit report. I hereby approve the uncontested findings and recommendations.
4. FirstEnergy should submit its implementation plan to comply with the uncontested recommendations within 30 days of issuance of this letter order. FirstEnergy should make quarterly submissions to DAA describing the progress made to comply with the

FirstEnergy Corporation

Docket No. FA19-1-000

uncontested recommendations, including the completion date for each corrective action. As directed by the audit report, these submissions should be made no later than 30 days after the end of each calendar quarter, beginning with the first quarter after this audit report is issued, and continuing until all the corrective actions are completed.

5. Pursuant to Part 41 of the Commission's regulations, this serves as notice that within 30 days of the issuance of this order, FirstEnergy may notify the Commission in writing as to whether it requests Commission review of Finding No. 1 and its associated Recommendation Nos. 1, and 7 through 11 by means of a shortened procedure or, if FirstEnergy contends that there are material facts in dispute which require cross-examination, a trial-type hearing. 18 C.F.R. § 41.2 (2021). If FirstEnergy does not timely respond to this order, it will be deemed to acquiesce in the finding and recommendations.

6. The Commission delegated authority to act on this matter to the Director of OE under 18 C.F.R. § 375.311. This letter order constitutes final agency action with respect to all uncontested findings and recommendations. FirstEnergy may file a request for rehearing of this letter order with the Commission within 30 days of the date of this order under 18 C.F.R. § 385.713. This letter order does not constitute final agency action with respect to Finding No. 1 and its associated Recommendation Nos. 1, and 7 through 11 so long as FirstEnergy timely responds to this letter order as set forth in Paragraph 5 above.

7. This letter order is without prejudice to the Commission's right to require hereafter any adjustments it may consider proper from additional information that may come to its attention. In addition, any instance of non-compliance not addressed herein or that may occur in the future may also be subject to investigation and appropriate remedies.

8. I appreciate the courtesies extended to the auditors. If you have any questions, please contact Mr. Gerald Williams, Director and Chief Accountant, Division of Audits and Accounting at (202) 502-8277.

Sincerely,

JANEL
BURDICK

Digitally signed by
JANEL BURDICK
Date: 2022.02.01
14:54:26 -05'00'

Janel Burdick
Director
Office of Enforcement

Enclosure



Federal Energy Regulatory Commission
Office of Enforcement
Division of Audits and Accounting

AUDIT REPORT

Audit of FirstEnergy Corporation's and its subsidiaries' compliance with:

- Cross-subsidization restrictions on affiliate transactions under 18 C.F.R. Part 35;
- Service company accounting, recordkeeping, and FERC Form No. 60 reporting requirements under 18 C.F.R. Parts 366, 367, and 369;
- Accounting and reporting requirements prescribed for public utilities pertaining to transactions with affiliated companies under 18 C.F.R. Parts 101 and 141; and
- Preservation of records requirements for holding companies and service companies under 18 C.F.R. Part 368.

Docket No. FA19-1-000
February 4, 2022

FirstEnergy Corporation

Docket No. FA19-1-000

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I. Executive Summary

A. Overview

The Division of Audits and Accounting (DAA) within the Office of Enforcement of the Federal Energy Regulatory Commission (Commission) has completed an audit of FirstEnergy Corporation (FirstEnergy) and its subsidiaries. The audit evaluated FirstEnergy's and its subsidiaries' compliance with: (1) cross-subsidization restrictions on affiliate transactions under 18 C.F.R. Part 35; (2) service company accounting, recordkeeping, and FERC Form No. 60 reporting requirements under 18 C.F.R. Parts 366, 367, and 369; (3) accounting and reporting requirements prescribed for public utilities pertaining to transactions with affiliated companies under 18 C.F.R. Parts 101 and 141; and (4) preservation of records requirements for holding companies and service companies under 18 C.F.R. Part 368. The audit covered the period January 1, 2015 to September 30, 2021.

B. FirstEnergy Corporation and its Subsidiaries

FirstEnergy, headquartered in Akron, OH, was incorporated under Ohio law in 1996 as a public utility holding company. FirstEnergy and its subsidiaries are engaged in the generation, transmission, distribution, and sale of energy in the Midwest and Mid-Atlantic regions. FirstEnergy has 63 subsidiaries that it owns directly or indirectly, which include ten wholly owned franchised public utilities (FPU)¹ and three transmission-lines-only public utilities.²

FirstEnergy FPUs and Transmission-Lines-Only Companies

During the audit period, FirstEnergy's FPUs provided distribution and wholesale transmission services and made wholesale sales of power for resale under Commission

¹ FirstEnergy's FPU subsidiaries are: The Cleveland Electric Illuminating Company, Jersey Central Power and Light Company (JCP&L), Metropolitan Edison Company, Monongahela Power Company, Ohio Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, The Potomac Edison Company, The Toledo Edison Company, and West Penn Power Company.

² FirstEnergy's transmission-lines-only subsidiaries are: American Transmission Systems, Incorporated (ATSI), Mid-Atlantic Interstate Transmission, LLC (MAIT), and Trans-Allegheny Interstate Line Company (TrAILCo) (collectively, Transmission Companies).

market-based rate tariffs.³ Three of the FPU – Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company – recovered their wholesale transmission service costs pursuant to stated, cost-based wholesale transmission Open Access Transmission Tariff (OATT) rates as transmission owner members of the PJM Interconnection, L.L.C. (PJM).⁴ Effective January 1, 2021, these companies implemented a forward-looking formula rate, which was accepted by the Commission, subject to refund, pending further hearing and settlement procedures.⁵ JCP&L began recovering its wholesale transmission service costs pursuant to a formula rate tariff in PJM that became effective January 1, 2020,⁶ and the remaining six FPUs either did not have transmission assets, or transferred their transmission assets to affiliates, during the audit period.

The Transmission Companies are transmission owner members of PJM. The companies recover their transmission service costs pursuant to their respective individual

³ See The Cleveland Electric Illuminating Company, Market-Based Rate Power Sales Tariff, Second Revised Market-Based Rate Power Sales Tariff, 5.0.0; The Ohio Edison Company, Market-Based Rate Power Sales Tariff, Second Revised Ohio MBR, FE Ohio Revised MBR Tariff, 5.0.0; The Toledo Edison Company, Market-Based Rate Power Sales Tariff, Second Revised Toledo MBR Tariff, 5.0.0; Pennsylvania Power Company, Market-Based Rate Power Sales Tariff, Revised PennPower MBR Power Sales Tariff, 5.0.0; The Metropolitan Edison Company, Market-Based Power Sales Tariff, Revised MetEd Tariff, 5.0.0; Pennsylvania Electric Company, Market-Based Rate Power Sales Tariff, 10 Revised, Revised Ancillary Services, 2.0.0; Jersey Central Power & Light Company, Market-Based Rate Power Sales Tariff, Section 1, Market Based Rates, 5.0.0; Monongahela Power Company, Allegheny Power Market Rate Tariff, Revised Allegheny Power Market Based Rate Tariff 4.0.0; The Potomac Edison Company, Allegheny Power MBR Tariff, Cert. of Concurrence, Allegheny Power Market Tariff (Potomac Edison) 0.1.0; and West Penn Power Company, Allegheny Power Market Tariff (West Penn), Cert. of Concurrence, Allegheny Power Market Tariff (West Penn) 0.1.0.

⁴ See PJM Interconnection, L.L.C., FERC FPA Electric Tariff, Intra-PJM Tariffs, Schedule 12, Appendix A-14 Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company, all doing business as Allegheny Power, 19.0.0.

⁵ *Monongahela Power Co.*, 173 FERC ¶ 61,290 (2020), *reh'g denied by operation of law*, 174 FERC ¶ 62,136 (2021).

⁶ *Jersey Central Power & Light Co.*, 169 FERC ¶ 61,205 (2019).

wholesale transmission formula rate mechanisms found in the PJM OATT.⁷ The FPU and Transmission Companies collectively serve approximately 6 million customers and have over 24,000 miles of transmission lines and over 272,000 miles of distribution lines.

FirstEnergy Special Purpose Entities

During the audit period, FirstEnergy had two special purpose entity subsidiaries – FirstEnergy Service Company (FESC) and Allegheny Energy Service Corporation. FESC was FirstEnergy’s centralized service company. It provided administrative, management, support, and external affairs services during the audit period, including political and regulatory advocacy services on behalf of FirstEnergy and its subsidiaries under a shared services agreement. Allegheny Energy Service Corporation owned aircraft and leased them to FESC.

Competitive Power Generation Entities

FirstEnergy owned FirstEnergy Solutions Corp. (FES) and FirstEnergy Nuclear Operating Company (FENOC), which provided energy related products and services. FES, through its subsidiaries, and FENOC owned and operated two coal-fired generating plants, a dual fuel gas/oil plant, a petroleum coke-fired plant, and three nuclear power plants.⁸ On March 31, 2018, FES and FENOC, together with FES’s subsidiaries, filed voluntary petitions for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in connection with the implementation of a proposed plan of reorganization.⁹ Under the reorganization plan ultimately approved by the bankruptcy court, upon emergence from bankruptcy, a new privately-held holding company, Energy Harbor was formed and became the parent of the companies. Energy Harbor is neither a subsidiary

⁷ See PJM Interconnection L.L.C., FERC FPA Electric Tariff, Intra-PJM Tariffs, OATT Attachment H-21A - ATSI, 4.0.0; PJM Interconnection L.L.C., FERC FPA Electric Tariff, Intra-PJM Tariffs, OATT Attachment H-28A - MAIT Formula Rate Template, 1.0.0; and PJM Interconnection L.L.C., FERC FPA Electric Tariff, Intra-PJM Tariffs, OATT Attachment H-18A - Trans-Allegheny, 4.0.0.

⁸ FES and its wholly owned subsidiaries – FirstEnergy Generation, LLC, and FirstEnergy Nuclear Generation, LLC – had market-based rate tariffs on file with the Commission.

⁹ Due to the bankruptcy proceeding, which was ongoing during this audit, and FirstEnergy’s representation that FES and FENOC ceased to be under its control upon completion of the reorganization, there were limited audit procedures performed that were directed at FES’s and FENOC’s operations.

nor an affiliate of FirstEnergy. The market-based rate tariffs previously held by FES and its subsidiaries were succeeded by market-based rate tariffs of Energy Harbor's subsidiaries – Energy Harbor LLC, Energy Harbor Generation LLC, and Energy Harbor Nuclear Generation LLC.¹⁰

C. Summary of Compliance Findings

Audit staff's compliance findings are summarized below. Details of these findings are in Section IV. Audit staff found the following seven areas of noncompliance:

- *Allocation of Overhead Costs to CWIP* – FirstEnergy's subsidiaries capitalized overhead costs to Account 107, Construction Work in Progress-Electric, using an allocation method that was not based on actual time employees were engaged in construction activities based on timecard reports or on a representative time study. This may have led to FirstEnergy's subsidiaries capitalizing costs to Account 107 that did not have a definite relationship to construction. As a result, the companies may have overstated construction costs recorded in Account 107 and electric plant in service, as well as accumulated depreciation, depreciation expenses, and accumulated deferred income tax (ADIT) balances, and understated operating expenses. Moreover, accumulated overstatement of electric plant in service and the related depreciation due to this accounting practice during and prior to the audit period may have resulted in the FirstEnergy subsidiaries with wholesale transmission formula rate service cost recovery mechanisms, overstating their respective wholesale annual transmission revenue requirements and overcharging wholesale transmission customers.
- *Accounting for Vegetation Management Costs* – The FirstEnergy FPU's improperly accounted for maintenance expenses incurred to remove vegetation surrounding in service distribution powerlines. Specifically, the FPU's inappropriately capitalized the cost to electric plant in service. This accounting practice caused the companies to overstate electric plant in service, accumulated depreciation, ADIT,

¹⁰ See *Energy Harbor LLC*, Docket Nos. ER20-1436-000, ER20-1437-000, and ER20-1438-000 (May 21, 2020) (delegated order on succession and related tariff changes); see also *Energy Harbor LLC*, FERC FPA Electric Tariff and Market-Based Rate Power Sales Tariff; *Energy Harbor Generation LLC*, FERC FPA Electric Tariff and Market-Based Power Sales Tariff; *Energy Harbor Nuclear Generation LLC*, FERC FPA Electric Tariff and Market-Based Rate Power Sales Tariff.

depreciation expenses, and other account balances, and understate operating expenses incurred.

- *Accounting for Amortization of Regulatory Assets* – FirstEnergy’s subsidiaries deferred certain maintenance expenses, associated with costs incurred to remove vegetation in transmission corridors, and recorded the deferred expenses as regulatory assets in Account 182.3, Other Regulatory Assets, for Commission accounting and reporting purposes. Certain subsidiaries then improperly amortized \$3.8 million of the deferred costs as expenses in subsequent periods without obtaining Commission approval to recover these regulatory assets in rates. Moreover, two of the Transmission Companies, ATSI and TrAILCo, included these expenses representing amortization of the regulatory assets in their annual transmission revenue requirements calculated pursuant to their wholesale transmission formula rates without the required Commission approval to recover such regulatory assets. Also, certain FirstEnergy subsidiaries recovered overstated depreciation expense through transmission formula rates.

As a result of the above deficiencies, the Transmission Companies inappropriately included approximately \$2.7 million of regulatory asset amortization and depreciation expense in their annual transmission revenue requirements and overbilled their wholesale transmission customers by this amount.

- *Accounting for Lobbying Costs, Donations, and Costs that Lacked Proper Supporting Documentation* – FESC improperly accounted for and improperly reported lobbying expenses, donations, and other costs that lacked proper supporting documentation or were misclassified (unsupported costs). Moreover, FESC allocated and charged the improperly accounted for lobbying, donation, and unsupported costs to FirstEnergy and its subsidiaries. This led the FirstEnergy subsidiaries to improperly account for and report the lobbying expenses, donations, and unsupported costs in their respective books and records, and FERC Form No. 1. The errors resulted in the Transmission Companies including the lobbying expenses, donations, and unsupported costs in their annual wholesale transmission revenue requirements and billing rates, and overbilling wholesale transmission customers.
- *Allowance for Funds Used During Construction* – FirstEnergy’s FPU’s improperly included undistributed subsidiary earnings and accumulated other comprehensive income in equity balances used for the purpose of computing AFUDC rates. As a

result, the companies over-accrued AFUDC during the audit period, which led them to overstate CWIP and plant-in-service balances.

- *Service Company Billing Procedures* – Billing information that FESC provided to FirstEnergy’s subsidiaries pertaining to charges for services provided to them was insufficient. Specifically, FESC did not provide detailed information to reflect the services provided and showing the charges classified as direct costs, indirect costs, or compensation for use of capital, with the details of service company accounts by service provided, as required. As a result, the FirstEnergy subsidiaries misclassified costs charged by FESC.
- *Accounting for Fuel – Coal Supply and Other Consulting Services* – The FirstEnergy FPU, Monongahela Power Company, improperly accounted for fixed monthly consultation fees paid in Account 501, Fuel, as a component cost of coal used in operations without first being accounted for as inventoried fuel stock in Account 151, as required. The accounting led to costs being included in fuel used in operations that may not have been directly assignable and likewise not properly allocable to the cost of coal purchased and used. As a result, Monongahela Power Company may have overcharged wholesale customers, through operation of the fuel cost adjustment formula in its tariff, for the cost of fuel included as a component cost of generating electricity.

D. List of Recommendations

Audit staff’s recommendations to remedy the audit findings are listed below. Details are in Section IV. Audit staff recommends that FirstEnergy:

Allocation of Overhead Costs to CWIP

1. Retain an independent third-party entity, subject to approval by DAA, to conduct a representative labor time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The independent consultant should have expertise and experience independently performing time studies used in the determination of overhead capitalization rates of U.S. based utilities subject to the accounting requirements prescribed for public utilities and licensees or for natural gas companies under 18 C.F.R. Part 101 or Part 201, respectively. The time study should involve a representative sample of study participants (employees) that provides for extrapolation of the study results to the full population of FirstEnergy employees, and should include processes for application of the study results from

the audit period to the issue date of this audit report, and processes for applying the capitalization rate(s) the study finds for 2021 back to the period January 1, 2015 through December 31, 2020, either with no change to the capitalization rates found in the study or with such modifications to the capitalization rate(s) the independent consultant finds reasonable and supported by evidence. The independent consultant should use its expertise and all relevant information available to it to make recommendations as to what the capitalization rate(s) should be for prior years for each FirstEnergy subsidiary, should set forth the basis for its recommendations, and provide both the recommendations and the basis therefore to FirstEnergy and DAA. If there is no recommendation by the independent consultant for any year or other period between January 1, 2015 and December 31, 2020 for any specific capitalizable cost center, then FirstEnergy should base its capitalization rate and the amount to be capitalized for such year or period on the rates and costs of such specific cost centers for which FirstEnergy can provide to DAA reasonable evidence as to the time employees in such cost centers spent having a definite relation to construction, and exclude from consideration those cost centers for which FirstEnergy cannot provide such evidence, per, for example, 18 C.F.R. Part 101, General Instruction No. 2 and § 41.8.

The progress of the study should be reported within 120 days and the time study results provided to DAA for review and consideration within 180 days of the date of issuance of this audit report, and the developed allocation procedures should be submitted when complete, but no later than 60 days after completion of DAA's review of the labor time study. At a minimum, the developed allocation procedures should provide a method for overhead cost allocation and capitalization to construction based on actual timecard distributions or where this procedure is impractical, based on periodic time studies.

2. Revise written policies, practices, procedures, and controls governing the methods used to account for, track, report, and review overhead labor and related costs, and all other costs allocated to construction projects to be consistent with Commission accounting requirements. In addition, adopt procedures to retain formal documentation supporting the amount of overhead costs allocated to electric plant accounts.
3. Revise accounting processes and procedures to account for and report capitalized A&G amounts recorded in Accounts 920, Administrative and General Salaries, and 921, Office Supplies and Expenses, using Account 922, Administrative Expenses Transferred – Credit, consistent with Commission regulations.

4. Train relevant staff on the revised overhead allocation, control, and A&G accounting procedures and documentation, and provide periodic training in this area, as needed.
5. Train staff on the time reporting guidelines and establish a periodic training program in this area.
6. Within 30 days of the completion of Recommendation No. 1, submit an estimate to DAA, including the calculations and determinative components, of overhead costs that would have been allocated to CWIP from 2015 through the present consistent with the requirements of Electric Plant Instruction No. 4 and General Instruction No. 9. The estimate should be based on a recalculation of 2015's and subsequent years' overhead costs allocated to construction with labor and related costs removed from the cost of plant that were not associated with construction activities based on the methodology developed in response to Recommendation No. 1.
7. With the response to Recommendation No. 6, submit proposed accounting entries to DAA that remove the overhead costs that were allocated to CWIP and electric plant in service from 2015 through the present that exceed the amount of costs that would have been allocated to the accounts based on the methodology developed in response to Recommendation No. 1. Also, provide proposed accounting entries to remove associated amounts from other accounts and balances affected by the inappropriately allocated cost such as the accumulated depreciation and ADIT accounts, and AFUDC balances capitalized into CWIP and electric plant in service. If the adjusting entries result in a significant impact to income for the current year, FirstEnergy subsidiaries may account for the transaction as a correction of a prior period error in Account 439, Adjustments to Retained Earnings. Such adjustments to retained earnings with the proposed accounting entries should be submitted to DAA.
8. Revise account balances for FirstEnergy subsidiaries' utility plant, accumulated depreciation, ADIT, and other account balances impacted by the inappropriate allocation of unsupported overhead costs after receiving DAA's approval of proposed accounting entries submitted per Recommendation No. 7, and restate and footnote the balances reported in the next-filed FERC Form No. 1 reports of the FirstEnergy subsidiaries for both the current and comparative years presented in each subsidiary's next-filed report, as necessary to reflect and disclose the revisions.
9. Submit a refund analysis to DAA that explains and details the following:
 - (1) calculation of refunds that result from correcting the overstatement of

FirstEnergy Corporation

Docket No. FA19-1-000

transmission plant due to the improperly capitalized labor costs, as determined by the labor time study, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

10. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
11. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

Accounting for Vegetation Management Costs

12. Revise accounting policies and procedures for vegetation management activities in distribution corridors to be consistent with Commission accounting requirements.
13. Train relevant staff on the revised vegetation management accounting policy and procedures and provide periodic training.
14. Submit proposed accounting entries and supporting documentation to DAA that reflect the correction of the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by the capitalization of vegetation management expenses for the period from October 1, 2021 through the present within 60 days of issuance of this audit report.
15. Revise the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by over-accrual of AFUDC after receiving DAA's approval of the proposed accounting entries per Recommendation No. 14 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

Accounting for Amortization of Regulatory Assets

16. Revise policies, practices, and procedures to amortize or write off the regulatory assets consistent with Commission accounting requirements.
17. Train relevant staff on the revised methods, and provide periodic training in this area, as needed.
18. Submit a refund analysis, within 60 days of issuance of this audit report, to DAA for review that explains and details the following: (1) calculation of refunds that result from the correction of ATSI's and TrAILCo's improper and unauthorized,

respective, depreciation and amortization of plant and regulatory assets to the depreciation expense account and inclusion of the expenses in service rate determinations, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

19. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
20. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

Accounting for Lobbying Expenses, Donations, and Unsupported Costs

21. Critically review and strengthen internal controls in FirstEnergy and its subsidiaries. Establish and implement procedures governing methods to be used to appropriately identify, account for, track, report, and review all lobbying costs, donations, and any unsupported expenses, including, but not limited to, expenses of external lobbyists, monies paid to external corporate entities to be used for lobbying, and other external lobbying costs and internal lobbying costs, including employee lobbying time and other internal lobbying costs.
22. Train relevant staff on the internal control enhancements and procedures established, including internal controls over vendor creation in the accounts payable system, payments, accounting, and reporting violations; and provide periodic training in this area, as needed.
23. Perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities, including payments of FirstEnergy funds to outside entities for purposes of those entities using those funds for lobbying, and provide support to identify lobbying-related expenses improperly charged to utility operating accounts, for the audit period and, with respect to the specific issues discussed in this finding, for the entire period affected by or relevant to each such specific issue. Within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each internal or external investigation discussed in the finding or any new internal or external investigation arising directly from Ohio House Bill 6 (HB 6) or lobbying activities occurring prior to 2021, provide the results of the investigation, proposed correcting journal entries, and FirstEnergy's analysis of the findings from each investigation and the related impact on prior and future accounting and rate development to audit staff.

24. Submit a refund analysis, within 60 days of issuance of this audit report and on a rolling basis within 60 days of conclusion of each investigation discussed in the finding or any new investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from correcting the improper accounting for external lobbying costs, donations, and unsupported costs in utility operating and plant accounts; and internal lobbying costs as identified pursuant to the analysis performed in response to Recommendation No. 23, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.
25. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
26. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

Allowance for Funds Used During Construction

27. Revise and implement the FPU's processes and procedures to calculate their respective AFUDC rates consistent with EPI No. 3(A)(17) and other applicable Commission requirements. Revisions should include processes to prevent the inclusion of balances in Accounts 216.1 and 219 in the AFUDC rate calculations.
28. Train relevant staff on the revised AFUDC calculation method, and provide periodic training, as needed.

Service Company Billing Procedures

29. Revise FESC policies, procedures, and accounting systems so as to provide sufficient billing information to FirstEnergy's subsidiaries in accordance with the Commission's regulations.
30. Train relevant staff on the revised policies, procedures, and accounting systems and provide periodic training in this area, as needed.

Accounting for Fuel – Coal Supply and Other Consulting Services

31. Revise accounting policies and procedures for cost of fuel by the FPU's to ensure compliance with the Commission's accounting regulations.
32. Train relevant staff on the revised policies and procedures and provide periodic training.

33. Perform an analysis of all monthly payments made to consultants, including BCG Resources, LLC, that were included in the cost of fuel used in operations during the audit period and submit the analysis to DAA with supporting documents within 60 days of issuance of this audit report. Based on the analysis, submit proposed adjusting accounting entries to record the consultation costs in the appropriate accounts for DAA's review and approval.
34. Revise the FirstEnergy FPU's fuel inventory and other account balances impacted by the improper accounting after receiving DAA's approval of the proposed accounting entries per Recommendation No. 33 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.
35. Review collections received, including but not limited to uplift payments, during the audit period based, in part, on the cost of fuel and submit an analysis to DAA for review of retail and wholesale overcollections due to improper recording of costs in Account 501.
36. Submit a refund analysis if there were overcollections from wholesale customers, within 60 days of issuance of this audit report, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from the improper accounting for fuel costs, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale customers to receive refunds; and (5) period(s) refunds will be made.
37. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
38. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

E. Implementation of Recommendations

Audit staff further recommends that FirstEnergy submit the following:

- A plan for implementing the audit recommendations within 30 days after the audit report is issued;
- Quarterly reports describing progress in completing each corrective action recommended. Quarterly nonpublic submissions should be made no later than 30 days after the end of each calendar quarter, beginning with the first quarter after

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the audit report is issued, and continuing until all recommended corrective actions are completed; and

- Copies of any written policies and procedures developed in response to the recommendations. These documents should be submitted in the first quarterly filing after development of a written policy or procedures.

II. Background

A. FirstEnergy Service Company

FESC is a centralized service company that provides certain accounting, administrative, management, utility operation, and other services to FirstEnergy and its subsidiary companies, including through June 2020 to FirstEnergy's former subsidiaries FES and FENOC, which ceased to be FirstEnergy's subsidiaries after emerging from bankruptcy in February 2020. FESC recovers its cost of providing services through monthly billings to associate companies. The associate companies are either directly assigned or allocated a portion of the costs. Direct assignment takes place when a service provided by FESC benefits a specific company. When the cost of a service provided by FESC benefits multiple companies, the costs are billed to the benefiting companies using an allocation method intended to consider cost causation. Shared service agreements between FESC and the associate companies describe the services provided and the cost allocation methodologies.

B. Service Company Accounting System

FESC's accounting system primarily consists of an SAP SE (SAP) general ledger system and related modules. It is a system with several modules that process transactions for accounting, cost allocation, and financial reporting. Additionally, FESC uses other business systems that interface with the SAP system, including, for example, PowerPlan, which processes fixed assets and taxes. FESC maintains the accounting records for the FPU's and Transmission Companies, as well as for FirstEnergy's other subsidiaries, in its integrated SAP general ledger system. Transactions recorded in the system are designated with individual company codes.

FESC uses its own internal account numbers to account for revenue and expenses, and it converts the balances in those general ledger accounts to the Commission's prescribed accounts for public utilities and service companies for regulatory reporting purposes. The SAP general ledger balance sheet account numbers used by FESC are the same as those provided in the Commission's Uniform System of Accounts Prescribed for Public Utilities and Licensees, 18 C.F.R. Part 101, and Uniform System of Accounts for Centralized Service Companies, 18 C.F.R. Part 367 (collectively, USofA).

C. Cost Accumulation and Allocation

FESC's cost accumulation and allocation procedures are performed within its SAP system. Costs are accumulated using several cost collectors in addition to the internal account numbers. The cost collectors are accounting devices used to plan and track detailed costs of different categories or types of work. Cost collectors used by FESC are

cost centers, work breakdown structure elements (WBS), and internal orders. The cost centers collect routine costs for employees providing services for particular functions. Internal orders are used to collect costs for projects of a certain dollar amount that are not capital investments. The internal orders are company specific and are numbered by the SAP system sequentially. WBS are used for projects exceeding certain dollar amounts or durations that involve capital investments.

Cost collectors accumulate costs from payroll and employee time sheets, expense reports, overhead distributions, vendor invoices, journal entries, allocations, etc. for later billing to the associate company (or companies) benefiting from the work performed. The SAP system records the entity providing a service and the corresponding entity or entities benefiting from the service based on whether the service cost is directly charged or, alternatively, allocated pursuant to allocation rates input into the system. FESC has 18 allocators, as reported in its FERC Form No. 60, Annual Report of Centralized Service Companies, that result in distribution percentages for charging the cost of specific activities performed to associate companies that benefit. Approximately 65 percent of the total costs incurred by FESC during the audit period were indirect costs assigned to associate companies using the allocators.

D. Department of Justice Complaint and Subsequent Investigations

On July 17, 2020, the U.S. Department of Justice (DOJ) filed a criminal complaint in the U.S. District Court for the Southern District of Ohio alleging that then-Speaker of the State of Ohio House of Representatives, four other individuals, and a 501(c)(4) nonprofit entity named Generation Now, organized under the laws of the State of Delaware, engaged in conducting the affairs of an enterprise through a pattern of racketeering activity in violation of federal law, and committed multiple acts of bribery chargeable under Ohio law.¹¹ The complaint alleged that the defendants facilitated and participated in actions to funnel almost \$61 million received from an Ohio public utility, referred to as Company A in the complaint, and its affiliates through the nonprofit entity to various Ohio political figures to support election of the lead defendant as Speaker of the House, then secure the passage of Ohio Bill 6, which, among other things, would provide over a billion dollars in subsidies, to be paid for by Ohio ratepayers, to the Ohio-based coal-fired and nuclear power plants owned by Company A's affiliates, and then defeat a ballot initiative effort calling for the repeal of the Ohio Bill 6 legislation.

¹¹ *United States v. Larry Householder, et al.*, Case No. 1:20-MJ-00526 (S.D. Ohio), Complaint (July 17, 2020).

On July 21, 2020, FirstEnergy disclosed in a public statement that it had received subpoenas from the DOJ in connection with the investigation surrounding Ohio House Bill 6.¹² In October 2020, two of the five individual defendants named in the DOJ complaint entered guilty pleas.¹³ On October 29, 2020, FirstEnergy issued a press release, which stated that the Independent Review Committee of the Board of Directors of FirstEnergy had terminated FirstEnergy's Chief Executive Officer, effective immediately, and had also terminated FirstEnergy's Senior Vice President of Product Development, Marketing, and Branding and its Senior Vice President of External Affairs, also effective immediately.¹⁴

The DOJ complaint and audit staff's discussions on internal controls during onsite interviews of FESC employees raised audit staff's concerns about the existence of significant shortcomings in FirstEnergy and its subsidiary companies' controls over financial reporting, including controls over accounting for the costs of civic, political, and related activities, such as lobbying activities, performed by and on behalf of FirstEnergy and its subsidiaries. Moreover, these controls may have been circumvented in ways designed to conceal the nature and purpose of expenditures made and, as a result, that led to the improper inclusion of lobbying and other nonutility costs in wholesale rate determinations.

¹² See [An Act that] Creates Ohio Clean Air Program, 2019 Am. Sub. HB 6 ("HB 6"), *repealed in part by* [An Act to] Revise electric utility service law; repeal portions of HB 6, 2021 Am. Sub. HB 128 ("HB 128"). HB 6 passed the Ohio House on May 29, 2019. The bill passed the Ohio Senate and was signed into law by the Governor of Ohio in July 2019, with an effective date of October 22, 2019. A referendum effort to repeal HB 6 in its entirety was waged from July 24, 2019 to the Act's effective date in October 2019, but was not successful. However, in March 2021, HB 128 was signed into law, which repealed the provisions of HB 6 that provided approximately \$1 billion to two Ohio nuclear plants, and repealed certain other provisions, but left in place assistance provided to coal-fired generation plants. See also "FirstEnergy Corp. Statement on HB 6 Investigation," FirstEnergy Newsroom, at https://www.firstenergycorp.com/content/fecorp/newsroom/news_articles/firstenergy-corp--statement-on-hb-6-investigation.html.

¹³ See *United States v. Jeff Longstreth*, Case No. 1:20-CR-77 (S.D. Ohio), Plea Agreement (filed Oct. 29, 2020); and *United States v. Juan Cespedes*, Case No. 1:20-CR-77 (S.D. Ohio), Plea Agreement (filed Oct. 29, 2020).

¹⁴ See "FirstEnergy Announces Leadership Transition," FirstEnergy Newsroom, at https://www.firstenergycorp.com/content/fecorp/newsroom/news_articles/firstenergy-announces-leadership-transition.html.

Following the filing of the DOJ complaint, the U.S. Securities and Exchange Commission, the U.S. Internal Revenue Service, the Public Utilities Commission of Ohio, the Ohio Attorney General, and the Commission commenced investigations of FirstEnergy's operations.¹⁵ In addition, FirstEnergy initiated its own internal investigation to be overseen by the Independent Review Committee of FirstEnergy's Board of Directors. As of the date of this report, these investigations have either not been completed, or the findings of these investigations were not available to audit staff during performance of this audit.

On November 12, 2020, FirstEnergy informed audit staff that, as part of its internal investigation, it had determined that responses provided to audit staff's data requests relating to lobbying activities were incomplete and omitted several payments. FirstEnergy proposed to provide several supplemental updates to its lobbying-related data responses over the next several months. Included in FirstEnergy's supplemental data responses and its further responses to audit staff's follow up data requests were the following:

- a) *Payments to certain corporate entities, including U.S. Internal Revenue Code Section 501(c)(4) entities:*

FirstEnergy identified eight lobbying payments, made between March 2017 and October 2019, amounting to a total of \$26.5 million, paid to Generation Now (\$1 million) and Partners for Progress, Inc. (\$25 million), which were U.S. Internal Revenue Code Section 501(c)(4) entities, and to Hardworking Ohioans, Inc. (\$0.5 million), a for-profit corporation. Audit staff determined that the payments to Generation Now and Hardworking Ohioans, Inc. were allocated to the ten FPU's of FirstEnergy and improperly accounted for as General and Administrative expenses (\$0.65 million) and costs of electric plant in service (\$0.85 million). Those expenses were then used to develop service rates charged. The \$25 million paid to Partners for Progress, Inc. was allocated to FirstEnergy Corporation.

In a supplemental data request response, FirstEnergy produced a schedule of lobbying payments, prepared by Energy Harbor, which identified additional lobbying payments made between October 2018 and October 2019, totaling around \$43.1 million that were paid to Generation Now. Those

¹⁵ On February 18, 2021, FirstEnergy disclosed in its 2020 SEC Form 10-K, under Item 1A, Risk Factors, Risks Associated with the Ongoing Investigations, that staff of the Commission's Division of Investigations in its Office of Enforcement had initiated an investigation.

payments were made by FESC on behalf of FES under a service agreement.¹⁶ FirstEnergy also disclosed payments to two additional entities – 614 Solutions LLC and The Oxley Group – totaling \$1 million and around \$0.3 million, respectively. FirstEnergy represented to audit staff that these additional payments totaling \$44.4 million were made with funds provided to FESC by FES and that the payments had no impact on the operations of the FPU and Transmission Companies.

In summary, the total payments to 501(c)(4) entities and Hardworking Ohioans, Inc. and others disclosed by FirstEnergy, including those made by FES, amounted to approximately \$70.9 million. Audit staff notes that FirstEnergy did not disclose that these payments were made until after the DOJ investigation was made public. At which point, FirstEnergy informed audit staff that it would supplement its prior data request responses to correct inaccurate information previously provided regarding its and its subsidiaries' lobbying activities and costs incurred.

According to FirstEnergy, out of the \$70.9 million of payments, \$44.4 million was recorded in the accounts of FES and \$25 million was recorded in FirstEnergy's own books.¹⁷ Out of the \$1.5 million that FirstEnergy identified as being charged to the FPU and the Transmission Companies, \$0.65 million were recorded as General and Administrative expenses, while around \$0.85 million were ultimately recorded as the cost of electric plant in service.

¹⁶ The payments totaling around \$43.1 million were made prior to FES's emergence from bankruptcy and becoming an Energy Harbor subsidiary.

¹⁷ Audit staff evaluated FESC's accounts and other records and determined that the payments FESC made were charged to FES and to FirstEnergy. Audit staff's evaluation did not include the accounts and records of FirstEnergy, which does not allocate costs to its Commission-jurisdictional subsidiaries, and did not include the accounts and records of FES and FENOC, which were under independent management and bankruptcy court supervision, and also did not allocate costs to FirstEnergy's FPU and Transmission Companies. Audit staff did obtain information pertaining to FirstEnergy and FES, however, confirming their receipt of the \$25 million and \$44.4 million charges, respectively.

- b) *Payments made to Sustainability Funding Alliance of Ohio, Inc. and IEU-Ohio Administration Company, LLC – entities associated with an appointed Ohio government official:*

On November 19, 2020, FirstEnergy disclosed, in its SEC Form 10-Q filing for the quarter ended September 30, 2020, that a payment of approximately \$4 million had been made in early 2019, in connection with the termination of a purported consulting agreement that had been in place since 2013. The counterparty to the consulting agreement, Sustainability Funding Alliance of Ohio, Inc., was associated with a person who was later appointed to be the Chairman of the Public Utility Commission of Ohio (PUCO) in February 2019. This person was identified as Public Official B in a FirstEnergy deferred prosecution agreement with the United States Attorney's Office for the Southern District of Ohio wherein the person was determined by the DOJ to have operated in an official capacity as the PUCO Chairman to assist with the passage of legislation and regulatory orders that benefited FirstEnergy in return for monetary payments.¹⁸

Audit staff followed up on the SEC Form 10-Q disclosure. In response, FirstEnergy identified approximately \$13.8 million, including the approximately \$4 million disclosed in its SEC Form 10-Q, paid between 2013 and 2018 to Sustainability Funding Alliance of Ohio, Inc. FirstEnergy's FPU's and Transmission Companies were allocated \$11.9 million of the costs which were accounted for as General and Administrative expenses initially and then a \$6.7 million portion was capitalized as electric plant in service and the balance of \$5.2 million continued to be accounted for as General and Administrative expenses. FirstEnergy's improper capitalization of General and Administrative expenses is discussed in Finding No. 1, Allocation of Overhead Costs to CWIP, in Section IV of this report.

FirstEnergy disclosed to audit staff additional payments to Sustainability Funding Alliance of Ohio, Inc., established under a different vendor number in FirstEnergy's Accounts Payable system, and IEU-Ohio Administration Company, LLC, another entity associated with the former PUCO Chairman. Those payments, made from 2010 to 2015, in \$1 million annual installments to Sustainability Funding Alliance of Ohio, Inc. and \$0.5 million annual installments to IEU-Ohio Administration Company, LLC, totaled \$9 million. In summary, the two entities received around \$22.8 million

¹⁸ *United States v. FirstEnergy Corp.*, Case No. 1:21-CR-00086-TSB (S.D. Ohio), Deferred Prosecution Agreement (filed Jul. 22, 2021). The deferred prosecution agreement notes that Public Official B resigned from the PUCO in November 2020.

in payments and \$20.9 million of this amount was charged to certain FirstEnergy FPU's and Transmission Companies. Some of the costs were used in customer rate development for those regulated entities and a portion was recovered from customers. However, FirstEnergy acknowledged that certain transactions were either improperly classified, misallocated to certain of the FPU's and Transmission Companies, or lacked proper supporting documentation and resulted in amounts collected from customers.

FirstEnergy represented to audit staff that it will make refunds of around \$185,000 to retail and transmission customers and has already made the related accounting entries to correct charges of \$6.7 million allocated to electric plant in service of the FPU's and Transmission Companies and to prevent those expenses from impacting future rates.

c) *Payments to sixteen entities associated with an individual under investigation by FirstEnergy:*

In coordination with its filing of SEC Form 10-K for 2020, FirstEnergy revealed to audit staff in February 2021 that it was investigating payments totaling around \$28.8 million made between 2003 and 2020 to sixteen entities associated with an individual identified by FirstEnergy. FirstEnergy's FPU's were allocated around \$19.7 million of these payments, the Transmission Companies \$1.1 million, FES \$2.2 million, and \$5.8 million was allocated to FirstEnergy and its nonregulated subsidiaries.

The FPU's and Transmission Companies included \$1.4 million of the cost in electric plant in service balances, including capital lease balances, and \$19.4 million in Operating Expense balances that were used in the development of customer rates charged. FirstEnergy acknowledged that certain transactions were either improperly classified, misallocated to certain of the FPU's and Transmission Companies, or lacked proper supporting documentation and resulted in amounts collected from customers. FirstEnergy committed to remove the cost from electric plant in service balances and provide an estimated \$9.6 million in customer refunds.

d) *Deferred Prosecution Agreement*

On July 20, 2021, FirstEnergy and the United States Attorney's Office for the Southern District of Ohio entered into a deferred prosecution agreement

(DPA).¹⁹ As set forth in the DPA, FirstEnergy acknowledged that it, “through the acts of its officers, employees, and agents conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy’s benefit.”²⁰ Per the DPA, among other things, FirstEnergy agreed to pay a penalty of \$230 million, accept a single charge of conspiracy to commit honest services wire fraud, and undertake substantial compliance-related and other obligations going forward.

In addition, FirstEnergy committed to address any deficiencies in its internal controls, which includes its policies, and procedures.²¹ Specifically, FirstEnergy committed to “ensure that it has a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts.”²² Pursuant to the DPA, this system “should be designed to provide reasonable assurances that [FirstEnergy’s] transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.”²³ Such system should also provide reasonable assurances that FirstEnergy’s transactions are recorded as necessary to permit preparation of financial statements for Commission reporting purposes in conformity with the definitions, instructions, and accounts of the Uniform System of Accounts and FERC Form Nos. 1 and 3-Q, and to maintain accountability for assets.²⁴

¹⁹ *United States v. FirstEnergy Corp.*, Case No. 1:21-CR-00086-TSB (S.D. Ohio), Deferred Prosecution Agreement (filed Jul. 22, 2021).

²⁰ *Id.* P 17.

²¹ *Id.* P 5(F), Remediation, Corporate Compliance Program, and Reporting. (In order to address any deficiencies in its internal controls, policies, and procedures, FirstEnergy Corp. represents that it will continue to undertake in the future, in a manner consistent with all of its obligations under this Agreement, a review of its internal controls, policies, and procedures regarding compliance with U.S. law.)

²² *Id.* at Attachment B: Corporate Compliance Program.

²³ *Id.*

²⁴ *Id.*

III. Introduction

A. Objectives

The audit evaluated FirstEnergy's and its subsidiaries' compliance with cross-subsidization restrictions on affiliate transactions; service company and public utility accounting, recordkeeping, and reporting requirements pertaining to transactions with associate companies; and preservation of records requirements for holding companies and service companies. The audit covered the period January 1, 2015 to September 30, 2021.

B. Scope and Methodology

Audit staff observed during the audit planning that FirstEnergy and several affiliated companies were operating in a financially stressed environment. Significant impairment losses were recognized under Generally Accepted Accounting Principles and the ability of certain affiliated generation companies to operate as a going concern became questionable. Audit staff also observed media reports on major efforts by FirstEnergy to lobby at the federal and state level to gain support for its failing nuclear and coal generating plants. This financially stressed operating environment combined with audit staff's discovery of deficient internal controls led to increased testing by audit staff.

Audit staff performed the following actions to facilitate the testing and evaluation of FirstEnergy's and its subsidiaries' compliance with the Commission's requirements relevant to the audit objectives:

- *Review of Public Information* – Reviewed publicly available information before commencing the audit. The review provided information on FirstEnergy's operations and finances, reorganization, significant contracts, and other key regulatory and business activities. Examples of materials reviewed include FirstEnergy's annual reports and SEC Forms 10-K and 10-Q, FERC Form Nos. 1 and 60 of the FirstEnergy subsidiaries, prior Commission audit reports, company-related websites, and other relevant regulatory and media sources.
- *Audit Criteria* – Identified audit criteria including the Commission's rules, regulations, and other requirements necessary to evaluating compliance with the audit objectives.
- *Data Requests* – Issued data requests to collect audit evidence and information. The information related to internal policies; service company and operating company operations, procedures, and controls; business practices; risk

management; corporate structure; contractual agreements; financial accounting, cost allocation and reporting activities; corporate compliance; regulatory filings; and other pertinent information, including internal and external audit reports, Board of Directors and Audit Committee meeting minutes, corporate compliance program procedures, and other items not publicly available. The evidence and information were used to test and evaluate compliance with Commission requirements relevant to audit objectives.

- *Teleconferences* – Held multiple teleconferences with FirstEnergy and FESC staff to discuss audit objectives, testing, data request responses, technical and administrative matters, and compliance concerns.
- *Site Visits* – Participated in three site visits to FirstEnergy’s headquarters in Akron, OH to discuss and observe controls and procedures related to audit objectives. The visits enabled audit staff to:
 - Discuss FirstEnergy’s and its subsidiaries’ organizational and corporate structures, departmental functions, and employee responsibilities, and meet with key company officials;
 - Learn about FirstEnergy’s and its subsidiaries’ cost allocation and capitalization program, processes and operations, in particular the cost of departments, activities, functions, and systems attributed to plant construction;
 - Interview executives, managers, and staff responsible for accounting, financial reporting, corporate compliance, and utility operations, including construction operations;
 - Review Board of Directors and Audit Committee meeting minutes and internal and external audit reports;
 - Discuss the management and operation of the corporate compliance program; and
 - Discuss and observe accounting and reporting procedures, processes, and controls relevant to audit objectives.
- *Internal Commission Collaboration* – Conferred with other Commission staff on compliance issues to ensure audit findings were consistent with Commission precedent and policy.

Accounting, Recordkeeping, and Financial Reporting

To evaluate FirstEnergy's and its subsidiaries' compliance with accounting, recordkeeping, and financial reporting requirements of the FERC Form Nos. 1 and 60, audit staff reviewed the following:

- *Application of USofA* – Analyzed the companies' interpretations and applications of select accounts for consistency with Commission accounting instructions. For example, reviewed balances in regulatory asset and liability accounts to assess whether the companies had the proper regulatory basis to record each item in these accounts and amortized these costs to the proper expense accounts and accounting periods as required. Analyzed costs recorded in operating accounts that have historically been found during Commission audits to be misclassified, such as lobbying expenses. Also, sampled 900 series accounts to determine whether the companies recorded salaries, office supplies, outside services, and other administrative and general expenses in a manner consistent with Commission accounting instructions.
- *Associate Company Transactions* – Reviewed corporate and associate company transactions to assess whether FirstEnergy's subsidiaries recorded revenues and costs for goods and services received and provided at the appropriate price and in the correct accounts, taking into consideration cross-subsidization restrictions and the nature of the transactions. As part of this review, audit staff evaluated policies, procedures, and practices relating to the sale of non-power goods and services to understand (1) the types of services provided by and between FirstEnergy subsidiaries, (2) the contract terms for the pricing of the non-power goods and services provided, and (3) invoice, work order, and other price and cost support documentation. Further, audit staff interviewed FESC accounting staff; reviewed transactions reported in FERC Form Nos. 1 and 60; tested a sample of FESC charges for non-power goods and services; and assessed billings by and between associate companies to verify proper classification of the amounts and compliance with the "at cost" standard.²⁵
- *Reconciliation of Reported Information* – Reconciled a sample of information reported in the FERC Form No. 1 at page 429 to information reported in

²⁵ 18 C.F.R. § 35.44(b)(3) (2021) provides that a franchised public utility that has captive customers, or that owns or provides transmission service over jurisdictional transmission facilities, may only purchase or receive non-power goods and services from a centralized service company at cost.

FESC's FERC Form No. 60 to determine whether information was reported accurately and consistently. Also, evaluated compliance with the USofA for the information under review, including related guidance, accounting releases, and Commission orders.

- *Reporting Processes and Procedures* – Evaluated the FERC Form Nos. 1 and 60 reporting processes and procedures to determine whether there was accurate, complete and timely reporting consistent with Commission reporting requirements and the instructions of the forms.
- *Annual FERC Filings* – Reviewed the FERC Form Nos. 1 and 60, including related notes to the financial statements, to identify major accounting matters. Highlighted significant notes to understand financial statement and cost allocation implications and identified underlying accounting entries for these matters.
- *Variance Analysis* – Performed variance analyses of a sample of balance sheet and income statement accounts reported in 2013-2017 FERC Form No. 60 filings. Analyzed unusual variances to understand their basis and identify potential accounting and reporting concerns.
- *Audit Sampling* – Evaluated various account balances that were reported as associate company transaction charges for compliance with relevant accounting and cost charging requirements.
- *Accounting Processes and Procedures* – Reviewed FirstEnergy's subsidiaries' accounting and financial reporting processes, procedures, and internal controls for compliance with the Commission's regulations. Specifically, reviewed reporting controls, procedures, and practices to test the accuracy and completeness of the reported account data, and interviewed employees that worked directly on daily reporting and with management responsibility for ensuring that costs were charged in accordance with the requirements of the USofA under 18 C.F.R. Parts 101 and 367.
- *Capitalization of Administrative and General Costs* – Evaluated the methods used to allocate overhead labor and labor-related costs to the cost of construction projects. Audit procedures were performed to determine whether the overhead costs charged to Account 107, Construction Work in Progress, had a definite relation to construction. The audit procedures included, among other things, interviews of a randomized sample of FirstEnergy's and its subsidiaries' employees whose labor costs were allocated to construction projects during the audit period and a review of a sample of timesheets

- associated with the employees. Audit staff covered the following topics during its interviews: (i) responsibilities and day-to-day duties of each employee; (ii) associate companies that FESC's employees performed work on behalf of; (iii) the organizational structure and function of employees' business units; (iv) work performed by employees related to construction, and the estimated amount of time spent on construction-related activities; (v) availability of documentation to support time spent engaged on construction-related activities, such as calendar appointments or work products; (vi) policies, processes, and procedures related to the submission and approval of employees' timesheets, including the specific code(s) each employee used to charge time and any guidance received on how to charge time; (vii) employee awareness of methods used to allocate a portion of labor costs to construction projects; and (viii) internal communications about decisions on the allocation methods used to charge overhead costs to construction projects.
- *Capital Project Life Cycle* – Reviewed accounting and cost tracking procedures used during capital projects' life cycles. This included an assessment of procurement methods, cost allocator selections, confirmation of billings to companies, and accounting system work orders generated.
 - *Allowance for Funds Used During Construction (AFUDC)* – Reviewed the procedures that FirstEnergy's subsidiaries followed to calculate individual components of the AFUDC rates reported in their FERC Form No. 1 filings, including balances and cost rates for short-term debt, long-term debt, common stock, preferred stock, and CWIP. Verified the actual values of balances and cost rates for short-term debt, long-term debt, common stock, preferred stock, and CWIP to determine whether the AFUDC rates calculated were consistent with Commission accounting requirements. Identified major projects placed in service during the audit period and analyzed whether AFUDC accrual ceased when the projects were placed in service.
 - *External Accountants' Working Papers* – Reviewed FirstEnergy's external accountants' working papers to better understand certain accounting practices, and to identify accounting practice changes and material or unusual transactions.
 - *Chart of Accounts* – Reviewed each of FirstEnergy's subsidiaries' chart of accounts to determine whether the conversion from internal accounts to the Commission's USofA resulted in proper mapping of costs to specific balance sheet and income statement accounts.

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- *Cost Allocation* – Reviewed cost allocation methods and tested supporting details by recalculating a sample of allocation percentages used. Also, analyzed a sample of billings from FESC to associate companies and related accounting to test compliance with established cost allocation methods reported in FESC’s FERC Form No. 60 filings.
- *Preservation of Records* – Reviewed the retention schedules that were included in the record retention program. Interviewed employees responsible for record retention to understand processes, procedures, and controls for administration and maintenance of records. Sampled selected records to ascertain whether their retention period aligned with the Commission’s preservation of records regulations, and whether any records prematurely destroyed or lost were reported to the Commission.

IV. Findings and Recommendations

1. Allocation of Overhead Costs to CWIP

FirstEnergy's subsidiaries capitalized overhead costs to Account 107, Construction Work in Progress-Electric, using an allocation method that was not based on actual time employees were engaged in construction activities based on timecard reports or on a representative time study. This may have led to FirstEnergy's subsidiaries capitalizing costs to Account 107 that did not have a definite relationship to construction. As a result, the companies may have overstated construction costs recorded in Account 107 and electric plant in service, as well as accumulated depreciation, depreciation expenses, and ADIT balances, and understated operating expenses. Moreover, accumulated overstatement of electric plant in service and the related depreciation due to this accounting practice during and prior to the audit period may have resulted in the FirstEnergy subsidiaries, with wholesale transmission formula rate service cost recovery mechanisms, overstating their respective wholesale annual transmission revenue requirements and overcharging wholesale transmission customers.²⁶

Pertinent Guidance

- 18 C.F.R. Part 101, General Instruction No. 2, Records, states in part:
 - A. Each utility shall keep its books of account, and all other books, records, and memoranda which support the entries in such books of account so as to be able to furnish readily full information as to any item included in any account. Each entry shall be supported by such detailed information as will permit ready identification, analysis, and verification of all facts relevant thereto.
 - B. The books and records referred to herein include not only accounting records in a limited technical sense, but all other records, such as minute books, stock books, reports, correspondence, memoranda, etc., which

²⁶ The FirstEnergy subsidiaries with wholesale transmission formula rate mechanisms during the audit period were: The Cleveland Electric Illuminating Company, Metropolitan Edison Company, Ohio Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, The Toledo Edison Company, ATSI, MAIT, TrAILCo, and JCP&L. During the audit period, JCP&L transferred from a stated rate to a wholesale transmission formula rate mechanism effective January 1, 2020. *See Jersey Central Power & Light Co.*, 169 FERC ¶ 61,205 (2019).

may be useful in developing the history of or facts regarding any transaction.

C. No utility shall destroy any such books or records unless the destruction thereof is permitted by rules and regulations of the Commission.

- 18 C.F.R. Part 101, General Instruction No. 9, Distribution of Pay and Expenses of Employees, states:

The charges to electric plant, operating expense and other accounts for services and expenses of employees engaged in activities chargeable to various accounts, such as construction, maintenance, and operations, shall be based upon the actual time engaged in the respective classes of work, or in case that method is impracticable, upon the basis of a study of the time actually engaged during a representative period.

- 18 C.F.R. Part 101, Electric Plant Instruction No. 4, Overhead Construction Costs, states in part:

B. As far as practicable, the determination of payroll charges includible in construction overheads shall be based on timecard distributions thereof. Where this procedure is impractical, special studies shall be made periodically of the time of supervisory employees devoted to construction activities to the end that only such overhead costs as have a definite relation to construction shall be capitalized. The addition to direct construction costs of arbitrary percentages or amounts to cover assumed overhead costs is not permitted.

- 18 C.F.R. Part 101, Account 922, Administrative Expenses Transferred – Credit, states:

This account shall be credited with administrative expenses recorded in accounts 920 and 921 which are transferred to construction costs or to nonutility accounts. (See electric plant instruction 4.)

Background

FESC employed shared services personnel that performed legal, finance, accounting, information technology, human resources, utility and non-utility operations, and other functions on behalf of FirstEnergy and its subsidiaries. Pursuant to multiple service agreements by and between FESC and the companies, labor and related costs of FESC employees were directly charged by FESC to the specific company that benefitted from a service provided, or when multiple companies benefitted from a service provided, FESC charged the cost of the service to the multiple benefitting companies using a cost allocation procedure. Audit staff evaluated the FirstEnergy subsidiaries' accounting for administrative and general (A&G) expenses directly incurred by the companies and those incurred on their behalf for services provided and charged by FESC through direct and allocated charges. The evaluation included an assessment of labor, related A&G, and other costs that were accounted for as capitalized overhead construction cost on the FirstEnergy subsidiaries' books. Labor, related A&G, and other costs capitalized included employees' base salaries, overtime wages, pension and other benefit expense, payroll taxes, annual incentive plan payments, employee expenses, materials and supplies, outside contractor costs, advertising expenses, donations, dues and subscription costs, lease/rental payments, and insurance expenses.²⁷

During the evaluation, audit staff: (1) analyzed methods used by the companies to determine the pool of capitalizable costs, which included overhead labor and related A&G costs that were directly incurred by the FirstEnergy subsidiaries and those charged to the companies by FESC; (2) examined the development and application of overhead capitalization rates used to allocate costs in the overhead cost pool to construction projects; (3) assessed the accounting used to charge costs in the overhead cost pool to construction projects; and (4) interviewed FESC staff and an employee of FES, who transferred from FESC, about labor and related A&G costs included in the overhead cost pool. Audit staff discovered that many employees were not aware of FirstEnergy's corporate time reporting guidelines or were coached when hired but did not receive formal training on time reporting.

Audit staff found that all A&G costs incurred by FESC that were not directly charged to specific FirstEnergy subsidiaries were included in the overhead cost pool. These residual expense amounts, i.e., indirect costs, were charged to the FirstEnergy subsidiaries based on various cost allocation methodologies that were applied to each FESC business department. The FirstEnergy subsidiaries then applied calculated capitalization rates to the allocated cost and accounted for a portion of the cost as CWIP in Account 107. Additionally, the FirstEnergy subsidiaries applied the calculated

²⁷ FirstEnergy subsidiaries' A&G capitalization included other costs such as lobbying expenses and donations which were improperly classified as A&G expenses.

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capitalization rates to their directly incurred A&G expenses and similarly accounted for a portion of the cost as construction related in Account 107.

To assess the applicability, relevance and accuracy of the capitalization rates used to determine cost capitalized to the FirstEnergy subsidiaries' construction operations, audit staff evaluated the nature of the operations of the respective FESC business departments and interviewed a sample of employees in the departments to determine whether a nexus existed between activities performed by the employees and the FirstEnergy subsidiaries' construction operations. There were 90 FESC business departments that were represented as performing activities that supported the FirstEnergy subsidiaries' construction operations. These 90 business departments had a total of 553 employees. Audit staff interviewed a randomly selected, statistically representative sample of 80 employees, plus 11 additional employees, selected based on Audit staff's judgment, for a total of 91 interviews of employees that worked in the departments that had cost capitalized to construction projects. The selection resulted in a representative sample of employees from 56 of the 90 business departments.

Audit staff found that most of the employees interviewed performed work in business departments that did not support the capitalization rates used to charge labor and related cost to the FirstEnergy subsidiaries' construction operations. Instead, these business departments and the employees working therein performed activities that supported transmission, generation and/or distribution operations, as applicable, on FirstEnergy's existing in-service infrastructure or provided less construction support than represented by the capitalization rate applied. First, there were employees with labor and related costs capitalized to CWIP who did not support construction operation, and instead only supported the existing in-service infrastructure doing work such as information technology and physical security, analyzing plant operations, internal controls and risk assessment, and customer service.

Second, there were employees that spent less of their time supporting the FirstEnergy subsidiaries' construction operations than represented by the capitalization rates used to charge their time to the performance of construction related activities. For example, audit staff found that some employees spent five percent or less of their time performing work that supported the FirstEnergy subsidiaries' construction operations, but had more than 90 percent of their labor and related costs capitalized as a cost of construction. Consequently, the calculated capitalization rates applied to the A&G cost allocated to and directly incurred by the FirstEnergy subsidiaries were not determined with consideration of whether the activities of the employees involved or supported construction operations. As such, the capitalization rates used were not applicable or relevant to the FirstEnergy subsidiaries' construction operations.

Although the interviews revealed that the employees in the FESC business departments either: (1) spent no time supporting the FirstEnergy subsidiaries' construction operations; or (2) spent a lower percentage of their time supporting construction operations than represented by the capitalization rates, audit staff found that these employees had a significant portion of their labor and related costs charged to CWIP in Account 107. However, in accordance with the accounting requirements of Electric Plant Instruction No. 4, Overhead Construction Costs, and General Instruction No. 9, Distribution of Pay and Expenses of Employees, labor costs capitalized to plant must have a definite relation to construction, and must be based on time card distributions or be allocated based on a study of the time actually engaged in construction related activities during a representative period. FirstEnergy acknowledged that there was not a representative labor-time study performed. Further, some interviewed employees admitted to not receiving formal training on time reporting, thus there was a lack of awareness about the time reporting guidelines. Consequently, since the labor and related costs charged to construction were neither based on the time that employees actually engaged in construction activities nor on a representative time study of such engagement, the charged costs did not have a definite relation to construction.

Upon finding that the method used to determine overhead labor and related A&G costs capitalizable to construction was not consistent with Commission accounting requirements, audit procedures were performed to evaluate the accuracy of the capitalization rates used and to develop an estimate of the amount of costs appropriately capitalizable to construction. Audit staff found that the FirstEnergy companies historically developed overhead capitalization rate formulas that were used to determine the amount of A&G costs charged to construction projects. The overhead capitalization rate formula used by FirstEnergy's FPU's during the audit period was comprised of a ratio of total direct internal labor costs charged to FPU capital projects over total direct and indirect internal labor costs incurred by the FPU's. The formula used by FirstEnergy's Transmission Companies in 2016 and subsequent years was comprised of a ratio of total direct internal labor costs plus construction contractors' labor costs charged to the Transmission Companies capital projects over total direct and indirect internal labor costs plus construction contractors' labor costs incurred by the Transmission Companies. In 2015, the Transmission Companies' capitalization rate formula excluded construction contractors' labor costs from the ratio.

The capitalization practices resulted in the Transmission Companies using a capitalization rate of 56.7 percent in 2015 and 92 percent in 2016 and subsequent years, and the FPU's using a 56.7 percent capitalization rate in 2015 and subsequent years.²⁸

²⁸ The FPU's also capitalized a portion of customer service costs using varying capitalization rates for several business departments.

From 2015 through 2019, the First Energy subsidiaries capitalized \$575.5 million of overhead labor and related A&G costs to construction projects.²⁹ This total includes \$26.2 million of customer service costs that were capitalized. However, the customer service activities of which the costs were borne generally involved employee interaction with the public and customers with regard to the operation of FirstEnergy's existing in-service infrastructure. FirstEnergy acknowledged that it did not have evidence to support the customer service capitalization rates that were used. Consequently, the customer service activities lacked a definite relation to construction and thus the associated costs were not appropriately capitalizable as a cost of construction.³⁰

Based on an evaluation of the nature of the work performed by the FESC employees and a former FES employee interviewed that had overhead labor and related A&G costs charged to construction, audit staff developed an estimate of the average percentage of time employees throughout the corporation spent engaged in activities that supported construction operations. Audit staff estimated, based on the sampling and interviews it conducted, that the average of all administrative and general employees' time spent performing activities that supported construction operations was significantly below the A&G capitalization rates used by FirstEnergy's subsidiaries.³¹

During discussions with FESC employees with oversight responsibility for capitalization of A&G costs, the employees stated a belief that FESC's primary activities involved support of the FirstEnergy subsidiaries' construction operations. This belief, while not supported by the actual activities performed by a majority of FESC's staff who primarily supported operation of FirstEnergy's existing in service infrastructure, may have been factored into decisions that resulted in the use of inaccurate capitalization rates, which led to inappropriate A&G costs capitalized to CWIP in Account 107 and eventually plant in service. Moreover, audit staff discovered that FirstEnergy implemented an annual procedure to review the accuracy of the capitalization rates used and the company found on several occasions that the rates used could have been lower. Despite the findings of these reviews, FirstEnergy decided against lowering the capitalization rates or adjusting plant balances in response to the results of the reviews due, FirstEnergy asserts, to a lack of materiality.

²⁹ The FirstEnergy subsidiaries continued the capitalization practices in 2020 and 2021 adding additional amounts of A&G expenses to capital construction projects.

³⁰ See 18 C.F.R. Part 101, Electric Plant Instruction No. 4 (2021).

³¹ This average was derived from a random sample taken from all administrative and general employees, including those who spent no time, as well as those who spent some time, performing construction related activities.

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The FirstEnergy subsidiaries' improper capitalization practices impacted plant balances in Account 107 and electric plant in service, as well as accumulated depreciation, depreciation expenses, and ADIT balances, and understated certain operating expenses. Amounts recorded in these accounts were included in the determination of service rates of FirstEnergy subsidiaries with wholesale transmission formula rates. The accumulated impact of excess A&G capitalized during the audit period and prior years on electric plant in service that was included in rate determinations and resulting excess depreciation expense may have led the companies to overcharge wholesale transmission customers subject to the rates.

Finally, audit staff found that FirstEnergy's subsidiaries did not use Account 922, Administrative Expenses Transferred – Credit, as required, after 2015. The Commission's regulations require administrative expenses recorded in Accounts 920, Administrative and General Salaries, and 921, Office Supplies and Expenses, that are transferred to construction costs or to nonutility accounts be credited to Account 922. The companies' improper accounting impacted the uniformity and comparability of their capitalization activities to those reported by other utilities.

Recommendations

DAA recommends that FirstEnergy:

1. Retain an independent third-party entity, subject to approval by DAA, to conduct a representative labor time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The independent consultant should have expertise and experience independently performing time studies used in the determination of overhead capitalization rates of U.S. based utilities subject to the accounting requirements prescribed for public utilities and licensees or for natural gas companies under 18 C.F.R. Part 101 or Part 201, respectively. The time study should involve a representative sample of study participants (employees) that provides for extrapolation of the study results to the full population of FirstEnergy employees, and should include processes for application of the study results from the audit period to the issue date of this audit report, and processes for applying the capitalization rate(s) the study finds for 2021 back to the period January 1, 2015 through December 31, 2020, either with no change to the capitalization rates found in the study or with such modifications to the capitalization rate(s) the independent consultant finds reasonable and supported by evidence. The independent consultant should use its expertise and all relevant information available to it to make recommendations as to what the capitalization rate(s)

should be for prior years for each FirstEnergy subsidiary, should set forth the basis for its recommendations, and provide both the recommendations and the basis therefore to FirstEnergy and DAA. If there is no recommendation by the independent consultant for any year or other period between January 1, 2015 and December 31, 2020 for any specific capitalizable cost center, then FirstEnergy should base its capitalization rate and the amount to be capitalized for such year or period on the rates and costs of such specific cost centers for which FirstEnergy can provide to DAA reasonable evidence as to the time employees in such cost centers spent having a definite relation to construction, and exclude from consideration those cost centers for which FirstEnergy cannot provide such evidence, per, for example, 18 C.F.R. Part 101, General Instruction No. 2 and § 41.8.

The progress of the study should be reported within 120 days and the time study results provided to DAA for review and consideration within 180 days of the date of issuance of this audit report, and the developed allocation procedures should be submitted when complete, but no later than 60 days after completion of DAA's review of the labor time study. At a minimum, the developed allocation procedures should provide a method for overhead cost allocation and capitalization to construction based on actual timecard distributions or where this procedure is impractical, based on periodic time studies.

2. Revise written policies, practices, procedures, and controls governing the methods used to account for, track, report, and review overhead labor and related costs, and all other costs allocated to construction projects to be consistent with Commission accounting requirements. In addition, adopt procedures to retain formal documentation supporting the amount of overhead costs allocated to electric plant accounts.
3. Revise accounting processes and procedures to account for and report capitalized A&G amounts recorded in Accounts 920 and 921 using Account 922 consistent with Commission regulations.
4. Train relevant staff on the revised overhead allocation, control, and A&G accounting procedures and documentation, and provide periodic training in this area, as needed.
5. Train staff on the time reporting guidelines and establish a periodic training program in this area.
6. Within 30 days of the completion of Recommendation No. 1, submit an estimate to DAA, including the calculations and determinative components, of overhead

costs that would have been allocated to CWIP from 2015 through the present consistent with the requirements of Electric Plant Instruction No. 4 and General Instruction No. 9. The estimate should be based on a recalculation of 2015's and subsequent years' overhead costs allocated to construction with labor and related costs removed from the cost of plant that were not associated with construction activities based on the methodology developed in response to Recommendation No. 1.

7. With the response to Recommendation No. 6, submit proposed accounting entries to DAA that remove the overhead costs that were allocated to CWIP and electric plant in service from 2015 through the present that exceed the amount of costs that would have been allocated to the accounts based on the methodology developed in response to Recommendation No. 1. Also, provide proposed accounting entries to remove associated amounts from other accounts and balances affected by the inappropriately allocated cost such as the accumulated depreciation and ADIT accounts, and AFUDC balances capitalized into CWIP and electric plant in service. If the adjusting entries result in a significant impact to income for the current year, FirstEnergy subsidiaries may account for the transaction as a correction of a prior period error in Account 439, Adjustments to Retained Earnings. Such adjustments to retained earnings with the proposed accounting entries should be submitted to DAA.
8. Revise account balances for FirstEnergy subsidiaries' utility plant, accumulated depreciation, ADIT, and other account balances impacted by the inappropriate allocation of unsupported overhead costs after receiving DAA's approval of the proposed accounting entries submitted per Recommendation No. 7, and restate and footnote the balances reported in the next-filed FERC Form No. 1 reports of the FirstEnergy subsidiaries for both the current and comparative years presented in each subsidiary's next-filed report, as necessary to reflect and disclose the revisions.
9. Submit a refund analysis to DAA that explains and details the following: (1) calculation of refunds that result from correcting the overstatement of transmission plant due to the improperly capitalized labor costs, as determined by the labor time study, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.
10. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

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11. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

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2. Accounting for Vegetation Management Costs

The FirstEnergy FPU's improperly accounted for maintenance expenses incurred to remove vegetation surrounding in service distribution powerlines. Specifically, the FPU's inappropriately capitalized the cost to electric plant in service. This accounting practice caused the companies to overstate electric plant in service, accumulated depreciation, ADIT, depreciation expenses, and other account balances, and understate operating expenses incurred.

Pertinent Guidance

- 18 C.F.R. Part 101, Account 593, Maintenance of Overhead Lines (Major Only), states in part:

This account shall include the cost of labor, materials used and expenses incurred in the maintenance of overhead distribution line facilities, the book cost of which is includable in account 364, Poles, Towers and Fixtures, account 365, Overhead Conductors and Devices, and account 369, Services. . . .

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2. Work of the following character on overhead conductors and devices:

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k. Trimming trees and clearing brush.

Background

An audit report was issued on April 24, 2013, for an audit conducted of FirstEnergy subsidiary ATSI under Docket No. FA11-8-000 (the 2013 Audit).³² During the 2013 Audit, ATSI's policy for accounting for vegetation management expenses for the clearing of transmission and distribution corridors was assessed and found to be inconsistent with Commission accounting requirements. As a result of that audit, ATSI revised its policy so as to cease capitalizing vegetation management costs and to instead

³² *American Transmission Systems, Inc.*, Docket No. FA11-8-000 (Apr. 24, 2013) (delegated order).

account for the costs as maintenance expenses, consistent with Commission accounting requirements.

Audit staff evaluated ATSI's and the other FirstEnergy subsidiaries' policies for accounting for vegetation management expenses during the current audit and found that the FirstEnergy subsidiaries' policy for accounting for the vegetation management costs associated with the clearing of *transmission* corridors was consistent with Commission accounting requirements, but was not for the clearing of *distribution* corridors. Specifically, audit staff found that the FirstEnergy subsidiaries with distribution assets (i.e., the FPU's) capitalized maintenance costs incurred to remove vegetation surrounding in service distribution powerlines and were corrected and will be refunded to customers.

FirstEnergy acknowledged that, in response to the 2013 Audit of ATSI, the corporate-wide vegetation management accounting policy was changed for transmission corridors, but was not changed for distribution corridors. FirstEnergy reasoned that the results of the 2013 Audit were not applicable to vegetation management in distribution corridors because ATSI did not have distribution assets during the audit. However, although ATSI did not have distribution assets during the 2013 Audit (and had none during the current audit), the vegetation management accounting policy that was evaluated during the 2013 Audit applied to the clearing of transmission and *distribution* corridors. The 2013 Audit's report states that "ATSI provided audit staff with its vegetation management policy for accounting for the clearing of transmission and distribution corridors."³³ Consequently, the results of the audit were applicable to the vegetation management accounting policy for distribution, as well as transmission, corridors. Further, the same factors that make the vegetation management accounting policy applicable to transmission corridors logically also apply to distribution corridors. There is no reasonable basis to distinguish between transmission and distribution corridor vegetation management with respect to this subject.

In the 2013 Audit, it was determined that ATSI's capitalization of vegetation management expenses into in service plant was inappropriate because vegetation management activities performed after the initial clearing associated with construction of an asset do not result in a substantial addition to the corresponding in service transmission lines or system. The Commission has previously clarified that to qualify as a substantial addition, an item added to the cost of an in service asset must make the asset more useful, more efficient, of a greater durability, or of a greater capacity.³⁴ Vegetation

³³ *Id.* at 15.

³⁴ See, e.g., *National Fuel Gas Supply Corp.*, Docket No. AC98-11-000, at 1 (Jun. 17, 1998) (delegated order) (must be "a substantial betterment" the purpose of which "is

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management activities do not directly make distribution or transmission assets or systems more useful, more efficient, of a greater durability, or of a greater capacity. Consequently, vegetation management activities do not result in a substantial addition to in service distribution or transmission plant.

The FirstEnergy FPU's should have properly accounted for vegetation management activities performed in distribution corridors as maintenance expenses. Account 593, Maintenance of Overhead Lines (Major Only), provides for the accounting of costs to remove vegetation surrounding in service distribution powerlines. Since FirstEnergy only revised its vegetation management accounting policy for transmission corridors in response to the 2013 Audit, it continued improperly to account for vegetation management activities performed in distribution corridors, both prior to and during the current audit period. This led the FPU's to inflate distribution plant balances from 2013 through the audit period. This also impacted accumulated depreciation, ADIT, and other associated accounts, and resulted in the understatement of operating expenses prior to and during the audit period.

Consistency of accounting policies used for transmission and distribution plant is essential for accurate development of service rates, in particular where service rates are determined using a formula that includes a portion of certain costs in rate determinations based on a ratio of balances in accounts such as functional plant accounts. As such, FirstEnergy should be consistent in the determination and application of its accounting policy for vegetation management activities in distribution and transmission corridors.

Recommendations

DAA recommends that FirstEnergy:

12. Revise accounting policies and procedures for vegetation management activities in distribution corridors to be consistent with Commission accounting requirements.
13. Train relevant staff on the revised vegetation management accounting policy and procedures and provide periodic training.
14. Submit proposed accounting entries and supporting documentation to DAA that reflect the correction of the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by the capitalization of vegetation management expenses for the period from October 1, 2021 through the present within 60 days of issuance of this audit report.

to make property more useful, more efficient, of a greater durability, or of a greater capacity").

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15. Revise the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by over-accrual of AFUDC after receiving the DAA's approval of proposed accounting entries per Recommendation No. 14 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

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3. Accounting for Amortization of Regulatory Assets

FirstEnergy's subsidiaries deferred certain maintenance expenses, associated with costs incurred to remove vegetation in transmission corridors, and recorded the deferred expenses as regulatory assets in Account 182.3, Other Regulatory Assets, for Commission accounting and reporting purposes. Certain subsidiaries then improperly amortized \$3.8 million of the deferred costs as expenses in subsequent periods without obtaining Commission approval to recover these regulatory assets in rates. Moreover, two of the Transmission Companies, ATSI and TrAILCo, included these expenses representing amortization of the regulatory assets in their annual transmission revenue requirements calculated pursuant to their wholesale transmission formula rates without the required Commission approval to recover such regulatory assets. Also, certain FirstEnergy subsidiaries recovered overstated depreciation expense through transmission formula rates.

As a result of the above deficiencies, the Transmission Companies inappropriately included approximately \$2.7 million of regulatory asset amortization and depreciation expense in their annual transmission revenue requirements and overbilled their wholesale transmission customers by this amount.

Pertinent Guidance

- 18 C.F.R. Part 101, Account 182.3, Other Regulatory Assets, states in part:

A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (*See Definition No. 30.*)

B. The amounts included in this account are to be established by those charges which would have been included in net income, or accumulated other comprehensive income, determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services. When specific identification of the particular source of a regulatory asset cannot be made, such as in plant phase-ins, rate moderation plans, or rate levelization plans, account 407.4, regulatory credits, shall be credited. The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in rates, to the same account that would

have been charged if included in income when incurred, except all regulatory assets established through the use of account 407.4 shall be charged to account 407.3, regulatory debits, concurrent with the recovery in rates.

C. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.

Background

Pursuant to the 2013 Audit of ATSI, FirstEnergy revised its corporate-wide accounting policy for vegetation management expenses at transmission corridors to cease capitalizing the cost. During the compliance phase of the ATSI audit, the company informed the Commission that it would account for the costs of vegetation management activities as maintenance expenses consistent with Commission accounting requirements.³⁵ During the current audit, audit staff found that ATSI and the other FirstEnergy subsidiaries, as directed by the 2013 Audit report, had ceased the practice of capitalizing in plant accounts the vegetation management-related maintenance expenses incurred in transmission corridors for Commission accounting and reporting purposes, but had begun deferring the costs as regulatory assets. These entities continued to account for and report the cost in plant accounts for other non-Commission related purposes. Certain FirstEnergy subsidiaries sought and received approval from the Commission to recover a portion of the deferred costs through service rates charged, and certain of them did not.³⁶

In accordance with the instructions of Account 182.3, Other Regulatory Assets, expenses not includible in other accounts for recovery in current period, that probably

³⁵ The compliance phase of an audit commences after issuance of the audit report. During this phase, an audited entity submits information to audit staff that responds to the recommendations of the audit report that the entity will implement. This information includes discussion of activities that an audited entity has initiated as of the submittal or that it plans to initiate in a subsequent period to become compliant with Commission requirements and/or controls to help maintain compliance.

³⁶ See *Mid-Atlantic Interstate Transmission, LLC*, 158 FERC ¶ 62,185 (2017), *order on settlement*, 163 FERC ¶ 61,131 (2018) (MAIT received approval to include deferred vegetation management costs of \$4.18 million in wholesale transmission formula rate determinations); *Jersey Central Power & Light Co.*, 158 FERC ¶ 62,186

will be recovered in subsequent rates resulting from the ratemaking actions of regulatory agencies, may be deferred and accounted for as regulatory assets. To establish a regulatory asset, it must be probable that the Commission will permit the company to recover these costs in future rates. Further, amounts accounted for as regulatory assets are generally required to be amortized concurrent with recovery of the deferred expenses in rates and amounts for which recovery is disallowed must be charged to nonoperating expense accounts. Audit staff found that certain FirstEnergy subsidiaries improperly amortized the regulatory assets to Account 407.3, Regulatory Debits, without concurrent recovery in rates, and others amortized the cost to Account 403, Depreciation Expenses, and included the costs in rates without regulatory approval.³⁷ However, when expenses deferred as regulatory assets are appropriately amortized consistent with the instructions of Account 182.3, the cost must be amortized pursuant to, and concurrent with, authorized recovery in rates, and recorded in the same account that would have been charged if the costs were included in deriving the operating income when incurred.

Account 571, Maintenance of Overhead Lines, provides for the recording of the costs of vegetation management-related maintenance activities performed at transmission corridors when incurred. As such, the costs should be amortized to Account 571 after the companies receive regulatory approval for recovery. However, since the companies did not have approval for recovery, amortization of the costs was inappropriate, and the companies' use of Accounts 403 and 407.3 to account for the amortization of the regulatory assets was incorrect. In addition, certain of the subsidiaries that continued to account for and report the vegetation maintenance cost in plant accounts for non-Commission related purposes erroneously recorded depreciation of the cost to Account 403. Balances recorded in Account 403 were used to populate the Transmission Companies' wholesale transmission formula rates. Consequently, plant and regulatory

(2017), *order on settlement*, 162 FERC ¶ 61,140 (2018) (JCP&L was denied recovery of deferred vegetation management costs in wholesale transmission formula rate determinations); *American Transmission Systems, Inc.*, 171 FERC ¶ 61,273 (2020) (ATSI sought Commission approval to, among other things, recover regulatory assets related to deferred vegetation management costs. The Commission accepted the filing and set the matter for hearing and settlement judge procedures. The case is currently going through settlement procedures); *see Monongahela Power Co.*, 173 FERC ¶ 61,290 (2020), *reh'g denied by operation of law*, 174 FERC ¶ 62,136 (2021) (The Potomac Edison Company and West Penn Power Company sought Commission approval to, among other things, recover regulatory assets related to deferred vegetation management costs. The Commission accepted the filing and set the matter for hearing and settlement judge procedures. The case is currently going through settlement procedures).

³⁷ The Potomac Edison Company and West Penn Power Company amortized the regulatory assets to Account 407.3, and the Transmission Companies amortized the regulatory assets to Account 403.

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asset amounts improperly depreciated and amortized, respectively, to Account 403 were included in the Transmission Companies' wholesale transmission rates, which led to their customers being charged for unapproved amounts of approximately \$2.7 million. If rate recovery is disallowed, regulatory assets should be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance instead of annual amortization to other accounts.

Recommendations

DAA recommends that FirstEnergy:

16. Revise policies, practices, and procedures to amortize or write off the regulatory assets consistent with Commission accounting requirements.
17. Train relevant staff on the revised methods, and provide periodic training in this area, as needed.
18. Submit a refund analysis, within 60 days of issuance of this audit report, to DAA for review that explains and details the following: (1) calculation of refunds that result from the correction of ATSI's and TrAILCo's improper and unauthorized, respective, depreciation and amortization of plant and regulatory assets to the depreciation expense account and inclusion of the expenses in service rate determinations, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.
19. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
20. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

4. Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation

FESC improperly accounted for and improperly reported lobbying expenses, donations, and other costs that lacked proper supporting documentation or were misclassified (unsupported costs). Moreover, FESC allocated and charged the improperly accounted for lobbying, donation, and unsupported costs to FirstEnergy and its subsidiaries. This led the FirstEnergy subsidiaries to improperly account for and report the lobbying expenses, donations, and unsupported costs in their respective books and records, and FERC Form No. 1. The errors resulted in the Transmission Companies including the lobbying expenses, donations, and unsupported costs in their annual wholesale transmission revenue requirements and billing rates, and overbilling wholesale transmission customers.

Pertinent Guidance

- 18 C.F.R. § 367.3, Records, states in part:
 - (a) Each service company must keep its books of account, and all other books, records, and memoranda that support the entries in the books of account, so as to be able to furnish full information on any item included in any account. Each entry must be supported by sufficient detailed information that will permit ready identification, analysis, and verification of all facts relevant and related to the records.
 - (b) The books and records referred to in this part include not only accounting records in a limited technical sense, but all other records, such as minutes books, stock books, reports, correspondence, and memoranda, that may be useful in developing the history of or facts regarding any transaction.
- 18 C.F.R. § 367.14, Transactions with associate companies, states:

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

nature. Nothing contained in this part, however, must be construed as restraining the service company from subdividing accounts for the purpose of recording separately transactions with associate companies.

- 18 C.F.R. § 367.4261, Account 426.1, Donations, states:

This account shall include all payments or donations for charitable, social or community welfare purposes.

- 18 C.F.R. § 367.4264, Account 426.4, Expenditures for Certain Civic, Political and Related Activities, states in part:

(a) This account must include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials.

- 18 C.F.R. Part 101, General Instructions, E states:

All amounts included in the accounts prescribed herein for electric plant and operating expenses shall be just and reasonable and any payments or accruals by the utility in excess of just and reasonable charges shall be included in account 426.5, Other Deductions.

Background

In the fall of 2020, FirstEnergy acknowledged the existence of the DOJ initiated investigation into its activities.³⁸ The investigation assessed FirstEnergy's activities involving payment of over \$61 million from FirstEnergy to 501(c)(4) entities and others, that allegedly were made to influence public opinion, state legislation, and a state ballot initiative using means employed by a 501(c)(4) entity and other individuals that the

³⁸ See FirstEnergy statement accessed Oct. 30, 2020, <https://www.prnewswire.com/news-releases/firstenergy-corp-statement-on-hb-6-investigation-301097421.html>.

federal government has alleged to be unlawful.³⁹ Audit staff interviews of FESC employees, reviews of internal emails and messages, and Attachment A – Statement of Facts included in DPA and agreed to by FirstEnergy indicate the existence of significant shortcomings in FirstEnergy and its subsidiaries’ internal controls over financial reporting, including controls over accounting for expenses relating to civic, political, and related activities, such as lobbying activities performed by and on behalf of FirstEnergy and its subsidiaries. Even more concerning, several factual assertions agreed to by FirstEnergy in DPA and the remedies FirstEnergy agreed to undertake, point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates.

FESC performed lobbying activities during the audit period that it represented were intended to influence public opinion and federal and state legislatures. One of its lobbying initiatives involved garnering legislative support for FirstEnergy’s former subsidiaries, FES and FENOC, which owned fossil fuel and nuclear power generation assets that operated in competitive markets. Audit staff evaluated costs incurred associated with this initiative and with others undertaken by FESC – i.e., costs which were associated with civic, political, and related activities incurred during the audit period. Audit staff reviewed and analyzed accounting detail records, invoices, engagement letters, press articles, advertisement contracts, and advertisements on social media platforms, and interviewed internal lobbyists, in order to understand the nature and extent of the lobbying activities.⁴⁰

External Lobbyist Expenses

During its review, Audit staff discovered, based on responses provided to data requests, that FESC improperly recorded approximately \$10.9 million of lobbying costs in utility operating expense accounts, rather than in Account 426.4, Expenditures for Certain Civic, Political and Related Activities, as required by the Commission’s accounting regulations. Account 426.4 provides for the reporting of expenditures made

³⁹ See Affidavit in Support of Criminal Complaint, *United States v. Larry Householder, et al.*, Case No. 1:20-MJ-00526 (July 17, 2020) (Affidavit in Support of Criminal Complaint).

⁴⁰ Audit staff conducted this audit to test compliance with the Commission’s accounting requirements in the areas within the audit’s objectives and scope. This audit report does not incorporate, and has no bearing on, the DOJ investigation and criminal complaint proceeding, or other ongoing federal and state agency-directed investigations of FirstEnergy’s or its affiliated companies’ activities.

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for the purpose of influencing public opinion, such as lobbying expenses. FESC incorrectly accounted for amounts paid to outside firms that lobbied on behalf of FirstEnergy and its subsidiaries in Account 923, Outside Services Employed, and Account 568, Maintenance Supervision and Engineering (Major Only), as follows:

Lobbying Expenses	2015	2016	2017	2018	Jan to June 2019	Total
Account No. 923	1,880,798	1,865,456	2,875,150	2,914,619	881,004	10,417,027
Account No. 568	-	181,477	304,000	-	-	485,477
Total Operating Accounts	1,880,798	2,046,933	3,179,150	2,914,619	881,004	10,902,504

Audit staff determined that, out of the approximately \$10.9 million of lobbying expenses initially disclosed, about \$760,000 was charged to the FPU's and the Transmission Companies. The FPU's and the Transmission Companies properly reclassified and accounted for \$341,000 of these lobbying costs in Account 426.4, but the balance – approximately \$419,000 – remained in the utility operating expense accounts. FirstEnergy represented that the improper accounting for these external lobbying expenses resulted in approximately \$58,000 of overbillings to the Transmission Companies' wholesale transmission formula rate customers.

Following audit staff's initial review of FirstEnergy's responses described above, in July 2020 the DOJ filed the criminal complaint described in greater detail in Section II, which alleged that funds received from FirstEnergy had been used for lobbying purposes. FirstEnergy informed audit staff on November 12, 2020 that its own internal investigation determined that data request responses previously provided to audit staff regarding lobbying expenses were incomplete, and FirstEnergy provided several supplemental data response updates. These supplemental data responses and audit staff's analysis of them and of other publicly available information revealed that there were additional amounts of improperly reported lobbying expenses, donations, and other costs incurred by FirstEnergy and its current and former subsidiaries. In accordance with 18 C.F.R. Sections 367.3 and 367.14, each service company must maintain books of account, and all other books, records, and memoranda that support the entries in the books of account and keep its accounts and records so as to be able to furnish accurately and expeditiously statements of all transactions with associate companies. The statements may be required to show the general nature of the transactions, the amounts involved in the transactions and the amounts included in each account prescribed in this part with respect to such transactions. FirstEnergy represented to audit staff that several

payments identified in its supplemental data responses lacked sufficient supporting documentation, the background of which is provided in greater detail in Section II:

Payments to Section 501(c)(4) Entities and to Hardworking Ohioans, Inc.: FirstEnergy made payments of approximately \$70.9 million to various 501(c)(4) entities and to Hardworking Ohioans, Inc. for lobbying or other nonoperating purposes, or that were not sufficiently supported. Of this total, \$44.4 million was recorded in the accounts of FirstEnergy's former generation subsidiaries and \$25 million was recorded in the accounts of FirstEnergy Corporation, which were not reviewed by the audit staff. Out of the \$1.5 million that FirstEnergy identified as being charged to the FPU's and the Transmission Companies, \$ 0.65 million was improperly recorded as General and Administrative costs, while around \$0.85 million was improperly recorded as the cost of electric plant in service. FirstEnergy's improper capitalization of General and Administrative costs is discussed in Finding No. 1, Allocation of Overhead Costs to CWIP.

Payments to Sustainability Funding Alliance of Ohio, Inc. and IEU-Ohio Administration, LLC: From 2010 to early 2019, FirstEnergy made payments to Sustainability Funding Alliance of Ohio, Inc., and IEU-Ohio Administration Company, LLC, two small entities associated with a former Chairman of the PUCO, totaling \$22.8 million.⁴¹ FESC allocated around \$11.9 million of the total payments to FirstEnergy's FPU's and Transmission Companies as General and Administrative costs, of which \$6.7 million was recorded as electric plant in service and the balance of around \$5.2 million as General and Administrative costs, which were used in customer rate development for certain of those regulated entities. An additional amount of \$9 million, which was paid in part to Sustainability Funding Alliance of Ohio, Inc. under a different vendor number, and in part to IEU-Ohio Administration Company, LLC, was allocated to the FirstEnergy FPU's located in Ohio. FirstEnergy acknowledged that it did not have sufficient supporting documentation and detailed information, as required by 18 C.F.R Section 367.3, to support the total of around \$22.8 million in payments made to Sustainability Funding Alliance of Ohio, Inc. and IEU-Ohio Administration Company, LLC, and the allocation of approximately \$20.9 million of these amounts to the FPU's and Transmission Companies, and around \$1.9 million to its former generation subsidiaries. FirstEnergy has estimated that around \$185,000 in customer refunds are due, stemming

⁴¹ As provided in the DPA between FirstEnergy and the United States Attorney's Office for the Southern District of Ohio, the former PUCO Chairman was identified as Public Official B in the DOJ's criminal complaint, wherein he was alleged by the DOJ to have operated in an official capacity as the PUCO Chairman to assist the passage of legislation and regulatory orders that benefited FirstEnergy in return for these monetary payments. See *United States v. FirstEnergy Corp.*, Case No. 1:21-CR-00086-TSB (S.D. Ohio), Deferred Prosecution Agreement (filed Jul. 22, 2021).

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from the \$20.9 million allocated to the FPU's and Transmission Companies. FirstEnergy identified certain of these transactions were either improperly classified, misallocated to certain of the FPU's and Transmission Companies, or lacked proper supporting documentation and resulted in amounts collected from customers. FirstEnergy represented that it would make the refunds and has already made the necessary accounting entries to correct this issue and prevent the expenses from impacting future rates.

Payments to Sixteen Entities Associated With One Person: In coordination with its filing of SEC Form 10-K for the year ended December 31, 2020, FirstEnergy revealed to audit staff in February 2021 that FirstEnergy was investigating payments totaling approximately \$28.8 million made between 2003 and 2020 to sixteen entities associated with one individual. FESC allocated around \$19.7 million of these payments to FirstEnergy's FPU's, \$1.1 million to the Transmission Companies, \$2.2 million to former generation subsidiaries, and \$5.8 million to FirstEnergy and other nonregulated subsidiaries. FirstEnergy identified certain of these transactions were either improperly classified, misallocated to certain of the FPU's and Transmission Companies, or lacked proper supporting documentation and resulted in amounts collected from customers. FirstEnergy has estimated that around \$9.6 million in customer refunds are due, stemming from the \$20.8 million allocated to the FPU's and Transmission Companies. FirstEnergy represented that it would make the refunds and has already made the necessary accounting entries to correct this issue and prevent the expenses from impacting future rates.

As described above and in Section II, audit staff has confirmed with FirstEnergy the existence of several ongoing investigations by external entities into FirstEnergy's affairs. These include investigations by the SEC, the U.S. Internal Revenue Service, the PUCO, and the Ohio Attorney General. In addition, FirstEnergy continues to conduct internal investigations and examinations of various matters. FirstEnergy has committed that, in the event that final, conclusive results of one or more of the investigations calls into question the propriety of its past accounting and/or rate determination decisions and customer charges, it will provide notice to the Commission and initiate actions to attain compliance with Commission accounting requirements and make refunds to customers, as appropriate.

Internal Lobbyists' Expenses

Audit staff interviewed FESC employees who were classified as registered lobbyists in its Governmental Affairs Department that engaged in lobbying activities on behalf of FirstEnergy and its subsidiaries. Based on interviews pertaining to activities performed by the employees and reviews of their time cards and associated accounting for their labor, audit staff determined that FESC did not record the portion of the costs of

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labor in its Governmental Affairs Department that was associated with the performance of lobbying activities in Account 426.4, as required by the Commission's accounting regulations. As a result, FESC charged the improperly accounted for costs to FirstEnergy and its subsidiaries. The costs were included in the Transmission Companies' annual wholesale transmission revenue requirements and charged to their customers.

Further, audit staff found that FESC lacked formal procedures and oversight controls to help ensure that lobbying costs were accounted for appropriately. FESC should have had adequate controls in place to prevent such accounting errors. Also, audit staff is concerned about FESC's lack of adherence to its prevailing internal controls and procedures.

Recommendations

DAA recommends that FirstEnergy:

21. Critically review and strengthen internal controls in FirstEnergy and its subsidiaries. Establish and implement procedures governing methods to be used to appropriately identify, account for, track, report, and review all lobbying costs, donations, and any unsupported expenses, including, but not limited to, expenses of external lobbyists, monies paid to external corporate entities to be used for lobbying, and other external lobbying costs and internal lobbying costs, including employee lobbying time and other internal lobbying costs.
22. Train relevant staff on the internal control enhancements and procedures established, including internal controls over vendor creation in the accounts payable system, payments, accounting, and reporting violations; and provide periodic training in this area, as needed.
23. Perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities, including payments of FirstEnergy funds to outside entities for purposes of those entities using those funds for lobbying, and provide support to identify lobbying-related expenses improperly charged to utility operating accounts, for the audit period and, with respect to the specific issues discussed in this finding, for the entire period affected by or relevant to each such specific issue. Within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each internal or external investigation discussed in the finding or any new internal or external investigation, provide the results of the investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, proposed correcting journal entries,

and FirstEnergy's analysis of the findings from each investigation and the related impact on prior and future accounting and rate development to audit staff.

24. Submit a refund analysis, within 60 days of issuance of this audit report and on a rolling basis within 60 days of conclusion of each investigation discussed in the finding or any new investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from correcting the improper accounting for external lobbying costs, donations, and unsupported costs in utility operating and plant accounts; and lobbying costs as identified pursuant to the analysis performed in response to Recommendation No. 23, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.
25. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.
26. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

5. Allowance for Funds Used During Construction

FirstEnergy's FPU's improperly included undistributed subsidiary earnings and accumulated other comprehensive income in equity balances used for the purpose of computing AFUDC rates. As a result, the companies over-accrued AFUDC during the audit period, which led them to overstate CWIP and plant-in-service balances.

Pertinent Guidance

- 18 C.F.R. Part 101, Electric Plant Instruction No. 3(A)(17) states, in part:

(a) The formula and elements for the computation of the allowance for funds used during construction shall be:

$$A_i = s(S/W) + d(D/D + P + C)(1 - S/W)$$

$$A_e = [1 - S/W][p(P/D + P + C) + c(C/D + P + C)]$$

A_i = Gross allowance for borrowed funds used during construction rate.

A_e = Allowance for other funds used during construction rate.

S = Average short-term debt.

S = Short-term debt interest rate.

D = Long-term debt.

D = Long-term debt interest rate.

P = Preferred stock.

P = Preferred stock cost rate.

C = Common equity.

C = Common equity cost rate.

W = Average balance in construction work in progress plus nuclear fuel in process of refinement, conversion, enrichment and fabrication, less asset retirement costs (See General Instruction 25) related to plant under construction.

(b) The rates shall be determined annually. The balances for long-term debt, preferred stock and common equity shall be the actual book balances as of the end of the prior year. The cost rates for long-term debt and preferred stock shall be the weighted average cost determined in the manner indicated in § 35.13 of the Commission's Regulations [u]nder the Federal Power Act. The cost rate for common equity shall be the rate granted common equity in the last rate proceeding before the ratemaking body having primary rate jurisdiction[.]. If such cost rate is not available, the average rate actually earned during the preceding three years shall be used. The short-term debt balances and related cost and the average balance for construction work in progress plus nuclear fuel in process of refinement, conversion,

enrichment, and fabrication shall be estimated for the current year with appropriate adjustments as actual data becomes available.⁴²

- Order No. 469, states in relevant part:

[I]t will continue to be the Commission's policy that the undistributed earnings of subsidiaries are to be excluded from the common stockholder's equity in determining rate of return.⁴³

- Order No. 627, the order establishing Account 219, Accumulated Other Comprehensive Income, states in relevant part:

70. One commenter recommended that the Commission state it will not incorporate derivative instruments, hedging activities, and other comprehensive income into its ratemaking process for utilities, because the value of these instruments are certain to change over time and the Commission would set rates incorrectly.

71. As stated in the NOPR, the proposed rule was not intended to prescribe the ratemaking treatment for items of other comprehensive income or for derivative instruments and hedging activities. The adoption of any particular rate treatment for these amounts is beyond the scope of this rulemaking. *The Commission will decide the appropriate treatment for these*

⁴² 18 C.F.R. Part 101, Electric Plant Instruction No. 3(17) (2021); see Amendments to Uniform System of Accounts for Public Utilities and Licensees and for Natural Gas Companies (Classes A, B, C and D) To Provide for the Determination of Rate for Computing the Allowance for Funds Used During Construction and Revisions of Certain Schedule Pages of FPC Reports, Order No. 561, 57 FPC 608 (Order No. 561), reh'g denied, Order No. 561-A, 59 FPC 1340 (1977) (Order No. 561-A), order on clarification, 2 FERC ¶ 61,050 (1978).

⁴³ Revisions in Uniform System of Accounts, and Annual Report Forms No. 1 and No. 2 to Adopt the Equity Method of Accounting for Long-Term Investments in Subsidiaries, Order No. 469, 49 FPC 326, at 327 (1973).

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*transactions on a case-by-case basis in individual rate proceedings.*⁴⁴

Background

AFUDC represents the financing cost of construction and consists of two components: Allowance for Borrowed Funds (debt) and Allowance for Other Funds (equity). Electric Plant Instruction (EPI) No. 3(A)(17) provides a uniform formula for calculating a utility's maximum permitted AFUDC rates. Audit staff reviewed the FirstEnergy subsidiaries' processes and policies for computing their respective AFUDC rates and the application of such rates to the cost of their construction projects. Through its review, audit staff identified deficiencies in the FirstEnergy FPU's method for calculating their respective AFUDC rates.

The FPUs improperly included balances recorded in Account 216.1, Undistributed Subsidiary Earnings, and Account 219, Accumulated Other Comprehensive Income, in deriving the equity component of the AFUDC rate calculation. The amounts in Account 216.1 represent retained earnings undistributed by the subsidiaries, and the amounts in the FPUs' Account 219 represent gains and losses which require appropriate rate treatment decision by the Commission on a case-by-case basis. Therefore, amounts in Accounts 216.1 and 219 were not available to the FPUs to be spent for any purposes, including to finance construction, and those amounts should not have been considered as funds available to the FPUs for construction in deriving the AFUDC rates.

As a result of improperly including amounts recorded in Accounts 216.1 and 219 in AFUDC rate calculations, the FPUs over-accrued AFUDC during the audit period. These amounts were capitalized as a component cost of construction and subsequently included in Account 106, Completed Construction not Classified-Electric, or Account 101, Electric Plant in Service.

Recommendations

DAA recommends that FirstEnergy:

27. Revise and implement the FPUs' processes and procedures to calculate their respective AFUDC rates consistent with EPI No. 3(A)(17) and other applicable Commission requirements. Revisions should include processes to prevent the inclusion of balances in Accounts 216.1 and 219 in the AFUDC rate calculations.

⁴⁴ Accounting and Reporting of Financial Instruments, Comprehensive Income, Derivatives and Hedging Activities, Order No. 627, 101 FERC ¶ 61,032, at PP 70-71 (2002) (emphasis added) (footnotes omitted).

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28. Train relevant staff on the revised AFUDC calculation method, and provide periodic training, as needed.

6. Service Company Billing Procedures

Billing information that FESC provided to FirstEnergy's subsidiaries pertaining to charges for services provided to them was insufficient. Specifically, FESC did not provide detailed information to reflect the services provided and showing the charges classified as direct costs, indirect costs, or compensation for use of capital, with the details of service company accounts by service provided, as required. As a result, the FirstEnergy subsidiaries misclassified costs charged by FESC.

Pertinent Guidance

- 18 C.F.R. § 367.27, General Instruction No. 27, Billing Procedures, states:

Charges for services to associate public-utility companies must be made monthly with sufficient information and in sufficient detail to permit such company, where applicable, to identify and classify the charge in terms of the system of accounts prescribed by the regulatory authorities to which it is subject. The information provided to associate public-utility companies must provide a summary of the accounts by service provided and showing the charges, classified as direct cost, indirect cost, and compensation for use of capital.

- 18 C.F.R. § 367.14, General Instruction No. 14, Transactions with Associated Companies, states:

Each service company must keep its accounts and records so as to be able to furnish accurately and expeditiously statements of all transactions with associate companies. The statements may be required to show the general nature of the transactions, the amounts involved in the transactions and the amounts included in each account prescribed in this part with respect to such transactions. Transactions with associate companies must be recorded in the appropriate accounts for transactions of the same nature. Nothing contained in this part, however, must be construed as restraining the service company from subdividing accounts for the purpose of recording separately transactions with associate companies.

- 18 C.F.R. § 367.9260, Account 926, Employee Pensions and Benefits, state in part:

- (a) This account must include pensions paid to, or on behalf of, retired employees, or accruals to provide for pensions, or payments for the purchase of annuities for this purpose, when the service company has definitely, by contract, committed itself to a pension plan under which the pension funds are irrevocably devoted to pension purposes, and payments for employee accident, sickness, hospital, and death benefits, or insurance related to this account. Include, also, expenses incurred in medical, educational or recreational activities for the benefit of employees, and administrative expenses in connection with employee pensions and benefits.

Background

FESC's method during the audit period to allocate and account for its costs of providing services to FirstEnergy and its subsidiaries consisted of multiple processes and procedures that were performed within its accounting systems. Audit staff observed the operation of the systems and evaluated information on costs output from the systems. Audit staff discovered that billing information FESC provided to FirstEnergy's subsidiaries pertaining to charges for services provided was insufficient. Specifically, FESC did not provide the detailed information required by the Commission's regulations to reflect the services it provided and showing service company accounts for the charges billed and classified as direct costs, indirect costs, or compensation for use of capital.

Audit staff found that, rather than provide detailed billing information as required, FESC provided certain aggregated cost information that made it difficult to discern the basis of costs charged. For example, FESC billing information pertaining to payroll taxes and employee benefit costs were combined with payroll costs in the accounting systems and billed to FirstEnergy's subsidiaries as an aggregated amount that was recorded in Account 923, Outside Services Employed. However, services provided by FESC on behalf of the FirstEnergy subsidiaries must be accounted for in the appropriate accounts for transactions of the same nature in accordance with the requirements of General Instruction No. 14, Transactions with Associated Companies. Account 926, Employee Pensions and Benefits, provides for the recording of expenses associated with employee benefits, and payroll taxes must be accounted for in the appropriate utility or nonutility account on a functional basis related to the labor provided. FESC's accounting and billing procedures resulted in the FirstEnergy subsidiaries not having the detailed information required to appropriately account for costs charged by FESC. As a result, the FirstEnergy subsidiaries misclassified some costs charged by FESC.

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Recommendations

DAA recommends that FirstEnergy:

29. Revise FESC policies, procedures, and accounting systems so as to provide sufficient billing information to FirstEnergy's subsidiaries in accordance with the Commission's regulations.
30. Train relevant staff on the revised policies, procedures, and accounting systems and provide periodic training in this area, as needed.

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7. Accounting for Fuel – Coal Supply and Other Consulting Services

The FirstEnergy FPU, Monongahela Power Company, improperly accounted for fixed monthly consultation fees paid in Account 501, Fuel, as a component cost of coal used in operations. The accounting led to costs being included in fuel used in operations that were not directly assignable and likewise not properly allocable to the cost of coal purchased and used. As a result, Monongahela Power Company may have overcharged wholesale customers, through operation of the fuel cost adjustment formula in its tariff, for the cost of fuel included as a component cost of generating electricity.

Pertinent Guidance

- 18 C.F.R. Part 101, Account 501, Fuel, states in part:
 - A. This account shall include the cost of fuel used in the production of steam for the generation of electricity, including expenses in unloading fuel from the shipping media and handling thereof up to the point where the fuel enters the first boiler plant bunker, hopper, bucket, tank or holder of the boiler-house structure. Records shall be maintained to show the quantity, B.t.u. content and cost of each type of fuel used.
 - B. The cost of fuel shall be charged initially to account 151, Fuel Stock (for Nonmajor utilities, appropriate fuel accounts carried under account 154, Plant Materials and Operating Supplies) and cleared to this account on the basis of the fuel used. Fuel handling expenses may be charged to this account as incurred or charged initially to account 152, Fuel Stock Expenses Undistributed (for Nonmajor utilities, an appropriate subaccount of account 154, Plant Materials and Operating Supplies). In the latter event, they shall be cleared to this account on the basis of the fuel used. Respective amounts of fuel stock and fuel stock expenses shall be readily available.
- 18 C.F.R. Part 101, Account 151, Fuel Stock, states:

This account shall include the book cost of fuel on hand.

Items

 1. Invoice price of fuel less any cash or other discounts.

2. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium.

3. Excise taxes, purchasing agents' commissions, insurance and other expenses directly assignable to cost of fuel.

4. Operating, maintenance and depreciation expenses and ad valorem taxes on utility-owned transportation equipment used to transport fuel from the point of acquisition to the unloading point.

5. Lease or rental costs of transportation equipment used to transport fuel from the point of acquisition to the unloading point.

- Monongahela Power Company, FERC Electric Tariff, First Revised Volume No. 1, Part 6, Rate Schedule- Wholesale for Resale Power Service, states in part:

Fuel Adjustment

A fuel cost adjustment shall apply to all kilowatthours billed under this rate schedule. The adjustment shall be determined by the following formula to the nearest 0.001 cent per kilowatthour:

$$A = \left\{ \frac{F_m - F_b}{S_m - S_b} \right\} \times L \times \frac{1}{1-T}$$

A = Fuel Cost Adjustment in cents per Kilowatthour

F_m = Fuel Cost in the current period relating to:

- Fossil and nuclear fuel consumed in generation in wholly-owned and jointly-owned stations and identifiable fossil and nuclear fuel costs in energy purchased plus the net energy cost of energy purchased on an economic dispatch basis less;
- Fossil and nuclear fuel costs recovered through intersystem sales.

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All fuel costs will be those charged to Account 501, cleared through Account 151, and Account 518 in the month preceding the billing Month.

S_m = All kilowatthour sales to regular Customers in the current period.

F_b and S_b = Fuel and kilowatthour sales in the base period as defined above. The factor $\frac{F_b}{S_b} = 1.70$ cent per kilowatt-hour

L = Adjustment factor to recognize losses to service voltage where different than average losses in the delivery system. This factor is 0.97.

T = The gross receipts tax rate in effect during the billing Month, expressed as a decimal.

The amount of fuel adjustment shall not be subject to any discounts.

Background

During the audit period, FirstEnergy's FPU, Monongahela Power Company, generated electric power using its coal-fired Fort Martin and Harrison power stations that are located in West Virginia. The two power stations had a combined capacity of 3,082 MW and used around 7.8 million tons of coal annually. As relevant here, Monongahela Power Company made wholesale sales of electricity in the PJM market under a tariff established on September 17, 2010.⁴⁵ Service rates of wholesale customers that purchased electricity from Monongahela Power Company pursuant to the tariff included the cost of fuel used to generate the electricity. The cost of fuel was determined based on a formula in an adjustment clause of the tariff that provided for fuel costs charged to Account 501 that were cleared through Account 151, Fuel Stock, in the month preceding the billing month.

Consulting Agreement Statement of Work

On June 1, 2018, Monongahela Power Company entered into an agreement with BCG Resources, LLC (BCG), titled Statement of Work for Purchase of Professional and

⁴⁵ Monongahela Power Company, FERC Electric Tariff, First Revised Volume No. 1.

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Consulting Services (Statement of Work), that provided for monthly payments to BCG of \$625,000, amounting to \$7.5 million in payments for the initial term of the then-one year agreement, which included provisions for automatic yearly renewals. The agreement was renewed in subsequent years. Monongahela Power Company paid a total of \$18.75 million in consulting service fees under the Statement of Work, which was composed of thirty monthly payments of \$625,000 made from June 2018 until the agreement with BCG was terminated in November 2020.

The Statement of Work required BCG to provide management and advisory services at the direction of Monongahela Power Company including fuel sourcing and supply, coal blending, inventory strategy and management, renewables, regulatory services related to fuel and ash requirements and economic development, and additional services not defined in the Statement of Work subject to agreement of both parties.

Accounting for management and advisory services

Audit staff observed that the monthly payments made to BCG were directly charged by Monongahela Power Company to Account 501 without first being accounted for as inventoried fuel stock in Account 151, as required.⁴⁶ Account 501 provides for the recording of the cost of fuel actually used in operations to generate electricity. The cost of fuel used in operations for a given month should consider the inventoried cost of the fuel used as consistent with the company's inventory valuation method, e.g., first-in first-out, last-in first-out, or weighted average cost. The cost of inventoried fuel stock recordable in Account 151 that is subsequently used in operations and recorded in Account 501 is determined, in part, based on the invoice price of fuel purchased less any discounts, plus other expenses directly assignable to the cost of fuel. Certain consultant fees paid to acquire fuel related advisory services may be includible as a component cost of inventoried fuel stock.⁴⁷

Monongahela Power Company attributed 100 percent of the monthly BCG consultant fees paid to fuel used in operations recorded in Account 501 without first determining: (1) the portion of the fees allocable to fuel stock inventory, (2) the related amount of fuel in inventory actually used in operations during the period recorded in Account 151, and (3) the inventoried cost of the fuel used including the portion of consultant fees appropriately included therein. However, only a portion of the monthly consulting fee payments, directly assignable to the purchase cost of coal, should have been recorded in Account 151 and then transferred to Account 501 when the coal was

⁴⁶ See, 18 C.F.R. Part 101, Account 501, Paragraph B.

⁴⁷ Other services provided by consultants such lobbying services are generally prohibited from inclusion as a component cost of fuel.

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actually burned as used in operations. As a result, Monongahela Power Company may have overcharged wholesale customers, including other FirstEnergy FPU's, due to its accounting practices and the associated operation of the fuel cost adjustment formula in its tariff, for the cost of fuel included as a component cost of generating electricity.

Recommendations

DAA recommends that FirstEnergy:

31. Revise accounting policies and procedures for cost of fuel by the FPU's to ensure compliance with the Commission's accounting regulations.
32. Train relevant staff on the revised policies and procedures and provide periodic training.
33. Perform an analysis of all monthly payments made to consultants, including BCG, that were included in the cost of fuel used in operations during the audit period and submit the analysis to DAA with supporting documents within 60 days of issuance of this audit report. Based on the analysis, submit proposed adjusting accounting entries to record the consultation costs in the appropriate accounts for DAA's review and approval.
34. Revise the FirstEnergy FPU's' fuel inventory and other account balances impacted by the improper accounting after receiving DAA's approval of the proposed accounting entries per Recommendation No. 33 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.
35. Review collections received, including but not limited to uplift payments, during the audit period based, in part, on the cost of fuel and submit an analysis to DAA for review of retail and wholesale overcollections due to improper recording of costs in Account 501.
36. Submit a refund analysis if there were overcollections from wholesale customers, within 60 days of issuance of this audit report, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from the improper accounting for fuel costs, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale customers to receive refunds; and (5) period(s) refunds will be made.
37. File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

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38. Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

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V. FirstEnergy's Response



76 South Main St.
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Jason J. Lisowski
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January 24, 2022

Mr. Gerald Williams
Director and Chief Accountant
Division of Audits and Accounting
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, NE, Room 5K-13
Washington, DC 20426

Re: FirstEnergy Corp. Docket No. FA19-1-000

Dear Mr. Williams:

FirstEnergy Corp. and its subsidiaries ("FirstEnergy" or "the Company"), pursuant to Section 41.1(b) of the Commission's regulations in 18 C.F.R. Part 41, provides the following response to the Draft Audit Report of the Division of Audits and Accounting ("DAA") within the Federal Energy Regulatory Commission ("Commission" or "FERC")'s Office of Enforcement. Our response addresses the January 7, 2022 Draft Audit Report.

As discussed in Attachment A, FirstEnergy largely accepts the Findings and Recommendations in the Draft Audit Report. In many instances, DAA Staff's Recommendations have been implemented or are already underway. For the Recommendations that have not yet been implemented, we look forward to working cooperatively with DAA Staff during the compliance phase of the audit.

FirstEnergy is committed to fostering a strong culture of compliance, including ensuring compliance with the Commission's accounting regulations. We appreciate that the changes that have been implemented and will be implemented as part of this audit will help us achieve that goal. Our whole team would like to thank DAA Staff for their professionalism and courtesy throughout the audit.

Respectfully submitted,

/s/ Jason Lisowski

Jason Lisowski
FirstEnergy Corp., Vice President,
Controller & Chief Accounting Officer

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Director and Chief Accountant
Division of Audits and Accounting

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Responses to Specific Findings and Recommendations**Finding 1: Allocation of Overhead Costs to CWIP**

FirstEnergy respectfully submits that its approach to capitalizing and allocating overhead costs to CWIP is consistent with the Commission's regulations. Specifically, as the costs in question generally were for services and expenses of employees of FirstEnergy Service Company, FirstEnergy used an "appropriate allocation method" as provided in Section 367.11 of Part 367 (Uniform System of Accounts for Centralized Service Companies). An "appropriate allocation method" under this Section does not require the use of the timecard reports or time study described in Part 101, which DAA Staff incorrectly relies on exclusively and without regard to Part 367.

FirstEnergy respectfully submits that DAA Staff's position would read Section 367.11 out of the regulations, which would be contrary to the regulation, established canons of statutory/regulatory interpretation, and principles of prior notice and due process with regard to the proper application and interpretation of the regulation. Prior notice and due process are of particular importance here because, in 2010, DAA Staff audited FirstEnergy, FirstEnergy Service Company, and associated companies and, in the course of that audit, DAA Staff audited the cost allocations and billing by FirstEnergy Service Company, including capitalization of A&G overheads costs to construction, as well as evaluated the accounting of those costs on the utilities' books under the Uniform System of Accounts requirements under 18 C.F.R. Part 101. See December 6, 2010, Final Audit Report, Docket No. FA10-2-000. Unlike the current audit, where DAA Staff does not address Part 367, the 2010 audit expressly considered both Part 367 and Part 101, and did not result in any findings that FirstEnergy's allocation method was inconsistent with Commission regulations or any recommendations that FirstEnergy alter its approach. As such, FirstEnergy relied reasonably on the outcome of this audit to continue its practice of applying an "appropriate methodology" as permitted in Section 367.11 of the Commission's regulations for allocating and capitalizing FirstEnergy Service Company overheads.

Also important here is that the State Commissions that regulate FirstEnergy's franchised public utility affiliates during state jurisdictional rate proceedings have had opportunity to review FirstEnergy's existing allocation and capitalization of FirstEnergy Service Company overhead costs to its franchised public utility affiliates and have issued rate orders without modifying those rates. As such, these costs have been included in retail rates pursuant to lawfully-issued State Commission orders.

Nonetheless, as noted below in the Company's response to Recommendation 1, FirstEnergy has retained, and DAA Staff have approved, a consultant – Black & Veatch Management Consulting, LLC ("B&V") – to conduct a representative time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures

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FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs.

Although B&V will develop capitalization rates for the audit period, FirstEnergy respectfully submits that the proper course here is to apply the 2021 capitalization rate to 2022 and future years, subject to reasonable plans to update the 2021 capitalization rate periodically. Reasons for prospective application of the B&V study results are that a large amount of expense could be run through forward-looking formula rates, as well as the fact that, as noted above that, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates.

Recommendation 1: Retain an independent third-party entity, subject to approval by DAA, to conduct a representative labor time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The independent consultant should have expertise and experience independently performing time studies used in the determination of overhead capitalization rates of U.S. based utilities subject to the accounting requirements prescribed for public utilities and licensees or for natural gas companies under 18 C.F.R. Part 101 or Part 201, respectively. The time study should involve a representative sample of study participants (employees) that provides for extrapolation of the study results to the full population of FirstEnergy employees, and should include processes for application of the study results from the audit period to the issue date of this audit report, and processes for applying the capitalization rate(s) the study finds for 2021 back to the period January 1, 2015 through December 31, 2020, either with no change to the capitalization rates found in the study or with such modifications to the capitalization rate(s) the independent consultant finds reasonable and supported by evidence. The independent consultant should use its expertise and all relevant information available to it to make recommendations as to what the capitalization rate(s) should be for prior years for each FirstEnergy subsidiary, should set forth the basis for its recommendations, and provide both the recommendations and the basis therefore to FirstEnergy and DAA. If there is no recommendation by the independent consultant for any year or other period between January 1, 2015 and December 31, 2020 for any specific capitalizable cost center, then FirstEnergy should base its capitalization rate and the amount to be capitalized for such year or period on the rates and costs of such specific cost centers for which FirstEnergy can provide to DAA reasonable evidence as to the time employees in such cost centers spent having a definite relation to construction, and exclude from consideration those cost centers for which FirstEnergy cannot provide such evidence, per, for example, 18 C.F.R. Part 101, General Instruction No. 2 and § 41.8.

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The progress of the study should be reported within 120 days and the time study results provided to DAA for review and consideration within 180 days of the date of issuance of this audit report, and the developed allocation procedures should be submitted when complete, but no later than 60 days after completion of DAA's review of the labor time study. At a minimum, the developed allocation procedures should provide a method for overhead cost allocation and capitalization to construction based on actual timecard distributions or where this procedure is impractical, based on periodic time studies.

FirstEnergy Response: *FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. As noted above in the response to Finding 1, FirstEnergy has proposed, and DAA Staff have approved, FirstEnergy's retention of B&V to conduct a representative time study for allocation of overhead costs incurred in 2021 to CWIP, and to assist with the development of procedures FirstEnergy subsidiaries shall use to periodically determine the allocation of overhead labor and labor-related costs capitalized by each FirstEnergy subsidiary into the cost of construction after 2021. The determined 2021 capitalization rate will be applied to 2022 and future years, subject to reasonable plans to update the rate periodically.*

Although changes to capitalization rates and revised procedures should be prospective only, B&V has prepared a Statement of Work that includes processes for application of the study results from January 1, 2015 to date, and processes for applying capitalization rates that B&V finds reasonable and supported by the evidence for this period. FirstEnergy will submit the updated Statement of Work for DAA Staff review.

Recommendation 2: Revise written policies, practices, procedures, and controls governing the methods used to account for, track, report, and review overhead labor and related costs, and all other costs allocated to construction projects to be consistent with Commission accounting requirements. In addition, adopt procedures to retain formal documentation supporting the amount of overhead costs allocated to electric plant accounts.

FirstEnergy Response: *Accept. The Company will revise its policies, procedures, and controls accordingly.*

Recommendation 3: Revise accounting processes and procedures to account for and report capitalized A&G amounts recorded in Accounts 920, Administrative and General Salaries, and 921, Office Supplies and Expenses, using Account 922, Administrative Expenses Transferred – Credit, consistent with Commission regulations.

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FirstEnergy Response: *Accept. The Company will make the recommended revisions.*

Recommendation 4: Train relevant staff on the revised overhead allocation, control, and A&G accounting procedures and documentation, and provide periodic training in this area, as needed.

FirstEnergy Response: *Accept. The Company will provide the training accordingly.*

Recommendation 5: Train staff on the time reporting guidelines and establish a periodic training program in this area.

FirstEnergy Response: *Accept. The Company will provide the training accordingly.*

Recommendation 6: Within 30 days of the completion of Recommendation No. 1, submit an estimate to DAA, including the calculations and determinative components, of overhead costs that would have been allocated to CWIP from 2015 through the present consistent with the requirements of Electric Plant Instruction No. 4 and General Instruction No. 9. The estimate should be based on a recalculation of 2015's and subsequent years' overhead costs allocated to construction with labor and related costs removed from the cost of plant that were not associated with construction activities based on the methodology developed in response to Recommendation No. 1.

FirstEnergy Response: *Accept. The Company will submit the results of the B&V study to DAA Staff.*

Recommendation 7: With the response to Recommendation No. 6, submit proposed accounting entries to DAA that remove the overhead costs that were allocated to CWIP and electric plant in service from 2015 through the present that exceed the amount of costs that would have been allocated to the accounts based on the methodology developed in response to Recommendation No. 1. Also, provide proposed accounting entries to remove associated amounts from other accounts and balances affected by the inappropriately allocated cost such as the accumulated depreciation and ADIT accounts, and AFUDC balances capitalized into CWIP and electric plant in service. If the adjusting entries result in a significant impact to income for the current year, FirstEnergy subsidiaries may account for the transaction as a correction of a prior period error in Account 439, Adjustments to Retained Earnings. Such adjustments to retained earnings with the proposed accounting entries should be submitted to DAA.

FirstEnergy Response: *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate*

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proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 7 be updated to reflect that FirstEnergy will ensure that its accounting entries, on a going forward basis, reflect the B&V study results.

Recommendation 8: Revise account balances for FirstEnergy subsidiaries' utility plant, accumulated depreciation, ADIT, and other account balances impacted by the inappropriate allocation of unsupported overhead costs after receiving DAA's approval of proposed accounting entries submitted per Recommendation No. 7, and restate and footnote the balances reported in the next-filed FERC Form No. 1 reports of the FirstEnergy subsidiaries for both the current and comparative years presented in each subsidiary's next-filed report, as necessary to reflect and disclose the revisions.

FirstEnergy Response: *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus require no further action with regard to FERC Form 1 reporting. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 8 be updated to reflect that no account balances will be revised.*

Recommendation 9: Submit a refund analysis to DAA that explains and details the following: (1) calculation of refunds that result from correcting the overstatement of transmission plant due to the improperly capitalized labor costs, as determined by the labor time study, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

FirstEnergy Response: *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require a refund analysis. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have*

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issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 9 be updated consistent with this response.

Recommendation 10: File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

FirstEnergy Response: *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require refunds or a refund report. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 10 be updated consistent with this response.*

Recommendation 11: Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

FirstEnergy Response: *Based on the relevant facts and circumstances, FirstEnergy respectfully requests that changes to capitalization rates and revised procedures should be applied prospectively only. Adoption of this course would leave all account balances intact, and thus would not require refunds or a refund report. As noted above in FirstEnergy's comments in response to Finding No. 1, only prospective application is warranted, as retroactive application could result in a large amount of expense being run through forward-looking formula rates. Prospective application is further warranted as, during state jurisdictional rate proceedings, State Commissions previously have had opportunity to examine the capitalization rates that were applied to distribution accounts and have issued rate orders without modifying those rates. As such, FirstEnergy respectfully requests that the language of Recommendation No. 11 be updated consistent with this response.*

Finding 2: Accounting of Vegetation Management Costs

FirstEnergy provides the following response to the four recommendations in the Draft Audit Report dealing with Accounting for Vegetation Management Costs:

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Recommendation 12: Revise accounting policies and procedures for vegetation management activities in distribution corridors to be consistent with Commission accounting requirements.

FirstEnergy Response: *Accept. The Company has already remediated this Finding by revising its policies effective October 1, 2021.*

Although the policies have now been updated, it is the Company's position that the FPU's appropriately capitalized the cost to electric plant in service prior to this date, and therefore, there is no overstatement of electric plant in service, accumulated depreciation, ADIT, depreciation expenses, and other account balances, nor is there an understatement of operating expenses incurred.

Recommendation 13: Train relevant staff on the revised vegetation management accounting policy and procedures and provide periodic training.

FirstEnergy Response: *Accept. The Company will train our employees on the revised vegetation management accounting policy and procedures.*

Recommendation 14: Submit proposed accounting entries and supporting documentation to DAA that reflect the correction of the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by the capitalization of vegetation management expenses for the period from October 1, 2021 through the present within 60 days of issuance of this audit report.

FirstEnergy Response: *Accept. The Company will submit the requested accounting entries and supporting documentation reflecting the revised policy effective October 1, 2021. No corrections are necessary because the policy change was implemented by the Company as of October 1, 2021, and the Company did not have any further capitalization of vegetation management after this date. The requested accounting entries demonstrate that the capitalization of vegetation management expenses ceased on October 1, 2021, as proposed in Recommendation No. 12.*

Recommendation 15: Revise the FirstEnergy FPU's CWIP, electric plant in service, accumulated depreciation, ADIT, and other accounts impacted by over-accrual of AFUDC after receiving DAA's approval of the proposed accounting entries per Recommendation No. 14 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

FirstEnergy Response: *Accept. The Company has already completed the recommended policy and accounting changes as of October 1, 2021. Therefore, there is no additional information to provide. Since the changes are made prospectively from October 1, 2021, the Company disagrees with the Commission's recommendation to correct prior period balances and to restate prior Form 1s.*

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Finding 3: Accounting for Amortization of Regulatory Assets

FirstEnergy provides the following response to the five recommendations in the Draft Audit Report dealing with Accounting for Amortization of Regulatory Assets:

Recommendation 16: Revise policies, practices, and procedures to amortize or write off the regulatory assets consistent with Commission accounting requirements.

FirstEnergy Response: *Accept. The Company will revise our policies, practices, and procedures consistent with Commission requirements.*

Recommendation 17: Train relevant staff on the revised methods, and provide periodic training in this area, as needed.

FirstEnergy Response: *Accept. The Company will train our employees on the revised method.*

Recommendation 18: Submit a refund analysis, within 60 days of issuance of this audit report, to DAA for review that explains and details the following: (1) calculation of refunds that result from the correction of ATSI's and TrAILCo's improper and unauthorized, respective, depreciation and amortization of plant and regulatory assets to the depreciation expense account and inclusion of the expenses in service rate determinations, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

FirstEnergy Response: *Accept. The Company will submit a refund analysis within 60 days from the issuance of the audit report, in accordance with the Commission's recommendation.*

Recommendation 19: File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

FirstEnergy Response: *Accept. The Company will file a refund report after receiving DAA's assessment of the refund analysis.*

Recommendation 20: Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

FirstEnergy Response: *Accept. Accounting recorded correcting entries in Q3 2021. For transmission rate purposes, these corrections will be handled through the standard formula rate true-up process. For each impacted transmission entity, the 2021 actual transmission revenue requirement, which will be developed in the May/June 2022, will include these adjustments and therefore will be a component of the overall true-up for calendar year 2021 rates. This true-up plus interest in accordance with 35.19a will be*

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included in the next projected transmission revenue requirement. For TrAILCo, this refund will occur from June 1, 2022 through May 31, 2023. For the remaining impacted entities, the refund will occur over calendar year 2023.

Finding 4: Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation

FirstEnergy provides the following response to the six recommendations in the Draft Audit Report dealing with Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation:

Recommendation 21: Critically review and strengthen internal controls in FirstEnergy and its subsidiaries. Establish and implement procedures governing methods to be used to appropriately identify, account for, track, report, and review all lobbying costs, donations, and any unsupported expenses, including, but not limited to, expenses of external lobbyists, monies paid to external corporate entities to be used for lobbying, and other external lobbying costs and internal lobbying costs, including employee lobbying time and other internal lobbying costs.

FirstEnergy Response: *Accept. The Company will review and strengthen its internal controls in the Company and its subsidiaries accordingly.*

Recommendation 22: Train relevant staff on the internal control enhancements and procedures established, including internal controls over vendor creation in the accounts payable system, payments, accounting, and reporting violations; and provide periodic training in this area, as needed.

FirstEnergy Response: *Accept. The Company will provide the training accordingly.*

Recommendation 23: Perform an analysis of costs that FirstEnergy and its subsidiaries incurred associated with internal and external lobbying activities, including payments of FirstEnergy funds to outside entities for purposes of those entities using those funds for lobbying, and provide support to identify lobbying-related expenses improperly charged to utility operating accounts, for the audit period and, with respect to the specific issues discussed in this finding, for the entire period affected by or relevant to each such specific issue. Within 60 days of the issuance of this audit report and on a rolling basis within 60 days of conclusion of each internal or external investigation discussed in the finding or any new internal or external investigation arising directly from Ohio House Bill 6 (HB 6) or lobbying activities occurring prior to 2021, provide the results of the investigation, proposed correcting journal entries, and FirstEnergy's analysis of the findings from each investigation and the related impact on prior and future accounting and rate development to audit staff.

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FirstEnergy Response: *The Company accepts this recommendation, subject to the points below.*

With respect to providing the results of future investigations, if any, into the requested lobbying-related expenses, FirstEnergy will provide responsive factual information but not information protected from disclosure by the attorney-client privilege and attorney work product doctrines or other relevant law.

Recommendation 24: Submit a refund analysis, within 60 days of issuance of this audit report and on a rolling basis within 60 days of conclusion of each investigation discussed in the finding or any new investigation arising directly from HB 6 or lobbying activities occurring prior to 2021, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from correcting the improper accounting for external lobbying costs, donations, and unsupported costs in utility operating and plant accounts; and internal lobbying costs as identified pursuant to the analysis performed in response to Recommendation No. 23, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale transmission customers to receive refunds; and (5) period(s) refunds will be made.

FirstEnergy Response: *Accept. The Company will implement to the extent the results of Recommendation No. 23, if any, warrant a refund to customers.*

Recommendation 25: File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

FirstEnergy Response: *Accept. The Company has already started to implement the refunds, and, to the extent the results of the analysis, if any, warrant an additional refund to customers, the Company will implement that additional refund as well.*

Recommendation 26: Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

FirstEnergy Response: *Accept. The Transmission Companies have already started to implement the refunds, and, to the extent the results of the analysis, if any, warrant an additional refund to customers, the Transmission Companies will implement that additional refund as well.*

Finding 5: Accounting for Funds Used During Construction

FirstEnergy makes the following response to the two recommendations in the Draft Audit Report dealing with Accounting for Funds Used During Construction:

Recommendation 27: Revise and implement the FPU's processes and procedures to calculate their respective AFUDC rates consistent with EPI No. 3(A)(17) and other

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applicable Commission requirements. Revisions should include processes to prevent the inclusion of balances in Accounts 216.1 and 219 in the AFUDC rate calculations.

FirstEnergy Response: *Accept. The Company has already revised and implemented an AFUDC policy consistent with Commission requirements, including but not limited to, the exclusion of balances in Account 216.1 and 219 in the AFUDC rate calculations.*

Recommendation 28: Train relevant staff on the revised AFUDC calculation method, and provide periodic training, as needed.

FirstEnergy Response: *Accept. The Company will provide the training accordingly.*

Finding 6: Service Company Billing Procedures

FirstEnergy provides the following response to the two recommendations in the Draft Audit Report dealing with Service Company Billing Procedures:

Recommendation 29: Revise FESC policies, procedures, and accounting systems so as to provide sufficient billing information to FirstEnergy's subsidiaries in accordance with the Commission's regulations.

FirstEnergy Response: *Accept. The Company will revise its policies, procedures, and systems accordingly.*

Recommendation 30: Train relevant staff on the revised policies, procedures, and accounting systems and provide periodic training in this area, as needed.

FirstEnergy Response: *Accept. The Company will provide the training accordingly.*

Finding 7: Accounting for Fuel – Coal Supply and Other Consulting Services

FirstEnergy provides the following response to the eight recommendations in the Draft Audit Report dealing with Accounting for Fuel – Coal Supply and Other Consulting Services:

Recommendation 31: Revise accounting policies and procedures for cost of fuel by the FPU's to ensure compliance with the Commission's accounting regulations.

FirstEnergy Response: *Accept. The Company will revise the accounting policies and procedures accordingly.*

Recommendation 32: Train relevant staff on the revised policies and procedures and provide periodic training.

FirstEnergy Response: *Accept. The Company will train relevant staff on the revised policies and procedures and provide periodic training.*

Recommendation 33: Perform an analysis of all monthly payments made to consultants, including BCG Resources, LLC, that were included in the cost of fuel used in operations

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during the audit period and submit the analysis to DAA with supporting documents within 60 days of issuance of this audit report. Based on the analysis, submit proposed adjusting accounting entries to record the consultation costs in the appropriate accounts for DAA's review and approval.

FirstEnergy Response: *Accept. The Company will perform an analysis of all monthly payments made to consultants by Monongahela Power Company as described in Recommendation No. 33. Based upon the fuel cycle, the Company's understanding is that any fuel at issue would have already been burned in close proximity to the timing of payments under the contract and therefore any accounting impact arising from this review is anticipated to be de minimis.*

Recommendation 34: Revise the FirstEnergy FPU's fuel inventory and other account balances impacted by the improper accounting after receiving DAA's approval of the proposed accounting entries per Recommendation No. 33 and restate and footnote the FERC Form No. 1 reports for current and comparative years as necessary.

FirstEnergy Response: *Accept. The Company will revise the FirstEnergy FPU's fuel inventory and other impacted account balances. Based on a preliminary review, changes to the accounting entries are anticipated to be de minimis; however, if appropriate, FirstEnergy will footnote the FERC Form No. 1 for the current year. There is no need to restate prior balances and revise previously issued Form 1s.*

Recommendation 35: Review collections received, including but not limited to uplift payments, during the audit period based, in part, on the cost of fuel and submit an analysis to DAA for review of retail and wholesale overcollections due to improper recording of costs in Account 501.

FirstEnergy Response: *Accept. The Company will review collections received and will provide the necessary support regarding such collections as part of the compliance phase. Based on the Company's preliminary investigation, if any refund is due, such refund is anticipated to be de minimis.*

Recommendation 36: Submit a refund analysis if there were overcollections from wholesale customers, within 60 days of issuance of this audit report, for DAA's review, that explains and details the following: (1) calculation of refunds resulting from the improper accounting for fuel costs, plus interest; (2) determinative components of the refund; (3) refund method; (4) wholesale customers to receive refunds; and (5) period(s) refunds will be made.

FirstEnergy Response: *Accept. The Company will do a refund analysis to determine if there was any effect on wholesale rates. Based on the fuel cycle, the Company's understanding is that any of the fuel at issue would have already been burned and therefore, if any refund is due, it would be de minimis.*

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Recommendation 37: File a refund report with the Commission after receiving DAA's assessment of the refund analysis.

FirstEnergy Response: *Accept. If, after the analysis performed pursuant to Recommendation No. 36, a refund is indicated, the Company shall file a refund report with the Commission.*

Recommendation 38: Refund the amounts disclosed in the refund report to customers, with interest calculated in accordance with section 35.19a of the Commission's regulations.

FirstEnergy Response: *Accept. In the event a refund is indicated, the Company shall refund the amount in the refund report, with interest calculated in accordance with section 35.19a of the Commission's regulations.*

Document Content(s)

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EXHIBIT B

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

GENERAL OBJECTIONS

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

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

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

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

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

the Companies withhold any document on the basis of any applicable privilege, immunity, or protection, the Companies will provide the information required by Ohio Rule of Civil Procedure 26(B)(8)(a).

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

RESPONSES AND OBJECTIONS TO INTERROGATORIES

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

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

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

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

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

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

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

agreement?

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

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

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

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

Regarding this statement, please provide the following information:

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

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

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

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION OF DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regarding this statement, please provide the following documents:

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

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

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

Dated: March 18, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

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On behalf of the Companies

CERTIFICATE OF SERVICE

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

/s/ Margaret M. Dengler

Attorney for the Companies

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EXHIBIT C

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

PROCEEDINGS

before Ms. Megan Addison and Ms. Jack St. John,
Attorney Examiners, at the Public Utilities
Commission of Ohio, via Webex, called at 10:00 a.m.
on Friday, March 11, 2022.

- - -

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- - -

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and Mr. Cory Lee
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On behalf of the Ohio Edison Company,
The Cleveland Electric Illuminating
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On behalf of Citizens Utility Board of
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On behalf of Industrial Energy Users Ohio.

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On behalf of the Ohio Hospital
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On behalf of Ohio Energy Group.

Dave Yost, Ohio Attorney General
Mr. John Jones, Section Chief
By Mr. Thomas Lindgren,
Mr. Werner L. Margard, III,
and Ms. Sarah Feldkamp
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

1 Friday Morning Session,
2 March 11, 2022.

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4 EXAMINER ST. JOHN: Go on the record.
5 The Public Utilities Commission of Ohio calls for a
6 prehearing conference at this time and place, Case
7 No. 20-1502-EL-UNC, being In the Matter of the Review
8 of the Political and Charitable Spending by Ohio
9 Edison Company, The Cleveland Electric Illuminating
10 Company, and The Toledo Edison Company.

11 My name is Jackie St. John, and with me
12 is Megan Addison. And we are the Attorney Examiners
13 assigned to preside over this prehearing conference.
14 Now, let's begin by taking appearances starting with
15 the Companies.

16 MR. KNIPE: Good morning, your Honors.
17 Appearing on behalf of Ohio Edison Company, The
18 Cleveland Illuminating Company, and The Toledo Edison
19 Company, I'm Brian Knipe, FirstEnergy Service
20 Company, 76 South Main Street, Akron, Ohio 44308.
21 Also appearing on behalf of the Ohio Companies, the
22 law firm of Jones-Day, are Michael Gladman, 325 John
23 H. McConnell Boulevard, Columbus, Ohio 43215, and
24 Ryan Doringo, North Point, 901 Lakeside Avenue,
25 Cleveland, Ohio 44114.

1 EXAMINER ST. JOHN: Thank you. Although
2 not a party to this case, we have asked Mr. Lee to
3 attend, so Mr. Lee, would you like to make an
4 appearance at this time?

5 MR. LEE: Good morning. Yes, Corey Lee
6 on behalf of FirstEnergy Corporation, with Jones-Day,
7 North Point, 901 Lakeside Avenue, Cleveland, Ohio
8 44114.

9 EXAMINER ST. JOHN: Thank you. Next I
10 have Citizens Utility Board of Ohio.

11 MR. DOUGHERTY: Yes. Thank you. Trent
12 Dougherty for CUB Ohio, 1391 Grandview Avenue,
13 Columbus, Ohio 43212.

14 EXAMINER ST. JOHN: Thank you.
15 Industrial Energy Users Ohio.

16 MR. MC KENNEY: Good morning, your
17 Honors. On behalf of IEU Ohio, Bryce McKenney and
18 Matthew Pritchard, with the law firm of McNees,
19 Wallace & Nurick, 21 East State Street, 17th floor,
20 Columbus, Ohio 43215.

21 EXAMINER ST. JOHN: Thank you. The Ohio
22 Hospital Association.

23 MS. MAINS: Good morning, your Honors.
24 This is Rachael Mains on behalf of the Ohio Hospital
25 Association, with the law firm Bricker & Eckler, 100

1 South Third Street, Columbus, Ohio 43215. Thank you.

2 EXAMINER ST. JOHN: Thank you.

3 Northwest Aggregation Coalition?

4 Ohio Manufacturers Association Energy
5 Group.

6 MS. BOJKO: Good morning, your Honors.
7 On being half of OMAEG, Kimberly W. Bojko, Thomas
8 Donadio, with the law firm Carpenter, Lipps & Leland,
9 280 North Ohio Street, Suite 1300, Columbus, 43215.

10 EXAMINER ST. JOHN: Thank you.
11 Interstate Gas Supply Inc.

12 MR. NUGENT: Good morning, your Honors.
13 On behalf of Interstate Gas Supply, Inc., Michael
14 Nugent, Evan Betterton, and Joseph Olikier, 6100
15 Emerald Parkway, Dublin, Ohio 43016.

16 EXAMINER ST. JOHN: Thank you.
17 Mr. Dove?

18 Ohio Environmental Council?

19 Ohio Consumers' Counsel?

20 MS. WILLIS: Thank you, your Honor. On
21 behalf of the Residential Customers of the
22 FirstEnergy utilities, Bruce J. Weston, Consumers'
23 Counsel, by Maureen R. Willis and John Finnigan, 65
24 East State Street, Suite 700, Columbus, Ohio 43215.
25 Thank you.

1 EXAMINER ST. JOHN: Thank you.

2 Environmental Law & Policy Center?

3 Ohio Energy Group?

4 MS. COHN: Good morning, your Honor. On
5 behalf of the Ohio Energy Group, Jody Cohn, Michael
6 Kurtz, and Kurt Boehm, from the law firm of Boehm,
7 Kurtz & Lowry, 36 East Seventh Street, Cincinnati,
8 Ohio 45202.

9 EXAMINER ST. JOHN: Thank you. And on
10 behalf of Staff?

11 MR. LINDGREN: Thank you, your Honor.
12 On behalf of the Commission Staff, Ohio Attorney
13 General Dave Yost, by Thomas Lindgren, Werner
14 Margard, and Sarah Feldkamp, at 30 East Broad Street,
15 26th floor, Columbus, Ohio 43215.

16 EXAMINER ST. JOHN: Thank you. The
17 first thing I'd like to note today, as I'm sure many
18 of you have seen earlier in this week, the Commission
19 issued a request for proposals for audit services in
20 this case, and the Commission plans to select an
21 auditor on May 4th.

22 Now I'd like to turn to the discussion
23 of the in camera review. First I do have some
24 questions. I'm not sure if Mr. Gladman or
25 Mr. Doringo would be the appropriate parties to field

1 these questions to, but the first group of documents
2 that I'd like to discuss are documents 82, 83, 87,
3 and 145.

4 And specifically with those documents
5 I'd like to discuss just the very first couple pages
6 of the document. And for identification purposes
7 those have a navigation link at the bottom of the
8 page.

9 So my question for you is, is this a
10 general reference document that the Companies use in
11 many different context, or is this a document that
12 was prepared specifically to go along with the
13 remainder of those documents?

14 MR. DORINGO: Thank you, your Honor.
15 This is Ryan Doringo, I'll be fielding these
16 questions.

17 And I just wanted to note up front,
18 given the nature of the topic of discussion with
19 these privileged materials, I'm going to try to be as
20 circumspect as possible when speaking about these so
21 as to not potentially disclose privileged
22 information, so bear with me if it takes me a little
23 bit longer to respond than maybe normal.

24 But with respect to these documents, as
25 you probably have figured out, that these are all the

1 copies of the same spreadsheet that were attached to
2 different emails.

3 As to your question specifically, the --
4 this is -- well, let me back up. This is a
5 compilation of data that was prepared at the
6 direction of counsel for the Companies' use in
7 responding to the Commission's show cause directive
8 in September of 2020.

9 And specifically, if you would look at
10 the last three tabs of the spreadsheet, those contain
11 analyses performed at the request of counsel.

12 And I understand that there are lots of
13 tabs and it's a little unwieldy. So while the data
14 on the first number of sheets in that spreadsheet is
15 not -- I guess I would say was not created
16 specifically for the case, this is a compilation of
17 data collected and analyzed for purposes of this
18 proceeding.

19 And, your Honor, while we are on this
20 subject, because I think it might be useful, I wanted
21 to direct the Bench to what we would call the parent
22 emails for each of these attachments, the spreadsheet
23 attachments, which when you look at those, you'll see
24 that they are communications between counsel for the
25 Companies and Jones-Day, in most instances, or

1 internal counsel for the Companies, that specifically
2 regard responding to OCC's discovery request in this
3 case.

4 So for Log Item No. 82, the parent email
5 is Log Item No. 219. For Log No. 83, the parent
6 email is Log No. 79. For Log No. 87, the parent
7 email is Log No. 220, and for the Log No. 145, the
8 parent email is Log No. 225.

9 And I realize that that is not at all
10 intuitive during an in camera review given that these
11 are not sequential in order, but I think that was a
12 product of how the metadata sorted the items on our
13 log.

14 That is all I have on those first four
15 documents.

16 EXAMINER ST. JOHN: Okay. I appreciate
17 that. That's helpful. I guess to kind of ask my
18 question again: So specific to the very first page
19 or two of that document, were you saying that that is
20 a compilation that is related to the data in the
21 sequential tabs of those documents?

22 MR. DORINGO: Right. So I guess I was
23 referring to the spreadsheet as a whole being a
24 compilation of data that was analyzed and reviewed
25 for purposes of this proceeding at the request of

1 counsel.

2 The first tab just lays out, I guess,
3 the contents of the following tabs, but again, I
4 guess the meat of it is those last three tabs that I
5 referenced, take that data in the preceding tabs and
6 analyze them for purposes of this case. I'm sorry if
7 I'm -- if I'm missing your question, but is that
8 helpful?

9 EXAMINER ST. JOHN: That is helpful. I
10 guess my question is, you know, as we looked at the
11 very first couple documents, we were not sure if this
12 was a general reference document that would be used
13 in other contexts as well, or if it was created along
14 with the other tabs in those documents, and is
15 directly related to those.

16 MR. DORINGO: Yes. And so I can say
17 that this data would be used, I think, in other
18 contexts, but the compilation of the data and the
19 analysis performed here makes that document work
20 product and privileged protected. And yes, I
21 believe -- so I mean, the raw data, itself, would be
22 used in other contexts.

23 EXAMINER ST. JOHN: So --

24 MR. DORINGO: And there's a pivot
25 table -- excuse me, I apologize. There's a pivot

1 table at the end that sort of does the analysis for
2 purposes of responding to the Commission's directive.

3 EXAMINER ST. JOHN: Understood. When we
4 review the documents, there was not a question in our
5 minds about the large majority of the documents in
6 those -- those document numbers, so those aren't in
7 question.

8 But the last three sections that you're
9 referencing we -- you know, we were not questioning
10 the privilege of those documents, but specifically
11 the very first few pages.

12 And again, those are the pages that have
13 a link at the bottom of them to -- as it looked like,
14 it could have been a reference material that's used
15 generally.

16 So with that being said, is just the
17 very first page of the document, is that something
18 that you would be willing to produce, or do you
19 maintain that that is privileged and that was created
20 specific -- specific to the remainder of the
21 documents, and is privileged?

22 MR. DORINGO: Thank you. And just when
23 we are talking about the first page, since we're
24 working on a spreadsheet, I just want to make sure
25 I'm on the same page, but are we talking about the --

1 there's a tab titled Table of Contents, or the tab
2 titled Review Matrix?

3 EXAMINER ST. JOHN: Yeah, I believe it
4 would be the tab -- so we don't have, you know,
5 labels for the document in what we have been
6 provided, but I believe it is referencing a document
7 that would be considered a table of contents.

8 MR. DORINGO: Right. So I think,
9 standing alone, that that information would not be
10 privileged, but in the context of this compilation we
11 would assert privilege over it.

12 But if I could ask for -- you know,
13 after we field your questions, for a little bit of
14 time to confer with my client about whether we would
15 be able to sort of separate out this data, I would
16 appreciate that, rather than, you know, giving an
17 answer right now, given the potential privileged
18 implications of that.

19 EXAMINER ST. JOHN: Understood. All
20 right. Thank you. And let's move on to the next
21 group of documents.

22 MS. WILLIS: Your Honor, if I may, will
23 OCC be given a chance to be heard on these documents?
24 Is that your -- because we would like to be heard and
25 give a general response to the inquiry.

1 I guess we had asked for, originally, a
2 line by line review, we did not get that, but we
3 would be happy to provide commentary on the
4 spreadsheets, because I think the spreadsheets are
5 the items that your Honors have questions on.

6 And we have -- certainly have our
7 opinion and view on the spreadsheets and the
8 propriety of using attorney/client or work product to
9 shield facts, versus attorney/client advice or mental
10 impressions.

11 EXAMINER ST. JOHN: Just to be clear,
12 Ms. Willis, are your comments related to specific
13 items that we'll be discussing today, or are your
14 comments generally related to the in camera review as
15 a whole?

16 MS. WILLIS: Well, your Honor, I think
17 they could be categorized as arguments related to the
18 specific spreadsheets that your Honors identified
19 that they had questions on.

20 And we also have other comments on
21 spreadsheets, you know, we're prepared to talk about
22 the spreadsheets. I think those are the most
23 pertinent items.

24 As your Honors have indicated, you know,
25 there's where your questions are, so we would be

1 prepared to have -- address both these spreadsheets,
2 and generally the spreadsheet that -- the assumption
3 of privilege for spreadsheets and data and facts.

4 EXAMINER ST. JOHN: Okay. Understood.
5 Yes, we will -- we'll hear your arguments at this
6 time.

7 MS. WILLIS: Okay. Your Honor, with
8 respect to the spreadsheets themselves, we would
9 assert that these are facts or data compilation, and
10 it's not -- it's not entitled to attorney/client
11 privilege, and it does not -- would not divulge the
12 attorney's mental impression.

13 And if it's work product -- you know, it
14 can be under Civil Rule 26B if it's found to be work
15 product and not necessarily attorney/client, that
16 that protection can be removed if a party can
17 demonstrate there's a sufficient need for the
18 protected materials, which we believe we have
19 demonstrated.

20 And then, your Honor, I bring up
21 generally the question about whether there's been
22 waiver by the actions of the utilities in this -- to
23 this extent.

24 In Ohio there's expressed waiver and
25 there's implied waiver, and the expressed waiver

1 occurs if the client has shared that with a third
2 party.

3 We believe this information may have
4 been shared with the PUCO Staff, and so that would be
5 a waiver. And there's also an implied waiver, and
6 that's under the Hern test in Ohio.

7 And an implied waiver can result if
8 they -- if a party has, through affirmative action,
9 placed the protected information at issue by making
10 it relevant to the case, and we believe by the filing
11 of the affidavit and the supplemental response, that
12 it has made this information relevant to this case,
13 and therefore has impliedly waived that privilege.

14 So in all, your Honor, we are saying
15 that FirstEnergy utilities can't just pick and choose
16 which opponents it's going to give information to and
17 say it's not waiving privilege, and then maintain a
18 claim of confidentiality to obstruct others, and we
19 think that's what's going on here with respect to the
20 information that may have been provided to the PUCO
21 Staff, and/or the Blue Ridge Consulting Firm, with
22 respect to the show cause and the spreadsheet
23 information that we're talking about here.

24 EXAMINER ST. JOHN: Ms. Willis, I was
25 under the impression that we had already discussed

1 and made a ruling on the waiver claims at our last
2 prehearing conference.

3 I believe Mr. Doringo expressed at that
4 time that these documents had not been disclosed to
5 any third parties, and that he would let the Bench
6 know, and the parties know, if they were disclosed
7 between the time of that prehearing conference and
8 this prehearing conference. Mr. Doringo, is that
9 correct?

10 MR. DORINGO: That is correct, your
11 Honor. These have not been disclosed to Staff or
12 anyone else.

13 And I will say also that to the extent
14 anything has been disclosed to Staff in this case, or
15 others, that those materials have been produced to
16 OCC. And the same is true with the auditors that we
17 provided information to.

18 And I -- you know, I strongly disagree
19 with the characterizations of waiver, and the issue
20 of whether work product can apply -- work product
21 protection or privilege can apply to compilations of
22 materials.

23 The law in Ohio is very clear that it
24 can and does, but I think we're sort of past the
25 point, your Honor, as you mentioned, of reviewing or

1 returning to those issues.

2 EXAMINER ST. JOHN: Thank you.

3 Ms. Willis, is there anything you'd like to add?

4 MS. WILLIS: No, your Honor.

5 EXAMINER ST. JOHN: Okay. Thank you.

6 Moving on to the next group of
7 documents, I'd like to discuss documents 208
8 through 211.

9 You know, Mr. Doringo, as you've noted,
10 one of the difficulties with these documents is, you
11 know, as we're reviewing we don't know exactly how
12 the documents are related, and if they are related.

13 So my question to you is, is this group
14 of documents 208 to 211, is there a relationship
15 between that group of documents? And if so, what is
16 that relationship?

17 MR. DORINGO: Right. So in terms of the
18 subject matter, they are related in that they concern
19 review of certain vender payments, but they are not
20 of the same -- we call them families of documents,
21 right, when we're doing electronic discovery. So
22 they are not all attachments to the same
23 communication.

24 Three of them, however, are. The
25 spreadsheets -- I'll turn to those first. The 209,

210, and 211 are part of the same family of emails.
The parent document for all three of those items is
Log No. 200, which is a communication between counsel
and Ms. Mikkelsen.

EXAMINER ST. JOHN: I'm sorry, did you
say that was -- the parent is 200, 2-0-0?

MR. DORINGO: Yes, that's right, the
parent document is 200 for Log Nos. 209, 210 and 211.
So those are part of the same email family, and all
those spreadsheets are attached to that email.

This was, again, a compilation of data
prepared at the direction of counsel for analysis
relating to those vender payment issues that I
discussed, and any spreadsheet contains I guess
indications of matters that were specifically under
review by counsel at that time.

As for 208, like I said, the subject
matter is related, and I would assume that the work
that was being done in connection with the first
proof of documents we talked about fed into 208. But
yes, it's part of the same effort, I guess I would
say.

EXAMINER ST. JOHN: Okay. Thank you.
Ms. Willis, do you have any comments on that group of
documents?

1 MS. WILLIS: Yes, your Honor, and I
2 guess this really goes to sort of the approach that
3 we took.

4 When we looked -- relooked at the
5 spreadsheets, we tried to group the spreadsheets by
6 the subject matter, how the Companies had -- had
7 categorized the subject matter, and the 208 through
8 211 were categorized as vender payments in certain
9 cost centers.

10 So when we looked at that spreadsheet we
11 found that there were a number of other spreadsheets
12 on this privileged log that had that same -- that had
13 that same category.

14 So to the extent that your Honors are
15 considering whether or not the spreadsheets on the
16 vender payments for lines 209 through 211 are
17 privileged, we would expect that similar items -- and
18 we have got a list of them -- should be under review,
19 and should the Commission determine that the lines
20 208 through 211 are not subject to privilege and
21 should be disclosed, we would argue that similar
22 items on similar lines -- and again, I've got the
23 specific lines -- that the ruling would apply to
24 those lines as well, and those lines as well would be
25 subject to disclosure.

1 So I don't know what point in time you'd
2 like to hear what lines they are, but we have them --
3 we do certainly have them divided up by category, and
4 this category was vender payments and certain cost
5 centers, and so we took that category and found all
6 the line items that entailed Excell spreadsheets and
7 put them in that category.

8 EXAMINER ST. JOHN: I appreciate that.
9 Let's hold off on that further discussion until --
10 because -- let's hold off until a ruling is made on
11 the privilege of those documents, which I anticipate
12 to make later on in this prehearing conference.

13 MS. WILLIS: And, your Honor, we
14 might -- there is an issue that we need to discuss,
15 and I want to raise it just because I think it's out
16 there and it does need to be discussed.

17 We have seen that there are -- there are
18 several data lines that indicate that the company is
19 claiming privilege with regard to Tracy Klaes
20 communications, and Tracy Klaes is, of course, the
21 analyst for the Blue Ridge Consulting.

22 And there are a number of items where
23 the -- Tracy Klaes is listed as the author, and we
24 would question how that could be covered by the
25 Companies' attorney/client privilege, and how that

1 plays into all this. So that certainly is an issue
2 we want to raise and discuss.

3 EXAMINER ST. JOHN: Okay. Do you have
4 document numbers for those? Are there particular
5 document numbers for those?

6 MS. WILLIS: Yes, your Honor, we have
7 lines 100, 102, 149, and 158, all dealing with Tracy
8 Klaes. And the dates of those -- the dates vary on
9 those.

10 I think the -- I think one or two of
11 them are a spreadsheet, the other are communications.
12 But again, we have a hard time figuring out how a
13 communication with the auditor who was looking at the
14 vender payments could be considered privileged
15 information that the Company is asserting privilege
16 over.

17 EXAMINER ST. JOHN: Understood.

18 Mr. Doringo, I understand that these
19 were not documents that we had flagged for your
20 review to discuss during this conference, so at the
21 risk of kind of, you know, putting you on the spot
22 here, would you have any response to Ms. Willis'
23 comments about those four documents at this time?

24 MR. DORINGO: Yes, that the -- and I'm
25 trying to go through my log here and identify these.

1 My assumption is that these were
2 attachments to privileged emails being exchanged
3 between counsel during the audit process, which is
4 not surprising that the Companies would be conferring
5 with their counsel about responding to auditor
6 requests or questions.

7 I do not see, in my quick review of our
8 log, any email communications involving Ms. Klaes --
9 Mr. Klaes, I'm sorry, I'm not familiar with Tracy
10 Klaes. Is it Ms.?

11 MS. WILLIS: Yes.

12 MR. DORINGO: Okay.

13 -- Ms. Klaes in the logs. So my guess
14 is that they are attachments to emails, the
15 production of which would reveal the privileged --
16 the contents rather than the subject matter of the
17 privileged communications exchanged with counsel.

18 I'll also note that the Attorney
19 Examiners were provided with all of these documents
20 for their in camera review, and we would expect that
21 if there were questions about whether they were
22 privileged or not, that the Attorney Examiners are
23 well positioned to address those.

24 EXAMINER ST. JOHN: All right. Thank
25 you for that.

1 The last document that I wanted to
2 discuss is document No. 214. Mr. Doringo, could you
3 talk a bit more about this document and how you find
4 that it is privileged?

5 MR. DORINGO: Right. And this is -- so
6 this document contains notes by Ms. Mikkelsen for a
7 meeting, but those meeting notes reflect and
8 incorporate the advice and work product impressions
9 of counsel on a number of regulatory proceedings
10 pending, and anticipated in Ohio and elsewhere.

11 I'll note that among those issues are
12 responses -- the plan for responding to certain data
13 requests that the Companies have received, which had
14 not yet been produced to Staff in this case, and the
15 anticipated legal impact of House Bill 6 related
16 issues and other forums in which the Ohio -- I'm
17 sorry, in which FirstEnergy has operating companies.

18 So we believe that this reflects and
19 takes in advice and impressions of counsel relating
20 to the path forward at this point in time.

21 EXAMINER ST. JOHN: So you are saying
22 even though this document was not prepared by
23 counsel, that it includes impressions of counsel?

24 MR. DORINGO: Right. And certainly, at
25 least in the one instance where I mentioned that

1 the -- the plan for a response to Staff data requests
2 that had not been submitted yet, I think there's one
3 instance where it is very clear that the advice and
4 impressions of counsel are included in this document.

5 That said, we -- upon reviewing this
6 one, we did think that it may be appropriate to
7 provide a redacted version of this document. We'd be
8 willing to do so.

9 There are -- there's certainly factual
10 information we think in here and we could redact out
11 the problematic portions if necessary.

12 EXAMINER ST. JOHN: Okay. Thank you.
13 Ms. Willis, do you have any response to that?

14 MS. WILLIS: Thank you, your Honor.
15 Apparently I missed that one in the review, so I
16 don't have anything to add.

17 EXAMINER ST. JOHN: Okay. Thank you.
18 And, Ms. Willis, do you have anything else to add
19 generally, because otherwise I would like to take a
20 short break to review these documents briefly just
21 one more time before making a ruling, unless there's
22 anything you'd like to add before we take that break?

23 MS. WILLIS: Thank you, your Honor. I
24 do appreciate that. I just think generally, you
25 know, we should -- the Commission should err on the

1 side of if there is attorney/client privileged
 2 information and/or work product that can be redacted,
 3 and that the facts that are contained within these
 4 documents, the accounts, the information that's been
 5 put together and compiled by accountants with respect
 6 to amounts and accounts that may be related to show
 7 cause, or related to vender payments, that that
 8 information should be provided, and if it's part of a
 9 larger document, I would urge the Commission to
 10 redact anything that could be considered
 11 confidential, but to disclose -- to err on the side
 12 of disclosure of facts and information in
 13 spreadsheets, especially, your Honor, for purposes of
 14 transparency and allowing parties the discovery
 15 rights that they are entitled to under 4903.082.
 16 Thank you.

17 EXAMINER ST. JOHN: Thank you. And with
 18 that I'd like to take a short break. I'd encourage
 19 everyone, please do not log off of the Webex event,
 20 but instead feel free to stop your video and mute
 21 yourself if you have not already done so.

22 I'd like to come back -- take about a
 23 five-minute break -- let's take a little bit longer
 24 just so we have an opportunity to, you know, give
 25 these -- give your arguments and the documents the

1 full attention that they deserve, so let's come
2 back -- I think the time is 10:31, let's come back at
3 10:40. Thank you.

4 (Recess taken.)

5 EXAMINER ST. JOHN: Let's go back on the
6 record.

7 I want to thank you all for your
8 patience as we took that break to rereview a couple
9 of the documents that we had discussed this morning.

10 Before I get to our rulings, I first
11 want to mention that during our in camera review we
12 were as minimally intrusive as we could be. As soon
13 as we identified that a privileged is attached to a
14 document, we stopped reviewing at that time.

15 I know there was a concern expressed
16 during our last prehearing conference on that point,
17 so I did want to confirm that we took that into
18 consideration and conducted our in camera review
19 accordingly.

20 So I do have a couple questions for
21 Mr. Doringo concerning documents 100 and 102, that
22 Ms. Willis flagged during our earlier discussion.

23 My question to you regarding those two
24 documents in particular, could you confirm the parent
25 email log numbers for those documents?

1 MR. DORINGO: Your Honor, I'm looking to
2 see if I can do that quickly.

3 EXAMINER ST. JOHN: Take your time.
4 Thank you.

5 MR. DORINGO: You asked for 100 and 102?

6 EXAMINER ST. JOHN: Yes.

7 MR. DORINGO: I can say that I don't
8 think I'm going to be able to quickly pull those
9 parent emails while we have everybody waiting here,
10 but I do -- based on the review that we did since
11 Ms. Willis raised that question, it looks like those
12 were draft responses to audit requests which would
13 explain why the original author would have been
14 Ms. Klaes, but they were edited by counsel and
15 others, I believe, in preparation for submission to
16 the auditor.

17 EXAMINER ST. JOHN: Okay. So at this
18 time you are confirming that those were either
19 attached to emails or drafts created by individuals
20 employed by the company in response to those -- I'm
21 sorry, could you say that one more time?

22 I'm trying to catch myself, because I
23 don't want to over speak and over share what the
24 documents are. So I'll ask you to please say what
25 you said again so I'm not over sharing more than what

1 you feel comfortable with.

2 MR. DORINGO: Of course. And I
3 appreciate that. But my understanding is that those
4 were either the requests or the draft responses that
5 were received from the auditor attached to
6 communications between counsel about responding to
7 those requests, which should explain the original
8 author of those documents being Ms. Klaes.

9 That said, I do not have the parent
10 emails in front of me right now, and I don't think I
11 would have them in the next couple minutes, so if we
12 learn differently, we are happy to alert the Bench.

13 EXAMINER ST. JOHN: Okay. I guess my
14 question to you -- I'm not sure who is going to be
15 fielding the discussion regarding the FERC
16 investigation that we planned to turn to next.

17 Are you going to be fielding that
18 discussion? And if not, would you have an
19 opportunity to possibly get answers to those
20 questions during the remainder of the prehearing
21 conference?

22 MR. DORINGO: Right. I will be
23 addressing the FERC matter, but there are others of
24 my team on this call who I know are working
25 diligently to try to answer this question while I

1 will be talking to you about the FERC.

2 EXAMINER ST. JOHN: Understood. Well,
3 with that being said, let's hold off on any ruling
4 for documents 100 and 102 at this time, and we can
5 turn to those two particular documents towards the
6 end of our prehearing conference.

7 MS. WILLIS: Your Honor, if I may be
8 heard very quickly, we -- in our earlier discussion I
9 talked about waiver, and your Honors had said that
10 that issue was addressed fully in the prior
11 prehearing conference.

12 Over the break I did get a chance to
13 relook at the transcript. Although I believe the
14 express -- the concept of expressed waiver was ruled
15 on, I don't think there was a ruling on implied
16 waiver, that there can be a waiver -- an implied
17 waiver under the Hern's test in Ohio related to the
18 filing of testimony and the filing of -- well, the
19 filing of the affidavit and the supplemental
20 response. So I just raise that for your
21 consideration.

22 EXAMINER ST. JOHN: Okay. Thank you.

23 Mr. Doringo, I'd like to next turn to
24 documents 82, 83, 87 and 145. My question to you is,
25 would the Companies be willing to produce just that

1 first page of the document that we had discussed
2 earlier in the prehearing conference?

3 MR. DORINGO: Yes, I think we would be,
4 if we're permitted to take out the compilation -- the
5 compilation I discussed earlier.

6 EXAMINER ST. JOHN: Yes. With that
7 understanding, we will ask you to produce just that
8 first page of the document then, and that again is
9 for documents 82, 83, 87, and 145.

10 Next, we find the document 214 should be
11 produced, and that the Company should produce, as
12 discussed earlier, a redacted version of that
13 document.

14 This next document is not one that we
15 have already discussed this morning, but we'll note
16 the documents 1, 10 and 233 appear to be the same
17 document.

18 Documents 10 and 233 were redacted,
19 while document 1 was withheld. To fix that
20 inconsistency we'd like to clarify to the parties
21 that they can reference the redacted documents 10 and
22 233 in place of document 1. We assume that was just
23 a minor oversight by the Companies.

24 Next, we find the documents 208 to 211,
25 that we discussed earlier in the prehearing

1 conference, we do find those documents to be
2 privileged.

3 And at this time, with the exception of
4 documents 100 and 102 which we have yet to rule on,
5 and the documents that I have already ruled on, we
6 find that the remainder of the documents in the
7 privileged log are privileged.

8 And with that, I will turn things over
9 to Judge Addison.

10 ATTORNEY EXAMINER ADDISON: Thank you,
11 Judge St. John.

12 EXAMINER ST. JOHN: I'm sorry to
13 interrupt, I think Ms. Willis was trying to speak and
14 was on mute.

15 MS. WILLIS: Thank you, your Honor. If
16 I may be heard just quickly. During our discussion I
17 had indicated there were a number of documents --
18 spreadsheets very similar to the -- to the
19 spreadsheets that your Honors identified as having
20 questions on, and would ask that we -- or ask that
21 the Bench consider the privilege -- whether privilege
22 is appropriate for those very similar documents.

23 I know we didn't have an opportunity to
24 go line by line, that that was done off the record,
25 so we would be prepared to provide a list of the

1 categories of documents, along with the lines that we
2 would ask the Bench to consider for purposes of
3 whether or not they should be produced.

4 EXAMINER ST. JOHN: We have gone through
5 the entirety of the privilege log, identified each
6 document item by item, with the caveat, of course,
7 that I've said before that we have -- as soon as we
8 recognized that a privilege existed, moved on to the
9 following document.

10 But I do want to confirm at this time
11 that we have looked at each document that has been
12 produced for in camera review, so to the extent,
13 Ms. Willis, that you would like to draw our attention
14 to other documents, I know that you have done that
15 already in this prehearing conference, the documents
16 relating to Ms. Klaes, but in terms of spreadsheets,
17 tables, things like that, we have reviewed those
18 documents and, again, the remainder of the documents
19 we have found to be privileged.

20 MS. WILLIS: Thank you, your Honor.

21 EXAMINER ST. JOHN: Thank you. And with
22 that, I'll go ahead and turn it over to you once
23 again, Judge Addison.

24 ATTORNEY EXAMINER ADDISON: Thank you
25 very much.

1 And if the parties could provide a
2 reminder to the Examiners that we still need to
3 address items 100 and 102 at the end of the
4 prehearing conference, we would certainly appreciate
5 that.

6 We know everyone has quite a bit on
7 their plate during this prehearing conference,
8 ourselves included, and we would certainly appreciate
9 the reminder.

10 Moving on to our second area of focus
11 today, during our previous prehearing conference held
12 on February 10th, 2022, we took up OCC's request that
13 we revisit our ruling on the motion to compel filed
14 by OCC on June 29th, 2021, requesting that
15 FirstEnergy disclose all documents given to the
16 Federal Energy Regulatory Commission, or FERC, as
17 part of their recent audit of the FirstEnergy
18 utilities.

19 As previously discussed, we denied the
20 motion to compel during the August 31st, 2021,
21 prehearing conference held in this proceeding, noting
22 that we would allow FERC to proceed with their
23 investigation in a confidential manner, and could
24 revisit this issue if and when the public audit was
25 released.

1 The audit report was publicly filed on
2 February 4th, 2022. After hearing some brief
3 arguments during that last conference, we instructed
4 parties to file additional memoranda before we
5 provided our decision.

6 As a preliminary matter, we thought we
7 would ask the parties if we still needed a ruling on
8 this issue, or if some other resolution had been
9 reached.

10 Specifically, we are curious if
11 FirstEnergy Corp. will otherwise be providing these
12 documents subject to the motion to compel in response
13 to a subpoena to FirstEnergy Corp.'s Vice-President,
14 Controller, and Chief Accounting Officer, Mr. Jason
15 Lisowski in the corporate separation case, which is
16 Case No. 17-974-EL-UNC.

17 MR. LEE: Thank you, your Honor. This
18 is Corey Lee on behalf of FirstEnergy Corp.

19 First I'd like to just clarify one
20 thing. There is both the -- two different FERC
21 matters at issue, the FERC investigation, which is
22 ongoing and has not been completed, and then there's
23 the FERC audit, which has been completed.

24 So with that as background, yes, there
25 has been a subpoena to FERC -- or to FirstEnergy

1 Corporation for the FERC communication relating to
2 the audit, and FirstEnergy Corporation will not be
3 providing those documents.

4 And we actually moved to quash
5 Lisowski's subpoena yesterday. And that is a
6 position the Corporation has taken -- consistently it
7 has not agreed to produce those documents to any
8 third party.

9 I would also add, too, your Honor that
10 OCC has actually moved to intervene in front of FERC,
11 so it has placed this issue of its entitlement to
12 documents in front of FERC itself.

13 ATTORNEY EXAMINER ADDISON: Thank you,
14 Mr. Lee.

15 In that case, I'd like to thank the
16 parties for filing additional memoranda on this
17 narrow question of whether the confidentiality
18 provisions still apply once the FERC audit report has
19 been released.

20 I believe the request has been slightly
21 narrowed since the initial filing, Ms. Willis, so I'd
22 like to confirm first and foremost, the two discovery
23 requests at issue are RPD-5-001, and
24 Interrogatory-06-003; is that correct?

25 MS. WILLIS: Yes, your Honor, that's my

1 understanding. And you are correct that we did
2 narrow those.

3 We narrowed those fairly early on,
4 recognizing that we should -- we were trying to reach
5 an agreement and accommodation, so we did not -- we
6 are not seeking FERC's nonpublic files or their
7 nonpublic documents, we are merely seeking the
8 documents that FirstEnergy entities, including
9 FirstEnergy Corp., and any subsidiary, may have
10 provided to FERC during the course of the audit and
11 afterwards.

12 ATTORNEY EXAMINER ADDISON: Thank you,
13 Ms. Willis.

14 And just to follow up from the previous
15 prehearing conference, OCC is obviously only
16 interested in those documents relating to Ohio
17 entities, correct?

18 MS. WILLIS: Yes, your Honor, that is
19 correct. So to the extent that documents would
20 include more than Ohio information, we would accept
21 the redactions on those documents.

22 ATTORNEY EXAMINER ADDISON: Thank you
23 very much.

24 And just to make the record as clear as
25 possible, I will mention, even though the

1 interrogatory has not been narrowed in scope, I would
2 just like to state for the record, with respect to
3 the FERC audit mentioned, OCC is also requesting, in
4 response to that interrogatory, the employees that
5 have met with the FERC staff either in person or via
6 virtual meeting, the employees interviewed by FERC
7 staff, and the employees that have communicated with
8 FERC staff.

9 We have read the pleadings, including
10 the additional memoranda filed on February 18th, but
11 do have some follow-up questions, and I believe I'll
12 begin with Ms. Willis.

13 Can you respond to the Companies' claim
14 that there's still an ongoing audit or investigation
15 at issue here? I believe Mr. Lee may have started
16 this for us. And if so, if there is an ongoing audit
17 or investigation, will granting your narrowed motion
18 to compel inhibit FERC's ability to conduct that
19 audit or investigation?

20 MS. WILLIS: Thank you for your
21 question, your Honor.

22 As I understand it, FirstEnergy is being
23 investigated with respect to HB 6 activities and
24 political and charitable contributions.

25 We were advised of that in a pleading

1 that was filed by FirstEnergy, and it was also
2 apparently disclosed in a filing before the
3 Securities & Exchange Commission.

4 We are told that there were two letters
5 that were sent to FirstEnergy with regard to the
6 investigation, and those were sent in, I believe,
7 2021, in February -- well, actually 2020, I
8 believe -- well, certainly we can get that date from
9 the Company.

10 But the investigation, your Honor, is a
11 completely different proceeding than the audit. The
12 investigation is under different standards with
13 different staff, and it is a completely different
14 scope.

15 The audit was of the entire FirstEnergy
16 Corp. and their affiliates, and whether or not they
17 were complying with the FERC restrictions on
18 affiliate transactions and on service company
19 accounting, and it was a very separate matter.

20 The investigation is a different matter
21 all together. So yes, we would -- we do understand
22 the investigation is ongoing, we do not understand
23 that the audit is ongoing.

24 The audit report was issued.
25 FirstEnergy actually even provided a response to that

1 audit report. It's at a much advanced stage, much
2 different than the investigation where there is no
3 audit -- there is no report that has been issued, no
4 findings, no -- as far as we know, certainly not in
5 the docket, there is no published audit or published
6 report of the investigation.

7 So they are two separate proceedings.
8 Although they might involve similar issues, they are
9 very separate proceedings.

10 So we do not believe that by asking for
11 the documents that FirstEnergy provided to FERC in
12 the audit would interfere with the separate
13 investigation that FERC is undertaking with respect
14 to FirstEnergy's HB 6 activities.

15 So I guess that's the answer to your
16 question. I hope I've given you enough. So if you
17 have any -- if you want to -- if you have further
18 questions, if I wasn't very clear, I can certainly
19 respond.

20 ATTORNEY EXAMINER ADDISON: Thank you,
21 Ms. Willis. I think that will be fine for now.

22 Mr. Doringo, would you like to respond?

23 MR. DORINGO: Yes. Thank you, your
24 Honor. The investigation staff's directions to the
25 Companies -- or to FirstEnergy were to maintain

1 records developed as part of the ongoing audit
2 conducted by FERC's Division by Audits & Accounting.

3 That audit and those records are
4 directly relevant to the ongoing investigation being
5 conducted by FERC. The -- we would note, as we have
6 in our pleadings, that the audit itself has not
7 completed, either.

8 OCC, as Mr. Lee mentioned, has moved to
9 intervene in the FERC -- and what if any rights it
10 has with respect to that confidential audit are going
11 to be addressed by FERC soon.

12 We think that while -- as we said in our
13 pleadings, that there is nothing in the Federal Power
14 Act of FERC's regulations, or any authority cited by
15 any party indicating that the confidentiality
16 protections of FERC statutes and regulations go away
17 once an audit report is published.

18 This is the worst type of case to allow
19 intrusion and to find an exception in those rules for
20 the production of confidential materials exchanged
21 with FERC in light of the ongoing confidential
22 investigation.

23 ATTORNEY EXAMINER ADDISON: Thank you,
24 Mr. Doringo.

25 Before I open it up to others to

comment, as noted in the responsive memorandum, you acknowledged during this particular phase in the FERC process, pursuant to the applicable regulations, FirstEnergy Corp. may, within 30 days, notify FERC whether it requests FERC review of certain findings through a shortened procedure, or contends that there are material facts in dispute which require cross-examination or more trial type proceeding.

My question is, was such a request made, and were either of these options selected?

MR. DORINGO: I am not aware of that right now. I did not represent FirstEnergy in that proceeding. If Mr. Lee has any information, I defer to him, but I do not know that answer.

ATTORNEY EXAMINER ADDISON: Thank you, Mr. Lee?

MR. LEE: Yes, your Honor. So I believe you're asking is the Company going to contest the findings of the audit report.

At this point in time, I do not believe the Company intends to contest the audit itself. That audit has now moved into its compliance phase where there may be additional disputes regarding compliance issues, but not the findings of the audit itself.

1 ATTORNEY EXAMINER ADDISON: Thank you
2 for that clarification.

3 MS. WILLIS: Your Honor, if I might add,
4 the FirstEnergy Corp. actually filed a response to
5 the audit where it -- and that response is dated
6 January 24th, 2022, where it agreed in large part
7 and -- to the audit recommendations and findings.

8 ATTORNEY EXAMINER ADDISON: Thank you
9 very much, Ms. Willis.

10 Mr. Doringo, in many of the FERC cases
11 that you cite in your pleading, particularly the
12 cases related to discussion and adoption of FERC's
13 procedural rules, they specifically cite to the fact
14 that information to be provided to the audit staff
15 will be done so on a nonpublic basis.

16 Is there a difference between nonpublic
17 and confidential?

18 MR. DORINGO: I don't think so. Maybe
19 we have used those words interchangeably, but I
20 think -- well, I think a nonpublic investigation
21 ensures for those under review in these comprehensive
22 FERC compliance investigations that the documents and
23 communications they exchange with FERC will not be
24 subject to disclosure later, which, you know,
25 promotes candor and efficiency in that process.

1 So I guess I do not -- maybe we did not
2 draw a distinction between the confidential nature
3 and the nonpublic nature.

4 I think it's a difference in how FERC
5 describes the confidential nature of the proceeding
6 in the regulations and the -- and in its
7 communications to parties under review who are told
8 that the documents will be placed in nonpublic files.

9 ATTORNEY EXAMINER ADDISON: Thank you.
10 Ms. Willis, would you care to respond to that?

11 MS. WILLIS: No, your Honor. I'm not
12 sure I could add anything to that discussion, but
13 thank you.

14 ATTORNEY EXAMINER ADDISON: Thank you.
15 Of course.

16 Ms. Willis, in the Companies' responsive
17 memorandum they note an offer to produce the
18 underlying documents that were provided to FERC
19 during the audit as a proposed compromise to this
20 issue.

21 Should the communications in response to
22 FERC's inquiries during the audit be held to a
23 different standard than the underlying documents?

24 Do we run the risk of revealing FERC's
25 internal deliberative process by granting your motion

1 to compel, even as it is narrowed?

2 MS. WILLIS: Your Honor, our position
3 would be that just the responsive documents could
4 be -- could be given to OCC and provided on a
5 public -- well, I guess they could be provided -- I
6 don't think it runs the risk of revealing FERC's
7 process, thought processes, or their audit.

8 Again, I think, you know, if you are
9 going to consider that argument, then, you know, we
10 get into this argument I suppose of whether or not
11 the -- the FERC audit, after it's completed, still --
12 whether those documents still remain nonpublic.

13 But I do not believe that the -- it runs
14 the risk of revealing FERC -- important FERC data
15 about the audit.

16 ATTORNEY EXAMINER ADDISON: Thank you.

17 MS. WILLIS: And I guess, your Honor,
18 just to quickly add, the offer of underlying
19 documents, certainly that -- you know, that is an
20 offer, we do appreciate the offer.

21 We do have a concern, and it's been a
22 concern that -- you know, it's been borne out by
23 practice, what FERC -- what FirstEnergy considers
24 appropriate documents for us to review is not
25 necessarily what we would consider appropriate

1 underlying documents, so there is that challenge that
2 we have not really been able to -- I mean, we haven't
3 even been able to agree on what HB 6 costs are in
4 this case.

5 So I would find it, you know, difficult
6 to just accept that FirstEnergy is going to give us
7 the appropriate underlying documents.

8 EXAMINER ADDISON: Thank you.

9 Mr. Doringo.

10 MR. DORINGO: Well, to the -- your
11 Honor, I think your question was -- and I just want
12 to clarify.

13 Was your question whether the production
14 of underlying records would reveal the deliberative
15 process in which FERC is engaged, or was it the
16 production of the responses themselves to the
17 request?

18 ATTORNEY EXAMINER ADDISON: Responses
19 themselves.

20 MR. DORINGO: Well, then, I thought
21 that's what your question was, and I disagree with
22 Ms. Willis that the production of the questions and
23 answers from FERC and received from FirstEnergy Corp.
24 during the audit absolutely reveal the heart of the
25 deliberative process.

1 That is exactly how the FERC collects
2 information, and would reveal the course of its
3 investigation.

4 Those are the primary means by which the
5 Companies are -- FirstEnergy Corp. communicated with
6 FERC during the process, and they are just the type
7 of thing that parties should not be entitled to.

8 And I would note that even in contested
9 audits before FERC, when parties are allowed to
10 intervene, those parties, in contested audits, do not
11 get the audit communications with -- exchanged with
12 FERC during the audit process. That's set out in
13 Order No. 675 from FERC and 114 FERC, Paragraph
14 61,178. So, you know, I do think there is an abiding
15 interest in protecting those communications.

16 And as to the -- our offer to produce
17 the underlying communications -- I'm sorry, the
18 documents that were produced for FERC, I would just
19 reiterate that, as I said in the pleadings more than
20 once, it was never the Companies' contention that a
21 document, just because it was provided to FERC, was
22 protected somehow in all other instances.

23 What we are seeking to protect is FERC's
24 investigative process itself. But -- and the problem
25 has been that OCC has framed its request solely with

1 reference to those communications with FERC.

2 So we offered to produce documents
3 without the Q and A responses to OCC. And I do not
4 share Ms. Willis' concern that they need have any
5 doubts about whether we would produce documents
6 relating to the Ohio Companies that weren't produced
7 to FERC. It's what we committed to do and would
8 endeavor to do, but they again rejected that offer.

9 ATTORNEY EXAMINER ADDISON: Thank you.

10 One final question, and then I'll open
11 it up for general comments from others that may want
12 to weigh in before we provide a ruling.

13 Mr. Doringo, is OCC correct that there's
14 an inconsistency in the application of these FERC
15 statutes with the comparable statute applying to the
16 Securities & Exchange Commission?

17 OCC alleges that FirstEnergy Corp. has
18 already produced, or is in the process of producing,
19 the documents it turned over to the SEC related to
20 its investigation. So how is this different?

21 MR. DORINGO: And my -- well, I'll back
22 up.

23 What we have produced -- or FirstEnergy
24 Corp., rather, Mr. Lee has produced to OCC, documents
25 that were made in productions to DOJ and the SEC, not

1 the communications with those regulators, but the
2 underlying documents that were made in productions to
3 them.

4 That is precisely what I have proposed
5 to OCC to resolve this dispute. So I do not see any
6 inconsistency with our position here as opposed to
7 the way FirstEnergy Corp. has handled other matters.

8 And I'll also remind the Bench that
9 those productions were a result of a similar
10 resolution where OCC was seeking a broader range of
11 materials, but in that instance decided that the
12 underlying documents weren't sufficient to address
13 their concerns.

14 ATTORNEY EXAMINER ADDISON: Thank you
15 very much.

16 Ms. Willis, any response?

17 MS. WILLIS: Your Honor, I would tee
18 this up for Mr. Finnigan, as to Mr. Finnigan would be
19 much more familiar with this than I. If you would
20 allow that, I'd appreciate that.

21 ATTORNEY EXAMINER ADDISON: Certainly.
22 Mr. Finnigan.

23 MR. FINNIGAN: Your Honor, our position
24 would be that, you know, the whole scope of documents
25 produced to FERC should be subject to discovery in

1 the case.

2 MR. LEE: Your Honor, if I may, I
3 believe Mr. Finnigan didn't really answer the
4 question that was asked of you, and to answer your
5 question, as part of our resolution around the SEC
6 documents, no communications with the SEC, any kind
7 of the Q and A back and forth, were produced, only
8 underlying factual documents were produced, which I
9 believe is similar to the resolution that the
10 Companies have suggested here.

11 ATTORNEY EXAMINER ADDISON: Thank you,
12 Mr. Lee.

13 Any other parties that would like to
14 weigh in at this time?

15 MS. BOJKO: Your Honor, this is Kim
16 Bojko with OMAEG. We did file responsive pleadings,
17 I think the pleading speaks for itself.

18 Just as discovery is considered, data
19 requests in Ohio audits are considered to be
20 discoverable.

21 I think that while the word
22 communication is used in OCC's request for
23 production, that it's very comparable that it's a
24 question and answer, a data request, and it should be
25 able to be produced by the FirstEnergy utilities.

1 Nobody is asking the FERC employees, the
2 members, officers, or employees of the Commission to
3 divulge any fact or information which may come to the
4 knowledge during the course of examination of the
5 books or the accounts of the utility, and that's
6 what's privileged under the investigatory privilege
7 here.

8 We're not asking that, we're asking
9 FirstEnergy utilities to produce the communications,
10 the written communications. And in fact, the
11 Interrogatory 06-003 only asks for identification of
12 the employees, so that's not even asking for
13 underlying documents or communications, just asking
14 please identify the employees.

15 So those things do not fall under the
16 privilege, and given that the audit report has been
17 filed, I think the investigatory privilege ends,
18 which I think was your Honor's original question
19 about how long it goes.

20 And the word confidential has been used
21 a lot today and in the last prehearing. There's a
22 distinction between what is privileged and what is
23 confidential.

24 If it's confidential, that can be
25 handled under a protective agreement, and that cannot

1 be allowed to be disclosed to the public, but that
2 doesn't mean that it's not disclosed to the parties.

3 So I think we have to be careful about
4 our use of confidential versus privileged, which have
5 different production results. Thank you, your Honor.

6 ATTORNEY EXAMINER ADDISON: Thank you,
7 Ms. Bojko.

8 Any other parties? Ms. Willis or
9 Mr. Doringo, do you have anything to add as a final
10 thought on the matter?

11 MR. DORINGO: No, your Honor. I think
12 the briefs and our statements today speak for
13 themselves.

14 MS. WILLIS: And likewise, your Honor, I
15 think we have fully briefed it and are ready for the
16 decision.

17 ATTORNEY EXAMINER ADDISON: Thank you.
18 I believe we are ready to provide a decision.

19 Upon consideration of the arguments
20 presented in the February 18th, 2022, memoranda and
21 discussion here today, the arguments of OCC and OMAEG
22 are well taken, and we will grant OCC's motion to
23 compel as to Interrogatory O6-003 and RPD-05-001 to
24 the extent that it has been narrowed as discussed
25 earlier during this conference.

Ohio Admin Code 4901.116 provides 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 grounds 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.

As noted earlier, we denied OCC's June 29th discovery request to allow FERC to conclude its audit without interference from the discovery process in this proceeding.

That audit has now been completed per the express statement from the FERC Division of Audits and Accounting.

While the Companies admit, and the memorandum contra OCC's original June 29, 2021 motion to compel that these federal statutes and regulations expressly apply to FERC, the Companies also attempt to argue that they reflect and implement important federal rules and policy that implicitly extends to State regulators like this Commission. However, the Companies have produced no persuasive case precedent to substantiate that claim.

The cases regarding the Freedom of

1 Information Act cited by the Companies may be
2 informative to some limited extent as to how FERC may
3 choose to respond to a request for its records
4 regarding the audit, but they are not compelling or
5 on point for our purposes today.

6 Analogous to our own statute, RC
7 4901.16, which precludes Commission employees from
8 prematurely divulging information during the course
9 of its investigation, we find that the statutes and
10 regulations proffered by the Companies in their
11 responsive memoranda ultimately serve that same
12 purpose.

13 Furthermore, the provision of
14 information to FERC's audit staff as nonpublic during
15 the course of an audit is similar to the routine
16 procedural practice here at the Commission where
17 entities can provide Staff information on a nonpublic
18 basis during the course of an investigation.

19 Now that that audit has been publicly
20 filed, the requested information may and should be
21 disclosed through discovery.

22 Moreover, we believe our ruling today
23 will not improperly interfere with FERC's ongoing
24 nonpublic investigation of FirstEnergy Corp.'s
25 lobbying and governmental affairs activities, nor

1 cause an inappropriate intrusion into any applicable
2 deliberative process of FERC.

3 We are focused on the publicly available
4 audit report. While the Companies provided guidance
5 from FERC indicating that it is not uncommon for
6 information to be shared between audit staff and
7 enforcement staff to promote efficiency, that was
8 made in reference to encourage entities undergoing an
9 audit to be forthcoming with existing violations and
10 cooperate during that audit process.

11 Our ruling today is limited to those
12 documents and communications provided by the
13 Companies to FERC during the course of the audit.

14 It does not, however, cover any
15 communications from the audit staff to FirstEnergy,
16 or internal workpapers, draft reports, or internal
17 communications of the audit staff, whether the audit
18 staff subsequently provided such information to the
19 enforcement staff, or how the enforcement staff may
20 use any information during the course of its
21 investigation, which is separate as noted by several
22 parties during this conference call from the audit.

23 To the extent that there are concerns
24 regarding the confidentiality of information to be
25 produced, Ms. Bojko was quite correct indicating

1 during the last prehearing conference, and today's
2 conference, that the majority, if not all parties
3 have executed a confidentiality agreement with the
4 Companies.

5 Further, any disputes as to the
6 confidentiality of such information will be handled
7 through the routine mechanisms we have in place, and
8 with which I'm sure all the parties here are quite
9 familiar at this point.

10 As to timing for producing information,
11 Mr. Doringo, when would production be possible?

12 MR. DORINGO: Your Honor, can I
13 understand, please, before I answer that question,
14 the limitation to the documents that must be
15 produced? It might help inform my response there.

16 ATTORNEY EXAMINER ADDISON: Okay.

17 MR. DORINGO: So if I think I heard your
18 Honor correctly, the ruling is limited to documents
19 provided by the Companies to FERC during the audit,
20 and -- go ahead.

21 ATTORNEY EXAMINER ADDISON: Documents
22 and communications provided by the Companies to the
23 audit staff, correct.

24 MR. DORINGO: Right. And I think that
25 the ruling was not communications provided by audit

1 staff to the Companies, and my question just is, you
2 know, in terms of data requests and responses, of
3 course the request themselves, you know, will include
4 the communications of the Staff to the Companies and
5 others.

6 So I just want to be clear that those
7 data requests and responses are subject to being
8 compelled -- subject to the compelling production?

9 ATTORNEY EXAMINER ADDISON: Correct.

10 MR. DORINGO: In terms of timing, will
11 there be -- I assume -- can I ask whether there will
12 be a written ruling on this issue?

13 ATTORNEY EXAMINER ADDISON: Similar to
14 our prior prehearing conferences held in this and
15 other investigations related to what -- one of the
16 four investigations of the FirstEnergy utilities,
17 this will be all the parties get. There will be no
18 written ruling in response to our holdings here
19 today.

20 MR. DORINGO: Okay. Thank you, your
21 Honor. We do reserve all of our rights with respect
22 to this ruling and to take advantage of the -- of
23 rules of interlocutory appeal of course.

24 ATTORNEY EXAMINER ADDISON: Of course.

25 MR. DORINGO: And in terms of timing, I

1 would say given the length of the audit that
2 continued for, you know, some years, and the breath
3 of the audit and OCC's request, we would request 30
4 days at least to make a production, subject to any
5 motions of interlocutory appeal.

6 MS. WILLIS: Your Honor, if I may.

7 ATTORNEY EXAMINER ADDISON: You may.

8 MS. WILLIS: When you said that the
9 documents are to be produced, those are the ones that
10 the Companies provided to the audit staff.

11 The clarification, we had asked for all
12 FirstEnergy entities, whether it be the utilities or
13 the Corp. or the Service Company, because all of
14 those entities were subject to the audit, it was not
15 just the FirstEnergy utilities.

16 ATTORNEY EXAMINER ADDISON: Thank you
17 for that clarification, Ms. Willis.

18 I was granting the motion to compel as
19 it has been narrowed, so to the extent that I
20 misspoke, we will granting the motion to compel as we
21 discussed earlier in the conference.

22 MS. WILLIS: So that would include the
23 entities -- discovery of documents from FirstEnergy
24 entities, is that --

25 ATTORNEY EXAMINER ADDISON: Correct.

1 MS. WILLIS: Thank you.

2 MR. DORINGO: Your Honor, I'm sorry,
3 just trying to get this --

4 ATTORNEY EXAMINER ADDISON: Go ahead.

5 MR. DORINGO: Just to be clear, when you
6 say it includes production of documents from
7 FirstEnergy entities, I understand that to mean all
8 entities that were under -- that were party to that
9 audit, but so the limitation then is only those
10 documents which concern the Ohio Companies?

11 ATTORNEY EXAMINER ADDISON: Of course.
12 And I think we did make that designation earlier
13 during the conference, but thank you for making that
14 clarification, Mr. Doringo.

15 I do believe the 30-day time frame is
16 appropriate to allow the FirstEnergy utilities to
17 file an interlocutory appeal, if they so choose.

18 And if that would happen, we will of
19 course take that under advisement, and to the extent
20 that we need to adjust the timing of any production,
21 or if the Commission would later reverse our decision
22 here today, we can certainly -- that will certainly
23 be addressed at a later time.

24 Anything else in regards to the motion
25 to compel?

1 Okay. I will note we are, here at the
2 Commission, starting to slowly transition back into
3 meeting in the physical hearing rooms for purposes of
4 prehearing conferences and hearings.

5 I will note and advise everyone, in the
6 event that we do have future prehearing conferences,
7 we wanted to let everyone know that we will likely be
8 in person. Anything else? I'm sorry, did I hear
9 something?

10 MS. WILLIS: Yes, your Honor, that was
11 me. Yes, there were a couple other matters that we
12 wanted to raise for the Bench's attention.

13 The first matter is we were making a
14 motion for clarification of Examiner Price's letter
15 of withdrawal from presiding over this case and the
16 three other cases that he filed March 4th, 2022.

17 And specifically, we're seeking
18 clarification of Examiner Price's words that he
19 withdraws from presiding over the case, and the three
20 other cases.

21 We are asking for whether Examiner Price
22 will continue to have involvement either directly, or
23 indirectly, with anything and anyone regarding the
24 four cases, and if so, what would his involvement be?

25 And we give as an example, will Examiner

1 Price be supervising or advising any PUCO personnel
2 involved in these cases?

3 And also, is there a distinction between
4 the words withdraw from presiding, and the commonly
5 used judicial term recusal? Thank you.

6 ATTORNEY EXAMINER ADDISON: Thank you,
7 Ms. Willis. And you indicated that you'll be filing
8 this in the docket?

9 MS. WILLIS: Your Honor, if that is your
10 preference, we can do that, although we would
11 certainly accept clarification through this
12 prehearing.

13 ATTORNEY EXAMINER ADDISON: Thank you.
14 I think it would be our preference that this be filed
15 in the docket. We had quite a bit to move through
16 today, that obviously was not on our agenda. So I
17 would appreciate if OCC could make that filing for
18 us.

19 MS. WILLIS: Appreciate it, your Honor.

20 Secondly, I guess we raise the issue
21 about -- I mean, we raised the issue about whether or
22 not the schedule that we have got set out for this
23 proceeding will work.

24 We are wondering whether -- we are still
25 considering whether there would be a need for a

1 continuance or extension of the schedules that
2 were -- that we are under, so we are considering that
3 matter.

4 I raise that for the Bench's knowledge
5 so that you were aware that this is one of the
6 considerations we are -- that we are weighing.

7 And the other -- the last issue that we
8 wanted to briefly raise for future consideration is
9 that we have a number -- in the different proceedings
10 we have had issued -- have had subpoenas issued for a
11 number of FirstEnergy Corp. personnel, and in the
12 past the Bench has indicated a preference, or a
13 strong desire that we not file pleadings and
14 documents with multiple case headings on them, and
15 we're heading into these -- I mean, right now we're
16 still going to -- we're still under the subpoenas,
17 we're still trying to figure out whether -- because
18 of all the pleadings that have been filed, whether
19 the subpoenas will be upheld because of our motions
20 to quash, but we raise the issue that a lot of the
21 witnesses, like the corporate witnesses, their
22 testimony would be applicable to more than one case
23 number, and we would rather not have to bring these
24 witnesses in more than once and depose them multiple
25 times with different cases numbers, so we raise that

1 as an issue.

2 And I know there's been many, many times
3 when consolidation has been considered and ultimately
4 it has not been ruled upon, it has not been decided,
5 but we raise it as an issue that, you know, once
6 these depositions get started, if we don't have some
7 accommodation, we may have to issue -- and we don't
8 want to do that -- issue subpoenas for several
9 depositions in each different case that a witness
10 might be relevant in.

11 ATTORNEY EXAMINER ADDISON: Thank you.
12 Are you asking if we will allow parties to file a
13 subpoena in multiple case -- in multiple cases?

14 MS. WILLIS: Certainly that would be --
15 that would be -- yes, your Honor, I think that would
16 be a request -- that that would be one way to handle
17 it.

18 We're just raising that -- I think it's
19 an issue that we should be thinking about, and that
20 will require resolution at some point.

21 ATTORNEY EXAMINER ADDISON: Thank you,
22 Ms. Willis.

23 With that, I do believe the current
24 process of keeping these cases separate has been
25 working, especially to the benefit of the Attorney

1 Examiners to be able to sort everything out and not
2 convolute everything into one big proceeding as these
3 proceedings have not been consolidated.

4 So we will take that under advisement.
5 If the parties do feel it would be beneficial, that
6 would certainly be something we would entertain.

7 MS. WILLIS: Thank you.

8 EXAMINER ADDISON: Anything else for the
9 good of the order?

10 MR. DORINGO: Go ahead.

11 EXAMINER ST. JOHN: I think at this time
12 it might be a good point for us to revisit documents
13 100 and 102 that were subject to the in camera
14 review.

15 Mr. Doringo, I don't know if at this
16 time you have been able to obtain the information of
17 the parent document for those two line items.

18 MR. DORINGO: I have. The -- so the
19 parent email to those documents is an internal
20 discussion regarding the -- including counsel,
21 regarding the audit responses, some audit responses
22 submitted in the Rider DCR Case No. 2016-29.

23 That document, the parent email was not
24 subject to production in this case, and so it was
25 not -- it was not on the privilege log. We are happy

1 to separately provide it to the Attorney-Examiners.

2 My understanding that -- is that the
3 spreadsheet to -- that was attached to that email,
4 document No. 100, was modified -- though it was
5 received from Ms. Klaes, was modified by the
6 Companies in draft form in preparing the responses to
7 those audit requests.

8 EXAMINER ST. JOHN: Thank you for that
9 information.

10 With taking that into consideration, at
11 this time we will find both documents 100 and 102 to
12 be privileged.

13 And also for clarity of the record, I'd
14 like to address OCC's implied waiver argument head
15 on.

16 Just for clarity of the record, again,
17 we do not find anything to suggest that the Companies
18 meet the test for implied waiver of its privilege
19 that we found for the documents at issue in this in
20 camera review.

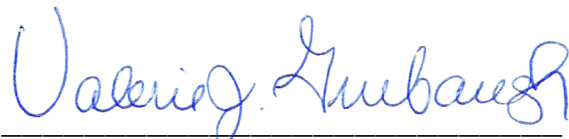
21 And unless there's anything else that
22 the parties would like to discuss before we sign off
23 for the day, hearing none, I'd like to thank you all
24 for your participation today, and with that we are
25 adjourned.

(Thereupon, the prehearing was
adjourned at 11:45 a.m.)

- - -

CERTIFICATE

I do hereby certify that the foregoing
is a true and correct transcript of the proceedings
taken by me in this matter on Friday, March 11, 2022,
and carefully compared with my original stenographic
notes.



Valerie J. Grubaugh,
Court Reporter and Notary
Public in and for the State
of Ohio.

My commission expires August 11, 2026.

EXHIBIT D

1997 WL 638807

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES
FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth
District, Cuyahoga County.

Carl William BAYNARD, dba BBF
Business Systems, Plaintiff–Appellee

v.

OAKWOOD VILLAGE, et al. Defendants–Appellants

No. 71711.

|

Oct. 16, 1997.

Civil appeal from Court of Common Pleas, No. 283652.

Attorneys and Law Firms

[Rufus Sims](#), Shaker Hts., Ohio for plaintiff-appellee.

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appellants.

JOURNAL ENTRY AND OPINION

[PORTER, J.](#)

*1 Defendants-appellants Oakwood Village and its Mayor Gary V. Gottschalk appeal from the judgment of the trial court following a bench trial in which the court denied defendants' counterclaim to recover sums paid to plaintiff-appellee Carl W. Baynard for computer services supplied the Village. Defendants claim the trial court improperly limited their discovery and that the judgment was against the manifest weight of the evidence. We find no error and affirm.

Plaintiff originally filed his complaint on January 20, 1995, against defendants seeking \$5,000 compensatory damages for additional work and \$25,000 in punitive damages against Mayor Gottschalk. Plaintiff claimed breach of a “pre-existing verbal contract,” bad faith, unjust enrichment and personal injury from a physical assault by the Mayor. Defendants generally denied the allegations, alleged affirmative defenses

of illegality and lack of consideration against plaintiff's contract claims, and filed a counterclaim for \$10,500 for return of the monies paid to plaintiff for his computer services under the void contract. Defendants also asserted that the plaintiff overbilled the Village for the services he provided.

During the discovery phase of this action, the Village requested five years of documents relating to plaintiff's tax, personal, business income, financial and banking records. Plaintiff objected to their relevance. Defendants moved to compel production of documents, answers to interrogatories and for sanctions. On September 7, 1995, in a written opinion, the trial court ordered certain answers to interrogatories, but ruled the requests for tax, financial and banking information were not relevant to the issues. Although the court did not squarely address the request for production of documents, it indirectly did so by stating as follows:


The first two contractual and quasi-contractual counts are against the corporate defendant. Interrogatory Nos. 8, 9, 10 and 11 essentially attempt to delve into the plaintiff's income and bank accounts. There is no relevancy whatsoever based on the causes of action to these discovery requests. Absent a claim for lost wages in the assault claim, as the Court views the causes of action and the issues between the parties, the plaintiff could be “rich as Rockefeller” or poor as a church mouse and his causes of action would remain essentially the same.

(Judgment Entry, Sept. 7, 1995 at 1). Defendants made no further request for the documents in question.

On December 13, 1995, the trial court granted defendants' motion to dismiss the complaint for plaintiff's failure to provide the ordered discovery and set the case for trial on the counterclaim only. The dismissal of the complaint is not at issue on this appeal. The case went to bench trial on the counterclaim on March 27 and 28, 1996.

The evidence at trial showed that plaintiff performed work for the Village from April 1993 until he was terminated by the Mayor in July of 1994. His work consisted of installing

computers, programming computers and training Village personnel on the use of the computers. He performed this function for three different departments: the Mayor's office, the finance department and the building department.

*2 The Village does not contest the work performed for the building department as this contract was entered into between plaintiff and the head of the building department, Tony Bomboulis. The Village does contest the work performed by the plaintiff for the Mayor's office and the finance department, as it contends that Barbara Francis, plaintiff's sister-in-law, hired him for these projects in violation of  R.C. 2921.42, which bars public officials from having an interest in contracts with certain family members or business associates. In the alternative, the Village claimed that even if the contract was found to be valid, plaintiff was overpaid for his services and/or did not perform the work. Plaintiff contended that the work was approved by the Mayor.


In early 1993, Barbara J. Francis was appointed Finance Director for the Village. Ms. Francis' sister, Cassandra, was married to plaintiff. Ms. Francis testified that, with the approval of the Mayor, she hired her brother-in-law, the plaintiff, to perform certain computer work for the Village. She claimed she advised the Mayor that plaintiff was her brother-in-law. The Mayor denied authorizing the hiring of plaintiff or knowing he was Ms. Francis' brother-in-law.

The evidence showed plaintiff worked for the Village under the name BBF Business Systems, a sole proprietorship. Cassandra Baynard, plaintiff's wife and the finance director's sister, was on BBF invoice/letterheads as vice-president/treasurer. However, plaintiff testified that he performed the accounting and computer services for BBF and that he was the only employee, agent or representative. He claimed he only placed his wife's name on the letterhead to make the company look larger.

At trial, the Village attempted to establish that same day payments made to plaintiff were not the norm for other vendors, thereby displaying favoritism by the finance director towards her brother-in-law. However, Alzon Rice, a senior finance clerk for the Village for over eleven years, stated that "same day payments were not highly unusual. If there's a vendor that comes in and asks for payment, we will do it that day." Ms. Rice also stated she first met plaintiff in 1993, and Ms. Francis introduced him as her brother-in-law. Ms. Rice stated that from 1993 plaintiff was there every day, in and out

of different departments, including the Mayor's office and the building department.

Ms. Glynis Deadwyler, the Mayor's former secretary, verified that when she worked for the Village, every contract had to have the approval of the Mayor; and that although she was not sure of the date she thought that she and the mayor were introduced to plaintiff in the Spring of 1994 by Ms. Francis as Ms. Francis' brother-in-law. Ms. Deadwyler testified that plaintiff worked for the Village every day, in the Mayor's office, finance department and building department.

On November 13, 1996, the trial court held in a nine page opinion that  R.C. 2921.42 did not void the contract for plaintiff's work because Ms. Francis was not barred from contracting with her brother-in-law since she did not live with him; that Ms. Francis was not the plaintiff's business partner or associate in BBF Business Systems; and that Ms. Francis did not profit from plaintiff's contract with the Village. (Judgment Entry at 6). In addition, based on the evidence and the credibility of the witnesses, the trial court held the Village was not entitled to recover a money judgment on its claims of overpayment. (Judgment Entry at 8).

*3 This timely appeal ensued.

We will address defendants' assignments of error in the order presented.

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO COMPEL CERTAIN ANSWERS TO INTERROGATORIES AND THE PRODUCTION OF DOCUMENTS RELATING TO PLAINTIFF-APPELLEE'S PERSONAL AND BUSINESS RELATED INCOME, FINANCIAL, BANKING AND BUSINESS RECORDS.

Defendants' essentially contend that the court's failure to allow discovery of plaintiff's income tax, financial and banking information thwarted their ability at trial to prove that Ms. Francis, the finance director, had an improper business relationship with plaintiff or her sister. At the time defendants filed their first set of interrogatories and request for documents, the complaint was still in issue. The Village's counterclaim sought the repayment of \$10,500 paid to plaintiff in 1994, for computer services rendered pursuant to a pre-existing verbal contract.

Defendants' interrogatories and request for production filed April 3, 1995 requested the plaintiff to disclose and produce the following documents:

Copies of plaintiff's and BBF's federal and state income tax returns for the tax years 1990 to present;

Copies of clients lists beginning January 1990 to the present;

Copies of all meetings of the board of directors, shareholders, partners, and/or owners of BBF Business Systems for the past five years;

Copies of BBF Business Systems' bank statements, canceled checks and check stubs showing all of its transactions and disbursements of money from the inception of its business life to the present date.

(Defdts' First Request, ¶¶ 1–6, 14–15).

In his response to the interrogatories, plaintiff objected to the interrogatories addressed to the same subjects as not relevant to the present case. The trial court, as previously noted, agreed and sustained the objections in denying defendants' motion to compel in part.

Following trial, the court elaborated on this issue as follows in its Judgment Entry at 6–7:

The Village sought the income tax records of Plaintiff and BBF Business Systems during pretrial discovery and filed a motion to compel their production. The court refused to compel them to be produced by Plaintiff because the Court deemed them irrelevant to the action. The Village had not explained their relevancy in its motion, made no subsequent argument substantiating their relevancy and made no further attempt to obtain their discovery. Now after trial in the defendants' brief the Court is presented for the first time with evidence and argument that make such records relevant. The Village's burden was to seek the records and advance their relevancy

arguments prior to trial, especially so after the Court refused to compel their production.

(Judgment Entry at 6–7).

We have carefully reviewed the defendants' motion to compel discovery and for sanctions filed August 9, 1995 and agree with the trial court's analysis stated above. Defendants made no showing or offered any explanation why the requested documents were relevant to the issues in the case at that time. There was no mention in defendants' motion papers of the defendants' claim that said documents were necessary to probe the financial or business relationship between the finance director and the plaintiff or his wife.

Civ.R. 26(B) provides in relevant part:

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action * * *. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

“For discovery to be allowed, relevance to the subject matter must be shown.” 4 Moore's Federal Practice (1987–1988) ¶¶ 25–26 at 26–101. While the scope of relevance in discovery is broad, it is not without limits. See 4 Moore's Federal Practice 91987–1989) ¶¶ 26–56 at 26–97. This Court recognized the parameters of these principles in *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 715:

Civ.R. 26(B)(1) grants broad discovery powers to parties. Although the rule limits the matter to be discovered to that which is “relevant to the subject matter,” Civ.R. 26(B)(1) also provides for discovery of information “reasonably calculated to lead to the discovery of admissible evidence.” The test for relevancy under Civ.R. 26(B)(1) “is much broader than the test to be utilized at trial. It is only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence.” *Icenhower v. Icenhower* (Aug. 14, 1975), Franklin App. No. 75AP–93, unreported, at 2; see,

also, *State ex rel. Fisher v. Rose Chevrolet* (1992), 82 Ohio App.3d 520, 523, 612 N.E.2d 782, 784.

In the instant case, Ferguson did not claim privilege with regard to the information sought to be discovered by Tschantz. Rather, he relied upon Civ.R. 26(C), which reads:

“(C) Protective Orders. Upon motion by any party or by the person from whom discovery is sought, *and for good cause shown*, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (91) that the discovery not be had; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; * * * (96) that a deposition after being sealed be opened only by order of the court * * *.” (emphasis added.)

Pursuant to this rule, a trial court has inherent authority to regulate discovery. *State ex rel. Gandview Hosp. Ctr. v. Gorman* (1990), 51 Ohio St.3d 94, 554 N.E.2d 1297. Civ.R. 37 reinforces this inherent authority by affording courts the ability to impose sanctions upon these persons who unjustifiably seek or resist discovery.

The 1970 Staff Note to Civ.R. 26 referenced the comment to the Federal Advisory Committee statement as follows:

All provisions as to the scope of discovery are subject to the initial qualification that the court may order otherwise in accordance with these rules. [Rule 26(c) * * * confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. * * *].

The Staff Note to Civ.R. 34 likewise adds dimension to the procedural context as follows:

The rule is designed, like §§ 2317.33 and 2317.35, R.C., to

operate extrajudicially. See, 1967 Prelim. Draft 70. The court does not automatically consider every Rule 34 request, but is concerned only when there is noncompliance or an objection or both. As in Rule 33 the burden is upon the party seeking discovery. He must make a motion under Rule 37 to compel discovery or to invoke the Rule 37 sanctions.


As noted, the scope of relevancy in such matters is within the broad discretion of the trial court. See, also *State ex rel. Daggett v. Gessaman* (1973), 34 Ohio St.2d 55; *Glick v. Marler* (1992), 82 Ohio App.3d 752, 758; *Shoenfelt v. Ohio v. Rights Comm.* (1995), 105 Ohio App.3d 373, 379. Once the plaintiff objected to the relevancy of the information or documents defendants requested, the burden was on defendants to make a prima facie showing of relevance, i.e., how discovery of plaintiff's tax returns or personal, financial or business records for the past five years was “reasonably calculated to lead to the discovery of admissible evidence” that had any bearing on the issues of whether plaintiff overcharged the Village for his computer services. Defendants failed to make any showing satisfactory to the trial court in their motion to compel under Civ.R. 37.

Customary motion practice dictates that the burden is on the moving party to persuade the court of the merits of its position and overcome the objections of its opponent. It is not enough to simply point out that the opponent has resisted the discovery. See *Kook, Mann, Coffey & Co. v. Catellini Co.* (Aug. 2, 1995), Hamilton App. No. C-930951, unreported at 10 (“trial court's denial of the appellants' motion to compel the production of documents did not constitute an abuse of discretion, because the appellants have failed to demonstrate the relevance of the documents sought to be discovered to the subject matter of their complaint.”).



We will not second guess the trial court's ruling on discovery issues in the absence of an abuse of discretion. We find none here. If defendants were prejudiced by the failure to obtain detailed financial information from the plaintiff, this was a matter that should have been pressed before trial, not afterwards.

Assignment of Error I is overruled.


II. THE TRIAL COURT'S
JUDGMENT ENTRY IN FAVOR
OF PLAINTIFF-APPELLEE
AND AGAINST DEFENDANT-
APPELLANTS ON
DEFENDANT-APPELLANTS'
COUNTER-CLAIM IS AGAINST
THE MANIFEST WEIGHT OF
THE EVIDENCE.

The Village challenges the trial court's judgment on the weight of the evidence. It principally asserts that the contracts for computer consulting services between plaintiff and the Village during 1993 and 1994 should be found to be “void *ab initio*” because the contracts were made in violation of  [R.C. 2921.42\(A\)](#). In the alternative, the Village claims that the plaintiff received overpayment for work. We find no merit to these contentions.

Our scope of review on an attack on the weight of the evidence was recently described in *Arnett v. Midwestern Ent., Inc.* (1994), 95 Ohio App.3d 429, 431:

We initially note that a judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. See  *C.E. Morris Co. v. Voley Constr. Co.* (1978), 54 Ohio St.2d 279, 280, 8 O.O.3d 261, 262, 376 N.E.2d 578, 579. In addition, under a manifest weight of the evidence test, the court of appeals is guided by the presumption that the findings of the trial court are correct.  *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 411, 461 N.E.2d 1273, 1276. Thus, if there is competent credible evidence going to the trial court's finding that the retail buyer's order does not constitute a valid and

enforceable contract this court must affirm the judgment of the trial court.

 [R.C. 2921.42\(A\)\(1\)](#), a criminal statute, states as follows:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.



In the present case, it is undisputed that Ms. Francis, the finance director of the Village, was a public official. However, plaintiff contends that none of the other requirements of the statute were met based on the evidence at trial. We agree, as did the trial court.

The trial court properly found that while Ms. Francis hired plaintiff to perform computer work for the Village, there was no credible evidence that Ms. Francis or her sister, Cassandra Baynard, wife of plaintiff, were part of or had an interest in BBF Business Systems or that either of them participated in the contract plaintiff had with the Village. (Judgment Entry at 6–7).

In support of defendants' contention that Ms. Baynard was active in BBF Business Systems defendant presented invoices, to wit: Defendants' Exhibits 5 through 22, from December 3, 1993 through June 10, 1994, which listed Mrs. Baynard as Vice President/Treasurer of BBF Systems. However, the trial court concluded that Mrs. Baynard categorically denied that she had any participation with BBF Business Systems other than merely being plaintiff's spouse and being on the letterhead to portray that BBF was more than a one person business. (Journal Entry at 7). Later versions of the said letterhead bore only Carl William Baynard's name. (Journal Entry at 7).

Defendants also argue that two checks plaintiff wrote to Ms. Francis in the amount of \$75.00 from a personal joint account with Mrs. Baynard in April 1993, endorsed by Ms. Francis somehow symbolized Ms. Francis' involvement with BBF Business Systems. However, the account and its checks did not refer to BBF Business Systems and appeared to be from a personal joint checking account. (Journal Entry at 4). The Village produced no evidence that Ms. Francis was

either receiving kickbacks from Mrs. Baynard or plaintiff, or providing any services for BBF Business Systems. At trial, plaintiff presented invoices for each request for payment for services rendered. (Def. Ex. 4).

The law of Ohio does not prohibit public officials from hiring a brother-in-law unless such relative resides with the public official in question. 1980 Ohio Ethics Commsn. Ops. Nos. 80-001, 90-010;  *Walsh v. Bollas* (1993), 82 Ohio App.3d 588, 591;  *Jones v. Rookfield Twp. Trustees* (June 30, 1995), Trumbull App. No. 92-T-4692, unreported at 8. The Village presented no evidence that the plaintiff and Ms. Francis ever resided in the same household. (Judgment Entry at 7).

The Village attempted to assert that plaintiff's wife, Cassandra, was a participant in BSF Business Systems, thus, Ms. Francis entering into a contract with BBF violated Ohio law because Ms. Francis was contracting with her sister's business. The trial court found, however: "The Court has carefully considered all the evidence bearing on third issue and its credibility and persuasiveness and is not convinced by a preponderance of the evidence that Francis was plaintiff's business partner or associate in BBF Business Systems or that Francis profited from plaintiff's contract." (Journal Entry at 7). Having reviewed the same trial record, given the deference to the trial court's findings, we cannot conclude that the trial court's judgment finding the contract valid is against the manifest weight of the evidence.

We also find no merit to defendants' contention that the plaintiff was overpaid for his services. Only one witness, Bernice Miller, testified that the plaintiff did not spend as much time training her as he represented on his invoices. The invoices and the rest of the testimony regarding the payments to plaintiff simply did not conclusively show he was overpaid.

Based on such inconclusive evidence, we find the trial court did not err in failing to find the plaintiff was overpaid by the village.

Assignment of Error II is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to [Rule 27 of the Rules of Appellate Procedure](#).

MATIA, P.J., and SPELLACY, J., concur.

N.B. This entry is an announcement of the court's decision. See [App.R. 22\(B\)](#), [22\(D\)](#) and [26\(A\)](#); Loc.[App.R. 27](#). This decision will be journalized and will become the judgment and order of the court pursuant to [App.R. 22\(E\)](#) unless a motion for reconsideration with supporting brief, per [App.R. 26\(A\)](#), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per [App.R. 22\(E\)](#). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

All Citations

Not Reported in N.E.2d, 1997 WL 638807

1989 WL 44655

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

WILLISTON BASIN INTERSTATE
PIPELINE COMPANY, Plaintiff,

v.

FEDERAL ENERGY REGULATORY
COMMISSION, Defendant.

CIV. A. No. 88-0592-LFO.

|
April 17, 1989.

MEMORANDUM

OBERDORFER, District Judge.

*1 Plaintiff pipeline is engaged in a proceeding before the Federal Energy Regulatory Commission ("FERC"). At issue is whether certain payments to natural gas producers are recoverable pursuant to a so-called "purchased gas adjustment clause." FERC trial staff opposes the adjustment on the ground that FERC only recently discovered certain practices of plaintiff. To refute this contention, plaintiff claims that FERC had notice of these practices as a result of information provided, *inter alia*, in reports prepared by FERC audit representatives. When plaintiff's attempt to obtain these reports directly through discovery was rebuffed by FERC, plaintiff invoked the Freedom of Information Act ("FOIA"). Denied relief administratively, it filed the instant suit to enjoin FERC from withholding the audit reports.

The matter has been briefed (with a *Vaughn* Index), argued, and is now before the Court on cross-motions for summary judgment and plaintiff's request that the Court conduct an *in camera* inspection.

In responding to plaintiff's request, FERC deleted the names and identity of staff members from the released documents, citing FOIA Exemption 2. That exemption protects matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). According to plaintiff the identity of FERC employees revealed by the audit documents would not expose housekeeping details such as sick leave and lunch hour policies or risk circumvention of any statutes or agency regulations. FERC has abandoned

any special reliance on Exemption 2 itself as a basis for withholding documents, while continuing to invoke Exemption 2 as an adjunct of Exemption 7.

It is FERC's central position based on Exemptions 2 and 7 that disclosure of the audit reports sought by plaintiff and the identity of the FERC employees whose names appear on and in connection with those reports would disclose techniques used by field auditors to determine if plaintiff was in compliance with federal statutes and regulations and would thereby disclose "techniques and procedures for law enforcement investigations or prosecutions or ... guidelines for law enforcement investigations or prosecutions ... [which] could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). In addition, FERC claims that release of the withheld portions of the documents would disclose pre-decisional advice protected by Exemption 5. 5 U.S.C. § 552(b)(5).

FERC contends that the audit reports are the functional equivalent of a manual for use in investigations such as was at issue in *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 670 F.2d 1051 (D.C.Cir.1981), and the audit assisting computer program at issue in *Windels v. Department of Commerce*, 576 F.Supp. 405 (D.D.C.1983). Defendant demonstrates the functional equivalency of the audit to a manual and the role of the audit in the deliberative process by the uncontradicted affidavit of Sherri L. Booye, FERC's Chief of the Analysis and Field Review Branch, Division of Rate Filing in the Office of Pipeline and Producer Regulations. Moreover, FERC contends that the audit techniques described (or revealed) in the audit work papers are not publicly revealed "for to do so would risk circumvention of the law." FERC Statement of Material Fact ¶ 7.

*2 Ms. Booye is the designer of the field audit program and supervisor of the personnel who produced the audit reports here at issue. The ultimate objective of the audit program is to provide Ms. Booye and her immediate superiors with data and the recommendations of her audit staff for use by them in making recommendations to the Commission as to whether an auditee has overcharged customers so as to require a refund or possibly, in the event of serious or egregious violations, reference to FERC's General Counsel for Enforcement Action. These auditor recommendations are not binding on Ms. Booye or her ultimate superiors, who are the decision makers responsible for determining that an

auditee has overcharged and/or should be pursued in an enforcement proceeding. Plaintiff does not effectively refute or otherwise counter these representations. Accordingly, this affidavit establishes that to the extent that any document is created as part of this deliberative activity, it is entitled to the protection of Exemption 5.

According to the affidavits, an institutional requirement that each auditor place on each page the “role that [the sheet] plays in the audit and the investigatory technique being utilized,” as well as the auditor’s conclusion, is the functional equivalent of a manual of investigative techniques. Booye Affidavit ¶¶ 6–11. It seems undisputable that portions of each audit report, containing what Ms. Booye tags as the “purpose, source and conclusion” (“P,S, C”) would disclose investigative techniques and should be redacted. The same obviously applies to the section summaries composed of the personal opinions of auditors and their discussions of investigative techniques.

Moreover, the affidavit and the accompanying *Vaughn* Index represent that once the so-called “P,S,C” and the section summaries were redacted, all segregable, purely factual materials in each audit sheet could be and were disclosed. Booye Affidavit ¶ 13. Indeed, according to Ms. Booye, in a few instances the “P,S,C” was even released where its contents should be obvious to the requestor, or where such release would result in negligible harm to the government.” *Ibid.* Nothing on the face of the FERC affidavits or in any of plaintiff’s contentions justifies any discounting of representations of FERC affiants that it has disclosed all reasonably segregable, non-exempt portions of the responsive documents. *See* Schopf Declaration ¶ 4.

In view of the foregoing, FERC must prevail on its defensive contentions based on Exemptions 2, 5 and 7 that the identity of its auditors, the so-called “P,S, C’s,” and the section summaries are exempt from disclosure, and that it has disclosed all other reasonably segregable material. Accordingly, an accompanying Order will grant a summary judgment for defendant and deny plaintiff’s summary judgment motion.

FERC’s claim for reimbursement of its costs should be denied because defendant has failed to show that the naming of Commissioners as parties and the filing of a motion for summary judgment had an “improper purpose” such as “to harass or to cause unnecessary delay or needless increase in the cost of litigation.” *Fed.R.Civ.P. 11*.

ORDER

*3 For the reasons stated in the accompanying Memorandum, it is this 17th day of April, 1989, hereby

ORDERED: that defendant’s motion for summary judgment should be, and is hereby, GRANTED; and it is further

ORDERED: that plaintiff’s motion for summary judgment should be, and is hereby, DENIED; and it is further

ORDERED: that defendant’s claim for reimbursement of its costs should be, and is hereby, DENIED.

All Citations

Not Reported in F.Supp., 1989 WL 44655

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

Summary: Request Interlocutory Appeal Concerning Discovery of Non-Public Audit Materials Produced to the Federal Energy Regulatory Commission electronically filed by Ryan A. Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company