

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY IN SUPPORT OF EBONY YEBOAH-AMANKWAH'S MOTION TO QUASH
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SUBPOENA**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") subpoena to Ebony Yeboah-Amankwah (the "Subpoena") should be quashed in its entirety. **First**, OCC's Subpoena is both misdirected and unnecessary in light of its parallel discovery efforts. OCC makes no effort to explain what specific information it seeks from nonparty Ebony Yeboah-Amankwah that it cannot obtain through its numerous other pending subpoenas and depositions. OCC and FirstEnergy have already agreed to one or more depositions of individuals with direct access to relevant information about the corporate separation issues animating this Subpoena. In contrast, Ms. Yeboah-Amankwah, a former employee, has no access to FirstEnergy information and could at most provide repetitive information and speculation. **Second**, much of the sought-after information is outside the proper scope of this case. And **third**, document discovery is closed.

II. ARGUMENT

A. OCC's Subpoena is Misdirected and Redundant.

Ms. Yeboah-Amankwah's Motion to Quash established that the Subpoena is unreasonable and oppressive because OCC seeks information that Ms. Yeboah-Amankwah, a

nonparty former FirstEnergy employee, does not have, and because OCC is presently seeking the same information from the sources that do have it.¹ OCC's memorandum offers no meaningful response.

Ms. Yeboah-Amankwah has explained that she simply does not have much of the information OCC seeks. With respect to documents, Ms. Yeboah-Amankwah returned any FirstEnergy documents in her personal possession when she separated from her former employer. In its response memorandum, OCC insists that Ms. Yeboah-Amankwah should be ordered to reproduce documents belonging to FirstEnergy that were produced to her in pending civil litigation subject to a protective order.² Yet OCC remains silent about whether it has already received those documents or attempted to obtain them from FirstEnergy. As noted below, document discovery is now closed. But even if OCC could timely request FirstEnergy's documents, it should request them from FirstEnergy, not from a third party.

OCC's request for a deposition is similarly futile. OCC's Subpoena is motivated by an apparent records limitation reported by Daymark, the PUCO-appointed auditor of FirstEnergy. OCC has argued in this case that "Daymark failed to adequately explain (but should have explained) why the termination of FirstEnergy's compliance officer resulted in the lack of access to records **that are the property of FirstEnergy, not the former employee.**"³ Ms. Yeboah-

¹ See Ohio Adm. Code § 4901-1-25(C) ("The commission . . . may quash a subpoena if it is unreasonable or oppressive."); *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 756 (1st Dist. 2007) ("Civ.R. 45 provides that when a nonparty moves to quash a subpoena on the ground that it imposes an undue burden, the party seeking the discovery must demonstrate a substantial need for the materials that cannot be met through alternate means.").

² OCC Mem. at 8.

³ Initial Comments on Protecting Consumers From Improper Charges Under FirstEnergy's Corporate Separation filed by OCC ("Initial Comments") (filed Nov. 22, 2021), at 7 (bold emphasis added; italics in original); see also Reply Comments on Protecting Consumers From Improper Charges Under FirstEnergy's Corporate Separation filed by OCC ("Reply Comments") (Dec. 13, 2021), at 3 (stating that Daymark "simply stated that

Amankwah, who separated from FirstEnergy before Daymark began its audit, has no knowledge relevant to this issue. OCC claims it is “beside the point” that Ms. Yeboah-Amankwah left before Daymark’s audit, but still does not explain how she could possibly have the information it requests about FirstEnergy inquiries “into the information that PUCO auditor Daymark stated (in its audit report) was missing and not available for Daymark’s auditing.”⁴

As for any events that *did* take place during the period of her employment (now years ago), Ms. Yeboah-Amankwah lacks documents to refresh her recollection. Deposing Ms. Yeboah-Amankwah without the benefit of documents would call for speculation. OCC’s only response is: “This happens all the time at depositions.”⁵ But OCC says nothing about how it plans to appropriately tailor its questioning. For example, OCC suggests it would ask Yeboah-Amankwah to speculate about documents she no longer possesses, including whether she returned to FirstEnergy any documents related to corporate separation.⁶ It is obvious that FirstEnergy, not Ms. Yeboah-Amankwah, is best positioned to provide reliable answers to such questions. The same is true for OCC’s proposed approach to the privilege issues that will necessarily arise from Ms. Yeboah-Amankwah’s roles as Deputy General Counsel and General Counsel—it asserts that those issues can be handled at a deposition, but provides no indication of how it plans to do so.

More fundamentally, OCC does not explain why it needs to subject Ms. Yeboah-Amankwah to a deposition or what marginal benefit her deposition would provide. Even if Ms.

the records were missing but provided no additional background information” and arguing that the Commission should investigate “what efforts FirstEnergy made to search for the records”).

⁴ OCC Mem. at 8.

⁵ *Id.* at 9.

⁶ *Id.*

Yeboah-Amankwah was a proper target of a subpoena on these issues (she is not), it is not clear what information OCC cannot obtain through its parallel and duplicative discovery efforts. OCC offers the conclusory assertion that it “clearly has a substantial need” for Ms. Yeboah-Amankwah’s testimony and documents that “cannot *necessarily* be obtained from other sources.”⁷ But it provides no support for even this qualified claim. First, OCC provides no context about whether the voluminous document productions already in its possession include the information it is looking for.⁸ And second, OCC is simultaneously seeking the *same* information through (1) one or more depositions of individuals FirstEnergy has designated as suitable to testify on corporate separation issues,⁹ and (2) multiple other subpoenas directed to FirstEnergy Corp. and individuals currently affiliated with it. It is unreasonable for OCC to subpoena a former employee before it first resolves whether any of FirstEnergy, its Ohio utilities, or its current employees have the information OCC seeks (or even whether OCC already has that information).

The Commission should quash OCC’s futile and redundant subpoena in its entirety. But if it declines to do so, it should at least stay any deposition of Ms. Yeboah-Amankwah pending the agreed depositions of current FirstEnergy-affiliated individuals concerning corporate separation. At a minimum, OCC should not be permitted to simultaneously seek the same

⁷ Case No. 17-974-EL-UNC, OCC Memorandum Contra (“OCC Mem.”) (Mar. 21, 2022), at 6 (emphasis added).

⁸ See Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers’ Counsel and Northeast Ohio Public Energy Council (January 14, 2022) (noting in this proceeding that OCC “has received approximately 233,000 pages of documents from FirstEnergy Corp. in the last month, and more will be provided on a rolling basis”).

⁹ Case No. 17-974-EL-UNC, Memorandum Contra FirstEnergy’s Motion to Quash Subpoena to FirstEnergy’s Chief Ethics and Compliance Officer Antonio Fernandez (Mar. 15, 2022), at 7 (noting OCC has reached agreement with FirstEnergy Corp.’s Counsel to depose one or more of Robert Mattiuz, Jr., and Olenger Pannell).

discovery from nonparty Ms. Yeboah-Amankwah and numerous other individuals. OCC could renew its request if, after deposing knowledgeable individuals, it believes Ms. Yeboah-Amankwah has *additional* information it cannot obtain elsewhere. In an acknowledgement of the redundancies in its various pending subpoenas, OCC recently agreed to stay its deposition of FirstEnergy’s current Chief Ethics and Compliance Officer pending other depositions.¹⁰ As a former employee who separated prior to Daymark’s audit, Ms. Yeboah-Amankwah has even less access to information than that individual. Her deposition should be quashed or stayed.

B. OCC Seeks Information Outside the Scope of Appropriate Discovery.

Ms. Yeboah-Amankwah’s Motion also established that many topics on which OCC seeks information—including matters solely related to FirstEnergy’s non-regulated entities and HB-6 activities—are beyond the scope of the corporate separation issues relevant to this case. OCC’s memorandum does not address that argument at all. It likewise does little to clarify the relevance of its proposed topic related to a single settlement payment to Lincoln Electric seven years ago. OCC claims it has an interest in who made the payment and which entities benefited from it.¹¹ But it provides no particular reason to believe there was any aspect of this particular settlement payment that implicates Ohio corporate separation law. OCC may not conduct free ranging discovery into every individual transaction FirstEnergy has entered into just because FirstEnergy’s regulated utilities have affiliates—especially since OCC does not “have broad

¹⁰ *Id.*

¹¹ OCC Mem. at 6.

rights of discovery vis-a-vis the unrelated FirstEnergy Corp. and FirstEnergy Service Corp.” or their former employees.¹²

C. The OCC’s Document Requests Violate This Case’s Procedural Schedule.

Finally, the Commission should quash OCC’s document requests because they violate the operative discovery schedule. The Commission ordered that the “deadline for the service of discovery, except for notices of deposition,” was “November 24, 2021.”¹³ Yet OCC’s Subpoena—served many months after this deadline—purports to require Ms. Yeboah-Amankwah to produce numerous broad categories of documents.

As Ms. Yeboah-Amankwah’s Motion noted, Commission precedent establishes that OCC may not evade a document discovery deadline by later requesting documents through the deposition process.¹⁴ In its memorandum, OCC does not address or contest this precedent, but continues to argue that it can treat the deposition process as a procedural loophole, allowing it to obtain documents at any time without regard for deadlines. O.A.C. 4901-1-25(D) authorizes deposition subpoenas, and provides that such subpoenas “may” also include document production requests. But such requests are only appropriate before the document discovery deadline: parties may not “circumvent the discovery deadline by using a subpoena to request additional documentation.”¹⁵ Of course, that is exactly what OCC is attempting to do.

¹² See Case No. 17-974-EL-UNC, Hr’g Tr., at 25:6-11 (September 30, 2021); see also Case No. 20-1502-EL-UNC, Hr’g Tr., 18:20-19:10, 23:14-18 (June 30, 2021) (limiting production to information about the Companies).

¹³ Case No. 17-974-EL-UNC, Entry (October 12, 2021).

¹⁴ See *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., v. Palmer Energy Company*, Case No. 10-693-EL-CSS, 2011 Ohio PUC LEXIS 406, Entry at *5-6 (Mar. 30, 2011) (granting motion to quash).

¹⁵ *Id.*

OCC also relies on the requirement that discovery be completed before the commencement of a hearing, O.A.C. 4901-1-17(A), but nothing in that provision supports OCC's claim that discovery must remain open until the day of the hearing. The Commission may set different deadlines for document discovery and depositions, and those deadlines may be prior to the hearing. Any other rule would be inconsistent with Commission precedent.¹⁶ Indeed, O.A.C. 4901-1-17(A) affirmatively requires that discovery be completed "as expeditiously as possible." Document discovery was open for many years in this case. Consistent with the requirements of the Ohio Administrative Code, it has now finally closed.

OCC has no explanation for why it failed to issue any document requests before the close of discovery, or why it never objected to the operative deadline. It still does not even argue that it can show good cause for an extension.¹⁷ OCC asserts that it has not been dilatory overall because it has engaged in *other* discovery, but fails to say why it could not have sought *this* discovery earlier.¹⁸ Ultimately, OCC resorts to unsupported speculation that the operative deadline is the result of an "inadvertent omission by the PUCO."¹⁹ But there is no evidence for this claim. OCC must adhere to the PUCO-ordered schedule.

¹⁶ See *id.*; *In the Matter of the Complaint of Brenda Fitzgerald & Gerald Fitzgerald, Complainant*, No. 10-693-EL-CSS, 2011 WL 1682213, at *5 (P.U.C.O. Apr. 25, 2011) (quashing document request component of subpoena where document discovery was closed).

¹⁷ Ohio Adm. Code 4901-1-17 provides that "the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery . . . upon motion of any party *for good cause shown*." See also Case No. 17-974-EL-UNC, Entry (February 10, 2022) (noting that OCC sought an interlocutory appeal of the Commission's ruling extending certain procedural deadlines (but not the discovery deadline, which had already passed), and further observing that at the January 4, 2022 prehearing conference "Counsel for OCC duly reported on the status of the production of documents by FirstEnergy Corp. in response to a subpoena requested by OCC," but did not "object[] to the new procedural schedule").

¹⁸ OCC Mem. at 12.

¹⁹ *Id.* at 10.

III. CONCLUSION

OCC's Subpoena should be quashed for all the reasons identified above and in the Motion to Quash. OCC has not shown why it needs Ms. Yeboah-Amankwah to provide speculative testimony about her former employer when it is simultaneously arranging to depose one or more knowledgeable individuals presently affiliated with FirstEnergy on the same topics and also pursuing similar subpoenas of other individuals. In any event, much of the information OCC seeks is outside either the period of Ms. Yeboah-Amankwah's employment or the scope of this case. And OCC's document requests are an untimely attempt to use the deposition process to evade the operative document discovery deadline.

The Commission should quash OCC's unreasonable Subpoena in its entirety. In the alternative, it should quash OCC's document requests and stay any deposition of Ms. Yeboah-Amankwah pending the agreed depositions on the same topics.

Dated: March 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on March 29, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Summary: Reply in Support of Ebony Yeboah-Amankwah's Motion to Quash The
Office of the Ohio Consumers' Counsel's Subpoena electronically filed by Ms.
Marcella Lape on behalf of Ebony Yeboah-Amankwah