

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**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 FIRSTENERGY CORP.'S MOTION TO QUASH
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SUBPOENA
DIRECTED TO JASON LISOWSKI**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") February 22, 2022 subpoena¹ to Mr. Jason Lisowski, FirstEnergy Corp. Vice President, Controller and Chief Accounting Officer, is procedurally deficient and facially overbroad. No amount of "context"² changes that analysis or that OCC's subpoena to Mr. Lisowski must be quashed. *First*, Mr. Lisowski is not responsible for the FirstEnergy Ohio Utilities'³ compliance with Ohio corporate separation rules. And compliance or non-compliance with FERC regulations is not the same as compliance or non-compliance with Ohio corporate separation rules. *Second*, document discovery is closed. OCC's self-serving read of the applicable discovery rules and new-found insistence that the Commission

¹ Case No. 17-974-EL-UNC, OCC's Motion for a Subpoena Duces Tecum for FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer Jason Lisowski and Memorandum in Support ("OCC Mot." or "OCC Mem.") (Feb. 22, 2022).

² Case No. 17-974-EL-UNC, Memorandum Contra FirstEnergy's Motion to Quash OCC's Subpoena for a Deposition of FirstEnergy's Vice President, Controller & Chief Accounting Officer Jason Lisowski ("OCC Opp.") at 3 (Mar. 25, 2022).

³ As used herein, "FirstEnergy Ohio Utilities" or "Utilities" is meant to refer to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

inadvertently omitted⁴ an updated document discovery deadline should be disregarded. *Third*, even if OCC’s requests were timely made—they were not—OCC shows no substantial need for the irrelevant documents it seeks. And any need is outweighed by the burden placed on Mr. Lisowski and FirstEnergy Corp. to produce duplicate copies of thousands of documents, many of which are already at issue in a separate proceeding involving the same parties.

FirstEnergy Corp. does not “seek[] to limit OCC’s fact-finding by refusing to provide subpoenaed documents to OCC.”⁵ It is merely exercising its right, as a nonparty, to challenge an improper subpoena that is directed towards the wrong deponent and lodges new requests for documents months after the close of document discovery. For the reasons stated in FirstEnergy’s memorandum in support of its motion to quash, and those explained in more detail below, FirstEnergy Corp.’s motion must be granted.

II. ARGUMENT

A. OCC’s Subpoena Is Misdirected.

OCC assumes that because “Mr. Lisowski appears to be familiar with the FERC audit and in fact provided FirstEnergy Corp.’s response to the audit on behalf of FirstEnergy Corp.,”⁶ he possesses knowledge relevant to this proceeding and may be deposed. OCC’s assumption is flawed. “[F]amiliarity with the FERC audit and FERC requirements”⁷ is irrelevant.⁸ In addition to the fact that the FERC audit touched on dozens of topics related to federal regulatory accounting—many of which are wholly distinct from corporate separation matters—FERC

⁴ OCC Opp. at 10.

⁵ OCC Opp. at 2.

⁶ OCC Opp. at 5.

⁷ OCC Opp. at 5.

⁸ See Case No. 17-974-EL-UNC, Motion to Quash the Office of the Ohio Consumers’ Counsel’s Subpoena Directed to FirstEnergy Corp.’s Vice President, Controller & Chief Accounting Officer Jason Lisowski and Memorandum in Support (“Mot.”) at 10-13 (Mar. 10, 2022).

requirements are not equivalent to Ohio's corporate separation regulations. Although the FirstEnergy Ohio Utilities may have looked to FERC requirements to model some of their corporate separation measures,⁹ the question here is one of the Utilities' compliance with *this* Commission's rules and R.C. 4928.17. Mr. Lisowski has no insight on that question. OCC's counterarguments address issues well beyond the scope of Ohio corporate separation compliance and cannot support their efforts to compel testimony and documents from Mr. Lisowski.¹⁰

To be clear, it is not FirstEnergy Corp.'s position that deposition discovery is closed.¹¹ Rather, FirstEnergy Corp. asks the Commission to quash the subpoena as to testimony because (1) Mr. Lisowski is the wrong deponent as he has no responsibility for compliance with Ohio-specific regulations and (2) other deponents that are more knowledgeable about FirstEnergy Ohio Utilities' compliance with R.C. 4928.17 and O.A.C. 4901:1-37 have been offered by the Utilities and thus a deposition of Mr. Lisowski is burdensome and duplicative. OCC has been made well aware of these facts. Thus, OCC's own delays and procedural errors have prevented depositions from moving forward—not any wholesale objection by “FirstEnergy” to depositions in toto.

B. The Discovery Deadline Bars OCC's Document Requests.

Despite several briefs on this issue, nowhere does OCC explain why its untimely subpoena should not be quashed. Instead, OCC asserts, without support, it should be permitted to request thousands of documents from a nonparty months after the close of discovery because “OCC's subpoena is in consumers' interest and does not violate the procedural schedule in this case.”¹² OCC's post-hoc reasoning deserves no consideration. First, OCC cannot use O.A.C. 4901-1-25(A)

⁹ Case No. 17-974-EL-UNC, Compliance Audit Report (Sept. 13, 2021), at 33 (Section V.E).

¹⁰ OCC Opp. at 4-6.

¹¹ Mot. at 6.

¹² OCC Opp. at 10.

and (D) to circumvent Commission procedural schedules.¹³ In addition to the fact that such a reading would render O.A.C. 4901-1-25(C) meaningless, *see infra* at Section II.C.,¹⁴ allowing OCC to take discovery over a Commission imposed deadline displaces the Attorney Examiners' authority to manage discovery.¹⁵ Doing so also negates the purpose of establishing a procedural schedule in the first place.

Second, OCC puts forth no credible argument that the Commission "inadvertently" failed to extend document discovery.¹⁶ Discovery in this case has been closed since November 24, 2021.¹⁷ Though OCC and the Northeast Ohio Public Energy Council moved on November 5, 2021 "for an extension on the comment deadlines and evidentiary hearing,"¹⁸ nowhere in their motion did they ask the Commission for additional time to conduct document discovery despite the cut-off being three weeks away. Having granted two prior extensions, the Attorney Examiners were and are aware of the procedural deadlines. Any omission was OCC's.

¹³ *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2 (P.U.C.O. Mar. 30, 2011) (quashing subpoenaed documents where such requests would have "circumvent[ed] the discovery deadline by using a subpoena to request additional documentation" and went "beyond the scope of the prior discovery and that to allow the subpoena to remain as drafted would in essence allow for the conducting of discovery beyond the previously established deadlines"); *In the Matter of the Complaint of Brenda Fitzgerald & Gerard Fitzgerald, Complainant*, No. 10-791-EL-CSS, 2011 WL 1682213, at *5 (P.U.C.O. Apr. 25, 2011) (quashing subpoena as it pertains to the production of documents given that discovery was complete); *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2 (P.U.C.O. Mar. 30, 2011) (granting motion to quash with respect to accompanying document requests since the document requests sought new discovery and exceeded the previously established deadlines).

¹⁴ Moreover, that the Attorney Examiners signed the subpoena does not cleanse it of any defect and it does not prevent FirstEnergy Corp. from moving to quash it now pursuant to O.A.C. 4901-1-25(C).

¹⁵ *In the Matter of the Application of P.H. Glatfelter Company for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, p. 3 (Oct. 15, 2009) ("implementing the Commission's procedural rules delineated in Chapter 4901-1, O.A.C., are routine matters with which . . . attorney examiners have . . . extensive experience in Commission proceedings").

¹⁶ OCC Opp. at 10.

¹⁷ Case No. 17-974-EL-UNC, Entry (Oct. 12, 2021), at ¶ 24(a).

¹⁸ Case No. 17-974-EL-UNC, Motion for Supplemental Audit, Motion to Extend Deadlines for Comments, Reply Comments and Hearing-Related Matters, Request for Expedited Ruling, at 3 (Nov. 5, 2021).

C. OCC Has Not Shown It Has A Substantial Need For The Irrelevant Document Discovery It Seeks.

Finally, OCC's argument it is entitled to "*all* of the documents sought"¹⁹ is at odds with Ohio law. While "[a]ll parties and intervenors shall be granted ample rights of discovery,"²⁰ OCC ignores the language of O.A.C. Rule 4901-1-25 itself. The Rule expressly permits the Commission to quash a subpoena "if it is unreasonable or oppressive."²¹ Similarly, Ohio Civ. R. 45(C), which informs the standard here, states that a "court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship." Though OCC argues that "that FirstEnergy Corp.'s reliance on Ohio Civ. R. 45(C) is misplaced,"²² the Commission rules acknowledge that the Ohio Rules of Civil Procedure are relevant to Commission decisions²³—particularly as they relate to subpoenas of non-parties.²⁴ OCC cannot ignore applicable limits on the scope of discovery in Commission proceedings where it does not suit them.

Nor should OCC be able to ignore applicable case law merely because of the alleged "unique circumstances" here.²⁵ OCC must show that it has a substantial need for the documents

¹⁹ OCC Opp. at 9.

²⁰ R.C. 4903.082.

²¹ O.A.C. Rule 4901-1-25(C).

²² OCC Opp. at 7.

²³ See R.C. 4903.082 ("Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.").

²⁴ Indeed, the Attorney Examiners have acknowledged as much in this matter when granting FirstEnergy Corp.'s motion to quash the discovery of documents related to FirstEnergy's privileged investigation report. Case Nos. 17-974-EL-UNC and 20-1629-EL-RDR, Hr'g Tr. (Sept. 14, 2021), at 20:3-8 ("FirstEnergy Service Corp. are nonparties to this proceeding. [OCC is] able to obtain these documents from FirstEnergy utilities. [OCC has] obtained the documents from FirstEnergy utilities. [OCC] really do[es]n't have a right that I can see to double-check their work. . . . I don't believe it's necessary to burden a nonparty with some idea that there may be additional documents that you can't identify at this time."); *id.* at 40:6-9 ("There's no reason to be burdening a nonparty while there is still outstanding discovery disputes that may result in these documents being produced.").

²⁵ OCC Opp. at 11.

and testimony requested and that the production of such discovery does not place an undue burden on the subpoenaed party. OCC cannot make that showing. The FirstEnergy Ohio Utilities have already offered to provide a deponent to speak on corporate separation issues. Yet the interveners, including OCC, have not noticed a single deposition of any party witness despite having many months to do so.

And OCC's request that the Commission, "consistent with its ruling in Case No. 20-1502, require the production of [the subpoenaed] documents prior to the deposition of Mr. Lisowski,"²⁶ serves only as a concession that OCC has no substantial need for the subpoenaed documents here. Beyond the fact that the subpoenaed documents are irrelevant to corporate separation issues, *see supra* at Section II.A., questions concerning the discoverability of FERC-related materials are already before the Commission in Case No. 20-1502. Should the Commission order the FirstEnergy Ohio Utilities to produce these documents over their objections, OCC will have its discovery. Thus, OCC cannot say it has no alternative means to obtain the documents sought.²⁷

"OCC has been provided with considerable amounts of information, which they have asked for and been given additional time to review;" the Attorney Examiners "have been extremely accommodating to the parties, including OCC."²⁸ OCC has shown no substantial need for the additional subpoenaed discovery. The Commission need not accommodate OCC's improper and untimely fishing expedition into matters unrelated to R.C. 4928.17, O.A.C. 4901:1-37, or matters

²⁶ Opp. at 5. OCC wrongly claims that "the utilities (unlike FirstEnergy Corp.) did not claim the information lacked relevance." *Id.* Such a claim plainly ignores the FirstEnergy Ohio utilities' arguments made during the March 11, 2022 preconference hearing and reiterated in their interlocutory appeal.

²⁷ FirstEnergy Corp. does not concede that subpoenaed FERC-related discovery is relevant to either this case or Case No. 20-1502 (it is not). But OCC's arguments as to the documents' relevance in Case No. 20-1502 rely largely in their alleged connection to franchising, cross-subsidization, and cost allocation issues, Mem. at 12-15, and thus, a finding that documents are irrelevant in Case No. 20-1502 should render them irrelevant in this case as well.

²⁸ See Recording of March 9, 2022 PUCO Commission Meeting, available at <https://www.youtube.com/watch?v=0YZcYX-tGDI>.

unrelated to the two audit reports addressing the Companies' compliance with corporate separation rules.²⁹

III. CONCLUSION

OCC does not have unfettered rights of discovery. Setting aside that OCC should not be allowed to use an overbroad and improper subpoena to force a supplemental audit the Commission has already deferred,³⁰ OCC cites to no case law to support its arguments or refute the fact that it is not entitled to documents now. Because OCC articulates no grounds to demand that FirstEnergy Corp. produce a deponent with no special knowledge of Ohio corporate separation rules or respond to twenty-three new requests for production months after the close of document discovery, its subpoena to Mr. Jason Lisowski should be quashed.

²⁹ Case No. 17-0974-EL-UNC, Hr'g Tr., at 27:14-20 (Jan. 4, 2022).

³⁰ Mot. at 9.

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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 April 1, 2022. The Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee
Attorney for FirstEnergy Corp.

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Summary: Reply in Support of the Motion to Quash the Office of the Ohio Consumers' Counsel's Subpoena Directed to FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer Jason Lisowski electronically filed by Mr. Corey Lee on behalf of FirstEnergy Corp.