

**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. )**

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

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Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-25(C), FirstEnergy Corp. moves the Commission for an order quashing the Office of the Ohio Consumers' Counsel's ("OCC") subpoena duces tecum served June March 10, 2022.<sup>1</sup> The FirstEnergy Ohio Utilities'<sup>2</sup> have offered to designate a witness to speak on the Utilities' compliance with R.C. 4928.17 and O.A.C. 4901:1-37, yet OCC has not noticed a deposition of any party witness. Moreover, OCC's nonparty subpoena is overbroad and defective, as more fully explained in the accompanying memorandum in support. First, OCC's subpoena demands testimony and the production of documents irrelevant to corporate separation matters. Second, and in any event, document discovery closed months ago. OCC's insistence on serving new document requests months after the deadline is at odds with the procedural schedule issued by the Attorney Examiners and should be ignored. Accordingly, FirstEnergy Corp. respectfully requests that the Commission grant its motion to quash OCC's subpoena in its entirety.

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<sup>1</sup> Case No. 17-974-EL-UNC, OCC's Motion for a Subpoena Duces Tecum for FirstEnergy Corp. to Attend and Given Testimony at a Deposition and Memorandum in Support ("OCC Mot." or "OCC Mem.") (Mar. 10, 2022).

<sup>2</sup> 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.

Dated: April 6, 2022

Respectfully submitted,

/s/ Corey A. Lee

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*On behalf of FirstEnergy Corp.*

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**I. INTRODUCTION**

OCC's nonparty subpoena seeks documents and information having no relation to this corporate separation proceeding. Rather than directing notice to the FirstEnergy Utilities, once again OCC attempts to enforce a subpoena to FirstEnergy Corp. that is deficient in all the same respects as its nearly identical subpoena directed at Vice President and Chief Ethics and Compliance Officer Antonio Fernández. *First*, OCC cannot use its sweeping subpoena as a vehicle to investigate matters not before the Attorney Examiners in Case No. 17-974-EL-UNC. OCC must show that it has a substantial need for the documents 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.

*Second*, the deadline for the service of document discovery has long passed.<sup>3</sup> OCC's nineteen new and overbroad document requests, served months after the close of document discovery, are thus improper and untimely. OCC should not be allowed to circumvent the Attorney Examiners' discovery orders by demanding the production of documents ranging from

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<sup>3</sup> Case No. 17-974-EL-UNC, Entry, at ¶ 18(a) (Sept. 17, 2021); Case No. 17-974-EL-UNC, Entry, at ¶ 24(a) (Oct. 12, 2021).

communications involving the former Chief Ethics Officer to confidential FERC investigation materials.

For these reasons and those explained below, the Commission should grant FirstEnergy Corp.'s motion to quash OCC's subpoena for document discovery and testimony entirely.

## II. APPLICABLE LAW

Under O.A.C. 4901-1-25, the Commission may quash a subpoena "if it is unreasonable or oppressive."<sup>4</sup> For a subpoena to be valid, it must "designate with reasonable particularity the matter on which examination is requested"<sup>5</sup> and be "within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code."<sup>6</sup> O.A.C. 4901-1-16, limits the scope of discovery to non-privileged matters that are "relevant to the subject matter of the proceeding" or reasonably calculated to lead to the discovery of admissible evidence.<sup>7</sup> Ohio Civ. R. 26 similarly limits discovery to relevant, non-privileged matters and requires that all requests be "proportional to the needs of the case."<sup>8</sup>

In addition, in the case of a subpoena, the party seeking discovery must make a showing of "substantial need" for the non-privileged information sought. For example, in *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 756 (1st Dist. 2007), the appellate court reversed a trial court's denial of a motion to quash a subpoena that sought information from a nonparty to a lawsuit involving a breach of a supplier agreement. The appellate court held that "the trial court's laissez-faire approach to discovery was at direct odds with . . . Civ. R. 45(C) . . . which provide[s]

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<sup>4</sup> Ohio Adm. Code § 4901-1-25(C).

<sup>5</sup> Ohio Adm. Code 4901-1-21(F).

<sup>6</sup> Ohio Adm. Code 4901-1-25.

<sup>7</sup> Ohio Adm. Code 4901-1-16(B).

<sup>8</sup> Ohio Civ. R. 26(B)(1).

protection for nonparties.”<sup>9</sup> Specifically, “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.”<sup>10</sup> Additionally: “[t]he rule further provides that the court shall quash the subpoena unless the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship.”<sup>11</sup> Well-settled Commission precedent is consistent with Ohio case law and the Commission quashes subpoenas that are overbroad, unduly burdensome, or otherwise unreasonable.<sup>12</sup>

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<sup>9</sup> Indeed, Commission rules also acknowledge that the Ohio Rules of Civil Procedure are relevant to Commission decisions. See R.C. 4903.082 (“Without limiting the commission’s discretion the Rules of Civil Procedure should be used wherever practicable.”). This is particularly true where the Commission is asked to consider subpoenas of nonparties. See 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. . . . 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.”).

<sup>10</sup> *Lambda Research*, 170 Ohio App. 3d at 756-757.

<sup>11</sup> *Id.* See also *Kaplan v. Tuennerman-Kaplan*, 9th Dist. Wayne No. 11CA0011, 2012 WL 256562, at \*4 (Jan. 30, 2012) (affirming the trial court’s decision to grant a motion to quash because the appellant failed to show substantial need for the discovery sought); *Martin v. Budd*, 128 Ohio App. 3d 115, 120 (9th Dist. 1998) (holding that trial court’s failure to grant a motion to quash a subpoena duces tecum was an abuse of discretion because the subpoena created an undue burden and the subpoenaing party failed to show a substantial need for the requested information); *Eitel v. Eitel*, 4th Dist. Pickaway No. 95CA11, 1996 WL 482703 at \*4-6 (Aug. 23, 1996) (affirming trial court’s decision to quash subpoenas that were unreasonable, oppressive, and unduly burdensome, and for failure of subpoenaing party to show substantial need).

<sup>12</sup> See, e.g., *In the Matter of the Complaint of the Ohio Consumers’ Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, 2011 Ohio PUC LEXIS 1202, Entry at \*4-5 (Nov. 2, 2011) (granting motion to quash because subpoena was unreasonable); *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 \*6 (Mar. 30, 2011) (granting motion to quash); see also *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, Opinion, Order, and Certificate at \*19-20 (May 28, 2013) (quashing “extraordinarily overbroad” subpoenas directed at nonparties, finding there was no showing by the subpoenaing party as to how it would suffer an “undue hardship” in the absence of the subpoenaed information and holding “it would be unreasonable to force a nonparty to expend its time and resources toward a request that is unlimited in scope”). While *Champaign Wind* is a decision from the Power Siting Board, the Board follows the same procedures as the Commission. See R.C. 4906.12 (“Procedures of the public utilities commission to be followed: Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906 of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.”).

### III. ARGUMENT

#### A. OCC's Cannot Show A "Substantial Need" For The Irrelevant Information It Subpoenas.

OCC's subpoena seeks information far beyond the scope of this corporate separation proceeding and for which it cannot show it has a substantial need. First, beyond the fact that OCC's document requests must be quashed as untimely, *see supra* Section III.B., OCC seeks to depose FirstEnergy Corp.'s witness without limitation. Indeed, OCC fails to specify the topics upon which it expects any FirstEnergy Corp. witness to testify. In addition to the requirements of O.A.C. 4901-1-16, which limits the scope of discovery to non-privileged matters that are "relevant to the subject matter of the proceeding," O.A.C. 4901-1-21(F) requires a party to "designate with reasonable particularity the matters on which examination is requested." OCC makes no such designation, stating merely that the witness "would be required to attend a deposition and testify on FirstEnergy Corp.'s behalf, as to matters known or reasonably available to FirstEnergy Corp."<sup>13</sup> That is not sufficient under Ohio law.<sup>14</sup>

Second, OCC's subpoena demands documents and testimony that are irrelevant to or inappropriate for the Commission's consideration in these corporate separation proceedings.<sup>15</sup> The question before the Commission is whether the FirstEnergy Ohio Utilities complied with this

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<sup>13</sup> OCC Mem. at 4.

<sup>14</sup> Indeed, *any* burden imposed by OCC's extensive requests for irrelevant information is by definition "undue." *See, e.g., Lister v. Hyatt Corp.*, No. C18-0961JLR, 2020 WL 419454, at \*3 (W.D. Wash. Jan. 24, 2020) (quoting *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335 (N.D. Cal. 1995) ("[I]f the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then any burden whatsoever imposed would be by definition 'undue.'"); *Arrowpac Inc. v. Sea Star Line, LLC*, No. 3:12-CV-1180-J-32JBT, 2014 WL 12618327, at \*2 (M.D. Fla. Jan. 31, 2014) (quoting same); *Toto, Inc. v. Sony Music Ent.*, No. C13MC80168MISCJSTDMR, 2014 WL 793558, at \*2 (N.D. Cal. Feb. 26, 2014) (quoting same); *Builders Ass'n of Greater Chicago v. City of Chicago*, No. 96 C 1122, 2001 WL 664453, at \*8 (N.D. Ill. June 12, 2001) (quoting same).

<sup>15</sup> Case No. 17-0974-EL-UNC, Hr'g Tr., at 27:14-20 (Jan. 4, 2022) (noting that the scope of these proceedings should not include matters unrelated to R.C. 4928.17, O.A.C. 4901:1-37, or matters unrelated to the two audit reports addressing the Companies' compliance with corporate separation rules).

Commission's rules and R.C. 4928.17. R.C. 4928.17 does not grant unlimited authority to investigate *all* aspects of the Companies' and their affiliates' business operations. Instead, that statute is directed at ensuring that no affiliate "in the business of providing *competitive* retail electric service" is unfairly advantaged by its corporate relationship to a regulated utility.<sup>16</sup> OCC's subpoenas have nothing to do with any unfair competitive advantage in the provision of retail electric service or any other legitimate corporate separation issue.<sup>17</sup> Quite the opposite. In fact, OCC indicates in its memorandum in support that this case should include investigation of "FirstEnergy's activities of concern involving House Bill 6 and FirstEnergy's activities of concern involving the former PUCO Chair (and anyone else at the PUCO)."<sup>18</sup>

And nowhere in OCC's motion for a subpoena or accompanying memorandum does OCC explain the relevance of FERC-related discovery (where FERC regulations are distinct from Ohio corporate separation rules)<sup>19</sup> or *all* communications, conversations, or intentions of a former employee (where that information is uniquely within that former employee's knowledge in their individual capacity).<sup>20</sup> In the absence of a showing that the requested testimony and documents, even if timely, are relevant to the provision of competitive retail electric service as provided by Ohio law, OCC cannot demonstrate substantial need.<sup>21</sup> Their requests amount to the type of

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<sup>16</sup> R.C. 4928.17 (emphasis added).

<sup>17</sup> See OCC Subpoena Request Nos. 1, 7-9, 11-17. With respect to Request Nos. 2-6, 10, and 18-19 FirstEnergy Corp. also objects to these requests because, in addition to the fact that all document requests are untimely, they seek all documents without limitation to specific custodians over a four-year period. As such, these requests unduly burden FirstEnergy Corp., a nonparty to these proceedings.

<sup>18</sup> OCC Mem. at 4-5.

<sup>19</sup> See OCC Subpoena Request Nos. 14, 16-17.

<sup>20</sup> See OCC Subpoena Request Nos. 1, 7-9, 11-13, 15.

<sup>21</sup> See, e.g., *See e.g., Hanick v. Ferrara*, 2020-Ohio-5019, ¶¶ 51-68, 161 N.E.3d 1 (7th Dist. 2020) (affirming the trial court's decision to quash the subpoena directed at a nonparty in part because it was overbroad and irrelevant); *In the Matter of the Application of Champaign Wind, LLC, for A Certificate to Construct A Wind-Powered Elec. Generating Facility in Champaign Cty., Ohio.*, No. 12-160-EL-BGN, 2013 WL 2446463, Opinion, Order, and Certificate at \*7

fishing expedition that Ohio courts and the Commission will not sanction, especially when directed at a nonparty.<sup>22</sup>

OCC's subpoena is not only facially deficient, it seeks information beyond what the Attorney Examiners have fairly indicated is within the bounds this case. Accordingly, OCC's subpoena should be quashed.

#### **B. OCC's Document Requests are Untimely.**

OCC's subpoena for documents should also be quashed because it is procedurally improper. Setting aside the fact that OCC places an undue burden upon FirstEnergy Corp. to produce documents responsive to 19 broad requests less than one month since it served its subpoena, its document requests are untimely. Document discovery ended months ago. Yet, OCC attempts to end-run deadlines that have long since passed.

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(May 28, 2013) (finding there was no "substantial need or undue hardship that would occur absent the subpoenas being enforced to overcome the burden that would be imposed on entities that were not parties in this proceeding."); *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, 2009 Ohio PUC LEXIS 931 at \*8-12 (Oct. 30, 2009) (denying in part motion to compel because several discovery requests were irrelevant, vague and overly broad); *In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at \*3-4 (Nov. 4, 2008) (denying motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at \*34-35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials "relevant to the subject matter of the proceeding" and denying motion to compel because "the information sought would not be relevant to the determination of [the present] matter"); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at \*2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, "not imperative in a final determination of [the] matter," overly broad, and because the respondent had already responded to several of the discovery requests at issue); *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at \*7-9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

<sup>22</sup> *Byrd v. Lindsay Corp.*, 9th Dist. Summit No. 29491, 2020 WL 4342786, at \*4 (July 29, 2020) (affirming the decision to quash a subpoena on the basis that it was a "mere fishing expedition" levied against a nonparty); *Martin v. The Budd Co.*, 128 Ohio App. 3d 115, 119, 713 N.E.2d 1128 (9th Dist. 1998) (reversing the trial court's denial of Goodyear's motion to quash considering its nonparty status and because "discovery proceedings may not be used to conduct a mere fishing expedition for incriminating evidence").



Ohio law and Commission decisions make clear that a party cannot ignore the close of discovery.<sup>23</sup> Specifically, it is well-settled Commission practice that a party cannot circumvent discovery deadlines by requesting documents through the deposition process.<sup>24</sup> *In the Matter of the Complaint of Buckeye Energy Brokers, Inc.*, No. 10-693-EL-CSS, 2011 WL 1319206, at \*2 (P.U.C.O. Mar. 30, 2011) (quashing a subpoena where it would “circumvent the discovery deadline” 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*”) (emphasis added).

Though OCC incorrectly claims that “due to a lack of records, state-appointed auditor Daymark was unable to assess the FirstEnergy Ohio utilities’ corporate separation compliance tracking and monitoring activities,”<sup>25</sup> OCC had ample time to explore any alleged compliance gaps. The Audit Report was filed on September 13, 2021. Four days later, all parties were put on notice of the November 1, 2021 service deadline.<sup>26</sup> The close of discovery was then extended to November 24, 2021.<sup>27</sup> OCC served no further requests between September 13 and November 24. Nor did OCC challenge the document discovery deadline. Instead, OCC and the Northeast Ohio

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<sup>23</sup> *Sciaretta v. Refractory Specialties, Inc.*, 2018-Ohio-1141, ¶ 67 (Ohio Ct. App. 2018) (finding that motion to compel was filed more than four weeks after the discovery deadline and that no request to extend the deadline was made, therefore affirming denial of motion to compel); *P.N. Gilcrest Ltd. P’ship v. Doylestown Fam. Prac., Inc.*, 2011-Ohio-2990, ¶ 20 (Ohio Ct. App. 2011) (affirming denial of motion to compel since discovery cut-off date had passed and Court was unpersuaded that party was not requesting further discovery and simply seeking to obtain it from a different source).

<sup>24</sup> *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.).

<sup>25</sup> OCC Mem. at 1.

<sup>26</sup> Case No. 17-974-EL-UNC, Entry, at ¶ 18(a) (Sept. 17, 2021) (“The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021.”).

<sup>27</sup> Case No. 17-974-EL-UNC, Entry, at ¶ 24(a) (Oct. 12, 2021).

Public Energy Council moved on November 5, 2021 “for an extension on the comment deadlines and evidentiary hearing,”<sup>28</sup> yet omitted any request for additional time to conduct document discovery despite the cut-off being three weeks away. OCC must adhere to the discovery deadline here; its document requests should be quashed.

#### IV. CONCLUSION

OCC’s overbroad subpoena to a nonparty seeks information irrelevant to corporate separation proceedings and demands the production of thousands of documents well after the document discovery deadline. And any investigation that is outside the bounds of this proceeding unduly burdens FirstEnergy Corp. OCC may still notice the FirstEnergy Ohio Utilities and elicit testimony on issues related to their compliance with Ohio’s corporate separation rules. It has chosen not to do so. For the reasons stated herein, FirstEnergy Corp. respectfully requests that this motion be granted and that the Commission quash OCC’s subpoena to a nonparty.

Dated: April 6, 2022

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<sup>28</sup> 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).

**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 6, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee  
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