

**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 Electric ) Case No. 20-1502-EL-UNC  
Illuminating Company, and the Toledo )  
Edison Company. )  
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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY’S  
MEMORANDUM CONTRA THE APPLICATION FOR REHEARING BY  
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

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## I. INTRODUCTION

Not satisfied with the well-defined audit ordered by the Commission in its March 9, 2022 Entry,<sup>1</sup> the Office of the Ohio Consumer's Counsel's ("OCC") Application for Rehearing<sup>2</sup> seeks what amounts to an open-book review of all political and charitable spending made on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"), as well as FirstEnergy Corp. Specifically, OCC's AFR, which repackages much of its Motion for an Audit,<sup>3</sup> impermissibly demands that the Commission expand the scope of the audit beyond Ohio House Bill 6 ("H.B. 6"), raises issues never raised previously, requests that the Companies and FirstEnergy Corp. produce large tracts of confidential, privileged, and/or irrelevant information, and unduly burdens any auditor tasked with reviewing the unwieldy and unfocused collection of transactions OCC now insists an auditor must review to take on the purported "challenge of auditing FirstEnergy."<sup>4</sup>

The Companies do not object to an audit of political and charitable spending by, or on behalf of, the Companies related to H.B. 6 and the subsequent referendum. Audits "have proven effective in the Commission's three other investigative proceedings."<sup>5</sup> But what OCC proposes is much broader and urges the Commission to exceed its authority.

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<sup>1</sup> Case No. 20-1502-EL-UNC, Entry directing the Staff to issue a request for proposals for audit services to assist Staff in its review to determine whether the show cause demonstration submitted by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company 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, (Mar. 9, 2022) ("March 9 Entry").

<sup>2</sup> Case No. 20-1502-EL-UNC, Application for Rehearing and Memorandum in Support, (Mar. 29, 2022) ("AFR" or "Application for Rehearing").

<sup>3</sup> Case No. 20-1502-EL-UNC, Revised Motion for an Independent Auditor to Investigate and Audit the Political and Charitable Activity of FirstEnergy Entities Related to Tainted House Bill 6 and Motion for the PUCO to Appoint a Committee Independent of the PUCO to Hire and Oversee the Independent Investigation and Audit and Memorandum in Support, (Oct. 27, 2021) ("Motion for an Auditor").

<sup>4</sup> OCC AFR, Mem. at 23.

<sup>5</sup> Opp. to OCC Mot. for an Auditor, at 1.

The Companies have been working diligently with the Commission in four separate proceedings to “identify, *to the extent possible*, the universe of costs expended on H.B. 6 related matters.”<sup>6</sup> They will continue to do so. And should the audit in this proceeding identify additional transactions that warrant further investigation, the Companies will of course oblige. However, OCC’s request to enlarge the audit before that audit has even begun is premature and unduly burdens the Commission and the auditor. The Companies thus request that OCC’s Application for Rehearing be rejected for several reasons.

***First***, OCC’s AFR is inappropriate because the Commission has already considered and rejected most of its positions. OCC has failed to show, as it must, that the March 9 Entry is in any way unreasonable or unlawful.<sup>7</sup>

***Second***, the Application for Rehearing is inappropriate to the extent it raises new issues that OCC did not put before the Commission in its Motion for an Audit (or anywhere in this proceeding). An application for rehearing is just that—an opportunity for a party to explain why the tribunal’s determination of issues previously raised is unreasonable or unlawful. OCCs failure to address (let alone meet) the applicable procedural rules is dispositive.

***Third***, and in any event, OCC’s application for rehearing is substantively without merit. Even the Commission’s broad discovery rules do not entitle OCC to a sweeping and unprincipled audit of privileged, protected, and irrelevant information. Therefore, and as explained further below, OCC’s Application for Rehearing should be denied in its entirety.

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<sup>6</sup> OCC AFR, Mem. at 20.

<sup>7</sup> R.C. 4903.10.

## II. ARGUMENT

### A. OCC Fails To Provide Any New Basis For The Commission To Reconsider OCC's Previously Rejected Arguments.

The history of this proceeding makes clear that the arguments put forth in OCC's application fall into two categories: they are either raised for the first time in the application *or* are copied and pasted from prior filings where the Commission has rejected them. Neither category of argument is sufficient for an application for rehearing under Ohio R.C. 4903.10 and Ohio Administrative Code ("O.A.C.") 4901-1-35. OCC has requested an overbroad audit of the Companies, as well as FirstEnergy Corp., on at least three occasions in this proceeding: (1) OCC's September 21, 2020 interlocutory appeal challenging the scope of the Commission's show cause directive; (2) OCC's October 27, 2021 Motion for an Audit and request for an independent, external auditor to investigate "FirstEnergy's" political and charitable spending related to HB 6, as well as the appointment of an independent committee to hire and oversee the auditor; and (3) OCC's November 29, 2021 initial comments on the Companies' responses to the Commission's show cause directive.

At bottom, throughout this proceeding OCC has ultimately requested an independent audit "to investigate FirstEnergy's political and charitable spending related to H.B.6" and its effect on Ohio ratepayers.<sup>8</sup> The Commission followed suit and directed Commission Staff to hire an independent auditor "to determine whether the Companies' show cause demonstration is sufficient

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<sup>8</sup> Case No. 20-1502-EL-UNC, OCC Motion for an Independent Audit (Oct. 27, 2021), at 5. *See also* Case No. 20-1502-EL-UNC, OCC Motion to Compel Responses to Discovery (Nov. 6, 2020), at 1; Case No. 20-1502-EL-UNC, OCC Interlocutory Appeal (Sept. 7, 2021), at 11; Case No. 20-1502-EL-UNC, OCC Initial Comments ("OCC Comments") (Nov. 29, 2021), at 7 ("The PUCO should grant OCC's motion to determine whether consumers were protected from the adverse impacts of FirstEnergy's political and charitable spending *in support of H.B. 6.*") (emphasis added); OCC Comments, at 15-17 (even though OCC notes a review of payments detailed in the DPA, OCC does so to make the argument that the PUCO "should investigate in this case whether *any* H.B. 6-related charges to customers were made by FirstEnergy . . . regardless of whether the spending was for internal services or external services").

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” between January 1, 2017 and December 31, 2019.<sup>9</sup> The Commission indicated that the audit should include a review of H.B. 6 spending by “both inside and outside government relations staff and lobbyists” and cover several FERC Accounts, “including but not limited to” Accounts 426.1, 426.4, 580, 923, and 930.2.<sup>10</sup>

However, in a response to the March 9 Entry, *which granted OCC’s request for an audit*, OCC now argues the Commission has not gone far enough. Indeed, it states the Commission has erred in nine ways by not requiring or ordering the audit to include:

- A. Spending on nuclear subsidy legislation in 2017-2019 that preceded H.B. 6;
- B. Costs booked to FERC Account 930.1;
- C. Documents from FirstEnergy Corp. and other FirstEnergy entities;
- D. An investigation of whether FirstEnergy Solutions bankruptcy settlement costs were allocated to the Companies;
- E. Documents “produced by FirstEnergy to FERC related to FERC’s audit”;
- F. The internal investigation report;
- G. The “veracity of the sworn affidavit and other responses to the PUCO’s Show Cause order”;
- H. All internal labor, overhead, and other charges paid to inside and outside staff and lobbyists and other vendors who worked on nuclear generation legislation; and
- I. All “FirstEnergy’s political spending during 2017-2019 that may have been improperly charged” to the Companies.

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<sup>9</sup> March 9 Entry at ¶ 14.

<sup>10</sup> March 9 Entry, Request for Proposal No. RFP RA22-PCS-1 at 5-6.

These so-called “errors” are not properly before the Commission as OCC’s AFR is based on arguments that are recycled and pasted from arguments that have already been rejected in prior case filings (or are raised for the first time, *see infra* Section II.B). For example, OCC restates its requests for an overbroad audit of the Companies and FirstEnergy Corp. without providing sufficient explanation as to how the Commission’s March 9 Entry was either unlawful or unreasonable. That it fails to do so is fatal to the application for rehearing. Ohio R.C. 4903.10 and O.A.C. 4901-1-35 require a party to “set forth” “the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful.” O.A.C. 4901-1-35. It is improper for a party “to simply reiterate[] arguments that were considered and rejected by the Commission.”<sup>11</sup>

Here, OCC not only reiterates many of the same arguments from its motion<sup>12</sup>—at times directly copying and pasting<sup>13</sup>—it points to no legal authority to support any claim here that the Commission’s rulings were unreasonable or unlawful. OCC’s assignments of error criticize the scope of the Commission’s audit yet “fail[] to provide any facts or arguments that would give the

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<sup>11</sup> *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at \*6-7 (Nov. 29, 2011). *See also In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at \*15-16 (May 4, 2011) (rejecting an application for rehearing that “raised nothing new”); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 WL 2288069, Entry on Rehearing, at \*5-7 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, Entry on Rehearing, at \*9-10 (Nov. 1, 2011) (denying application for rehearing because applicant “raised nothing new on rehearing that was not thoroughly considered” in the Commission order at issue).

<sup>12</sup> *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 20-1502-EL-UNC, Revised Motion for an Independent Auditor to Investigate and Audit the Political and Charitable Activity of FirstEnergy Entities Related to Tainted House Bill 6 and Motion for the PUCO to Appoint a Committee Independent of the PUCO to Hire and Oversee the Independent Investigation and Audit by the Office of the Ohio Consumers’ Counsel (“Motion” or “Mot.”) and Memorandum in Support (“Memorandum” or “Mem.”), (Oct. 27, 2021).

<sup>13</sup> Compare Case No. 20-1502-EL-UNC, OCC Comments (Nov. 29, 2021), at 19-21 with OCC AFR, at 11-13.

Commission just cause to reconsider its decision.”<sup>14</sup> The Commission should reject OCC’s arguments accordingly.

**B. OCC’s Application For Rehearing Raises Several New Issues That Are Not Properly Before the Commission.**

Under R.C. 4903.10 a “party . . . may apply for a rehearing in respect to any matters determined in the proceeding.” However, it is improper to raise entirely new arguments for the first time in an application for rehearing because those arguments are not properly before the Commission.<sup>15</sup> Here, some of OCC’s purported “errors,” listed above, are raised for the first time in its Application for Rehearing. For example, OCC argues it was unreasonable or unlawful for the Commission to focus the audit on H.B. 6 and the subsequent referendum effort instead of the “nuclear subsidy legislation . . . that preceded H.B. 6” as well. (OCC Assignment of Error I.A). But OCC has *never* argued for an audit of legislation that preceded H.B. 6, nor raised any other legislation in this proceeding.<sup>16</sup> So for OCC to petition the Commission, for the first time in its Application for Rehearing, to shift the entire focus and scope of this proceeding is improper.

Several other grounds for rehearing are new, too. OCC argues the Commission erred in not including FERC Account 930.1 as part of the audit, yet OCC never requested this FERC Account be included. Instead, it requested only FERC Account 923, which the Commission granted *in addition to including other* FERC Accounts for review on its own accord. Likewise,

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<sup>14</sup> *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at \*6 (Nov. 29, 2011).

<sup>15</sup> *In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Second Entry on Rehearing at ¶ 23 (Oct. 23, 2019) (“[Complainant] attempts to alter its initial grounds for complaint by asserting this new argument at the rehearing stage of the proceeding. For this reason alone, rehearing should be denied.”); *In the Matter of the Application of Killen Generating Station for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-891-EL-REN, Entry on Rehearing at ¶ 15 (May 26, 2010) (“[T]he Commission finds no merit to OCC and OEC’s argument . . . , which was improperly raised for the first time on rehearing.”); *In the Matter of the Commissions Review of Chapter 4901:1-35 of the Ohio Admin. Code.*, No. 18-1188-EL-ORD, 2020 WL 4819379, at \*6 (F.E.D.A.P.J.P. July 29, 2020) (same).

<sup>16</sup> See *supra* n.8.



OCC did not ask for the Commission to include in the scope of any audit a review of any Internal Investigation Report. Though it notes in its Motion for an Audit that “the PUCO . . . declined to order FirstEnergy to produce the investigative report for OCC,”<sup>17</sup> OCC has never requested the Report as the subject of an audit in this proceeding. These new arguments are not properly raised in an application for rehearing and should be rejected as procedurally deficient.

**C. The Grounds Upon Which OCC’s Bases Its Application For Rehearing Are Without Merit.**

Even if the issues raised in OCC’s application for rehearing were properly before the Commission, OCC’s arguments as to the specific ways the Commission purportedly “erred” in “unreasonably and unjustly limiting the scope for auditing FirstEnergy’s political and charitable spending” are without merit.

**1. OCC’s New Request to Include Spending in Support of Legislation Preceding H.B. 6 Should be Rejected.**

According to OCC, “the PUCO should have included within its investigation a review of FirstEnergy spending in 2017-2019 in support of nuclear subsidy legislation” “that preceded H.B. 6.”<sup>18</sup> But OCC never asked the Commission to review any legislation other than H.B. 6 and the referendum effort.<sup>19</sup> Nor has OCC even raised the issue of any Zero-Emissions Nuclear (“ZEN”) legislation in this proceeding. Setting aside that this brand new argument should be rejected out of hand as procedurally deficient, OCC fails to explain why it considers the Commission’s decision to focus the audit on H.B. 6 as “unreasonable or unlawful” when H.B. 6 has been the defined scope of this proceeding from the beginning. Even OCC itself has focused its arguments and past

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<sup>17</sup> OCC Motion for an Auditor, Mem. at 7.

<sup>18</sup> OCC AFR, at 7-8.

<sup>19</sup> See *supra* n.8.

requests for audits on H.B. 6. OCC's reversal amounts to an improper attempt to redefine the scope of this proceeding through an application for rehearing.

The information OCC offers to support its argument does nothing to change OCC's deficient argument. OCC makes two primary points: (1) the review should include a review of earlier nuclear subsidy legislation “[b]ecause of the interrelatedness of nuclear legislation being pursued at the same time,”<sup>20</sup> and (2) the DPA discusses the ZEN energy proposals. However, these arguments have been available to OCC since July 2021, when the DPA was filed. OCC filed its Motion for Audit in October 2021 and its initial comments in November 2021. Nowhere in these filings—or in any of its filings since the DPA—did OCC request this proceeding to include a review of costs concerning legislation other than H.B. 6 and the subsequent referendum effort. OCC simply cannot show that the Commission “unreasonably” or “unlawfully” focused this review on H.B. 6 (as opposed to earlier legislation).<sup>21</sup>

## **2. OCC Fails to Explain How the Commissions’ Selected FERC Accounts are Unreasonable or Unlawful.**

OCC also uses the Application for Rehearing to raise its entirely new argument that the audit should review costs booked to FERC Account 930.1. While the Commission can exercise its authority to include FERC Account 930.1 in the audit review, this argument is once again procedurally improper and should be rejected. Apart from the procedural deficiencies, OCC has also done nothing to show how the Commission’s selected FERC accounts for review are unreasonable or unlawful, especially when the Commission *granted* OCC’s request to review

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<sup>20</sup> OCC AFR, at 7.

<sup>21</sup> Moreover, to the extent OCC’s request seeks to review all FirstEnergy spending unrelated to whether costs were allocated or assigned to the Companies, OCC’s request should be rejected for asking the Commission to exceed its jurisdictional bounds. *See infra* at Section II.C.9; *see also* Case No. 20-1502-EL-UNC, Companies’ Memorandum Contra OCC Motion for an Independent Audit (Nov. 12, 2021), at 3-6.

FERC Account 923 (the only account OCC requested) and even added other FERC Accounts on its own accord, including Accounts 426.1, 426.2, 580, and 930.2.

OCC's reliance on *Newman v. FERC*, 22 F.4th 189, 2021 WL 6122669 (D.C. Cir. 2021) and the DPA to support its new argument is misplaced. First, as the Companies have explained, *Newman* is not relevant here.<sup>22</sup> And, in any event, the Commission already considered *Newman* as part of OCC's Motion for an Audit.<sup>23</sup> Second, the DPA offers nothing new to show that the Commission's decision regarding its selected FERC accounts is somehow unlawful or unreasonable. As noted above, the DPA was filed in July 2021, and OCC has not once cited to the DPA to argue that OCC's requested audit should include a review of Account 930.1. On these grounds, OCC has failed to offer "specific grounds" as to why the Commission's selected universe of FERC Accounts deemed relevant to this proceeding is somehow in error.

### **3. FirstEnergy Corp. and The Companies Have Produced to OCC Many Thousands of Pages of Documents for OCC's Review.**

While FirstEnergy Corp.'s productions to OCC and Staff are not within the Companies' custody, possession, or control, a few points are worth clarifying. First, contrary to OCC's misstatement, the Companies have not produced a "few documents" in this proceeding. The Companies productions in this proceeding alone are over 1,500 pages of documents and total over 25,000 pages of documents in all four investigative proceedings. Additionally, the Companies have responded to hundreds of discovery requests, including subparts, served by OCC in this proceeding alone. To argue that thousands of pages of documents and hundreds of discovery requests is not "that many documents" is misrepresenting the record. Suffice it to say, OCC has

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<sup>22</sup> Case No. 20-1502-EL-UNC, Companies' Memorandum Contra OCC's Motion to Accept Statement of Additional Authority (Feb. 2, 2022).

<sup>23</sup> Case No. 20-1502-EL-UNC, Hr'g Tr. (Feb. 10, 2022), at 9:2-9.

far more documents than they are letting on. One need look no further than in the Corporate Separation Audit, Case No. 17-974-EL-UNC, where OCC has complained that it “would not have time to wade through the mountain of discovery,”<sup>24</sup> and even requested an indefinite continuance of that proceeding to enable it to review all the documents produced by FirstEnergy Corp.<sup>25</sup>

Second, to the extent OCC is requesting that FirstEnergy Corp., as part of this audit, produce *additional* documents other than the rolling productions in response to OCC’s September 24, 2021 subpoena, then OCC is once again requesting an unlimited and expansive audit of a non-public utility and asking the Commission to exceed its jurisdictional bounds.<sup>26</sup>

In its Motion for Audit, OCC could have pointed the Commission to specific, relevant documents within FirstEnergy Corp.’s productions (to the extent such documents exist) to attempt to support the requests it makes now to expand this proceeding. It did not do so. Nor has OCC explained why the auditor should wholesale review all the securities productions. That OCC expects any auditor to review the “mountain of discovery” that OCC itself has not been able to “wade” through is unreasonable.<sup>27</sup>

#### **4. OCC’s Argument on the Inclusion of FirstEnergy Solutions’ Bankruptcy Settlement Should be Rejected.**

OCC copied and pasted its argument regarding the FirstEnergy Solutions Corp. (“FES”) bankruptcy directly from its Initial Comments. Such recycled arguments the Commission has already rejected are no basis for applications for rehearing.<sup>28</sup> To be sure, OCC offers nothing new

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<sup>24</sup> Case No. 17-974-EL-UNC, OCC and NOPEC Interlocutory Appeal (Jan. 14, 2022), at 13-14.

<sup>25</sup> Case No. 17-974-EL-UNC, OCC, NOPEC, and OMAEG Motion for an Indefinite Continuance (Mar. 14, 2022).

<sup>26</sup> Case No. 20-1502-EL-UNC, Companies’ Memorandum Contra OCC Motion for an Independent Audit (Nov. 12, 2021), at 3-6.

<sup>27</sup> Case No. 17-974-EL-UNC, OCC and NOPEC Interlocutory Appeal (Jan. 14, 2022), at 13-14.

<sup>28</sup> *See supra* Section II.A.

to explain why the Commission’s decision on FES’s bankruptcy costs is in any way unreasonable or unlawful. Nothing has changed on this point since the Companies filed their reply comments in December.<sup>29</sup>

Regardless, OCC’s arguments on this front are convoluted and unpersuasive. OCC ostensibly claims that FirstEnergy Corp.’s negotiated resolution of numerous matters with numerous parties in FES’s bankruptcy may have somehow resulted in the Companies incurring costs of political and charitable spending by FES in support of H.B. 6. OCC contends that the bankruptcy resolution, approved in January 2019, “called for FirstEnergy Corp. to credit FirstEnergy Solutions \$112.5 million toward the cost of charges by FirstEnergy Service Company” and that if any of those costs were charged to the Companies, then customers may have somehow “indirectly paid H.B. 6 costs” tied to FES’s H.B. 6 spending in the third quarter of 2019.<sup>30</sup> OCC’s incoherent argument asks the Commission to launch an investigation premised on speculation without an iota of record support.

#### **5. Documents Produced to FERC are Not Relevant to an Audit Here.**

OCC’s argument for the audit to include FERC documents—not even limited to the Companies’ or to the time period of this proceeding<sup>31</sup>—would expand the audit to cover irrelevant information. Much of FERC’s comprehensive audit of FirstEnergy Corp. and its subsidiaries is not relevant to this proceeding. OCC claims FirstEnergy Service Company “improperly accounted for and improperly reported lobbying expenses and donations,” “allocated and charged the improperly accounted for lobbying, donation and unsupported costs to FirstEnergy and its

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<sup>29</sup> Case No. 20-1502-EL-UNC, Companies’ Reply Comments (Dec. 14, 2021), at 15.

<sup>30</sup> OCC AFR, at 12.

<sup>31</sup> Case No. 20-1502-EL-UNC, Entry denying the interlocutory appeal (Apr. 6, 2022), at ¶ 44.

subsidiaries,” and “overbilled customers.”<sup>32</sup> It also argues that because of certain alleged “shortcomings” in internal controls, it is entitled to “review the analysis and follow up reporting that FirstEnergy Corp. has agreed to provide to FERC related to the costs incurred for internal and external lobbying activities.”<sup>33</sup>

Contrary to OCC’s position, FERC’s independent audit is not a stand-in for these proceedings. FERC’s audit focused on several regulatory accounting issues including the allocation of overhead costs to CWIP and accounting for vegetation management costs. It also reviewed FirstEnergy Corp. subsidiaries that are not parties to this proceeding. By contrast, this proceeding is much narrower as it focuses on political and charitable spending allocated to the Companies in relation to H.B. 6 between 2017 and 2019 only. Thus, OCC’s calls for the audit to include *all* FERC materials without a showing of relevance should not be entertained.<sup>34</sup>

## **6. FirstEnergy Corp.’s Internal Investigation Report and Supporting Documents are Privileged.**

Setting aside that OCC never asked the Commission to include in the scope of any audit a review of FirstEnergy Corp.’s Internal Investigation Report (or the supporting documentation), this Commission has rejected repeated calls from OCC in discovery concerning FirstEnergy Corp.’s privileged investigation.<sup>35</sup> It should do so again here. The information contained in the Internal Investigation Report and supporting documents is properly considered attorney-client

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<sup>32</sup> OCC AFR, Mem. at 4-5.

<sup>33</sup> OCC AFR, Mem. at 4-5.

<sup>34</sup> *See also supra* at Section II.B.

<sup>35</sup> The Attorney Examiners have already ruled on this issue, correctly finding that the investigation report is protected. Case No. 17-974-EL-UNC, Entry, at ¶ 20 (Oct. 12, 2021); Case No. 20-1629-EL-UNC, Entry, at ¶ 16 (Oct. 12, 2021); *see also* Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, Memorandum Contra the Office of the Ohio Consumers’ Counsel’s Request for Interlocutory Appeal (Oct. 25, 2021); Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, FirstEnergy Corp. and FirstEnergy Service Company’s Memorandum Contra OCC Motion to Accept Statement of Additional Authority (Dec. 6, 2021).

privileged and work product.<sup>36</sup> OCC's claim that FirstEnergy Corp.'s Internal Investigation Report is "key . . . [to] solving the maze of FirstEnergy corruption and for protecting two million utility consumers in this case" is not a sufficient basis to require the production of protected materials.

## **7. A Review of All Internal and External Political and Charitable Spending is Unworkable.**

OCC's demand to expand the audit to review "all forms of political or charitable spending in support of nuclear subsidy legislation or federal support for FirstEnergy's nuclear plants from 2017 to 2019, regardless of whether the spending is for internal or external resources" is untenable. As OCC notes, the Commission expanded the audit to "internal and external" staff with responsibility for the type of political and charitable spending at issue here.<sup>37</sup> Its concern, however, is that the Attorney Examiners have not gone far enough to "allow the audit to take the Auditor where the accounting records lead[]." <sup>38</sup>

OCC misplaces its reliance on *Newman v. FERC*<sup>39</sup> and on its own speculation. Rather than providing "examples"<sup>40</sup> of costs that should be audited based on their review of the many thousands of documents the Companies and FirstEnergy Corp. have produced in Commission proceedings, OCC speculates that "expenses incurred by others who *may* have worked on H.B. 6-related matters"<sup>41</sup> are ripe for review. That speculation necessarily renders any audit inoperable.

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<sup>36</sup> Case No. 17-974-EL-UNC, Entry, at ¶ 20 (Oct. 12, 2021).

<sup>37</sup> OCC AFR, Mem. at 19.

<sup>38</sup> OCC AFR, Mem. at 21.

<sup>39</sup> *See supra* at Section II.C.2.

<sup>40</sup> OCC AFR, Mem. at 19.

<sup>41</sup> OCC AFR, Mem. at 20.

FirstEnergy Corp. has 12,395 employees,<sup>42</sup> more than 7,000 of which are employed by FirstEnergy Service Corp. and the Companies. Requesting a review of spending by anyone “including but not limited to corporate executives, attorneys, rate department staff, plant operators, area managers, local managers, account representatives, economic development staff, policy staff and communications staff,”<sup>43</sup> places an undue burden on FirstEnergy Corp. and the Companies to produce, and the auditor to review, tens of thousands of documents from thousands of employees. Despite having hundreds of thousands of pages of documents, OCC does not make any showing of the relevance of all employees that would outweigh that undue burden.

The same is true of OCC’s request to broaden the scope of external actors covered by the audit. OCC argues without support that any outside vendor “employed . . . to aid the nuclear legislative effort” should be reviewed.<sup>44</sup> Again, OCC provides nothing other than media conjecture that “expenses that *may have been* allocated, distributed, or charged to the FirstEnergy” as the purported “specific” grounds for its broadened and expansive request as to external actors.<sup>45</sup> But OCC cites to no party documents or audit responses to support its claims.

## **8. A Wholesale Investigation of Political and Charitable Spending is Foreclosed.**

As shown above, OCC offers nothing new as to why the Commission’s findings on these issues are unreasonable or unlawful or why it should grant a significant expansion of its March 9 Entry. The Commission has exclusive jurisdiction when (1) the “PUCO’s administrative expertise [is] required to resolve the issue in dispute” and (2) the “act complained of constitute[s] a practice normally authorized by the utility.” *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 2008-

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<sup>42</sup> FirstEnergy Corp. Annual Report at 5.

<sup>43</sup> OCC AFR, Mem. at 20.

<sup>44</sup> OCC AFR, Mem. at 20.

<sup>45</sup> OCC Motion for an Auditor, Mem. at 20.



Ohio 3917, ¶ 12, 119 Ohio St. 3d 301, 304, 893 N.E.2d 824, 828. Here, political and charitable spending related to H.B. 6 and the referendum effort are subject to the Commission’s investigation into *rate impacts*. The same cannot be said of a review of “*all* FirstEnergy’s political spending during 2017-2019 that *may* have been improperly charged to the FirstEnergy Ohio Utilities.”<sup>46</sup> *Allstate* makes clear that OCC is asking the Commission to exceed its jurisdiction.

### **III. CONCLUSION**

As explained above, OCC has raised, and the Commission has rejected, most of OCC’s arguments on the scope of an audit of the Companies. And those it did not raise previously cannot be considered now. For all these reasons, the Commission should reject OCC’s rehearing application in its entirety.

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<sup>46</sup> OCC Motion for an Auditor, Mem. at 22.

Dated: April 8, 2022

Respectfully submitted,

/s/ Ryan A. Doringo

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

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

*On behalf of the Companies*

**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 8, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Shalini B. Goyal*  
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*Attorney for the Companies*

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electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and  
The Cleveland Electric Illuminating Company and The Toledo Edison Company