

**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**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") March 10, 2022 subpoena duces tecum¹ of FirstEnergy Corp.—like its subpoenas of FirstEnergy Corp. management—is overbroad and defective. Nothing in OCC's Memorandum Contra² alters that its subpoena must be quashed.

First, while depositions may take place, document discovery is closed.³ OCC cannot use O.A.C. 4901-1-25(A) or mischaracterize the Attorney Examiners' Entries regarding the procedural schedule⁴ to evade the document discovery deadline. OCC's argument ignores subsequent Attorney Examiner rulings⁵ and well-established Commission precedent.

Second, OCC has not shown substantial need for the documents and testimony requested. Broad discovery rights do not entitle OCC to serve untimely document requests that are irrelevant

¹ 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 (Mar. 10, 2022).

² Case No. 17-974-EL-UNC, Memorandum Contra FirstEnergy's Motion to Quash OCC's Subpoena to FirstEnergy Corp. (Apr. 21, 2022) ("OCC Mem.").

³ 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).

⁴ *Id.*

⁵ Case No. 17-974-EL-UNC, Entry, at ¶ 16 (Jan. 4, 2022); Case No. 17-974-EL-UNC, Entry, at ¶ 30 (Feb. 10, 2022); Case No. 17-974-EL-UNC, Entry, at ¶ 27 (April 7, 2022).

to the corporate separation docket. Particularly where most of the documents sought will be produced to OCC in Case No. 20-1502-EL-UNC.

FirstEnergy Corp. is not “again seeking to limit OCC’s fact-finding and case preparation.”⁶ It is exercising its rights as a non-party in these proceedings to object to burdensome discovery that is irrelevant to whether the FirstEnergy Ohio Utilities⁷ complied with Commission rules and R.C. 4928.17. Nor is it FirstEnergy Corp.’s position that depositions cannot take place. OCC attempts to paint FirstEnergy Corp. as uncooperative should be ignored.

For the reasons stated in FirstEnergy Corp.’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 Document Requests are Untimely.

Document discovery closed on November 24, 2021—more than five months ago. Thus, any document requests in this proceeding are untimely and must be quashed. Despite this, OCC asserts O.A.C. 4901-1-25 permits it to request documents beyond the deadline established by the Attorney Examiners’ procedural schedule. OCC’s argument is flawed for several reasons.

First, OCC’s reading of O.A.C. 4901-1-25 is at odds with the rule’s text and Commission precedent. While O.A.C. 4901-1-25(A) and (D) permit a subpoena to require a witness “to produce designated books, papers, documents, or other tangible things within the scope of discovery,” a party cannot ignore the close of discovery.⁸ Nor does Commission precedent allow the

⁶ OCC Mem. at 1.

⁷ 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.

⁸ *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

circumvention of a case-specific procedural schedule.⁹ In addition to the fact that such a reading would render the protections of O.A.C. 4901-1-25(C) meaningless,¹⁰ *see infra*, at Section II.B., allowing OCC to take discovery over a Commission imposed deadline displaces the Attorney Examiners' authority to manage discovery¹¹ and negates the purpose of establishing a procedural schedule in the first place.

Second, OCC misrepresents the Attorney Examiners' rulings concerning the procedural schedule in this matter. The Attorney Examiners' October 12 Entry,¹² which further extended the existing schedule, unequivocally stated the "deadline for the service of discovery, except for notices of deposition, shall be set for November 24, 2021."¹³ In so ruling, the Attorney Examiners also noted "that the additional time will allow the parties time to adequately conduct and review discovery."¹⁴ OCC made no subsequent request to extend the document discovery schedule until it, OMAEG, and NOPEC filed their March 14 Motion for an Indefinite Continuance.

passed and Court was unpersuaded that party was not requesting further discovery and simply seeking to obtain it from a different source).

⁹ *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).

¹⁰ 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).

¹¹ *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").

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

¹³ *Id.*

¹⁴ *Id.*

The Attorney Examiners' April 7 Entry, which denied Intervenor's March 14 Motion, expressly acknowledged that the Commission "did not extend the discovery deadline when the hearing was previously continued, in part, because no party requested such an extension."¹⁵ Moreover, the Attorney Examiners rejected Intervenor's "generalized assertion" that the discovery deadline should be extended to allow "more time for case preparation" because "[t]he moving parties ha[d] not identified any line of inquiry *or specific type of documents* that would be beneficial to discovery before the hearing."¹⁶

As such, any argument that the Attorney Examiners "did not rule that parties could not exercise their right to ask for documents to be produced at depositions"¹⁷ or that "[t]he discovery cut-off is itself wrong"¹⁸ is without merit. OCC was well-aware of the document discovery deadline and did nothing to extend it prior to November 24, 2021. Additionally, that the Attorney Examiners specifically rejected Intervenor's request for more documents prior to the hearing should preclude OCC from claiming it is entitled to documents through depositions now.

OCC cannot simply ignore the procedural schedule and applicable case law merely because of the alleged "unique circumstances" here.¹⁹ OCC had ample time to explore any alleged compliance gaps during document discovery and must adhere to the discovery deadline.

¹⁵ Case No. 17-974-EL-UNC, Entry, at ¶ 27 (Apr. 7, 2022).

¹⁶ *Id.* (emphasis added).

¹⁷ OCC Mem. at 9.

¹⁸ OCC Mem. at 9. *But see*, Case No. 17-974-EL-UNC, April 7 Entry at ¶ 27 ("To be sure, the decision not to extend the discovery deadline was not due to an oversight by the attorney examiners, as the moving parties suggest. The Commission has extended a hearing date without also extending the deadline for discovery on numerous occasions.").

¹⁹ OCC Mem. at 9.

B. OCC Has Not Shown “Substantial Need.”

Beyond the fact that OCC’s document requests must be quashed as untimely, OCC has not shown a substantial need for the documents and testimony it seeks. Ohio 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.”

Irrespective of these limits, OCC claims it “has a substantial need for the documents” as “all” the documents they seek are relevant.²⁰ OCC’s requests for overbroad discovery is contrary to Ohio law. While “[a]ll parties and intervenors shall be granted ample rights of discovery,”²¹ OCC ignores the explicit language of O.A.C. Rule 4901-1-25. The Rule permits the Commission to quash a subpoena “if it is unreasonable or oppressive.”²² Similarly, Ohio Civ. R. 45(C), which informs the standard here,²³ 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 Ohio Civ. R. 45(C) has no application in these proceedings,²⁴ Commission rules acknowledge that the Ohio Rules of Civil Procedure are relevant to Commission decisions.²⁵ This is particularly true in cases involving

²⁰ OCC Mem. at 3.

²¹ R.C. 4903.082.

²² O.A.C. Rule 4901-1-25(C).

²³ 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.”).

²⁴ OCC Mem. at 2.

²⁵ *See* R.C. 4903.082 (“Without limiting the commission’s discretion the Rules of Civil Procedure should be used wherever practicable.”).

subpoenas of non-parties.²⁶ OCC cannot disregard the applicable limits on the scope of discovery in Commission proceedings where inconvenient.²⁷

Nor are *all* the documents and testimony OCC seeks relevant. Information related to FERC's audit of FirstEnergy Corp. is irrelevant to the FirstEnergy Ohio Utilities' compliance with Ohio corporate separation rules. And information outside of the period between November 1, 2016 and October 31, 2020 is beyond the Commission's directive in this case.²⁸ Thus, if OCC's document requests are any indication of the topics to be addressed during a deposition of FirstEnergy Corp., it seeks information wholly unrelated to this docket.²⁹

Further, much of the information sought is redundant. OCC has already noticed a deposition of the FirstEnergy Ohio Utilities' witness, who will speak to corporate separation

²⁶ Indeed, the Attorney Examiners 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.").

²⁷ 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.").

²⁸ Case No. 17-974-EL-UNC, Entry, at ¶ 17 (Nov. 20, 2022).

²⁹ To the extent any deposition of FirstEnergy Corp. is permitted to move forward, it should be narrowly limited to "corporate separation policies, practices, and procedures of the FirstEnergy Ohio Utilities." See OCC Mem. at 6.

matters. And OCC's assertion that "[t]he documents requested . . . cannot be obtained from other sources,"³⁰ is incorrect considering the Commission's decision compelling the Companies to produce materials provided to FERC during its audit. OCC has its discovery. Thus, it cannot say it has no alternative means to obtain the subpoenaed documents.³¹

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. Yet, "OCC has been provided with considerable amounts of information, which they have asked for and been given additional time to review."³² OCC, therefore, has not made and cannot make that showing. Accordingly, OCC's subpoena should be quashed.

III. CONCLUSION

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. Despite several rounds of briefing on these issues, OCC still cites to no case law to support its arguments or refute the fact that it is not entitled to documents now. And OCC will receive many of the subpoenaed documents in Case No. 20-1502-EL-UNC. Thus, no grounds exist to demand the testimony and thousands of documents from a non-party. OCC's subpoena of FirstEnergy Corp. should be quashed.

³⁰ OCC Mem. at 8.

³¹ FirstEnergy Corp. does not concede that subpoenaed FERC-related discovery is relevant to either this case or Case No. 20-1502-EL-UNC (it is not).

³² See Recording of March 9, 2022 PUCO Commission Meeting, *available at* <https://www.youtube.com/watch?v=0YZcYX-tGDI>. See also, Case No. 17-0974-EL-UNC, Hr'g Tr., at 27:14-20 (Jan. 4, 2022).

Dated: April 28, 2022

Respectfully submitted,

/s/ Corey A. Lee

Corey Lee (0099866)

Jones Day

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114

Tel: (216) 586-3939

Fax: (216) 579-0212

calee@jonesday.com

On behalf of FirstEnergy Corp.

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 28, 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
Attorney for FirstEnergy Corp.

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

4/28/2022 4:48:22 PM

in

Case No(s). 17-0974-EL-UNC

Summary: Reply in Support of the Motion to Quash the Office of the Ohio
Consumers' Counsel's Subpoena Duces Tecum of FirstEnergy Corp. electronically
filed by Mr. Corey Lee on behalf of FirstEnergy Corp.