

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Delivery Capital )  
Recovery Rider Contained in the Tariffs ) Case No. 15-1739-EL-RDR  
of Ohio Edison Company, The Cleveland )  
Electric Illuminating Company and The )  
Toledo Edison Company. )

REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA  
OCC'S MOTION TO COMPEL  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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PUCO

I. INTRODUCTION

In this proceeding, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("FirstEnergy") seek to invest in distribution facilities and collect its costs from consumers through the distribution capital recovery rider ("Rider DCR"). Collections from consumers in this manner, denies customers the traditional used and useful protections found when collections are approved by the Public Utilities Commission of Ohio ("PUCO") through rate case proceedings.

The Office of the Ohio Consumers' Counsel ("OCC") sought discovery regarding the \$239 million revenue collected through its distribution charge from its 1.9 million customers. FirstEnergy refused to provide information in response to OCC's legitimate discovery request, prompting OCC to file a Motion to Compel on July 20, 2016 with the Public Utilities Commission of Ohio ("PUCO"). FirstEnergy responded to OCC's Motion to Compel and used its Memorandum in Opposition as an opportunity to ask the PUCO to restrict the review of FirstEnergy's distribution charges in this case. For the following

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reasons, the PUCO should deny FirstEnergy's attempt to redefine the scope of this case and grant OCC's Motion to Compel.

## II. BACKGROUND

On October 9, 2015, the PUCO Staff docketed a Memorandum in this case requesting that the PUCO open this docket.<sup>1</sup> On November 4, 2015, the PUCO issued an Entry ordering Staff to issue a request for proposals to perform an audit of FirstEnergy's DCR expenditures and revenues.<sup>2</sup> And on December 9, 2015, the PUCO selected Blue Ridge as the auditor.<sup>3</sup> The Blue Ridge audit report was docketed on April 22, 2016. OCC served discovery on FirstEnergy on March 17, 2016 and the Utility provided responses to OCC on April 6, 2016 that contained only objections to all the discovery requests. On June 24, 2016, FirstEnergy partially supplemented one response that is marked as confidential. The other three requests for production of documents remain unanswered by the Utility, despite the fact that the Order establishing this case explicitly states that non-signatory parties, "will have the opportunity to fully participate in any Commission proceeding resulting from the audit process, including ample rights for discovery."<sup>4</sup>

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<sup>1</sup> Memorandum at 1 (Oct. 9, 2015).

<sup>2</sup> Entry (Nov. 4, 2015).

<sup>3</sup> Entry at 2 (Dec. 9, 2015).

<sup>4</sup> *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan.*, Case No. 10-388-EL-SSO at 40 (Aug. 25, 2010) ("FE 2010 ESP Case").

### III. ARGUMENT

**A. OCC's requests for production of documents sought to discover information that is reasonably calculated to lead to the discovery of admissible evidence and is critical to ensure consumers are not charged unjust and unreasonable rates through Rider DCR.**

What OCC asks for in this case is very basic and particularly relevant information:

1. Copies of all formal and informal requests made to the Company by the Commission, the PUCO Staff and the PUCO's Attorneys General in this proceeding and the Company's responses.
2. Copies of all documents and workpapers provided to the Commission, the PUCO Staff and/or the PUCO's Attorneys General in connection with this proceeding.
3. Copies of all discovery received by the Company from other parties in this proceeding, and the Company's response to that discovery.
4. Copies of all communications related to this proceeding between the Company and the Commission, the PUCO Staff and/or the PUCO's Attorneys' General.<sup>5</sup>

FirstEnergy does not mention specifically what is irrelevant about these requests. Instead FirstEnergy steps into the shoes of the PUCO, determining that, “[w]hile OCC may be entitled to discovery on the conclusions, results, or recommendation of the audit, it is not entitled to wholesale disclosure of business information.”<sup>6</sup> OCC did not request, nor does it want wholesale business information from FirstEnergy. What OCC requests is that it be allowed to carry out its statutory obligation to protect the interests of the residential customers who must pay several hundred million dollars annually for the DCR. The information and workpapers that allowed Blue Ridge to make its conclusions, results,

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<sup>5</sup> OCC Motion to Compel, Attachment 1. (July 20, 2016).

<sup>6</sup> FirstEnergy Memo in Opposition at 2 ((Aug. 4, 2016).

and recommendations is what OCC is entitled to. OCC must be able to obtain the Auditor's workpapers that support the conclusions of the Auditor's report. Otherwise there is a distressing lack of transparency in the audit proceedings.

FirstEnergy argues that OCC's requests are irrelevant and lists several cases where the PUCO denied Motions to Compel.<sup>7</sup> However, those cases do not serve as precedent because the requested information was deemed irrelevant. In this case, the information sought through discovery is specific to the Utility's recovery of the \$239 million DCR revenue to be collected from FirstEnergy's customers and the information relied upon by the auditor in reaching the recommendations, conclusions, and other findings in the audit report.

The Ohio Supreme Court confirmed that Ohio Adm. Code 4901-1-16(B), which governs the scope of discovery in PUCO cases is similar to Ohio Civ. R. 26(B)(1) and has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.<sup>8</sup> In this case, the Ohio Supreme Court reversed the PUCO's denial of OCC's motion to compel and stated that R.C. 4903.082 provides all parties and intervenors shall be granted ample rights of discovery.<sup>9</sup>

The PUCO has stated that its, "rules are designed to allow broad discovery of material that is relevant to the proceeding in question and to allow the parties to prepare thoroughly and adequately for hearing."<sup>10</sup> And, relevance for purposes of discovery is

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<sup>7</sup> FirstEnergy Memorandum in Opposition at 7 (Aug. 4, 2016).

<sup>8</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm.* 111 Ohio St.3d 300 ¶83 (2006), citing to *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 661(1996) and *Disciplinary Counsel v. O'Neill*, 75 Ohio St.3d 1479 (1994).

<sup>9</sup> *Id.* at ¶82.

<sup>10</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case Nos 08-920-EL-SSO, et al, Entry at 3 (Oct. 1, 2008).

defined as reasonably calculated to lead to the discovery of admissible evidence.<sup>11</sup> OCC's discovery request at issue in its Motion to Compel falls within the PUCO's broad scope of permissible discovery.

**B. OCC is the statutory representative of Ohio's utility customers and, according to R.C. 4911.02 is entitled to participate in cases before the PUCO, state and federal courts and administrative agencies.**

FirstEnergy argues in its Memorandum in Opposition that full participation in the audit process proceeding is not available to any interested party,<sup>12</sup> and, that "OCC fails to demonstrate that it is entitled to participate in the audit process in the first place."<sup>13</sup> Yet, that contradicts FirstEnergy's earlier statements in this case, FirstEnergy stated, "OCC's legal position is premature until after the audit report is filed with the Commission."<sup>14</sup> The audit report was filed on April 22, 2016. It is now almost four months after the report has been filed and FirstEnergy refuses to follow the PUCO's Order permitting non-signatory parties ample rights of discovery. The PUCO should order FirstEnergy to produce the requested information.

Further, by the Utility's own admission, "OCC has intervened in past proceedings after the audit report was filed – without objection by the Companies – and has issued discovery and filed comments therein. The OCC therefore previously has followed the Commission-approved process and sought intervention in Rider DCR proceedings after

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<sup>11</sup> Ohio Adm. Code 4901-1-16(B).

<sup>12</sup> FirstEnergy Memorandum at 7 – 8 (Aug. 4, 2016).

<sup>13</sup> *Id.* at 8.

<sup>14</sup> Memorandum Contra OCC's Motion to Intervene at 4 (Jan. 4, 2016).

the audit report has been filed.”<sup>15</sup> The same situation applies in this case, and FirstEnergy should therefore, be compelled to produce the requested discovery.

The Utility also argues that R.C 4903.082 and Ohio Adm. Code 4901-1-16(B)<sup>16</sup> are not applicable in this case because the PUCO did not grant OCC’s motion to intervene.<sup>17</sup> The PUCO spoke directly to this issue in 2010 when it established the Utility’s ability to request revenues for its DCR Rider. Specifically, the PUCO stated that non-signatory parties, “will have the opportunity to fully participate in any Commission proceeding resulting from the audit process, including ample rights for discovery.”<sup>18</sup> Thus the PUCO guaranteed non-signatory parties full rights to litigate the DCR cases, which includes intervention. In fact, OCC has been granted intervention in many of the past DCR cases <sup>19</sup> FirstEnergy’s arguments that OCC is not entitled to participate must be rejected by the PUCO because Ohio law, PUCO rules, and PUCO orders permit OCC full rights of participation in this DCR case.

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<sup>15</sup> *Id.*

<sup>16</sup> FirstEnergy Memorandum in Opposition at 7 and 11, FirstEnergy argues that Ohio Adm. Code is inapplicable on page 11 of its Memorandum in Opposition but on page 7 argues that that “Ohio Adm. Code 4901-1-16(B) makes clear that a party to a proceeding may obtain discovery of matter that are ‘not privileged’ and ‘relevant to the subject matter of the proceeding.’” FirstEnergy cannot decide if this provision of the PUCO’s rules is applicable or not. OCC maintains that the PUCO’s rules are applicable to this case. (Aug. 4, 2016).

<sup>17</sup> FirstEnergy Memorandum in Opposition at 10 (Aug. 4, 2016).

<sup>18</sup> FirstEnergy 2010 SSO Case Opinion and Order at 40 (Aug. 25, 2010).

<sup>19</sup> *See In the Matter of the Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company*, Case No. 14-1929-EL-RDR, OCC’s Motion to Intervene (June 3, 2015) (“2014 FirstEnergy DCR Audit Case”); *In the matter of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 12-2855-EL-RDR, OCC’s Motion to Intervene (January 2, 2013) (“2012 FirstEnergy DCR Audit Case”).

**C. FirstEnergy lacks standing to assert that the information that OCC seeks in discovery from the Utility is protected under 4901.16.**

FirstEnergy continues to argue that the information being sought by OCC is privileged under R.C. 4901.16.<sup>20</sup> But FirstEnergy has no standing to make this argument.

R.C. 4901.16 reads as follows:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting in any other capacity under the appointment or employment of the commission.

This provision of the law does not apply to utility companies. The plain meaning of the statute prevents PUCO employees from divulging information under certain circumstances. The dispute regarding the Motion to Compel is between FirstEnergy and OCC. Moreover, OCC contends that R.C. 4901.16 cannot be used as a reason for not complying with the PUCO's discovery rules. The PUCO recently found that where the final audit report had been filed in the docket, release of the draft audit report and related communication is not inconsistent with R.C. 4901.16.<sup>21</sup> Furthermore, FirstEnergy seems to be unaware that R.C. 4911.16 provides the following:

For the purpose of carrying out the duties given him in Chapter 4911 of the Revised Code, the consumers' counsel shall have access to all books, contracts, records, documents, and papers in the possession of the public utilities commission at any time.<sup>22</sup>

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<sup>20</sup> FirstEnergy Memorandum in Opposition at 14 (Aug. 4, 2016).

<sup>21</sup> *In the Matter of the Application of the Fuel adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry at 6 (Feb. 3, 2016).

<sup>22</sup> R.C. 4911.16.

But this is not the place to make arguments that the Utility is unable to assert due to its lack of standing. R.C. 4901.16 can only be used by the PUCO staff. Any argument that FirstEnergy raises regarding R.C. 4901.16 must be dismissed.

Additionally, FirstEnergy seems to misunderstand the standard procedure that is followed in cases before the PUCO. FirstEnergy could very easily provide the information under a protective agreement with the OCC, like it has done in countless previous cases for decades at the PUCO. In fact, FirstEnergy has already provided information marked confidential to the OCC in this case without even requesting a protective agreement. OCC has dutifully treated that information as confidential.<sup>23</sup> The notion that OCC does not have a right to information simply because it is confidential is lacks merit.

**D. OCC made reasonable efforts to resolve this discovery dispute.**

FirstEnergy claims that OCC's Motion to Compel should be denied because OCC failed to undertake reasonable efforts to resolve the dispute as required by Ohio Adm. Code 4901-1-23. But FirstEnergy solely relies upon the affidavit of Robert Endris in making this claim and ignores the earlier interactions with FirstEnergy's attorney Jim Burk, as stated in the affidavit attached to OCC's Motion to Compel.<sup>24</sup> Before Mr. Endris began working on this case, OCC contacted FirstEnergy attorney Jim Burk on April 22, 2016 (when the audit report was docketed) and asked if discovery responses would be provided now that the audit report had been filed (earlier the Utility indicated that OCC's

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<sup>23</sup> See OCC Motion for a Protective Order (July 20, 2016).

<sup>24</sup> OCC Motion to Compel, Attachment 3 at 1 (July 20, 2016).



discovery would be acceptable to the company after the report was filed).<sup>25</sup> Mr. Burk stated that he would check and get back to OCC.<sup>26</sup> Mr. Burk never contacted OCC regarding the discovery question.<sup>27</sup> Then on June 23, 2016, OCC sent an email to FirstEnergy's counsel (Jim Burk) asking, again, if the Utility would provide responses to OCC's request for production of documents.<sup>28</sup> At this time Mr. Endris informed OCC that OCC was only allowed to ask questions about the report itself and that OCC was not entitled to other discovery.<sup>29</sup> OCC made every effort to resolve the discovery. OCC asks for the underlying workpapers and exchange of data and communications that support the conclusions and reports contained in the report.<sup>30</sup>

OCC, according to Ohio Adm. Code 4901-1-23(C), exhausted all reasonable means to resolve the discovery dispute with FirstEnergy and requests that the PUCO grant its Motion to Compel.

#### **IV. CONCLUSION**

It is unjust and unreasonable to allow FirstEnergy to refuse to provide responses to OCC's discovery requests. These discovery requests are reasonably calculated to lead to the discovery of admissible evidence. The law, Supreme Court precedent, and PUCO Rules confirm OCC's right to prepare its case by participating in ample discovery. For

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<sup>25</sup> FE Memorandum Contra OCC's Motion to Intervene, "non-signatory Parties 'may fully participate in any Commission proceeding resulting from the audit process, including ample right to discovery.' [footnote omitted] Indeed, the OCC has intervened in past proceedings after the audit report was filed – without objection by the Companies – and has issued discovery and filed comments therein. The OCC therefore has followed the Commission-approved process and sought intervention in Rider DCR proceedings after the audit report has been filed." at 4 (Jan. 4, 2016).

<sup>26</sup> OCC Motion to Compel, Attachment 3 at 1 (July 20, 2016).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2.

<sup>29</sup> *Id.*

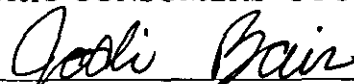
<sup>30</sup> See OCC Motion to Compel, Attachment 1 (July 20, 2016).

these reasons and those set forth in OCC's Reply, and Motion to Compel, OCC respectfully requests that the PUCO grant its Motion to Compel.

Further, because the parties have already begun settlement discussions in this case dealing with consumers' payments of \$239 million annually, OCC asks that the Motion be granted expeditiously. In order to allow OCC to adequately prepare and participate in this proceeding, OCC asks the PUCO to require FirstEnergy to respond to OCC's request for production of documents within three days of the PUCO's order.

Respectfully submitted,

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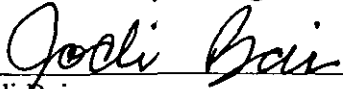
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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Reply was served upon the persons listed below via electronic transmission this 11<sup>th</sup> day of August 2016.

  
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