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 Illuminating Company, and The Toledo Edison Company.	)))))	Case No. 20-1502-EL-UNC

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE COMMISSION, AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Attorney Examiner should deny the Request for Certification (the "Request") filed by The Office of the Ohio Consumers' Counsel ("OCC"). The Request seeks certification of an interlocutory appeal from the Attorney Examiner's Entry dated September 15, 2020 ("Entry"). The Entry states the Commission's determination to open this proceeding to review the political and charitable spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") and directs the Companies "to show cause, by September 30, 2020, demonstrating that the costs 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." Entry ¶ 5.

Because OCC is not a party to this proceeding and the Entry is not a procedural ruling, OCC has no entitlement to take an interlocutory appeal to the Commission from the Entry. Thus, a review of the Request under O.A.C. 4901-1-15(B) is unnecessary.

Additionally, while OCC asks in its Request that the Entry be modified in no less than nine respects, OCC fails to provide any basis for the Commission to review the Entry itself. Indeed, OCC does not appear to object to what is contained in the Entry. As such, OCC cannot show that its appeal satisfies any of the criteria in O.A.C. 4901-1-15(B) for certification. Having failed to meet either of the prongs, let alone both, the Request should be denied.

Moreover, OCC has no factual or legal basis to request the many modifications to the Entry set out in its Application for Review. OCC has not shown that the Entry should be reversed, modified or expanded.

I. STANDARD OF REVIEW

For OCC's appeal to move forward, it must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." O.A.C. 4901-1-15(B). In order to seek the Attorney Examiner's certification of the proposed interlocutory appeal of the Entry, OCC must meet both of the requirements of O.A.C. 4901-1-15(B):

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
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> [1] the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and
>
> [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

O.A.C. 4901-1-15(B). *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets,* Case No. 08-917-EL-

SSO, Entry at ¶ 8 (Oct. 21, 2008) ("In order to certify an interlocutory appeal to the Commission, both requirements need to be met.").

Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018) ("The failure to demonstrate the second element, even where the first is satisfied, is fatal to any application for certification of an interlocutory appeal under Ohio Adm. Code 4901-1-15(B)"); *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions,* Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012) (same).

II. THE ATTORNEY EXAMINER SHOULD NOT APPROVE OCC'S REQUEST FOR CERTIFICATION.

A. OCC Is Not a Party that May Take an Interlocutory Appeal from the Entry.

As provided in O.A.C. 4901-1-15(B), an interlocutory appeal is available only to a "party . . . from any ruling issued under rule 4901-1-14 of the Administrative Code." OCC is not a party to this proceeding, and the Entry is not a ruling issued under O.A.C. 4901-1-14. Therefore, OCC's Request must be denied.

O.A.C. 4901-1-10 defines who is a party to Commission proceedings, and OCC does not fall within any of the categories in O.A.C. 4901-1-10(A)(1)-(8). Certain of the Commission's rules provide that a person who has filed a motion to intervene shall be considered a party for purposes of that rule,[1] but O.A.C. 4901-1-15 does not include similar language. A person who has filed a motion to intervene, which has not been granted, is not a party for purposes of O.A.C. 4901-1-15. Because OCC is not a party for purposes of O.A.C. 4901-1-15, it cannot take an interlocutory appeal from the Entry.

Additionally, an interlocutory appeal may be taken only from a "ruling" issued under O.A.C. 4901-1-14, which is limited to rulings on "any procedural motion or other procedural matter." O.A.C. 4901-1-14; O.A.C. 4901-1-15(B). The Entry is not a ruling on a procedural motion or other procedural matter. *See In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al*., Opinion and Order (March 31, 2016) (denying interlocutory appeal as procedurally improper because it was not filed in response to a ruling issued under O.A.C. 4901-1-14). A "ruling" is "an official or authoritative decision, decree, statement, or interpretation (as by a judge on a point of law)." *Merriam-Webster Dictionary* (online), available at https://www.merriam-webster.com/dictionary/ruling (accessed Sept. 26, 2020). No ruling has been issued yet in this proceeding. Instead, the Entry did two things: (1) initiate this proceeding; and (2) direct to the Companies to show cause regarding their rates. Thus, the Entry is not a procedural ruling, and O.A.C. 4901-1-15 is inapplicable.

[1] *See* O.A.C. 4901-1-05(E) (person who has filed motion to intervene is party for purposes of service); O.A.C. 4901-1-12(E) (person who has filed motion to intervene is party for purposes of motion); O.A.C. 4901-1-16(H) (for purposes of Rules 16 through 26 governing discovery, a person who has filed a motion to intervene is a party).

Because O.A.C. 4901-1-15 is inapplicable, the Request must be denied, thereby rendering consideration of the criteria in O.A.C. 4901-1-15(B) unnecessary.

B. OCC Has Failed to Demonstrate that the Entry Presents a New or Novel Question of Law or Policy.

OCC asserts in its Request that its appeal presents a new or novel question of law or policy, but it fails to point to any question of either law or policy that the appeal presents, let alone a question that is new or novel. OCC has no objection to the Entry itself, and it does not cite to any provision of Ohio utility law or policy that is put at issue by the Entry. OCC complains only that the Commission should be taking more expansive action because "the facts at issue in this case are unique." But what OCC calls "facts" – actually allegations – are neither law nor policy. And unlike the Entry, which is focused on the Companies' rates and charges, the expansive investigation OCC hungers for would stray far beyond the Commission's and the OCC's jurisdiction into questions of unregulated holding company activities and use of the Companies' revenues. Regardless, because nothing in the Entry itself presents a new or novel question of law or policy, OCC has not satisfied the first prong of O.A.C. 4901-1-15(B).

C. OCC Has Failed to Demonstrate that the Entry Presents a Departure from Past Precedent.

OCC suggests that the Entry departs from past precedent because it did not grant the motions filed by OCC in Case Nos. 17-2474-EL-RDR and 17-974-EL-UNC. Request, p. 2; OCC Mem. in Supp. pp. 6-7. The absurdity of this should be self-evident. The Companies have responded to those motions in those proceedings,[2] and the only departure from past precedent would be if the Commission ruled on those motions in this proceeding.

[2] *See* Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra Motions by the Office of The Ohio Consumers' Counsel

OCC also suggests that the departure from past precedent is the Commission's purported decision not to conduct an independent audit of expenses that may have been charged to customers. OCC Mem. in Supp. p. 6. Yet, again, OCC is making an assumption – and placing blame on the Commission based on that assumption – that clearly is erroneous. OCC is fully aware that the Companies' riders generally are subject to audit. There is no indication in the Entry that the Commission has decided to abandon its audit function.

In contrast to OCC's narrative in the Request, the Entry simply directs the Companies to provide specific assurances regarding a category of costs – political and charitable spending – that typically would not be included in rates. *See, e.g., Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus; *City of Cleveland v. Pub. Util. Comm.*, 63 Ohio St.2d 62, 73, 406 N.E.2d 1370 (1980); *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Increase and Adjust its Rates and Charges and to Change Regulations and Practices Affecting the Same*, Case No. 84-1272-TP-AIR, et al., 1985 WL 1172159, Opinion and Order (Oct. 29, 1985). OCC has not shown that an entry of this type is a departure from past precedent.

Because OCC has failed to satisfy either part of the first prong, the Request should be denied.

D. OCC Cannot Show that an Immediate Determination by the Commission Is Needed to Prevent the Likelihood of Undue Prejudice or Expense.

The Entry does not unduly prejudice OCC, which alleges that "in scandals of this sort" employees may leave employment over time. OCC Mem. in Supp. at p. 7. OCC does not explain, however, how employee attrition would affect the Companies' accounts showing what costs are

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Regarding House Bill 6, filed September 23, 2020 in Case Nos. 17-2474-EL-RDR and 17-974-EL-UNC.

being recovered in the Companies' rates. OCC also does not provide one example where employee attrition affected a Commission audit, let alone was a significant issue. Nor is OCC willing to recognize that Commission audits typically are grounded in statute or Commission order or rule, while OCC has not cited one valid legal basis for its requested audit and investigation of the Companies.

OCC also claims the Entry deprives it of its due process rights because the Entry does not provide for discovery and an evidentiary hearing. OCC Mem. in Supp. at p. 8. Given the number of times OCC has made this illegitimate due process argument, it must know that it has only the due process afforded by statute in Commission proceedings. *See, e.g., Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213, ¶ 20 (2006) ("We have repeatedly held that there is no constitutional right to notice and hearing in rate-related matters if no statutory right to a hearing exists."); *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248, 638 N.E.2d 550 (1994) ("absent express statutory provision, a ratepayer has no right to notice and hearing under the Due Process Clauses of the Ohio and United States Constitutions"). Because OCC has not shown how the Entry deprives it of any statutory rights it may have, it has not been unduly prejudiced by the Entry.

OCC claims it is harmed by the Commission's purported refusal to "get to the answers customers need – i.e., whether they funded expenses related to FirstEnergy's House Bill 6 activities." OCC Mem. in Supp. at p. 7. But OCC's need to know expands far beyond its limited jurisdiction, which "extends to every case that he or another party brings before the public utilities commission involving the fixing of any rate, joint rate, fare, charge, toll, or rental charged for commodities or services by any public utility, the plant or property of which lies wholly within this state." R.C. 4911.14. *See Tongren v. D&L Gas Marketing, Ltd.*, 149 Ohio App.3d 508, 2002-

Ohio-5006, 778 N.E.2d 76, ¶ 15 (10th Dist.). OCC may represent residential consumers before the Commission whenever a public utility applies to change its rates or a person files a complaint that a public utility's rates are unreasonable or unlawful. R.C. 4911.15.[3] There are no rates being fixed here. Indeed, OCC's focus is not on the Companies' rates but on expenditures alleged in the federal complaint to have been made by entities other than the Companies. Regardless, OCC has no jurisdiction to inquire into or complain about the Companies' expenditures.

This confusion between the Companies' rates, on the one hand, and the use of the Companies' revenues, on the other hand, runs throughout OCC's Request. Yet the Commission (and OCC) may exercise jurisdiction only over the former, as the Commission has done in the Entry. And while the Commission does have jurisdiction over the Companies' rates and their provision of adequate service, how the Companies use the funds from their revenues is not the subject of Commission review. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953). It is not OCC's job to manage the Companies.

Therefore, OCC's Request should be denied.

III. OCC'S APPLICATION FOR REVIEW SHOULD BE REJECTED.

OCC's Application for Review rehashes many of the same deficient arguments made by OCC in its Motion for a PUCO Investigation and Management Audit, etc. (the "Motions") filed in Case Nos. 17-2474-EL-RDR and 17-974-EL-UNC, but with a few new and strange twists. Indeed, OCC pretends that the Entry in this proceeding is erroneous because it failed to grant all four of the Motions filed in those other proceedings (it did not). *See* OCC Mem. in Supp. at pp. 10-16. One interesting change in emphasis between the Motions and this Application is that the Motions

[3] Similarly, OCC may "take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission." R.C. 4911.02(B)(2)(b).

focused on an investigation of FirstEnergy Corp.'s alleged non-utility spending while the Application focuses on the Companies' theoretical non-utility spending.[4] Yet this focus on the Companies' non-utility spending simply reinforces that the Commission lacks a valid legal basis for reversing, modifying or expanding the Entry.

A. The Entry Should Not Be Expanded to Include an Investigation or Audit of the Companies' Non-Utility Spending.

OCC asserts that it is concerned the Companies may have "breached the law (R.C. 4928.17; R.C. 4928.02(H)) that separates utility expenditures charged to customers from expenditures that belong to unrelated FirstEnergy affiliates." OCC Mem. in Supp. at p. 10. First, neither statute is implicated by the allegations in OCC's Request. R.C. 4928.02(H) prohibits "the recovery of any generation-related costs through distribution or transmission rates," which is not alleged to have occurred here. R.C. 4928.02(H) also declares as a state policy the avoidance of "anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa." Similarly, R.C. 4928.17(A)(3) requires that the Companies' corporate separation plan be "sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service." No anticompetitive subsidy flowing between competitive and noncompetitive services, or a non-electric product or service, is alleged to have occurred here, and

[4] OCC purports to focus on non-utility spending by "FirstEnergy," which OCC defines in the Request to mean the Companies. *See* Request at p. 1, fn. 2. In attempting to spin a tale that implicates the Companies, OCC also misleadingly uses "FirstEnergy" in the Request when referring to allegations involving FirstEnergy Corp. *See, e.g.*, OCC Mem. in Supp. at p. 14.

OCC has not shown that the language of the Companies' corporate separation plan is insufficient on this score.[5]

Second, to the extent the concern is "utility expenditures charged to customers" – which apparently is code in this context for the Companies including political or charitable contributions in the Companies' rates – that's the exact question posed in the Entry. And if no such expenses were included in the Companies' rates and charges, then whether those expenditures are separate from "expenditures that belong to unrelated FirstEnergy affiliates" is a moot point.

Moreover, OCC has not shown there is a case or controversy concerning the Companies' provision of public utility service. A complaint that merely requests an investigation fails to trigger the Commission's jurisdiction. *In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems, v. FirstEnergy Corporation*, Case No. 98-1616-EL-CSS, Entry at pp. 3-4 (May 19, 1999). OCC wants the Commission to determine whether the Companies spent funds for reasons other than electric utility service. OCC Mem. in Supp. at p. 15. But OCC's filings in this proceeding and others are based entirely on a federal criminal complaint, and that complaint contains no allegations of any wrongdoing, let alone any spending for non-utility purposes, by the Companies. There is no case or controversy here.

Nor has OCC shown how non-utility spending is improper, let alone illegal. OCC absurdly suggests that all "money . . . collected from customers" must "be used for electric utility service." OCC Mem. in Supp. at p. 15. That is not reality. Public utility rates in Ohio provide the return of costs incurred in rendering the public service, R.C. 4909.15(A)(4), plus a fair and reasonable return on property that is deemed used and useful, R.C. 4909.15(A)(2). *See Dayton Power & Light Co.*

[5] Nor is there any reason to further investigate the Companies' corporate separation plan in this proceeding, given that the language of the Companies' corporate separation plan has been exhaustively reviewed, pored over and argued over in Case No. 17-974-EL-UNC for several years.

v. Pub. Util. Comm., 4 Ohio St.3d 91, 103, 447 N.E.2d 733 (1983). Beyond the investment necessary to provide adequate service, a public utility may spend its funds in the best interests of the utility as determined by its management. *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953) (utility "is subject to extensive control and regulation" but "is still an independent corporation and possesses the right to regulate its own affairs and manage its own business"); *West Ohio Gas Co. v. Pub. Util. Comm.*, 128 Ohio St. 301, 381 (1934) ("It is a matter of common sense, as well as law, that the members of the Public Utilities Commission of Ohio cannot substitute themselves as managers of the gas company or dictate its policies"). To the extent the Companies use a portion of their revenues to make political or charitable contributions, this is not improper or illegal.

OCC also has not shown how the Companies' non-utility spending comes under the Commission's or OCC's jurisdiction. In particular, political contributions and charitable donations are not included in utility rates and fall outside the Commission's jurisdiction. *See Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), syllabus; *In re Chapter 4901:1-20, Ohio Adm. Code*, 2004 WL 1950732, Case No. 04-48-EL-ORD, Finding and Order at p. 14 (July 28, 2004) (finding that political contributions or donations are "a matter outside of our jurisdiction."). As discussed above, non-utility spending also falls outside the OCC's jurisdiction. *See* R.C. 4911.14, 4911.15.

OCC has no authority to request the investigation described in its Request, and the Commission has no authority to approve it. As a result, OCC has not shown that the Entry should be reversed, modified or expanded.

B. OCC's Application Lacks a Statutory Basis.

OCC claims that authority for the far-ranging investigation[6] and audit it requests "is found under R.C. 4905.05, 4905.06, 4909.154 and Ohio Adm. Code 4901-1-12." None support the action requested.

O.A.C. 4901-1-12 is a procedural rule permitting the filing of a motion by a party to a proceeding. It does not, as OCC claims, give the Commission expansive powers to order an independent audit.

R.C. 4909.154 applies to regulated public utilities when fixing base distribution rates for utility service under R.C. 4909.15. It does not apply to FirstEnergy Corp., which is not a regulated public utility and does not provide utility service, and it does not apply to the Companies unless they have filed an application to increase their base distribution rates. *See, e.g., In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at p. 16 (June 20, 2002) ("Section 4909.154, Revised Code, clearly applies to a rate case"); *In the Matter of the Application of the City of Cleveland for the Initiation of an Investigation and/or Rulemaking Proceeding to Implement Amended Section 4909.154, Revised Code*, Case No. 83-790-AU-UNC, 1987 WL 1466574 at *1, Entry (Feb. 10, 1987) (finding that R.C. 4909.154 "refers to the Commission's consideration during a rate case proceeding of the management policies, practices, and organization of a public utility"); *In the Matter of the Complaint of Randustrial Corporation v.*

[6] Among other things, OCC demands that the Commission examine the Companies' corporate governance and corporate relationships just to see whether such an examination will "shed light on regulatory issues that may need fundamental correction for consumer protection." OCC Mem. in Supp. at p. 11. It is difficult to conceive of a clearer example of a fishing expedition lacking any factual or legal support.

The Ohio Bell Telephone Co., Case No. 82-921-TP-CSS, *et al.*, 1984 WL 992121 at *13, Attorney Examiner's Report (June 25, 1984) ("it is clear that the grant of authority [in R.C. 4909.154] given to allow the Commission to review management policies and practices of a utility is therein restricted to rate proceedings.").

To the extent OCC is hoping the Commission will investigate FirstEnergy Corp. under R.C. 4905.05 and 4905.06, these statutes give the Commission jurisdiction only over those holding companies that are "exempt under section 3(a)(1) or (2) of the 'Public Utility Holding Company Act of 1935,' 49 Stat. 803, 15 U.S.C. 79c." FirstEnergy Corp. is not so exempt.

And to the extent OCC is hoping the Commission will investigate the Companies under R.C. 4905.05 and 4905.06, OCC has not provided the Commission a valid basis for doing so. As discussed above, there is no case or controversy here and spending that is not included in rates is not the Commission's (or OCC's) concern. As recently emphasized by the Ohio Supreme Court, the General Assembly has confined the PUCO's jurisdiction to the supervision of public utilities when acting as public utilities. *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020).

OCC lacks a statutory basis for its demand that the Commission expand the Entry to require an expansive fishing expedition of the Companies.

C. The Entry Is Not Unreasonable for Failing to Reopen Case No. 17-2474-EL-RDR.

As explained in the Companies' Memorandum Contra filed on September 23, 2020 in Case Nos. 17-2474-EL-RDR and 17-974-EL-UNC, which is incorporated herein by reference, OCC's attempt to reopen the Rider DMR audit proceeding is an improper and untimely application for rehearing, and the Commission cannot waive the requirement of R.C. 4903.10 that an application for rehearing be filed within thirty days of an order.

Further, since the Entry in this proceeding is entirely unrelated to Case No. 17-2474-EL-RDR, it cannot be unreasonable for the Attorney Examiner to refuse to reopen Case No. 17-2474-EL-RDR in this proceeding. Of course, the Attorney Examiner did not fail to reopen Case No. 17-2474-EL-RDR; he simply issued a show cause entry.

D. The Entry Is Not Unreasonably Limited in Scope.

OCC's unreasonable and non-jurisdictional request to expand the Entry to include an investigation into the Companies' spending is addressed above.

OCC's request that the Companies be ordered to show cause that they are not violating any and all utility laws, rules or Commission orders is improper and contrary to Commission precedent. *See, e.g., In the Matter of the Complaint of Ohio Consumer Alliance for Responsible Electrical Systems, v. FirstEnergy Corporation,* Case No. 98-1616-EL-CSS, Entry at pp. 3-4 (May 19, 1999). There is no basis in Ohio law, in OCC's filing, or in the federal complaint that is the source for OCC's filing, to require the Companies to prove a negative.

OCC complains that the Entry did not require the Companies to respond through specific individuals under oath. Making an explicit requirement of a show cause order that the response be supported by specific individuals, who may not have personal knowledge, is unnecessary.

E. The Entry Is Not Unreasonable for Failing to Direct the Companies to Identify Companies Referenced in the Federal Complaint.

The Companies did not draft the federal complaint and are not referenced in the federal complaint. The Companies are not in a position to identify the entities in the federal complaint. OCC's request is nothing more than harassment.

F. The Entry Is Not Unreasonable for Not Requiring Multiple Corporate Officers and Entities to Retain Records.

Given the pending federal investigation referenced in OCC's Request, as well as other pending investigations, one wonders how OCC could possibly believe that record retention is an

issue. Regardless, the Entry is not unreasonable for lack of a record retention order. As OCC notes, the Appendix to O.A.C. 4901:1-9-06 already imposes record retention obligations on the Companies.

Further as discussed above and elsewhere, neither the Commission's jurisdiction nor the OCC's jurisdiction extends to all records related to Am. Sub. H.B. 6 in the possession of the Companies, any affiliate of the Companies, FirstEnergy Corp. or Energy Harbor. Contrary to OCC's belief, the Commission is not an all-powerful law enforcement agency, and neither is OCC. The Commission has a defined role, and the Entry is consistent with that role.

G. The Entry Is Not Unreasonable for Failing to Establish a Procedural Schedule.

There is no reason to believe at this point that a procedural schedule, beyond that established in the Entry for comments, is necessary or appropriate. Indeed, the Companies are confident that their response to the Entry will demonstrate that no further proceedings are necessary.

IV. CONCLUSION

An interlocutory appeal from the Entry is not authorized by O.A.C. 4901-1-15(B) and, regardless, OCC has failed to meet its burden to establish both requirements for certification of an interlocutory appeal. Therefore, for the reasons stated above, the Attorney Examiner should deny OCC's Request.

Respectfully Submitted,

/s/ James F. Lang

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 28th day of September, 2020. The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ James F, Lang
One of the Attorneys for Applicants

4816-3756-1548, v. 1

Summary: Memorandum Contra Interlocutory Appeal, Request for Certification and Application for Review by OCC electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company