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

REPLY IN SUPPORT OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MOTION FOR PROTECTIVE ORDER

The Office of the Ohio Consumers' Counsel ("OCC") repeatedly asserts in its Memorandum Contra that it wants to convert this proceeding into an investigation of "illegal activities" of "FirstEnergy" that are unrelated to "providing utility service to customers" for purposes of "public transparency."[1] Indeed, OCC confesses that, as far as it is concerned, whether Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") included any costs of H.B. 6 spending[2] in their rates or charges is "beside the point," since OCC cares only about whether the Companies spent funds from their revenues on alleged "illegal activities" – none of which are attributed to the Companies – currently being investigated by the U.S. Department of Justice (as well as the U.S. Securities and Exchange Commission and the Ohio Elections Commission).[3] Through this proceeding, OCC hopes to be a public prosecutor intent on uncovering criminal activity, and its Notice to Take

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[1] OCC Memo. Contra, pp. 1, 3, 4, 6, 7, 19.

[2] References in this Reply to the "costs of H.B. 6 spending" include the costs of any political or charitable spending in support of Am. H.B. 6 – either supporting enactment of the bill or opposing the subsequent referendum effort.

[3] OCC Memo. Contra, pp. 2, 7. The alleged "illegal activities" also are the subject of a lawsuit filed by the Ohio Attorney General.

Deposition and Request for Production of Documents ("Notice") served in this proceeding is part and parcel of its hoped-for criminal investigation.[4]

But OCC has no prosecutorial authority, and neither does the Commission. Both the Commission and OCC are creatures of statute, and neither is authorized to prosecute alleged illegal activity. OCC's Memorandum Contra is devoid of any reference to a statute giving it law enforcement powers. OCC also fails to identify statutory authority for the Commission to investigate illegal activity that is unrelated to a public utility's provision of utility service to customers. To the contrary, the Commission's jurisdiction is confined to the supervision of public utilities when acting as public utilities.[5] A public utility is acting as a public utility when it is "engaged in the business of supplying electricity for light, heat, or power purposes" to retail customers.[6] In contrast, OCC asserts that any political and charitable spending by the Companies is unrelated to "providing public utility service to customers."[7] Thus, the allegedly criminal activity OCC wants to investigate does not involve the Companies acting as public utilities and falls outside the Commission's and OCC's jurisdiction.[8]

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[4] In addition to the Memorandum Contra filed by OCC, a Memorandum Contra was filed by the Ohio Manufacturers' Association Energy Group ("OMAEG") and nearly identical memoranda were filed by Ohio Partners for Affordable Energy ("OPAE") and the self-styled "Environmental Advocates." Because these parties did not serve the discovery upon which the Companies' Motion for a Protective Order is based, this Reply will focus on OCC's arguments and reference OMAEG, OPAE and the Environmental Advocates only as appropriate.

[5] *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020).

[6] *Id.* ¶ 15.

[7] *See* OCC Memo. Contra, pp. 3, 4, 19.

[8] To the extent OCC or another party should claim that the recent employment termination of FirstEnergy Corp. executives for violation of the FirstEnergy Corp. code of conduct justifies expanding the scope of this proceeding, the Commission already has decided to review that matter in Case No. 17-974-EL-UNC. In contrast, the Commission has asked in this proceeding whether the cost of H.B. 6 spending is included in the Companies' rates and charges paid by customers. *See* Case No. 20-1502-EL-UNC, Entry ¶ 5 (Sept. 15, 2020) (hereinafter, "Sept. 15, 2020 Entry").

Notably, OCC defines "FirstEnergy" in footnote 3 of its Memorandum Contra as the Companies, but then also uses "FirstEnergy" to mean FirstEnergy Corp. or a related entity when OCC believes it helps its story. Indeed, OCC asserts in the second sentence of its Memorandum Contra that the backdrop of this proceeding is the federal complaint "apparently involving FirstEnergy," which is false if "FirstEnergy" means the Companies. The federal criminal complaint contains no allegations of wrongdoing by the Companies but, instead, involves allegations of past political activity by a social welfare organization, a state office holder and lobbyists that allegedly violated 18 U.S.C. § 1962. None of the allegations involve Ohio utility law or a Commission order, and none of the allegations, as OCC is careful to note, involve the provision of retail electric service by the Companies.

Therefore, OCC's own Memorandum Contra makes clear the Companies are entitled to an order that discovery only be had via written requests to protect them "from annoyance, embarrassment, oppression, or undue burden or expense" under O.A.C. 4901-1-24(A)(3). Since Mr. Fanelli is responsible for the Companies' rates and charges for electric utility service, he is an appropriate person to explain that the costs of any H.B. 6 spending were not included in rates or charges paid by the Companies' customers, in response to the Commission's specific question. OCC, however, is attempting to use the Affidavit of Santino Fanelli to open a door to annoy, embarrass and harass the Companies with OCC's desired criminal investigation, notwithstanding OCC's and the Commission's lack of any authority to conduct a criminal investigation, and notwithstanding the fact that Mr. Fanelli is not responsible for political and charitable expenditures or for the other subject matters raised in OCC's Notice and written discovery that are beyond those addressed by the Affidavit. In fact, OCC admitted in its Memorandum Contra that the specific question addressed in the Fanelli Affidavit – whether the cost of H.B. 6 spending is included in

rates or charges paid by the Companies' customers – is "beside the point."[9] Notably, OCC has not raised any factual concerns with the Companies' response and instead is focusing on other matters beyond the scope of this proceeding, thus demonstrating that OCC has no interest in the question posed by the Commission in its Sept. 15, 2020 Entry. OCC would rather dig into allegedly illegal spending by the Companies and other FirstEnergy entities despite that activity lying well outside the jurisdiction of OCC and the Commission. That is harassment that merits a protective order.

A. The Commission lacks jurisdiction under R.C. 4905.04, 4905.05 or 4909.154 to review the Companies' political and charitable spending.

The Companies already have briefed on several occasions the Commission's lack of jurisdiction over the Companies' political and charitable spending generally, and over any H.B. 6 spending more specifically.[10] While OCC notes that the Commission has authority under R.C. 4905.05, 4905.06 and 4909.154 to investigate the Companies and its affiliates,[11] the relevant question is whether the Commission has authority under those statutes to independently investigate any H.B. 6 expenditures the Companies might have made. What OCC always conveniently overlooks is that R.C. 4905.05 and 4905.06 focus on costs associated with the provision of public utility service, which, understandably, is why the Sept. 15, 2020 Entry focused on whether H.B. 6 costs for political or charitable spending were included in rates or charges paid by the Companies' customers.[12] The Commission's legal authority does not extend as far as OCC and other

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[9] OCC Memo. Contra, p. 7.

[10] *See*, *e.g.*, Memorandum Contra Interlocutory Appeal, Request for Certification and Application for Review by OCC (Sept. 28, 2020), and Memorandum Contra the Motion of ELPC/OEC to Expand the Scope of the Commission's Review (Oct. 14, 2020). *See also* Memorandum Contra Motions by the Office of the Ohio Consumers' Counsel (Sept. 23, 2020), filed in Case Nos. 17-974-EL-UNC and 17-2474-EL-RDR.

[11] OCC Memo. Contra, pp. 3-4.

[12] Sept. 15 Entry, ¶ 5.

intervenors would like, but that certainly has not stopped them from asking the Commission to exceed its jurisdiction.

OPAE and the Environmental Advocates confusingly suggest that ratepayers pay for all spending of the Companies because every "customer provides FirstEnergy with a little bit of profit" and, thus, that all expenditures related to H.B. 6 are within the Commission's jurisdiction.[13] They are mistaken. What ratepayers pay are the Commission-approved rates and charges for utility service. By paying for electric service, ratepayers do not possess a legal or equitable interest in utility assets or revenues:

> Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stocks.

Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 34-35 (1926). By paying for electric service, the Companies' customers do not obtain an interest in how the Companies spend funds (and, of course, are not held responsible for any such spending).

Beyond the investment necessary to provide adequate service, an investor-owned 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

[13] OPAE Memo. Contra, pp. 7-10; Environmental Advocates Memo. Contra, pp. 7-10.

the members of the Public Utilities Commission of Ohio cannot substitute themselves as managers of the gas company or dictate its policies"). What OPAE and the Environmental Advocates are suggesting is that being the customer of a business gives one control over management decisions as to how to spend funds received from customers and other sources. This is not true for ***any*** investor-owned business. OPAE and the Environmental Advocates are simply wrong that the Commission has jurisdiction over any spending of funds of a public utility that may have flowed from Commission-authorized rates and charges.

OCC attempts to distinguish the Ohio Supreme Court's decision in *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429 (Sept. 17, 2020), because it did not consider the exact fact pattern at issue here.[14] But the *Direct Energy Business* case is directly analogous. Indeed, the Court found in that case that the Commission lacked jurisdiction over Duke Energy Ohio under R.C. 4905.04 and 4905.05 because they only authorize the Commission to regulate "public utilities" as defined in R.C. 4905.03. When an electric distribution utility is not "supplying electricity for light, heat, or power purposes to consumers within this state," it is not acting as a public utility as defined in R.C. 4905.03 and is not subject to regulation by the Commission under R.C. 4905.05, R.C. 4905.06 or any other section of Chapter 4905.[15] OCC has not shown how the criminal investigation of H.B. 6 spending it wants to pursue involves public utilities acting as public utilities (or even involves any public utility, for that matter). To the contrary, OCC repeatedly notes that the alleged "illegal activities" involved money that was **not** spent on providing public utility service to customers.[16] Because the *Direct Energy*

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[14] OCC Memo. Contra, p. 5.

[15] *Direct Energy Business,* 2020-Ohio-4429, ¶¶ 14-15, 23-25.

[16] OCC Memo. Contra, pp. 3, 4, 19.

Business decision is directly applicable, it supports the Commission's issuance of a protective order to prevent OCC from investigating questions outside the Commission's jurisdiction.

OCC also mischaracterizes *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 258, 431 N.E.2d 683 (1982), which held, in its syllabus, as follows: "Charitable contributions, as a category of expenditures, are not a cost of rendering the public utility service and can not be allowed as operating expenses." While OCC accurately quotes one line of the Court's discussion,[17] the Court's holding was clear – charitable contributions are not a cost of rendering public utility service within the meaning of R.C. 4909.15(A)(4) and, thus, cannot be included in base distribution rates.[18] While the Commission certainly has jurisdiction over a public utility's attempt to include political or charitable contributions in its rates, the Commission does not otherwise have jurisdiction over such spending because it is not a cost of rendering public utility service.

Likewise, OCC fails to distinguish the Commission's statement in *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), that prohibiting or restricting political contributions or donations is "a matter outside of our jurisdiction." OCC does not explain how the Commission would lack jurisdiction to regulate a utility's political contributions but would have jurisdiction to investigate a utility's political contributions. Simply put, under both Ohio Supreme Court decisions and the Commission's decisions, the Commission lacks jurisdiction to conduct a proceeding to investigate alleged "illegal activities" that do not involve the provision of electric service to customers.

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[17] OCC Memo. Contra, p. 6.

[18] *CEI*, 69 Ohio St.2d 258, at syllabus. *See also id.* at 262.

B. OCC lacks jurisdiction to investigate the Companies' spending.

OCC insists that it possesses broad statutory authority to investigate, seemingly without limitation, the Companies' political and charitable spending, regardless of whether such spending was included in or recovered by rates and charges paid by customers.[19] Specifically, OCC contends that its jurisdiction is not governed solely by R.C. 4911.14 or R.C. 4911.15, but also by "a preceding and controlling enabling statute, R.C. 4911.02(B)(2)," which enumerates without limitation "broadly defined" power and duties of OCC.[20] Not only does OCC claim it has broadly defined powers, OCC more boldly asserts it "has discrete authority to act" whenever "the PUCO is operating in a manner that does not serve the public's interest (by failing to adequately examine FirstEnergy's HB 6 activities)."[21] Based on that sweeping interpretation of its statutory authority, OCC seeks Commission approval of an unconstrained fishing expedition into the spending of the Companies and other FirstEnergy entities. The Commission must decline to sanction such a flagrant abuse of both OCC's statutory authority and the discovery process in Commission proceedings. Although OCC might want to conduct its own criminal investigation in parallel with the proper authorities, OCC's arguments ignore and contravene the plain language of R.C. 4911.14, well-established Commission and judicial precedent, and public policy.

As an initial matter, OCC fails to cite a single statute, administrative rule, Commission order/entry, or any case law to support its naked assertion of plenary power to investigate the Companies' political and charitable spending. OCC's inability to provide any citation or legal support for such sweeping investigatory powers is unsurprising because there is none. To the

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[19] OCC Memo. Contra, pp. 9-10.

[20] *Id.*, p. 8.

[21] *Id.*, p. 9.

contrary, the Commission has explicitly observed that "[t]he authority enumerated for OCC is ***not unlimited***; it is linked to rights and powers in the context of a party appearing before the Commission in an official proceeding."[22] Indeed, the Commission has explicitly cautioned that "[t]he boundaries of OCC's jurisdiction are found in its enabling statutes."[23] Here, OCC ignores those boundaries, positing that R.C. 4911.02(B)(2) confers seemingly limitless authority on OCC "to act" whenever the "PUCO is operating in a manner that does not serve the public's interest."[24] Tellingly, OCC does not clarify what type of "actions" it may lawfully take under such circumstances, nor does OCC identify the legal basis for applying an amorphous "public interest" standard. In truth, OCC's self-serving assertions of authority have no basis in law, fact, or reality.

In support of its claim that R.C. 4911.02 grants OCC the authority to broadly investigate the Companies' political and charitable spending, OCC cites Case No. 89-1031-EL-CSS[25] ("Condo Association Case").[26] In the Condo Association Case, OCC, acting on behalf of a condominium association, filed a complaint alleging that Ohio Edison improperly charged a commercial rate (instead of a residential rate) for electricity that serviced common areas of the condominiums.[27] In response, Ohio Edison argued, *inter alia*, that OCC lacked statutory authority under R.C. 4911.15 to sue on behalf of a non-profit condominium association – i.e., a non-

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[22] *In re Amendment of Certain Rules of the Ohio Administrative Code to Implement Sections 4905.261 and 4911.021, Revised Code*, Case No. 05-1350-AU-ORD, 2006 WL 193640, Opinion and Order and Entry on Rehearing (Jan. 4, 2006) (emphasis added).

[23] *Id.*

[24] OCC Memo. Contra, p. 9.

[25] OCC incorrectly cited the Condo Association Case as Case No. 89-1032-EL-CSS. *Id.* at 8. The correct docket number is Case No. 89-1031-EL-CSS.

[26] *In the Matter of the Complaint of the Office of Consumers Counsel on Behalf of the Residents of Copley Village Condominium Association v. Ohio Edison Company*, Case No. 89-1032-EL-CSS, 1989 WL 1733762, Entry (Oct. 6, 1989) ("Condo Association Case").

[27] *Id.* at ¶ 1.

residential customer.[28] The Commission found that the "without limitation because of enumeration" language in R.C. 4911.02 supported a broader interpretation of R.C. 4911.15 under which OCC could be understood as representing the interests of the individual residents of the condominiums.[29]

The Condo Association Case is inapposite for several reasons. First, the Condo Association Case involved allegations of *unlawful rates* charged to residential customers. Under R.C. 4911.14, "[t]he jurisdiction of the consumers' counsel 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."[30] Since the Condo Association Case involved a complaint about residential rates/charges, the Commission found that it fell squarely within the jurisdiction of the OCC under R.C. 4911.14. Here, however, OCC's attempt to conduct a limitless probe into the Companies' and other FirstEnergy entities' political and charitable spending has nothing to do with customers' rates/charges given that the Companies have unequivocally demonstrated in their September 30 Response that they have not included any costs of HB 6 spending in any customer rates or charges. Consequently, exploring such subject matter (via deposition, written discovery, or otherwise) falls well outside the bounds of OCC's statutorily circumscribed jurisdiction under R.C. 4911.14.

Second, the Condo Association Case never concerned or addressed the *type of subject matter* over which OCC has jurisdiction. Rather, the Condo Association Case focused on the *type*

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[28] *Id*. at ¶¶ 4, 11.

[29] *Id*. at ¶¶ 11-12.

[30] R.C. 4911.14 (emphasis added).

of customer OCC may represent. Here, the underlying dispute does not concern the type of customer OCC may represent under R.C. 4911.15; rather, the dispute is whether OCC possesses the statutory authority to act as a self-appointed special prosecutor with unbounded power to investigate the spending of public utilities. To no surprise, the Condo Association Case never once cites, references, or discusses R.C. 4911.14, *i.e.*, the controlling jurisdictional statute that delineates the type of cases/subject matter over which OCC has jurisdiction. Instead, the Condo Association Case focused primarily on R.C. 4911.15, the statute that delineates the types of customers OCC may represent. As such, the Condo Association Case is inapplicable and unavailing to OCC.

Third, despite OCC's baseless claims to the contrary, the Commission has never held – in the Condo Association Case or otherwise – that R.C. 4911.02 vests OCC with blanket authority to conduct a widespread investigation into the spending of a public utility. As referenced previously, OCC even goes so far as to argue that it enjoys the "discrete" statutory authority under R.C. 4911.02(B)(2) "to act" whenever "the PUCO is operating in a manner that does not serve the public's interest."[31] But oversight of the Commission is not OCC's responsibility. OCC does not enjoy the statutory authority to force the Commission "to act" whenever OCC is unhappy. Neither the Condo Association Case nor Ohio law grants OCC any legal authority to step in the shoes of the Commission when OCC deems it necessary, so long as some murky "public interest" standard is satisfied according to OCC.[32]

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[31] OCC Memo. Contra, p. 9.

[32] *Id.* In fact, as discussed below, in examining the jurisdiction of both the OCC and the Commission, the Commission refuted OCC's argument that it has "discrete" statutory authority to assume the role/duties of the Commission whenever the Commission fails to protect the public interest: "The clear language of Sections 4905.05 and 4911.14, Revised Code, delineate the jurisdiction of the Commission and the OCC. ***The General Assembly did not duplicate nor imply in any fashion that the duties and authority of the***

In fact, the Commission has explicitly cautioned against adopting OCC's distorted interpretation of its statutory authority. For instance, in Case No. 96-1175-TP-ORD, the Commission found that OCC's jurisdiction under R.C. 4911.14 is limited because "[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities, only to represent the interest of residential customers in such proceedings before the Commission.[33] Critically, the Commission recognized that R.C. 4911.14 explicitly permits OCC jurisdiction only "in cases before the Commission which affect the rates, tolls, or charges for the commodity or services offered by a public utility."[34] Similarly, the Tenth District Court of Appeals underscored in *Tongren v. D&L Gas Mktg., Ltd.,* that it is a violation of public policy for OCC to gain by administrative fiat investigatory powers that the legislature never granted to it.[35] Here, OCC does not have jurisdiction to probe the political and charitable expenditures of the Companies or other FirstEnergy entities, as it not within OCC's statutory purview to "monitor or supervise the operations and/or performance of public utilities."

Making matters even worse, OCC misrepresents the Companies' opposition to OCC's attempts to expand the scope of this proceeding beyond the Commission's and OCC's jurisdiction, by contending that the Companies are trying to prevent OCC from participating in this docket: "FirstEnergy argues that OCC has no jurisdiction to participate in this PUCO review."[36] To the

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Commission were also vested in the OCC." *In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code*, Case No. 96-1175-TP-ORD, 1997 WL 34878871, Finding and Order (June 26, 1997) (emphasis added).

[33] *Id*.

[34] *Id.*

[35] *Tongren v. D&L Gas Mktg., Ltd.*,149 Ohio App. 3d 508, 511, 2002-Ohio-5006, 778 N.E.2d 76 (10th Dist. 2002).

[36] OCC Memo Contra, p. 8.

contrary, the Companies do not oppose OCC's intervention in this docket. Rather, the Companies oppose expanding this proceeding's scope to cover subjects over which OCC has no jurisdiction.[37]

Similarly, the Commission should reject OCC's attempt here to leverage R.C. 4911.02(B) to expand its jurisdictional reach beyond the explicit statutory boundaries set by R.C. 4911.14. OCC asks the Commission to simply ignore the plain language of R.C. 4911.14 and to focus instead on its allegedly broad implied powers in R.C. 4911.02(B). Just as the court of appeals in *Tongren* halted OCC's attempted overreach, so too should the Commission here find that it is a violation of public policy for a publicly funded agency like OCC to use taxpayer funds to investigate allegedly "illegal activities" – a subject matter over which OCC clearly lacks jurisdiction.

C. OCC's Memorandum Contra affirms that OCC intends to exceed the scope of this proceeding.

OCC makes clear in its Memorandum Contra that its discovery in this proceeding, including its proposed deposition of Mr. Fanelli, should not be limited to the scope of this proceeding as set forth in the Sept. 15, 2020 Entry, namely, whether the Companies demonstrated 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."[38] Tellingly, OCC admits that Mr. Fanelli's affidavit affirming that the costs of any H.B. 6 spending were not included in the Companies' rates or charges "is beside the

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[37] OCC even cites Case No. 92-550-WS-COI to refute the argument (never made by the Companies) that OCC has no right to participate in this proceeding. *See id*. at 9, fn. 20. Yet Case No. 92-550-WS-COI merely demonstrates that OCC may intervene in a Commission ordered investigation – an irrelevant point that the Companies do not dispute. *See In the Matter of the Commission Investigation Into the Operations and Services of Ohio Utilities Company*, Case No. 92-550-WS-COI, 1992 WL 12719847, Entry (June 2, 1992).

[38] Sept. 15, 2020 Entry, ¶ 5.

point."[39] In other words, asking Mr. Fanelli about the statements in his affidavit, or whether the costs of any H.B. 6 spending were included in the Companies' rates or charges, is not the purpose of the Notice. Its true purpose – the "point" as described by OCC – is to question Mr. Fanelli concerning any "political or charitable contributions that funded the illegal activities alleged by federal prosecutors."[40] According to OCC, the issue here is not a regulatory matter involving rates and charges, but whether the Companies can prove their "innocence."[41]

Because OCC's stated purpose for the Notice is to inquire into subject matter that is beyond the scope of this proceeding (as well as, as noted above, beyond the Commission's and OCC's jurisdiction), an order is necessary to protect the Companies and Mr. Fanelli "from annoyance, embarrassment, oppression, or undue burden or expense."[42] OCC claims a broad right to discovery in Commission proceedings,[43] but that right is limited to matters "relevant to the subject matter of the proceeding."[44] As OCC has no interest in discovering whether the costs of any H.B. 6 spending were included in the Companies' rates or charges, the Notice seeks matters not relevant to the scope of this proceeding.

OMAEG recommends that the deposition go forward so that the Companies' counsel can object to each question that is beyond the scope of this proceeding, the Commission's jurisdiction

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[39] OCC Memo. Contra, p. 7.

[40] *Id.* *See also id.*, p. 13. OMAEG suggests that the Notice itself does not make OCC's purpose clear (OMAEG Memo. Contra, pp. 8-10), but this suggestion ignores everything OCC has filed and or served to date.

[41] *Id.*, p. 12.

[42] O.A.C. 4901-1-24(A).

[43] OCC Memo. Contra, pp. 10-17. *See also* OMAEG Memo. Contra, pp. 6-7.

[44] O.A.C. 4901-1-16(B).

or OCC's jurisdiction,[45] but this would be a futile exercise given OCC's (and OMAEG's) position. If any party actually has an interest in the one question raised in the Sept. 15, 2020 Entry (as opposed to pursuing a criminal investigation into political and charitable spending generally), the most reasonable course of action is for discovery on that question to proceed via written questions. This affords all parties the same deliberative opportunity to present arguments regarding the proper scope of each written request while avoiding gamesmanship.

While OCC and other potential intervenors are correct that the Commission has authorized discovery in proceedings that did not involve an evidentiary hearing, the key question here is whether a deposition on the subject matter sought by OCC is reasonable under the circumstances presented given the scope of this proceeding. And OCC and the other potential intervenors have not rebutted the fact that the Commission ultimately has the discretion to decide this key question. In fact, they have completely ignored that the Commission has the right under O.A.C. 4901-1-24(A)(3) to order that discovery "may be had only by a method of discovery other than that selected by the party seeking discovery." Despite all their claims that "full" discovery equates to all methods of discovery in every case, the Commission's rules clearly authorize the relief requested here by the Companies.

Because OCC seeks through the Notice to delve into subject matter that is outside the scope of this proceeding and the Commission's and OCC's jurisdiction, the Companies are entitled to an order under O.A.C. 4901-1-24(A)(3). This is not a question of whether a deposition seeks relevant information but nonetheless presents "undue burden or expense" because it requires too much travel or too many hours to prepare responses, as in the cases cited by OCC.[46] Instead, the

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[45] OMAEG Memo. Contra, pp. 10-11.

[46] OCC Memo. Contra, p. 18. *See also* OMAEG Memo. Contra, pp. 4-6, 11-14.

Notice imposes "annoyance, embarrassment, oppression, or undue burden or expense" simply because its purpose is to inquire into subject matter that is beyond the scope of this proceeding and the Commission's and OCC's jurisdiction.

While OCC and other potential intervenors argue that discovery is necessary to file comments in this case, they overlook two points: (1) the Sept. 15, 2020 Entry called for comments "regarding the Companies' response to this Entry,"[47] and (2) discovery on the Companies' response to the Sept. 15, 2020 Entry is not otherwise impeded. The Companies simply are asking for a limited and reasonable restriction as to one method of discovery because OCC's Notice clearly is not intended to assist OCC in filing comments regarding the Companies' response to the Sept. 15, 2020 Entry. And to the extent OCC seeks information specific to whether the costs of any H.B. 6 spending were included in the Companies' rates or charges paid by customers, the answer is unchanging: the Companies have not included, directly or indirectly, any costs of H.B. 6 spending in any rates or charges paid by ratepayers in Ohio.

The question presented in the Sept. 15, 2020 Entry is not a complex question shrouded in shades of grey. It does not involve witness credibility or hours of follow-up.[48] It does not give rise to questions that can only be asked in a deposition,[49] and OCC has not suggested otherwise. Nor does it require any analysis of spending made in support of H.B. 6. All that is needed is an

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[47] Sept. 15, 2020 Entry, ¶ 6.

[48] *See* OCC Memo. Contra, pp. 16-17.

[49] OMAEG claims that a deposition should go forward so that OCC can ask questions "not covered by or not directly related to the prior discovery." OMAEG Memo. Contra, pp. 8-9. But neither OCC nor OMAEG have identified even one such question that is relevant to the subject matter of this proceeding. OCC already has asked numerous times whether the costs of any H.B. 6 spending were included in the Companies' rates or charges paid by customers, and that question has been answered "no" numerous times. Does OMAEG want a deposition so that OCC can ask Mr. Fanelli whether the answer is still "no?" Of course not. Instead OMAEG, like OCC, wants to investigate whether the Companies or other FirstEnergy entities made contributions in support of H.B. 6. *See* OMAEG Memo. Contra, p. 7.

understanding of what costs are included in the Companies' rates and charges, which is what Mr. Fanelli's affidavit provides. Indeed, since Mr. Fanelli is responsible for the Companies' rates and charges for electric utility service but not their political and charitable expenditures or the other related subject matters raised in OCC's Notice and written discovery, he is not the person to answer OCC's questions about expenditures allegedly made "on illegal activities (and not on providing utility service to customers)."[50] As such, compelling the requested deposition in this proceeding would be inappropriate and futile, as described above.

D. Conclusion

For the foregoing reasons and the reasons set forth in the Companies' Motion for Protective Order, the Companies respectfully request that the Motion be granted and that the Commission issue an order limiting discovery to written requests only.

Respectfully submitted,

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[50] OCC Memo. Contra, p. 3.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 9th day of November, 2020. The PUCO'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 Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

4850-6454-6001, v. 1

Summary: Reply in Support of Motion for Protective Order electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company