

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Political)	
and Charitable Spending by Ohio Edison)	
Company, The Cleveland Electric)	Case No. 20-1502-EL-UNC
Illuminating Company, and The Toledo)	
Edison Company.)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA
OCC’S MOTION TO COMPEL RESPONSES TO DISCOVERY**

Once again, the Office of the Ohio Consumers’ Counsel (“OCC”) insists that this proceeding be expanded into a broad-ranging investigation of whether any funds collected from “FirstEnergy Utility” customers were used by “FirstEnergy” for “alleged illegal activities to support H.B.6.”¹ OCC served voluminous discovery requests on Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”), but only a handful arguably related to the scope of this proceeding as stated in the Commission’s September 15, 2020 Entry initiating this proceeding, *viz.*, whether the Companies included the costs of any political or charitable spending in support of Am. Sub. H.B. 6 (“H.B. 6”), or the subsequent referendum effort (“HB 6 Spending”), in their rates or charges paid by customers.² The Companies provided appropriate responses to those requests, which generally

¹ Revised Motion to Compel Responses to Discovery (“OCC’s Motion”), p. 1 (filed Nov. 10, 2020). As it often does, OCC appears to use “FirstEnergy” in its Motion to mean FirstEnergy Corp. and all affiliates and subsidiaries, as opposed to the “FirstEnergy Utilities” that are the subject of this proceeding. *See id.*, pp. 1-2. Thus, OCC wants “to get answers about what FirstEnergy did for H.B. 6 and who paid for it” by compelling the “FirstEnergy Utilities” to respond to its discovery requests. *Id.*, p. 2.

² *See* Interrogatory Nos. 2(h), 4(i), 5(h), 7(k), 12, 14, and 15 through 18 and Request for Admissions (“RFA”) Nos. 8 through 11 in Response to First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents Propounded Upon FirstEnergy Utilities by the Office of the Ohio

meant restating that “the Companies have not included, directly or indirectly, the costs of any H.B. 6 Spending in any rates or charges paid by ratepayers in Ohio.”³ OCC, however, believes this information is “beside the point.”⁴

The bulk of OCC’s discovery requests sought information regarding all political and charitable spending by FirstEnergy Corp., FirstEnergy Service Company, FirstEnergy Foundation, the Companies and others since at least January 1, 2017, and sometimes dating back to January 1, 2008.⁵ While OCC’s Motion abandons some of its most objectionable requests, OCC remains focused on whether the Companies or any affiliate of the Companies spent funds to support H.B. 6. This includes attempts to piggy-back on pending investigations of FirstEnergy Corp. by the Department of Justice (“DOJ”), Securities and Exchange Commission (“SEC”), and the Ohio Attorney General, as well as on shareholder lawsuits.⁶ Moreover, OCC moves to compel responses to interrogatories in its Second Set that are impossible to answer, *viz.*, whether “any of the money collected from” customers was used by the Companies for political or charitable spending or H.B. 6 Spending.⁷ These interrogatories have matching RFAs in the Second Set, and the Companies

Consumers’ Counsel, served Oct. 19, 2020 (“Response to OCC First Set”), attached to OCC’s Motion. Hereinafter, “costs of H.B. 6 spending” will refer both to the costs of any political or charitable spending in support of H.B. 6 and to costs of the subsequent referendum effort.

³ See *id.* See Response to Second Set of Interrogatories, Requests for Admissions and Requests for Production of Documents Propounded Upon FirstEnergy Utilities by the Office of the Ohio Consumers’ Counsel, served Oct. 22, 2020 (“Response to OCC Second Set”), attached to OCC’s Motion.

⁴ Case No. 20-1502-EL-UNC, OCC Memo. Contra the Companies’ Motion for Protective Order (OCC Memo Contra), p. 7 (Nov. 2, 2020); see also OCC Memo in Supp. Revised Motion to Compel Responses to Discovery (“OCC’s Memo in Supp.”), p. 12 (filed Nov. 10, 2020).

⁵ See generally Response to OCC First Set and Response to OCC Second Set.

⁶ See OCC’s Memo in Supp., p. 2. See also Response to OCC First Set, Interrogatory Nos. 2, 5, 11, 12, 13, 14, and 19 through 21, Requests for Production of Documents Nos. 4, 5, 7, 8, 9, 12, 13, and 14, and Requests for Admissions 5, 6, 16, and 18. See also Response to OCC Second Set, Interrogatory Nos. 2 through 9 and Request for Production No. 1.

⁷ Response to OCC Second Set, Interrogatory Nos. 2 through 8.

explained in their responses to those RFAs that money collected from customers is not differentiated from other sources of funding:

the Companies deny that they included, directly or indirectly, the costs of any H.B. 6 Spending in any rates or charges paid by ratepayers in Ohio. Further, following a reasonable inquiry, the Companies lack information sufficient to either admit or deny this Request because funds received from riders and charges are not differentiated from funds received by the Companies from other revenues or sources.⁸

OCC's Motion moves to compel responses to requests that are well outside the scope of this proceeding and the Commission's and OCC's jurisdiction, as well as overbroad, unduly burdensome, harassing, oppressive, vague, ambiguous and that seek to impose an undue expense on the Companies. Thus, OCC's Motion should be denied.

I. ARGUMENT

A. OCC's Motion Seeks to Compel Responses to Requests that are Outside the Scope of this Proceeding.

OCC's Motion unreasonably and unlawfully asks the Commission to compel responses to numerous discovery requests that seek information beyond the scope of this proceeding. OCC seeks to compel responses to OCC's first set of discovery, Interrogatory Nos. 2, 5, 11, 12, 13, 14, and 19 through 21, Requests for Production of Documents Nos. 4, 5, 7, 8, 9, 12, 13, 14, 19 and 20, and Requests for Admissions 5, 6, 16, and 18, as well as OCC's second set of discovery, Interrogatory Nos. 2-002 through 2-009 and Request for Production No. 2-001.⁹ All of these requests are irrelevant because they involve matters outside the scope of this proceeding. Nevertheless, the Companies did answer Interrogatories 01-002(h), 01-005(h), 01-012 (in part)

⁸ Response to OCC Second Set, RFA No. 2-002; *see also id.*, RFA Nos. 2-001 through 2-007. *See also* Response to OCC Second Set, Interrogatory Nos. 2 through 8.

⁹ *See* OCC's Motion, p. 2.

and 01-014, because they related to whether H.B. 6 costs were included in the Companies' rates and charges, and also fully answered RPD-02-001.¹⁰ The Companies also responded to RPD-01-004 by providing documents relied upon to confirm that any costs of H.B. 6 Spending were not included in any rates or charges paid by ratepayers in Ohio.¹¹

OCC claims a broad right to discovery in Commission proceedings,¹² but that right is limited to matters "relevant to the subject matter of the proceeding."¹³ Here, the Commission's Sept. 15, 2020 Entry defines the scope of the proceeding as confirming 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."¹⁴ In contrast, the focus of OCC's Motion, as reflected in the bulk of OCC's discovery requests, is on whether the Companies or any affiliate of the Companies spent funds, or borrowed funds, to support H.B. 6 and defeat the subsequent referendum.¹⁵ The focus of these requests is not on whether costs were included in the Companies' rates or charges but on expenditures alleged by federal prosecutors to have been made by entities other than the Companies. Therefore, each of these requests seeks information beyond the scope of this proceeding.

¹⁰ OCC's inclusion of RPD-02-001 in its Motion appears to be a mistake, as this request is not referenced in OCC's Memorandum in Support.

¹¹ See Response to OCC First Set, RPD-01-004 and RPD-01-004 Attachment 1.

¹² OCC's Memo in Supp., pp. 5, 6, 14.

¹³ O.A.C. 4901-1-16(B).

¹⁴ Case No. 20-1502-EL-UNC, Entry ¶ 5 (Sept. 15, 2020) (hereinafter, "Sept. 15, 2020 Entry"). Notably, the Commission is auditing the Companies' compliance with their affiliate code of conduct in Case No. 17-974-EL-UNC and, thus, any code of conduct concerns will be addressed in that proceeding and not in this proceeding.

¹⁵ See OCC's Memo in Supp., p. 2. See also Response to OCC First Set, Interrogatory Nos. 2, 5, 11, 12, 13, 14, and 19 through 21, Requests for Production of Documents Nos. 4, 5, 7, 19, and 20 and Requests for Admissions 5, 6, 16, and 18. See also Response to OCC Second Set, Interrogatory Nos. 2-002 through 2-009 and Request for Production No. 2-001.

While OCC argues that this discovery is necessary to file comments in this case, it overlooks the fact that the Sept. 15, 2020 Entry called for comments “regarding the Companies’ response to this Entry.”¹⁶ The question presented in that entry – whether any costs of H.B. 6 Spending were included in any rates or charges paid by ratepayers – does not require any analysis of political and charitable spending by the Companies or any affiliate or any analysis of spending made in support of H.B. 6. All that is needed is an understanding of what costs are included in the Companies’ rates and charges. To the extent OCC has requested 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.¹⁷

Thus, the Companies responded to Interrogatories 01-002(h) and 01-005(h) because these interrogatories asked, respectively, whether any payments to Generation Now were included in the Companies’ rates and charges and whether any political or charitable spending regarding H.B. 6 activities were included in the Companies’ rates and charges paid by customers. The other subparts of these interrogatories are irrelevant. The Companies also answered Interrogatory 01-014 by stating that “the costs of the Companies’ political and charitable spending are recorded in FERC Accounts 426.1 and 426.4, which are not used to calculate the Companies’ rates or charges.”¹⁸

¹⁶ Sept. 15 Entry, ¶¶ 5, 6.

¹⁷ Companies’ Sept. 30, 2020 Response. *See also* Response to OCC First Set, Interrogatories 2(h), 3(j), 4(i), 5(h), 7(k), 12, 14 through 18 and RFAs 8 through 11; Response to OCC Second Set, RFAs 1 through 7.

¹⁸ Response to OCC First Set, Interrogatory 14. This interrogatory is unclear because it appears to request accounts in which political and charitable expenses are recorded that are associated with providing electric service to customers, but OCC is well aware that political and charitable expenses are not associated with providing electric service to customers. Thus, the Companies identified the accounts where political and charitable expenses are recorded and then confirmed that these accounts are not used to calculate the Companies’ rates and charges.

The Companies also answered Interrogatory 02-001, despite it being confusingly drafted and argumentative.¹⁹ And the Companies responded to RPD-01-004 within the scope of this proceeding.²⁰ OCC's Motion ignores that the Companies answered these interrogatories and document request. The Companies objected to the remainder of the requests at issue because they seek information that is beyond the scope of this proceeding.

Interrogatories 2, 5, 11, 12 and 13 in OCC's First Set request information on possible spending by or on behalf of the Companies, regardless of whether the cost of that spending is included in the Companies' rates and charges.²¹ RFAs 5, 6, 16 and 18 in OCC's First Set, RPDs 4, 5, 7, 19 and 20 in OCC's First Set, and Interrogatories 2 through 9 in OCC's Second Set pursue the same line of inquiry.²² Notably, RFAs 1 through 7 in OCC's Second Set mimic Interrogatories 2 through 8 in OCC's Second Set, and the Companies answered RFAs 1 through 7 despite their lack of relevance to this proceeding. Interrogatories 2 through 8 in the Second Set are equally incapable of being answered given that, as stated in response to RFAs 1 through 7 in OCC's Second Set, funds received from specific rates or riders of the Companies are not differentiated from funds received by the Companies from other revenues or sources. And Interrogatories 19 through 21 in

¹⁹ Response to OCC Second Set, Interrogatory 1.

²⁰ See Response to OCC First Set, RPD-01-004 and RPD-01-004 Attachment 1.

²¹ As noted above, the Companies answered Interrogatories 01-002(h) and 01-005(h) because they do ask whether the cost of any spending was included in the Companies' rates or charges.

²² OCC's First Set, RPD Nos. 19 and 20, are slightly different than the others, but have the same objectionable purpose. These requests seek information on the position of the "Director of State Affairs for Ohio" and the structure of FirstEnergy's "External Affairs" organization. See Response to OCC First Set, pp. 54-55. OCC argues this information "may form the basis of identifying potential deponents with specific knowledge of HB 6 spending by FirstEnergy." OCC's Memo in Supp., p. 9. Thus, these requests are not reasonably calculated to lead to the discovery of relevant or admissible evidence because they do not relate in any way to whether the costs of any political or charitable spending in support of H.B. 6 or the subsequent referendum were included, directly or indirectly, in any rates or charges paid by the Companies' ratepayers in Ohio.

OCC's First Set randomly request information on line items in the Companies' FERC Form 1s for 2018, none of which relate to whether the costs of any H.B. 6 Spending were included in the Companies' rates or charges paid by customers in Ohio.

Tellingly, OCC has admitted that the purpose of its discovery requests is not to determine whether the costs of any H.B. 6 Spending were included in the Companies' rates or charges.²³ The true purpose as described by OCC is to investigate "the illegal activities alleged by federal prosecutors,"²⁴ – none of which are attributed to the Companies – currently being investigated by the U.S. Department of Justice and other law enforcement agencies. Yet OCC has failed to explain how, for example, RICO claims are relevant to the scope of this proceeding or within the Commission's or OCC's jurisdiction.

This is reflected in OCC's effort to compel responses to OCC's First Set of Requests for Production of Documents Nos. 8, 9, 12, 13, and 14.²⁵ Each of these requests seeks information related to the investigations, such as "all records produced by FirstEnergy Utilities and FirstEnergy Service Co. in response to the subpoenas issued by the U.S. Attorney's Office for the Southern District of Ohio" (RPD No. 8); "all documents related to the shareholder lawsuits against FirstEnergy and current and former directors, officers and other employees . . . relating to House Bill 6 activities," (RPD No. 9); "all documents related to the Securities Exchange Commission investigation into matters related to House Bill 6 activities" (RPD No. 12); and documents related

²³ OCC Memo. Contra, p. 7; *see also* OCC Memo in Supp., p. 12

²⁴ OCC's Memo in Supp., pp. 4, 13

²⁵ *See* OCC's Mot., p. 2; *see also* OCC's Memo in Supp., pp. 9-10.

to the Attorney General's lawsuit, filed in the Franklin County Court of Common Pleas related to House Bill 6 activities (RPD Nos. 13 & RPD No. 14).²⁶ None of these requests is relevant.

The federal criminal complaint contains no allegations of wrongdoing by the Companies. To the contrary, the allegations involve 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. The information that OCC seeks with these responses does not relate to a regulatory matter involving rates and charges, but rather unrelated investigations occurring within other jurisdictions. Because each of the discovery requests that OCC seeks to compel inquire into subject matter that is beyond the scope of this proceeding (as well as, as noted below, beyond the Commission's and OCC's jurisdiction), the Commission should deny OCC's Motion to Compel.

B. OCC's Motion Seeks to Compel Responses to Discovery Requests that Are Outside the Commission's Jurisdiction.

Not only does OCC's Motion seek to compel responses to requests that are beyond the scope of this case, these requests also seek to investigate matters beyond the Commission's jurisdiction.

As a last resort to support Commission jurisdiction, OCC's Motion generally cites to R.C. 4905.05 and R.C. 4905.06,²⁷ but OCC fails to show why the Commission has jurisdiction over the investigation OCC wants to pursue. While the Commission does have jurisdiction over the Companies' rates and their provision of adequate service, whether the Companies used the funds

²⁶ Response to OCC First Set, pp. 47-48, 50-51.

²⁷ OCC's Memo in Supp., p. 12.

from their revenues for a purpose other than providing utility service to customers²⁸ 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) (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”). Indeed, the Commission has previously stated that the basis for political contributions and donations made by public utilities is “a matter outside of our jurisdiction.” *See 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).

Here, OCC Interrogatories No. 2, 5, 11, 12, 13, 14, and 19 through 21, Requests for Production of Documents Nos. 4, 5, and 7, and Requests for Admissions 5, 6, 16, and 18, as well as Interrogatories 2-002 through 2-009 and Request for Production 2-001, each seek information regarding the expenditures related to political and charitable spending by the Companies and others, regardless of whether the costs of any such expenditures were included in the Companies’ rates and charges.²⁹ Similarly, OCC’s First Set of Requests for Production of Documents Nos. 8, 9, 12, 13, and 14 each seek information related to investigations in other jurisdictions of alleged “illegal activities” that do not involve the provision of electric service to customers.³⁰ Therefore,

²⁸ *See* OCC’s Memo in Supp., p. 13 (asserting that “FirstEnergy” should be held accountable if it spent money collected from customers on anything other than providing utility service to customers).

²⁹ *See* Response to OCC First Set, pp. 4-30, 34-35, 44-47; Response to OCC Second Set, pp. 4-12.

³⁰ Response to OCC First Set, pp. 47-48, 50-51.

each of these requests seeks information regarding matters outside the scope of the Commission's jurisdiction.

The relevant question under R.C. 4905.05 and R.C. 4905.06 is whether the Commission has authority under those statutes to independently investigate any H.B. 6 expenditures the Companies might have made. What OCC continuously 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 any political or charitable spending were included in rates or charges paid by the Companies' customers.³¹

The Commission's jurisdiction is confined to the supervision of public utilities when acting as public utilities.³² 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.³³ In contrast, OCC asserts that any political and charitable spending by the Companies is unrelated to "providing public utility service to customers."³⁴ Thus, the alleged activity OCC wants to investigate does not involve the Companies acting as public utilities (or even involves any public utility, for that matter) and falls outside the Commission's and OCC's jurisdiction. Simply put, under both Ohio Supreme Court decisions and the Commission's decisions, the Commission lacks jurisdiction to

³¹ Sept. 15 Entry, ¶ 5.

³² *In re Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, ¶ 25 (Sept. 17, 2020). 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. *Id.* ¶¶ 14-15, 23-25.

³³ *Id.* ¶ 15.

³⁴ See OCC's Memo in Supp., p. 13; see also OCC Memo. Contra, pp. 3, 4, 19.

conduct a proceeding to investigate alleged “illegal activities” that do not involve the provision of electric service to customers.

Therefore, to prevent OCC from investigating questions outside the Commission’s jurisdiction, the Commission should deny OCC’s Motion to Compel.

C. OCC Lacks Jurisdiction to Investigate the Companies’ Spending.

The Commission should also deny OCC’s motion to compel because OCC’s discovery requests exceed OCC’s own jurisdiction. OCC’s jurisdiction “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.”³⁵ 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.³⁶

Here, there are no rates being fixed. Indeed, OCC’s focus is not on the Companies’ rates – OCC says what costs are included in rates is “beside the point”³⁷ – but on expenditures alleged in the federal complaint to have been made by entities other than the Companies.³⁸ OCC, however, 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 funds from the Companies’

³⁵ 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.).

³⁶ R.C. 4911.15.

³⁷ OCC’s Memo in Supp., p. 12. *See also* OCC Memo Contra, p. 7.

³⁸ *See* OCC’s Memo in Supp., p. 2. *See also* Response to OCC First Set, Interrogatory Nos. 2, 5, 11, 12, 13, 14, 19-21, Requests for Production of Documents Nos. 4, 5, 7, and Requests for Admissions 5, 6, 16, 18. *See also* Response to OCC Second Set, Interrogatory Nos. 2-002 through 2-009 and Request for Production No. 2-001.

revenues, on the other hand, runs throughout OCC's discovery requests. Yet the Commission (and OCC) may exercise jurisdiction only over the former, as the Commission has done in the Entry.

It is not within OCC's authority to manage the Companies. Nevertheless, 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.³⁹ 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.⁴⁰ 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 take the action urged in OCC's motions (subject to OCC's interlocutory appeal))."⁴¹ 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 their affiliates.

For example, OCC seeks to compel responses to requests that seek: (1) information regarding the expenditures related to political and charitable spending by the Companies and their affiliates,⁴² not whether the costs of any political or charitable spending in support of H.B. 6 were included, directly or indirectly, in any rates or charges; and (2) information related to the

³⁹ OCC Memo. in Supp., pp. 15-16.

⁴⁰ *Id.*, p. 14.

⁴¹ *Id.*, p. 16.

⁴² See Response to OCC First Set, Interrogatory Nos. 2, 5, 11, 12, 13, 14, and 19 through 21, Requests for Production of Documents Nos. 4, 5, and 7, and Requests for Admissions 5, 6, 16, and 18. See also Response to OCC Second Set, Interrogatory Nos. 2-002 through 2-009.

investigations in other jurisdictions of alleged “illegal activities” that do not involve the provision of electric service to customers.⁴³

The Commission must decline to sanction such an 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 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.”⁴⁴ Indeed, the Commission has explicitly cautioned that “[t]he boundaries of OCC’s jurisdiction are found in its enabling statutes.”⁴⁵ 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.”⁴⁶

⁴³ See Response to OCC First Set, Requests for Production of Documents Nos. 8, 9, 12, 13, and 14. OCC also seeks to compel the Companies’ response with respect to OCC’s Requests for Production of Documents Nos. 19 and 20. These requests seek information on the position of the “Director of State Affairs for Ohio” and the structure of FirstEnergy’s “External Affairs organization.” See Response to OCC First Set, pp. 54-55; Response to OCC Second Set, p. 4.

⁴⁴ *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).

⁴⁵ *Id.*

⁴⁶ OCC’s Memo in Supp., pp. 15-16.

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.

Despite OCC’s baseless claims to the contrary, the Commission has never held 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.”⁴⁷ But oversight of the Commission is not OCC’s responsibility. OCC does not enjoy the statutory authority to force the Commission “to act” at OCC’s direction. Ohio law does not grant OCC any legal authority to step in the shoes of the Commission when OCC deems it necessary.

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 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.”⁴⁸ 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.”⁴⁹ Similarly, the Tenth District Court of Appeals underscored in *Tongren v. D&L Gas Mktg., Ltd.*, that it is a violation of

⁴⁷ OCC Memo. in Supp., pp. 15-16.

⁴⁸ *Id.*

⁴⁹ *Id.*

public policy for OCC to gain by administrative fiat investigatory powers that the legislature never granted to it.⁵⁰ Here, OCC does not have jurisdiction to probe the political and charitable expenditures of the Companies or other FirstEnergy entities, as it is not within OCC's statutory purview to "monitor or supervise the operations and/or performance of public utilities."⁵¹

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, charged with advocating consumers' interests in utility ratemaking matters, to use taxpayer funds to investigate alleged criminal matters, a subject matter over which OCC clearly lacks jurisdiction.

D. OCC's Motion Seeks to Compel Responses to Requests that are Overbroad, Unduly Burdensome, Harassing, Oppressive, Vague, Ambiguous and that Seek to Impose an Undue Expense on the Companies.

Because each of the discovery requests to which OCC seeks to compel responses delves into subject matter that is outside the scope of this proceeding and the Commission's and OCC's jurisdiction, as discussed above, OCC seeks to compel responses to requests that would pose an undue burden and expense on the Companies. This is not a question of whether the discovery requests seek relevant information but nonetheless present "undue burden or expense" because they require too many documents to review or too many hours to prepare responses, as in the cases

⁵⁰ *Tongren v. D&L Gas Mktg., Ltd.*, 149 Ohio App. 3d 508, 511, 2002-Ohio-5006, 778 N.E.2d 76 (10th Dist. 2002).

⁵¹ *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*, 1997 WL 34878871.

cited by OCC.⁵² Instead, requiring the Companies to respond to the requests would impose significant “annoyance, embarrassment, oppression, or undue burden or expense” simply because the purpose of the requests is to inquire into subject matter that is beyond the scope of this proceeding and the Commission’s and OCC’s jurisdiction. 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 other FirstEnergy entities despite that activity lying well outside the jurisdiction of OCC and the Commission. This is harassment and requires the Commission to deny OCC’s motion to compel.

Moreover, the subparts of Interrogatories 01-002 and 01-005 and RPDs 01-004, 01-005, and 01-007 are overly broad, unduly burdensome, harassing, oppressive, vague and ambiguous because they request irrelevant payment detail and the name of every person who might have known about every payment. Interrogatories 01-011 through 01-013 and 02-002 through 02-009 are similar. Interrogatories 01-019 through 01-021 are overly broad and unduly burdensome because they involve questions about various line items in each 2018 FERC Form 1, none of which relate to whether the costs of any H.B. 6 Spending were included in the Companies’ rates or charges paid by customers in Ohio. RFAs 01-016 and 01-018 are overly broad and unduly burdensome for asking whether the Companies or any affiliate borrowed from the regulated money pool to fund H.B. 6 activities, which is inconsistent with OCC’s own professed fear that the Companies might have used funds received from customers for the costs of H.B. 6 Spending.

⁵² OCC Memo. in Supp., p. 17.

RPDs 01-008, 01-009, 01-012, 01-013 and 01-014 are classic fishing expeditions with no purpose other than to harass. The Companies stand on their objections as reasonable.

E. Conclusion

For the foregoing reasons, the Companies respectfully request that the Commission deny OCC's Motion to Compel.

Respectfully submitted,

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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 17th 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

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