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especially warranted. (It remains inexplicable to us that the PUCO closed the case after such an Auditor finding.)

The Public Utilities Commission of Ohio (“PUCO”) responded (in part) to OCC’s September 8 investigatory motions by opening three investigations into the FirstEnergy Utilities’ role in the scandal. The investigations included this investigation into the FirstEnergy Utilities’ use of distribution modernization funds collected from customers, along with other investigations into FirstEnergy’s political and charitable spending and corporate separation.

The FirstEnergy Utilities have forced the Office of the Ohio Consumers’ Counsel (“OCC”) to burn up time (both attorney time and delay time for case preparation) with its tactics. This despite FirstEnergy’s public relations ushering in the supposed new FirstEnergy era of “fostering trust and transparency at all levels.” We are not convinced.

In our continuing quest to get answers that the FirstEnergy Utilities owe for its two million consumers that we represent, OCC respectfully asks the PUCO to grant this Motion to Compel Discovery.

## **II. BACKGROUND**

Eight months ago, the U.S. Attorney filed a Criminal Complaint against the former Ohio House Speaker and others, alleging that an unnamed “Company A” paid \$60 million to entities, including a dark money group known as Generation Now, to enact tainted H.B. 6 and defeat the public referendum. “Company A” was generally understood to be FirstEnergy, though FirstEnergy has not been charged in the scandal.

A March 10, 2021 civil lawsuit filing is the clearest evidence that FirstEnergy is “Company A.” In that filing, FirstEnergy Corp. and FirstEnergy Service Company admit

to making payments to the *same entity* (Generation Now), in the *same amounts* and on the *same dates* as “Company A” is alleged to have done in the Criminal Complaint filed by the U.S. Attorney.<sup>1</sup>

FirstEnergy fired a few executives (including its CEO) and pledged to begin “fostering trust and transparency at all levels.”<sup>2</sup> But FirstEnergy has not yet even clearly acknowledged or denied a threshold issue that it is “Company A” and that it paid tens of millions of dollars to guarantee the passage of tainted House Bill 6.

FirstEnergy’s Jekyll-and-Hyde approach of claiming transparency but refusing to provide information extends to these proceedings before the PUCO – which brings us to OCC’s present Motion to Compel Discovery. OCC filed its Motion Compel Discovery on February 22, 2021. With its Memorandum Contra, the FirstEnergy Utilities continue to obstruct the release of information to the public’s consumer advocate. The Utilities’ arguments against OCC’s Motion to Compel Discovery are without merit. The PUCO should grant OCC’s Motion and allow discovery to go forward.

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<sup>1</sup> *Smith v. FirstEnergy Corp., et al.*, Case No. 2:20-cv-03755 Answer of Defendants FirstEnergy Corp., *et al.* at ¶34, 52(m),64, and 69(S.D. Ohio) (March 10, 2021).

<sup>2</sup> FirstEnergy Press Release, “FirstEnergy names Hyun Park Senior Vice President & Chief Legal Officer” (Jan. 5, 2021) [https://www.firstenergycorp.com/newsroom/news\\_articles/firstenergy-names-hyun-park-senior-vice-president---chief-legal-.html](https://www.firstenergycorp.com/newsroom/news_articles/firstenergy-names-hyun-park-senior-vice-president---chief-legal-.html)

### III. ARGUMENT

#### A. **Intervening parties have a right to ample discovery under law and prompt and expeditious discovery under the Administrative Code, and those rights are not dependent on the stage of the proceeding.**

OCC, as a party in this proceeding, is entitled to begin discovery “immediately” after a proceeding is commenced under the PUCO rules of discovery.<sup>3</sup> This proceeding was commenced by the PUCO in 2017 to review whether Rider DMR revenues collected from customers were being used, directly or indirectly, in support of grid modernization.<sup>4</sup>

OCC’s right to discovery is assured by law, rule, and Supreme Court of Ohio (“Court”) precedent.<sup>5</sup> OCC is entitled to obtain discovery from the FirstEnergy Utilities at all stages of the proceeding, beginning with when the proceeding is commenced. Further, the Ohio Administrative Code instructs parties to complete discovery “as expeditiously as possible.”<sup>6</sup>

But the FirstEnergy Utilities are denying OCC (and consumers) its legal rights by pursuing tactics to delay and distract. The Utilities argue that no party should be able to conduct discovery in an audit proceeding until after the audit report is filed.<sup>7</sup> The

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<sup>3</sup> See O.A.C. 4901-1-17 (A).

<sup>4</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶4 (Dec. 13, 2017).

<sup>5</sup> *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

<sup>6</sup> O.A.C. 4901-1-17(A).

<sup>7</sup> FirstEnergy Utilities’ Memo Contra at 2.

Utilities’ arguments cling to a singular ruling by the Attorney Examiner, made earlier in this proceeding,<sup>8</sup> which is clearly distinguishable.

The Utilities claim that in the earlier ruling the “Attorney Examiner did not limit that ruling to any specific factual circumstances.”<sup>9</sup> But this interpretation ignores the Attorney Examiner’s explicit ruling: “In this case, the filing of an audit report is contingent upon one of two events: the filing of an extension of the DMR or the termination of the DMR. *Given that no application for extension has been filed and that the DMR has not been terminated, OCC’s motion to compel is premature and should be denied.*”<sup>10</sup>

Here, there are no such contingencies to weigh. The audit is going forward to provide the PUCO with additional evidence under the reopened proceeding. There is no reason to allow the FirstEnergy Utilities to avoid responding to OCC’s discovery until after there is a second audit report.

In contrast, there are other PUCO rulings that have taken a more consistent and sensible approach to discovery, as mentioned in OCC’s Motion to Compel.

In 2012, in a similar discovery dispute over when OCC’s rights to discovery begin, the PUCO denied Columbia Gas of Ohio, Inc.’s (Columbia) motion for a stay of discovery.<sup>11</sup> Columbia argued that OCC’s discovery was “premature,” given that the

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<sup>8</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry (Nov. 1, 2018).

<sup>9</sup> FirstEnergy Utilities’ Memo Contra at 5.

<sup>10</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶15 (Nov. 1, 2018) (emphasis added).

<sup>11</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, *et al.*, Entry at 2–4 (Jan. 27, 2012).

PUCO had not set a procedural schedule in the case.<sup>12</sup> Columbia claimed that without a procedural schedule it is impossible to know whether OCC's discovery requests are relevant or likely to lead to the discovery of admissible evidence.<sup>13</sup> Columbia's argument is strikingly familiar to the argument that the FirstEnergy Utilities now make where they claim that until the final audit is issued, parties "could not possibly determine what evidence would be relevant."<sup>14</sup>

The PUCO summarily denied Columbia's motion. It noted that the discovery process is required under the law and PUCO rule and may begin immediately after a proceeding commences.<sup>15</sup> It observed that discovery is beneficial because it places the PUCO in a position of being informed of the matters in the case.<sup>16</sup> The PUCO ruled that even though it had not determined what further process to follow, parties should be permitted to continue the discovery process.<sup>17</sup>

And in 2017, the PUCO denied a similar utility motion that sought to preclude OCC from obtaining discovery before an audit report was filed.<sup>18</sup> The attorney examiner declared that "no statute or Commission rule prohibits OCC from engaging in discovery in these audit proceedings or otherwise limits OCC's right to conduct discovery before

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<sup>12</sup> *Id.*, Columbia Motion To Stay Discovery, Memorandum in Support at 3-4 (Dec. 19, 2011).

<sup>13</sup> *Id.* at 5.

<sup>14</sup> FirstEnergy Utilities' Memorandum Contra at 4.

<sup>15</sup> *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC, *et al.*, Entry at ¶8 (Jan. 27, 2012).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *In the Matter of the Audit of the Percentage of Income Payment Plan Rider of The East Ohio Gas Company D/B/A Dominion Energy Ohio*, Case No. 17-219-GA-EXR, Entry (Sept. 28, 2017).



audit reports are filed.”<sup>19</sup> Here, the PUCO should follow the rules, the law, and this PUCO precedent to allow discovery to go forward now, not months from now.

Also, the FirstEnergy Utilities protest that OCC has not established any need for immediate discovery.<sup>20</sup> That is self-serving and nonsensical. First, the PUCO’s Rule 16 encourages prompt and expeditious discovery, without the FirstEnergy Utilities’ claimed condition precedent (need) for discovery. In any event, OCC has a need and a right to prepare its case. And preparing a case against the FirstEnergy Utilities’ delay and distract tactics is a lengthy and drawn-out process as we have seen over the past three months in this case and the other two PUCO investigations.

Indeed, OCC has learned in the past that we must press discovery lest the PUCO decide a case before we can even fully pursue discovery, such as the PUCO’s approach in the FirstEnergy Advisors case (which NOPEC and OCC both have appealed).<sup>21</sup> Another example is where the PUCO protected PALMco, an energy services marketer, from OCC discovery by denying OCC’s motion to compel on the basis that OCC had not pursued discovery early enough.<sup>22</sup> So, contrary to the FirstEnergy Utilities’ claims for delay, we are compliant with PUCO expectations – and with our rights under law.

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<sup>19</sup> *Id.* at ¶13.

<sup>20</sup> FirstEnergy Utilities’ Memorandum Contra at 7.

<sup>21</sup> *In the Matter of the Application of Suvon, LLC D/B/A FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio*, Case No. 20-103-EL-AGG, Finding and Order at ¶25 (Apr. 22, 2020) (finding motions to compel discovery requests by OCC and NOPEC to be moot).

<sup>22</sup> *In the Matter of the Commission’s Investigation into PALMco Power OH, LLC*, Case No. 19-957-GE-COI, Entry at ¶ 30 (Sept. 3, 2019) (denying OCC’s motion to compel in part finding that OCC had early opportunities for discovery that it did not pursue and sought to “burden PALMco with numerous depositions on a broad array of topics in the limited time remaining before hearing.”).

Further, OCC is pursuing discovery when the potential for preservation of evidence is greater than lesser. In this regard, it has been reported that FirstEnergy officials, including officials who may have knowledge about issues OCC is raising, have been severed from FirstEnergy. More may follow those exits. Delay can create challenges for OCC to later gain access to officials who no longer are employees of FirstEnergy but who may have knowledge of relevant events.

Of course, the FirstEnergy Utilities would be aware that delay can work for them, to help avoid accountability. The PUCO should not be accommodating for such delay tactics.

**B. Any balance between parties' rights to discovery and an "orderly" audit process must be in favor of discovery.**

The Utilities claim that blocking parties' discovery until after the audit report is a more "orderly" approach that balances the need for an "efficient and orderly audit process" with a party's rights to discovery.<sup>23</sup> These arguments are easily overcome.

First, OCC's discovery is not interfering with the audit process. OCC has served one set of discovery in this case since it has reopened. That discovery set consisted of 20 interrogatories, five requests for admission and 18 requests for production. Every single discovery request in this second set was objected to, and no answers were provided at all. None.

There is no reason why the FirstEnergy Utilities cannot answer OCC's discovery now and still participate in an efficient and orderly audit process. Tellingly, the utilities made no claim that OCC's discovery will interfere with the audit. If this were true (it's

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<sup>23</sup> FirstEnergy Utilities' Memorandum Contra at 2 (Mar. 26, 2021).

not), it was incumbent upon the FirstEnergy Utilities to affirmatively act to seek relief from OCC's discovery by filing a motion for protection. They did not do so. (Their reply is bereft of any explanation of why they failed to file such a motion.)

As far as finding a balance between process and parties' rights to discover the truth, we find direction in the PUCO's words: "Therefore, *given the unique circumstances at this time, and in the interests of both transparency and state policy*, we find good cause exists to grant OCC's motion and initiate an additional review of the entire duration of Rider DMR."<sup>24</sup>

These are indeed unique times for Ohioans that call for transparency. Sixty million dollars were allegedly used to fund tainted H.B. 6 activities toward enacting subsidies at Ohioans' expense. The public's confidence in its government, including in the legislative and regulatory systems, is at risk. Discovery should proceed.

**C. The FirstEnergy Utilities' claim of "limiting principles" on discovery should be rejected.**

The FirstEnergy Utilities offer up an interpretation of PUCO discovery rules that conveniently suits their obstructionist tactics. The utilities argue that the PUCO's rules "anticipate at least two limiting principles on discovery."<sup>25</sup> The first limiting principle they identify is that "a hearing or some other opportunity to take evidence must be scheduled to occur. If there is no such opportunity, then it follows that there will be nothing to lead to the discovery of admissible evidence." The PUCO has never adopted this so called "principle." Enough said.

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<sup>24</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶22 (Dec. 30, 2020). (Emphasis added).

<sup>25</sup> FirstEnergy Utilities' Memorandum Contra at 4.

The second of the FirstEnergy Utilities’ so-called discovery principles is that parties are only entitled to discovery that is relevant and reasonably calculated to lead to admissible evidence. And, if neither party knows what issues the final audit report will cover, then they could not possibly determine what evidence would be relevant to those issues.<sup>26</sup> The FirstEnergy Utilities’ arguments are off the mark, again.

The PUCO reopened this proceeding to allow for the taking of additional evidence in response to OCC’s Sept. 8<sup>th</sup> motion. In its Entry reopening the proceeding,<sup>27</sup> the PUCO found an audit should be conducted to “assist the Staff with the full review of Rider DMR, as contemplated by ESP IV.”<sup>28</sup>

OCC’s discovery is well within the bounds of the scope of the reopened investigation. The PUCO should see the FirstEnergy Utilities’ claims as the impermissible obstructionism that they are. The PUCO should reject the FirstEnergy Utilities’ stall tactics and allow OCC to move forward to prepare its case. OCC’s Motion to Compel should be granted.

**D. Discovery on the mid-term audit report is reasonably calculated to lead to the discovery of admissible evidence.**

The FirstEnergy Utilities also objected to some of OCC’s discovery requests as not reasonably calculated to lead to the discovery of admissible evidence.<sup>29</sup> These discovery requests primarily concern anything that touches upon the initial audit (Mid-

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> *See* O.A.C. 4901-1-34.

<sup>28</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶23 (Dec. 30, 2020).

<sup>29</sup> *See, e.g.*, the FirstEnergy Utilities’ response to OCC INT 2-15, 2-18; RFP 2-1 through 2-8 and 2-11.

Term audit) of Rider DMR by Oxford, including discovery requests and responses reflecting communications among Oxford, the PUCO Staff, and the Utilities.

According to the FirstEnergy Utilities, the Mid-Term audit report is not relevant to this proceeding, given there will be an additional report that the PUCO ordered in its December 2019 Entry.<sup>30</sup> Further the Utilities argue that the purpose of the Mid-Term audit was to inform a PUCO decision on whether there would be an extension of the charge.<sup>31</sup> And so, according to the Utilities, it can't be relevant now because this case is not about FirstEnergy seeking an extension of the rider. Again, the FirstEnergy Utilities are mistaken.

The mere fact that the new, additional audit will be conducted does not make the Oxford Mid-Term report irrelevant. Oxford's Mid-Term report provides crucial information in this proceeding related to how Rider DMR funds collected from customers are being used by the FirstEnergy Utilities and thier affiliates. One of the purposes of reopening this proceeding is to present additional evidence and for the PUCO to complete its review of FirstEnergy's use of the DMR funds collected from customers. The presentation of additional evidence does not mean that evidence already in the record (the Mid-Term audit) should be ignored. To the contrary, the evidence provides a strong foundation upon which to build a full and complete record for much needed answers to consumers.

Contrary to the Utilities' assertions otherwise, the purpose of the Oxford audit was not to determine if an extension should be granted. Rather, according to the PUCO

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<sup>30</sup> FirstEnergy Utilities' Memo Contra at 5.

<sup>31</sup> *Id.*

the scope of Oxford’s review was “to assist Staff in determining FirstEnergy’s compliance with its Commission-approved Rider DMR. The Monitor’s review will include an *identification, quantification, and explanation of the use of the Rider DMR Funds and FirstEnergy’s use of those funds in a manner consistent with the Commission’s directives.*”<sup>32</sup>

Identify, quantify, and explain the FirstEnergy Utilities’ use of Rider DMR funds was exactly what the Oxford Mid-Term report did. In Oxford’s Mid-Term review, Oxford addressed the use of modernization funds at length and identified issues of concern for consumers. *To begin with, the PUCO-hired Auditor stated that FirstEnergy “declined to restrict the use of the funds and did not contemplate the tracking of Rider DMR funds to specific expenditures.”*<sup>33</sup> *FirstEnergy placed the distribution funds in the “Regulated Utility Money Pool” where other non-Ohio regulated companies had borrowing access to the money pool.*<sup>34</sup> *The Auditor also found that funds in the money pool had been used to pay dividends to FirstEnergy allowing increased dividends to FirstEnergy during the collection period of the distribution modernization charge.*<sup>35</sup>

These findings continue to be highly relevant to the reopened proceeding, which is directed at the same purpose: “to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in ESP IV.”<sup>36</sup> The second audit merely

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<sup>32</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry, RFP at 1 (Dec. 13, 2017). (Emphasis added).

<sup>33</sup> *Id.*, Oxford Mid-Term Report at 16 (June 14, 2019).

<sup>34</sup> *Id.* at 17. (Emphasis added).

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 17-2474-EL-RDR, Entry at ¶23 (Dec. 30, 2020).

allows the new auditor to focus as well on whether DMR funds were used to fund political activity, including tainted H.B. 6 activity. And it will enable the PUCO to rule on the merits of whether the FirstEnergy Utilities complied with their directive to use the funds to support grid modernization. That is a ruling that consumers were waiting on but were deprived of when the PUCO dismissed the case in early 2020.<sup>37</sup>

OCC's discovery related to the Mid-Term Audit report should be allowed as reasonably calculated to lead to the discovery of admissible evidence. The PUCO should overrule the FirstEnergy Utilities' objections.

**E. The FirstEnergy Utilities have waived their right to object to OCC's discovery on the basis of relevance or any other unnamed grounds.**

Apart from the discovery specifically discussed above, the FirstEnergy Utilities failed to object to OCC's remaining discovery on grounds of relevance. The Utilities assert that they can, at "an appropriate time" raise this objection (and other unnamed objections) by simply announcing that they are "reserving" their right to "make all further objections." The FirstEnergy Utilities argue that they "cannot waive objections to discovery requests that are unauthorized and premature."<sup>38</sup> Once again, the FirstEnergy Utilities' distorted view of the PUCO's discovery rules should be rejected.

The PUCO's rules do not exempt a utility from its discovery obligations to object, on a theory that the discovery, in their opinion, is "unauthorized" or "premature." Such an approach would operate to even further extend the kind of delay that the FirstEnergy Utilities are imposing – a delay that strikes against the stated purpose of the PUCO

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<sup>37</sup> *Id.*, Entry (Feb. 26, 2020).

<sup>38</sup> FirstEnergy Utilities' Memorandum Contra at 8.

discovery rules: to encourage prompt and expeditious use of discovery.<sup>39</sup> The utilities are obliged to answer discovery, unless objected to, in which case they must state the objection in lieu of an answer.<sup>40</sup> They failed to object on grounds of relevance (and other unnamed grounds) when they had the opportunity and obligation to do so. If the utilities thought the discovery was unauthorized or premature, they should have sought a motion for protection asking that such discovery not be had.<sup>41</sup> They did not do that either, forcing OCC to file its motion to compel.

The FirstEnergy Utilities also claim that requiring them to immediately state all objections “would place the Companies in the impossible position of having to speculate about what the scope of this case will be when the audit report is issued.”<sup>42</sup> This argument should also fail.

First, as described above, the scope of this case is known and set. No speculation is required. Second, the utilities seem to take issue with the requirement in the discovery rule that requires a party to state its objection at the time responses are due, not some undefined time that is convenient for the party. This is not the proceeding to resolve that. The FirstEnergy Utilities can raise that issue in the periodic rules review required by JCARR. Not here. Not now.

OCC is gathering from the H.B. 6 scandal the kind of influence and control FirstEnergy seems accustomed to exerting. But here the Ohio Administrative Code’s

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<sup>39</sup> O.A.C. 4901-1-16(A).

<sup>40</sup> O.A.C. 4901-1-19(A).

<sup>41</sup> See O.A.C. 4901-1-24(A)(1).

<sup>42</sup> *Id.*



discovery rules control. And those rules operate in favor of OCC conducting its case preparation for consumer protection.

#### **IV. CONCLUSION**

The PUCO has much more than enough experience with its discovery rules and decades of experience to know what's happening here. The FirstEnergy Utilities are misusing the law and rules of discovery to trample OCC's rights. For the reasons stated, the PUCO should grant OCC's Motion to Compel and require the FirstEnergy Utilities to fully respond to OCC's discovery requests, *post haste*.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Reply was served on the persons stated below via electric transmission this 2<sup>nd</sup> day of April 2021.

*/s/Maureen R. Willis*  
Senior Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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