BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA MOTION TO COMPEL RESPONSES TO THE SIXTH SET OF DISCOVERY BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") motion to compel ("Motion") should be denied. OCC claims Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") have thwarted OCC's discovery efforts. But OCC again ignores that the Companies have worked diligently to respond to the literal hundreds of requests OCC has served in this proceeding and sought at every opportunity a reasonable resolution of the parties' discovery disputes. OCC's real grievance is, at bottom, that the Companies continue to object to OCC's improper requests. Here, those requests range from seeking to invade an ongoing, confidential FERC audit to demanding a far-reaching investigation into non-party FirstEnergy Corp. (including over two years of FirstEnergy's former CEO's emails). As demonstrated below, none of the handful of requests at issue falls within the permissible bounds of discovery.[1]

II. ARGUMENT

Six requests are at issue in OCC's Motion: INT 06-003, RPD 06-003, RPD 06-004, RPD 06-005, RPD 06-006, and RPD 06-008.[2] The Motion should be denied as to all of them. These requests seek irrelevant information; improperly attempt to probe an ongoing FERC audit; impose undue burdens; and demand documents outside the Companies' possession, custody, or control. The Companies address each in turn.

[1] The Companies reserve their right to file separately a memorandum contra OCC's Motion for an *In-Camera* Hearing on Set 6. OCC expressly stated that it was not seeking expedited treatment of its Motion for an *In-Camera* Hearing on Set 6. *See* Motion, at 3. Accordingly, the Companies' deadline to file any memorandum contra OCC's Motion for an *In-Camera* Hearing is July 14.

[2] OCC's Motion targets nine requests in all, but the Companies intend to supplement or revisit their objections to their responses to each of the following: INT-06-004(d)–(e), INT-06-007, INT-06-010. This leaves six requests disputed between the parties.

A. **OCC's Attempts To Probe A Confidential FERC Audit Must Be Rejected. (INT 06-003; RPD 06-008).**

1. **OCC's Requests For Confidential FERC Audit Information Are Outside The Scope Of This Proceeding.**

Two of OCC's requests—INT 06-003 and RPD 06-008—are directed at a confidential FERC audit of FirstEnergy Corp. and seek information outside the scope of this case. INT 06-003 asks the Companies to identify the employees who met with, were interviewed by, or communicated with FERC staff. RPD-06-008 requests that the Companies produce FirstEnergy Corp.'s responses to formal and informal data requests from FERC, any documents provided to FERC staff through site visits, and all transcripts, notes, or "other documents" related to any interviews with FERC staff. As demonstrated below, these requests are an improper attempt to invade a confidential FERC proceeding that the Commission should not sanction. But on top of that, these requests seek documents and information provided to FERC by FirstEnergy Corp.—a non-party to this case—and are in no way tailored to any relevant issue. OCC instead seeks essentially every document generated in connection with FERC's confidential audit, not even making an attempt to tie the requests to external political and charitable spending by the Companies. Simply put, these requests are overbroad, outside the scope of this proceeding, and not reasonably calculated to lead to the discovery of admissible evidence.[3]

2. **The Confidential FERC Audit Information Is Also Protected From Disclosure.**

OCC's FERC-related requests are improper for another reason: Federal law establishes that documents connected with an ongoing FERC audit are confidential and thus protected from disclosure. *See* 16 U.S.C. § 825(b); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a).

[3] *See* Case No. 20-1502, Hr'g Tr., at 37:19–22 (Jan. 7, 2021) (stressing that questions should focus on political and charitable spending by the *Companies*).

On February 6, 2019, FERC's Division of Audits and Accounting commenced an audit of FirstEnergy Corp. to evaluate compliance with various accounting, recordkeeping, and reporting requirements from June 1, 2015 until present.[4] The letter, consistent with longstanding FERC regulations and policy, noted that all materials produced by FirstEnergy for the audit are "subject to the confidentiality provisions" of "section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2012), and section 1265(d) of the Energy Policy Act of 2005 (EPAct), 42 U.S.C. § 16452 (2012)."[5] And to place the matter beyond debate, the letter continues, "Documents and information Commission staff obtains during the audit, as well as all working papers developed, will be placed in nonpublic files."[6] In reliance on the protection afforded by federal law, FirstEnergy cooperated with FERC and produced the requested confidential information.

These confidentiality protections are of no small import. In order for FERC to carry out its audit duties with efficiency, companies must be able to provide their business information freely with an expectation of confidentiality and without fear of that information becoming a matter of public record. The Federal Power Act, The Energy Policy Act, and FERC's implementing regulations provide the protection that is critical to that exchange.

OCC's requests therefore threaten to undermine the confidentiality and candor of the audit process here and in future proceedings. If, as OCC suggests, the confidentiality protections of

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[4] FERC Docket No. FA19-1-000, Letter from L. Parkinson, Director, Officer of Enforcement, FERC (Feb. 6, 2019) (FERC Audit Letter).

[5] *Id.* Those federal statutes (as well as FERC regulation 18 C.F.R. § 3c.2(a)) provide, "No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts." 16 U.S.C. § 825(b).

[6] FERC Audit Letter at 1. FERC has also noted the role of confidentiality in its audit process on its webpage describing the rules and policies governing audits: "Electric Audit Authority – DAA's authority to perform audits of electric public utilities is found in section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2018), and is subject to the confidentiality provisions of that section. Documents and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files." *See* https://www.ferc.gov/audits.

federal law are to be ignored, there will be scant protection for FirstEnergy and future, similarly-situated companies under FERC audit. Requests made in future audits will be assumed to be subject to the ordinary rules of discovery in collateral state regulatory proceedings. And OCC's requests risk undermining the integrity of FERC's current audit by threatening FirstEnergy with the release of sensitive information it provided to FERC in confidence.[7]

And, should any doubt remain, the enforcement of state law is invalid to the extent that it "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[8] Thus, when state action "presents [even] the prospect of interference with the federal regulatory power" of FERC, such "state law may be pre-empted even though collision between the state and federal regulation may not be an inevitable consequence."[9] Put succinctly, "state action is preempted if it interferes with, or even potentially interferes with, federal authority."[10]

Here, there is little doubt that a breach of the confidentiality of FERC's audit of FirstEnergy would compromise the integrity of FERC proceedings and would discourage candid and transparent cooperation with FERC audits in the future. Indeed, one place to look for the "purposes and objectives of Congress" is the Congress's own handiwork, including the federal Freedom of Information Act, which includes an exemption for information that "could reasonably be expected to interfere with enforcement proceedings."[11] For that reason, FOIA requests for materials

[7] Moreover, while the Federal Power Act provides for intervention and rights of discovery in matters set for hearing by FERC, including ratemaking proceedings, 16 U.S.C. §§ 824e, 825g, it provides no such thing for FERC-led audits or investigations, 16 U.S.C. §§ 825, 825f. OCC should not be allowed to use the Commission to end-run the Federal Power Act's limits on party access to information and data that is subject to FERC audit or investigation.

[8] *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 298 (1988).

[9] *Id.* at 310.

[10] *In re California Wholesale Elec. Antitrust Litig.*, 244 F. Supp. 2d 1072, 1082 (S.D. Cal. 2003).

[11] 5 U.S.C. § 552(b)(7).

connected to potential FERC investigations are regularly rejected.[12] It is entirely backwards to suggest, as OCC must, that Congress would intend for FERC audit materials to be exempt from its own federal public disclosure law but readily available through broad discovery requests in state regulatory proceedings.[13]

OCC raises the specter of FirstEnergy's audit-related materials forever remaining in a shroud of secrecy if the Commission does not compel their production this very instance. The truth could not be any further. Both the commencement letter and the final FERC audit report are released to the public as a matter of course, along with the audited entity's response to the final report.[14] At that time, both OCC and the Commission will have access to the results of FERC's audit. As is clear from even a quick review of these public audit reports, which are easily available on FERC's website, FERC's audit reports provide significant detail into the factual and legal issues raised in the audit, the process followed in the audit, the views and concerns of the company about the audit, and FERC's response to those views and concerns.[15] The public has the ability to learn a great deal about the nature of an audit from the audit report, and that will be true here as well. OCC's motion to compel the details of FERC's audit, while that audit is still underway, is nothing more than an effort to short-circuit that careful, detailed process, impermissibly interfering with the proceedings of a federal agency.

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[12] *See, e.g.*, *STS Energy Partners LP v. Fed. Energy Regul. Comm'n*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015) ("It is therefore irrelevant in this case that FERC's investigation of Oceanside has come to a close. The investigation—writ large—continues, and that is enough under Exemption 7(A).").

[13] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136, 95 S. Ct. 1504, 1509, 44 L. Ed. 2d 29 (1975).

[14] Audits, Enforcement, FERC (June 8, 2021), https://www.ferc.gov/audits ("The results of completed audits are also published on the eLibrary system, along with the order issuing their release and the comments of the audited entity. Through these means, audit staff provides audited entities and the industry with insight into areas of emphasis and concern.").

[15] *See* https://www.ferc.gov/audits (providing links to "all final audit reports issued since Fiscal Year 2015 below" and noting that "The audit reports detail audit findings of noncompliance and audit staff recommendations for corrective actions in which jurisdictional companies developed robust compliance plans to implement").

OCC next argues that the federal statutes and regulations, by their terms, apply only to FERC and its staff, not FirstEnergy. OCC, however, ignores—and asks the Commission to ignore—that these laws and regulations establish an important federal interest in the confidentiality of the audit materials. State regulators should take great care to avoid needlessly undermining such confidentiality. Thus, while the federal statutes and regulation expressly apply to FERC, they reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission.

It is not as if OCC has identified a particularized need for a specific document that just happens to be one of the records that FirstEnergy turned over to FERC as part of its audit. Nor, contrary to OCC's misplaced claims, have the Companies anywhere argued that documents become forever protected by mere virtue of their provision to FERC. Instead, OCC itself has defined the relevant set of documents *solely by reference to the FERC audit*: the relevant request for production asks for FirstEnergy's "responses to formal or informal data requests from FERC," "documents provided to FERC Staff associated with site visits," and "transcripts, notes, recordings or other documents pertaining to interviews with the FERC Staff."[16]

To reflexively allow wholesale discovery of FERC audit material in this fashion would interfere with FERC's ability to proceed in a considered and orderly fashion and would render FERC's guarantee of confidentiality meaningless. Why would federal law guarantee the confidentiality of FERC audit materials, and why would FERC premise their investigations upon such confidentiality, if any outside party could simply compel the very same materials in a collateral proceeding? Respect for the Federal Power Act, The Energy Policy Act, and FERC's regulatory architecture demands more.

[16] RPD-06-008.

This is not the first time a party has tried an end run of this sort. The Supreme Court of Texas's decision in *Eli Lilly & Co. v. Marshall* is instructive.[17] That case addressed information that Eli Lilly had gathered from patients who had adverse reactions to their drug, Prozac. Federal law requires a drug manufacturer to submit any such reports it receives to the FDA.[18] However, FDA regulations provide that the agency must keep confidential the identities of the patient and of the person or institution that reported the adverse reaction.[19] In a products liability suit brought against Eli Lilly, a trial court ordered the disclosure of this confidential information through discovery.

The Supreme Court of Texas, recognizing that the FDA regulation spoke to agency disclosures, held that the regulation did not "preempt the trial court's order."[20] But that conclusion was academic, the Court added, because "[t]he FDA regulations clearly embody a vital public interest in confidential voluntary reporting that is eviscerated as equally by a manufacturer's compelled disclosure as by the FDA's disclosure."[21] The Court stressed that "the congressional objective of fostering post-approval reporting of possible adverse reactions for all FDA-approved drugs [was] severely compromised by the trial court's order of wholesale disclosure of reporters' identities."[22] And the Court noted that Eli Lilly, the FDA, and the general public all have a strong interest "in maintaining the free flow of information derived from adverse reaction reports."[23]

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[17] 850 S.W.2d 155 (Tex. 1993).

[18] 21 U.S.C. § 355(k)(1).

[19] 21 C.F.R. § 314.430(e)(4).

[20] 850 S.W.2d at 160.

[21] *Id.*

[22] *Id.*

[23] *Id.*

Because the trial court "ordered full disclosure . . . without a showing of particularized relevance and need," the Court vacated the discovery order.[24]

So too here. There is no doubt that protecting the confidentiality of FirstEnergy's FERC audit serves a "vital public interest" in promoting disclosure to FERC, which would be "eviscerated as equally by [FirstEnergy's] compelled disclosure as by [FERC's] disclosure."[25] And because OCC indiscriminately asks for "full disclosure" of all FERC audit materials "without a showing of particularized relevance and need," the Commission should deny its requests.[26]

FERC's empowering statutes and governing regulations leave no room for OCC's requested relief. Indeed if OCC can obtain the data it seeks, then any party in any Commission case would be able to expose the details of any ongoing FERC proceeding under the Federal Power Act. Such an outcome is simply incompatible with Congress's clear intent to honor the confidentiality of FERC audits. The results of FERC's audit of FirstEnergy will be reported to the public once the audit is complete, and OCC has no warrant to cut the line in the meantime.

3. OCC Seeks Information Outside The Statutory Scope Of Permissible Discovery Under The Commission's Jurisdiction And Outside OCC's Authority To Investigate.

Beyond all this, OCC's FERC-related requests ask the Commission to exceed the scope of its authority, and also exceed OCC's own jurisdiction. As the Ohio Supreme Court recently recognized, the General Assembly has conferred the Commission with jurisdiction to supervise public utilities when acting as public utilities.[27] FirstEnergy Corp. is not a public utility, and does

[24] *Id.*

[25] *Id.*

[26] *Id.*

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

not charge for or provide utility service. While the Commission may have jurisdiction and general supervisory powers over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and R.C. 4905.06, those circumstances do not apply here.[28] Additionally, FERC's audit involves many utilities in other states—Jersey Central Power & Light, four Pennsylvania utilities, and Potomac Edison in Maryland—that the Commission does not regulate. It follows that OCC's demands implicate the production of information from out-of-state utilities that are subject to the jurisdiction of their respective state's utilities commissions. The Commission should resist OCC's requests, which lack any statutory basis, to compel disclosure of information from a confidential federal proceeding involving entities that the Commission does not regulate.

Nor does OCC itself have investigatory powers to pursue the questions it poses,[29] since its authority "is linked to the rights and powers in the context of a party appearing before the

[28] The Commission has authority to examine the records and accounts of only those holding companies and their affiliates that are exempt from federal regulation under the Public Utilities Holding Company Act of 1935 ("PUHCA") if those records and accounts relate to a regulated public utility's cost of service. R.C. 4905.05. The PUHCA was repealed by the Energy Policy Act of 2005, effective February 2006, and, thus, no companies currently are exempt under sections 3(a)(1) or (2) thereof. *See* Pub. L. No. 109-58, 119 Stat. 594, 974, Sec. 1263 (2005). Prior to the repeal of the PUHCA, sections 3(a)(1) and (2) of the PUHCA permitted the Securities and Exchange Commission ("SEC") to exempt holding companies and subsidiaries from the provisions of the PUHCA if the holding company and its subsidiaries were predominantly intrastate in character. *See* 15 U.S.C. §§ 79c(a)(1), (2). While the PUHCA was in effect, FirstEnergy Corp. became a non-exempt registered holding company operating across multiple states. Thus, its records and accounts have not been subject to the Commission's jurisdiction under R.C. 4905.05 for many years. When the PUHCA was still in effect, the Commission stated that it "is well aware of the limitations of its jurisdiction imposed by Section 4905.05, Revised Code, and it does not intend to manage the affairs of holding companies." *In re Financial Condition of Ohio's Regulated Public Utilities*, Case No. 02-2627-AU-COI, Entry at p. 1 (Oct. 10, 2002).

[29] *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) ("The 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."); *In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997) ("[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."); *Tongren v. D&L Gas Mktg., Ltd.*, 149 Ohio App. 3d 508, 511, 2002-Ohio-5006, 778 N.E.2d 76 (10th Dist. 2002).

Commission in an official proceeding."[30] "[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities"—not to mention FirstEnergy Corp.[31]

To claim it has such authority, OCC offers two primary arguments: (1) that the Companies did not object to OCC's intervention in this proceeding and (2) that Ohio R.C. 4911.02(B)(2) provides "that OCC's powers and duties are 'without limitation because of enumeration' . . . "[32] Neither argument carries any weight. The first point is irrelevant. Whether or not the Companies objected to OCC's intervention does not affect the legal bounds of OCC's authority. And on the second point, R.C. 4911.02(B)(2) does not endow OCC with unlimited power. R.C. 4911.02(B)(2) provides that OCC "may intervene in . . . proceedings in administrative agencies on behalf of the residential consumers," but that it "*shall* have all the rights and powers of any party in interest appearing before the public utilities commission."[33] OCC's statutory grant of authority does not grant it powers or rights *greater* than those of any other party.[34]

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[30] *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).

[31] *In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997).

[32] *See* OCC's Mem. in Supp. at p. 9–10.

[33] R.C. 4911.02(B)(2)(a), (c).

[34] *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).

B. **OCC's Requests Impose An Undue Burden On The Companies. (RPDs 06-003, 004, 005, 006).**

Four of OCC's requests—RPD 06-003, RPD 06-004, RPD 06-005, RPD 06-006—are excessively overbroad and burdensome.[35] Each request demands that the Companies process a set of unreasonably broad search terms against certain custodians and then produce all emails containing any of those terms regardless of whether they are relevant to political and charitable spending by the Companies or to costs incurred by the Companies for external political or charitable contributions. Some requests cover May 1, 2020 to the present (a fourteen-month period), while another asks the Companies to search FirstEnergy Corp.'s former CEO's "communications" from January 1, 2017 to the present—a *thirty-month* period. These requests are, at bottom, a textbook example of an impermissible fishing expedition.[36] And they are tantamount to OCC conducting its own far-reaching investigation rather than constructing a proper request tailored to the matters relevant to, and appropriate for, the Commission's review in this case.

The Commission routinely denies motions to compel when, like here, the movant seeks the production of irrelevant information or when the discovery requested is vague, overly broad, or

[35] These requests seek "all communications" sent or received by certain individuals from either May 1, 2020, or January 1, 2017, through the present, containing terms such as "Political or charitable spending or contributions;" "Misallocate, misallocation, allocate or allocation;" or "Adjust or adjustments."

[36] *See In the Matter of the Application of The Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 80-376-EL-AIR, 1980 WL 625218, at *1 (Nov. 14, 1980) (noting that a "sweeping demand for information," which would cover subjects not relevant to the proceeding, is not proper because "discovery is not unlimited" and "cannot be used as a fishing expedition"). Ohio state courts similarly prohibit such discovery practices. *See, e.g.*, *Henderson v. Speedway LLC*, No. 106737, 2018 WL 6012456, at *2 (Ohio Ct. App. Nov. 15, 2018) (explaining that the court "may permissibly limit discovery so as to prevent mere fishing expeditions in an effort to locate incriminating evidence") (quotations omitted).

otherwise objectionable.[37] Simply put, these requests are so broad and so vague that the Companies had no choice but to object.

C. OCC Seeks Information Outside The Companies' Possession, Custody, Or Control. (All Requests).

Another pervasive problem with OCC's requests is that they demand production of information that is not within the Companies' possession, custody, or control. OCC's FERC-related requests (INT 06-003; RPD 06-008) facially seek information uniquely within FirstEnergy Corp.'s control. And the other requests, including OCC's demand for an investigation of FirstEnergy Corp.'s former CEO's emails (RPD 06-006), reach the same result through their sheer overbreadth.

It is a foundational principle of the discovery rules that a party may demand production of information only within the possession, custody, or control of a request's recipient.[38] And both state and federal courts have held that a party must have "control"—meaning "the legal right to obtain the documents required on demand"—over the records before it can be compelled to

[37] *See, e.g.*, *In the Matter of the Application of Buckeye Wind LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio,* Case No. 08-666-EL-BGN, 2009 Ohio PUC LEXIS 931 at *8–12 (Oct. 30, 2009) (denying in part motion to compel because several discovery requests were irrelevant, vague and overly broad); *In the matter of the Application of Middletown Coke Co.*, Case No. 08-281-EL-BGN, 2008 Ohio PUC LEXIS 821 at *3–4 (Nov. 4, 2008) (denying motion to compel and holding that irrelevant material was not subject to discovery); *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, 2003 Ohio PUC LEXIS 392 at *34–35 (Sept. 2, 2003) (acknowledging the general rule that discovery is limited to materials "relevant to the subject matter of the proceeding" and denying motion to compel because "the information sought would not be relevant to the determination of [the present] matter"); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at *2–19 (June 21, 2002) (denying motion to compel where discovery requested was vague, "not imperative in a final determination of [the] matter," overly broad, and because the respondent had already responded to several of the discovery requests at issue); *In the Matter of Bauman v. The Western Reserve Telephone Co.*, Case No. 90-1095-TP-PEX, 1991 Ohio PUC LEXIS 325 at *7–9 (denying a motion to compel discovery because requested information was irrelevant to the proceeding).

[38] *See* Ohio R. Civ. P. 34(A); Ohio Adm. Code 4901-1-20(A)(1).

produce them.[39] It is not enough that the Companies are subsidiaries of FirstEnergy Corp. "A subsidiary, by definition, does not control its parent corporation" and cannot be made to produce records held by its parent "except in rare circumstances."[40] For example, evidence that one company operates as the other's alter ego or that one company acted as the agent of the other company in a transaction giving rise to a claim may support a finding of legal "control."[41] But a sweeping assertion that the companies "operate under the same corporate umbrella" is insufficient.[42] And vague claims that an agency relationship exists between two companies or that the two operate as a unified entity likewise fail to justify disregard of the corporate form, not to mention Ohio's requirements for corporate separation.[43] Moreover, it is the party seeking production of documents who bears the burden of establishing the opposing party's control over them.[44]

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[39] *See Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 179, 660 N.E.2d 765, 768 (Ohio Com. Pl. 1993) ("In order to obtain discovery from the subsidiary, the party seeking discovery must show that the party from whom the discovery is sought has control of said subsidiary."); *In re Porsche Cars N. Am., Inc.*, No. 2:11-MD-2233, 2012 WL 4361430, at *4 (S.D. Ohio Sept. 25, 2012) (defining "control" as "the legal right to obtain the requested documents on demand"); *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2011 WL 13078603, at *11 (S.D. Ohio Aug. 8, 2011) ("Documents are deemed to be within the 'possession, custody or control' for purposes of [Federal] Rule 34 if the party has actual possession, custody or control, or has the *legal right* to obtain the documents on demand.") (emphasis in original); *Genentech, Inc. v. Trs. of Univ. of Pa.*, No. C 10-2037 PSG, 2011 WL 5373759, at *2–3 (N.D. Cal. Nov. 7, 2011) (holding that a party failed to meet its burden to show that a wholly-owned subsidiary had legal control over the parent's documents when there was no evidence that parent was obliged to disclose documents to the subsidiary); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254–56 (D.C. Cir. 2005) (refusing to find the subsidiary had control over the parent corporation's documents as a matter of law); *Playboy Ent. Grp., Inc. v. United States*, No. CIV. A. 96-94-JJF, 1997 WL 873550, at *3–4 (D. Del. Dec. 11, 1997) (denying a motion to compel because the subsidiary did not control the parent corporation's documents).

[40] *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145 (D. Del. 2005); *see also In re Porsche*, 2012 WL 4361430, at *5.

[41] *In re Porsche*, 2012 WL 4361430, at *4.

[42] *See id.* at *5.

[43] *Id.*

[44] *See In re Porsche*, 2012 WL 4361430, at *4 ("The party seeking documents bears the burden of establishing control."); *Union Home Mortg. Corp. v. Jenkins*, No. 1:20-CV-2690, 2021 WL 1110440, at *9 (N.D. Ohio Mar. 23, 2021) ("The burden of establishing control over the documents sought is on the party seeking production."); *Princeton Digital Image Corp. v. Konami Digital Ent. Inc.*, 316 F.R.D. 89, 90 (D. Del. 2016).

Here, OCC essentially argues that all the records kept by all FirstEnergy entities are subject to the Companies' control.[45] To prove such an extraordinary claim—and to compel disregard of the corporate form—OCC was required to make a showing tantamount to "justifying the application of the alter ego doctrine to pierce the corporate veil of the subsidiary."[46] OCC comes nowhere near clearing that high bar, which requires, among other things, that a parent's control "was so complete that the [subsidiary] has no separate mind, will, or existence of its own."[47] Instead, OCC relies primarily on the contentions that the Companies shared an officer with FirstEnergy Corp. and that certain FirstEnergy Service Company employees provided services to the Companies.[48] As Ohio courts expressly recognize, those entirely ordinary facts fall far short of demonstrating the level of control required by Ohio's exacting veil-piercing standard.[49]

What's more, OCC's claim that the Companies have control over all of their affiliates' records certainly cannot be squared with the Commission's regulations, which mandate formal separation between the Companies and their unregulated affiliates. As OCC well knows, Ohio's corporate separation rules (O.A.C. 4901:1-37 *et seq.*) require that "[e]ach electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other" and mandate the separation of a utility's and its affiliates' books, records, and accounts. Far from having "no separate mind, will, or existence" of their own,

[45] Mem. at 23 (stating that the Companies "should be required to provide information that FirstEnergy Corp. and other affiliates possess.").

[46] *Power Integrations*, 233 F.R.D at 145.

[47] *Dombroski v. WellPoint, Inc.*, 2008-Ohio-4827, ¶ 18, 119 Ohio St. 3d 506, 511.

[48] *See* Mem. at 21.

[49] *See, e.g.*, *Meinert Plumbing v. Warner Indus., Inc.*, 2017-Ohio-8863, ¶ 47, 90 N.E.3d 966, 977 (8th Dist.) ("Sharing of management, directors, or employees alone is not sufficient justification for piercing the corporate veil[.]").

the Companies operate under stringent separation requirements, in accordance with their Commission-approved corporate separation plan and applicable regulations.

In short, OCC cannot reasonably argue here either that the Companies should have access to all the documents and communications of their affiliates or that the Companies have somehow "use[d] [FirstEnergy's] corporate structure" to restrict access to information. Fundamental precepts of corporate law and Ohio regulation instead require that the legal distinctions between the Companies and their affiliates be respected.

III. **CONCLUSION**

For all these reasons, the Motion should be denied. The Companies have agreed to respond to some of the requests subject to OCC's Motion, rendering them moot. And the remaining requests are all far outside the bounds of permissible discovery.

Dated: July 9, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on July 9, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
Attorney for the Companies

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel Responses to the Sixth Set of Discovery electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company