

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of the)	
Delivery Capital Recovery Rider of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo Edison)	
Company.)	

**MOTION TO COMPEL THE FIRSTENERGY UTILITIES TO ANSWER
DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (#0016973)
Ohio Consumers' Counsel

William J. Michael (#0070921)
Counsel of Record
Ambrosia E. Wilson (#0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
Columbus, Ohio 43215
Telephone: (614) 466-1291 (Michael)
Telephone: (614) 466-1292 (Wilson)
William.michael@occ.ohio.gov
Ambrosia.Wilson@occ.ohio.gov
(willing to accept service by e-mail)

August 26, 2021

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of the)
Delivery Capital Recovery Rider of Ohio)
Edison Company, The Cleveland Electric) Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo Edison)
Company.)

**MOTION TO COMPEL THE FIRSTENERGY UTILITIES TO ANSWER
DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

This filing marks the 7th motion to compel that OCC has had to file to obtain H.B.6 investigation information over the objections of the FirstEnergy Utilities, whose parent company has been charged with the federal crime of conspiring to commit honest services wire fraud.¹ This case was intended to be the annual review of the FirstEnergy Utilities’² spending under their so-called Delivery Capital Recovery Rider (“DCR Charge”). Under the DCR, the FirstEnergy Utilities charge Ohio consumers hundreds of millions of dollars for various taxes and utility plant.³

The PUCO’s annual review of the DCR was already important for consumer protection—but is even more so now. FirstEnergy made admissions to the U.S. Securities and Exchange Commission (“SEC”) that FirstEnergy had uncovered vendor payments charged to the FirstEnergy Utilities (and potentially their consumers) that were

¹ Title 18, United States Code, Sections 1343, 1346, 1349.

² Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company, and FirstEnergy Corp. (collectively FirstEnergy or the FirstEnergy Utilities).

³ These include property taxes, the commercial activity tax and associated income taxes. The intangible plant including general plant from FirstEnergy Service Company that supports the Companies and was not included in the rate base determined in *In re FirstEnergy*, Case No. 07-551-EL-AIR, et al, Opinion and Order (January 21, 2009).

improper.⁴ This admission in turn prompted PUCO Staff to request an expansion of the audit to investigate these improper payments,⁵ which the PUCO granted.⁶

The expanded audit report ordered by the PUCO was released on August 3, 2021.⁷ The auditor asserted that \$6.6 million in improper vendor payments should be returned to consumers.⁸ This amount includes \$2.4 million charged to consumers in base distribution rates,⁹ \$4.15 million charged to consumers through the demand side management and energy efficiency rider,¹⁰ and \$82,850 charged to consumers in pole attachments¹¹ rates usually only paid by other utilities. The auditor also recommended that \$7,445,573 recorded as capital should be identified and excluded from rate base in any future base rate case.¹²

OCC served the consumer protection discovery that is the subject of this motion in late April. OCC's discovery that is the subject of this motion to compel is directed toward two issues: 1) the internal investigation regarding vendor payments that were either improperly classified, misallocated, or lacked proper supporting documentation, and 2) FERC's investigation regarding the matter. FirstEnergy declined to respond to OCC's discovery requests on these topics. The OCC requests at issue are Interrogatory

⁴ FirstEnergy Corp., Third Quarter Report (Form 10-Q) (Nov. 19, 2020).

⁵ See Entry (March 10, 2021) (granting PUCO's Staff's request to expand the audit).

⁶ *Id.*

⁷ Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery Riders, Expanded Scope at 28 (August 3, 2021) ("Expanded Audit Report").

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

02-002(c) and (e); Request for Production-02-001; Request for Production-02-002 (b), (d), (e), and (f); Request for Production-02-003 (b) and (c); and Interrogatory-03-001 (d) and (e).

OCC and FirstEnergy have reached an impasse regarding the discovery related to FirstEnergy's internal investigation and the FERC investigation. Accordingly, OCC moves¹³ the PUCO for an order compelling the FirstEnergy Utilities to immediately and fully respond to OCC's Second and Third Sets of Discovery, served on April 21, 2021, and April 27, 2021, respectively. OCC's discovery is attached.

The reasons supporting this motion are set forth in the attached Memorandum in Support. The PUCO should require the FirstEnergy Utilities to fully respond to OCC's discovery requests, *posthaste*.

Respectfully submitted,

Bruce Weston (#0016973)
Ohio Consumers' Counsel

/s/ William J. Michael
William J. Michael (#0070921)
Counsel of Record
Ambrosia E. Wilson (#0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
Columbus, Ohio 43215
Telephone: (614) 466-1291 (Michael)
Telephone: (614) 466-1292 (Wilson)
William.michael@occ.ohio.gov
Ambrosia.Wilson@occ.ohio.gov
(willing to accept service by e-mail)

¹³ Under Ohio Admin. Code 4901-1-12 and 4901-1-23.

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. PARTIES' RIGHT TO BROAD DISCOVERY	5
A. Under PUCO Rules, OCC is entitled to begin discovery prior to completion of the Audit Report because discovery may begin "immediately after a proceeding has commenced."	5
B. This case's unusual circumstances necessitate full transparency through discovery now, in consumers' interest.....	6
C. To protect consumers, immediate PUCO intervention is necessary to prevent FirstEnergy from continuing to thwart OCC's discovery rights.....	8
III. ARGUMENT	10
A. The information OCC seeks is relevant to determining the nature of payments made for political activity, and/or other matters that were improperly charged to the FirstEnergy Utilities and is relevant to the PUCO's goal to determine whether the funds associated with those payments should be returned to consumers through the DCR Charge or through an alternative proceeding.....	10
B. The FirstEnergy Utilities have failed to show that information sought is not reasonably calculated to lead to the discovery of admissible evidence.	12
C. The FirstEnergy Utilities have failed to prove that the discovery is outside of OCC's jurisdiction and thus unlawful for OCC to investigate.	13
D. The First Energy Utilities have failed to show how OCC's requests are "vague and ambiguous."	15
E. The First Energy Utilities have failed to show how OCC's requests seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines.....	16
F. The PUCO can require the release of internal investigations which FirstEnergy Corp. and FirstEnergy Service Company claim are privileged.	20
G. The FirstEnergy Utilities have failed to show how OCC's requests seeks information protected from disclosure under the Federal Power Act,	

	including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC’s regulations, including 18 C.F.R. Part 388.	22
H.	The FirstEnergy Utilities have failed to show OCC’s request is for information that is not within the Companies’ possession, custody, or control.	26
I.	The FirstEnergy Utilities’ objection that OCC’s requests are overbroad, unduly burdensome, and not limited in time is without merit.	30
J.	OCC undertook reasonable efforts to resolve the discovery dispute.	31
IV.	CONCLUSION.....	32

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of the)	
Delivery Capital Recovery Rider of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo Edison)	
Company.)	

MEMORANDUM IN SUPPORT

I. INTRODUCTION

On March 22, 2021, OCC intervened in this proceeding. As provided for under Ohio law and the PUCO's rules, OCC served four sets of discovery on the FirstEnergy Utilities.¹⁴

In the second set of OCC's discovery, served on April 21, 2021, OCC sought information related to disclosures FirstEnergy made in federal filings. Those FirstEnergy filings were a Form 8-K filed with the SEC on February 16, 2021 and the FirstEnergy Utilities' FERC Form 1 filings on April 6, 2021.

On May 12, 2021, the FirstEnergy Utilities objected to Interrogatory 2 and to OCC's second request for production of documents numbers 2-2 and 2-3.¹⁵ This discovery addressed two areas: 1) the internal investigation regarding vendor payments that were either improperly classified, misallocated, or lacked proper supporting documentation, and 2) FERC's investigation regarding the matter.

The FirstEnergy Utilities' responses to OCC's discovery were nearly identical at every turn. For example:

¹⁴ This motion only concerns the second and third sets of discovery.

¹⁵ See Attachment 1.

1. The FirstEnergy Utilities objected to the term “FirstEnergy” as vague and ambiguous.¹⁶
2. The FirstEnergy Utilities objected that OCC’s request is not “relevant to the subject matter involved in this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence.”¹⁷
3. The FirstEnergy Utilities objected that “OCC has no jurisdiction to investigate the business practices of FirstEnergy Corp. or other affiliates of the Companies.”¹⁸
4. The FirstEnergy Utilities also objected that the information requested is confidential, non-public, and protected from disclosure under the Federal Power Act, including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC’s regulations, including 18 C.F.R. Part 388.”¹⁹
5. Additionally, the FirstEnergy Utilities objected that “OCC’s requests are premature, given the audit is ongoing and the final audit report has yet to issue.”²⁰
6. The FirstEnergy Utilities objected that “OCC seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines.”²¹

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 10.

¹⁸ *Id.*

¹⁹ *Id.* at 8. FirstEnergy claims that “FERC makes clear that its Audit process “is subject to the confidentiality provisions of [section 301 of the Federal Power Act]” and that “[d]ocuments and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files.”

²⁰ *Id.* at 10.

²¹ *Id.*

7. Additionally, the FirstEnergy Utilities alleged that “expenditures made by the Companies are outside OCC’s jurisdiction and thus, unlawful for OCC to investigate.”²²
8. The FirstEnergy Utilities further objected to “OCC’s use of the phrase “relating to” as overbroad and ambiguous, making it impossible for the Companies to determine the scope of documents requested.”²³
9. Finally, the FirstEnergy Utilities complained that OCC’s discovery is “overly broad, unduly burdensome, harassing, oppressive, vague, ambiguous and seeks to impose an undue expense.”²⁴

In the third set of OCC’s discovery, OCC sought information regarding disclosures FirstEnergy made in a Form 10-Q filed with the SEC on November 19, 2020 (for the quarter ending September 30, 2020). The disclosures related to FirstEnergy’s Board of Directors firing former senior managers for violating company ethics policies. The former senior managers paid \$4 million to a company associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating FE’s Ohio distribution companies.²⁵ The FirstEnergy Utilities’ response to OCC’s third set of interrogatories was nearly identical to its responses to the second set. FirstEnergy added additional objections as follows: “OCC’s characterization of the November 19, 2020 10-Q” because “the document speaks for itself.” FirstEnergy’s objections in response to OCC’s second and third sets of discovery have no merit.

²² *Id.* at 8, 10.

²³ *Id.* at 10, 11.

²⁴ *Id.* at 5.

²⁵ *See* Attachment 2 (OCC Interrogatory 03-001).

On its February 18, 2021 earnings call, FirstEnergy Corp. identified transactions related to “political advocacy and/or other matters that were improperly charged to FirstEnergy Utilities or improperly substantiated over a period of several years.”²⁶ This information apparently resulted from reports of FirstEnergy Corp.’s internal investigation (about which it will not provide discovery responses to OCC).

According to Christopher Pappas (FirstEnergy Corp. Board Executive Director), the transactions could include lobbying and political activities misallocated to certain of its utility companies, resulting in collections from consumers.²⁷ It was said the majority of the transactions related to Ohio.²⁸ This is not good news, but tends to confirm our suspicions (as does the audit report in this case). And it calls into question the FirstEnergy Utilities’ assertion, in the filed affidavit of Mr. Fanelli, that the “Companies have not included, directly or indirectly, any H.B. 6 costs in any rates or charges paid by ratepayers in Ohio.”²⁹ In fact, FirstEnergy Corp. recently stated it was “re-evaluating statements about political spending not being charged to consumers.”³⁰

In particular, if the FirstEnergy Utilities used DCR Charge funds for H.B.6 purposes (as the audit report appears to say they did) or for purposes other than delivery capital recovery, Ohio law and PUCO orders were violated and consumers who were harmed are deserving of justice (including refunds). Further, if there is any failure to

²⁶ FirstEnergy Corp. Earnings Call (Feb. 16, 2021), Tr. at 21, 22. (Executive Director, Christopher Pappas).

²⁷ *Id.*

²⁸ *Id.* at 28 (Eileen Mikkelsen, Vice President Rates and Regulatory Affairs).

²⁹ *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, FirstEnergy Utilities Response to Show Cause Order, Affidavit at ¶4 (Sept. 30, 2020).

³⁰ *After prosecution deal, FirstEnergy Corp. says it’s ‘re-evaluating’ statements about political spending not being charged to consumers*, Cleveland.com (July 27, 2021, 19:21).

follow PUCO orders by the FirstEnergy Utilities,³¹ they can be subject to forfeitures under R.C. 4905.55 and other remedies.

OCC's Counsel and FirstEnergy Utilities' Counsel attempted to resolve the discovery dispute between the parties, as outlined in the attached affidavit of William J. Michael. As a result of those efforts, FirstEnergy Utilities' Counsel agreed to respond to some, but not all, of OCC's discovery requests.

But the rest of OCC's requests are still outstanding. These include discovery related to FirstEnergy's internal investigation and the discovery related to the FERC investigation.

Having reached an impasse—after pursuing reasonable means to resolve differences—OCC seeks the PUCO's intervention to compel the FirstEnergy Utilities to respond.

II. PARTIES' RIGHT TO BROAD DISCOVERY

A. Under PUCO Rules, OCC is entitled to begin discovery prior to completion of the Audit Report because discovery may begin "immediately after a proceeding has commenced."³²

The crux of the FirstEnergy Utilities' delay is whether a party may begin discovery before the filing of an audit report. The answer to this is found in the PUCO's rules. Yes, parties may begin discovery when a proceeding is commenced under Ohio Admin. Code 4901-1-16(A). This proceeding was commenced on October 22, 2020, nearly ten months ago. The FirstEnergy Utilities acted unreasonably and contrary to

³¹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illumination Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*. Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶282 (Oct. 12, 2016).

³² Ohio Admin. Code 4901-1-17 (A). *Accord*, Ohio Civ. R. 33 (A) (interrogatories may be served by any party without leave on the plaintiff "after commencement of the action.").

PUCO rules when they refused to respond to discovery until after an audit report is filed. And since the audit report has now been filed (on August 3, 2021), FirstEnergy's argument is now moot.

B. This case's unusual circumstances necessitate full transparency through discovery now, in consumers' interest.

The unusual circumstances of this and the related H.B. 6 scandal cases, including FirstEnergy Corp.'s guilty plea to the deferred prosecution agreement and the improper political and charitable H.B. 6 payments totaling *at least* \$6.6 million charged to consumers, present additional reasons for full transparency in discovery now.

According to the PUCO "the policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side's industry or efforts."³³ The PUCO's rules on discovery "*do not create an additional field of combat to delay trials or to appropriate the Commission's time and resources*"; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings."³⁴ The rules are also intended to "minimize commission intervention in the discovery process."³⁵ These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

R.C. 4903.082 states that "[a]ll parties and intervenors shall be granted ample rights of discovery."³⁶ The discovery statute was effective in 1983 as part of a more

³³ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

³⁴ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

³⁵ Ohio Admin. Code 4901-1-16(A).

³⁶ *See OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases.

Yet all these years later, the FirstEnergy Utilities continue to frustrate OCC's discovery efforts. The PUCO should not allow the FirstEnergy Utilities' obstructionist tactics being used to deny OCC the ample discovery rights allowed under Ohio law and PUCO rules. OCC, as a party in this proceeding, is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed "full and reasonable discovery" under its rules.

OCC, as a party in this proceeding, is entitled to begin discovery "immediately" after a proceeding is commenced under the PUCO rules of discovery.³⁷ Under its rules, the PUCO has established that "discovery may begin immediately after a proceeding is commenced."³⁸ This proceeding was commenced when the PUCO opened the docket to "*review the delivery capital recovery rider.*" Subsequently, the PUCO expanded the scope of the audit to "*include payments made to a number of vendors, recently disclosed by FirstEnergy Corp.*"³⁹ And the PUCO ruled that the audit should also address "whether the funds associated with those payments should be returned to ratepayers through Rider DCR or through an alternative proceeding."⁴⁰ The focus of this proceeding was and continues to be whether the FirstEnergy Utilities appropriately used consumer-provided DCR Charge funds.

³⁷ See Ohio Admin. Code 4901-1-17 (A).

³⁸ Ohio Admin. Code 4901-1-17 (A). *Accord*, Ohio Civ. R. 33 (A) (interrogatories may be served by any party without leave on the plaintiff "after commencement of the action.").

³⁹ Entry at ¶8 (March 10, 2021).

⁴⁰ Entry at ¶8.

The PUCO has also adopted rules that specifically define the scope of discovery.

Ohio Adm. Code 4901-1-16(B) provides:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

The PUCO's rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.⁴¹

This scope of discovery is applicable to requests for production. Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under Ohio Adm. Code 4901-1-20.

C. To protect consumers, immediate PUCO intervention is necessary to prevent FirstEnergy from continuing to thwart OCC's discovery rights.

In Ohio Adm. Code 4901-1-23, the PUCO provided the procedure for parties to obtain the enforcement of these discovery rights, guaranteed by law and rule. Ohio Adm. Code 4901-1-23(A) and (B) provide a means for the PUCO to compel a party to answer discovery when the party has failed to do so, including when answers are evasive or incomplete. Ohio Adm. Code 4901-1-23(C) details the technical requirements for a motion to compel, all of which are met by OCC in this pleading.

⁴¹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

The motion to compel is to be accompanied by a memorandum in support setting forth the basis of the motion and authorities relied upon; a brief explanation of how the information sought is relevant; and responses to objections raised by the party from whom the discovery is sought.⁴² Copies of the discovery requests and the responses are to be attached.⁴³ Finally, Ohio Adm. Code 4901-1-23(C) also requires the party seeking discovery to file an affidavit explaining how it has exhausted all other reasonable means of resolving the differences with the party from whom the discovery is sought.

OCC has detailed in the accompanying Affidavit of William J. Michael, consistent with Ohio Admin. Code 4901-1-23(C)(3), the efforts that it undertook to resolve differences between OCC and the FirstEnergy Utilities. At this point, there can be no resolution of this discovery dispute without PUCO intervention.

OCC's right to discovery is assured by law, rule, and Supreme Court of Ohio ("Court") precedent.⁴⁴ 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."⁴⁵

OCC seeks discovery from the FirstEnergy Utilities now and the FirstEnergy Utilities will continue to refuse to produce the discovery without the PUCO compelling such a result.

⁴² Ohio Admin. Code 4901-1-23(C)(1).

⁴³ Ohio Admin. Code 4901-1-23(C)(2).

⁴⁴ *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

⁴⁵ Ohio Admin. Code 4901-1-17(A).

III. ARGUMENT

- A. **The information OCC seeks is relevant to determining the nature of payments made for political activity, and/or other matters that were improperly charged to the FirstEnergy Utilities and is relevant to the PUCO's goal to determine whether the funds associated with those payments should be returned to consumers through the DCR Charge or through an alternative proceeding.**

It is improper for the FirstEnergy Utilities to “pass upon the relevancy or competency of evidence to be offered in any court action.”⁴⁶ The Court has already determined that this is the function of the court (or PUCO in this case).⁴⁷ Additionally, the FirstEnergy Utilities never explained *why* the information sought by OCC is not relevant. But even if they did, as the Court has explained in an analogous context, “[a] witness cannot refuse to answer questions simply because he deems them incompetent or irrelevant....”⁴⁸ Rather, “the production of the evidence should be compelled if there is a possibility of its being competent, relevant, and material on the trial.”⁴⁹ The PUCO has also held that “[e]ven where the relevance is not clear, the information should be provided where it could lead to the discovery of admissible evidence.”⁵⁰

This case involves an additional review of the entire duration of the FirstEnergy Utilities’ DCR Charge to verify that money collected from consumers for that charge was used lawfully and in compliance with PUCO orders. OCC’s discovery requests are relevant and reasonably designed to elicit information on this topic.

⁴⁶ *In re Frye*, 155 Ohio St. 345, 351, 98 N.E.2d 798 (1951) (“The answer to this claim is that it is not the function of the witness to pass upon the relevancy or competency of evidence to be offered in any court action. That is the function of the trial court”).

⁴⁷ *Id.*

⁴⁸ *In re Martin*, 141 Ohio St. 87, 96, 47 N.E.2d 388 (1943).

⁴⁹ *Id.*

⁵⁰ *See* 1991 Ohio PUC LEXIS 1242, *8 (Ohio P.U.C. October 31, 1991).

OCC's discovery was aimed at uncovering information about FirstEnergy Corp.'s Fourth Quarter earnings call on February 18, 2021, where FirstEnergy Corp. executives disclosed that they had uncovered various charges relating to political advocacy and/or other matters that were improperly charged to the FirstEnergy Utilities or improperly substantiated over a period of several years.⁵¹ This information would illuminate how the DCR Charge to consumers was improperly used to improve the capital structure and financial metrics of the FirstEnergy Utilities and whether the DCR Charge to consumers was used for H.B. 6 activities. FirstEnergy Corp. has already plead guilty in its deferred prosecution agreement that it made illegal and improper payments to influence H.B. activities.⁵² And the Expanded Audit Report uncovered improper vendor payments to seventeen different entities, totaling more than \$15.8 million.⁵³ These topics are very relevant in the PUCO's review of the DCR Charge and any connection it may have to H.B. 6 spending.

The FirstEnergy Utilities claim that information regarding its internal investigation and the amounts allocated to which FERC accounts is not relevant to whether the DCR Charge was used to improperly charge consumers for H.B. 6 activity. The FirstEnergy Utilities are wrong. At a minimum, the FirstEnergy Utilities should have noted their objection and provided the information subject to the objection, similar to

⁵¹ Attachment 1 at 6.

⁵² Agreement at 17-18 ("FirstEnergy Corp., through the acts of its officers, employees, and agents, conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.'s benefit").

⁵³ Expanded Audit Report at 27.

what is required at depositions under binding Court precedent,⁵⁴ PUCO Rules,⁵⁵ and as FirstEnergy responded to OCC Interrogatory 2-1.⁵⁶

In any event, the information OCC seeks is *directly relevant* to the purpose for which the PUCO expanded the scope of the audit in this case.

The PUCO should compel FirstEnergy to respond to these discovery requests.

B. The FirstEnergy Utilities have failed to show that information sought is not reasonably calculated to lead to the discovery of admissible evidence.

The party opposing the discovery request has the burden to establish that the requested information would not reasonably lead to the discovery of admissible evidence.⁵⁷ In this regard, the FirstEnergy Utilities state, but only in response to OCC Requests for Production 2-1 and 2-2, that the information, documents, and admissions sought by OCC are not reasonably calculated to lead to the discovery of relevant or admissible evidence.⁵⁸ The FirstEnergy Utilities failed to provide any explanation for its blanket assertion that OCC's requests are "not reasonably calculated to lead to the discovery of relevant or admissible evidence." FirstEnergy has not met its burden. The PUCO should compel responses to OCC Requests for Production 2-1 and 2-2.

⁵⁴ See *Frye*; see also *Martin*.

⁵⁵ O.A.C 4901-1-21(I).

⁵⁶ See 1990 Ohio PUC LEXIS 161, *2-4 (Ohio P.U.C. February 15, 1990) ("if there is an objection to a question based on relevance, the objection should be noted, and the question should be answered by the deponent. Under this procedure, the relevance of the evidence is determined at the hearing when a party attempts to introduce the evidence into the record"); see also 2001 Ohio PUC LEXIS 561, *8 (Ohio P.U.C. September 13, 2001) (finding "Ohio Edison's witness should have responded to OCC's questions subject to Ohio Edison's objection").

⁵⁷ *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

⁵⁸ Attachment 1, response to OCC Requests for Production 2-1, 2-2; Attachment 2, response to OCC Interrogatory-3-1.

C. The FirstEnergy Utilities have failed to prove that the discovery is outside of OCC's jurisdiction and thus unlawful for OCC to investigate.

In many of the responses to OCC's discovery, the FirstEnergy Utilities claim that OCC "has no jurisdiction to investigate the communications of FirstEnergy Corp. or other affiliates of the Companies."⁵⁹ The FirstEnergy Utilities are wrong.

OCC, as a party in this proceeding, is entitled to timely and complete responses to its discovery inquiries. Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed "full and reasonable discovery" under its rules. OCC's right to discovery is made certain by law, rule, and Supreme Court of Ohio precedent.⁶⁰ Therefore, OCC has ample rights of authority to investigate this matter under Ohio law and PUCO rules, contrary to the FirstEnergy Utilities' objection.

Additionally, the PUCO addressed this issue in the prehearing conference on March 25, 2021 in Case No. 20-1502-EL-UNC, where it ruled against the FirstEnergy Utilities' "no jurisdiction to investigate" objection. The OCC has jurisdiction, on behalf of the FirstEnergy Utilities' consumers, to review the FirstEnergy Utilities' spending as a party to the audit of the DCR Charge, and as the statutory representative of the FirstEnergy Utilities' consumers, to determine whether funds collected from consumers were improperly and illegally used for tainted H.B. 6 spending. To conclude (as do the FirstEnergy Utilities)⁶¹ that OCC has no jurisdiction over illegal use of consumers' funds

⁵⁹ See FirstEnergy's response to Requests for Production 2-1 and 2-2 (Attachment 1).

⁶⁰ *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213.

⁶¹ See, e.g., Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company's Motion for Protective Order, Memorandum in Support at 6 (Oct. 16, 2020).

collected for the provision of utility service but not used for that purpose is contrary to public integrity and public policy and Ohio law.

OCC's intervention and participation in this proceeding is also permitted under other provisions of Ohio law (and PUCO rules).⁶² Under R.C. 4911.02, OCC "shall have the rights and powers of any party and interest appearing before the public utilities commission." R.C. 4903.221 allows any person who may be adversely affected by a public utilities commission proceeding to intervene provided certain conditions are met. OCC filed its motion to intervene explaining how it met these conditions. The FirstEnergy Utilities have not opposed OCC's intervention. The FirstEnergy Utilities' failure to object to OCC's intervention before responding to discovery should be considered a late-filed memorandum contra OCC's intervention, which should be denied as untimely filed (and filed without leave of the PUCO).

Further, the scope of the audit in this proceeding was expanded to allow a PUCO "review" of FirstEnergy's DCR Charge to consumers and any relation it may have to FirstEnergy's tainted H.B. 6 spending. The review is akin to a PUCO investigation. OCC has been permitted to intervene in numerous cases where the PUCO has initiated a review or investigation of utilities' activities.⁶³

⁶² See Ohio Admin. Code 4901-1-11.

⁶³ See, e.g., *In the Matter of the Commission Investigation of the Suburban Fuel Gas Inc., Relating to the Establishment of Rates*, Case No. 90-1285-GA-COI, Entry (Sept. 5, 1991); *In the Matter of the Commission's Investigation of Services Provided by Columbia Gas of Ohio, Inc.*, Case No. 89-1586-GA-COI, Entry (Apr. 5, 1990); and *In the Matter of the Investigation into the Management Practices and Policies of GTE North Inc.*, Case No. 85-1969-TP-COI, Entry (Oct. 28, 1988).

D. The First Energy Utilities have failed to show how OCC's requests are “vague and ambiguous.”

OCC's interrogatories and requests for production seek information and documents related to FirstEnergy's Fourth Quarter earning calls on February 18, 2021, the 8-K SEC filing made on February 16, 2021, and the 10-Q SEC filing on November 19, 2020. Inexplicitly, the FirstEnergy Utilities objected to the term “FirstEnergy,” as used in OCC's Interrogatory 2-2, Requests for Production 2-1 through 2-3, and OCC's Interrogatory 3-1, because it is “vague and ambiguous, given ¶ 13 of OCC's general definitions.”

This objection is without merit, and certainly does not support the FirstEnergy Utilities' failure to answer the discovery. Given the reference to FirstEnergy's Fourth Quarter earnings call on February 18, 2021, and the SEC filings of November 19, 2020 and February 16, 2021, there is no factual or reasonable question about the meaning of the term “FirstEnergy” in this interrogatory.

There is one and only one entity with FirstEnergy executives that held an earnings call on that date and discussed the matters referenced in the interrogatory. That is FirstEnergy Corp.

Also, at page 123.12 of its 2020 FERC Form 1, Ohio Edison stated:

Also, in connection with the internal investigation, FirstEnergy recently identified certain transactions, which, in some instances, extended back ten years or more, including vendor service, that were either improperly classified, misallocated to certain FirstEnergy utility and transmission companies, or lacked proper supporting documentation.

OCC's discovery tracked the language of this disclosure in Ohio Edison's FERC Form 1 almost word-for-word. The FirstEnergy Utilities cannot reasonably claim that this

interrogatory and OCC's requests for production of documents is vague and ambiguous when it essentially repeats the language that Ohio Edison used in the FERC Form 1 disclosure.

Here the FirstEnergy Utilities have failed to show how the term "FirstEnergy" is vague and ambiguous. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support⁶⁴ and the FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection.

E. The First Energy Utilities have failed to show how OCC's requests seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines.

In response to OCC Interrogatory 2-2, Request for Production 2-1, Request for Production 2-2, and Request for Production 2-3 (regarding the FERC investigation, vendor payments, and payments for political advocacy), the FirstEnergy Utilities objected on the grounds that the information requested is confidential or protected from disclosure by the attorney-client privilege or attorney work product. For these discovery responses, the FirstEnergy Utilities did not even attempt to make a document by document showing of privilege. The FirstEnergy Utilities have asserted blanket privilege objections making it impossible for OCC (or the Attorney Examiner) to evaluate their claims.

"Privileges are to be construed narrowly because they impede the search for truth and contravene the principle that the public has a right to everyone's evidence."⁶⁵ The

⁶⁴ *Gulf Oil Corp. v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

⁶⁵ *State v. Perez*, 124 Ohio St.3d 122, 2009 Ohio 6179, 920 N.E.2d 104, ¶121, *see also Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

party claiming application of the privilege or work product bears the burden of proving each element of the claim.⁶⁶ Blanket assertions of privilege are insufficient to meet that burden.⁶⁷ Instead the party must demonstrate the privilege or work product exists for each document it withholds, which is generally done by preparing a privilege log.⁶⁸

Accordingly, the FirstEnergy Utilities' claims based on attorney-client and work product privileges for OCC Interrogatory 2-2, Request for Production 2-1, Request for Production 2-2, and Request for Production 2-3 should be overruled because they failed to meet their burden of proving the existence of privilege.

Regardless, the FirstEnergy Utilities cannot reasonably claim that the information is subject to the attorney client privilege or attorney work product doctrines because it is publicly filed information and therefore a public record.

At page 123.12 of its 2020 FERC Form 1, Ohio Edison stated: "These utility and transmission companies will be working with the appropriate regulatory agencies to address these amounts." If the FirstEnergy Utilities will be publicly disclosing the information to regulators, including FERC or the PUCO, then it would waive any attorney client privilege or claim of attorney work product because it would constitute a public record.⁶⁹ And public records are not subject to the attorney client privilege because they are not confidential—they are public.

⁶⁶ *Williams v. Duke Energy Corp.*, No. 1:08 cv-00046, 2014 U.S. Dist. LEXIS 109835, *14 (S.D. Ohio Aug. 8, 2014).

⁶⁷ *Hitachi Medical Sys. Am. Inc. v. Branch*, No. 5:09 cv 1575, 2010 U.S. Dist. LEXIS 100597, *7 (N.D. Ohio Sept. 24, 2010).

⁶⁸ *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980).

⁶⁹ R.C. 149.43 ("Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township...").

Further, the FirstEnergy Utilities have a tool to protect information it claims is subject to privilege-it can (and should) produce a privilege log and request the PUCO review the information *in camera*.⁷⁰ That is the appropriate response. Refusing to provide discovery, while failing to provide information that enables parties and the PUCO to judge the validity of the privilege being claimed, is not.

Insomuch as the FirstEnergy Utilities claimed that a privilege applies, we requested as part of the discovery requests that they produce a discovery log that identifies with particularity each item it is withholding from discovery and explains why each item is privileged. The FirstEnergy Utilities did not respond to this request. OCC again made this request during the meet and confer call on June 16, 2021, but FirstEnergy has yet to provide it.

Additionally, FirstEnergy waived any privilege by its public discussion of the results of the internal investigation report. FirstEnergy has discussed the internal investigation report extensively in SEC filings and other public statements. FirstEnergy's 2020 Annual Report contains this representative statement:

Internal Investigation Relating to United States v. Larry Householder, et al.

As previously disclosed, a committee of independent members of the Board of Directors is directing an internal investigation related to ongoing government investigations. In connection with FirstEnergy's internal investigation, such committee determined on October 29, 2020, to terminate FirstEnergy's Chief Executive Officer, Charles E. Jones, together with two other executives, Dennis M.

⁷⁰ See, e.g., *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167; In the Matter of the Application of Ohio Edison, . *The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶18 (Jan. 27, 2011) (recognizing that an *in-camera* inspection of documents is appropriate).

Chack, Senior Vice President of Product Development, Marketing, and Branding, and Michael J. Dowling, Senior Vice President of External Affairs. Each of these terminated executives violated certain FirstEnergy policies and its code of conduct. These executives were terminated as of October 29, 2020. Such former members of senior management did not maintain and promote a control environment with an appropriate tone of compliance in certain areas of FirstEnergy's business, nor sufficiently promote, monitor or enforce adherence to certain FirstEnergy policies and its code of conduct. Furthermore, certain former members of senior management did not reasonably ensure that relevant information was communicated within our organization and not withheld from our independent directors, our Audit Committee, and our independent auditor. Among the matters considered with respect to the determination by the committee of independent members of the Board of Directors that certain former members of senior management violated certain FirstEnergy policies and its code of conduct related to a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement. Immediately following these terminations, the independent members of its Board appointed Mr. Steven E. Strah to the position of Acting Chief Executive Officer and Mr. Christopher D. Pappas, a current member of the Board, to the temporary position of Executive Director, each effective as of October 29, 2020. Mr. Donald T. Misheff will continue to serve as Non-Executive Chairman of the Board. Additionally, on November 8, 2020, Robert P. Reffner, Senior Vice President and Chief Legal Officer, and Ebony L. Yeboah-

Amankwah, Vice President, General Counsel, and Chief Ethics Officer, were separated from FirstEnergy due to inaction and conduct that the Board determined was influenced by the improper tone at the top. The matter is a subject of the ongoing internal investigation as it relates to the government investigations.⁷¹

This extended discussion of the results of the internal investigation waives any privilege that FirstEnergy otherwise might have had. FirstEnergy cannot use the internal investigation as both a sword, to assure investors that it has acted diligently in investigating the corruption allegations, but also as a shield, to block OCC, the PUCO and other stakeholders, from obtaining relevant information. Under these circumstances, FirstEnergy has waived any privilege for the internal investigation report.⁷²

The FirstEnergy Utilities have failed to show how OCC's requests seek information subject to attorney work product doctrines (and has waived any privilege). Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support⁷³ and FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection.

F. The PUCO can require the release of internal investigations which FirstEnergy Corp. and FirstEnergy Service Company claim are privileged.

FirstEnergy claims that all documents related to its internal investigation are covered by a blanket attorney-client privilege because it was "led by counsel for FirstEnergy Corp."⁷⁴ FirstEnergy's position is inconsistent with PUCO precedent. While

⁷¹ FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2021).

⁷² *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St. 3d 488, syllabus.

⁷³ *Gulf Oil Corp. v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

⁷⁴ Motion to Quash at 10 (July 19, 2021).

there might be some communications that meet the definition of attorney-client privilege, the burden rests with FirstEnergy to establish this through a discovery log, which the Attorney Examiner can review at an *in camera* hearing.

But an internal investigation report and company records that were part of the investigation are not privileged, as the PUCO held in a Dominion East Ohio case.⁷⁵ In that case, the PUCO ruled that OCC was entitled to obtain a copy of the utility's internal investigation report that it prepared in response to a civil lawsuit alleging improper interstate cost-shifting of gas supply contracts, as discussed below:

(17) Nevertheless, the examiner would agree with Dominion that conversations between Dominion and its legal counsel as to legal advice given and associated notes, correspondence, and email created in anticipation of litigation or for trial would be the type of information that would ordinarily be protected from disclosure under attorney-client privilege and attorney work product doctrines. *The examiner believes that the actions taken by Dominion employees, such as investigations to discern whether the events alleged in a lawsuit have occurred and, if they occurred, the actions taken by Dominion to stop, correct, and report such activities, would be relevant to determine whether Ohio GCR customers were impacted and whether Dominion's management oversight of its gas purchasing activities. Therefore, OCC's motion to compel should be granted with respect to Interrogatories 182 and 183. Similarly, OCC's requests for production of documents Nos. 62 and 63 seek documents related to those internal investigations.* To the extent that investigative documents were compiled in the course of any investigation of straddle transactions and actions taken by Dominion in response to such transactions, [*14] the motion to compel related to these document requests should

⁷⁵ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (July 28, 2006).

similarly be granted. Answers to these interrogatories and document requests should be provided to OCC within six days of this entry.⁷⁶

Consistent with existing precedent, the PUCO should order FirstEnergy to produce the internal investigation report and all related records. To the extent that FirstEnergy claims attorney-client privilege for any specific documents, it has the burden to establish this, and the initial step would be for FirstEnergy to produce a privilege log to establish the grounds for any privilege claim for each specific document.

G. The FirstEnergy Utilities have failed to show how OCC's requests seeks information protected from disclosure under the Federal Power Act, including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC's regulations, including 18 C.F.R. Part 388.

The FirstEnergy Utilities have failed to show how the information requested is confidential, non-public, and protected from disclosure under the Federal Power Act, including 16 U.S.C § 825, 42 U.S.C § 16452(d), and FERC's regulations, including 18 C.F.R. Part 388.

On February 6, 2019, FERC advised FirstEnergy Corp. that it was initiating a financial audit of FirstEnergy Corp., including its affiliates (FirstEnergy Service Company and its utilities). *See* Attachment 3. The scope of the financial audit is set forth in the FERC letter. In its financial audit, FERC will evaluate, among other things, the service companies' accounting, record keeping and FERC Form 60 reporting (annual reporting of centralized service companies). And the FERC audit will cover accounting and reporting requirements for franchised public utilities for their transactions with

⁷⁶ *Id.* at 7.

associated companies (like FirstEnergy Service Company). The audit will cover January 1, 2015 to the present. *Id.*

There is no question, even given what little OCC discovery has been answered, that there is a real issue pertaining to the expenses FirstEnergy Service Company was allocating to the franchised public utilities in Ohio, along with improper vendor payments to seventeen different entities, including the former PUCO Chairman, totaling at least \$15.8 million.⁷⁷ But we don't know if that is the extent of the political and charitable spending that was allocated to the Ohio FirstEnergy Utilities by FirstEnergy Service Company (or any other FirstEnergy affiliate). We intend to confirm this information through discovery.

Transactions between FirstEnergy Service Company and the franchised utilities are germane to the PUCO's investigation here (and its investigation in the corporate separation proceeding). Allocation of expenditures by FirstEnergy Service Company to the Ohio FirstEnergy Utilities will be audited by FERC and that audit includes the period related to H.B. 6 activities (Jan. 1, 2017 to Dec. 31, 2019). Because of the connection between the FERC audit and the PUCO's investigation, OCC asked for the names of FirstEnergy employees interacting with the FERC Audit team. (OCC Request for Production 2-1). In this request OCC did not ask for documents from the FERC staff. Rather OCC's requests were related to documents produced by the FirstEnergy entities.

One of the objections raised by the FirstEnergy Utilities was that "the information requested is confidential, non-public, and protected from disclosure under the Federal Power Act, including 16 U.S.C. §825, 42 U.S.C. §16452(d), and FERC's regulations,

⁷⁷ Expanded Audit Report at 27.

including 18 C.F.R. Part 388.” Attachment 1 at 8. These objections should be overruled because the statutes cited by the FirstEnergy Utilities do not support their claim that they (and not members, officers, or employees of FERC) are barred from disclosing documents produced in response to a FERC audit.

Here is a look at the statutes that the FirstEnergy Utilities rely upon for their claims that utilities are bound by law not to disclose any information related to FERC’s financial audit.

16 U.S.C. 825(b), in pertinent part reads:

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*** except insofar as he may be directed by the Commission or by a court.
(Emphasis added).

And 42 U.S.C. 16452, in pertinent part reads:

No member, officer, or employee of the Commission shall divulge any fact or information which may come to his or her knowledge during the course of examination of books, accounts, memoranda, or other records as provided in this section, except as may be directed by the Commission or by a court of competent jurisdiction.
(Emphasis added).

These provisions apply to the FERC Staff, not the FirstEnergy Utilities. They only prevent disclosure of information by the staff of FERC. Nothing in these laws prevent the FirstEnergy Utilities from providing information to parties.⁷⁸ These statutes set forth the obligations of a public entity—the FERC and its Staff. Nothing more.

⁷⁸ OCC researched this topic and was unable to find related case law that establishes the non-disclosure requirements of 16 U.S.C. 825 and 42 U.S.C. 16452 as applicable to public utilities. OCC conveyed this to the FirstEnergy Utilities during its discussion of this issue at the meet and confer on the 6th set of discovery. OCC invited the Utilities to provide authority to support their contention that the non-disclosure requirements of these laws apply to the utilities. They were unable and or unwilling to do so.

The FirstEnergy Utilities are not the FERC Staff. They are not bound by the nondisclosure requirements of Federal Power Act. The non-disclosure requirements apply to the FERC Staff. There will be no violation of these Federal Power Act provisions if OCC's motion to compel is granted. Disclosure is not being sought from the FERC Staff. Disclosure is being sought from the FirstEnergy Utilities.

Contrary to the FirstEnergy Utilities' assertions otherwise, these federal laws simply do not impose similar non-disclosure obligations on a public utility. There is no mutuality or symmetry that attaches to the statutes owing to the differences between the obligations of a public entity (like FERC) and private entities such as the FirstEnergy Utilities.

Additionally, the information sought under OCC Request for Production 2-1 is details about who talked to the FERC Staff. Even if such information is protected from disclosure (it's not), it does not divulge "any fact or information" known by an employee of FERC as a result of an audit. It merely provides information about who are FirstEnergy employees who have knowledge of the FERC audit matters. This information may prove useful to OCC in its further discovery efforts. It is reasonably calculated to lead to the discovery of admissible evidence.

Finally, even if the statute did apply to the FirstEnergy Utilities (it does not) OCC and the FirstEnergy Utilities have a protective agreement in place for this proceeding that allows confidential information to be shared with OCC. The protective agreement achieves an appropriate balance of safeguarding the FirstEnergy Utilities' protected information and providing them with sufficient recourse for breach, while facilitating full and complete discovery and development of the record.

Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support⁷⁹ and FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection. The FirstEnergy Utilities have failed to show how the phrase “relating to” as it is overbroad and ambiguous, making it impossible for the Companies to determine the scope of the documents requested.

H. The FirstEnergy Utilities have failed to show OCC’s request is for information that is not within the Companies’ possession, custody, or control.

In response to OCC’s Request for Production 2-2, and Interrogatory 3-1, the FirstEnergy Utilities object to OCC’s request primarily seeking information relating to disclosures FirstEnergy Corp. made in a Form 8-K filed with the SEC on February 16, 2021. The same information is disclosed in FERC Form 1’s filed by the FirstEnergy Utilities on April 6, 2021. The information sought relates to matters regarding FirstEnergy Utilities’ and FirstEnergy Corp.’s involvement with H.B. 6, such as costs allocated to the FirstEnergy Utilities, rates charged by the FirstEnergy Utilities, and supporting documentation for the costs. The FirstEnergy Utilities objected on the grounds that this information is not in the possession, custody, or control of the FirstEnergy Utilities.

This objection is frivolous. If the FirstEnergy Utilities don’t have this information in their possession, custody, or control, then they could not have reported it to FERC in their FERC Form 1’s filed on April 4, 2021. Nor could it have provided this

⁷⁹ *Gulf Oil Corp. v Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

information to PUCO Staff, which it did.⁸⁰ Additionally, federal regulations require that the FirstEnergy Utilities must record services performed by affiliated companies.

(i) Records of services performed by associated companies. Public utilities and licensees must assure the availability of records of services performed by and for associated or affiliated companies with supporting cost information for the periods indicated in § 125.3 as necessary to be able to readily furnish detailed information as to the nature of the transaction, the amounts involved, and the accounts used to record the transactions.⁸¹

The NARUC record retention guidelines also provide for the utility to keep records related to its financial transactions, regardless of whether the utility's service company performs all of the utility's back-office services.⁸² The NARUC record retention guidelines require the utility to keep "all financial and operating records prepared by or on behalf of the public utility or licensee."⁸³ So even though FirstEnergy Service Company may perform all back-office functions for the FirstEnergy Utilities, the Utilities are responsible for keeping all of these operating records. The FirstEnergy Utilities cannot deny access to their records on the grounds that their back-office functions were performed by an affiliated company.

These records are also under the FirstEnergy Utilities' control under Ohio law. The PUCO has jurisdiction over the records of FirstEnergy Corp. and all its affiliates that

⁸⁰ See Staff Request at 2.

⁸¹ 18 CFR § 125.2(i).

⁸² NARUC, REGULATIONS TO GOVERN THE PRESERVATION OF RECORDS OF ELECTRIC, GAS AND WATER UTILITIES (Rev. Oct. 2007).

⁸³ *Id.* at 1.

“in any way affect or relate to the costs associated with the provision of electric utility service.”⁸⁴ The records OCC seeks relate to the costs of utility service.

In addition to the PUCO’s statutory jurisdiction over these records, the guidance under the Ohio Rules of Civil Procedure indicates that the FirstEnergy Utilities’ objection is without merit. Ohio Civ. Pro. Rule 34 permits litigants to discover certain items “in the responding party’s possession, custody, or control.” A litigant “may obtain discovery from a subsidiary of a party from whom discovery is sought if the party from whom discovery is sought has control of the subsidiary.”⁸⁵ This means that courts may require parent corporation litigants to provide in discovery information of subsidiaries they control and vice versa.

In *Sedgwick*,⁸⁶ the court noted that a subsidiary can be required to provide this type of discovery if nominally separate corporate entities “are in fact a single unit.” To determine whether related corporations are a single unit, a court must find “(1) control of one by another; (2) that one was the mere conduit of the business of the other; and (3) the recognition of their separate existence would sanction a fraud, permit oppression and injustice.”⁸⁷ OCC’s discovery request meets this standard.

Chuck Jones was the chief executive officer of each individual FirstEnergy Corp., so they were under common control. FirstEnergy Corp. used the FirstEnergy Utilities as a conduit to advance the H.B. 6 scheme because it charged the utilities with the costs of

⁸⁴ R.C. 4905.05.

⁸⁵ 36 Ohio Jur.3d Discovery and Depositions § 10, citing *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 660 N.E.2d 765 (C.P. 1993).

⁸⁶ *Sedgwick v. Kawasaki Cycleworks, Inc.*, 24 Ohio App.3d 109, 111, 493 N.E.2d 308, 311 (10th Dist.1985).

⁸⁷ *Id.*

payments to seventeen different vendors, including the former PUCO Chairman.⁸⁸ FirstEnergy Corp. admitted as much in its criminal plea stating “FirstEnergy Corp., through the acts of its officers, employees, and agents, conspired with public officials and other individuals and entities to pay millions of dollars to and for the benefit of public officials in exchange for specific official action for FirstEnergy Corp.’s benefit”).⁸⁹ It would perpetuate a fraud if OCC is denied access to the records because it might enable FirstEnergy Corp. to succeed in a scheme to charge utility consumers for the cost of the \$60 million bribery payments.

Courts outside of Ohio have similarly assessed the underlying business relationship between parent and subsidiary to determine whether a subsidiary may be required to provide its parent’s documents in discovery. In *Dri-Steem*,⁹⁰ the United States District Court for the District of Oregon, Medford Division, summarized the approach that courts have taken nationwide:

A subsidiary will be deemed to have possession, custody or control of documents held by its parent company only in certain circumstances. See *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138, 1152-53 (N.D. Ill. 1979). If, for example, there exist circumstances that indicate some form of “control” by the subsidiary over the documents and information sought—even if the documents or other information are in the possession of the parent—the subsidiary may be required to produce the requested data or at least to make a good faith effort to do so. *Id.* Where the relationship is such that the subsidiary can secure documents of the parent to meet its own business needs, courts have not permitted the subsidiary to deny control for purposes of discovery by an opposing party. See e.g., *First National City Bank v. Internal Revenue Service*, 271 F.2d 616, 618 (2d Cir. 1959) (where there is access to the documents when the need arises in the ordinary course of business, there is sufficient control when the need arises

⁸⁸ Expanded Audit at Report at 27.

⁸⁹ Agreement at 17-18.

⁹⁰ *Dri-Steem Corp. v. NEP, Inc.*, 2014 WL 12776884 at *2.

because of governmental requirements); *Cooper Industries v. British Aerospace Corporation*, 102 F.R.D. 918, 919 (S.D.N.Y. 1984) (where wholly-owned defendant subsidiary was the marketer and servicer of parent's aircraft in the United States, it was found “inconceivable” that subsidiary could not obtain aircraft manuals and related documents); *Compagnie Francaise D'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984) (agent organization should be required to produce documents held by its principals). District courts in this circuit have found that a wholly-owned subsidiary has access and control over documents in the possession of its parent corporation when it markets the products of the parent company, when the two companies share databases dealing with a variety of documents and records, and when the subsidiary is able to obtain high-level documents from the parent company when it requests them. See *Choice-Intersil Microsystems, Inc. v. Agere Sys., Inc.*, 224 F.R.D. 471, 473 (N.D. Cal. 2004).

As demonstrated above, the FirstEnergy Utilities should be required to provide information that FirstEnergy Corp. and other affiliates possess because OCC has demonstrated that parent and subsidiary operated as one, rather than as separate entities, based on Chuck Jones’ role as chief executive officer of each individual company.

I. The FirstEnergy Utilities’ objection that OCC’s requests are overbroad, unduly burdensome, and not limited in time is without merit.

The FirstEnergy Utilities’ objection to OCC’s Request for Production 2-3, that OCC’s request is overbroad, unduly burdensome, and not limited in time is without merit.

The FirstEnergy Utilities' objection that it is overly burdensome to respond to OCC's discovery has never been adequately explained to OCC. Such statements appear to be conclusory at best. The FirstEnergy Utilities must do more than simply repeat the familiar litany that the discovery is burdensome. Federal case law⁹¹ has held that, when a

⁹¹ Although federal case law is not binding upon the PUCO with regard to interpreting the Ohio Civil Rules of Practice (upon which the PUCO discovery rules are based), it is instructive where, as here, Ohio's rule is similar to the federal rules. Ohio Adm. Code 4901-1-24 allows a protective order to limit discovery to

party objects to an interrogatory based on oppressiveness or undue burden, that party must show specifically how, despite the broad and liberal construction afforded discovery rules, each interrogatory is overly broad, burdensome, or oppressive.⁹²

Here the FirstEnergy Utilities have failed to show how the requests for production of information are unduly burdensome. Because the burden falls upon the party resisting discovery to clarify and explain its objections and to provide support⁹³ and FirstEnergy Utilities have failed to do so, the PUCO should overrule this objection.

J. OCC undertook reasonable efforts to resolve the discovery dispute.

As detailed in the accompanying Affidavit of William Michael, OCC undertook reasonable efforts to resolve this discovery dispute. On or around May 28, 2020, OCC Counsel sent a letter to the FirstEnergy Utilities' Counsel regarding: Deficiencies in FirstEnergy's Response to OCC's Second and Third Sets of Discovery in Case No. 20-1629-EL-RDR. OCC's letter also contained an OCC executed Protective Agreement and advised the FirstEnergy Utilities' Counsel that it would be following up with a motion to compel if a response was not provided within seven days from the date of its letter.

The FirstEnergy Utilities did not respond at all at first but later contacted OCC to schedule a call to discuss the discovery dispute. When OCC and FirstEnergy finally did

protect against "undue burden and expense." C.R. 26(c) similarly allows a protective order to limit discovery "to protect against undue burden and expense." *Cf. In the Matter of the Investigation into Perry Nuclear Power Station*, Case No. 85-521-EL-COI, Entry at 14-15 (Mar. 17, 1987), where the Commission opined that a motion for protective order on discovery must be "specific and detailed as to the reasons why providing the responses to matters***will be unduly burdensome."

⁹² *Trabon Engineering Corp. v. Eaton Manufacturing Co.*, (N.D. Ohio 1964), 37 F.R.D. 51, 54.

⁹³ *Gulf Oil Corp. v. Schlesinger*, (E.D.Pa. 1979), 465 F.Supp. 913, 916-917.

discuss FirstEnergy's deficient discovery responses in mid-June, FirstEnergy committed to providing *some*, but not *all*, of the information sought by OCC.

After agreeing to and executing a protection agreement, FirstEnergy did provide some discovery to OCC, related to the "consulting agreement." But to date, FirstEnergy has not provided any discovery related to the internal investigation nor the FERC investigation. Specifically, FirstEnergy has refused to fully respond to OCC Interrogatory-02-002 (c) and (e); Request for Production-02-001, Request for Production-02-002 (b), (d), (e), and (f); Request for Production-02-003 (b) and (c); and Interrogatory-03-001 (d) and (e). As it has in the other H.B. 6 spending cases, OCC has exhausted all other reasonable means to resolve differences between it and FirstEnergy Utilities.

IV. CONCLUSION

The FirstEnergy Utilities have failed to bear the burden of providing that OCC's discovery will not lead to the discovery of admissible evidence. Nor have the FirstEnergy Utilities provided anything but conclusory statements as to the "burden" that will be imposed on it to answer OCC's discovery.

As such, it is appropriate and fitting that the PUCO, consistent with its rules and Ohio law, grant OCC's Motion to Compel. Granting OCC's Motion to Compel will further the interests of consumer protection by assisting OCC and other parties in preparing comments and reply comments in this proceeding. It will also better inform the PUCO's review of the DCR Charge to determine whether any charges to consumers were used for the political and charitable spending of the FirstEnergy Utilities and FirstEnergy Corp. related to HB 6 in this case, by providing it with a complete record upon which to base its decision. And it would additionally better inform the PUCO's review of whether

the FirstEnergy Utilities properly managed the DCR Charge, by providing the PUCO with a more complete record upon which to base its decision.

OCC's Motion to Compel should be granted and the FirstEnergy Utilities should be ordered to respond to the remainder of OCC's Second and Third Sets of Discovery immediately.

Respectfully submitted,

Bruce Weston (#0016973)
Ohio Consumers' Counsel

/s/ William J. Michael
William J. Michael (#0070921)
Counsel of Record
Ambrosia E. Wilson (#0096598)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
Columbus, Ohio 43215
Telephone: (614) 466-1291 (Michael)
Telephone: (614) 466-1292 (Wilson)
William.michael@occ.ohio.gov
Ambrosia.Wilson@occ.ohio.gov
(willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel was served on the persons stated below via electric transmission this 26th day of August 2021.

/s/ William J. Michael

William J. Michael

Counsel of Record

Assistant Consumers' Counsel

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

SERVICE LIST

werner.margard@ohioAGO.gov
Thomas.lindgren@ohioAGO.gov
Bojko@carpenterlipps.com
Donadio@carpenterlipps.com
rlazer@elpc.org
mleppla@theOEC.org
tdougherty@theOEC.org
ctavenor@theOEC.org

Attorney Examiners:

Megan.addison@puco.ohio.gov
Gregory.price@puco.ohio.gov
Jacqueline.st.john@puco.ohio.gov

bknipe@firstenergycorp.com
mrgladman@jonesday.com
mdengler@jonesday.com
radoringo@jonesday.com
calee@jonesday.com
rdove@keglerbrown.com
dparram@bricker.com
eakhbari@bricker.com
rmains@bricker.com
bethany.allen@igs.com
joe.oliker@igs.com
evan.betterton@igs.com

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of the)
Delivery Capital Recovery Rider of Ohio)
Edison Company, The Cleveland Electric) Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo Edison)
Company.)

**AFFIDAVIT OF WILLIAM J. MICHAEL
IN SUPPORT OF MOTION TO COMPEL**

I, William J. Michael, Assistant Consumers' Counsel for the Ohio Consumers' Counsel ("OCC") in the above-captioned case, submit this affidavit in support of OCC's Motion to Compel Responses to Discovery.

1. On April 21, 2021, OCC sent the FirstEnergy Utilities its Second Set of Discovery. And on April 27, OCC sent the FirstEnergy Utilities its Third Set of Discovery. The FirstEnergy Utilities responded to OCC's Second Set of Discovery on May 12, 2021, and to the Third Set on May 17, 2021 by generally not answering and objecting to OCC's discovery. I contacted the FirstEnergy Utilities Counsel by email on May 28, 2021, to explain why the objections were without merit and to inquire whether FirstEnergy Utilities' Counsel intended to stand but their objections. FirstEnergy's counsel did not immediately respond to the letter. But later, on June 11, 2021, FirstEnergy's counsel contacted me to schedule a meet and confer call to attempt resolution of the discovery issues.
2. OCC's counsel and FirstEnergy's counsel conferenced on June 16 and FirstEnergy's counsel agreed to provide some of the discovery that OCC sought by July 2, 2021.
3. On July 6, 2021, FirstEnergy partially supplemented its responses to OCC but made them subject to a protective agreement.
4. After discussions with FirstEnergy's counsel, a protective agreement was reached on July 20, 2021 and FirstEnergy provided its confidential responses to OCC.
5. Although FirstEnergy provided responses to *some* of OCC's discovery, there are still items outstanding. Specifically, FirstEnergy has not provided responses to OCC Interrogatory-02-002(c) and (e); Request for Production-02-001; Request

for Production-02-002 (b), (d), (e), and (f); Request for Production-02-003 (b) and (c); and Interrogatory-03-001 (d) and (e), and FirstEnergy indicated on the call and confer of June 16, 2021, that it would not provide this information.

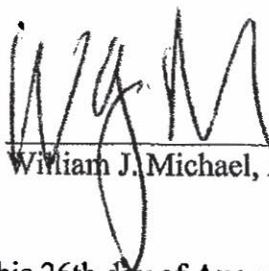
6. As of August 25, 2021, FirstEnergy has not provided this discovery.
7. Given the history of FirstEnergy's non-response to OCC's discovery and interposing of delay for OCC, OCC is filing its motion to compel discovery answers.

STATE OF OHIO)
)
COUNTY OF FRANKLIN)

SS:

The undersigned, being of lawful age and duly sworn by oath, hereby certifies, deposes and states the following:

I have caused to be prepared the attached written affidavit for OCC in the above-referenced docket. This affidavit is true and correct to the best of my knowledge, information and belief.



William J. Michael, Affiant

Subscribed and sworn to before me this 26th day of August 2021.



DEBRA JO BINGHAM
Notary Public
State of Ohio
My Comm. Expires
June 13, 2025


Notary Public

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2020 Review of the)	
Delivery Capital Recovery Rider of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo)	
Edison Company.)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S
SUPPLEMENTAL RESPONSES AND OBJECTIONS TO THE SECOND SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Pursuant to Rules 4901-1-16 through 4901-1-22 of the Ohio Administrative Code and in accordance with Ohio Rules of Civil Procedure 26, 33, and 34, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”), hereby submit these Supplemental Objections and Responses to the Second Set of Interrogatories and Requests for Production of Documents (collectively, the “Discovery Requests”) served by the Office of the Ohio Consumers’ Counsel.

GENERAL OBJECTIONS

As used herein, the following definitions apply:

1. The Companies object to OCC’s attempt to provide definitions and “instructions for answering” that are broader than, or inconsistent with, the rules of the Ohio Administrative Code or the Ohio Rules of Civil Procedure. The Companies will respond in accordance with their obligations under those rules.
2. The Companies object to the definition of “Documents” and “Documentation” to the extent it seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the

- Ohio Rules of Civil Procedure. The Companies construe the term “documents” to be synonymous in meaning and equal in scope to the usage of the term “documents” in Rule 34(A) of the Ohio Rules of Civil Procedure.
3. The Companies object to the definition of “Communication” as overbroad, unduly burdensome, and vague and ambiguous, and the Companies further object to the extent that the definition seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. For example, OCC defines “Communication(s)” to include the transmission of information by “oral” or “otherwise perceptible means” and therefore unreasonably purports to require the Companies to describe in detail communications that are not contained in any document. Further, the definition states that a request “seeking the identity of a communication . . . encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication” and therefore unreasonably purports to place an undue burden on the Companies to identify any documents or communications having any “nexus” or containing any “explicit or implicit” reference to the subject matter of a communication.
 4. The Companies object to the definition of “You,” and “Your,” or “Yourself” as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide information on behalf of any “present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or

joint venturer” and is unlimited as to time. The Companies construe the terms “You,” “Your,” and “Yourself” to refer only to the Companies.

5. The Companies object to the definition of “Identify,” or “the identity of,” or “identified” as overbroad, unduly burdensome, vague, and ambiguous. For example, this definition unreasonably purports to obligate the Companies to provide information outside of their personal knowledge, to identify all persons “in the presence” of parties to communications, and to describe an “act” and the persons in the presence of the “actor.”
6. The Companies object to the instruction “to produce responsive materials and information” in the possession of persons “purporting to act on [the Companies’] behalf” because this instruction on its face calls for the production of materials that are not within the Companies’ possession, custody, or control.
7. The Companies object to the instruction in numbered paragraph 8 of the “Instructions for Answering” as overbroad, unduly burdensome, vague, and ambiguous. For example, this instruction unreasonably purports to require the Companies to search for and produce “information and tangible materials” over a twenty-year period of time.
8. The Companies object to the “instructions” for invoking privilege to the extent they seek to impose requirements on the Companies that are broader than, or inconsistent with, those imposed by the Ohio Administrative Code or by the Ohio Rules of Civil Procedure. Should the Companies withhold any document on the basis of any applicable privilege, immunity, or protection, the Companies will provide the information required by Ohio Rule of Civil Procedure 26(B)(8)(a).

9. The Companies object to each request to the extent that it seeks production of information that is confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties.
10. The Companies object to OCC's Discovery Requests to the extent they seek information or documents protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable doctrine.
11. The Companies object to OCC's Discovery Requests to the extent any request seeks confidential information that is protected from disclosure to third parties under Ohio R.C. 4901.16. To the extent any request calls for information that is the subject of an ongoing audit, that request functions as an end-run around Ohio R.C. 4901.16.
12. A statement that documents will be produced is not intended to suggest that responsive documents exist within the Companies' possession, custody, or control; nor is it intended to suggest that the Companies will search every electronic and paper file within their possession, custody, or control, because that exercise would be unduly burdensome and prohibitively expensive and is not required under the rules. A statement that documents will be produced means that the Companies will search for documents in those places where the Companies reasonably anticipate they may be located and, if located and not subject to any privilege, the Companies will make them available for inspection and copying at a mutually agreeable time and place. Where applicable, the Companies will designate documents as confidential or competitively sensitive confidential and will release such documents only to parties with properly executed protective agreements.

SUPPLEMENTAL RESPONSES AND OBJECTIONS TO INTERROGATORIES

INT-02-002. On FirstEnergy's Fourth Quarter earnings call on February 18, 2021, FirstEnergy executives disclosed that they had uncovered various charges relating to consulting agreements, political advocacy and/or other matters that were improperly charged to FirstEnergy Utilities or improperly substantiated over a period of several years.

Regarding this statement, please provide the following information:

- a. The date, amount and description of each charge;
- b. The amount of each charge that was included in customer rates, including but not limited to, the Delivery Capital Recovery Rider, for the FirstEnergy Utilities;
- c. The persons who authorized each charge;
- d. The supporting documentation for each charge; and
- e. Please explain how FirstEnergy determined each charge was improper.

RESPONSE: The Companies object to the term "FirstEnergy," as used in this Request, because it is vague and ambiguous, given ¶ 13 of OCC's general definitions. The Companies further object to this Request on the grounds that OCC's requests are premature, given the audit is ongoing and the final audit report has yet to issue. Case No. 17-2474-EL-RDR, Hearing Tr., at 24:23-25:4 (April 8, 2021). The Companies also object to the extent OCC seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the

Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines.

SUPPLEMENTAL RESPONSE (DATED JULY 6, 2021): Per the parties' June 16 meet-and-confer discussion and subject to and without waiving any objections, in response to subparts (a), (b), and (d), see OCC INT-02-002-Attachments 001–339 – Confidential.

**SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
REQUESTS FOR PRODUCTION OF DOCUMENTS**

RPD-02-002: On February 16, 2021, FirstEnergy filed a Form 8-K with the SEC describing “a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since 2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement. The matter is a subject of the ongoing internal investigation related to the government investigations.”

- a. Please produce a copy of the consulting agreement, as amended.
- b. Please provide a copy of all documents relating to communications with the counterparty referred to in this statement.
- c. Please produce all documents relating to payments made to the counterparty pursuant to this agreement.

- d. Please produce all documents relating to actions FirstEnergy took to help the individual referenced become appointed to his or her position as a regulator of the Ohio companies.
- e. Please produce all documents relating FirstEnergy's belief that the payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement.
- f. Please produce all documents relating to what FirstEnergy believes may have been the true purpose of the payments related to the consulting agreement.
- g. Please provide all documents relating to the consulting agreement in the form of books of account, and all other books, records, and memoranda which support the entries in such books of account.

RESPONSE: The Companies object to the term "FirstEnergy," as used in this Request, because it is vague and ambiguous, given ¶ 13 of OCC's general definitions. The Companies object because this Request calls for information not relevant to the subject matter involved in this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence. The Companies also object to this Request because OCC has no jurisdiction to investigate the communications of FirstEnergy Corp. or other affiliates of the Companies, and the Companies object to the extent this Request calls for information that is not within the Companies' possession, custody, or control. Additionally, OCC's requests are premature, given the audit is ongoing and the final audit report has yet to issue. Case No. 17-2474-EL-RDR, Hearing Tr., at 24:23-25:4 (April 8, 2021). The Companies also object to the extent OCC seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines. In subparts (b) through (f), the Companies object to the phrase

“relating to,” as it is overbroad and ambiguous, making it impossible for the Companies to determine the scope of documents requested.

SUPPLEMENTAL RESPONSE (DATED JULY 6, 2021): Per the parties’ June 16 meet-and-confer discussion and subject to and without waiving any objections, in response to subparts (a), (c), and (g), see OCC INT-02-002-Attachments 001–339 – Confidential.

RPD-02-003: On FirstEnergy’s Fourth Quarter earnings call on February 18, 2021, FirstEnergy executives disclosed that they had uncovered various charges relating to consulting agreements, political advocacy and/or other matters that were improperly charged to FirstEnergy Utilities or improperly substantiated over a period of several years. Regarding this statement, please provide the following documents:

- a. All documents relating to the improper charges;
- b. All documents relating to information that FirstEnergy has provided to third parties outside FirstEnergy regarding these charges.
- c. All documents relating to FirstEnergy’s efforts to reverse these charges.
- d. All documents relating to the amount of these charges that were assigned, allocated or distributed to the FirstEnergy Utilities.
- e. All documents relating to the amount of these charges that were placed in customer rates for the FirstEnergy Utilities.

RESPONSE: The Companies object to the term “FirstEnergy,” as used in this Request, because it is vague and ambiguous, given ¶ 13 of OCC’s general definitions. The Companies further object to this Request on the grounds that OCC’s requests are premature, given the audit is ongoing and the final audit report has yet to issue. Case No. 17-2474-EL-RDR, Hearing Tr., at 24:23-25:4

(April 8, 2021). The Companies also object to the extent OCC seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines. In each of the subparts, the Companies object to the phrase “relating to,” as it is overbroad and ambiguous, making it impossible for the Companies to determine the scope of the documents requested. More specifically, as to subparts (a) and (b), FirstEnergy objects on the grounds those subparts call for information that is overbroad, unduly burdensome, and not limited in time.

SUPPLEMENTAL RESPONSE (DATED JULY 6, 2021): Per the parties’ June 16 meet-and-confer discussion and subject to and without waiving any objections, in response to subparts (a), (d), and (e), see OCC INT-02-002-Attachments 001–339 – Confidential.

Dated: July 6, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

Brian J. Knipe (0090299)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 384-5795
bknipe@firstenergycorp.com

Michael R. Gladman (0059797)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
mdengler@jonesday.com

Ryan A. Doringo (0091144)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
radoringo@jonesday.com

On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for all parties by email on
July 6, 2021:

/s/ Margaret M. Dengler
Attorney for the Companies

SERVICE LIST

werner.margard@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov
bojko@carpenterlipps.com
donadio@carpenterlipps.com
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org
rdove@keglerbrown.com

william.michael@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
ccox@elpc.org
rlazer@elpc.org
dparram@bricker.com
eakhbari@bricker.com
rmains@bricker.com
drinebolt@opae.org

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2020 Review of the)	
Delivery Capital Recovery Rider of Ohio)	
Edison Company, The Cleveland Electric)	Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo)	
Edison Company.)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S
SUPPLEMENTAL RESPONSES AND OBJECTIONS TO
THE THIRD SET OF INTERROGATORIES
BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

Pursuant to Rules 4901-1-16 through 4901-1-22 of the Ohio Administrative Code and in accordance with Ohio Rules of Civil Procedure 26, 33, and 34, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”), hereby submit these Supplemental Objections and Responses to the Third Set of Interrogatories (collectively, the “Discovery Requests”) served by the Office of the Ohio Consumers’ Counsel.

GENERAL OBJECTIONS

As used herein, the following definitions apply:

1. The Companies object to OCC’s attempt to provide definitions and “instructions for answering” that are broader than, or inconsistent with, the rules of the Ohio Administrative Code or the Ohio Rules of Civil Procedure. The Companies will respond in accordance with their obligations under those rules.
2. The Companies object to the definition of “Documents” and “Documentation” to the extent it seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. The Companies construe the term “documents” to be

synonymous in meaning and equal in scope to the usage of the term “documents” in Rule 34(A) of the Ohio Rules of Civil Procedure.

3. The Companies object to the definition of “Communication” as overbroad, unduly burdensome, and vague and ambiguous, and the Companies further object to the extent that the definition seeks to impose obligations on the Companies that are broader than, or inconsistent with, those imposed by the rules of the Ohio Administrative Code and the Ohio Rules of Civil Procedure. For example, OCC defines “Communication(s)” to include the transmission of information by “oral” or “otherwise perceptible means” and therefore unreasonably purports to require the Companies to describe in detail communications that are not contained in any document. Further, the definition states that a request “seeking the identity of a communication . . . encompasses documents having factual, contextual, or logical nexus to the matter, as well as communications in which explicit or implicit reference is made to the matter in the course of the communication” and therefore unreasonably purports to place an undue burden on the Companies to identify any documents or communications having any “nexus” or containing any “explicit or implicit” reference to the subject matter of a communication.
4. The Companies object to the definition of “You,” and “Your,” or “Yourself” as overbroad, unduly burdensome, vague, and ambiguous because it unreasonably purports to require the Companies to provide information on behalf of any “present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer” and is unlimited as to time. The Companies construe the terms “You,” “Your,” and “Yourself” to refer only to the Companies.

5. The Companies object to the definition of “Identify,” or “the identity of”, or “identified” as overbroad, unduly burdensome, vague, and ambiguous. For example, this definition unreasonably purports to obligate the Companies to provide information outside of their personal knowledge, to identify all persons “in the presence” of parties to communications, and to describe an “act” and the persons in the presence of the “actor.”
6. The Companies object to the instruction “to produce responsive materials and information” in the possession of persons “purporting to act on [the Companies’] behalf” because this instruction on its face calls for the production of materials that are not within the Companies’ possession, custody, or control.
7. The Companies object to the instruction in numbered paragraph 8 of the “Instructions for Answering” as overbroad, unduly burdensome, vague, and ambiguous. For example, this instruction unreasonably purports to require the Companies to search for and produce “information and tangible materials” over a twenty-year period of time.
8. The Companies object to the “instructions” for invoking privilege to the extent they seek to impose requirements on the Companies that are broader than, or inconsistent with, those imposed by the Ohio Administrative Code or by the Ohio Rules of Civil Procedure. Should the Companies withhold any document on the basis of any applicable privilege, immunity, or protection, the Companies will provide the information required by Ohio Rule of Civil Procedure 26(B)(8)(a).
9. The Companies object to each request to the extent that it seeks production of information that is confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties.

10. The Companies object to OCC's Discovery Requests to the extent they seek information or documents protected from disclosure by the attorney-client privilege, attorney work product doctrine, or any other applicable doctrine.
11. The Companies object to OCC's Discovery Requests to the extent any request seeks confidential information that is protected from disclosure to third parties under Ohio R.C. 4901.16. To the extent any request calls for information that is the subject of an ongoing audit, that request functions as an end-run around Ohio R.C. 4901.16.
12. A statement that documents will be produced is not intended to suggest that responsive documents exist within the Companies' possession, custody, or control; nor is it intended to suggest that the Companies will search every electronic and paper file within their possession, custody, or control, because that exercise would be unduly burdensome and prohibitively expensive and is not required under the rules. A statement that documents will be produced means that the Companies will search for documents in those places where the Companies reasonably anticipate they may be located and, if located and not subject to any privilege, the Companies will make them available for inspection and copying at a mutually agreeable time and place. Where applicable, the Companies will designate documents as confidential or competitively sensitive confidential and will release such documents only to parties with properly executed protective agreements.

SUPPLEMENTAL RESPONSES AND OBJECTIONS TO INTERROGATORIES

INT-03-001. FirstEnergy revealed in its third quarter SEC Form 10-Q that its Board of Directors fired former senior managers for violating company ethics policies when they paid \$4 million to a company "associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating FE's Ohio distribution companies."

- a. Please identify the name of the "individual" referred to in this statement;
- b. Please identify the name of the company to which such payment was made;
- c. Please identify the purported purpose of the payment;
- d. Please identify the real purpose of the payment;
- e. Please explain how FirstEnergy learned that the real purpose of the payment differed from the purported purpose of the payment;
- f. Please identify the FirstEnergy company that made the payment; and
- g. Please identify whether any costs from this payment were allocated to the Ohio utilities and, if so, the amounts allocated and the FERC accounts to which the costs were allocated.

RESPONSE: The Companies object to the term "FirstEnergy," as used in this Request, because it is vague and ambiguous, given ¶ 13 of OCC's general definitions. The Companies also object to OCC's characterization of the November 19, 2020 10-Q; the document speaks for itself. The Companies also object because this Request calls for information not relevant to the subject matter involved in this proceeding and not reasonably calculated to lead to the discovery of relevant or admissible evidence. Further, the Companies object because this Request seeks information that is not within OCC's authority to investigate, and the Companies object to the

extent this Request calls for information that is not within the Companies' possession, custody, or control. Additionally, OCC's requests are premature, given the audit is ongoing and the final audit report has yet to issue. Case No. 17-2474-EL-RDR, Hearing Tr., at 24:23-25:4 (April 8, 2021). The Companies also object to the extent OCC seeks information that is (1) confidential business, commercial, financial, or proprietary information belonging to the Companies or third parties or (2) protected from disclosure by the attorney client privilege or attorney work product doctrines. See also the Companies' objections to OCC RPD-02-002.

SUPPLEMENTAL RESPONSE (DATED JULY 6, 2021): Per the parties' June 16 meet-and-confer discussion and subject to and without waiving any objections, in response to subparts (a), (b), (c), (f), and (g), see OCC INT-02-002-Attachments 001–339 – Confidential.

Dated: July 6, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

Brian J. Knipe (0090299)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 384-5795
bknipe@firstenergycorp.com

Michael R. Gladman (0059797)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
mdengler@jonesday.com

Ryan A. Doringo (0091144)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
radoringo@jonesday.com

On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for all parties by email on
July 6, 2021:

/s/ Margaret M. Dengler
Attorney for the Companies

SERVICE LIST

werner.margard@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov
bojko@carpenterlipps.com
donadio@carpenterlipps.com
mleppla@theoec.org
tdougherty@theoec.org
ctavenor@theoec.org
rdove@keglerbrown.com

william.michael@occ.ohio.gov
ambrosia.wilson@occ.ohio.gov
ccox@elpc.org
rlazer@elpc.org
dparram@bricker.com
eakhbari@bricker.com
rmains@bricker.com
drinebolt@opae.org

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

In Reply Refer To:
Office of Enforcement
Docket No. FA19-1-000
February 6, 2019

Robert R. Mattiuz, Jr. P.E.
Vice President, Compliance and Regulated Services,
and Chief FERC Compliance Officer
FirstEnergy Corporation
76 South Main Street
Akron, OH 44308

Dear Mr. Mattiuz:

The Division of Audits and Accounting (DAA) in the Office of Enforcement of the Federal Energy Regulatory Commission (the Commission) is commencing an audit of FirstEnergy Corporation (FirstEnergy), including its service companies and other associated companies in the FirstEnergy holding company system (collectively, the Companies). The audit will evaluate the Companies' compliance with the Commission's: (1) cross-subsidization restrictions on affiliate transactions under 18 C.F.R. Part 35; (2) service companies accounting, recordkeeping, and FERC Form No. 60 reporting requirements under 18 C.F.R. Parts 366, 367, and 369; (3) accounting and reporting requirements for franchised public utilities for their transactions with associated companies under 18 C.F.R. Parts 101 and 141; and (4) preservation of records requirements for holding companies and service companies under 18 C.F.R. Part 368. The audit will cover the period January 1, 2015 to the present. However, this period may be expanded if necessary, and recommendations for corrective actions may also cover preceding years.

This audit is being conducted pursuant to section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2012), and section 1264(d) of the Energy Policy Act of 2005 (EPAAct), 42 U.S.C. § 16452 (2012), and is subject to the confidentiality provisions of those sections. Documents and information Commission staff obtains during the audit, as well as all working papers developed, will be placed in nonpublic files. Section 301(b) of the FPA and section 1264(d) of the EPAAct require the Companies to furnish, within reasonable timeframes, any information the Commission may request; grant Commission staff free access to their property, accounts, records, and memoranda; and allow Commission staff to keep copies of any accounts, records, and memoranda that pertain to

FirstEnergy Corporation

Docket No. FA19-1-000

the audit. Pursuant to section 301(b), audit staff reserves the right to obtain and examine all accounts, records, and memoranda in years prior to the audit period stated above, as deemed necessary. Section 301(c) of the FPA and sections 1264(a) and (c) of the EPO Act allow Commission staff to examine the books, accounts, records, and memoranda of any person who controls, directly or indirectly, the Companies, and of any other company controlled by such person, insofar as they relate to transactions with or the business of the Companies.

Consistent with the requirements of sections 301, 304, and 311 of the FPA, 16 U.S.C. §§ 825, 825c, and 825j (2012); section 1264(a) of the EPO Act, 42 U.S.C. 16452 (2012); and 18 C.F.R. Parts 125 and 368, the Companies must preserve and retain, and shall not discard or destroy, any and all existing and future records or communications, including but not limited to, electronic documents, email, instant messages, text messages, and voice recordings relating to this audit.

We will contact you shortly to schedule a conference call between audit staff and FirstEnergy to: (1) explain the audit process; (2) address any questions about the audit you may have; (3) clarify audit staff's understanding of certain information; (4) discuss the initial data request and response schedule; and (5) discuss scheduling for the initial site visit.

If you have any questions about this letter, please contact Subramaniam Narthana, Auditor-in-Charge, at (202) 502-6102. Also, if you would like to discuss the audit with DAA management at any time during the audit, please contact Christopher Handy, Audit Manager, at (202) 502-6496, or Steven Hunt, Acting Director and Chief Accountant, DAA, at (202) 502-6084.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry R. Parkinson", with a long horizontal flourish extending to the right.

Larry R. Parkinson
Director
Office of Enforcement

Document Content(s)

FA19-1-000.PDF.....1

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

8/26/2021 9:11:26 AM

in

Case No(s). 20-1629-EL-RDR

Summary: Motion Motion to Compel the FirstEnergy Utilities to Answer Discovery by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.