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 Illuminating Company, and The Toledo Edison Company.	))))))	**Case No. 20-1629-EL-RDR**

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

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") motion to compel ("Motion") should be denied. OCC claims Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") have thwarted OCC's discovery efforts. But OCC's real grievance is that the Companies continue to object to improper requests that fall outside the bounds of permissible discovery. Indeed, the Companies have worked in good faith with OCC to supplement discovery and have produced numerous responsive documents to date. But many of OCC's requests are improper, ranging from OCC's attempt to invade an ongoing, confidential FERC audit to its demands for a far-reaching investigation into non-party FirstEnergy Corp. As demonstrated below, OCC's motion to compel on these requests should be denied.

II. ARGUMENT

OCC places five requests at issue: INT 02-002 (c) and (e); RPD 02-001; RPD 02-002 (b), (d), (e), and (f); RPD 02-003 (b) and (c), and INT 03-001 (d) and (e). The Motion should be denied as to all of them. To start, the Companies are willing to supplement their responses to INT-02-002 (c) and (e), rendering those requests moot. The remaining requests are improper on numerous grounds.

On March 8, 2021, Staff requested that the Commission expand the scope of this audit following a disclosure in FirstEnergy Corp.'s Form 10-K dated February 18, 2021 regarding certain transactions "that were either improperly classified, misallocated . . . or lacked supporting documentation."[1] The Commission granted Staff's request, expanding the audit to determine

[1] Case No. 20-1629-EL-RDR, Entry ¶ 6 (March 10, 2021) ("March 10 Entry").

"whether the funds associated with those payments should be returned to ratepayers through Rider DCR or through an alternative proceeding."[2] What the Commission did not do is expand the scope of this proceeding to probe into an internal investigation conducted by non-party FirstEnergy Corp., nor did it endorse a review of FirstEnergy Corp.'s confidential interactions with other regulators, such as FERC. Yet, through its only remaining discovery requests, OCC seeks to break the boundaries of this expanded scope proceeding by demanding documents from FirstEnergy Corp.'s internal investigation and communications from FirstEnergy Corp. to FERC's Division of Audits and Accounting. OCC admits as much in its motion to compel.[3]

Therefore, RPD 02-001; RPD 02-002 (b), (d), and (e); RPD 02-003 (b) and (c), and INT 03-001 (d) and (e) should be denied on the grounds that they seek information not relevant nor reasonably calculated to lead to the discovery of admissible evidence; demand documents outside the Companies' possession, custody, or control; and improperly attempt to probe an ongoing FERC audit. The Companies address each request in turn.

A. RPD-02-001

1. RPD-02-001 is Overbroad and Seeks Information Not Relevant Nor Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

OCC in RPD-02-001 seeks all documents "reflecting . . . communications from FirstEnergy to FERC's Division of Audits and Accounting" relating to the disclosed FERC audit. This request fails at the outset because OCC has made no attempt to tailor it to the relevance standard dictated by the Commission's rules. Instead, OCC seeks the wholesale production of all the information exchanged between FirstEnergy Corp.—a non-party to this case—and FERC in the context of

[2] *Id.* ¶ 8.

[3] Case No. 20-1629-EL-RDR, OCC Motion to Compel, Memorandum in Support ("OCC Mem."), at 20-22 (Aug. 26, 2021) ("[T]he PUCO should order FirstEnergy to produce the internal investigation report and all related records."); *id.* at 25.

FERC's comprehensive, ongoing audit. The request is untethered to whether certain funds should be returned to Ohio ratepayers in this proceeding. And given this, the request likewise seeks to impose an immense and undue burden upon the Companies to review and produce essentially every document relating to the FERC audit, which covers a review dating back to 2015.[4] For these reasons alone, the motion to compel on RPD-02-001 should be denied.

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

RPD-02-001 is improper for another reason: Federal law establishes that documents connected with an ongoing FERC audit are confidential and thus protected from disclosure. *See* 16 U.S.C. § 825(b); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a). And just recently in a separate Commission proceeding, the Attorney Examiners ruled that OCC's identical request would be denied so as to not interfere with FERC's audit work.[5] The request should be denied here as well.

By letter dated February 6, 2019, FERC commenced an audit to evaluate FirstEnergy Corp.'s compliance with various FERC accounting, recordkeeping, and reporting requirements from June 1, 2015 until present.[6] The letter, consistent with longstanding FERC regulations and policy, noted that all materials produced by FirstEnergy Corp. for the audit are "subject to the confidentiality provisions" of "section 301 of the Federal Power Act (FPA), 16 U.S.C. § 825 (2012), and section 1265(d) of the Energy Policy Act of 2005 (EPAct), 42 U.S.C. § 16452

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

[5] Case No. 20-1502-EL-UNC, Hr'g Tr., at 18:6–11, 36:23–37:4 (Aug. 31, 2021).

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

(2012)."[7] And to place the matter beyond debate, the letter continues, "Documents and information Commission staff obtains during the audit, as well as all working papers developed, will be placed in nonpublic files."[8] In reliance on the protection afforded by federal law, FirstEnergy Corp. cooperated with FERC and produced the requested confidential information.

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

OCC's request therefore threatens to undermine the confidentiality and candor of the audit process here and in future proceedings. If, as OCC suggests, the confidentiality protections of federal law are to be ignored, there will be scant protection for FirstEnergy Corp. and future, similarly-situated companies under FERC audit. Requests made in future audits will be assumed to be subject to the ordinary rules of discovery in collateral state regulatory proceedings. And OCC's request risks undermining the integrity of FERC's current audit by threatening FirstEnergy Corp. with the release of sensitive information it provided to FERC in confidence.[9]

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

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

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

And, should any doubt remain, the enforcement of state law is invalid to the extent that it "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[10] Thus, when state action "presents [even] the prospect of interference with the federal regulatory power" of FERC, such "state law may be pre-empted even though collision between the state and federal regulation may not be an inevitable consequence."[11] Put succinctly, "state action is preempted if it interferes with, or even potentially interferes with, federal authority."[12]

Here, there is little doubt that a breach of the confidentiality of FERC's audit of FirstEnergy Corp. would compromise the integrity of FERC proceedings and would discourage candid and transparent cooperation with FERC audits in the future. Indeed, one place to look for the "purposes and objectives of Congress" is the Congress's own handiwork, including the federal Freedom of Information Act, which includes an exemption for information that "could reasonably be expected to interfere with enforcement proceedings."[13] For that reason, FOIA requests for materials connected to potential FERC investigations are regularly rejected.[14] It is entirely backwards to suggest, as OCC must, that Congress would intend for FERC audit materials to be exempt from its own federal public disclosure law but readily available through broad discovery requests in state regulatory proceedings.[15]

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

[11] *Id.* at 310.

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

[13] 5 U.S.C. § 552(b)(7).

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

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

OCC raises the specter of FirstEnergy Corp.'s audit-related materials forever remaining in a shroud of secrecy if the Commission does not compel their production this very instance. But both the commencement letter and the final FERC audit report are released to the public as a matter of course, along with the audited entity's response to the final report.[16] At that time, both OCC and the Commission will have access to the results of FERC's audit. As is clear from even a quick review of these public audit reports, which are easily available on FERC's website, FERC's audit reports provide significant detail into the factual and legal issues raised in the audit, the process followed in the audit, the views and concerns of the company about the audit, and FERC's response to those views and concerns.[17] The public has the ability to learn a great deal about the nature of an audit from the audit report, and that will be true here as well. OCC's motion to compel the details of FERC's audit, while that audit is still underway, is nothing more than an effort to short-circuit that careful, detailed process, impermissibly interfering with the proceedings of a federal agency.

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

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

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

reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission.

It is not as if OCC has identified a particularized need for a specific document that just happens to be one of the records that FirstEnergy Corp. turned over to FERC as part of its audit. Nor, contrary to OCC's misplaced claims, have the Companies anywhere argued that documents become forever protected by mere virtue of their provision to FERC. Instead, OCC itself has defined the relevant set of documents *solely by reference to the FERC audit*: the relevant request for production asks for "communications from FirstEnergy to FERC's Division of Audits and Accounting relating to this audit."[18]

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

This is not the first time a party has tried an end run of this sort. The Supreme Court of Texas's decision in *Eli Lilly & Co. v. Marshall* is instructive.[19] That case addressed information that Eli Lilly had gathered from patients who had adverse reactions to their drug, Prozac. Federal law requires a drug manufacturer to submit any such reports it receives to the FDA.[20] However,

[18] RPD-02-001.

[19] 850 S.W.2d 155 (Tex. 1993).

[20] 21 U.S.C. § 355(k)(1).

FDA regulations provide that the agency must keep confidential the identities of the patient and of the person or institution that reported the adverse reaction.[21] In a products liability suit brought against Eli Lilly, a trial court ordered the disclosure of this confidential information through discovery.

The Supreme Court of Texas, recognizing that the FDA regulation spoke to agency disclosures, held that the regulation did not "preempt the trial court's order."[22] But that conclusion was academic, the Court added, because "[t]he FDA regulations clearly embody a vital public interest in confidential voluntary reporting that is eviscerated as equally by a manufacturer's compelled disclosure as by the FDA's disclosure."[23] The Court stressed that "the congressional objective of fostering post-approval reporting of possible adverse reactions for all FDA-approved drugs [was] severely compromised by the trial court's order of wholesale disclosure of reporters' identities."[24] And the Court noted that Eli Lilly, the FDA, and the general public all have a strong interest "in maintaining the free flow of information derived from adverse reaction reports."[25] Because the trial court "ordered full disclosure . . . without a showing of particularized relevance and need," the Court vacated the discovery order.[26]

So too here. There is no doubt that protecting the confidentiality of FirstEnergy's FERC audit serves a "vital public interest" in promoting disclosure to FERC, which would be "eviscerated as equally by [FirstEnergy's] compelled disclosure as by [FERC's] disclosure."[27]

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[21] 21 C.F.R. § 314.430(e)(4).

[22] 850 S.W.2d at 160.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

And because OCC indiscriminately asks for "full disclosure" of all FERC audit materials "without a showing of particularized relevance and need," the Commission should deny its request.[28]

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

3. RPD-02-001 Seeks Information Outside the Companies' Possession, Custody, or Control.

Another problem fatal to OCC's request is that it demands production of information that is not within the Companies' possession, custody, or control. Instead, RPD-02-001 facially seeks information uniquely within FirstEnergy Corp.'s control.

It is a foundational principle of the discovery rules that a party may demand production of information only within the possession, custody, or control of a request's recipient.[29] And both state and federal courts have held that a party must have "control"—meaning "the legal right to obtain the documents required on demand"—over the records before it can be compelled to produce them.[30] It is not enough that the Companies are subsidiaries of FirstEnergy Corp. "A

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[28] *Id.*

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

[30] *See Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc. 2d 174, 179, 660 N.E.2d 765, 768 (Ohio Com. Pl. 1993) ("In order to obtain discovery from the subsidiary, the party seeking discovery must show that the party from whom the discovery is sought has control of said subsidiary."); *In re Porsche Cars N. Am., Inc.*, No. 2:11-MD-2233, 2012 WL 4361430, at *4 (S.D. Ohio Sept. 25, 2012) (defining "control" as "the legal right to obtain the requested documents on demand"); *Graff v. Haverhill N. Coke Co.*, No. 1:09-CV-670, 2011 WL 13078603, at *11 (S.D. Ohio Aug. 8, 2011) ("Documents are deemed to be within the 'possession, custody or control' for purposes of [Federal] Rule 34 if the party has actual possession, custody or control, or has the *legal right* to obtain the documents on demand.") (emphasis in original); *Genentech, Inc. v. Trs. of Univ. of Pa.*, No. C 10-2037 PSG, 2011 WL 5373759,

subsidiary, by definition, does not control its parent corporation" and cannot be made to produce records held by its parent "except in rare circumstances."[31] For example, evidence that one company operates as the other's alter ego or that one company acted as the agent of the other company in a transaction giving rise to a claim may support a finding of legal "control."[32] But a sweeping assertion that the companies "operate under the same corporate umbrella" is insufficient.[33] And vague claims that an agency relationship exists between two companies or that the two operate as a unified entity likewise fail to justify disregard of the corporate form, not to mention Ohio's requirements for corporate separation.[34] Moreover, it is the party seeking production of documents who bears the burden of establishing the opposing party's control over them.[35]

Here, OCC essentially argues that all the records kept by all FirstEnergy entities are subject to the Companies' control.[36] To prove such an extraordinary claim—and to compel disregard of the corporate form—OCC was required to make a showing tantamount to "justifying the

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at *2–3 (N.D. Cal. Nov. 7, 2011) (holding that a party failed to meet its burden to show that a wholly-owned subsidiary had legal control over the parent's documents when there was no evidence that parent was obliged to disclose documents to the subsidiary); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 254–56 (D.C. Cir. 2005) (refusing to find the subsidiary had control over the parent corporation's documents as a matter of law); *Playboy Ent. Grp., Inc. v. United States*, No. CIV. A. 96-94-JJF, 1997 WL 873550, at *3–4 (D. Del. Dec. 11, 1997) (denying a motion to compel because the subsidiary did not control the parent corporation's documents).

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

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

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

[34] *Id.*

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

[36] OCC Mem. at 28–30 (stating that the Companies "should be required to provide information that FirstEnergy Corp. and other affiliates possess.").

application of the alter ego doctrine to pierce the corporate veil of the subsidiary."[37] OCC comes nowhere near clearing that high bar, which requires, among other things, that a parent's control "was so complete that the [subsidiary] has no separate mind, will, or existence of its own."[38] Instead, OCC relies primarily on the contentions that the Companies shared an officer with FirstEnergy Corp. and that certain FirstEnergy Service Company employees provided services to the Companies.[39] As Ohio courts expressly recognize, those entirely ordinary facts fall far short of demonstrating the level of control required by Ohio's exacting veil-piercing standard.[40]

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

In short, OCC cannot reasonably argue here either that the Companies should have access to all the documents and communications of their affiliates or that the Companies have somehow used FirstEnergy's corporate structure to "deny access to . . . records."[41] Fundamental precepts of

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

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

[39] *See* OCC Mem. at 28–29.

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

[41] OCC Mem., at 27.

corporate law and Ohio regulation instead require that the legal distinctions between the Companies and their affiliates be respected.

4. OCC Asks the Commission to Exceed Statutory Authority.

Due to the expansiveness of RPD-02-001, OCC is likewise asking the Commission to exceed the scope of its authority and OCC's own jurisdiction. As the Ohio Supreme Court recently recognized, the General Assembly has conferred the Commission with jurisdiction to supervise public utilities when acting as public utilities.[42] FirstEnergy Corp. is not a public utility, and does not charge for or provide utility service. While the Commission may have jurisdiction and general supervisory powers over public utility holding companies and their subsidiaries in narrowly defined circumstances under R.C. 4905.05 and R.C. 4905.06, those circumstances do not apply here.[43] Additionally, FERC's audit involves many utilities in other states—Jersey Central Power & Light, four Pennsylvania utilities, and Potomac Edison in Maryland—that the Commission does not regulate. It follows that OCC's demands implicate the production of information from out-of-state utilities that are subject to the jurisdiction of their respective state's utilities commissions. The Commission should resist OCC's requests, which lack any statutory basis, to compel

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

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

disclosure of information from a confidential federal proceeding involving entities that the Commission does not regulate.

Nor does OCC itself have investigatory powers to pursue the questions it poses,[44] since its authority "is linked to the rights and powers in the context of a party appearing before the Commission in an official proceeding."[45] "[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities"—not to mention FirstEnergy Corp.[46]

To claim it has such authority, OCC argues that under R.C. 4911.02 OCC "shall have the rights and powers of any party and interest appearing before the public utilities commission."[47] This argument carries no weight. R.C. 4911.02(B)(2) does not endow OCC with unlimited power. R.C. 4911.02(B)(2) provides that OCC "may intervene in . . . proceedings in administrative agencies on behalf of the residential consumers," but that it "*shall* have all the rights and powers

[44] *In re Amendment of Certain Rules of the Ohio Administrative Code to Implement Sections 4905.261 and 4911.021, Revised Code*, Case No. 05-1350-AU-ORD, 2006 WL 193640, Opinion and Order and Entry on Rehearing (Jan. 4, 2006) (emphasis added) ("The authority enumerated for OCC is not unlimited; it is linked to rights and powers in the context of a party appearing before the Commission in an official proceeding."); *In the Matter of the Amend. of the Minimum Tel. Serv. Standards As Set Forth in Chapter 4901:1-5 of the Ohio Admin. Code.*, No. 96-1175-TP-ORD, 1997 WL 34878871 (June 26, 1997) ("[T]he General Assembly did not intend or imply that the OCC should monitor or supervise the operations and/or performance of public utilities, only to represent the interest of residential customers in such proceedings before the Commission."); *Tongren v. D&L Gas Mktg., Ltd.*, 149 Ohio App. 3d 508, 511, 2002-Ohio-5006, 778 N.E.2d 76 (10th Dist. 2002).

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

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

[47] OCC Mem., at 14.

of any party in interest appearing before the public utilities commission."[48] OCC's statutory grant of authority does not grant it powers or rights *greater* than those of any other party.[49]

B. RPD-02-002

Turning to RPD-02-002, what remains at issue in this request is either outside the bounds of permissible discovery or moot. Referencing FirstEnergy Corp.'s internal investigation and related government investigations, OCC demands a copy of all "communications with the counterparty" to the consulting agreement (subpart b) and all documents "relating to actions FirstEnergy took to help the individual referenced become appointed to his or her position" (subpart d). These requests are not tailored to seek what is relevant to this proceeding: whether payments pursuant to the consulting agreement impacted rates and should be returned to the Companies' Ohio customers. Indeed, the Companies have already produced to OCC the consulting agreement and its amendment, documents concerning payments made under the consulting agreement, and calculations of the payments' impact, if any, on rates paid by Ohio ratepayers.[50] Yet, despite the Companies' efforts to supplement their discovery and produce documents relevant to this case, OCC continues to exceed the scope of this proceeding by demanding information at issue in the internal investigation conducted by FirstEnergy Corp. and an ongoing criminal proceeding.

Further, subparts (e) and (f), which request documents related to "FirstEnergy's belief" regarding the "true purpose" of the payments, have been rendered moot by the Deferred

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

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

[50] The Companies have likewise recently produced all of their responses to the auditor's requests.

Prosecution Agreement and its accompanying statement of facts (together, the "DPA") filed with the United States District Court for the Southern District of Ohio on July 22, 2021. The purpose of the payments have been disclosed and are explained in the DPA.[51]

Beyond all this, RPD-02-002 subparts (b), (d), (e), and (f) seek information that is not within the Companies' possession, custody, or control, *see* Section II.A.3—as these requests are squarely directed at probing FirstEnergy Corp.'s internal investigation.[52] For all these reasons, OCC's requests should be denied.

C. RPD-02-003

As for RPD-02-003, its remaining subparts—to the extent they properly seek relevant information—are moot because the Companies have already produced responsive documents. RPD-02-003 subpart (b) requests all "documents relating to information that FirstEnergy has provided to third parties outside FirstEnergy regarding" charges to certain vendors. And RPD-02-003 subpart (d) requests all "documents relating to FirstEnergy's efforts to reverse" those charges. To the extent these requests seek documents about the Companies' provision of information to third parties or the Companies' efforts to refund the charges, OCC already has them. The Companies have produced their responses to Staff's initial data requests, and as noted above, their responses to all of the auditor's requests. Not to mention that OCC now also has the final audit report. However, to the extent these requests seek other information from FirstEnergy Corp.

[51] *United States v. FirstEnergy Corp.*, Case No. 1:21-cr-00086, Doc. # 3, at 34–43 (S.D. Ohio July 22, 2021).

[52] The Companies also note that OCC asserts a waiver argument with respect to any documents related to the internal investigation conducted by FirstEnergy Corp. While the Companies do not assert privilege on behalf of FirstEnergy Corp. with respect to its internal investigation, OCC's legal arguments are misplaced in any event. FirstEnergy Corp.'s statements regarding the findings or results of an internal investigation do not waive attorney-client privilege over the evidence, communications, or internal materials of an investigation, nor do they waive the protection provided by the work product doctrine. *See*, *e.g.*, *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983) (finding that a press release that "merely released the findings of the report" compiled by a special committee during an internal investigation did not waive attorney-client privilege or work product protections over the report itself).

regarding what FirstEnergy Corp. has provided to third parties (e.g., other regulators) or what it has done to effectuate refunds outside of Ohio, that information is not relevant, outside of the Companies' possession, custody, or control, *see* Section II.A.3, and outside the permissible statutory bounds of discovery in Commission proceedings, *see* Section II.A.4.

D. INT-03-001

Finally, referencing a payment made under the consulting agreement with the former regulator, OCC in INT-03-001 (d) and (e) demands that the Companies identify "the real purpose of the payment" and "explain how FirstEnergy learned that the real purpose of the payment differed from the purported purpose of the payment." As stated in FirstEnergy Corp.'s public SEC filings, this matter was the subject of an ongoing internal investigation related to government investigations.[53] Subsequently, the filing of the DPA disclosed and explained the purpose of the payments under the consulting agreement, as amended. Probing into an internal investigation conducted by FirstEnergy Corp. related to government investigations is a matter outside the scope of this proceeding and will not lead to the discovery of admissible evidence regarding whether certain payments should be returned to ratepayers, *see* Section II.B. Further, and again, information concerning FirstEnergy Corp.'s internal investigation is not within the Companies' possession, custody, or control, *see* Section II.A.3, nor within the statutory bounds set by Ohio law governing Commission proceedings, *see* Section II.A.4.

[53] *See*, *e.g.*, FirstEnergy Corp. Form 10-K, at 9 (February 18, 2021).

III. CONCLUSION

For all these reasons, the Motion should be denied. The Companies have agreed to respond to some of the requests subject to OCC's Motion, rendering them moot, and certain other requests have been rendered moot by the filing of the DPA. As for the remaining requests, those are all far outside the bounds of permissible discovery.

Dated: September 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on September 2, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
Attorney for the Companies

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