BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

The Attorney Examiners should deny the Request for Certification (the "Request") filed by the Office of the Ohio Consumers' Counsel ("OCC"). OCC's Request seeks certification of an interlocutory appeal from the Attorney Examiners' prehearing conference ruling on August 31, 2021, where the Attorney Examiners denied OCC's motion to compel on RPD-05-001 (as narrowed by OCC), INT-06-003, and RPD-06-008 (hereinafter, collectively referred to as the "FERC requests"). Each of these requests improperly seeks information produced or communicated to the Federal Energy Regulatory Commission ("FERC") as part of FERC's ongoing confidential audit.

For at least two primary reasons, OCC's Request should be denied. *First*, the rulings on OCC's FERC requests do not meet the requirements of an interlocutory appeal under O.A.C. 4901-1-15(B) because the Attorney Examiners' rulings here rest within their broad grant of discretion with respect to discovery. *Second*, the Attorney Examiners correctly ruled that FERC should proceed with its confidential audit without any potential disruptions.[1] OCC's arguments to the contrary are without merit. In particular, OCC improperly raises a new argument—made for the first time in its Request—that production of FERC materials should occur because "a U.S. District Court ordered FirstEnergy Corp. to produce to plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to FERC for the FERC audit."[2] This argument is not only procedurally incorrect but factually incorrect as well.

For the same reasons stated above, OCC's Application for Review should likewise be denied. Further, as part of its Application for Review, OCC argues that its FERC requests are

[1] *See* Case No. 20-1502-EL-UNC, Hr'g Tr., at 36:24–37:2 (Aug. 31, 2021) ("Aug. 31 Hr'g Tr.").

[2] Case No. 20-1502-EL-UNC, OCC Interlocutory Appeal, Request for Certification, and Application for Review, Memorandum in Support, at 3 (Sept. 7, 2021) ("OCC Mem.").

relevant and within the proper scope of discovery. The Attorney Examiners, however, did not rule on these issues, so OCC's arguments are not properly before the Commission in its Application for Review. Even so, OCC's FERC requests remain irrelevant, overbroad, and outside the proper scope of discovery in a Commission proceeding.

II. ARGUMENT

A. OCC Fails to Meet the Requirements of O.A.C. 4901-1-15(B).

Pursuant to Rule 4901-1-15(B), a party may take an interlocutory appeal "from any ruling issued under rule 4901-1-14 of the Administrative Code." But prior to consideration by the Commission, the party's request must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." Rule 4901-1-15(B), O.A.C. Certification of a request for an interlocutory appeal requires an applicant to satisfy both of the following requirements:

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
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> [1] the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and
>
> [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

O.A.C. 4901-1-15(B). [3] Requests for certification that fail to meet ***both*** of these requirements are summarily denied, as OCC's Request should be too.[4]

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[3] *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at ¶ 8 (Oct. 21, 2008) ("In order to certify an interlocutory appeal to the Commission, both requirements need to be met.").

[4] *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018); *In the Matter of the Self Complaint*

1. OCC's Request for Certification Does Not Present a New or Novel Question of Law Nor a Departure From Past Commission Precedent.

At the August 31 hearing, the Attorney Examiners ruled that they would "let FERC proceed with their investigation in a confidential matter" and "allow FERC to continue its investigation without any potential disruptions by the PUCO or people operating under a motion to compel from the PUCO."[5] Further, the Attorney Examiners' ruling was not absolute; the Attorney Examiners stated that "when a public audit is released by FERC, we can revisit this issue at that time."[6] OCC fails to show, as it must, that this conditional ruling raises any new or novel question of law or policy. There is nothing novel about Attorney Examiners exercising their authority to manage and oversee discovery in Commission proceedings. In truth, OCC's Request addresses only the ordinary exercise of an Attorney Examiner's discretion under the Commission's procedural rules. And such certification requests are regularly denied because "implementing the Commission's procedural rules delineated in Chapter 4901-1, O.A.C., are routine matters with which the Commission and its attorney examiners have had extensive experience in Commission proceedings."[7] Thus, as settled Commission precedent illustrates, run-of-the-mill procedural decisions, including those concerning discovery disputes, hardly form the basis for certifying an interlocutory appeal.[8] For example, in *In re Vectren Energy Delivery of Ohio, Inc.*, the attorney

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of Suburban Natural Gas Company Concerning its Existing Tariff Provisions, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012).

[5] Aug. 31 Hr'g Tr. at 18:6-11, 36:23-37:4.

[6] Aug. 31 Hr'g Tr. at 18:9-11; *see also id.* at 37:2-4.

[7] *In the Matter of the Application of P.H. Glatfelter Company for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, p. 3 (Oct. 15, 2009) (denying request for certification of an interlocutory appeal).

[8] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operations of an Integrated Gasification Combined*

examiners denied OCC's certification of an interlocutory appeal, recognizing that "motions to compel discovery . . . and motions for protective orders are . . . routine matters with which the Commission and its examiners have had long experience in Commission proceedings."[9]

OCC likewise fails to show how the Attorney Examiners' ruling is a departure from past precedent. To argue it is, OCC claims that the ruling at issue here is "inconsistent with the PUCO rulings routinely allowing discovery of documents and information that utilities provide to PUCO Staff or independent auditors during the course of the audit."[10] This argument is flawed for many reasons.

Attorney examiners do not, as a matter of law, order the production of responses to Staff data requests in Commission proceedings—especially before the filing of a final audit report.[11] This is a discretionary decision based on the relevance of the audit responses, the timing of discovery, and the scope and procedural contours of a given case.[12] But even if obtaining responses to Ohio Commission Staff audit requests, unqualified and at any time, were the rule, producing responses to Ohio Commission Staff data requests from the same Ohio Commission proceeding is not at all analogous to producing FERC materials from a federal audit, with a

Cycle Electric Generating Facility, Case No. 05-376-EL-UNC, 2005 Ohio PUC LEXIS 234 at *3 (May 10, 2005) (denying request to certify an interlocutory appeal regarding the setting of a procedural schedule); *In the Matter of the Application of Ohio Edison Company, 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, 2010 Ohio PUC LEXIS 1400 at *8-10 (Dec. 22, 2010) (denying request for certification of an interlocutory appeal from a procedural ruling because Commission rules vest Attorney Examiners with discretion "to assure an orderly and expeditious proceeding").

[9] *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry, at 6 (March 7, 2007).

[10] OCC Mem., at 7.

[11] *See*, *e.g.*, Case No. 17-2474-EL-RDR, Entry, ¶ 15 (Nov. 1, 2018) (denying OCC's motion to compel filed before the filing of the final audit report as premature).

[12] *Id.* Even in *In re Columbus Southern Power Co. Rate Case*, Case No. 91-418-EL-AIR, Entry at ¶5 (Aug. 23, 1991), cited by OCC, the attorney examiners considered whether responses to staff's data requests were relevant and whether producing the responses in discovery would be unduly burdensome.

different scope, and involving additional, different entities that are not public utilities operating in the state of Ohio. Also, there are jurisdictional concerns involved with ordering production of FERC materials, *see infra* Section III. Moreover, OCC cites no precedent for its proposition that federal rules and regulations should be interpreted to comport with Ohio Revised Code Section 4901.16. At bottom, federal rules and regulations protect FERC materials from disclosure and discovery, *see supra* II.[13]

Further, OCC cites to no case where the Commission ordered a utility to produce information the utility's holding company communicated to or produced to FERC. So OCC cannot contend that the Attorney Examiners' ruling is a departure from any past precedent.

2. OCC Fails to Show It Is Unduly Prejudiced by the Attorney Examiners' August 31 Rulings.

Protecting the disclosure of confidential FERC materials (which are irrelevant to this proceeding in any event) does not present any undue prejudice nor hamper OCC's ability to obtain relevant information in this proceeding. When taking into account supplemental responses, the Companies have substantively answered over 160 discovery requests, including subparts. OCC's ability to obtain information continues. OCC served its ninth set of discovery on the Companies just last week. Beyond that, the Companies continue to supplement their requests as a result of their Supplemental Response to the Commission's directive to show cause, which they have committed to do by September 17. In addition, the Companies are supplementing their responses to certain of OCC's requests for production of documents as a result of other rulings by the

[13] Materials communicated to or produced to FERC remain confidential even after the filing of the final audit report. However, this is not at issue in OCC's Request, as the Attorney Examiners' in their August 31 ruling deferred ruling on this issue until after the filing of the FERC audit report. *See* Aug. 31 Hr'g Tr. at 18:6-11, 36:23-37:4. At the appropriate time, the Companies will show that FERC materials remain confidential and are protected from disclosure even after the filing of a final audit report.

Attorney Examiners at the same August 31 prehearing conference.[14] So for OCC to state "what little OCC discovery has been answered" as grounds for showing prejudice is incorrect.[15]

OCC argues it is unduly prejudiced by the denial of its motions to compel responses to its FERC-related requests. However, prejudice cannot be "undue" if the information a party seeks is protected from disclosure under law (especially when, like here, a party can obtain relevant information through other means).[16] OCC's argument is akin to stating it would be unduly prejudiced by not receiving information protected by attorney-client privilege. Separately, and setting aside for the moment the confidentiality of the FERC materials, there is no undue prejudice from not receiving irrelevant and overbroad material.[17] Failing to meet O.A.C. 4901-1-15(B)'s two requirements, OCC's Request cannot stand.

B. The Attorney Examiners Correctly Ruled That FERC Materials Are Confidential And OCC's Arguments to the Contrary Are Misplaced or Factually Incorrect.

Federal law establishes that documents connected with an ongoing FERC audit are confidential and thus protected from disclosure.[18]

On February 6, 2019, FERC's Division of Audits and Accounting commenced an audit of FirstEnergy Corp. to evaluate compliance with various accounting, recordkeeping, and reporting requirements from June 1, 2015 until present.[19] The letter, consistent with longstanding FERC

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[14] *See generally* Case No. 20-1502-EL-UNC, Hr'g Tr. (June 30, 2021); Aug. 31 Hr'g Tr.

[15] OCC Mem. at 8.

[16] *See*, *e.g.*, *Lieberman v. Screen Mach. Advert. Specialties & Screen Print Design*, No. 96APE05-665, 1997 WL 52923, at *3 (Ohio Ct. App. Feb. 4, 1997) (overturning trial court's order compelling disclosure of private information protected from disclosure), *see infra* Section II.

[17] *Piatt v. Miller*, 2010-Ohio-1363, ¶ 27 (Ohio Ct. App. 2010) ("A producing party has no duty to respond to discovery to the extent it becomes overbroad" or to "requests that exceed the confines of Civ. R. 26 . . . .").

[18] See 16 U.S.C. § 825(b); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a).

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

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 (2012)."[20] 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."[21] 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 requests therefore threaten to undermine the confidentiality and candor of the audit process here and in future proceedings. If, as OCC suggests, the confidentiality protections of 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 discovery in collateral state regulatory proceedings. And OCC's requests risk

[20] *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).

[21] 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.

undermining the integrity of FERC's current audit by threatening FirstEnergy Corp. with the release of sensitive information it provided to FERC in confidence.[22]

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."[23] 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."[24] Put succinctly, "state action is preempted if it interferes with, or even potentially interferes with, federal authority."[25]

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 (FOIA), which includes an exemption for information that "could reasonably be expected to interfere with enforcement proceedings."[26] For that reason, FOIA requests for materials connected to potential FERC investigations are regularly rejected.[27] It is entirely

[22] 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.

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

[24] *Id.* at 310.

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

[26] 5 U.S.C. § 552(b)(7).

[27] *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).").

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.[28]

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.[29] 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.[30] 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

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

[29] 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.").

[30] *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").

such confidentiality. Thus, while the federal statutes and regulation expressly apply to FERC, they reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission.

It is not as if OCC has identified a particularized need for a specific document that just happens to be one of the records that FirstEnergy 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. To be clear, if a document was provided to FERC, and is also subject to a proper request by OCC, the Companies have produced such documents and have not relied on their production to FERC as a reason such a document should be withheld. Instead, OCC itself has defined the relevant set of documents *solely by reference to the FERC audit*: one request for production asks for FirstEnergy Corp.'s "responses to formal or informal data requests from FERC," "documents provided to FERC Staff associated with site visits," and "transcripts, notes, recordings or other documents pertaining to interviews with the FERC Staff."[31]

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.

[31] RPD-06-008.

This is not the first time a party has tried an end run of this sort. The Supreme Court of Texas's decision in *Eli Lilly & Co. v. Marshall* is instructive.[32] 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.[33] However, FDA regulations provide that the agency must keep confidential the identities of the patient and of the person or institution that reported the adverse reaction.[34] 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."[35] 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."[36] 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."[37] 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."[38]

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[32] 850 S.W.2d 155 (Tex. 1993).

[33] 21 U.S.C. § 355(k)(1).

[34] 21 C.F.R. § 314.430(e)(4).

[35] 850 S.W.2d at 160.

[36] *Id.*

[37] *Id.*

[38] *Id.*

Because the trial court "ordered full disclosure . . . without a showing of particularized relevance and need," the Court vacated the discovery order.[39]

So too here. There is no doubt that protecting the confidentiality of FirstEnergy Corp.'s FERC audit serves a "vital public interest" in promoting disclosure to FERC, which would be "eviscerated as equally by [FirstEnergy Corp.'s] compelled disclosure as by [FERC's] disclosure."[40] And because OCC indiscriminately asks for "full disclosure" of all FERC audit materials "without a showing of particularized relevance and need," the Commission should deny its requests.[41]

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 Corp. will be reported to the public once the audit is complete, and OCC has no warrant to cut the line in the meantime.

OCC's arguments to the contrary are without merit. Citing to 16 U.SC. 825, 42 U.S.C. 16425, and C.F.R. 388.107, OCC makes the same argument for each: "the proper interpretation of the FERC confidentiality laws is that these provisions apply to the release of information by FERC, but not the release of information by a party that has provided information to FERC relating to a FERC audit."[42] As already shown above, however, while the federal statutes and regulation

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] OCC Mem., at 4-5,

expressly apply to FERC, they reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission.

In further support of its argument that the FERC materials at issues are not confidential and protected from disclosure, OCC erroneously relies on a United States District Court opinion from June 14, 2021, in *In re FirstEnergy Corp. Securities Litigation*.[43] To start, this argument is not properly before the Commission in this Request. As acknowledged by OCC, the order it relies upon was issued on June 14—almost three months ago. OCC served a letter request on June 16 to the Attorney Examiners and counsel of record seeking discovery from the securities case in light of the June 14 order. OCC had two opportunities to raise this issue before the Attorney Examiners: (1) in its motions to compel filed on June 29 and (2) in its arguments at the preconference hearing on August 31. OCC did neither, and the Attorney Examiners did not rule on this issue nor did the Companies have an opportunity to the respond this argument. Therefore, OCC's argument is not properly before the Commission.[44]

However, even if the argument had been properly raised previously, the Companies argument would have been the same earlier as it is now: OCC is incorrect that FirstEnergy Corp. was ordered "to produce to plaintiffs (shareholders) in the securities fraud case copies of all documents that FirstEnergy Corp. produced to FERC for the FERC audit."[45] The June 14 order merely lifted the stay of discovery in narrow areas, but did not order the production of any specific documents. FirstEnergy Corp. in the securities case objected to the production of FERC-related materials for the same reasons as the Companies' objected here: documents produced to FERC as

[43] Case No. 2:20-cv-03785, ECF No. 175, Opinion and Order, at 6 (S.D. Ohio June 4, 2021).

[44] *Corrigan v. Illuminating Co.*, 2017-Ohio-7555, 151 Ohio St. 3d 85, 88, 86 N.E.3d 287, 291 (finding new arguments not raised in opening brief waived).

[45] OCC Mem., at 5.

part of its ongoing audit are and remain confidential under federal law. To be clear, FirstEnergy Corp. has not produced FERC-related materials to the plaintiffs in the securities case.

III. OCC's Application for Review Should Be Rejected

OCC's Application for Review should be rejected for all the reasons stated above, which the Companies fully incorporate herein.

Additionally, as part of its Application for Review, and scattered throughout its Request, OCC argues that its FERC requests seek relevant information within the permissible scope of discovery—including the jurisdictional bounds of Commission proceedings.[46] However, this argument is not properly before the Commission. The Attorney Examiners issued no ruling with respect to the relevance of OCC's FERC requests, nor any jurisdictional issues (though the Companies maintain the FERC requests are irrelevant and outside the permissible bounds of discovery). Accordingly, there was no "ruling" on these issues, and an interlocutory appeal may be taken only from a "ruling" issued under Rule 4901-1-14. A "ruling" means "an official or authoritative, decision, decree, statement, or interpretation (as by a judge on a point of law)."[47] The Attorney Examiners simply have not yet decided these issues, and OCC therefore has no basis to raise any relevance or jurisdictional arguments in its Request or Application for Review. Indeed, the Attorney Examiners expressly deferred ruling on the remaining issues, and stated that they would "revisit this issue" upon the filing of the final FERC audit report.[48]

Regardless, OCC's FERC requests seek information not relevant to this proceeding and outside the jurisdictional bounds of a Commission proceeding. As to relevance, OCC's FERC

[46] OCC Mem., at 8, 9-11, 13-14.

[47] Merriam-Webster Dictionary (online), available at https://www.merriam-webster.com/dictionary/ruling (accessed Dec. 17, 2020).

[48] Aug. 31 Hr'g Tr. at 18:9-11; *see also id.* at 37:2-4.

requests are not tailored to any issue regarding the Companies' political and charitable spending. FERC's audit concerns FirstEnergy Corp.'s compliance with FERC rules, not the Companies' compliance with Ohio law or Commission regulations. It follows that OCC's request for wholesale and broad-reaching discovery of FERC's audit falls squarely beyond the scope of the Commission's review here.

As to jurisdictional problems, OCC's FERC requests ask the Commission to exceed the scope of its authority. 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.[49] 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.[50] Nor do the other statutes and regulations OCC cite (R.C. 4909.154 and O.A.C. 4901-1-12) change the equation.[51] Additionally,

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

[50] 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).

[51] R.C. 4909.154 applies to regulated public utilities when fixing base distribution rates for utility service under R.C. 4909.15. It does not apply to FirstEnergy Corp., which is not a regulated public utility and does not provide utility service, and it does not apply to the Companies unless they have filed an application to increase their base distribution rates. *See, e.g.*, *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in Chapter 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI, Entry on Rehearing at p. 16 (June 20, 2002) ("Section 4909.154, Revised Code, clearly applies to a rate case"); *In the Matter of the Application of the City of Cleveland for the Initiation*

FERC's audit involves many utilities in other states—including Jersey Central Power & Light, four Pennsylvania distribution utilities, and Potomac Edison in Maryland—that the Commission does not regulate. It follows that OCC's demands implicate the production of information from out of-state utilities that are subject to the jurisdiction of their respective state's utilities commissions. The Commission should resist OCC's requests, which lack any statutory basis, to compel disclosure of information from a confidential federal proceeding involving entities that the Commission does not regulate.

Finally, with regards to OCC's argument that it was unreasonable for the Attorney Examiner to decide to "reconsider" his ruling after the FERC audit was completed, the Companies incorporate their arguments from Section II above. There simply is no undue prejudice by protecting the disclosure of confidential FERC materials that OCC has failed to show are relevant to this proceeding or within the permissible bounds of discovery. OCC's discovery rights are not being hampered in this case. The Companies continue to supplement their responses and respond to additional discovery requests recently received from OCC.

IV. CONCLUSION

OCC's Request should be denied for the reasons provided above.

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of an Investigation and/or Rulemaking Proceeding to Implement Amended Section 4909.154, Revised Code, Case No. 83-790-AU-UNC, 1987 WL 1466574 at *1, Entry (Feb. 10, 1987) (finding that R.C. 4909.154 "refers to the Commission's consideration during a rate case proceeding of the management policies, practices, and organization of a public utility*"); In the Matter of the Complaint of Randustrial Corporation v. The Ohio Bell Telephone Co.*, Case No. 82-921-TP-CSS, et al., 1984 WL 992121 at *13, Attorney Examiner's Report (June 25, 1984) ("it is clear that the grant of authority [in R.C. 4909.154] given to allow the Commission to review management policies and practices of a utility is therein restricted to rate proceedings."). OCC does not explain how O.A.C. 4901-1-12 is relevant to its jurisdictional arguments. In any event, O.A.C. 4901-1-12 governs motions practice in Commission proceedings.

Dated: September 13, 2021

Respectfully submitted,

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On behalf of the Companies

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 13, 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 Request Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review electronically filed by Ryan A. Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company