

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 17-974-EL-UNC
Edison Company's Compliance with)	
R.C. 4928.17 and Ohio Adm. Code)	
Chapter 4901:1-37.)	

**EBONY YEBOAH-AMANKWAH'S MOTION TO QUASH
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SUBPOENA**

Pursuant to Ohio Administrative Code ("O.A.C.") 4901-1-25(C), Ebony Yeboah-Amankwah moves the Commission for an order quashing a subpoena from the Office of the Ohio Consumers' Counsel's ("OCC"), served February 12, 2022 (the "Subpoena"). As more fully explained in the accompanying Memorandum in Support, the Subpoena is unreasonable, untimely, and unjustly seeks to impose extraordinary burdens on nonparty Ms. Yeboah-Amankwah.

Dated: March 7, 2022

Respectfully submitted,

/s/ Marcella L. Lape

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**EBONY YEBOAH-AMANKWAH'S MEMORANDUM IN SUPPORT OF MOTION TO
QUASH THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SUBPOENA**

I. INTRODUCTION

The OCC belatedly and improperly attempts to obtain discovery related to FirstEnergy's Ohio corporate separation policies by seeking to compel nonparty Ebony Yeboah-Amankwah, a former officer of FirstEnergy Service Corp., to appear for an oral deposition and produce numerous categories of documents that the OCC itself has acknowledged are the property of FirstEnergy, *not* of Ms. Yeboah-Amankwah. These documents include, for example, "all records" (1) "containing processes and procedures that FirstEnergy Ohio utilities used pertaining to Ohio corporate separation requirements during 2016 through 2020," (2) "pertaining to training undertaken with respect to FirstEnergy Ohio utilities' corporate separation compliance from 2016 through 2020," and (3) "pertaining to FirstEnergy Ohio Utilities' day-to-day compliance with Ohio's corporate separation rules and law."¹

To justify its requests, the OCC points to statements that Daymark Energy Advisors ("Daymark") made in its audit report on the FirstEnergy Operating Companies' compliance with the Ohio corporate separation rules—a report that was issued and filed in this case on September

¹ See Ex. A at 1.

13, 2021 (the “Audit Report” or “Report”). Specifically, Daymark noted that it “could not get access to records of the [FirstEnergy] compliance officer in place during the audit period [2016 through 2020] since that person had been separated from the company prior to the start of the audit” and remarked that “[a]ssociated records were not identified per our legal support, and back up personnel to that position were either also separated or there were none.”² Daymark further commented that as a result of FirstEnergy having several vacant positions related to compliance monitoring during the audit, including the Chief Ethics Officer role, which had ultimate responsibility for corporate separation compliance, “FirstEnergy staff mentioned that . . . they are not able to locate systems and processes in place for compliance monitoring and tracking.”³

For months following the publication of the Audit Report, the OCC criticized Daymark’s failure to explain why FirstEnergy could not provide the requested records and what was done to look for them. In a November 22, 2021 filing, for example, the OCC asserted that “Daymark fails to explain (but should have explained) why [FirstEnergy’s] records were missing.”⁴ The OCC also properly recognized that the Ohio corporate separation documents are the “property of FirstEnergy,” *not* of Ms. Yeboah-Amankwah. The OCC wrote: “Oddly, Daymark failed to adequately explain (but should have explained) why the termination of FirstEnergy’s compliance officer resulted in the lack of access to records **that are the property of FirstEnergy, not the former employee.**”⁵

² *Id.* at 1-2.

³ *Id.* at 32.

⁴ *See* Initial Comments on Protecting Consumers From Improper Charges Under FirstEnergy’s Corporate Separation filed by OCC (“Initial Comments”) (filed Nov. 22, 2021), at 7.

⁵ *Id.* at 7 (bold emphasis added; italics in original); *see also* Reply Comments on Protecting Consumers From Improper Charges Under FirstEnergy’s Corporate Separation filed by OCC (“Reply Comments”) (Dec. 13, 2021), at 3 (stating that Daymark “simply stated that the records were missing but provided no additional

Yet the OCC never sought to subpoena FirstEnergy for the corporate separation records, nor did it seek information regarding what FirstEnergy did to look for the records. Instead, the OCC waited nearly five months, allowed discovery in this Action to close,⁶ and only then filed a Motion for a Subpoena Duces Tecum to be issued to Ms. Yeboah-Amankwah. Simultaneously, the OCC also filed a Motion for a Subpoena Duces Tecum for FirstEnergy Vice President and Chief Ethics and Compliance Officer Antonio Fernandez, in which the OCC asks that Mr. Fernandez be compelled to attend and give testimony at a deposition and produce documents regarding the *same* subjects as Ms. Yeboah-Amankwah (the “Fernandez Subpoena”).⁷ And then just two weeks later, on February 22, 2022, the OCC filed yet another motion for a subpoena duces tecum—this time to compel Jason Lisowski, FirstEnergy Corp.’s Vice President, Controller & Chief Accounting Officer, to attend and give testimony at a deposition and produce documents related to FirstEnergy’s compliance with FERC corporate separation regulations (the “Lisowski Subpoena”).

The Commission should quash the Subpoena for at least the following five reasons: ***First***, the OCC demands information and documents outside of Ms. Yeboah-Amankwah’s custody, possession, or control. As a former employee who was required to return all records at the time of her separation, Ms. Yeboah-Amankwah does not have the information or documents concerning corporate separation that the OCC is seeking. ***Second***, the OCC fails to make any showing that it first sought this information from Ms. Yeboah-Amankwah’s former employer,

background information” and arguing that the Commission should investigate “what efforts FirstEnergy made to search for the records”).

⁶ See October 12, 2021 Entry at ¶ 24a (“The deadline for the service of discovery, except for notices of deposition, shall be set for November 24, 2021.”)

⁷ Compare Ex. A at 1-2 to Fernandez Subpoena (attached as Ex. B) at 1-2.

FirstEnergy Service Company (“FirstEnergy”) or any of its affiliates, including the entities at issue under this Action and regulated by the Commission: Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”). Moreover, the OCC appears to be seeking simultaneously the same information from other sources who remain affiliated with FirstEnergy and have access to the requested information. **Third**, it would be unduly burdensome and futile to require Ms. Yeboah-Amankwah to appear for a deposition and be forced to testify about topics without having the ability to review any relevant materials and refresh her recollection. **Fourth**, the Subpoena, in part, seeks information on topics that are irrelevant to the scope of this Action and unrelated to the Companies—something that is especially concerning here given that Ms. Yeboah-Amankwah served as the Deputy General Counsel and General Counsel of FirstEnergy during the applicable time period and sensitive privilege issues may arise. And **fifth**, the OCC’s pursuit of this Subpoena is untimely—discovery is closed in this Action, and the OCC has had Daymark’s Audit Report since September of last year. Accordingly, and as explained in full below, the Commission should grant Ms. Yeboah-Amankwah’s Motion to Quash OCC’s subpoena in its entirety.⁸

⁸ Counsel for Ms. Yeboah-Amankwah has engaged in good-faith discussions with counsel for the OCC regarding the Subpoena, including by raising the issues discussed herein. Ultimately, however, the OCC declined to withdraw its demands that Ms. Yeboah-Amankwah produce documents and sit for a deposition regarding the topics outlined in the Subpoena. As a result, Ms. Yeboah-Amankwah was forced to file this Motion to Quash.

II. ARGUMENT

A. The Commission Should Quash the Subpoena Because It Is Unreasonable and Oppressive.

The Commission should quash the Subpoena under Rule 4901-1-25, O.A.C., because it is both unreasonable and oppressive.⁹ As an initial matter, the OCC plainly seeks information from Ms. Yeboah-Amankwah—a nonparty—that is outside of her possession, custody, and control.¹⁰ As the OCC has recognized, the documents that it seeks through the Subpoena are “the property of FirstEnergy, *not* [of Ms. Yeboah-Amankwah].”¹¹ Moreover, pursuant to FirstEnergy’s policies, Ms. Yeboah-Amankwah returned to the company all FirstEnergy documents in her personal possession at the time of her separation on November 8, 2020. Today, the only FirstEnergy-related documents that Ms. Yeboah-Amankwah has in her possession are those documents that she received from FirstEnergy in connection with discovery requests in the pending derivative litigation related to HB-6. Even assuming that there are corporate separation documents responsive to the Subpoena within those productions—a fact that Ms. Yeboah-Amankwah has no reason to believe to be true—the documents are subject to a protective order and are more properly sought from FirstEnergy itself. Accordingly, the OCC’s request that Ms. Yeboah-Amankwah produce numerous categories of documents and records related to FirstEnergy’s corporate separation compliance is futile and unreasonable. She should not be forced to produce information she does not control.

⁹ Ohio Adm. Code § 4901-1-25(C) (“The commission . . . may quash a subpoena if it is unreasonable or oppressive.”).

¹⁰ See Ohio Civ. R. 45(A)(1)(b)(iv) (noting that a subpoena can require a person to produce documents “that are in the possession, custody or control *of the person*”) (emphasis added).

¹¹ Initial Comments at 3.

In addition, without the benefit of access to any documents to refresh her memory, Ms. Yeboah-Amankwah would be unable to provide non-speculative deposition testimony about corporate separation issues from years past. Nor has the OCC explained why it failed to first seek information from FirstEnergy about its own corporate separation policies. Skipping this step makes no sense.¹² If the OCC seeks materials related to FirstEnergy’s policies and procedures, it needs to go to FirstEnergy, not to a former employee who lacks access to company documents.¹³

The OCC itself appears to realize that there are other, more appropriate avenues for obtaining the information it seeks. That is why the OCC simultaneously sought the Fernandez Subpoena and, subsequently, the Lisowski Subpoena. Counsel also understands that the OCC is currently coordinating with counsel for the FirstEnergy Ohio utilities to facilitate depositions of other individuals affiliated with FirstEnergy who actually possess the information at issue.¹⁴ The OCC should not be permitted to subject numerous nonparties to depositions *before* determining which one is actually likely to possess relevant information.

The absurdity of serving Ms. Yeboah-Amankwah this Subpoena without first attempting to seek documents and testimony from FirstEnergy is exemplified by the fact that one of the categories of documents the OCC seeks is “[a]ll records containing inquiries by FirstEnergy

¹² The OCC recently noted in this proceeding that it “has received approximately 233,000 pages of documents from FirstEnergy Corp. in the last month, and more will be provided on a rolling basis.” Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers’ Counsel and Northeast Ohio Public Energy Council (January 14, 2022). Nonetheless, it makes no attempt to show that any of the information it now seeks was missing from the voluminous productions FirstEnergy Corp. provided.

¹³ *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 756 (1st Dist. 2007) (“Civ.R. 45 provides that when a nonparty moves to quash a subpoena on the ground that it imposes an undue burden, the party seeking the discovery must demonstrate a substantial need for the materials that cannot be met through alternate means.”)

¹⁴ See Case No. 17-974-EL-UNC, Motion to Quash the Office of the Ohio Consumers’ Counsel’s Subpoena Duces Tecum for FirstEnergy Vice President and Chief Ethics and Compliance Officer, at 6 (February 28, 2021).

entities into the information that PUCO auditor Daymark stated (in its audit report) was missing and not available for Daymark's auditing."¹⁵ Ms. Yeboah-Amankwah, who separated from her former employer *before* Daymark's audit began, does not possess any knowledge let alone documents about these issues. Accordingly, to the extent the OCC is permitted to continue its efforts to belatedly seek discovery in this Action, it should be required to do so as against FirstEnergy only. Ms. Yeboah-Amankwah should not be forced to seek leave from her employment to appear at a deposition and provide speculative testimony.¹⁶

B. The OCC's Subpoena, in Part, Seeks Information Outside the Scope of This Proceeding.

The Subpoena is also improper because it seeks broad information from a former officer of FirstEnergy Service Corp., an entity outside the Commission's statutory jurisdiction, and, in part, related to topics that are outside the subject matter of this proceeding.¹⁷ Ohio Revised Code Section 4905.05 defines the Commission's jurisdiction as extending primarily to public utilities operating in Ohio as defined in R.C. 4905.03. And as the Ohio Supreme Court recently reaffirmed, the Commission's statutory mandate is to regulate and supervise a *public utility* when it "act[s] as a *public utility*." Unlike the Companies, Ms. Yeboah-Amankwah's former employer FirstEnergy Service Corp. is not a public utility. Thus, as the Hearing Examiner previously stated in this case, the OCC does not "have broad rights of discovery vis-a-vis the unrelated

¹⁵ See Ex. A at 1.

¹⁶ See, e.g., *In the Matter of the Complaint of the Ohio Consumers' Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, 2011 Ohio PUC LEXIS 1202, Entry at *4-5 (Nov. 2, 2011) (granting motion to quash because subpoena was unreasonable); *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., v. Palmer Energy Company*, Case No. 10-693-EL-CSS, 2011 Ohio PUC LEXIS 406, Entry at *6 (Mar. 30, 2011) (granting motion to quash)

¹⁷ See Ohio Adm. Code 4901-1-16(B).

FirstEnergy Corp. and FirstEnergy Service Corp”—entities that the Commission does not regulate.¹⁸ Nor does it have broad rights of discovery vis-a-vis their former employees.

Yet the OCC’s Subpoena makes clear that the OCC is seeking information outside the substantive scope of this case. As justification for the Subpoena, the OCC argues that the PUCO staff “appallingly” limited Daymark’s audit to “exclude investigation of FirstEnergy’s House Bill 6 activities.”¹⁹ But as the Commission recently noted, “these same arguments were raised by OCC in its application for rehearing filed on December 4, 2020. The Commission considered, and rejected, those arguments.”²⁰

The OCC also includes in its Subpoena a request for “[a]ll records explaining, documenting and/or referencing the statement in an email from Ms. Yeboah-Amankwah about paying Lincoln Electric, including any opinion that she held with regard to making the payment.”²¹ Yet the OCC provides no context or explanation in the motion for subpoena for why it requests information about “any opinion” Ms. Yeboah-Amankwah (an attorney) may recall from 2015—seven years ago—about a single payment that the referenced email indicates was in connection with a settlement agreement. Nor does the OCC offer any basis to conclude that the payment is in any way relevant to the corporate separation requirements. Indeed, it appears that

¹⁸ See Case No. 17-974-EL-UNC, Hr’g Tr., at 25:6-11 (September 30, 2021); *see also* Case No. 20-1502-EL-UNC, Hr’g Tr., 18:20-19:10, 23:14-18 (June 30, 2021) (limiting production to information about the Companies).

¹⁹ Case No. 17-974-EL-UNC, Motion for a Subpoena Duces Tecum Memorandum in Support for FirstEnergy’s Former Chief Ethics Officer Ebony Yeboah-Amankwah, at 4-7 (February 7, 2022).

²⁰ Case No. 17-974-EL-UNC, Entry, at 8 ¶ 27 (February 10, 2022).

²¹ Ex. A at 2.

the OCC has included this request on the sole basis that the email refers to open items related to Sam Randazzo.²²

The OCC cannot be permitted to use the Subpoena as an attempt to push at the margins in order to investigate entities and topics it believes *should* be a focus. The only appropriate topic for discovery in this case is compliance with corporate separation requirements under Ohio law.²³ Any attempt to seek information from Ms. Yeboah-Amankwah related to any other topic, including HB6 or Sam Randazzo, would be beyond the permitted scope of discovery and amount to a speculative “fishing expedition” that must be prohibited.²⁴ The Commission has quashed subpoenas for this reason in similar circumstances.²⁵ Allowing the Commission the ability to seek broad deposition testimony would additionally likely create a host of complicated privilege issues as Ms. Yeboah-Amankwah served as the Deputy General Counsel and General Counsel during the applicable time period. For this reason too, the Commission should grant the Motion to Quash.

²² Ex. A at 3.

²³ See Case No. 17-974-EL-UNC, Hr’g Tr., at 26:22-27:1 (January 4, 2022) (“The proceeding is about FirstEnergy’s compliance with the corporate separation requirements contained in Ohio 25 Revised Code 4928.17 and the appropriate Ohio Administrative Code Chapter.”).

²⁴ *Martin v. Budd*, 128 Ohio App. 3d 115, 120 (9th Dist. 1998) (stating that “discovery proceedings may not be used to conduct a mere fishing expedition” and holding that trial court’s failure to grant a motion to quash a subpoena duces tecum was an abuse of discretion because the subpoena created an undue burden and the subpoenaing party failed to show a substantial need for the requested information). See also Ohio Adm. Code 4901-1-16(B) (subject to certain inapplicable exceptions, “any party to a commission proceeding may obtain discovery of any matter, not privileged, *which is relevant to the subject matter of the proceeding*”) (emphasis added).

²⁵ See *In the Matter of the Complaint of Jane Ann Bidwell, v. Ohio Power Company*, Case No. 15-1020-EL-CSS, 2016 Ohio PUC LEXIS 475, Entry at *5 (May 19, 2016) (granting motion to quash where there was a failure to “show the party at issue could offer any evidence of probative value relating to any material issue in this case”); *Buckeye*, 2011 Ohio PUC LEXIS 406, Entry at *5-6 (granting motion to quash where requested documents went “beyond the scope of the prior discovery”).

C. The OCC's Subpoena is Untimely.

Finally, the OCC's subpoena is procedurally improper. As set forth by the Commission, the operative "deadline for the service of discovery, except for notices of deposition," was "November 24, 2021,"²⁶ a deadline that passed months ago. And clearly established Commission precedent holds that a party may not evade a discovery deadline by later requesting documents through the deposition process.²⁷ The OCC's subpoena is therefore improper.

While the OCC has challenged various procedural deadlines in this case, it has never challenged this discovery deadline or attempted to make a showing of good cause that would support an extension of the discovery period.²⁸ Moreover, the OCC has had access to the Audit Report in this case—and any statement in it that purportedly motivates this Subpoena—since it was filed on September 13, 2021. The OCC had the opportunity to request information related to statements in the Report before the close of discovery, but it chose not to do so. It cannot now attempt to seek that information months after the deadline by issuing a nonparty subpoena. That the OCC devotes the bulk of its motion for subpoena to repeating arguments it has previously made about allegedly improper audit exclusions only underscores its improper delay. For this reason too, the Subpoena should be quashed.

²⁶ Case No. 17-974-EL-UNC, Entry (October 12, 2021).

²⁷ See *Buckeye*, 2011 Ohio PUC LEXIS 406, Entry at *5-6 (granting motion to quash with respect to accompanying document requests since the document requests sought new discovery and exceeded the previously established deadlines).

²⁸ Ohio Adm. Code 4901-1-17 provides that "the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery . . . upon motion of any party *for good cause shown*." See also Case No. 17-974-EL-UNC, Entry (February 10, 2022) (noting that OCC sought an interlocutory appeal of the Commission's ruling extending certain procedural deadlines (but not the discovery deadline, which had already passed), and further observing that at the January 4, 2022 prehearing conference "Counsel for OCC duly reported on the status of the production of documents by FirstEnergy Corp. in response to a subpoena requested by OCC," but did not "object[] to the new procedural schedule").

III. CONCLUSION

As set forth above, the OCC's Subpoena is untimely and seeks information from the wrong place. Not only are the document requests futile as the information sought is outside of Ms. Yeboah-Amankwah's possession, custody, or control, but it would be unreasonable and unduly burdensome to require Ms. Yeboah-Amankwah to sit for a deposition when the OCC could have and should have sought the requested information from FirstEnergy. It is also clear both from the OCC's motion for subpoena and the list of requested document topics that the OCC does not intend to limit its questioning to the issues relevant to this proceeding—FirstEnergy's corporate separation compliance. Accordingly, for all of these reasons, any one of which alone is sufficient, the Commission should quash the Subpoena in its entirety.

Dated: March 7, 2022

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 March 7, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Marcella L. Lape _____
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Case No(s). 17-0974-EL-UNC

Summary: Motion Ebony Yeboah-Amankwah's Motion to Quash The Office of the Ohio Consumers' Counsel's Subpoena electronically filed by Ms. Marcella Lape on behalf of Ms. Ebony Yeboah-Amankwah