

**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.)**

**MOTION TO QUASH THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
SUBPOENA DIRECTED TO JASON LISOWSKI**

Pursuant to Ohio Administrative Code (“O.A.C.”) 4901-1-25(C), FirstEnergy Corp. moves the Commission for an order quashing the subpoena directed to its Vice President, Controller and Chief Accounting Officer Jason Lisowski, filed by the Office of the Ohio Consumers’ Counsel (“OCC”) on February 22, 2022.¹ OCC’s subpoena to Mr. Lisowski—its second attempt in less than three weeks to side-step the procedural schedule laid out by this Commission²—should be quashed as improper. First, OCC has no special need to depose Mr. Lisowski. As previously briefed, FirstEnergy Corp. and the FirstEnergy Ohio utilities³ are already working with OCC to facilitate the deposition of the person most knowledgeable about topics relevant to this proceeding.⁴ Second, document discovery in this proceeding is closed; OCC’s overbroad subpoena to a non-party constitutes yet another effort to demand documents it previously failed to

¹ OCC’s subpoena (“OCC Sub.”) is attached to its Motion for a Subpoena Duces Tecum for FirstEnergy Corp.’s Vice President, Controller & Chief Accounting Officer Jason Lisowski and Memorandum in Support (“OCC Mot.” or “OCC Mem.”).

² 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 (Feb. 28, 2022).

³ All references to the “FirstEnergy Ohio utilities” are meant to refer to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, collectively.

⁴ 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 (Feb. 28, 2022) at 2, 6.

request. Third, OCC's *twenty-three* document requests are neither relevant to corporate separation matters nor reasonably calculated to lead to the discovery of admissible evidence. Accordingly, FirstEnergy Corp. respectfully requests that the Commission grant this Motion to Quash.

Dated: March 10, 2022

Respectfully submitted,

/s/ Corey A. Lee

Corey Lee (0099866)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
calee@jonesday.com

On behalf of FirstEnergy Corp.

**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.)**

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S SUBPOENA
DIRECTED TO JASON LISOWSKI**

TABLE OF CONTENTS

I.	INTRODUCTION	- 2 -
II.	APPLICABLE LAW	- 3 -
III.	ARGUMENT	- 5 -
A.	OCC Cannot Show A “Substantial Need” For The Subpoenaed Discovery.	- 5 -
B.	OCC Seeks To Improperly Circumvent The Procedural Schedule.....	- 7 -
C.	OCC’S Document Requests Are Irrelevant.	- 10 -
IV.	CONCLUSION.....	- 13 -

I. INTRODUCTION

In addition to seeking the deposition of Mr. Lisowski—who has no responsibility for the FirstEnergy Ohio utilities’ corporate separation compliance—OCC requests twenty-three broad categories of documents covering everything from accounting detail related to former FirstEnergy Corp. subsidiaries to all discovery served “to persons engaged in legal actions against FirstEnergy that involve FirstEnergy’s House Bill 6 activities and relationship with former PUCO Chair Sam Randazzo.”⁵ Not only is OCC’s untimely and overly broad subpoena duplicative of the dozens of requests it has served in this and other proceedings before the Commission, but it invades the province of ongoing investigations conducted by FERC and the SEC. Indeed, OCC continues to request FERC materials even though their prior requests for these materials remain the subject of dispute in a separate proceeding before the Commission.⁶

Thus, OCC’s subpoena is improper and should be quashed for several reasons. **First**, OCC cannot show it has a substantial need for the extensive discovery it seeks, particularly where any need is significantly outweighed by the burden placed on Mr. Lisowski (who has no special knowledge of corporate separation matters) and FirstEnergy Corp. (who is a non-party to these proceedings).

Second, OCC’s request for documents is untimely. Though document discovery in this proceeding closed several months ago, OCC demands the production of *twenty-three* broad categories of documents from a non-party within *eleven* business days of service of its subpoena. In doing so, OCC improperly seeks to circumvent the Attorney Examiners’ discovery orders.

⁵ OCC Sub. at 1-4.

⁶ See *supra* at Section III.C.

Third, OCC's document requests are irrelevant to the corporate separation matters at-issue in this proceeding. OCC makes no showing that its expansive requests for all documents produced to FERC, the SEC, this Commission, or any litigant in any proceeding involving FirstEnergy Corp. are relevant to the FirstEnergy Ohio utilities' compliance with Ohio's corporate separation rules. OCC's continuing efforts to collapse independent Commission proceedings against the FirstEnergy Ohio utilities into an inquisition of FirstEnergy Corp. should be stopped.

For these reasons and those explained below, the Commission should grant FirstEnergy Corp.'s Motion to Quash OCC's subpoena in its entirety.

II. APPLICABLE LAW

Under O.A.C. Rule 4901-1-25, the Commission may quash a subpoena "if it is unreasonable or oppressive."⁷ For a subpoena to be valid, it must "designate with reasonable particularity the matter on which examination is requested"⁸ and be "within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code."⁹ O.A.C. Rule 4901-1-16, limits the scope of discovery to non-privileged matters that are "relevant to the subject matter of the proceeding" or reasonably calculated to lead to the discovery of admissible evidence.¹⁰ Ohio Civil Rule 26 similarly limits discovery to relevant, non-privileged matters and requires that all requests be "proportional to the needs of the case."¹¹

In the case of a subpoena to a non-party, the party seeking discovery must make a showing of "substantial need" for the non-privileged information sought.¹² Ohio Civ. R. 45(C) "provide[s]

⁷ Ohio Adm. Code 4901-1-25(C).

⁸ Ohio Adm. Code 4901-1-21(F).

⁹ Ohio Adm. Code 4901-1-25.

¹⁰ Ohio Adm. Code 4901-1-16(B).

¹¹ Ohio Civ. R. 26(B)(1).

¹² See *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 2007-Ohio-309, 869 N.E.2d 39, ¶¶ 17-18 (1st Dist.).

protection for nonparties;” where 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.”¹³ “The rule further provides that the court shall quash the subpoena unless the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship.”¹⁴ Well-settled Commission precedent is consistent with this Ohio case law. Accordingly, the Commission quashes subpoenas that are overbroad, unduly burdensome, or otherwise unreasonable.¹⁵

¹³ *Id.* at ¶¶ 18, 19.

¹⁴ *Id.* at ¶ 18 (internal quotations omitted). *See also Kaplan v. Tuennerman-Kaplan*, 9th Dist. Wayne No. 11CA0011, 2012 WL 256562, at *4 (Jan. 30, 2012) (affirming the trial court’s decision to grant a motion to quash because the appellant failed to show substantial need for the discovery sought); *Martin v. Budd*, 128 Ohio App. 3d 115, 120 (9th Dist. 1998) (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); *Eitel v. Eitel*, 4th Dist. Pickaway No. 95CA11, 1996 WL 482703 at *4-6 (Aug. 23, 1996) (affirming trial court’s decision to quash subpoenas that were unreasonable, oppressive, and unduly burdensome, and for failure of subpoenaing party to show substantial need).

¹⁵ *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); *see also In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110, Opinion, Order, and Certificate at *19-20 (May 28, 2013) (quashing “extraordinarily overbroad” subpoenas directed at nonparties, finding there was no showing by the subpoenaing party as to how it would suffer an “undue hardship” in the absence of the subpoenaed information and holding “it would be unreasonable to force a nonparty to expend its time and resources toward a request that is unlimited in scope”). While *Champaign Wind* is a decision from the Power Siting Board, the Board follows the same procedures as the Commission. *See* R.C. 4906.12 (“Procedures of the public utilities commission to be followed: Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906 of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.”); *In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415, Entry at *5-13 (April 4, 2011) (denying in part motion to compel where respondent had already provided responses to several discovery requests at issue and the requests otherwise sought irrelevant information); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554, Entry at *2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, “not imperative in a final determination of [the] matter,” overly broad, and because the respondent had already responded to several of the discovery requests at issue).

III. ARGUMENT

A. OCC Cannot Show A “Substantial Need” For The Subpoenaed Discovery.

For its subpoena to stand, OCC must demonstrate it has a substantial need for the information sought. Beyond the untimely and irrelevant nature of OCC’s requests, *see infra* Sections III B.-C., OCC cannot show its unreasonable and oppressive subpoena for testimony and documents can be answered without undue hardship.

With respect to testimony, OCC seeks to cross-examine Mr. Lisowski on issues “concerning the February 4, 2022 Draft¹⁶ Audit Report of the Federal Energy Regulatory Commission’s Office of Enforcement, Division of Audits and Accounting,” as well as “FirstEnergy’s response to the FERC Draft Audit Report.”¹⁷ Mr. Lisowski’s deposition, OCC asserts, “is crucial to understand whether and to what extent FirstEnergy is complying with FERC’s rules and regulations on corporate separation.”¹⁸

But Mr. Lisowski has no special knowledge of the FirstEnergy Ohio utilities’ compliance with corporate separation matters under O.A.C. Rule 4901:1-37-05(B)(11). While Mr. Lisowski serves both as Controller and Chief Accounting Officer of FirstEnergy Corp. and as an Officer of Ohio Edison Company, he is not responsible for the FirstEnergy Ohio utilities’ corporate separation plan. In either role, Mr. Lisowski’s focus is whether FirstEnergy Corp. and its subsidiaries maintain an adequate system of accounting for financial reporting, including the Company’s regulatory accounting system. Financial reporting obligations, are entirely distinct from the FirstEnergy Ohio utilities’ implementation of or operation under a corporate separation

¹⁶ OCC seeks to cross-examine Mr. Lisowski on the “Draft” FERC Audit Report issued February 4, 2022; no “Draft” report was issued on that date. The final FERC Audit Report was.

¹⁷ OCC Mot. at 1.

¹⁸ OCC Mot. at 2.

plan that “‘satisfies the public interest’ and is ‘sufficient’ to protect Ohioans from undue preference or advantage being given to the utilities’ affiliate(s).”¹⁹ And OCC is working with counsel for the Companies, the parties in this action, to facilitate the deposition of the compliance officer who is responsible for the FirstEnergy Ohio utilities’ compliance with corporate separation rules.²⁰ Because there is no indication that Mr. Lisowski “had any involvement in or knowledge of the events surrounding this . . . proceeding,” and OCC can obtain the testimony it seeks through less burdensome alternative means, its subpoena should be quashed.²¹

OCC’s twenty-three document requests are likewise unduly burdensome and unreasonable. As an initial matter, OCC is already in possession of many of the categories of documents sought. For example, OCC requests with respect to lobbying costs²² have been disclosed for months in productions in Case No. 20-1502-EL-UNC and Case No. 20-1629-EL-RDR. The same is true of documents produced to the SEC or this Commission, which included documents related to Sustainability Funding Alliance and former Commission Chair Randazzo.²³ OCC is not entitled to duplicate productions of documents already in their possession.²⁴ And it has not identified gaps

¹⁹ OCC Mot. at 2; *see also* OCC Mem. at 3.

²⁰ *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 (Feb. 28, 2022) at 2, 6.

²¹ *See In the Matter of the Complaint of Brenda Fitzgerald & Gerard Fitzgerald, Complainant*, No. 10-791-EL-CSS, 2011 WL 1682213, at *4 (F.E.D.A.P.J.P. Apr. 25, 2011) (quashing a subpoena where “[t]here [wa]s no indication in any of the filings in this case that [the deponent] has had any involvement in or knowledge of the events surrounding this complaint proceeding or that he could contribute any input of value by his appearance” and finding that “[w]ithout more relevant justification . . . it would be unreasonable and an undue burden to compel the appearance”).

²² OCC Sub. Request Nos. 6 through 12.

²³ OCC Sub. Requests Nos. 15, 16, and 18.

²⁴ *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2 (F.E.D.A.P.J.P. Mar. 30, 2011) (“Additionally, the attorney examiner notes that, in its motion to quash, Palmer Energy delineated the eight categories of documents that it provided to Buckeye Energy in response to its discovery requests. To the extent that Palmer Energy did not believe that the discovery provided was responsive to its requests, the appropriate remedy would have been to file a motion to compel.”).

in FirstEnergy Corp.'s productions to date which warrant the additional production of documents.²⁵

Moreover, through its subpoena to Mr. Lisowski, which is even broader than the improper subpoena to Mr. Antonio Fernandez, FirstEnergy Corp. Vice President and Chief Ethics and Compliance Officer, OCC requests the production of tens of thousands of pages of documents within just a few weeks. Not only are OCC's document requests unduly burdensome on their face, *see supra* at n.15, its requests are directly at odds with its representations to the Commission. Despite asking the Commission to indefinitely delay this proceeding so it can "wade through the mountain of discovery that OCC has received from FirstEnergy Corp.—discovery that is continuing 'with no end in sight'"²⁶ —it has subpoenaed documents in addition to the approximately 300,000 pages it has already received. It is unreasonable for OCC to ask FirstEnergy Corp. and its deponents to collect, review, produce potentially tens of thousands of documents, and log any documents withheld for privilege, within eleven business days. This is particularly true where OCC itself has admitted it has been unable to review many of the same tens of thousands of documents even though it has had months to do so. OCC's burdensome subpoena must be quashed.

B. OCC Seeks To Improperly Circumvent The Procedural Schedule.

OCC's subpoena should also be quashed because it is untimely and procedurally improper. OCC well knows that document discovery—even between the *parties* to this case—ended months ago. Yet, OCC attempts to misuse the subpoena process to end-run the deadlines that have long

²⁵ *See id.*

²⁶ Case No. 17-974-EL-UNC, Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14.

since passed, making twenty-three duplicative and burdensome document requests in its subpoena to Mr. Lisowski.

Ohio law and Commission decisions make clear that a party cannot merely ignore the close of discovery.²⁷ And it is well-settled Commission practice that a party cannot circumvent discovery deadlines by requesting documents through the deposition process.²⁸ *See In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2 (P.U.C.O. Mar. 30, 2011) (quashing subpoenaed documents where such requests would have “circumvent[ed] the discovery deadline by using a subpoena to request additional documentation” and went “beyond the scope of the prior discovery and that to allow the subpoena to remain as drafted would in essence allow for the conducting of discovery *beyond the previously established deadlines.*”)²⁹

OCC’s document requests go “beyond the scope of the prior discovery” and “beyond the previously established deadlines.”³⁰ The Audit Report was filed on September 13, 2021; the close of discovery was then extended to November 24, 2021.³¹ OCC lodged no challenge to the discovery deadline (despite filing interlocutory appeals with respect to several other procedural

²⁷ *Sciaretta v. Refractory Specialties, Inc.*, 2018-Ohio-1141, ¶ 67 (Ohio Ct. App. 2018) (finding that motion to compel was filed more than four weeks after the discovery deadline and that no request to extend the deadline was made, therefore affirming denial of motion to compel); *P.N. Gilcrest Ltd. P’ship v. Doylestown Fam. Prac., Inc.*, 2011-Ohio-2990, ¶ 20 (Ohio Ct. App. 2011) (affirming denial of motion to compel since discovery cut-off date had passed and Court was unpersuaded that party was not requesting further discovery and simply seeking to obtain it from a different source).

²⁸ *In the Matter of the Complaint of Brenda Fitzgerald & Gerard Fitzgerald, Complainant*, No. 10-791-EL-CSS, 2011 WL 1682213, at *5 (P.U.C.O. Apr. 25, 2011) (quashing subpoena as it pertains to the production of documents given that discovery was complete); *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2 (P.U.C.O. Mar. 30, 2011) (granting motion to quash with respect to accompanying document requests since the document requests sought new discovery and exceeded the previously established deadlines.).

²⁹ *Id.* (emphasis added).

³⁰ *Id.*

³¹ Case No. 17-974-EL-UNC, Entry, at ¶ 24(a) (Oct. 12, 2021).

deadlines in proceedings involving the FirstEnergy Ohio utilities). And it served no additional document requests between September 13 and November 24 though it had ample time to do so. Civil Rule 45 does not permit parties to demand discovery from nonparties beyond established deadlines or for discovery; it should not be used as such here.

Of course, it is unsurprising that OCC's subpoena comes on the heels of the Commission's decision to deny its interlocutory appeal for a supplemental audit in this proceeding. OCC insists that the corporate separation audit should have "examin[ed] whether Ohio ratepayers were the source of funds used to support H.B. 6."³² As such, it requests documents related to lobbying costs, political and charitable spending, and documents produced to other regulators following the criminal indictment of former Ohio Speaker of the House, Larry Householder.³³ The Attorney Examiners have already determined that the need for any additional audit which touches upon those topics will be evaluated *after* the evidentiary hearing on corporate separation issues as "this case has been open for nearly five years, . . . [with] two audit reports [,] . . . three separate comment periods[, and where] . . . [h]undreds of pages of comments have been filed by the parties."³⁴ There simply are no grounds to use Mr. Lisowski's deposition to get additional discovery on topics the Commission has expressly indicated are not yet before the Commission in this proceeding—especially as OCC bases its requests for this information here on nothing more than speculation and conjecture.³⁵

³² OCC Mot. at 6.

³³ *See, e.g.*, Request Nos. 6-21.

³⁴ Case No. 17-974-EL-UNC, Hr'g Tr. (Jan. 4, 2022), at 24:3-8; *see also* Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022) at ¶¶ 25-29.

³⁵ Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022) at ¶ 29.

The Attorney Examiners have previously denied entertaining OCC's fishing expeditions with respect to subpoenas to non-parties in this proceeding where there is no *evidence* to do so.³⁶ The Commission should do so again here. Whatever its motivation, OCC has no grounds to request sweeping document discovery at this late hour.

C. OCC'S Document Requests Are Irrelevant.

Besides ignoring the procedural schedule, OCC's subpoena seeks large tracts of discovery entirely unrelated to the corporate separation audit of the FirstEnergy Ohio utilities. In directing the parties as to the scope of the upcoming evidentiary proceeding, the Attorney Examiners were unequivocal: "[t]he proceeding is about FirstEnergy's compliance with the corporate separation requirements contained in Ohio Revised Code 4928.17 and the appropriate Ohio Administrative Code Chapter."³⁷ Because OCC's requests are untethered to the Commission's directive, its subpoena must be quashed.

First, OCC seeks the production of FERC investigation materials—including communications with and documents produced to FERC in connection with its audit of FirstEnergy Corp.—yet has failed to show why these materials are relevant to this proceeding. A subpoena must be “within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code,”³⁸ which limits the scope of discovery to non-privileged matters that are “relevant to the

³⁶ Case No. 17-974-EL-UNC, Hr'g Tr. (Jan. 4, 2022), at 22:21-23:4.

³⁷ Case No. 17-974-EL-UNC, Hr'g Tr. (Jan. 4, 2022), at 26:22-27:1; *see also id.* at 27:14-28:2 (“We have a statute, 4928.17, that sets forth corporate separation requirements. We have an entire Administrative Code Chapter that sets forth corporate separation requirements. And we have two audit reports. Anything fitting within those three categories is relevant to the scope of the testimony. . . . If you include something that's not relevant to the proceeding and a party moves to strike it, most likely it will be stricken.”).

³⁸ Ohio Adm. Code 4901-1-25.

subject matter of the proceeding” or reasonably calculated to lead to the discovery of admissible evidence.³⁹

Nowhere in OCC’s motion for a subpoena or accompanying memorandum does OCC explain the relevance of any of the requested FERC materials, which deal entirely with federal regulations. OCC claims the “FERC’s audit gives the clearest picture yet of the ongoing FirstEnergy misdeeds involving H.B. 6” and that “[t]he audit findings should be analyzed and thoroughly reviewed by the parties to this case and other cases involving the HB 6 investigation.”⁴⁰ That is outside the scope of this proceeding. Not only was corporate separation not an issue in the FERC audit, which focused on federal regulatory accounting issues, such as the allocation of overhead costs to CWIP and accounting for vegetation management costs, the FERC materials cover FirstEnergy Corp. subsidiaries that are not parties to this proceeding and are not involved with the compliance of the FirstEnergy Ohio utilities with Ohio law. OCC’s FERC-related requests here amount to mere “fishing expeditions” that go beyond the scope of reasonable or otherwise limited discovery—which Ohio courts disfavor.⁴¹

Moreover, the discovery of FERC materials is a pending issue in these investigative Commission proceedings.⁴² Black letter federal law broadly protects from disclosure confidential information exchanged with FERC to promote efficiency and candor in the audit process and safeguard the confidential information of businesses subject to comprehensive FERC compliance

³⁹ Ohio Adm. Code 4901-1-16(B).

⁴⁰ OCC Mot. at 4.

⁴¹ See, e.g., *Martin*, 128 Ohio App. 3d at 119 (“[D]iscovery proceedings may not be used to conduct a mere fishing expedition.”); *Bland v. Graves*, 85 Ohio App. 3d 644, 659 (9th Dist. 1993) (“The court may permissibly limit discovery so as to prevent mere ‘fishing expeditions’ in an effort to locate incriminating evidence.”).

⁴² See Case No. 20-1502-EL-UNC, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Supplemental Memorandum (Feb. 18, 2022) (showing that the FERC materials requested are confidential under federal law and FERC rules).

investigations.⁴³ That the final FERC audit report has been published does not permit OCC to discover the underlying audit workpapers.⁴⁴ In fact, FERC has indicated as much.⁴⁵ FERC’s confidential audit—which has just entered the compliance phase—and investigation processes are ongoing. FERC has an important interest in ensuring the integrity of investigations that follow from FERC audits.⁴⁶ Breaching the confidentiality of the audit materials would risk compromising not only the ongoing audit, but also the investigation flowing from that audit.

Second, requests related to alleged “FirstEnergy scandals . . . involving House Bill 6 and FirstEnergy’s activities of concern involving the former PUCO Chair (and anyone else at the

⁴³ See 16 U.S.C. § 825(b) (“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.”) (emphasis added); 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a) (Federal law “*prohibit[s] any employee*, in the absence of Commission or court direction, from divulging *any fact or information* which may come to his or her knowledge during the course of examination of books or other accounts.”) (emphasis added). See also *supra* at n.42.

⁴⁴ *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 43 (Feb. 17, 2006) (“[a]udited persons provide information to the audit staff on a non-public basis.”); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, 2008 WL 2067393, at ¶ 15 (May 15, 2008) (“Although the commencement letter is a public document, all information and documentation gathered during the audit fieldwork, with the exception of the company’s written response to the draft audit report, is treated as non-public information.”); *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 206 (D.D.C. 2007) (exempting from public disclosure FERC’s documents, data, and communications with Reliant as the information was illustrative of FERC’s “decisions about how to look at the data, how to select portions of the data to examine, and how to interpret the data,” despite the publication of the final report detailing FERC’s conclusions); *Wholesale Competition in Regions with Organized Elec. Markets*, 125 FERC ¶ 61,071, 2008 WL 4686146, Order No. 719, at ¶ 465 (Oct. 17, 2008) (“By Commission rule, all information and documents obtained during the course of an investigation are non-public.”); *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015) (“It is . . . irrelevant . . . that FERC’s investigation . . . has come to a close. The investigation—writ large—continues, and that is enough under [FOIA] Exemption 7(A).”); *Williston Basin Interstate Pipeline Co. v. FERC*, No. CIV. A. 88-0592-LFO, 1989 WL 44655, at *1 (D.D.C. Apr. 17, 1989) (finding that audit reports, as well as the identities of FERC employees named in those reports, were excepted from FOIA disclosure because producing such documents “would disclose techniques used by field auditors to determine if plaintiff was in compliance with federal statutes and regulations,” and “techniques and procedures for law enforcement investigations or prosecutions,” and “could reasonably be expected to risk circumvention of the law”).

⁴⁵ See FERC Docket No. FA19-1-000, Letter from L. Parkinson, Director, Officer of Enforcement, FERC (Feb. 6, 2019), at 1 (“[D]ocuments and information that the Commission staff obtains during an audit, as well as all working papers developed, will be placed in nonpublic files.”).

⁴⁶ See *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 44 (Feb. 17, 2006) (noting that information is shared between audit staff and enforcement staff to promote efficiency and stating, “the knowledge that an audit may lead to an investigation should encourage entities subject to the Commission’s jurisdiction to volunteer the existence of violations and to cooperate to the maximum extent practicable to expose and remedy misconduct promptly”).

PUCO)” are wholly unrelated this proceeding.⁴⁷ As the Companies have explained elsewhere, calls for discovery from and investigation of company affiliates, where there are no allegations of corporate separation violations, let alone any nexus to affiliate transactions, raises serious jurisdictional concerns.⁴⁸ And to the extent the OCC’s subpoena of Mr. Lisowski is directed at how the costs of FirstEnergy Corp.’s political spending in support of H.B. 6 were allocated and whether any of those costs had an impact on the Companies’ rates, those questions are being addressed in other Commission cases. OCC’s efforts to blur separate Commission proceedings into an unending inquiry of FirstEnergy Corp., along with its subpoena to Mr. Lisowski, should be quashed.

IV. CONCLUSION

As is evident from its subpoena, OCC seeks to cross-examine Mr. Lisowski on topics not properly before the Commission in this proceeding, and on which this Commission has expressly declined to expand the corporate separation audit to include.⁴⁹ OCC should not be able to use its overbroad and burdensome subpoena to overrule the Commission’s orders. Accordingly, and for the foregoing reasons, FirstEnergy Corp. respectfully requests that this Motion be granted and that the Commission quash OCC’s subpoena.

⁴⁷ OCC Mot. at 5.

⁴⁸ See, e.g., Case No. 17-974-EL-UNC, Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (Dec. 13, 2021) at 14.

⁴⁹ Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022) at ¶¶ 25-29.

Dated: March 10, 2022

Respectfully submitted,

/s/ Corey A. Lee

Corey Lee (0099866)

Jones Day

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114

Tel: (216) 586-3939

Fax: (216) 579-0212

calee@jonesday.com

On behalf of FirstEnergy Corp.

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 10, 2022. The Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee

Attorney for FirstEnergy Corp.

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

3/10/2022 5:08:06 PM

in

Case No(s). 17-0974-EL-UNC

Summary: Motion to Quash the Office of the Ohio Consumers' Counsel's Subpoena
Directed to FirstEnergy Corp.'s Vice President, Controller & Chief Accounting
Officer electronically filed by Mr. Corey Lee on behalf of FirstEnergy Corp.