

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 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 the Ohio Adm. Code)
Chapter 4901:1-37.)

**MOTION FOR AN INDEFINITE CONTINUANCE OF THE HEARING
AND
MOTION TO ENLARGE THE TIME PERIOD FOR DISCOVERY
AND
REQUEST FOR EXPEDITED RULING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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March 14, 2022

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The Office of the Ohio Consumers’ Counsel (“OCC”), Ohio Manufacturers’ Association Energy Group (“OMAEG”), and Northeast Ohio Public Energy Council (“NOPEC”) bring these motions to protect two million FirstEnergy consumers. This case concerns whether the FirstEnergy Utilities violated Ohio corporate separation requirements intended for consumer protection. Corporate separation is a regulatory practice that is needed to protect consumers from being charged by their monopoly utility (through cross-subsidization) as a result of the utility “extend[ing] any undue preference or advantage to any affiliate, division, or part of its own business***,” per R.C. 4928.17(A)(3).

Proper corporate separation requires a strong commitment by management. But the commitment to good governance by FirstEnergy’s senior management has been lax. Indeed, most of the senior management was terminated as a result of the recent scandals,

including the compliance officer for corporate separation. FirstEnergy Corp. is the holding company that owns three Ohio electric utilities serving two million Ohioans. FirstEnergy Corp. stands charged with a federal crime and has admitted the underlying facts to that crime.

As background, a significant issue involving consumer justice in this case is that the Staff of the Public Utilities Commission of Ohio (“PUCO”) limited the scope of this audit in this case to exclude H.B.6 investigations. The Staff limited the scope of the case even though the PUCO ordered the “additional corporate separation audit for the period between November 1, 2016 and October 31, 2020.”¹ That span of time includes the period leading up to the passage of H.B.6 and the subsequent referendum.

Upon learning of the PUCO’s limitation on the audit, OCC and NOPEC filed a motion for a supplemental audit. OCC and NOPEC asked the PUCO to require an auditor to specifically audit for facts about whether FirstEnergy charged consumers for any of its H.B.6 activities or otherwise harmed consumers in violation of corporate separation law and rules.

The Attorney Examiner did not grant the request as submitted by OCC and NOPEC for a supplemental audit. In not ordering the commencement of the supplemental audit requested by OCC and NOPEC, Attorney Examiner Gregory Price ruled:

If the evidence presented at the hearing demonstrates a need for a supplemental audit, the Commission will consider supplemental audit after the hearing, but we do believe the auditors should have an opportunity to speak to the need of a supplemental audit before any decision is made to conduct one.²

¹ Entry at ¶ 17 (Nov 4, 2020).

² Transcript of Prehearing Conference on Jan. 4, 2022 at 24 (Jan. 14, 2022).

Subsequently, on February 10, 2022, the PUCO issued an Entry scheduling a hearing date of May 9, 2022.³ That Entry also states that: “The attorney examiners will entertain reasonable requests for further extension of the procedural schedule if OCC and NOPEC, or any other party, provide meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.”⁴

Per the February 10, 2022 Entry, such circumstances do exist to warrant a further continuance of the hearing date for an indefinite time period until document production, review and any discovery follow-up are complete. Although many documents have been produced by FirstEnergy Corp., the utilities and the PUCO, document production is far from complete. Thus, review of documents necessary for trial preparation is not and cannot be complete. Accordingly, consistent with the February 10, 2022 Entry and R.C. 4903.082, O.A.C. 4901-1-12, 4901-1-13(A) and 4901-1-16 *et seq.*, additional time is needed. Movants seek a continuance of the May 9, 2022 hearing date. As shown in the accompanying Memorandum in Support, there is good cause for indefinitely continuing the evidentiary hearing per O.A.C. 4901-1-13(A).

Further supporting good cause, OCC has scheduled and will be scheduling depositions. Some of those depositions include requests for documents to be made available to the parties. But the depositions and the document production have been opposed by FirstEnergy Corp., FirstEnergy Utilities, and a former FirstEnergy employee (the former corporate separation compliance officer). As it now stands, two depositions

³ Entry at ¶ 30 (Feb. 10, 2022).

⁴ *Id.*

sought through subpoenas are not occurring while pleadings are filed by opposing parties' attempting to shut down or limit the depositions.

Another significant discovery delay involves documents FirstEnergy Corp. and the PUCO produced to the Department of Justice ("DOJ"), Securities and Exchange Commission ("SEC"), and in related civil litigation. The DOJ subpoenaed documents from FirstEnergy Corp. on July 21, 2020.⁵ OCC and FirstEnergy Corp. reached an agreement on October 13, 2021 for FirstEnergy Corp. to produce these documents. And while parties received a number of documents, the parties still do not have all the documents. Thus, review of these documents is far from over and additional time is needed to obtain, review and conduct follow-up (if needed) on the documents.

The DOJ also subpoenaed documents from the PUCO on April 13, 2021, and May 19, 2021.⁶ OCC has been actively attempting (via public records request) to obtain the documents ever since. But Movants still do not have all the documents that were provided last year by the PUCO to the DOJ. Thus, document review of these documents is far from over and additional time is needed to obtain, review and conduct follow-up (if needed) on the documents.

Finally, the parties could receive additional documents based on the Attorney Examiner's March 11, 2022 ruling in Case No. 20-1502-EL-UNC (involving FirstEnergy's political and charitable spending in support of H.B.6), in response to Memoranda filed by OCC and OMAEG. In the March 11, 2022 prehearing ruling, the Attorney Examiner required FirstEnergy to produce (in thirty days) to the parties the

⁵ FirstEnergy Corp. News Release, *FirstEnergy Corp. Statement on HB 6 Investigation* (Jul. 21, 2020).

⁶ A. Tobias, *Feds Subpoena Records from Public Utilities Commission of Ohio as part of ongoing criminal probe*, Cleveland.com (Aug. 3, 2021).

documents that FirstEnergy provided to FERC for FERC's audit. These documents may provide relevant evidence as to whether FirstEnergy violated Ohio corporate separation requirements.

In a February 4, 2022 Audit Report, FERC found several deficiencies in FirstEnergy's accounting and recordkeeping practices related to corporate separation practices and service company charges to franchised public utilities, including the FirstEnergy Ohio Utilities.⁷ Among other things, FERC found that FirstEnergy Service Company had improperly accounted for and improperly reported lobbying expenses and donations, ultimately resulting in overbilling utility consumers.⁸

Since the February 10, 2022 Entry, the parties received additional documents and also learned that more documents will be produced at a later date. Per the Entry, the attached Memorandum in Support provides a "meaningful, qualified assessment" of the additional documents the parties received since the PUCO's February 10, 2022 Entry. And it provides new information about additional documents that will be produced at a later date.

Under O.A.C. 4901-1-17(G), Movants also move for an extension of the discovery cut-off date (to "enlarge the time periods for discovery"). Movants request that the PUCO extend the discovery period indefinitely until document production has been completed, review of such discovery has been done, any follow-up is completed, depositions have been held, and a new hearing date is scheduled.

⁷ *In re FirstEnergy Audit*, Docket No. FA19-1-000 (Feb. 4, 2022).

⁸ *Id.* at 5.

Alternatively, if the PUCO fails to grant this motion for a continuance of the hearing date, Movants request that the discovery period be enlarged and extended. The discovery deadline should be extended to the commencement of a hearing in this case, consistent with O.A.C. 4901-1-17(A). Indeed, it seems an oversight that the old deadline was not reset when the hearing was twice continued. FirstEnergy is already interposing discovery objections based on the outdated discovery deadline. As demonstrated in the accompanying Memorandum in Support, there is good cause for extending the discovery period, per O.A.C. 4901-1-17(G).

Under O.A.C. 4901-1-12(C), Movants request an expedited ruling on their Motions. The grounds for these Motions are more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FirstEnergy Corp. is charged with and has admitted the underlying facts to honest services wire fraud.⁹ FirstEnergy Corp. has admitted to making \$60 million in payments to the former Speaker of the House to pass H.B.6 and a \$4.3 million payment. It was said that the latter FirstEnergy Corp. payment was:

in return for Public Official B [former Chairman Randazzo] performing official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.¹⁰

At OCC’s request,¹¹ the PUCO on November 4, 2020 ordered a new corporate separation audit,¹² and opened other investigations.¹³ FirstEnergy Corp. issued a series of

⁹ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement at 17 (S.D. Ohio) (Jul. 22, 2021).

¹⁰ *Id.* at 17.

¹¹ Motion for a PUCO Investigation and Management Audit of FirstEnergy, its Corporate Governance and its Activities Regarding House Bill 6 (Sept. 8, 2020).

¹² Entry (Nov. 4, 2020).

¹³ See PUCO web page, *FirstEnergy & HB 6 related cases*, available at: <https://puco.ohio.gov/utilities/electricity/resources/hb-6-related-investigations>.

news releases and SEC filings which, over time, disclosed that FirstEnergy Corp. played a principal role in “likely the largest bribery, money-laundering scheme ever perpetrated against the people in the state of Ohio.”¹⁴

A. Delays by FirstEnergy Corp. in Document Production.

OCC sought to obtain the documents that FirstEnergy Corp. produced to the DOJ, SEC, and civil litigation plaintiffs. The FirstEnergy Utilities initially objected to producing these documents because OCC’s discovery requests “seek the production of information that is not within the Companies’ possession, custody, or control.”¹⁵ While not conceding this point, OCC filed a Motion for Subpoena Duces Tecum to FirstEnergy Corp.¹⁶ OCC’s Subpoena sought to obtain documents that FirstEnergy Corp. was ordered to produce in a H.B.6-related civil lawsuit.¹⁷ In that case, the judge’s order required production of the following documents:

- (a) ...all documents produced, provided, or received [by Defendants] in the course of litigation against FirstEnergy arising out of the HB 6 bribery scheme, including any deposition testimony; and
- (b) ...all documents that [D]efendants have produced or provided to, or received from, any regulatory or government agency, federal or state law enforcement agency, or legislative body or representative in connection with the HB 6 bribery scheme, including any deposition testimony.¹⁸

¹⁴ Pelzer, J., *Ohio House Speaker Larry Householder, allies got more than \$60 million in FirstEnergy bribes to pass HB6, feds claim* Cleveland.com (Jul. 21, 2020).

¹⁵ *See, e.g.*, Case No. 20-1502-EL-UNC, FirstEnergy Utilities’ Responses to OCC’s Fifth Set of Discovery Requests at 14 (Mar. 18, 2021).

¹⁶ Motion for Subpoena Duces Tecum for FirstEnergy Corp. To Produce All Discovery Documents That FirstEnergy Corp. was Ordered to Provide by The U.S. Chief District Judge in a Shareholder Lawsuit by Office of the Ohio Consumers’ Counsel (Sept. 24, 2021).

¹⁷ *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Opinion and Order at 6 (Jun. 14, 2021).

¹⁸ *Id.*

OCC and FirstEnergy Corp. reached an agreement for FirstEnergy Corp. to produce all of the documents (specified above) to OCC and the parties. On January 18, 2022, FirstEnergy Corp. filed a discovery status report in the civil litigation.¹⁹ The report stated that FirstEnergy Corp. had produced 382,486 pages of documents to the plaintiffs as of January 18, 2022.²⁰ FirstEnergy Corp. also stated that there is “some additional work that remains” to complete the document production.²¹

When it became aware of this report, OCC wrote to FirstEnergy Corp. asking why it had produced about 100,000 fewer pages of documents to OCC and the parties as compared to what FirstEnergy Corp. had produced to the civil plaintiffs one month earlier (*See Attachment – Letter from John Finnigan to Corey Lee dated February 17, 2022.*) FirstEnergy Corp.’s counsel replied that it would produce the additional documents “on a rolling basis” with no specified completion date. (*See Attachment – Letter from Corey Lee to John Finnigan dated February 23, 2022.*) While many documents have been transmitted to OCC and other parties, the document production is far from complete. In addition, document review will and must continue so that parties will be adequately prepared for hearing.

B. PUCO’s Timeline Responding to OCC’s Public Records Request.

On August 12, 2021, OCC sent the PUCO a public records request for the documents that the PUCO produced in response to the DOJ’s subpoenas issued in April and May of 2021. Six months later, on February 11, 2022 (the day after the February 10,

¹⁹ *Jennifer Miller v. Michael Anderson*, Case No. 5:20-cv-01743, Nominal Defendant FirstEnergy Corp.’s Status Report and Motion to Extend Deadline to Confirm Completion of its Document Production and to Confirm Recent Discovery (N.D. Ohio) (Jan. 18, 2022).

²⁰ *Id.* at 2.

²¹ *Id.*

2022 Entry scheduling a May 9, 2022 hearing date), the PUCO responded by producing approximately 16,000 pages of documents. The PUCO advised that it will produce additional documents but did not say when. (*See* Attachment C – Letter from Donald Leming to Maureen Willis dated February 11, 2022.) Other parties subsequently requested and received said documents from the PUCO. Additional documents mean additional review of the documents after production, and therefore, additional time is needed to obtain and review the documents.

C. Delays in Depositions.

It has been difficult in this proceeding to find answers. Movants keep asking questions, but the answers are few. One of the most important ways to get answers is to depose witnesses that are in the know. But parties, non-parties and even a former FirstEnergy employee are forcing other parties to spend their time answering pleadings instead of conducting depositions. And this is happening despite the fact that subpoenas have been sought and obtained (authorized by the Attorney Examiners) to compel witnesses to attend and give testimony at scheduled depositions.

For instance, on February 7, 2022, OCC filed a Motion for Subpoena Duces Tecum to take the deposition of Mr. Antonio Fernandez.²² FirstEnergy Corp. informed OCC that Mr. Fernandez does not have personal possession of the documents OCC subpoenaed for the deposition. FirstEnergy Corp.’s counsel stated that, even though Mr. Fernandez is a Vice President and the Chief Ethics and Compliance Officer for FirstEnergy Corp., he has no custody or control of any documents and he would not produce the subpoenaed documents to OCC.

²² Motion for Subpoena Duces Tecum (Feb. 7, 2022).

FirstEnergy Corp. asserted that if OCC wants those documents, it must subpoena them from FirstEnergy Corp. itself. OCC did just that in an attempt to resolve the issue.²³ We expect that subpoena will be opposed because FirstEnergy Corp. now advances the theory that OCC cannot receive documents under subpoena because the discovery cut-off has passed.²⁴

And FirstEnergy Corp. also asserts that Mr. Fernandez is not the right person for OCC to depose, despite holding the position that the Auditor identified as being responsible for corporate separation compliance. FirstEnergy Corp. filed a Motion to Quash the subpoena on February 28, 2022.²⁵ FirstEnergy Corp. objects to the deposition and the production of documents and implies that the proper person would be the former employee that held the position.

However, when the former employee was subpoenaed for deposition (also on February 7, 2022), FirstEnergy Corp.'s former Vice President, General Counsel and Chief Ethics Officer Ebony Yeboah-Amankwah (who apparently was responsible for compliance with Ohio corporate separation requirements) responded (through a Motion to Quash) that she did not have the documents and could not have the documents as they were and are the property of FirstEnergy Corp. She also claimed that that OCC subpoenaed the wrong individual/entity.²⁶ The Motion to Quash filed by the former employee further stated that she was required to turn over all documents and property of

²³ OCC Motion for Subpoena Duces Tecum for FirstEnergy Corp. to Attend and Give Testimony at a Deposition (Mar. 10, 2022).

²⁴ FirstEnergy Corp. Motion to Quash (Feb. 28, 2022).

²⁵ Motion to Quash (Feb. 28, 2022).

²⁶ Motion to Quash (Mar. 7, 2022).

“FirstEnergy” (undefined in the Motion²⁷) upon termination from her employment with FirstEnergy Service Corp.

The PUCO’s auditor stated in the September 13, 2021 Audit Report that, incredibly, five years of documents related to corporate separation were unavailable due to the former compliance officer having been separated from the company. OCC’s subpoena was signed, served, and accepted on February 12, 2022. On March 7, 2022, she filed a Motion to Quash.²⁸ The subpoena and deposition of Ms. Yeboah-Amankwah will take time to resolve and will delay the parties’ hearing preparation.

Adding to that delay is FirstEnergy Corp.’s recent Motion to Quash another subpoena, this time to Mr. Lisowski. OCC sought to depose Mr. Lisowski on the FERC audit of FirstEnergy’s accounting and record keeping pertaining to affiliate transactions and service company charges. The FERC audit was publicly filed on February 4, 2022. Mr. Lisowski, Controller & Chief Accounting Officer, provided the official FirstEnergy response to the FERC Audit Report. In that response, FirstEnergy largely accepted FERC’s findings and recommendations.

OCC had secured a subpoena to compel Mr. Lisowski’s attendance at a deposition. But that deposition will be delayed until there is a ruling on the Motion to Quash that FirstEnergy Corp. filed on March 10, 2022. In that Motion to Quash, FirstEnergy Corp. asserts that OCC “has no special need to depose Mr. Lisowski.”²⁹ FirstEnergy Corp. also asserts that document discovery is closed, and the documents

²⁷ *Id.* It is unclear from the Motion which exact FirstEnergy Entities are being referenced as FirstEnergy is used interchangeably with several entities listed in the Motion and FirstEnergy is not defined.

²⁸ Motion to Quash (Mar. 7, 2022).

²⁹ FirstEnergy Corp. Motion to Quash at 1 (Mar. 10, 2022).

requested are not relevant to this proceeding.³⁰ Again parties will be forced to respond to FirstEnergy Corp.'s Motion, a ruling will have to be issued, and depositions and document production scheduled thereafter, potentially adding months before a deposition of Mr. Lisowski may occur.

D. Delay in FirstEnergy's Production of Documents from FERC Audit.

On February 19, 2021, OCC submitted a discovery request in Case No. 20-1502-EL-UNC (involving FirstEnergy's political and charitable spending in support of H.B.6). seeking documents related to a FERC audit.³¹ In a February 4, 2022 Audit Report, FERC found several deficiencies in FirstEnergy's accounting and recordkeeping practices related to corporate separation practices and service company charges to franchised public utilities, including the FirstEnergy Ohio Utilities.³² Among other things, FERC found that FirstEnergy Service Company had improperly accounted for and improperly reported lobbying expenses and donations, ultimately resulting in overbilling utility consumers.³³ The documents from the FERC audit are relevant to whether FirstEnergy violated Ohio's corporate separation requirements by engaging in political spending to support its competitive merchant business while charging the costs to utility consumers.

During a March 11, 2022 prehearing conference, the Attorney Examiner ruled that FirstEnergy must produce (in thirty days) the documents that FirstEnergy provided to FERC for FERC's audit. These additional documents mean additional review of the

³⁰ *Id.*

³¹ *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, Motion to Compel Responses to Fifth and Seventh Sets of Discovery at 2-3 (Jun. 29, 2021).

³² *In re FirstEnergy Audit*, Docket No. FA19-1-000 (Feb. 4, 2022).

³³ *Id.* at 5.

documents after production, and therefore, additional time is needed to obtain and review the documents.

FirstEnergy may file an interlocutory appeal on this ruling. This will lead to further delay in the parties' efforts to obtain these documents.

E. Parties Have Broad Discovery Rights.

Ohio law grants the parties broad discovery rights. Revised Code Section 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”³⁴ And the statute states that the PUCO’s rules should “aid full and reasonable discovery by all parties.”³⁵

The PUCO has held that “[t]he policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side’s industry or efforts.”³⁶ The PUCO’s rules on discovery “*do not create an additional field of combat to delay trials or to appropriate the Commission’s time and resources*; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”³⁷ The rules are also intended to “minimize commission intervention in the discovery process.”³⁸ These rules are intended to facilitate full and reasonable discovery. This is consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

³⁴ See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

³⁵ R.C. 4903.082.

³⁶ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23 (Mar. 17, 1987).

³⁷ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (Emphasis added).

³⁸ Ohio Admin. Code 4901-1-16(A).

Revised Code Section 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”³⁹ The discovery statute was effective in 1983 as part of regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Yet all these years after the 1983 reform law, FirstEnergy Corp. is impeding the parties’ discovery efforts. The PUCO should not allow FirstEnergy Corp. to obstruct and delay this process.⁴⁰

The DOJ, FERC, and SEC investigations related to H.B.6 are ongoing.⁴¹ Several parties have filed civil actions against FirstEnergy Corp. arising out of FirstEnergy Corp.’s role in the H.B.6 scheme. These government investigations and civil proceedings relate to the U.S. Attorney’s criminal charges against the former Speaker of the House and others, and the Deferred Prosecution Agreement where FirstEnergy Corp. admitted to the underlying facts of conspiracy to commit honest services wire fraud.⁴²

The PUCO ordered this audit to review the FirstEnergy Utilities’ potential violations of corporate separation laws and rules during the period leading up to the passage of H.B.6 and the subsequent referendum.⁴³ The PUCO also opened three other cases to review: (1) the FirstEnergy Utilities’ political and charitable spending in support of H.B.6 and the subsequent referendum effort; (2) whether FirstEnergy misused revenues collected under its Distribution Modernization Rider to support H.B.6; and (3)

³⁹ See *OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio-5789.

⁴⁰ *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630, 2021 Ohio LEXIS 2065, 2021 WL 4783198.

⁴¹ FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2021).

⁴² *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-00086-TSB, Deferred Prosecution Agreement at 16 (Jul. 22, 2021).

⁴³ Entry at ¶ 17 (Nov. 4, 2020).

whether FirstEnergy improperly charged consumers for H.B.6 costs through its Delivery Capital Recovery Rider.⁴⁴

As the documents that FirstEnergy Corp. produced to the DOJ, FERC, SEC, and plaintiffs in the other H.B.6 cases are core facts for the present case, the discovery is relevant, and the parties should be entitled to it. For example, making payments to benefit a legislator and regulator, a former PUCO Chair, for helping with nuclear bailout legislation, then charging the payments to the FirstEnergy Utilities, are facts relevant to the other cases as well as the present corporate separation violations audit. The parties' discovery requests therefore satisfy the discovery standards in the Ohio Administrative Code.

II. RECOMMENDATIONS

- A. The PUCO should continue the hearing date for an indefinite period until after FirstEnergy Corp. and the PUCO have produced all documents requested by the parties. The schedule should also build in a reasonable time for review of discovery responses and any follow-up, as well as to resolve privilege claims and to hold depositions.**

The PUCO should continue the hearing date for an indefinite period until the FirstEnergy Corp. and the PUCO document productions are complete. Even though a number of documents have been produced, there are more to come, which means more review will be necessary. The new schedule should also build in time for review of discovery responses and any follow-up, as well as to resolve any privilege claims and to hold depositions. A hearing date should allow a reasonable amount of time for the parties to prepare for the hearing after discovery is completed.

⁴⁴ PUCO web page, FirstEnergy & HB 6 related cases, available at: <https://puco.ohio.gov/wps/portal/gov/puco/utilities/electricity/resources/hb-6-related-investigations>.

In complex litigation, the parties usually receive adequate time to prepare for hearing following the completion of discovery. For example, Franklin County Common Pleas Local Rule 39 provides that in professional tort and product liability cases, the trial date should be assigned for 23 weeks following the discovery cut-off date. In one of the H.B.6 civil cases, the court ordered that discovery cut-off date would not occur until 120 days after the completion of the *U.S. v. Householder* criminal case.⁴⁵

Given the amount of information and documents involved, the PUCO should adopt similar time periods for the completion of discovery and for the hearing date in the present case. Under O.A.C. 4901-1-13(A), good cause exists for such a continuance.

After the current hearing date was established, FirstEnergy Corp. advised the parties and the Attorney Examiners that it would produce about 100,000 pages of additional documents that FirstEnergy Corp. had agreed in October 2021 to produce “on a rolling basis.” After the current hearing date was established, the PUCO produced approximately 16,000 pages of documents in response to the parties’ public records request for documents subpoenaed by the DOJ, and the PUCO advised Movants that it would produce additional documents. After the current hearing date was scheduled, FirstEnergy was ordered to produce FERC audit-related documents.

Movants and the other parties have no way of knowing when these documents will be provided and when discovery will be complete. The parties are unable to adequately prepare for a hearing in this case until after they have received all of the documents and have an adequate time period to review them and conduct any follow-up.

⁴⁵ *Smith v. FirstEnergy Corp.*, Case No. 2:20-cv-03755, Scheduling Order at 6-7 (S.D. Ohio) (Mar. 5, 2021).

Time is also needed to conduct depositions of a number of persons, including Ms. Ebony Yeboah Amankwah, Mr. Fernandez’s stand-ins (Mr. Mattiuz, Mr. Pannell), Mr. Lisowski, and perhaps Mr. Fernandez.

B. The PUCO should extend the discovery cut-off date for an indefinite period to correspond with an indefinite continuation of the hearing date. In the alternative, if the hearing date is not continued, the discovery period should be extended until the present hearing date.

The PUCO should extend the discovery cut-off date indefinitely to correspond with a continuation of the hearing date, per O.A.C. 4901-1-17(G) and 4901-1-13. In a September 17, 2021 Entry, the PUCO set the “deadline for the service of discovery, except for notices of deposition,” on November 1, 2021.⁴⁶ That was in conjunction with a now outdated procedural schedule that provided for an evidentiary hearing on January 4, 2022.⁴⁷

On October 12, 2021, the PUCO entered a new Entry with a new evidentiary hearing of February 10, 2022.⁴⁸ In that entry, the PUCO set the “deadline for the service of discovery, except for notices of deposition” on November 24, 2021.⁴⁹ Then, a February 10, 2022 Entry extended the hearing date to May 9, 2022. But, in perhaps an oversight, the Entry did not provide a corresponding extension of the discovery cut-off date.

Under O.A.C. 4901-1-13(A) and 17(G), Movants have demonstrated good cause for a continuance of the hearing date. Since the discovery cut-off date of November 24, 2022, OCC received approximately 100,000 pages of documents from FirstEnergy Corp.

⁴⁶ Entry (Sept. 17, 2021).

⁴⁷ *Id.*

⁴⁸ Entry (Oct. 12, 2021).

⁴⁹ *Id.*

and approximately 16,000 documents from the PUCO. FirstEnergy Corp. and the PUCO are expected to produce a significant number of additional documents. The Attorney Examiner in Case No. 20-1502-EL-UNC also ruled that FirstEnergy must produce (in thirty days) documents it submitted to FERC for the FERC audit. Additional documents mean additional review. These additional documents will likely create a need for the parties to seek follow-up discovery from the parties producing the discovery. Depositions of a number of persons are being sought and have yet to be resolved. Given the opposition to these depositions, they may be months out.

It also would be prejudicial (to both the parties and the PUCO) to hold the parties to the current and outdated discovery cut-off date of November 24, 2021. The parties need more time for case preparation. And the intervenors are not responsible for delays in obtaining documents from FirstEnergy (via discovery) and the PUCO (via public records requests). It would be prejudicial to the PUCO because, as the PUCO has oft stated, it needs facts for making its decisions for the Ohio public in the extraordinary circumstances of the FirstEnergy scandals.

In the alternative, if the PUCO does not grant Movants' motion for a continuance of the hearing date, Movants request that the discovery period be extended until the present hearing date, for the above reasons. The discovery period is outdated, as it was not extended when the hearing date was continued for months.

C. Request for expedited ruling.

Pursuant to O.A.C. 4901-1-12(C), the Movants request an expedited ruling. The reasons stated above for a hearing continuance and discovery extension demonstrate that time is needed to complete document production and for case preparation. The current schedule is unduly pressed given that document production has not yet been completed.

Under O.A.C. 4901-1-12(C), Movants are unable to certify that no party objects to an expedited ruling.

III. CONCLUSION

The need for a continuance of the hearing date and an extension of the discovery cut-off date is compelling in this investigation. Although many documents have been provided, there are many more to come, requiring additional time to review. Depositions of a number of persons are being sought and fought, pushing the scheduling of those depositions months out. To protect consumers, preserve the parties' discovery rights under R.C. 4903.082 and the Ohio Administrative Code, and provide the PUCO with the full record it needs for its decision-making in the public interest, the PUCO should grant the motion for an indefinite continuance of the hearing as proposed by Movants.

The PUCO should also indefinitely extend the discovery period for the parties to obtain discovery. In the alternative, if the PUCO does not grant the request for a continuance, then the PUCO should extend the outdated discovery period to correspond with the present hearing date.

Respectfully submitted,

/s/ Dane Stinson

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Counsel for Ohio Consumers' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served on the persons stated below via electronic transmission, this 14th day of March 2022.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

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

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Office of the Ohio Consumers' Counsel

February 17, 2022

VIA ELECTRONIC TRANSMISSION

Corey A. Lee, Esq.
Partner
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114

Re: Documents produced by FirstEnergy Corp. to Department of Justice and securities litigation plaintiffs

Dear Mr. Lee:

This letter concerns OCC and FirstEnergy Corp.'s agreement for FirstEnergy Corp. to produce all documents FirstEnergy Corp. produced to the Department of Justice, the SEC and the securities litigation plaintiffs related to H.B. 6.

We reviewed the discovery status reports filed by FirstEnergy Corp. on January 18, 2022 (doc #240) and February 7, 2022 (doc #263). in Case No. 5:20-cv-01743, and compared those to the documents we received, as follows:

Date	Bates Range	Pages	Date	Bates Range	Pages
11/5/21	FE_DERIV_0000001 to FE_DERIV_0175728	175,728	10/29/21	FE_CIV_SEC_PROD 01 0000001 to 0013298	13,298
11/12/21	FE_DERIV_0175729 to FE_DERIV_0257363	81,635	11/4/21	FE_CIV_SEC_PROD 02 0013299 to 0049992	36,694
11/19/21	FE_DERIV_0257364 to FE_DERIV_0288164	30,801	11/4/21	FE_CIV_SEC_PROD 03 0049993 to 0050521	529
11/15/21	FE_DERIV_0288165 to FE_DERIV_0289245	1,081	11/15/21	FE_CIV_SEC_PROD 04 0050522 to 0079346	28,825
12/20/21	FE_DERIV_0289246 to FE_DERIV_0090314	1,069	11/15/21	FE_CIV_SEC_PROD 05 0079347 to 0176257	96,911
12/23/21	FE_DERIV_0090315 to FE_DERIV_0292209	1,895	12/8/21	FE_CIV_SEC_PROD 06 0176258 to 0233133	56,876
1/7/21 (sic)	FE_DERIV_0292210 to FE_DERIV_0298556	6,346	1/26/22	FE-CIV_SEC_PROD 07 0233134 to 0257892	24,759
1/18/21 (sic)	FE_DERIV_0298556 to FE_DERIV_0382486	83,930	1/26/22	FE-CIV_SEC_PROD 08 0257893 to 0288693	30,801
	Total	382,486		Total	288,693

This comparison indicates that FirstEnergy Corp. has not yet produced all the documents it produced to the securities litigation plaintiffs. Our agreement stated that OCC would receive the same documents produced to the securities litigation plaintiffs, so please advise when FirstEnergy Corp. will produce the additional documents to OCC as indicated by the above table.

Letter to Mr. Corey A. Lee
February 17, 2022
Page 2 of 2

The status reports also state that FirstEnergy Corp. reached an agreement with the plaintiffs to review approximately 175,000 documents that hit on 176 search terms. FirstEnergy Corp. stated it was running additional search terms and would produce the resulting documents by January 31, 2022. Please advise when FirstEnergy Corp. will be producing these additional documents to OCC.

The January 18, 2022 status report stated that FirstEnergy Corp. expected to produce additional redacted and unredacted documents as it continues to review its privilege log. Please advise when FirstEnergy Corp. will be producing these additional documents to OCC.

The February 7, 2022 status report stated that FirstEnergy Corp. would be producing additional privilege logs by February 8, 2022. Please advise when FirstEnergy Corp. will be producing the updated additional privilege logs to OCC.

On January 27, 2022, FirstEnergy Corp. filed a Privilege Log Supplement (doc #246) where it agreed to provide certain metadata information to the plaintiffs regarding the privilege log. Please advise when FirstEnergy Corp. will be producing the metadata information to OCC.

Thank you for your cooperation in this matter.

Very truly yours,

/s/ John Finnigan

John Finnigan (0018689)

cc: Maureen Willis, Esq.
William Michael, Esq.

JONES DAY

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February 23, 2022

VIA E-MAIL

John Finnigan
The Office of the Ohio Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215
John.Finnigan@occ.ohio.gov

Re: FirstEnergy Corp. Documents Produced to the Securities Plaintiffs

Dear Mr. Finnigan:

As your letter acknowledges, FirstEnergy Corp. ("FirstEnergy") agreed to produce to OCC all documents FirstEnergy produced to the plaintiffs in the securities litigation, which include all documents produced to the Department of Justice and the Securities and Exchange Commission. FirstEnergy's agreement resolved OCC's September 24, 2021 subpoena, which specifically requested documents produced to the plaintiffs in the securities litigation and cited to *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio).

Your letter, however, cites to document productions and other discovery issues in the derivatives litigation (*Miller, et al. v. Anderson, et al.*, No. 5:20-cv-01743 (N.D. Ohio)). Therefore, the issues noted in your letter are unrelated to and have no bearing on FirstEnergy and OCC's agreement here. In any event, all documents produced to the plaintiffs in the derivative litigation will be produced to the securities plaintiffs. Accordingly, as agreed, OCC will receive (on a rolling basis in the coming weeks) all of the 382,486 pages of documents referenced in your letter.

Sincerely,



Corey A. Lee

cc: Maureen Willis
William Michael



Public Utilities Commission

Mike DeWine, Governor
Jenifer French, Chair

Commissioners

M. Beth Trombold
Lawrence K. Friedeman
Dennis P. Deters
Daniel R. Conway

February 11, 2022

Via Email: Maureen.willis@occ.ohio.gov

Maureen Willis
Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215-4213

RE: Records Request 151-21

Dear Ms. Willis:

Thank you for contacting the Public Utilities Commission of Ohio (PUCO). I am writing in response to your public records request for records produced by the PUCO in response to U.S. Department of Justice subpoenas issued on April 23, 2021 and May 18, 2021.

The PUCO is fully cooperating with the U.S. Department of Justice. The enclosed records are a portion of records identified in response to your public records request, which have been reviewed and are ready for production. The PUCO is continuing our ongoing review of records, which is anticipated to take additional time. Please note, many of the records identified as potentially responsive to these subpoenas may be exempt from disclosure as a public record and, consequently, legal review is ongoing. For example, personally identifiable information, such as social security numbers, which are prohibited by law from release, as well as confidential trade secret records, under R.C. 1333.61 et seq. are part of the ongoing public records review. Therefore, we will be supplementing our public records response.

As the PUCO continues its review of records identified in response to the subpoena, we will supplement this production. While no records identified as part of this initial production have been withheld or redacted, that may not be the case for future productions. If so, the PUCO will specify the applicable laws and/or rules supporting withholding or redacting such records in our supplement productions.

If you require any further assistance or have additional questions, please feel free to contact me at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald Leming".

Donald Leming
Deputy Legal Director

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

Summary: Motion Motion for an Indefinite Continuance of the Hearing and Motion to Enlarge the Time Period for Discovery and Request for Expedited Ruling by Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association Energy Group and Northeast Ohio Public Energy Council electronically filed by Ms. Alana M. Noward on behalf of Finnigan, John