

**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.)**

**REPLY IN SUPPORT OF FIRSTENERGY CORP.'S MOTION TO QUASH
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
SUBPOENA DIRECTED TO ANTONIO FERNÁNDEZ**

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") subpoena directed to Mr. Antonio Fernández should be quashed in its entirety as duplicative and deficient. OCC's arguments to the contrary and attempts to save its subpoena are futile. **First**, OCC offers no reasoned explanation for why it must stay its misdirected subpoena. Even OCC acknowledges that FirstEnergy Corp. ("FirstEnergy") and Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Ohio Companies") are coordinating with OCC on an alternative deposition date for the proper person. Further, following FirstEnergy's motion to quash this subpoena, OCC has since filed a subpoena directed to a FirstEnergy Corp. designee that includes *identical* requests. Accordingly, the parties' negotiations and OCC's subsequent, duplicative subpoena have rendered Mr. Fernández's subpoena moot. **Second**, despite OCC's wishes otherwise, document discovery has closed. **Third**, OCC has not and cannot establish a substantial need for the documents requested, many of which are irrelevant to this proceeding.

II. ARGUMENT

A. OCC's Subpoena Is Misdirected, Duplicative, And Moot.

OCC offers no meaningful explanation for staying Mr. Fernández's deposition. For OCC's subpoena to be valid, it must "designate with reasonable particularity the matters on which examination is requested."¹ OCC asserts its requested deposition is "intended to produce information that pertains to the issues in this case" and the "issues relate to how (and whether) the FirstEnergy Ohio Utilities complied with Ohio's corporate separation law and rules during 2016 through 2020."² But Mr. Fernández does not have the information OCC seeks, as he does not oversee the FirstEnergy Ohio utilities' regulatory compliance with corporate separation matters, and he only became employed by FirstEnergy in April of 2021, after the relevant time period.³ Therefore, OCC has not and cannot demonstrate "the matters on which examination is requested" with respect to Mr. Fernández, especially when an appropriate deponent will be provided for cross-examination.

OCC tries to argue otherwise by citing to a March 22, 2021 FirstEnergy press release.⁴ The press release does not designate Mr. Fernández as the Ohio Companies' compliance officer for Ohio corporate separation matters, and in fact does not speak to corporate separation at all. Rather, as OCC is well aware, Robert Mattiuz assumed responsibility from Ebony Yeboah-Amankwah for the Companies' Ohio corporate separation matters, as contemplated by O.A.C. 4910:1-37-05(B)(11), and Mr. Mattiuz, who is retiring, has now been replaced by Olenger Pannell

¹ Ohio Adm. Code 4901-1-21(F).

² Case No. 17-974-EL-UNC, OCC Motion for Subpoena Duces Tecum for FirstEnergy Vice President and Chief Ethics and Compliance Officer Antonio Fernández, Memorandum in Support (Feb. 7, 2022), at 1.

³ See Case No. 17-974-EL-UNC, FirstEnergy Corp. Motion to Quash OCC's Subpoena, Memorandum in Support ("FirstEnergy Mem.") (Feb. 28, 2022), at 5-6.

⁴ Case No. 17-974-EL-UNC, OCC Memorandum Contra ("OCC Mem.") (Mar. 15, 2022), at 6-7.

effective February 6, 2022.⁵ There is no need to depose Mr. Fernández on the issues OCC has raised, when FirstEnergy, the Ohio Companies, and OCC are coordinating the deposition of Mr. Mattiuz or Mr. Pannell.

Accordingly, OCC's continued insistence to reserve the right to a misdirected deposition is unreasonable, as is OCC's insistence for Mr. Fernández to produce documents that simply do not relate to his role within FirstEnergy. To that point, since the filing of this motion to quash, OCC has filed a subpoena directed to a FirstEnergy designee, seeking *identical* documents (in addition to others). The propriety of OCC's document requests at issue here is best left resolved within the context of the subpoena directed to the FirstEnergy designee⁶—not the one directed to Mr. Fernández who does not have the information OCC seeks. So, for these reasons, OCC's subpoena directed to Mr. Fernández is deficient, duplicative, and unreasonable, which under O.A.C. 4901-1-25, should be quashed.⁷

B. OCC Cannot Circumvent The Document Discovery Deadline.

Per the Attorney Examiners' order, document discovery closed *four months ago* on November 24, 2021.⁸ Try as OCC might, it cannot avoid the procedural directives of this proceeding, and its two primary attempts to override the discovery orders are futile.

⁵ See FirstEnergy Mem., at 5-6 (attaching Case No. 09-462-EL-UNC, Letter Filing (Feb. 11, 2022) and Case No. 09-462-EL-UNC, Letter Filing (Sept. 22, 2021)).

⁶ This includes through a motion to quash, if necessary, since FirstEnergy maintains OCC's document requests through any vehicle in this proceeding are untimely and altogether inappropriate, *see infra* Sections II.B and C.

⁷ Ohio Adm. Code § 4901-1-25(C); *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 WL 5506062, Entry at ¶ 7-9 (P.U.C.O. Nov. 2, 2011) (granting motion to quash because subpoena was unreasonable).

⁸ Case No. 17-974-EL-UNC, Entry (Oct. 12, 2021), at ¶ 24(a).

First, OCC cites to O.A.C. 4901-1-17(A) to say the Commission’s regulations require only that “discovery be completed prior to the commencement of a hearing,”⁹ and, according to OCC, the Commission’s “fail[ure] to establish a new discovery cut-off” in this proceeding is an “inadvertent omission.”¹⁰ Contrary to OCC’s reading, however, O.A.C. 4901-1-17 does not grant a right to discovery up until a scheduled hearing. Rather, O.A.C. 4901-1-17(A) mandates that discovery be “completed prior to the commencement of the hearing” and “*as expeditiously as possible*.”¹¹ Rule 4901-1-17 along with other Commission precedent grant the Attorney Examiners discretion to manage the time period for discovery.¹² The subsequent Attorney Examiner orders in this proceeding extending the hearing schedule did so to allow OCC time to review the “mountain of discovery” *it already has*.¹³ FirstEnergy has a right to rely on the procedural schedule of this proceeding and object in good faith when document requests are served via subpoena outside the bounds of that schedule.

Second, OCC claims that FirstEnergy failed to recognize that the Attorney Examiners allowed parties to conduct depositions. This is not true. FirstEnergy expressly acknowledged in

⁹ OCC Mem., at 8.

¹⁰ OCC Mem., at 8-9.

¹¹ Ohio Adm. Code § 4901-1-17(A) (“[D]iscovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.”).

¹² Ohio Adm. Code § 4901-1-17(G); *In the Matter of the Application of P.H. Glatfelter Company for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, 2009 WL 3413629, Entry, at ¶ 8 (P.U.C.O Oct. 15, 2009) (“[I]mplementing the Commission’s procedural rules delineated in Chapter 4901-1, O.A.C., are routine matters with which the Commission and its attorney examiners have had extensive experience in Commission proceedings.”); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176- EL-ATA, 2010 WL 5462077, at ¶ 13 (P.U.C.O. Dec. 22, 2010) (finding the Commission rules vest Attorney Examiners with discretion “to assure an orderly and expeditious proceeding”).

¹³ Case No. 17-974-EL-UNC, Entry (Feb. 10, 2022), at ¶ 30 (noting that the attorney examiners are mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. and extending the testimony and hearing schedule); Case No. 17-974-EL-UNC, Interlocutory Appeal (Jan. 14, 2022), at 13-14 (noting that OCC and others need “time to wade through the mountain of discovery that OCC has received from FirstEnergy Corp.”).

its motion to quash that “notices of deposition are still permitted under the procedural schedule.”¹⁴ Yet no intervenor has noticed a single deposition of any party witness, despite having many months during which to do so.¹⁵

OCC should also know that permitting “notices of deposition” after written discovery has closed does not mean it can shoe-horn document discovery requests into those notices.¹⁶ If it did, subpoenas to non-parties could always be used as an end-run around the close of document discovery, rendering the Commission’s procedural schedules—which are meant to promote efficient case management—meaningless.¹⁷ Yes, O.A.C. 4901-1-25(D) “*may*” allow parties to subpoena a person to give testimony at a deposition and “to produce designated books, papers, documents, or other tangible things within the scope of discovery.”¹⁸ But O.A.C. 4901-1-25(D) does not allow a party “to circumvent the discovery deadline by using a subpoena to request additional documentation.”¹⁹ OCC cannot disregard the discovery deadline of this proceeding by

¹⁴ FirstEnergy Mem., at 3.

¹⁵ See Case No. 17-974-EL-UNC, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Memorandum Contra the Motion for an Indefinite Continuance (Mar. 21, 2022), at 7.

¹⁶ *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.).

¹⁷ *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 subpoena that went “beyond the scope of the prior discovery” and finding “that to allow the subpoena to remain as drafted would in essence allow for the conducting of discovery beyond the previously established deadline.”).

¹⁸ O.A.C. 4901-1-25(D) is subject to the limits of rule 4901-1-16, which “encourage the *prompt and expeditious* use of prehearing discovery” and limit discovery to matters “not privileged, which [are] *relevant* to the subject matter of the proceeding.” O.A.C. 4901-1-16(A), (B) (emphasis added).

¹⁹ *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., Complainant*, No. 10-693-EL-CSS, 2011 WL 1319206, at *2.

serving fourteen new document production requests.²⁰ For this reason, too, OCC's onerous subpoena should be quashed.

C. OCC Fails To Show A Substantial Need For The Requested Documents.

Nowhere in its memorandum contra does OCC explain or show a “substantial need”²¹ for its fourteen new document requests. Instead, OCC merely argues, without support and in conclusory fashion, that it “clearly has a substantial need for the documents that cannot be met through other means.”²² OCC's purported inability to obtain these documents through “other means” is an issue of its own making—and OCC does not and cannot explain why these can *only* be produced through a subpoena directed to Mr. Fernández (who, again, does not have the information OCC seeks). Crucially, OCC fails to confront or even acknowledge the “other means” of obtaining these documents: it could have made these requests through timely party discovery. OCC's memorandum contra is silent on this point because, as FirstEnergy understands, OCC hasn't served any discovery in this proceeding since February 2021 and failed to serve any document requests following the filing of the Corporate Separation Audit Report on September 13, 2021.²³ OCC let the discovery deadline pass; its unreasonable requests for untimely document discovery should be rejected.²⁴

²⁰ See *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).

²¹ *Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 756 (1st Dist. 2007).

²² OCC Mem., at 5.

²³ See Case No. 17-974-EL-UNC, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra the Motion for an Indefinite Continuance (Mar. 21, 2022), at 3-4; see also FirstEnergy Mem., at 8.

²⁴ 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.

As for the requests for non-public FERC audit materials specifically, which are not even limited to documents concerning the Companies or corporate separation, OCC argues that Daymark's audit report in this case found that the Ohio Companies lean heavily on compliance with FERC requirements as a way to meet Ohio corporate separation requirements and so, for this reason, the FERC audit materials are relevant.²⁵ While OCC bases its assertion for relevance on Daymark's audit report, it fails to acknowledge that it already has in its possession all of the Ohio Companies' corporate separation audit responses.²⁶ Beyond that, OCC fails to explain how its overbroad and wholesale requests for communications and documents provided to FERC as part of its audit, even if limited to the time period around the filing of the audit report, is relevant to *Ohio* corporate separation matters. Moreover, the discovery of FERC materials is still a pending issue in another of the Commission's investigative proceedings.²⁷

D. FirstEnergy Has Worked Cooperatively With OCC To Facilitate Discovery.

Finally, OCC ascribes false and unsupported motives to FirstEnergy with respect to discovery in this proceeding. FirstEnergy, even as a non-party, has worked in good faith to resolve disputes related to OCC's subpoenas issued in this and the other three investigative proceedings. From OCC and FirstEnergy's negotiated resolution of the September 24, 2021 subpoena, FirstEnergy has produced to OCC approximately 300,000 pages of documents, and those productions continue. OCC has not issued a discovery request in this proceeding since February 2021, and document discovery closed *four months ago*. In blatant disregard for the procedural

10-2395-GA-CSS, 2011 WL 5506062, Entry at ¶ 7-9 (P.U.C.O. Nov. 2, 2011) (granting motion to quash because subpoena was unreasonable).

²⁵ OCC Mem., at 3-4.

²⁶ See Case No. 17-974-EL-UNC, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra the Motion for an Indefinite Continuance (Mar. 21, 2022), at 5-6.

²⁷ Case No. 20-1502-EL-UNC, Companies' Interlocutory Appeal Concerning Discovery of Non-Public Audit Materials Produced to the Federal Energy Regulatory Commission (Mar. 16, 2022).

schedule, OCC has now served fourteen new and significant document production requests on a non-party. FirstEnergy is merely exercising its rights, especially as a non-party, to follow the procedural schedule and to object to OCC's irrelevant and untimely document requests. Ignoring this, OCC repeatedly claims in its memorandum contra that FirstEnergy, through its motion to quash, is "seeking to shut down," "limit," or "prevent OCC's fact-finding."²⁸ To make such assertions simply because FirstEnergy is following the procedural orders of this proceeding is absurd, especially in light of the "mountain of discovery" OCC acknowledges it has received "from FirstEnergy Corp."²⁹

Further, OCC claims that FirstEnergy has "been dilatory in producing documents,"³⁰ which, as the record demonstrates, is untrue. FirstEnergy never represented that its productions to OCC would be complete by any date certain or even in the near future. Quite the opposite: at the January 4, 2022 prehearing conference in this proceeding, counsel for FirstEnergy expressly stated "there is probably no end in sight" and that counsel could not "come before the court and say [FirstEnergy] will be finished with producing documents on any date certain."³¹ As repeatedly represented, the productions to OCC remain "ongoing" and will continue "on a rolling basis."³²

III. CONCLUSION

For these reasons, and those explained in FirstEnergy's memorandum in support of its motion to quash, OCC's duplicative and deficient subpoena directed to Mr. Antonio Fernández should be quashed in its entirety.

²⁸ OCC Mem., at 2, 8, 10.

²⁹ Case No. 17-974-EL-UNC, Interlocutory Appeal (Jan. 14, 2022), at 13-14.

³⁰ OCC Mem., at 10 n.28.

³¹ Case No. 17-974-EL-UNC, Hr'g Tr. (Jan. 4, 2022), at 13:4-20.

³² *Id.*

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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 22, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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Attorney for FirstEnergy Corp.

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Summary: Reply in Support of the Motion to Quash the Office of the Ohio Consumers' Counsel's Subpoena Duces Tecum for FirstEnergy Vice President and Chief Ethics and Compliance Officer electronically filed by Mr. Corey Lee on behalf of FirstEnergy Corp.