

**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.)	

**MEMORANDUM CONTRA FIRSTENERGY'S MOTION TO QUASH OCC'S
SUBPOENA TO FIRSTENERGY CORP.
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

OCC requested a subpoena to depose a FirstEnergy Corp. designate on corporate separation policies, procedures and practice of the FirstEnergy Ohio Utilities. Consistent with the PUCO rules on discovery, OCC also asked FirstEnergy Corp. to produce documents several days before the deposition. The subpoena was signed and properly served.

Now FirstEnergy Corp. is again seeking to limit OCC's fact-finding and case preparation. FirstEnergy Corp. has moved to quash the subpoena duces tecum on a corporate designate. FirstEnergy Corp. asserts that OCC has not shown a "substantial need" for the "purportedly irrelevant" discovery it seeks.¹ And it says that OCC's document requests are untimely.²

¹ See FirstEnergy Corp.'s Motion to Quash at 6-8.

² *Id.* at 8-10.

FirstEnergy's Motion to Quash should be denied.³

II. ARGUMENT

A. FirstEnergy is mistaken that OCC must show a “substantial need” for the information it has subpoenaed, for consumer protection.

FirstEnergy Corp. claims that OCC must show “substantial need” for its subpoena and that OCC has not done so. FirstEnergy is wrong.

Substantial need is a standard in Ohio Civ. R. 45(C). FirstEnergy is regulated by the PUCO. For decades the PUCO has had its own specific rule on subpoenas and quashing subpoenas. That rule is O.A.C. 4901-1-25. Rule 25 does not even reference substantial need as a standard.

Were OCC required to show substantial need, the need we've shown is even greater than substantial. OCC's grounds for its motion for a subpoena, as set forth in the motion, show more than a substantial need for taking the deposition as part of our case preparation. Depositions are an imperative in this investigation of FirstEnergy's corporate separation (or lack of it) and related issues involving its House Bill 6 scandal.

Also lacking in FirstEnergy's claim about substantial need is that OCC's discovery rights are protected by R.C. 4903.082, which states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” *See OCC v. PUC*, 111 Ohio St.3d 300, 2006-Ohio 5789. The PUCO has also adopted rules that broadly define the scope of discovery. O.A.C. 4901-1-16(B) provides:

³ Gratuitously, FirstEnergy Corp. notes that “[t]he FirstEnergy Ohio Utilities have offered to designate a witness to speak on the Utilities' compliance with R.C. 4928.17 and O.A.C. 4901:1-37, yet OCC has not noticed a deposition of any party witness.” *Id.* at 1. This is beside the point, as FirstEnergy Corp. itself acknowledges by not making this gratuitous assertion in its argument to quash OCC's subpoena. In any event, OCC has noticed depositions of party witnesses.

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added.)

FirstEnergy Corp. alleges that OCC has failed “to specify the topics upon which it expects any FirstEnergy Corp. witness to testify.”⁴ It alleges that OCC “demands documents and testimony that are irrelevant to or inappropriate for the Commission’s consideration in these corporate separation proceedings.”⁵ In this regard, FirstEnergy Corp. alleges that “nowhere in OCC’s motion for a subpoena or accompanying memorandum does OCC explain the relevance of FERC-related discovery (where FERC regulations are distinct from Ohio corporate separation rules) or all communications, conversations, or intentions of a former employee (where that information is uniquely within that former employee’s knowledge in their individual capacity).”⁶ FirstEnergy is mistaken.

First, OCC has a substantial need for the documents (all of which are relevant) it seeks in this proceeding. Here is some context for OCC’s discovery for “FERC-related” information and FirstEnergy Corp.’s efforts to avoid this discovery. Under Ohio law, the FirstEnergy Ohio Utilities must implement and operate under a corporate separation plan

⁴ *Id.* at 6.

⁵ *Id.*

⁶ *Id.* at 7. FirstEnergy Corp. does not name the former employee. But it is apparent based on the subpoena that FirstEnergy Corp. is referring to Ms. Ebony Yeboah-Amankwah. Further, the documentation concerning Ms. Yeboah-Amankwah that OCC *actually* asked for was defined with much more precision than FirstEnergy Corp. characterizes it. *See* Subpoena at requests 1, 9, 11, 12, 13, and 15.

that “satisfies the public interest” and is “sufficient” to protect Ohioans from undue preference or advantage being given to the utilities’ affiliate(s).⁷

The PUCO-appointed auditor (Daymark) noted that FirstEnergy’s compliance approach to corporate separation was set up to meet FERC requirements. It found that “FirstEnergy leans heavily on compliance with FERC requirements as a way to meet Ohio corporate separation requirements.”⁸ Daymark reported that “[i]n many cases, FirstEnergy had no Ohio-specific processes or documentation; rather they relied on procedures developed to meet FERC’s Affiliate Restrictions rules that are laid out in 18 CFR §35.39.”⁹ Thus, FirstEnergy Corp.’s insistence that FERC regulations on corporate separation compliance are distinct from Ohio corporate separation rules is without merit and should be rejected.

Recently, FERC’s Division of Audits and Accounting undertook and completed an audit of FirstEnergy Corp., including its service companies and other companies in the FirstEnergy holding company system.¹⁰ That audit covered a five-year period and evaluated, among other things, compliance with cross-subsidization restrictions on affiliate transactions, service companies accounting and recordkeeping, and accounting and reporting for franchised public utilities for their transactions with associated entities.¹¹

⁷ R.C. 4928.17.

⁸ Daymark Audit at 28 (Sept. 13, 2021).

⁹ *Id.* at 29.

¹⁰ (Docket No. FA19-1-000).

¹¹ See link to FERC Audit: <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=9DDE513A-470F-CAC6-97AD-7EC4D2800000>.

Note that FERC’s audit findings included “significant shortcomings” in FirstEnergy and its subsidiaries’ internal controls over financial reporting for expenses relating to civic, political and lobbying activities. FERC additionally noted that:

[e]ven more concerning, several factual assertions agreed to by FirstEnergy in DPA [deferred prosecution agreement] and the remedies FirstEnergy agreed to undertake, point towards *internal controls having been possibly obfuscated or circumvented to conceal or mislead* as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates. (Emphasis added.)¹²

Given the FirstEnergy Ohio Utilities’ heavy reliance on maintaining a corporate separation plan that meets FERC requirements, it is crucial to understand whether and to what extent FirstEnergy Corp. and the FirstEnergy Ohio Utilities are complying with FERC’s rules and regulations on corporate separation. The “FERC-related” documents are highly relevant to this case involving corporate separation compliance. FirstEnergy Corp. and the FirstEnergy Ohio Utilities have themselves made them highly relevant.

The Attorney Examiner in Case No. 20-1502 recently issued a ruling on a similar issue where OCC had filed a motion to compel discovery seeking FERC audit related documents.¹³ The examiner ruled that OCC is entitled to all documents and communications provided to FERC Staff by all FirstEnergy entities during the course of the FERC audit, pertaining to the FirstEnergy Ohio Utilities.¹⁴ That ruling was affirmed

¹² *Id.*, Audit Report at 48 (Feb. 4, 2022).

¹³ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company et al.*, Case No. 20-1502-EL-UNC, Prehearing Conference, Tr. 55-59 (Mar. 11, 2022).

¹⁴ *Id.* Tr. 37, 56-59.

by the PUCO, when it denied the FirstEnergy Utilities request for an interlocutory appeal.¹⁵

We note this ruling for several reasons. The utilities (unlike FirstEnergy Corp.) did not claim the information was not relevant to the proceeding. Additionally, the FERC documents at issue here pertain to the same audit. The PUCO should, consistent with its ruling in Case No. 20-1502, require the production of these documents prior to the deposition of FirstEnergy Corp.’s designate.

Second, OCC specified the topics upon which it expects any FirstEnergy Corp. designate to testify. We said that the person designated by FirstEnergy Corp. would be cross-examined about “corporate separation policies, practices, and procedures[.]”¹⁶ We explained that the issues for deposition “relate to how (and whether) the FirstEnergy Ohio Utilities complied with Ohio’s corporate separation law and rules during 2016 through 2020.”¹⁷ We specified that

[t]he FirstEnergy Corp. designee should have knowledge regarding the corporate separation policies, practices, and procedures of the FirstEnergy Ohio Utilities and should be familiar with the documents and able to authenticate documents produced as part of this subpoena.¹⁸

And we pointed out that a corporate subpoena (at issue here) is *exactly* what FirstEnergy Corp. had previously said we should pursue.¹⁹ For FirstEnergy Corp. to assert that OCC

¹⁵ *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, Entry (Apr. 6, 2022).

¹⁶ OCC’s Motion for Subpoena at 1; *see also Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 3-4.

did not specify the topics upon which it expects any FirstEnergy Corp. designate to testify cannot be reconciled with the actual contents of OCC's motion for subpoena.

Regarding OCC's request for what FirstEnergy Corp. characterizes as "all communications, conversations, or intentions of a former employee (where that information is uniquely within that former employee's knowledge in their individual capacity)[,]"²⁰ it is equally relevant. The former employee is Ms. Ebony Yeboah-Amankwah. OCC has explained in detail the importance of obtaining information (testimony and documents) concerning Ms. Yeboah-Amankwah, who was FirstEnergy Corp.'s former Vice President, General Counsel and Chief Ethics Officer.²¹ Reiterating, Ms. Yeboah-Amankwah was ultimately responsible for corporate separation compliance during most of the time-period being investigated here.²² OCC's explanation is equally applicable here in response to FirstEnergy Corp.'s objection to us obtaining information concerning Ms. Yeboah-Amankwah.

The importance of obtaining information concerning Ms. Yeboah-Amankwah is highlighted by the finger-pointing between her and FirstEnergy Corp. in response to OCC's subpoenas. Ms. Yeboah-Amankwah has asserted that documents we subpoenaed from her are FirstEnergy Corp.'s property and that she returned all documents to FirstEnergy Corp. at the time of her separation.²³ FirstEnergy Corp. is now asserting that Ms. Yeboah-Amankwah has the documents.²⁴

²⁰ Motion to Quash at 7.

²¹ See OCC's Memorandum Contra Motion to Quash (Mar. 22, 2022).

²² See generally *Id.*

²³ See Ebony Yeboah-Amankwah's Motion to Quash the Office of the Ohio Consumer Counsel's Subpoena (Mar. 7, 2022) at 6.

²⁴ Motion to Quash at 7.

The documents requested by OCC cannot be obtained from other sources. FirstEnergy should identify those sources if it claims otherwise. OCC would face undue hardship if it were deprived of these documents. OCC clearly has a substantial need for the documents that cannot be met through other means.

Again, as we explained in our motion for subpoena, a corporate subpoena is *exactly* what FirstEnergy Corp. had previously said we should pursue.²⁵ FirstEnergy Corp. has failed to show that producing the documents would create an undue burden on it.

The Motion to Quash should be denied.

B. OCC’s subpoena duces tecum is in consumers’ interest and does not violate the procedural schedule for discovery in this case, as FirstEnergy Corp. wrongly asserts.

FirstEnergy Corp. asserts that the subpoena signed by the Attorney Examiner is “procedurally improper” because discovery is closed.²⁶ FirstEnergy Corp.’s effort to prevent OCC’s fact-finding is, once again, wrong.

FirstEnergy Corp. ignores that in the very Entries which set a discovery cut-off, the Attorney Examiner expressly exempted depositions.²⁷ The attorney Examiner stated: “The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021.”²⁸ Depositions were expressly exempted from the discovery cut-

²⁵ *Id.* at 3-4.

²⁶ *See* Motion to Quash at 7-8.

²⁷ Case No. 17-974-EL-UNC, Entry, at ¶ 18(a) (Sept. 17, 2021) (“The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021.”); Case No. 17-974-EL-UNC, Entry, at ¶ 24(a) (Oct. 12, 2021) (extending discovery cut-off to Nov. 24, 2021).

²⁸ Case No. 17-974-EL-UNC, Entry, at ¶ 18(a) (Sept. 17, 2021).

off. (The discovery cut-off is itself wrong and should be extended as OCC and others have argued elsewhere.)

Further, depositions of non-party deponents can be conducted, with attendance compelled through subpoenas. O.A.C. 4901-1-25(A) allows the PUCO (and those acting on its behalf) to issue a subpoena to compel a person to give testimony at a time and place specified and command such person to produce “books, papers, documents, or other tangible things.” O.A.C. 4901-1-25(D) allows parties to subpoena a person to attend and give testimony at a deposition, *and “to produce designated books, papers, documents, or other tangible things within the scope of discovery.”* That is just what OCC has done, consistent with the Entries allowing depositions to go forward, despite a discovery cut-off.

The Attorney Examiner did not rule that parties could not exercise their right to ask for documents to be produced at depositions. Nor did FirstEnergy Corp. or the FirstEnergy Utilities seek clarification of the Examiner’s ruling. Unfortunately for consumers, OCC does not have subpoena power (and the General Assembly should change that). OCC must first ask the PUCO to issue a subpoena.

FirstEnergy Corp. cites to several proceedings where the PUCO granted motions to quash the production of documents under a deposition subpoena.²⁹ Those cases, however, did not involve the truly unique circumstances that surround the PUCO’s FirstEnergy investigation cases concerning FirstEnergy’s H.B. 6 activities. These cases stem from what has been described as “likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio.” FirstEnergy Corp., the

²⁹ See, e.g., Motion to Quash at 4.

entity seeking to shut down OCC's fact-finding, stands charged with a federal crime—a crime which it has admitted.³⁰

The Motion to Quash should be denied.

III. CONCLUSION

The PUCO's Attorney Examiner signed OCC's subpoena, which is part of giving Ohioans the benefit of a full investigation of FirstEnergy's corporate separation plan, including issues involving the FirstEnergy scandals. The PUCO must consider whether the plan satisfies the public interest. And the PUCO must consider whether the plan is sufficient to ensure the FirstEnergy Ohio Utilities do not extend undue preference or advantage to FirstEnergy affiliates, to the detriment of Ohio consumers.

The testimony and documents subpoenaed from FirstEnergy Corp. are discoverable under law and the Ohio Administrative Code. FirstEnergy's Motion to Quash should be denied.

³⁰ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (Jul. 22, 2021).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electric transmission this 21st day of April 2022.

/s/ Maureen R. Willis
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Summary: Memorandum Memorandum Contra FirstEnergy's Motion to Quash
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