

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37.) Case No. 17-974-EL-UNC
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In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating company, and The Toledo Edison Company.) Case No. 17-2474-EL-RDR
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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
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In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.) Case No. 20-1629-EL-RDR
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**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**

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The Office of the Ohio Consumers' Counsel ("OCC") moves for a subpoena of H.B.6 investigation information from FirstEnergy Corp. FirstEnergy Corp has been charged with (and admitted to underlying facts involving) the federal crime of conspiring to commit honest services wire fraud.¹ The subject of this motion is documents FirstEnergy Corp. was

¹ Title 18, United State Code, Sections 1343, 1346, and 1349.

ordered by U.S. Chief District Judge Marbley to produce to shareholders in their lawsuit.² (A copy of Chief Judge Marbley's Opinion and Order is attached as Attachment A.)

The federal Court's Opinion and Order partially lifted the stay of discovery to allow plaintiffs to obtain the following documents from FirstEnergy Corp.:

- (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.³

Consistent with O.A.C. 4901-1-25(A) and (D), the Public Utilities Commission of Ohio ("PUCO") should grant OCC's motion for a subpoena compelling FirstEnergy Corp. to produce, by 3 p.m. September 30, 2021, at OCC's office at 65 East State Street, 7th Floor, Columbus, Ohio 43215 the same documents described above, which Chief Judge Marbley ordered FirstEnergy to produce to the plaintiffs in the securities fraud litigation ("documents to be produced in the securities fraud litigation").

The subpoena is reasonably calculated to lead to the discovery of admissible evidence. The grounds for this Motion are set forth in the accompanying Memorandum in Support.

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

³ *Id.*

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

These investigatory cases are important for consumer protection. OCC and other parties are investigating whether the FirstEnergy Utilities charged their two million consumers for any political activities associated with tainted House Bill 6 ("H.B. 6"). We now know they did, despite FirstEnergy's earlier assertions otherwise. We are still seeking answers on how much was charged to FirstEnergy utility consumers and whether those charges provided an unlawful subsidy to FirstEnergy affiliates.

Under a deferred prosecution agreement, filed on July 22, 2021, FirstEnergy Corp. has been charged with and admitted to the underlying facts of honest services wire fraud in defrauding the public. The criminal charge relates to bribery or kickbacks to public officials, for making \$60 million in dark money payments associated with the scandalous bill.⁴ H.B. 6 was tailor-made for FirstEnergy Corp., with a billion-dollar nuclear bailout and the consumer rip-off of the “recession-proofing” (decoupling) charge – not to mention the FirstEnergy Utilities profits enhancement slipped into the 2019 budget bill (H.B. 166). Thankfully, there was a partial legislative repeal of the tainted H.B. 6 subsidy charges to consumers.

The need for consumer protection in these cases is heightened, given FirstEnergy Corp. disclosures in SEC filings that a committee of independent members of the Board of Directors is directing an internal investigation related to ongoing government investigations.⁵ We learned that the internal investigation has unearthed findings that caused at least six top executives of FirstEnergy Corp. to be fired or “separated,” including for violations of FirstEnergy policies and its code of conduct.⁶

We learned of a “purported consulting agreement” between a FirstEnergy entity and counterparty to the agreement believed to be connected to the former PUCO Chair.⁷ We learned that under the purported consulting agreement of \$4.3 million was paid in early 2019 that, in the words of FirstEnergy’s February 2021 SEC disclosure “may have been for purposes other than those represented within the consulting agreement.”⁸ In the deferred prosecution agreement, FirstEnergy

⁴ United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement at 16 (July 22, 2021).

⁵ FirstEnergy Corp., Form 10-K at 125 (February 18, 2021).

⁶ FirstEnergy Corp., Form 8-K (October 30, 2020), Form 8-K (November 8, 2020) and Form 8-K (May 27, 2021).

⁷ FirstEnergy Corp., Form 8-K (February 16, 2021).

⁸ *Id.*

admitted the payment was for legislative and regulatory services the former PUCO Chair was to perform to benefit FirstEnergy in his role as PUCO Chair.⁹ We learned of certain transactions, including the \$4.3 million and other “vendor payments,” charged to the FirstEnergy Utilities (and potentially their customers) that were improper.¹⁰

All of this information came to light through the FirstEnergy Corp.’s independent internal investigation. And these findings/conclusions were all publicly reported through a number of FirstEnergy Corp.’s SEC filings. And we learned much more about FirstEnergy’s criminal role in H.B. 6 when we read the statement of facts supporting the deferred prosecution agreement.

FirstEnergy Corp. made these revelations in the midst of what former U.S. Attorney Devillers described as “likely the largest bribery, money-laundering scheme ever perpetrated against the people in the state of Ohio.”¹¹ Under these unusual circumstances, the need for transparency is paramount. The PUCO should do everything possible to facilitate broad discovery, that is our right under law and rule. That discovery is needed so consumers can obtain answers about whether FirstEnergy’s role in tainted H.B. 6 has adversely affected them and so the PUCO can dispel the “black cloud over the PUCO based upon the HB6 scandal.”¹²

When OCC has attempted to obtain relevant information from the FirstEnergy Utilities in discovery that may be in the possession of FirstEnergy Corp., the FirstEnergy Utilities will typically

⁹ United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement at 16 (July 22, 2021).

¹⁰ See Case No. 20-1629-EL-RDR, PUCO Staff’s Request to Expand Audit Scope in the Matter of the 2020 Review of the Delivery Capital Recovery Rider of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (March 8, 2021) (“Staff Request”).

¹¹ Pelzer, J., Ohio House Speaker Larry Householder, allies got more than \$60 million in FirstEnergy bribes to pass HB6, feds claim Cleveland.com (July 21, 2020).

¹² Pelzer, J., *New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of HB6 scandal* Cleveland.com (May 18, 2021).

object. Among other reasons, the FirstEnergy Utilities object because the requests “seek[s] the production of information that is not within the Companies’ possession, custody, or control.”¹³

While not conceding the FirstEnergy Utilities’ objections, OCC seeks these subpoenas to obtain the documents from FirstEnergy Corp., which has “possession, custody, or control” of the information.

OCC’s intention is to obtain this key information as quickly as possible for consumer protection.

The documents would assist OCC in developing comments that will be forthcoming in this proceeding. In the interest of moving forward in these cases as expeditiously as possible, the PUCO should order the production of documents that OCC requests through these Motions for Subpoenas, with the documents being produced by Sept. 28,

As an additional matter, the PUCO has granted OCC’s motion to compel discovery for certain items subject to the condition that OCC obtains consent from the U.S. Attorney handling the criminal investigation.¹⁴ This is an unreasonable requirement by the PUCO. It is especially unreasonable given that Chief Judge Marbley of the Southern District of Ohio has ordered FirstEnergy to produce these documents to the plaintiffs in the securities fraud class action lawsuit. This federal Court is the same court where the *U.S. v. Householder, et al.* criminal investigation is pending.

The PUCO should therefore order the production of documents that OCC requests through this Motion for Subpoena.

¹³ See, e.g., Case No. 20-1502-EL-UNC, FirstEnergy Utilities’ Responses to OCC’s Fifth Set of Discovery Requests at 14 (March 18, 2021).

¹⁴ See, e.g., Case No. 20-1502-EL-UNC, Tr. of Prehearing Conference on June 30, 2021 at 27 (July 13, 2021).

II. ARGUMENT

A. Issuing subpoenas to facilitate parties' discovery is within the PUCO's authority where, as here, the subpoenas seek information reasonably calculated to lead to the discovery of admissible evidence.

The PUCO's subpoena power, which facilitates parties' ability to conduct discovery, is grounded in Ohio law and rules. Attorney examiners are authorized to issue subpoenas.¹⁵ "A party may *** in a subpoena name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested"¹⁶ and "[a] subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code."¹⁷

The scope of discovery is defined as follows:

any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the sought would be inadmissible at the hearing if the information sought *appears* reasonably calculated to lead to the discovery of admissible evidence.¹⁸

The PUCO rule is similar to Ohio Civ. R. 26 (B)(1), which governs the scope of discovery in civil cases. Civ. R. 26(B) has been liberally construed to allow for broad discovery of any unprivileged matter relevant to the subject matter of the pending proceeding.¹⁹

¹⁵ R.C. 4901.18.

¹⁶ O.A.C. 4901-1-21(F).

¹⁷ O.A.C. 4901-1-25.

¹⁸ O.A.C. 4901-1-16(B) (Emphasis added).

¹⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing to *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 661 and *Disciplinary Counsel v. O'Neill* (1996), 75 Ohio St.3d 1479.

Under this standard, there are more than adequate grounds for granting OCC's Motion in the interest of consumer protection. The documents OCC seeks relate to documents that have been ordered to be produced in discovery in *In re FirstEnergy Securities Litigation*.²⁰ All of these documents are reasonably calculated to lead to the discovery of admissible evidence, as explained below.

Further, this subpoena directed at FirstEnergy Corp. is necessary to obtain the information sought because the FirstEnergy Utilities will likely assert in discovery that the information is not in their possession, custody, or control.²¹ The PUCO should exercise its jurisdiction over FirstEnergy Corp. to require it to produce the information in its possession.

B. OCC's request for all documents produced by FirstEnergy Corp. in the securities fraud litigation is reasonably calculated to lead to the discovery of admissible evidence on code of conduct violations between the utilities and their affiliates.

The documents that OCC seeks are reasonably calculated to lead to the discovery of admissible evidence because the securities fraud litigation is based on the same set of underlying facts as these two cases before the PUCO. This is plain from the Amended Complaint in the securities fraud litigation, which states:

3. Throughout the Class Period, FirstEnergy and its most senior executives bankrolled one of the largest corruption and bribery schemes in U.S. history. Unbeknownst to investors, FirstEnergy spent tens of millions of dollars on an unprecedented multi-year scheme to corrupt legislators and regulators, who FirstEnergy used to draft and pass legislation designed to provide \$2 billion in benefits to FirstEnergy – *all at ratepayers' expense*. FirstEnergy's scheme extended to the highest offices of the Ohio legislature, including the office of the Speaker of the House, and to the top energy regulator in the state, the Chairman of the Public Utilities Commission of Ohio ("PUCO"). FirstEnergy employed an

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

²¹ *See, e.g.*, Case No. 20-1502-EL-UNC, FirstEnergy Utilities' Responses to OCC's Seventh Set of Discovery Requests at 7 (April 22, 2021).

elaborate network of lobbyists, shell companies and political action committees; saturated media markets with a false and misleading advertising campaign funded through difficult-to-trace dark money networks; and directly subverted the free and fair operation of Ohio elections.

4. FirstEnergy's scheme to corrupt the political process and suborn the regulatory framework was not the work of rogue employees, but personally overseen and facilitated by the senior echelon of Company management, including FirstEnergy's then-Chief Executive Officer ("CEO") Charles E. Jones and numerous other executives responsible for FirstEnergy's regulatory affairs, legal compliance, financial reporting, and investor disclosures. Corruption became a fundamental aspect of the Company's business model as the key to unlocking \$2 billion in critical subsidies and overcoming the Company's most pressing operational challenges.²²

The Chief Judge presiding over the securities fraud litigation allowed discovery of documents that FirstEnergy Corp. produced to law enforcement and to federal regulators related to the H.B. 6 bribery investigation. The U.S. Attorney recently filed a racketeering charge against FirstEnergy Corp. for honest services wire fraud arising out of the H.B. 6 scandal in the same court – the Southern District of Ohio.²³ FirstEnergy Corp. entered into a deferred prosecution agreement where it admitted all the facts that formed the basis of the wire fraud charge.²⁴ The facts underlying the criminal wire fraud violation are the same underlying facts that the PUCO is investigating in the present cases.

In addition, the securities fraud plaintiffs were allowed to obtain discovery of the documents that FirstEnergy Corp. produced to FERC and the SEC related to the H.B. 6 bribery investigation.

²² *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Amended Complaint at 3 (February 26, 2021). (emphasis added).

²³ *U.S. v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Criminal Information (S.D. Ohio) (July 22, 2021).

²⁴ *Id.*, Deferred Prosecution Agreement (S.D. Ohio) (July 22, 2021).

FirstEnergy Corp. described those proceedings as follows:

In addition, on August 10, 2020, the SEC, through its Division of Enforcement, issued an order directing an investigation of possible securities laws violations by FE, and on September 1, 2020, issued subpoenas to FE and certain FE officers. Further, in letters dated January 26 and February 22, 2021, staff of FERC's Division of Investigations notified FirstEnergy that the Division is conducting an investigation of FirstEnergy's lobbying and governmental affairs activities concerning HB 6, and staff directed FirstEnergy to preserve and maintain all documents and information related to the same as such have been developed as part of an ongoing audit that is being conducted by FERC's Division of Audits and Accounting.²⁵

The FERC and SEC investigations focus on the same underlying facts involved in the present PUCO cases, so the discovery OCC seeks is relevant to these proceedings. This discovery will likely produce information on whether FirstEnergy policies and its code of conduct were violated by executives who served both FirstEnergy Corp. and the FirstEnergy Utilities. These findings may point to illegal subsidies and violations of corporate separation law and rules.

Ohio corporate separation law and rules require the FirstEnergy Utilities to follow a code of conduct between affiliates that, among other things, prohibits "anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa."²⁶ And the corporate separation rules provide for adherence to a cost allocation manual to ensure that no cross-subsidization is occurring between the electric utility and its affiliates.²⁷ The securities fraud discovery documents will presumably identify what conduct these fired executives engaged in and how their conduct violated FirstEnergy policies and its code of conduct, and perhaps the cost allocation manual. And the

²⁵ FirstEnergy Corp., Form 8-K at 18 (March 17, 2021).

²⁶ O.A.C. 4901:1-37-04(D)(4).

²⁷ O.A.C. 4901:12-37-08(C).

FERC documents should pertain to the intercompany billings that ultimately resulted in misallocated costs, including H.B..6 costs, being charged to consumers.

The purpose of the corporate separation investigation is to determine whether FirstEnergy (including the Utilities, FirstEnergy Corp., and the FirstEnergy Service Company) complied with Ohio corporate separation law and rules, including utility policies and procedures related to code of conduct rules between affiliates. The fired executives' code of conduct violations; therefore, are directly at issue in this proceeding and the internal investigation and related documents are directly probative of such violations of Ohio corporate separation law and rules.

In fact, less than a week after FirstEnergy Corp. announced the firing of its Chief Executive Officer (and others), the PUCO expanded its corporate separation audit to include examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum.²⁸ The PUCO explained that the information provided by FirstEnergy Corp. pertaining to its terminated executives required that it “take additional action to ensure compliance by the Companies and its affiliates with the corporate separation provision of R.C. 4928.17 and with the Companies’ Commission-approved corporate separation plans.”²⁹ We agree.

The PUCO has, thus, recognized and admitted the importance and relevance of the information sought by the securities fraud plaintiffs in finding violations of FirstEnergy policies and code of conduct. The information OCC seeks through this subpoena is directly connected to the FirstEnergy Utilities’ policies and code of conduct and are necessary for the OCC to investigate the

²⁸ *In the Matter of the Review of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC Entry at ¶4-5 (November 4, 2020).

²⁹ *Id.*, Entry at ¶17 (November 4, 2020).

issues presented by the PUCO's expanded scope of this proceeding. The subpoena should be granted.

FirstEnergy Corp. made disclosures relating to a "purported consulting agreement," stating that the \$4.3 million payment was in exchange for the individual taking action "for the benefit of [FirstEnergy*** during the time period *after* such payment during which the Individual was acting in any governmental or regulatory capacity."³⁰ The "individual" apparently was the former PUCO Chair.

FirstEnergy Corp. also disclosed that there were a number of transactions, dating back ten years or more, that were improperly classified, misallocated, or lacking supporting documentation that were charged to FirstEnergy Utilities, including the Ohio utilities.³¹ FirstEnergy admitted that the transactions included payments for "vendor services." In this regard, Santino Fanelli is an employee of FirstEnergy Service Company and is responsible for the FirstEnergy Utilities' regulatory matters in Ohio. At OCC's deposition of Mr. Fanelli,³² counsel for the FirstEnergy Utilities asserted that the transactions that were either improperly classified, misallocated, or lacked supporting documentation are "one and the same" as the payments made to the former Ohio

³⁰ FirstEnergy Corp., Waiver and Amendment No. 2 to Credit Agreement dated as of November 17, 2020 among FirstEnergy Corp., *et al.*, as Borrowers, the Lenders Named Herein, as Lenders, Mizuho Bank, Ltd., as Administrative Agent, the Fronting Banks Named Herein, as Fronting Banks and the Swing Line Lenders Named Herein, as Swing Line Lenders, and MUFG Bank, Ltd. as Joint Lead Arranger, Schedule 1 (November 17, 2020) (Emphasis added).

³¹ FirstEnergy Corp., Form 10-K (February 18, 2021).

³² *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, Deposition Transcript of Santino Fanelli (March 9, 2021) ("Fanelli Transcript") at 195:25-196:2 (cited portions are attached hereto as Attachment A).

government official.³³ This was borne out by the recent audit report in Case No. 20-1629-EL-RDR.³⁴

These disclosures raise important issues for the PUCO to consider within the context of its pending H.B. 6-related investigations. In the corporate separation case, misallocations of costs implicate the cost allocation manual, which is supposed to ensure that no cross-subsidization is occurring between the electric utility and its affiliates. Questions that should be answered include, but are not limited to, how did the misallocations happen, what was the effect of the misallocations, was the cost allocation manual followed, and why did the cost allocation manual and procedures not prevent what occurred. We have obtained some of these answers from the audit report but not all. The Auditor found that “Ohio Companies have little insight into the allocated charges they are receiving from FirstEnergy Service Company. *** There is no system in place for the Ohio Companies to review or dispute an allocated charge. Allocated charges are simply passed on to the Ohio Companies with little oversight from Ohio Company staff or even the business service group that works directly with the Ohio Companies.”³⁵ This led the Auditor to recommend that “FirstEnergy should implement a more robust internal process to audit costs allocated to Ohio Companies.”³⁶

In the DCR case, the annual audit of the DCR included an Expanded Scope to review the transactions to determine whether funds collected from customers were used to pay for the vendor

³³ *Id.* at 252:25-253:7.

³⁴ Case No. 20-1629-EL-RDR, Compliance Audit Expanded Scope (August 3, 2021).

³⁵ *In the Matter of the Review of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company’s Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC, Compliance Audi of FirstEnergy Operating Companies at 83 (September 13, 2021).

³⁶ *Id.* at 93.

services and whether funds should be returned to customers.³⁷ The auditor noted one question they were unable to answer:

Blue Ridge understands how costs were settled to the Ohio operating companies but not why FirstEnergy believed it was appropriate to record these charges to the Ohio operating companies to be possibly included in rates charged to customers. However, determining the reason is beyond the scope of Blue Ridge's analysis.³⁸

In the DMR case, the PUCO-hired auditor (Oxford Advisors) found that some of the DMR revenues were deployed in a manner contrary to the PUCO's order authorizing the DMR rider.³⁹ A new issue for investigation is whether the DMR revenues were also used to support the H.B. 6 bribery scheme. In the political and charitable spending case, the PUCO is investigating the extent to which costs related to the H.B. 6 bribery scheme were allocated to the FirstEnergy Utilities and included in rates collected from consumers.

The documents that OCC seeks through this subpoena may provide the answer to these questions.

OCC's Motion for Subpoena seeks documents produced in the securities fraud litigation. These documents are likely to be related to corporate separation violations and the vendor payments including the payments to the former PUCO chair and documents related to misallocated expenses (vendor payments) that customers of the FirstEnergy Utilities may have been charged for. These documents are reasonably calculated to lead to the discovery of admissible evidence.

³⁷ Case No. 20-1629-EL-RDR, Compliance Audit Expanded Scope (August 3, 2021).

³⁸ *Id.* at 4.

³⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illumination Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at ¶282 (October 12, 2016).

C. It would not be any burden for FirstEnergy Corp. to respond to OCC's request for all documents produced by FirstEnergy Corp.'s in the securities fraud litigation.

It would not be burdensome at all for FirstEnergy Corp. to produce these documents because it has already found, reviewed, organized, and marked the documents for production in the securities fraud litigation and in the underlying governmental and regulatory litigation. Courts have recognized that, under these circumstances, it is no burden to make a duplicate set of the documents. The plaintiffs in the securities fraud litigation described it well:

Here, the discovery sought is limited to just that which has been produced and is being produced or generated (in the form of deposition testimony), in other cases regarding the bribery scandal and Lead Plaintiff will suffer undue prejudice if kept in the dark for months while related cases rapidly move forward with discovery and towards resolution.

A. The Requested Discovery Is Particularized and Presents No Burden

Lead Plaintiff's request for just the discovery that already has been (or will be) produced in related matters unquestionably satisfies the particularity requirement of the PSLRA discovery stay's exception. See *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 2007 WL 518626, at *6 (E.D. Mich. Feb. 15, 2007) (particularity requirement satisfied where plaintiffs "only request[ed] the production of materials that have already been assembled and produced to Delphi's internal investigators and the federal authorities"); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 220 F.R.D. 246, 250 (D. Md. 2004) (particularity requirement satisfied where the motion "describes a 'clearly defined universe of documents,' and the burden of producing the materials should be slight, considering that the defendants have previously produced them to other entities"). Indeed, FirstEnergy's motion to stay discovery in the related RICO action was recently denied, with the court finding that "any prejudice to [FirstEnergy] would be minimal in terms of the discovery." *Smith v. FirstEnergy Corp.*, 2021 WL 507881, at *4 (S.D. Ohio Feb. 11, 2021). Moreover, production of discovery that has already been produced in related litigation imposes virtually no burden on Defendants and is not prejudicial in any way. Numerous courts have found that "[t]he burden on the defendants 'is slight when a defendant 'has already found, reviewed and organized the documents.'"" *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 2009 WL 4796169, at *2 (S.D.N.Y. Nov. 16, 2009) (lifting stay as to materials already made available to numerous government agencies and

others). As Judge Gwin recognized in lifting the PSLRA discovery stay in a prior securities fraud case against FirstEnergy, the company “cannot . . . allege any burden from providing documents that it has already reviewed and compiled.” FirstEnergy, 229 F.R.D. at 545; accord N.Y. State Teachers’ Ret. Sys., 2015 WL 1565462, at *4 (no undue burden where defendants “already had reviewed and compiled the documents when they produced them to other entities or parties”); WorldCom, 234 F. Supp. 2d at 306 (same); Royal Ahold, 220 F.R.D. at 250 (“the burden of producing the materials should be slight, considering that the defendants have previously produced them to other entities”); Seippel v. Sidley, Austin, Brown & Wood LLP, 2005 WL 388561, at *1 (S.D.N.Y. Feb. 17, 2005) (the cost of discovery that has already been compiled and produced by defendants “is minimal”).⁴⁰

D. The FirstEnergy Utilities committed to make affiliates’ records available to the PUCO and OCC.

When Ohio Edison merged with Centerior Energy Corporation, the FirstEnergy Utilities promised to make all relevant records of its affiliates available to the PUCO and OCC. The merger commitment states:

2. That in any proceeding before the PUCO, the Companies will make available to the PUCO and OCC all relevant books, records, employees, and officers of the Companies, and any affiliates or majority-owned subsidiaries of the Companies.⁴¹

The FirstEnergy Utilities’ previous objections that the documents should not be produced because they are beyond the PUCO’s jurisdiction violates this merger commitment. The PUCO should enforce the subpoenas and require the FirstEnergy Utilities to honor their merger commitment to produce records from affiliates.

⁴⁰ *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio), Memorandum of Points and Authorities in Support of Lead Plaintiff’s Motion to Partially Lift the PSLRA Discovery Stay at 7-8 (April 7, 2021).

⁴¹ *In the Matter of the Commission’s Review of the Merger of Ohio Edison Company and Centerior Electric Corporation*, Case No. 96-1322-EL-MER, Comments of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 2 (February 18, 1997).

III. CONCLUSION

The PUCO has emphasized its “commitment to act in a reasoned and methodical manner, based upon facts rather than speculation, in light of the recent allegations surrounding FirstEnergy Corp.” related to H.B. 6.⁴² As such, developing the facts is of paramount importance. And developing the facts requires broad discovery as permitted by the rules, so long as a party can show that the discovery is reasonably calculated to lead to the discovery of admissible evidence.

OCC’s motion seeking to subpoena documents from FirstEnergy Corp. should be granted as consistent with the scope of discovery and necessitated by the FirstEnergy Utilities’ claims that the information is not within their possession, custody, or control. The PUCO should grant OCC’s Motions.

Respectfully submitted,

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Ohio Consumers’ Counsel

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⁴² Case No. 20-1629-EL-RDR, Entry at ¶ 8 (March 10, 2021).

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Motion for Subpoena Duces Tecum was served upon the persons listed below by electronic transmission this 24th day of September 2021.

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

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Michael DeWine
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PUBLIC UTILITIES COMMISSION OF OHIO
SUBPOENA DUCES TECUM

TO: FirstEnergy Corp.
c/o Statutory Agent
CT Corporation System
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Suite 125
Columbus OH 43219

Upon application of the Office of the Ohio Consumers' Counsel ("OCC"),
FirstEnergy Corp. is hereby required to produce by October 18, 2021, the following
documents/information at the Offices of the Ohio Consumers' Counsel, 65 East State Street, 7th
Floor, Columbus, Ohio 43215:

1. All documents produced, provided, or received by FirstEnergy Corp. in the course of litigation against FirstEnergy Corp. arising out of the HB 6 bribery scheme, including any deposition testimony; and
2. All documents that FirstEnergy Corp. has 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.

The documents will be produced in connection with the proceedings entitled: "In the Matter of the Review of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio

Adm. Code Chapter 4901:1-37 (Case No. 17-0974-EL-UNC),” “In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Cash No. 17-2474-EL-RDR)”, “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 (Cash No. 20-1502-EL-UNC)” and “In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company”(Case No. 20-1629-EL-RDR).”

Dated at Columbus, Ohio, this 24th day of September 2021.



Attorney Examiner

NOTICE: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.