

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company, and The Toledo) Case No. 10-176-EL-ATA
Edison Company for Approval of a New)
Rider and Revision of an Existing Rider.)

ENTRY

The Commission finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.
- (3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers.
- (4) Further, by entry issued on October 8, 2010, this case was set for an evidentiary hearing on November 29, 2010. The evidentiary hearing in this matter commenced as scheduled on November 29, 2010, and was then continued until January 27, 2011. Pursuant to entries issued on October 8, 2010, October 14, 2010, and November 5, 2010, six local public hearings were scheduled and held in this matter.
- (5) By entry issued on November 17, 2010 (November 17 Entry), Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham, and Bob Schmitt Homes, Inc.

(Bob Schmitt Homes) (collectively, the CKAP Parties) were granted intervention in this proceeding.

- (6) On December 15, 2010, FirstEnergy filed a motion to compel, moving for an order compelling the CKAP Parties to provide complete responses to FirstEnergy's First and Third Sets of Interrogatories and Requests for Production. On December 17, 2010, FirstEnergy filed another motion to compel, this time seeking an order compelling OCC to provide complete responses to FirstEnergy's First, Second, and Third Sets of Interrogatories and Requests for Production. OCC responded by filing a memorandum contra on December 27, 2010.
- (7) Pursuant to an entry issued on January 3, 2011, a transcribed prehearing conference was held in this matter on January 7, 2011, in order to resolve the various discovery disputes between the parties. During the prehearing conference, the attorney examiners, *inter alia*, granted FirstEnergy's motions to compel OCC and the CKAP Parties. The attorney examiners found that OCC and the CKAP Parties had failed to establish that the documents sought by FirstEnergy were protected by an attorney-client or trial preparation privilege, that OCC and the CKAP Parties had failed to preserve their claim of privilege by not creating a privilege log or otherwise specifically identifying each document and the basis for the privilege claim, and that OCC and the CKAP Parties had failed to demonstrate that privilege applies to documents regarding past conduct by FirstEnergy. Further, the attorney examiners found that no privilege existed with respect to communications between OCC and the CKAP Parties prior to the October 12, 2010, effective date of the joint defense agreement between OCC and the CKAP Parties.
- (8) On January 12, 2011, OCC and the CKAP Parties (jointly, appellants) filed an interlocutory appeal and application for review, appealing the attorney examiners' ruling that OCC and the CKAP Parties must turn over to FirstEnergy documents not in the public domain that are related to communications between OCC and the CKAP Parties. FirstEnergy filed a memorandum contra on January 14, 2011.

- (9) A second transcribed prehearing conference was held in this matter on January 18, 2011.
- (10) Rule 4901-1-15(A), Ohio Administrative Code (O.A.C.), sets forth the applicable substantive standard for consideration of appellants' interlocutory appeal. The relevant portion of the rule states that any party who is adversely affected by an oral ruling issued during a prehearing conference granting a motion to compel discovery may take an immediate interlocutory appeal to the Commission.
- (11) Appellants initially contend that the attorney examiners abused their discretion in ruling that all documents related to privileged communications between OCC and the CKAP Parties must be turned over to FirstEnergy, as the attorney examiners failed to conduct an *in camera* review of each document claimed to be privileged. Appellants base their argument on the Ohio Supreme Court's decision in *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167. According to appellants, *Peyko* requires that a trial court conduct an *in camera* inspection of each document claimed to be privileged, even when the party resisting disclosure has failed to satisfy its burden of proving that the documents are privileged. Appellants claim that during the January 7, 2011 prehearing conference, the attorney examiners made a brief inspection of privileged materials provided by OCC and did not examine any documents claimed by the CKAP Parties to be privileged. (Appellants' Interlocutory Appeal at 13-15.)
- (12) FirstEnergy argues that appellants' reliance in *Peyko* is misplaced. According to FirstEnergy, in that case the Ohio Supreme Court rejected an insurer's privilege claim when the insurer relied upon blanket objections of privilege without making any document-by-document showing. FirstEnergy contends that appellants' approach to their privilege objections in this case is identical to the approach rejected in *Peyko*, as appellants have not remotely attempted a document-by-document showing of privilege and, in fact, provided only a sample of the allegedly privileged documents. FirstEnergy states that the allegedly privileged documents were not made

available at the January 7, 2011 prehearing conference for an *in camera* review. (FirstEnergy Memo Contra at 4-5.)

- (13) Appellants also contend that the attorney examiners unreasonably failed to protect privileged communications by ruling that communications and work product and trial preparation documents shared between OCC and the CKAP Parties are subject to discovery in the absence of a formalized joint defense agreement. Appellants assert that the statutory attorney-client privilege, pursuant to Section 2317.02(A), Revised Code, applies to communications directly between OCC attorneys and the attorney and individual members of the CKAP Parties. They further contend that common law attorney-client privilege would apply to communications made between agents for OCC's staff, the CKAP Parties, and counsel.

Based on the privilege log and the documents OCC provided at the January 18, 2011 prehearing conference, most of the communications which OCC claims are privileged involve OCC's director of government affairs and assistant director of analytical services. OCC asserts that these two non-attorney staff members are part of OCC's case team, and therefore qualify under the "control group" concept set forth in *Upjohn Co. v. United States* (1981), 449 U.S. 383, 389. Appellants argue that the communications in question were made in confidence, in furtherance of common but not identical legal representation of residential electric consumers, and pursuant to the need for legal advice. Appellants also maintain that the work product privilege applies and claim that disclosure to a third party or to another party sharing common interests does not constitute a waiver of the work product privilege absent a showing that such disclosure is inconsistent with maintenance of the confidentiality of the protected materials. (Appellants' Interlocutory Appeal at 18, 21; January 7, 2011 Tr. at 67.)

- (14) FirstEnergy responds that the communications appellants seek to protect fall outside of the traditional attorney-client privilege, as these communications involve the CKAP Parties and their counsel. These communications can only be protected, according to FirstEnergy, if a joint defense privilege

applies, and no such privilege is applicable here since OCC and CKAP do not share identical legal interests. FirstEnergy notes that appellants claimed divergent interests when the CKAP Parties sought intervention in this matter, and argues that appellants' stated common interest "in developing a solution to the all-electric rate discount issue" is meaningless because this interest is common to all parties to the case. FirstEnergy also asserts that the joint defense privilege does not apply to communications that do not involve counsel, to communications regarding past events, nor to communications or documents shared prior to the October 12, 2010, execution date of the joint defense agreement. FirstEnergy contends that appellants failed to explain why the involvement of non-attorneys was necessary to facilitate the attorney-client relationship and points out that the only staff member identified by OCC during the January 7, 2011 prehearing conference was OCC's legislative liaison. FirstEnergy equates this position with that of a lobbyist and points to case law holding that communications with lobbyists are not privileged. (FirstEnergy Memo Contra at 10-17.)

- (15) Appellants further assert that the attorney examiners' conclusion that appellants were required to create privilege logs in order to preserve their claim of privilege is unreasonable and unsupported by Commission rule, practice, or precedent. Appellants point out that Rule 4901-1-20, O.A.C., does not include a requirement that a party claiming privilege produce a privilege log, while also noting that FirstEnergy itself did not produce a privilege log when objecting to discovery in this proceeding on the basis of privilege. (Appellants' Interrogatory Appeal at 24-28.)
- (16) In response, FirstEnergy maintains that the attorney examiners properly made note of appellants' failure to provide a privilege log. FirstEnergy contends that, in their filing, appellants acknowledged that it is common practice for a privilege log to be produced in response to a motion to compel. FirstEnergy explains that it has not produced a privilege log in this matter because its privilege objections

have not been challenged. (FirstEnergy Memo Contra at 6-8, 17.)

- (17) Finally, appellants argue that the attorney examiners erred when noting that no joint defense agreement privilege was applicable before October 12, 2010. Appellants maintain that they shared an oral understanding toward mutual cooperation, starting shortly after the CKAP Parties filed their motion to intervene, at or around June 1, 2010. Appellants contend that the oral agreement between OCC and the CKAP Parties is enforceable as an oral contract and cite to a decision issued by a federal magistrate judge which, appellants claim, holds that oral joint defense agreements are legitimate. (Appellants' Interlocutory Appeal at 28-31.)
- (18) The Commission agrees that, pursuant to the Ohio Supreme Court's decision in *Peyko*, an *in camera* review of all documents claimed as privileged by appellants should be performed to determine if a privilege claim is valid. However, the Commission notes that the attorney examiners were prevented from conducting an *in camera* review of all documents OCC claims are privileged during the January 7, 2011 prehearing conference because, as counsel for OCC stated during that prehearing conference, OCC was unable to specifically identify the documents at that time. Instead, in lieu of providing all documents which OCC claims are privileged, OCC prepared samples of the relevant documents. In addition, when asked if OCC was making specific document-by-document claims, counsel for OCC indicated that OCC was not making such claims. (January 7, 2011 Tr. 47, 65.) The attorney examiners, in accordance with *Peyko*, reviewed all documents actually submitted by OCC for *in camera* review. The CKAP Parties presented no documents to the attorney examiners for review. The Commission finds that, because appellants failed to produce all documents for review during the January 7, 2011, prehearing conference, appellants' reliance upon *Peyko* is misplaced. Further, the Commission notes that, during an additional prehearing conference held on January 18, 2011, the attorney examiners afforded OCC a second opportunity to present for *in camera*

review to the attorney examiners all documents OCC claims are privileged, and that the attorney examiners did in fact conduct an *in camera* review of all documents presented by OCC. Accordingly, the Commission finds that OCC's claims that the attorney examiners did not conduct an *in camera* review is moot.

Moreover, the Commission finds that the attorney examiners correctly ruled that attorney-client and work product privileges do not apply to any documents gathered by appellants in connection with this case, as opposed to documents created by appellants. The Commission notes that many of the "gathered" documents appellants now claim are privileged were moved for admission at the local public hearings held in this case. For example, OCC moved for admission of documents 31-47, 49-71, 187-219, 221-244, and 246-265 as Kirtland Exs. 1-4 and 17 during the Kirtland public hearing on November 23, 2010. The Commission also notes that several of the documents OCC claims are privileged are merely copies of each other; for example, documents 187-206 are identical to documents 246-265, and, in any case, OCC already moved for admission of these documents as part of Kirtland Ex. 17.

- (19) Turning next to appellants' contentions with regard to privilege logs, the Commission points out that the purpose of a privilege log is to assist the party contesting the privilege claim as well as the attorney examiner in evaluating the merits of the privilege claim to understand both the parameters of the claim and its legal sufficiency. This is the reason why it is common practice for a privilege log to be produced in response to a motion to compel. The Commission notes that the attorney examiners did not rule that appellants' failure to provide a privilege log or otherwise specifically identify the documents for which appellants were claiming privilege constituted a waiver of any claims of privilege, as the attorney examiners had already ruled that appellants had failed to demonstrate that either the attorney-client or the work product privilege applied to the documents

in question. Accordingly, the Commission finds no error in the attorney examiners' comments regarding privilege logs.

- (20) Finally, the Commission finds that the attorney examiners did not err when finding that the joint defense agreement does not apply to any communications between OCC and the CKAP Parties prior to the October 12, 2010, effective date of the joint defense agreement between those parties. The Commission notes that appellants failed to point to any specific evidence supporting their contention that the parties' collaboration during litigation predated the formal joint defense agreement executed on October 12, 2010. Given the lack of specific evidence supporting appellants' claim that an oral joint defense agreement existed prior to October 12, 2010, the Commission concludes that communications between OCC and the CKAP Parties which predate the October 12, 2010 joint defense agreement are not privileged. Having determined that all communications between OCC and CKAP prior to October 12, 2010 are not privileged, it is unnecessary for the Commission to reach the question whether OCC staff members are members of a control group pursuant to *Upjohn*.
- (21) Finally, the Commission finds that appellants' claim that the attorney examiners unreasonably expanded the scope of attorney-client waiver lacks merit. The Commission notes that the attorney examiners found that appellants failed to prove that the documents in question were protected by the attorney-client or work product/trial preparation privileges in the first place. No waiver of the privilege can occur until after it has been established that the privilege actually applies. Apart from general statements claiming that all communications between certain individuals are privileged, appellants failed to show how the attorney-client and/or work product privilege applies to any particular document, and therefore the Commission finds that the attorney examiners did not err in finding that appellants failed to establish that either privilege applies to the documents in question.

It is, therefore,

ORDERED, That appellants' interlocutory appeal be denied. It is, further,

ORDERED, That discovery responses be served pursuant to the motions to compel by January 28, 2011, at 5:00 p.m. It is, further,

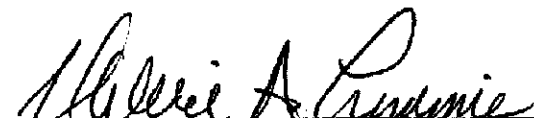
ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


Steven D. Lesser, Chairman



Paul A. Centolella



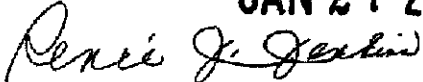
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JAN 27 2011

Renee J. Jenkins
Secretary