

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison           )  
Company, The Cleveland Electric Illuminating           ) Case No. 17-0974-EL-UNC  
Company, and The Toledo Edison Company's           )  
Compliance with R.C. 4928.17 and the Ohio Adm.       )  
Code Chapter 4901:1-37.                                       )

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**MEMORANDUM CONTRA THE MOTION FILED BY THE FIRSTENERGY  
UTILITIES TO THWART TRANSPARENCY AND FAIRNESS REGARDING  
THE PUCO'S AUDIT OF FIRSTENERGY'S CORPORATE SEPARATION  
PRACTICES  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 1.9 million residential electric consumers of the FirstEnergy Utilities ("Utilities" or "FirstEnergy") and submits this Memorandum Contra to the Utilities' motion in order to safeguard transparency in the Ohio regulatory process. OCC files this Memorandum Contra opposing the Utilities' motion where they seek a protective order from the Public Utilities Commission of Ohio ("PUCO") to block the release of public records to OCC about whether the Utilities are complying with the laws of Ohio and the PUCO rules on corporate separation.

The information sought by OCC is now in the possession of Ohio state government (the PUCO) and constitutes a public record under Ohio law. The public records at issue are records that the Utilities provided to the PUCO and SAGE Management Consultants, LLC ("Independent Auditor") regarding an independent audit on whether the Utilities are complying with Ohio law and PUCO rules regarding

corporate separation (“Independent Audit”). Any person can request public records. And public records requests can be made for any purpose - the purpose for a request is not relevant under Ohio records law. And contrary to the Utilities' assertions otherwise,<sup>1</sup> litigants are permitted to use the Ohio Public Records Act regardless of the existence of a discovery process.<sup>2</sup>

OCC is filing this Memorandum Contra to obtain public records that it is lawfully and rightfully entitled. FirstEnergy filed a motion for protective order in an attempt to use the PUCO's rules and processes to circumvent Ohio public records law. In making this filing, OCC asks the PUCO to reject FirstEnergy's efforts to mix the separate Ohio law of public records with the law and rules of the PUCO's processes.

The Utilities' Motion should be denied. The PUCO should immediately release the information that OCC requested under Ohio's public records law nearly six months ago.

## **II. PROCEDURAL BACKGROUND**

In a proceeding to determine whether FirstEnergy is complying with the laws of Ohio and the PUCO rules on corporate separation, FirstEnergy seeks to have the PUCO shield public records from being provided for review. The PUCO selected SAGE Management Consultants, LLC as the Independent Auditor to conduct the audit of the Utilities. On May 15, 2018, the Independent Auditor filed its final report with the PUCO.

On May 24, 2018, OCC hand-delivered a public records request to Ms. Angela Hawkins, Legal Director of the PUCO.<sup>3</sup> In its public records request to the PUCO, OCC

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<sup>1</sup> Utilities' Motion (Oct. 26, 2018).

<sup>2</sup> *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 661-662, 2004-Ohio-7108.

<sup>3</sup> See Attachment A.

sought records related to (1) records containing drafts of the audit report, (2) communications between FirstEnergy and the PUCO, (3) information requests made to FirstEnergy, (4) responses to information requests by FirstEnergy, (5) documents and workpapers in connection to this case, and (6) records containing communications related to this case.<sup>4</sup>

In the Ohio Attorney General’s public records compendium, “prompt production of records is required and copies are to be made available in a reasonable amount of time.” This timeline has been interpreted by the courts as being “without delay” and “with reasonable speed.” (Ohio Attorney General; *Ohio Sunshine Laws 2015: An Open Government Resource Manual* at 15).

Four months after OCC submitted its public records request, OCC contacted the PUCO’s Legal Director seeking a complete response to its public records request.<sup>5</sup> Thereafter, the PUCO conveyed that it had contacted the Utilities and they would be filing a motion concerning the public records request. On October 26, 2018, the Utilities filed their Motion for Protective Order.

### **III. ARGUMENT**

#### **A. The Utilities argue—mistakenly—for secrecy and against transparency in PUCO processes.**

The Utilities argue that OCC's public records request relates to information that cannot be divulged by the PUCO.<sup>6</sup> The Utilities derive their argument from the catch-all exemption from disclosure that is contained in R.C. 149.43(A)(1)(v).<sup>7</sup> There, "records the

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<sup>4</sup> See Attachment A.

<sup>5</sup> See Attachment B.

<sup>6</sup> Utilities' Motion (Oct. 26, 2018).

<sup>7</sup> Id. at 1.

release of which is prohibited by state or federal law" are excluded from the definition of a public record. The Utilities assert that R.C. 4901.16 is a state law that requires secrecy from the public in certain of the Utilities' dealings with the PUCO Staff and the PUCO auditor and prevents the release of the information requested by OCC.<sup>8</sup>

The Utilities argue that the PUCO should grant a motion for a protective order so as to preclude OCC from obtaining the public records it requested, leaving the PUCO's audit process as a secret between the utility, the PUCO Staff, and the Independent Auditor. As discussed below, the PUCO should reject the Utilities' arguments. The PUCO's provision of the requested public records is six months overdue and the records should be provided to OCC immediately.

**B. Ohio's public records law requires disclosure of the records involving FirstEnergy, as the law contains only limited exceptions to the general requirement for disclosure by a public office such as the PUCO.**

Ohio's public records law, for transparency in the operation of government, is found at R.C. 149.43. Ohio's state and local government offices must follow Ohio's Public Record Act. Under that law public scrutiny of state and local government records is permitted. Any person may request to inspect or obtain copies of public records from a public office that keeps those records. A public office must organize and maintain its public records in a manner that meets its duty to respond to public records requests, and must keep a copy of its records retention schedule at a location readily available to the public. When it receives a proper public records request, and unless part or all of a record

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<sup>8</sup> Id. at 5-7.

is exempt from release, a public office must provide inspection of the requested records promptly and at no cost, or provide copies at cost within a reasonable period of time.

The PUCO is even subject to additional requirements for public records.<sup>9</sup> Under R.C. 4901.12 "all proceedings of the public utilities commission and all documents and records in its possession are public records." Additionally, under R.C. 4905.07, "all facts and information in the possession of the public utilities commission shall be public, and all reports, records, files, books, accounts, papers, and memorandums of every nature in its possession shall be open to inspection by interested parties or their attorneys." These public records statutes that are specifically applicable to the PUCO "provide a strong presumption in favor of disclosure."<sup>10</sup> Accordingly, any exceptions in the law that permit certain types of records to be withheld from disclosure must be narrowly construed.<sup>11</sup>

R.C. 149.43 is Ohio's Public Records Law. It broadly defines public records to include records kept at any state office but excludes or exempts from the definition of public records those records "whose release is prohibited by state or federal law."

Thus, the issue that the Utilities have placed before the PUCO is whether the release of the information to OCC is prohibited by state or federal law. The Utilities have identified

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<sup>9</sup> These statutes also recognize that there are few exceptions to the Commission's open records policy: those that are established under another section of the Revised Code, R.C. 149.43, and at the same time, are consistent with the purposes of Title 49.

<sup>10</sup> See for example, *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, Opinion and Order at 5-6 (October 18, 1990).

<sup>11</sup> *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 21; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17; *State ex rel. Carr v. Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30 ("Insofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, we strictly construe exceptions against the public records custodian, and the custodian has the burden to establish the applicability of an exception.").

only one law that applies here: R.C. 4901.16. And that law is inapplicable in this situation.

**C. Contrary to FirstEnergy's assertions for secrecy, the PUCO's disclosure of the records is not prohibited by R.C. 4901.16.**

FirstEnergy justifies the secret process it wants by claiming that R.C. 4901.16 precludes the PUCO from divulging records acquired “in respect to the transaction, property, or business of any public utility”<sup>12</sup> while acting as an agent or employee of the PUCO. Under case law, the PUCO has strictly limited the application of that statute in two ways. First, the statute is understood to place limitations on the PUCO Staff, but not on the PUCO itself.<sup>13</sup> Second, the statute is applied to prevent disclosure of information when PUCO investigations are ongoing; the statute is not applied to information that relates to completed investigations.<sup>14</sup>

Here, the public records sought pertaining to discovery exchanged between the utilities and the PUCO-appointed auditor, who functioned as an independent contractor, not an employee.<sup>15</sup> And the information relates to an investigation that has concluded.

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<sup>12</sup> See R.C. 4901.12, 4901.16, and 4905.07 - these statutes also recognize that there are few exceptions to the Commission's open records policy: those that are established under another section of the Revised Code, R.C. 149.43, and at the same time, are consistent with the purposes of Title 49.

<sup>13</sup> *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS, Entry (Dec. 17, 2003); *In re Application of Columbus Southern Power Co. for Authority to Amend its Filed Tariffs to Increase the Rates & Charges for Electric Service*, PUCO Case No. 91-418-EL-AIR, 1991 Ohio PUC LEXIS 1033 (Aug. 23, 1991).

<sup>14</sup> *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters*, Case No. 00-681-GA-GPS Entry on Rehearing at 11 (July 28, 2004); *In the Matter of the Application of the Fuel adjustment Clauses for Columbus Southern Power Company and Ohio Power Company and Related Matters*, Case No. 11-5906-EL-FAC, Entry at 6 (Feb. 3, 2016) (release of a draft audit report and related communication is not inconsistent with R.C. 4901.16) See *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry at ¶10 (Feb. 14, 2013).

<sup>15</sup> See RFP.

The final audit report was docketed with the PUCO on May 14, 2018. R.C. 4901.16 does not prohibit the release of the information regarding the Independent Auditor, the PUCO-appointed independent contractor, who completed its audit of the Utilities.

The Utilities want a ruling that sanctions a private PUCO process involving interactions by utilities and independent PUCO auditors, essentially a case within a case that is held secret from the public. There is no law that allows for that secrecy. There are several laws that prohibit that secrecy.<sup>16</sup>

Instead of addressing the law, FirstEnergy engages in a policy discussion and argues that OCC's discovery will prevent utilities from providing “their business information freely with an expectation of confidentiality and without fear of that information becoming a matter of public record.”<sup>17</sup> But that argument is easily dispensed with; the Utilities and OCC have executed a confidentiality agreement.

Further, FirstEnergy uses the *CG&E Safety Case* as a springboard for its arguments.<sup>18</sup> But that case is wholly distinguishable. In the *CG&E Safety Case*, the PUCO was ruling on a public records request that was served upon it. The public records request sought to obtain from the PUCO copies of a progress report (pertaining to riser replacement) prepared by a third party, for a utility (CG&E). The utility had “on its own” contracted with the third party to conduct research.<sup>19</sup> The progress report was “informally provided to the staff.”<sup>20</sup> After initially determining that the progress report should be

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<sup>16</sup> R.C. 4901.16.

<sup>17</sup> Utilities Motion at 2.

<sup>18</sup> Utilities Motion at 7.

<sup>19</sup> *CG&E Safety Case* at ¶1.

<sup>20</sup> *Id.* at ¶11.

released<sup>21</sup> (over the utility's objections, including R.C. 4901.16), the PUCO reversed itself. The PUCO ruled that the progress report should not be released. Notably, however, the PUCO explained that "this situation involves a unique set of circumstances."<sup>22</sup> The uniqueness was explained as, inter alia, an agreement between the PUCO Staff and CG&E under which CG&E agreed to provide regular reports to the PUCO Staff and the PUCO Staff agreed to continue to monitor CG&E's riser replacement and inspection activities.<sup>23</sup> The PUCO, in reaching its conclusion, discussed the fact that disclosure could discourage utilities from sharing information with the PUCO Staff for fear of disclosure.<sup>24</sup>

But the facts underlying the *CG&E Safety Case* are distinguishable. In the case before the PUCO, the information being sought is part of a PUCO-ordered audit. There is nothing voluntary about the information being exchanged between the utility and the auditor. Nor is there anything informal about the arrangement between the auditor and the utility in this proceeding. While the policy of free and open sharing of information between utilities and the PUCO Staff may be important in voluntary and cooperative informal matters, its importance is greatly diminished in matters that are formal, mandatory proceedings. In fact, it makes no sense to argue that there will be a chilling effect on free and open sharing in the context of an independent audit such as this.

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<sup>21</sup> *CG&E Safety Case*, Entry (Dec. 17, 2003).

<sup>22</sup> *Id.*, Entry at ¶11 ((July 28, 2004).

<sup>23</sup> *CG&E Safety Case* at ¶11.

<sup>24</sup> *Id.* at ¶11.



**D. The PUCO should reject FirstEnergy's assertion that the secrecy it seeks in its dealings with the PUCO can be preserved by trumping the Ohio public records law with a PUCO rule for protective orders.**

The Utilities argue that the PUCO can maintain the secrecy of FirstEnergy's dealings with the Independent Auditor through a protective order. They rely upon the PUCO's rule in Ohio Adm. Code 4901-1-24 for the secrecy they seek, so that the PUCO does not release information to OCC in response to OCC's public records request. But the Utilities are mistaken in their belief that the PUCO has authority under that rule to prevent disclosure of information requested through a public records request. Ohio Adm. Code 4901-1-24 does not provide such authority and cannot be used to invalidate Ohio's public records law.

The Utilities are inappropriately mixing the PUCO's regulatory authority with the PUCO's responsibility as a state office under Ohio's public records law. Ohio Adm. Code 4901-24 (A), (B), and (C) relate solely to a motion for protection from *discovery*. Subsection (A) clearly states: "*Upon motion of any party or person from whom discovery is sought* the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Subsections (B) and (C) refer back to subsection (A), and merely explain the requirements of a motion for protection and the PUCO's ability to deny the motion in whole or part. OCC's public records request is not discovery. Ohio Adm. Code 4901-1-24 (A)-(C) do not cloak in secrecy the public records that are sought under the public records law.

Also, subsection (D) of Ohio Adm. Code 4901-1-24 does not apply. Subsection (D) relates to seeking protection against the *filing of a document* with the PUCO's

docketing division related to a case before the commission. It reads: “Upon motion of any party or person with regard to the *filing of a document with the commission’s docketing division* relative to a case before the commission, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order which is necessary to protect the confidentiality of information contained in the document.” The documents requested by OCC do not pertain to the filing of a document with the PUCO. The documents were not filed with the PUCO. Even if they were, this PUCO rule does not invalidate the Ohio public records law to which the PUCO is subject.

#### **IV. CONCLUSION**

Contrary to the mistaken direction where FirstEnergy would lead the PUCO, the PUCO should comply with Ohio’s public records law and respect the intended transparency of its processes by releasing the public records now. The PUCO should reject FirstEnergy’s attempts for secret PUCO processes instead of lawful public processes, in this case where FirstEnergy was audited to determine its compliance with Ohio law and PUCO rules on corporate separation. The PUCO should release the information that is long overdue under Ohio’s public records law.

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)  
Counsel of Record  
Senior Counsel

Bryce McKenney (0088203)  
Assistant Consumers' Counsel

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(Will accept service via email)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 13th day of November 2018.

*/s/ Maureen R. Willis*

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Maureen R. Willis  
Assistant Consumers' Counsel

## **SERVICE LIST**

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## Office of the Ohio Consumers' Counsel

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May 24, 2018

*VIA HAND DELIVERY*

Ms. Angela Hawkins, Director  
Legal Department  
The Public Utilities Commission of Ohio  
180 E. Broad St., 12<sup>th</sup> Fl.  
Columbus, Ohio 43215

Re: Public Records Request

Dear Ms. Hawkins:

The Office of the Ohio Consumers' Counsel's ("OCC") requests copies of public records in the possession of the Public Utilities Commission ("PUCO") relating to PUCO Case No. 17-0974-EL-UNC. The authority for this request is R.C. 149.43 et seq.

As background, the PUCO retained Sage Consulting ("Sage") to investigate and audit FirstEnergy utilities' compliance with Ohio's corporate separation law and PUCO rules in Case No. 17-0974-EL-UNC. On May 14, 2018, the final audit report of Sage was filed at the PUCO.

Please promptly provide the following public records<sup>1</sup> to OCC:

- (1) All records containing drafts of Sage's audit reports that the PUCO (and any organizations working on the PUCO's behalf, including Sage and the Ohio Attorney General's office) provided to FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities regarding PUCO Case No. 17-0974-EL-UNC;
- (2) All records containing communications from FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities to the PUCO (and to any organizations working on the PUCO's behalf, including Sage and the Ohio Attorney General's office) in memorialized form regarding drafts of audit reports by Sage in connection with PUCO Case No. 17-0974-EL-UNC;

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<sup>1</sup> Public records are as defined by R.C. 149.43.

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May 24, 2018  
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- (3) All records containing any formal and informal information requests (e.g. interrogatories, data requests) made to FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities by Sage, the PUCO, the PUCO Staff and the PUCO's Assistant Attorneys General in this proceeding;
- (4) All records containing any formal and informal responses by FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities to requests for information referenced in Item 3 above;
- (5) All records containing documents and workpapers provided to the PUCO, the PUCO Staff and/or the PUCO's Assistant Attorneys General in connection with Case No. 17-0974-EL-UNC; and,
- (6) All records containing communications (e.g. emails, memos, draft reports) related to Case No. 17-0974-EL-UNC between and Sage, the PUCO, the PUCO Staff and/or the PUCO's Assistant Attorneys General and FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities.

Please provide these records in an electronic format if electronic versions are available. If there are any fees for these records, please inform me if the cost to OCC will exceed \$400. Please respond promptly to this request. If the PUCO expects a delay (of more than seven days) in responding to this request, please contact me with information about when copies will be provided.

If the PUCO denies any portion of this request, in part or whole, please cite each Public Records Act exemption (or other law) that applies for each record, or portion thereof, that is withheld. If records responsive to this request existed but no longer exist, please explain.

If you have any questions, please contact me at (614) 466-9567 or by email at: [maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov). Thank you for your anticipated assistance with this request.

Sincerely,



Maureen Willis  
Senior Counsel



## Office of the Ohio Consumers' Counsel

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September 24, 2018

*VIA HAND DELIVERY*

Ms. Angela Hawkins, Director  
Legal Department  
Public Utilities Commission of Ohio  
180 E. Broad St.  
Columbus, Ohio 43215

RE: Public Records Request 68-18

Dear Ms. Hawkins:

Thank you for your July 16, 2018 response to the Consumers' Counsel public records request of May 24, 2018. We appreciate that you did provide us with some records that were responsive to our request.

There are, however, issues that I am following up on as a result of your response.

First, you did indicate that because OCC's request relates to a pending case before the PUCO "the PUCO has not produced records containing trial preparation materials and /or subject to attorney client privilege or deliberative privilege." Because you have not identified what documents have been withheld, it is difficult to evaluate the appropriateness of your claim. Most of the records OCC is seeking are documents exchanged between the PUCO or the consultant and third parties, including FirstEnergy utilities. It would be hard to imagine how these documents and communications would be either attorney client, privileged material or attorney work product, as they have been exchanged with third parties or originated outside of PUCO or its consultant.

In any event, I request that you identify the number and nature of the documents withheld as being subject to the attorney-client privilege or work product. Also if the basis for withholding documents was related to R.C. 4901.16, since the audit report has been released and the staff investigation is completed, I would expect that documents previously withheld on this basis can now be produced.

Second, you indicate that some of the information requested has been identified by the utilities as confidential/trade secrets and has been redacted. OCC has executed a protective agreement with FirstEnergy utilities that allows OCC access to information that is alleged to be confidential. I attach that agreement to this correspondence. Because that agreement specifically covers the public records we requested, I ask that you provide an unredacted version of the public records.

Third, in the public records request (item 3), we sought "formal and informal information requests (e.g. interrogatories, data request) made to FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities by Sage, the PUCO, the PUCO Staff and the PUCO's Assistant Attorneys

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General in this proceeding.” We also sought records (item 4) containing any “formal and informal responses by FirstEnergy utilities and/or corporate affiliates of FirstEnergy utilities to requests for information reference in item 3 above.” You indicated that the requests are overly broad and because of that the PUCO is unable to identify the records sought.

As we limited our requests to documents associated with Case No. 17-0974-EL-UNC, the reference to the specific case is sufficiently limiting to remove any overbroad objection. Nonetheless, for purposes of moving forward, we ask you to consider the following request as a revision to original requests 3 and 4:

Formal and informal information requests and responses to Sage Management Consultant discovery in Case No. 17-0974-EL-UNC, including the following:

Set 1-4, 1-5, 1-6, 3-43, 3-44, 3-45, 3-48, 3-49, 3-51, 3-53, 3-54, 3-55, 3-56, 3-69, 4-94, 4-95, 4-96, 4-102, 4-104, 4-108, 4-115, 4-116, 4-120, 4-128, 4-129, 4-130, 4-131, 4-133, 4-134, 4-135, 5-141, 5-142, 5-147, 5-151, 5-152, 5-153, 5-154, 5-160, 5-164, 5-165, 5-166, 7-172, 7-184, 7-193, 7-196, 7-197, 8-204, 8-209, 9-213, 9-218, 9-224, and 9-231.

Please provide these records in an electronic format if electronic versions are available. If there are any fees for these records, please inform me if the cost to OCC will exceed \$400. Please respond promptly to this request. If the PUCO expects a delay (of more than seven days) in responding to this request, please contact me with information about when copies will be provided.

If the PUCO denies any portion of this request, in part or whole, please cite each Public Records Act exemption (or other law) that applies for each record, or portion thereof, that is withheld. If records responsive to this request existed but no longer exist, please explain.

If you have any questions, please contact me at (614) 466-9567 or by email at: [maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov). Thank you for your anticipated assistance with this request.

Sincerely,



Maureen R. Willis  
Senior Counsel

Cc: Donald Leming  
Assistant General Counsel

Larry Sauer  
Deputy Consumer's Counsel



**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of The Ohio Edison    )  
Company, The Cleveland Electric Illuminating    ) Case No. 17-0974-EL-UNC  
Company, and The Toledo Edison Company's        )  
Compliance with R.C. 4928.17 and the Ohio        )  
Adm. Code Chapter 4901:1-37.                        )

**PROTECTIVE AGREEMENT**

This Protective Agreement ("Agreement") is entered into by and between The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company ("FirstEnergy " or "Company") and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with OCC of all information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Company and OCC as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials.

1. The purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.

2. "Proceeding" as used throughout this document means the above-captioned case(s), including any appeals, remands and other cases related thereto.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Company, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Company will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts

delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Company does not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Company to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Company notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Company will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Company files such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an

order of the court. If the Company does not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret and not subject to this Agreement. Alternatively, the Company may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Company will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Company's determination regarding any material identified as confidential by the Company and to pursue those remedies that may be available to OCC before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Company does not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Company before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

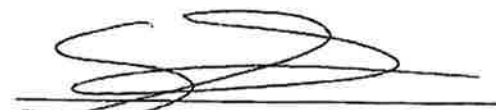
20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

FirstEnergy

Office of the Ohio  
Consumers' Counsel

BY:

BY:

  
Counsel

  
Counsel

5/30/18  
Date

5/31/18  
Date

**This foregoing document was electronically filed with the Public Utilities**

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

Summary: Memorandum Memorandum Contra the Motion Filed by the FirstEnergy Utilities to Thwart Transparency and Fairness Regarding the PUCO's Audit of FirstEnergy's Corporate Separation Practices by the Office Of The Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.