

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)	
Political and Charitable Spending by Ohio)	Case No. 20-1502-EL-UNC
Edison Company, The Cleveland Electric)	
Illuminating Company, and the Toledo)	
Edison Company.)	

**REPLY TO FIRSTENERGY’S OPPOSITION TO OCC’S
MOTION FOR AN *IN CAMERA* HEARING TO RESOLVE FIRSTENERGY’S CLAIM
OF AN ALLEGED PRIVILEGE AGAINST RESPONDING TO OCC’S DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

On June 29, 2021, OCC filed a Motion to Compel the FirstEnergy Utilities to answer OCC’s Sixth Set of Discovery. OCC requested the PUCO to conduct an *in camera* review of documents for which the FirstEnergy Utilities are claiming a legal privilege against disclosure to OCC. The *in camera* review is needed to determine if the FirstEnergy Utilities’ privilege claim is really true. In their July 14, 2021 response, the FirstEnergy Utilities opposed OCC’s request for an *in camera* review. For justice to consumers and needed transparency, the Public Utilities Commission of Ohio (“PUCO”) should grant the OCC’s Motion.

The FirstEnergy Utilities argue that an *in camera* review is only appropriate where a party broadly claims privilege and is inappropriate where a party produces a privilege log giving reasons why documents are privileged.¹ The FirstEnergy Utilities claim that the privilege log provided to OCC, containing 14 entries, is detailed and specific, and thus, they have met their burden of proving privilege. The FirstEnergy Utilizes also argue that there would be “an undue

¹ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co. et al.*, Case No. 20-1502-EL-UNC, FirstEnergy Utilities Memo Contra at 1 (July 14, 2021).

drain on the Commission's and parties' resources if just the submittal of a privilege log triggered the need for an *in camera* review.”² The *in camera* review of the documents described in the privilege log should go forward. And the PUCO should finally put a lid on the FirstEnergy Utilities' tactics of delay.

FirstEnergy's arguments are without merit. Their arguments are inconsistent with PUCO practice. Conducting an *in camera* review will assist the PUCO in resolving this discovery dispute that OCC has raised in its Motion to Compel. The *in camera* review of the documents described in the privilege log should go forward.

The FirstEnergy Utilities' limiting approach to privilege claims defeats the whole purpose for an *in camera* review – that is, to give the Attorney Examiner an opportunity to review the actual documents to determine whether the privilege claim is valid. The Ohio Supreme Court has held that if a party asserts the attorney-client privilege regarding the contents of a file sought to be discovered, the trial court before ordering disclosure of the contents “shall” determine by *in camera* inspection which portions of the file, if any, are so privileged.³

The PUCO's practice, following the Ohio Supreme Court's decision, is to conduct an *in camera* review of *all documents* claimed to be privileged. That enables the PUCO to determine, in response to a party's motion to compel and the assertion of privilege, if the privilege claim is

² *Id.* at 3.

³ *Peyko v. Frederick*, (1986), 25 Ohio St.3d 164, 167.

valid.⁴ The PUCO has used this approach on many occasions,⁵ including to allow the approach for FirstEnergy against OCC.⁶

The PUCO has never ruled that the *in camera* review process is to be reserved for “situations where there is a ‘well-founded basis for challenging’ a party’s privilege claims.”⁷ In any event, there is a well-founded basis for challenging FirstEnergy Utilities’ claims especially where they are claiming attorney-client privilege with respect to documents that are from non-attorneys to other non-attorneys and documents that are between non-attorneys with only a cc to attorneys.

The PUCO has described privilege logs and *in camera* reviews as assisting it in the discovery process and being consistent with the Federal Rules of Civil Procedure.⁸ This is the only way the PUCO can judge the validity of a party’s privilege claims. An *in-camera* hearing will allow both OCC and the FirstEnergy Utilities to present their respective views on the documents responsive to OCC’s discovery, but that the FirstEnergy Utilities seek to withhold from OCC. Moreover, there is no “undue drain” on time and resources here where the PUCO will be reviewing 14 entries on a privilege log. As the PUCO may recall, when FirstEnergy was

⁴ See, e.g. *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider contained in the Tariffs of Ohio Edison Co. et al.*, Case No. 15- 1739-EL-RDR, Entry (Dec. 19, 2016).

⁵ See, e.g., *Citizens Against Clear Cutting, et al., v Duke Energy Ohio, Inc.*, Case No. 17-2344-EL-CSS, Entry ¶18 (Aug. 24, 2018); *In the Matter of the Joint Application of the Timken Company and the Ohio Power Company for Approval of a Unique Arrangement for the Timken Company’s Canton, Ohio Facilities*, Case No. 10-366-EL-AEC, Entry (Mar. 22, 2011); *In the Matter of Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer*, Case No. 14-941-EL-SSO, Entry (Oct. 21, 2014); *In the Matter of the Complaint of Cameron Creek Apartments v. Columbia Gas of Ohio, Inc.*, Case No. 08-1091-GA-CSS, Entry (June 8, 2009).

⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-RDR, Entry (Jan. 3, 2011); Pre-hearing Conference held, transcript filed Jan. 21, 2011.

⁷ *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co. et al.*, Case No. 20-1502-EL-UNC, FirstEnergy Utilities Memo Contra at 1 (July 14, 2021).

⁸ See, e.g., *In the Matter of the Complaints of S.G. Goods, et al. v. The Cleveland Electric Illuminating Company, et al.*, Case No. 04-28-EL-CSS, Entry at 10 (Apr. 30, 2007).

the party requesting an *in camera* review of OCC documents, OCC produced a lengthy privilege log (94 entries), and the conference lasted approximately four hours, with a line-by-line discussion of the documents OCC claimed were privileged.⁹

Based on the foregoing, the PUCO should grant OCC's Motion for an *in camera* hearing. To preserve OCC's discovery rights under R.C. 4903.082 and Ohio rules, the PUCO should resolve the FirstEnergy Utilities' privilege claims using the ordinary PUCO process proposed by OCC.

Respectfully submitted,

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⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-RDR, Pre-hearing Conference, Transcript filed Jan. 21, 2011.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this OCC Reply to FirstEnergy Opposition to the 6th Set was served on the persons stated below via electronic transmission, this 21st day of July 2021.

/s/ Maureen R. Willis
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Summary: Reply Reply to FirstEnergy's Opposition to OCC's Motion for an In Camera Hearing to Resolve FirstEnergy's Claim of an Alleged Privilege Against Responding to OCC's Discovery by Office of the Ohio Consumers' Counsel electronically filed by Ms. Patricia J Mallarnee on behalf of Willis, Maureen Ms.