

**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 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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**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS,
AND
APPLICATION FOR REVIEW
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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October 18, 2021

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The Office of the Ohio Consumers' Counsel ("OCC") appeals (to the PUCO Commissioners) a ruling by the PUCO Attorney Examiner on October 12, 2021 granting FirstEnergy Corp.'s motion to quash OCC's subpoena. The ruling is reflected in the attached Entries dated October 12, 2021.

OCC filed its motion for subpoena on June 25, 2021, seeking "all Documents related to the Committee of Independent members of the Board of Directors' Internal Investigation." The Attorney Examiner denied OCC's motion in a September 14, 2021 ruling, but granted an *in camera* review of the internal investigation report itself. On September 20, 2021, OCC filed an interlocutory appeal of that ruling. That interlocutory appeal is still pending.

The October 12, 2021 ruling discussed the results of the *in camera* review and denied OCC's motion as to the actual internal investigation report. OCC asks that this appeal be certified to the

PUCO Commissioners for review and that, under O.A.C. 4901-1-15(B) and (E), they reverse the Attorney Examiner's ruling granting FirstEnergy's motion to quash the subpoena.

The Attorney Examiner's ruling represents a new and novel interpretation of policy and a departure from past precedent. An immediate determination is needed to prevent the likelihood of undue prejudice or expense to OCC and FirstEnergy's consumers, considering that the internal investigation report would likely produce highly relevant information including information that would be admissible at hearing. These documents could be used in formulating comments for Case No. 17-974, which are presently due on November 8, 2021.

This case is yet another example of the PUCO's failure to follow proper procedure in reviewing OCC's legitimate objections to the PUCO's rulings. *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*.¹ The Supreme Court of Ohio ruled in *FirstEnergy Advisors* that the PUCO fails in its responsibilities when it fails to fully explain the reasoning for decisions and fails to make factual determinations necessary to support its rulings.² The present case is yet another example where this has occurred.

Accordingly, and to protect utility consumers, the PUCO Commissioners should grant OCC's interlocutory appeal by reversing the Attorney Examiner's ruling of October 12, 2021. The ruling should occur expeditiously and FirstEnergy Corp.'s motion to quash the subpoena should be denied, in the public's interest for a proper investigation of FirstEnergy. FirstEnergy should be ordered to produce the internal investigation report no later than October 25, 2021.

¹ Slip Opinion No. 2021-Ohio-3130.

² *Id.* at ¶¶ 20-44.

The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. STANDARD OF REVIEW	3
III. REQUEST FOR CERTIFICATION.....	4
A. The discovery ruling is a departure from past precedent which holds that: (1) privileges can be waived; and (2) facts contained within an internal investigation reports are discoverable.	4
B. An immediate determination is needed to prevent undue prejudice.....	4
IV. APPLICATION FOR REVIEW	5
A. The information OCC seeks is relevant to this proceeding and could not be obtained from the FirstEnergy Utilities.	6
B. It was contrary to law and reason for the PUCO to deviate from its past precedent without a clear need and without explaining how the past precedent is in error.	7
C. It was unreasonable to interpret the law to quash OCC’s subpoena seeking documents related to the internal investigation.	8
1. The Attorney Examiner’s ruling is a departure from past precedent regarding waiver of privileged communications.	9
2. The Attorney Examiner’s ruling is a departure from past precedent regarding discovery of the underlying facts related to an internal investigation report.	14
V. CONCLUSION.....	15

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 8, 2020, OCC filed motions to protect consumers against what federal prosecutors have called “the largest bribery scheme ever” in Ohio.³ FirstEnergy Corp. fired its CEO and two other top executives on October 29, 2020. The firings occurred the same day that two of the criminal defendants in the *U.S. v. Householder*⁴ entered guilty pleas.⁵ FirstEnergy Corp.’s October 29, 2020 SEC filing explained that a committee of independent members of FirstEnergy’s Board of Directors was directing an internal investigation of ongoing governmental investigations, and it concluded that the executives’ actions related to H.B. 6 had violated company policies and its code of conduct.⁶ Later SEC filings revealed that FirstEnergy, through the course of its internal investigation, had discovered a \$4.3 million payment to a firm

³ N. Reimann, *Ohio Speaker of the House Arrested in State’s ‘Largest Bribery Scheme Ever*, Forbes.com (July 21, 2020).

⁴ *U.S. v. Larry Householder, et al.*, Case No. 1:20-cr-00077, Complaint (S.D. Ohio) (July 21, 2020).

⁵ J. Mackinnon, *FirstEnergy fires CEO Chuck Jones after 2 plead guilty in Householder bribery scheme*, Akron Beacon-Journal (Oct. 29, 2020).

⁶ FirstEnergy Corp., Form 8-K (Oct. 29, 2020).

controlled by the former PUCO Chair and that ten years of misallocated costs to the FirstEnergy Utilities.⁷

These matters appear to be serious corporate separation violations because FirstEnergy Corp. took these actions to enact a subsidy for its affiliate-owned nuclear plants, but improperly charged the costs to FirstEnergy Utilities' consumers. The independent audit in the FirstEnergy's Delivery Capital Recovery ("DCR") case confirmed this.⁸ Naturally, the internal investigation report is highly relevant to the PUCO's H.B. 6-related investigations and would likely lead to admissible evidence in these proceedings.

This is particularly true because the DCR audit gives no clue as to how the ten years of misallocated costs were discovered. The audit only covers a list of ten years of misallocated costs that FirstEnergy provided to the PUCO. We don't know how the list was developed, which accounts were reviewed, what supporting documentation was reviewed, *etc.*

OCC initially sought the internal investigation report from the FirstEnergy Utilities, but they claimed it was outside their possession, custody or control (even though Mr. Steven Strah is CEO of FirstEnergy Corp. and a Director of the FirstEnergy Utilities, and they share many other executive leaders and shared service company employees).⁹ As a result, OCC filed a motion to subpoena the internal investigation report from FirstEnergy Corp.

At the September 14, 2021 prehearing conference, the Attorney Examiner granted FirstEnergy Corp.'s motion to quash the subpoena, except that he required FirstEnergy Corp. to

⁷ FirstEnergy Corp., Form 10-K (Feb. 18, 2021).

⁸ *In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of FirstEnergy*, Case No. 20-1629-EL-RDR, Compliance Audit of the 2020 Delivery Capital Recovery (DCR) Riders of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company and Expanded Scope (Aug. 3, 2021).

⁹ *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, Motion to Compel Responses to Fifth and Seventh Sets of Discovery and Request For Expedited Ruling on Motion to Compel and Motion for In-Camera Hearing by Office of the Ohio Consumers' Counsel (June 29, 2021).

produce for *in camera* inspection the internal investigation report.¹⁰ The Attorney Examiner's October 12, 2021 ruling granted FirstEnergy Corp.'s motion to quash as to the internal investigation report.

The Attorney Examiner's ruling is unlawful and unreasonable because it departs from past precedent by: (1) failing to consider whether a party may waive the privilege shielding the report from discovery; and (2) holding that the facts underlying an internal investigation report are not discoverable.

II. STANDARD OF REVIEW

The PUCO will review an Attorney Examiner's ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.¹¹ The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question."¹² Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.¹³

¹⁰ Prehearing Conference Tr. at 28-29 (Sept. 14, 2021).

¹¹ O.A.C. 4901-1-15(B).

¹² *Id.*

¹³ O.A.C. 4901-1-15(E).

III. REQUEST FOR CERTIFICATION

A. The discovery ruling is a departure from past precedent which holds that: (1) privileges can be waived; and (2) facts contained within an internal investigation reports are discoverable.

It is well-established precedent that privileges shielding communications from discovery can be waived.¹⁴ Additionally, in *In re Dominion Purchased Gas Adjustment Case*, the PUCO ruled that OCC was entitled to the facts contained in an internal report prepared by Dominion.¹⁵ Consistent with this existing precedent, the PUCO should order FirstEnergy to produce the internal report in its entirety (due to waiver) or, at a minimum, produce the internal investigation report with any legal advice or work product redacted.

B. An immediate determination is needed to prevent undue prejudice.

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice¹⁶ to OCC and Ohio consumers. Consumers may have funded the illegal activities alleged in the criminal complaint through rates paid for electric utility service and should be recompensed for those actions.

An immediate determination is needed to prevent the likelihood of further undue prejudice or expense to OCC and FirstEnergy’s consumers, beyond the ongoing prejudice of FirstEnergy’s delays of OCC’s review. The internal investigation report covers the same subject matter as this proceeding. Without question, corporate separation violations have occurred. We know this from the deposition of Mr. Fanelli, the audit in Case No. 20-1629-EL-RDR, FirstEnergy Corp.’s SEC disclosures and the Deferred Prosecution Agreement.¹⁷ We don’t know

¹⁴ *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983).

¹⁵ *Id.*

¹⁶ O.A.C. 4901-1-15(B).

¹⁷ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

the full extent of these violations. The internal report OCC seeks through this subpoena is essential for a full investigation of these matters.

IV. APPLICATION FOR REVIEW

OCC asks the PUCO Commissioners to reverse the Attorney Examiner's October 12, 2021 ruling, under O.A.C. 4901-1-15(B) and (E). That ruling quashed OCC's subpoena of the H.B. 6-related internal investigation by FirstEnergy Corp. (which was charged with and admitted the underlying facts to a federal crime).

In the Deferred Prosecution Agreement, FirstEnergy admitted that it paid \$60 million to Generation Now and other entities controlled by the former Speaker of the House (the Enterprise) and \$4.3 million to the former PUCO Chair. In exchange for payments from FirstEnergy Corp., the Enterprise (including FirstEnergy Corp.) helped pass H.B. 6, described as a billion-collar "bailout" that saved from closure two failing nuclear power plants in Ohio affiliated with FirstEnergy Corp. The Enterprise then worked to corruptly ensure that H.B. 6 went into effect by defeating a ballot initiative.¹⁸ (No FirstEnergy employees have been charged.)

Through this interlocutory appeal, OCC seeks the internal investigation report on the grounds that any privilege pertaining to the report has been waived. In the alternative, OCC seeks a copy of the internal investigation report with any privileged communications redacted.

¹⁸ *Id.* at ¶9, Affidavit of Blane J. Wetzel in Support of a Criminal Complaint.

A. The information OCC seeks is relevant to this proceeding and could not be obtained from the FirstEnergy Utilities.

FirstEnergy Corp. claims that a privilege exists for the internal investigation report. As the objecting party, it bears the burden to establish that a privilege exists that protects the report from discovery.¹⁹ “The policy of discovery is to allow the parties to prepare cases and to encourage them to prepare thoroughly without taking undue advantage of the other side’s industry or efforts.”²⁰

The PUCO’s rules on discovery “do not create an additional field of combat to delay trials or to appropriate the Commission’s time and resources; they are designed to confine discovery procedures to counsel and to expedite the administration of the Commission proceedings.”²¹ The rules are also intended to “minimize commission intervention in the discovery process.”²² These rules are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082.

R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” *See* OCC v. PUC, 111 Ohio St.3d 300, 2006-Ohio-5789. The discovery statute was effective in 1983 as part of a more comprehensive regulatory reform. R.C. 4903.082 was intended to protect discovery rights for parties in PUCO cases. Yet all these years after the 1983 reform law, the FirstEnergy Utilities impeding OCC’s discovery efforts. The PUCO should not allow the FirstEnergy Utilities to obstruct and delay this process.

¹⁹ *State ex rel. Fisher v. Rose Chevrolet, Inc.*, (C.A. 1992), 82 Ohio App.3d 520, 523.

²⁰ *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry at 23. (Mar. 17, 1987).

²¹ *Id.*, citing *Penn Central Transportation Co. v. Armco Steel Corp.* (C.P. 1971), 27 Ohio Misc. 76. (emphasis added).

²² O.A.C. 4901-1-16(A).

O.A.C. 4901-1-16(B) provides for the scope of discovery:

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

The PUCO's 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.²³ Requests for production may elicit documents within the possession, custody, or control, of the party upon whom the discovery is served, under O.A.C. 4901-1-20.

OCC sought discovery of information relating to the internal investigation. This discovery seeks information that is relevant and is reasonably calculated to lead to the discovery of admissible evidence because the internal investigation covers several areas of apparent corporate separation violations. These cases involve a review of FirstEnergy's corporate separation violations related to H.B. 6. The FirstEnergy Utilities refused to produce the information on the ground that it was outside their possession, custody or control. OCC's subpoena against FirstEnergy Corp. satisfies the afore-mentioned standards in the Ohio Administrative Code.

B. It was contrary to law and reason for the PUCO to deviate from its past precedent without a clear need and without explaining how the past precedent is in error.

The PUCO failed to adhere to existing precedents regarding waiver of privileged communications and the production of underlying facts related to internal investigation reports.

²³ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, citing *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.

The Supreme Court has ruled that the PUCO should respect past precedents. It is essential that the PUCO respect its previous decisions and not depart from them without a clear need. In

Cleveland Elec. Illum. Co. v. Pub. Util. Comm. the Supreme Court stated:

Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law.²⁴

The PUCO violated this principle by not following past precedent regarding waiver of privileged communications and discovery of underlying facts related to internal investigation reports. This creates a conflict in the PUCO's rulings. The PUCO should address this conflict by following existing precedent on waiver of privileged communications and the PUCO's prior ruling in *In re Dominion Purchased Gas Adjustment Case*.²⁵ In the alternative, the PUCO must explain why the past rulings are in error.

C. It was unreasonable to interpret the law to quash OCC's subpoena seeking documents related to the internal investigation.

The PUCO has broad authority to investigate public utilities under R.C. 4905.05, 4905.06, 4909.154 and O.A.C. 4901-1-12. Specifically, under R.C. 4905.06, the PUCO has "general supervision" over "all public utilities within its jurisdiction allowing the PUCO to "examine such public utilities" with respect to, among other things "*their compliance with all laws, orders of the commission.*" And the PUCO's jurisdiction also extends to "all other companies" (per R.C. 4905.05 including companies that are part of an electric utility holding company system) as to any matters that "may relate to the costs associated with the provision of

²⁴ 42 Ohio St.2d 403, 431 (1975).

²⁵ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry (July 28, 2006).

utility service by public utilities in this state which are affiliated or associated with such companies.”

The PUCO frequently relies on these statutes to obtain information from the parent companies in matters such as rate cases, where the parent company holds important information relevant to the utility’s financial condition and its need for a rate increase. The PUCO also relies on these statutes when it must obtain information involving serious safety incidents, such as the 2003 FirstEnergy blackout²⁶ or the 2002 incident involving a large opening in the reactor head at the Davis-Besse nuclear plant.²⁷ The PUCO also relies on these statutes in cases of great public interest, such as investigating the cost overruns for the nuclear plants constructed in Ohio.²⁸ For that reason, the PUCO seemingly would want to interpret these jurisdictional statutes broadly to give itself full access to records that a utility produces related to an internal investigation of a matter of great concern to the PUCO. The Attorney Examiner’s ruling creates a precedent that could block the PUCO’s access to obtain important information in future cases.

1. The Attorney Examiner’s ruling is a departure from past precedent regarding waiver of privileged communications.

FirstEnergy Corp. waived any privilege shielding the internal investigation report from discovery by its repeated public disclosures of the results of the internal investigation report.

FirstEnergy Corp. initially disclosed the contents of its internal investigation report in a public press release on October 28, 2020 when it announced the firing of CEO Chuck Jones:

The Independent Review Committee of the Board of Directors of FirstEnergy Corp. (NYSE: FE) today announced a leadership transition, including the termination of the Company's Chief Executive Officer, Charles E. Jones, effective immediately.

²⁶ J.R. Minkel, *The Northeast Blackout: Five Years Later*, Scientific American (Aug. 13, 2008).

²⁷ NRC, *Backgrounder on Improvements Resulting From Davis-Besse Incident*, www.nrc.gov (last accessed Sept. 20, 2021).

²⁸ J. P. Meissner, *The Legal Warriors* (2013).

FirstEnergy today also announced the termination of two other executives: its Senior Vice President of Product Development, Marketing, and Branding; and its Senior Vice President of External Affairs, effective immediately.

During the course of the Company's previously disclosed internal review related to the government investigations, the Independent Review Committee of the Board determined that these executives violated certain FirstEnergy policies and its code of conduct.²⁹

In its annual report, FirstEnergy Corp. provided the following extensive discussion about the results of its internal investigation:

Internal Investigation Relating to United States v. Larry Householder, et al.

As previously disclosed, a committee of independent members of the Board of Directors is directing an internal investigation related to ongoing government investigations. In connection with FirstEnergy's internal investigation, such committee determined on October 29, 2020, to terminate FirstEnergy's Chief Executive Officer, Charles E. Jones, together with two other executives: Dennis M. Chack, Senior Vice President of Product Development, Marketing, and Branding; and Michael J. Dowling, Senior Vice President of External Affairs. Each of these terminated executives violated certain FirstEnergy policies and its code of conduct. These executives were terminated as of October 29, 2020. Such former members of senior management did not maintain and promote a control environment with an appropriate tone of compliance in certain areas of FirstEnergy's business, nor sufficiently promote, monitor or enforce adherence to certain FirstEnergy policies and its code of conduct. Furthermore, certain former members of senior management did not reasonably ensure that relevant information was communicated within our organization and not withheld from our independent directors, our Audit Committee, and our independent auditor. Among the matters considered with respect to the determination by the committee of independent members of the Board of Directors that certain former members of senior management violated certain FirstEnergy policies and its code of conduct related to a payment of approximately \$4 million made in early 2019 in connection with the termination of a purported consulting agreement, as amended, which had been in place since

²⁹ FirstEnergy Press Release, *FirstEnergy Announces Leadership Transition. Board of Directors Terminates Charles E. Jones; Appoints Steven E. Strah Acting CEO Christopher D. Pappas Named Executive Director of the Board; Donald T. Misheff Remains Non-Executive Chairman* (Oct. 29, 2020) (Emphasis added).

2013. The counterparty to such agreement was an entity associated with an individual who subsequently was appointed to a full-time role as an Ohio government official directly involved in regulating the Ohio Companies, including with respect to distribution rates. FirstEnergy believes that payments under the consulting agreement may have been for purposes other than those represented within the consulting agreement. Immediately following these terminations, the independent members of its Board appointed Mr. Steven E. Strah to the position of Acting Chief Executive Officer and Mr. Christopher D. Pappas, a current member of the Board, to the temporary position of Executive Director, each effective as of October 29, 2020. Mr. Donald T. Misheff will continue to serve as Non-Executive Chairman of the Board. Additionally, on November 8, 2020, Robert P. Reffner, Senior Vice President and Chief Legal Officer, and Ebony L. Yeboah-Amankwah, Vice President, General Counsel, and Chief Ethics Officer, were separated from FirstEnergy due to inaction and conduct that the Board determined was influenced by the improper tone at the top. The matter is a subject of the ongoing internal investigation as it relates to the government investigations.³⁰

This extensive disclosure of the results of the internal investigation waives any possible claim of privilege. The Attorney Examiner's October 12, 2021 ruling did not address OCC's waiver argument. The ruling is inconsistent with past precedent holding that voluntary public disclosure of a privileged communication waives the privilege.³¹

In *Westmoreland v. CBS, Inc.*, a CBS documentary portrayed General William Westmoreland unfavorably for inflating the U.S. Army's success during the Vietnam War. General Westmoreland sued for libel. CBS was criticized for its reporting. CBS conducted an internal investigation, then the President of CBS News, made the following public statement describing the results of the investigation:

I asked Burton Benjamin, Senior Executive Producer of CBS News, to conduct a study of the broadcast and its preparation. He approached it as a journalist reporting a complex story. He read the unedited transcripts of some 20 hours of interviews recorded for the

³⁰ FirstEnergy Corp., Form 10-K at 125 (Feb. 18, 2021).

³¹ *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983).

broadcast; the full text of General Westmoreland's January 26, 1982 news conference about the broadcast; numerous newspaper and magazine articles, books, portions of the Congressional Record , military documents and internal CBS News documents relevant to the broadcast. The broadcast and the Westmoreland news conference were repeatedly screened. Mr. Benjamin interviewed 32 persons -- 14 in person, 18 by telephone. Twelve of the interviews were with CBS News employees, all in person. Mr. Benjamin's report was presented to me July 8.

The following represents my conclusions and those of Mr. Benjamin and Edward M. Joyce, Executive Vice President of CBS News, about the editorial integrity of the broadcast and the adherence to CBS News Standards in its production.

CBS News stands by this broadcast.

We support the substance of the broadcast.³²

General Westmoreland sought the internal report in discovery. CBS objected on the ground of journalistic privilege. The court ruled that any privilege was waived by CBS' voluntary disclosure of the results of the internal report.³³ The court reasoned that CBS could not use the internal report both as a sword (to publicly defend itself against attacks on its journalistic integrity) and as a shield (by claiming it was only for internal use, and not discoverable due to privilege).³⁴

FirstEnergy Corp. did the exact same thing as CBS. FirstEnergy made extensive disclosures about the internal report (firing executives for breaches of company policy and code of conduct; an improper \$60 million payment for a legislator; an improper \$4.3 million payment to a regulator; ten years of misallocated costs, etc.). Just as CBS used its disclosures to convince the public of its journalistic integrity, FirstEnergy used its disclosures to convince shareholders of its managerial integrity in cleaning house after the H.B. 6 scandal. In both cases, the

³² *Id.* at 704.

³³ *Id.*

³⁴ *Id.*

voluntary disclosures of the results of the internal investigation waived any claim of privilege. The Attorney Examiner's ruling did not consider this argument.

The Attorney Examiner also failed to establish whether FirstEnergy Corp. produced the internal report to the SEC. If FirstEnergy Corp. produced the internal report to the SEC, this would be yet another instance of waiver.³⁵ The PUCO should grant this interlocutory appeal to establish whether FirstEnergy Corp. has produced the internal report to the SEC and, if so, then OCC is entitled to the report too.

The Attorney Examiner also failed to consider whether FirstEnergy Corp. waived the attorney-client privilege under the crime-fraud exception to the attorney-client privilege. Ohio recognizes the crime-fraud exception to the attorney-client privilege.³⁶ Under the crime-fraud exception, the attorney-client privilege is waived when the person seeking the information establishes that there is probable cause that a crime has been committed and the communications were in furtherance of the crime or were made to conceal a crime.³⁷

OCC easily meets both elements of the crime-fraud exception. First, FirstEnergy Corp. has admitted all of the underlying facts of the crime of honest services wire fraud.³⁸ Second, it appears that FirstEnergy Corp. is using the claim of attorney-client privilege as a shield to conceal wrongdoing. Evidence for this comes from the FirstEnergy Utilities' statement that "[p]rior to the filing of the [Deferred Prosecution Agreement], the Companies and their representatives were unaware that the \$4.3 million payment in part constituted political spending

³⁵ *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2nd Cir.) (Nov. 9, 1993); *In re Stone Energy Corp.*, 2008 U.S. Dist. LEXIS 62611 (W. D. La.) (Aug. 14, 2008); see Fed. R.Evid 502(a).

³⁶ *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533.

³⁷ *Id.* at ¶ 28; *In re Grand Jury Subpoena v. United States*, 642 Fed. Appx. 223, 2016 U.S. App. LEXIS (4th Cir. March 23, 2016).

³⁸ *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

in support of HB 6.”³⁹ FirstEnergy Corp. has been conducting the internal investigation since at least October 2020 when Mr. Jones was fired, but it has been using the internal investigation as a shield to conceal information about the full extent of its wrongdoing, even from its own utility subsidiaries. The PUCO should require FirstEnergy Corp. to produce the internal investigation report because this information is essential for the protection of consumers and FirstEnergy Corp. has waived any possible claim of attorney-client privilege.

The PUCO’s failure to consider OCC’s waiver argument not only violates the precedents discussed above, but also violates the PUCO’s responsibility to fully explain its decisions and to make all needed factual determinations. *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*.⁴⁰

2. The Attorney Examiner’s ruling is a departure from past precedent regarding discovery of the underlying facts related to an internal investigation report.

The Attorney Examiner’s ruling disregarded past precedent by overlooking a prior PUCO ruling allowing OCC to obtain an internal investigation report in *In re Dominion Purchased Gas Adjustment Case*.⁴¹ In that case, the PUCO ruled that OCC was entitled to the facts contained in an internal report prepared by Dominion, despite Dominion’s claims of attorney-client privilege.⁴²

Dominion involved the PUCO’s periodic review of Dominion’s purchased gas costs. Facts revealed that Dominion had been sued for alleged improper cost-shifting on contracts to

³⁹ *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, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Supplemental Response to the September 15, 2020 Show Cause Entry at 1-2 (Aug. 6, 2021).

⁴⁰ Slip Opinion No. 2021-Ohio-3130.

⁴¹ *Id.*

⁴² *Id.*

buy gas by the merchant company and by the utility. Dominion prepared an internal report relating to the claim. The PUCO ruled that OCC was entitled to obtain the internal report, over Dominion's objection on the grounds of attorney-client privilege.⁴³ The PUCO's discussion of how an *in camera* review should occur is instructive. The PUCO noted that OCC is entitled to obtain all underlying facts, and the purpose of an *in camera* review is to determine whether "certain information contained within documents is privileged."⁴⁴ In other words, any legal advice in the internal report can be redacted, and the redacted report revealing the underlying facts can be produced. Complete denial of access to this report is improper. The PUCO should follow this existing precedent.

The PUCO failed to explain why *Dominion* does not apply, and why OCC should not be entitled to all of the underlying documents that were reviewed for the internal report. Once again, this violates the PUCO's responsibility to fully explain its decisions and to make all needed factual determinations. *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*.⁴⁵

V. CONCLUSION

OCC's interlocutory appeal of the Attorney Examiner's October 12, 2021 ruling meets the standard for granting interlocutory appeals. OCC's appeal on behalf of millions of Ohio consumers should be certified to the PUCO and the PUCO should reverse the Attorney Examiner's ruling. For consumer protection, the PUCO should expeditiously reverse its Examiner's ruling and not permit the FirstEnergy Utilities to thwart a thorough and proper PUCO

⁴³ *Id.*

⁴⁴ *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR, Entry at 4-5 (Aug. 16, 2006).

⁴⁵ Slip Opinion No. 2021-Ohio-3130.

investigation related to FirstEnergy Utilities violation of Ohio corporate separation law and PUCO corporate separation rules.

Respectfully submitted,

Bruce Weston (#0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 18th day of October 2021.

/s/Maureen R. Willis

Senior Counsel

Assistant Consumers' Counsel

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

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THE PUBLIC UTILITIES COMMISSION OF OHIO

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

Entered in the Journal on October 12, 2021

{¶ 1} In this Entry, the attorney examiner finds that the internal investigation report is privileged, modifies the procedural schedule as requested, and schedules a prehearing conference to be held on December 6, 2021, via Webex.

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} To assist the Commission with the review of FirstEnergy's compliance with the corporate separation rules set forth in Ohio Adm.Code Chapter 4901:1-37, the Commission directed Staff, on May 17, 2017, to issue a request for proposal (RFP) for audit services. On July 5, 2017, the Commission issued an Entry selecting Sage Management Consultants, LLC (Sage) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a draft audit report was to be submitted by February 28, 2018, with the final audit report due on March 14, 2018. The deadline for the draft audit report and final audit report was extended to April 30, 2018, and May 14, 2018, respectively. Sage filed the final audit report on May 14, 2018.

{¶ 4} Comments regarding the Sage audit report were timely filed by Interstate Gas Supply, Inc. (IGS), Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council (NOPEC), the Companies, and Retail Energy Supply Association (RESA). Reply comments

were filed by NOPEC, FirstEnergy Solutions Corp. (FES), OCC, and the Companies. Joint reply comments were filed by RESA and IGS.

{¶ 5} In their comments, the Companies noted that, on March 20, 2018, FES filed a voluntary petition in the United States Bankruptcy Court for relief pursuant to Chapter 11 of Title 11 of the United States Code. Further proceedings in this case were deferred until the resolution of FES' bankruptcy proceeding.

{¶ 6} On March 20, 2020, the Companies filed a notice in this proceeding. The Companies represented that FES had emerged from bankruptcy as Energy Harbor Corp. (Energy Harbor) and that Energy Harbor is no longer an affiliate of the Companies' parent, FirstEnergy Corp.

{¶ 7} Further, on January 17, 2020, Suvon, LLC d/b/a FirstEnergy Advisors (Suvon) filed an application for certification as a competitive retail electric service power broker and aggregator in the state of Ohio. *In re Suvon LLC*, Case No. 20-103-EL-AGG. Suvon is an affiliate of the Companies. The Commission approved Suvon's application on April 22, 2020. The Commission also ruled that, although various parties in that case had raised issues both with Suvon's use of a trade name and with compliance with the corporation separation requirements by the Companies and other affiliates of FirstEnergy Corp., those issues were best addressed in this proceeding. *In re Suvon LLC*, Case No. 20-103-EL-AGG, Finding and Order (Apr. 22, 2020) at ¶ 20, 22.

{¶ 8} On April 29, 2020, the attorney examiner established a supplemental comment period regarding the audit report filed in this proceeding. Supplemental comments were timely filed by Vistra Energy Corp., NOPEC, IGS, OCC, RESA, and the Companies. Supplemental reply comments were timely filed by OCC, NOPEC, IGS, RESA, and the Companies.

{¶ 9} On September 8, 2020, the OCC filed motions in this proceeding for an investigation and management audit of FirstEnergy, its corporate governance, and its

activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from consumers or violate any utility regulatory laws, rules, or orders in its activities regarding Am. Sub. H.B. 6. The Companies filed a memorandum contra OCC's motions on September 23, 2020. OCC filed a reply on September 30, 2020.

{¶ 10} On September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC.

{¶ 11} On October 29, 2020, FirstEnergy Corp., the corporate parent of the Companies, filed a Form 8-K with the United States Securities and Exchange Commission reporting the termination of certain officers and appointment of new interim chief executive officers. The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

{¶ 12} On November 4, 2020, the Commission issued an Entry directing, in the instant case, Staff to issue an RFP to acquire audit services to assist the Commission with the review of FirstEnergy's compliance with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans for the period between November 1, 2016, and October 31, 2020. Bidders were directed to demonstrate their understanding of the project and the work required by showing a clear understanding of the tasks to be completed, the experience and qualifications of the personnel who will perform the work, and the anticipated breakdown of costs and timing.

All proposals were submitted on November 25, 2020, in accordance with the terms of the RFP.

{¶ 13} On January 27, 2021, the Commission selected Daymark Energy Advisors, Inc. (Daymark) and directed the Companies to enter into a contract with Daymark to perform the audit services described in the RFP and its proposal. In the Entry, the Commission also set the deadline for the completion of the audit report as June 21, 2021. Motions to extend the filing date of the audit report were filed and granted.

{¶ 14} On June 25, 2021, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp., FirstEnergy Service Company, and FirstEnergy Foundation. Those subpoenas were issued to the respective companies on June 25, 2021. Among other documents, the subpoenas seek the production of an internal investigation report by a committee of independent members of the FirstEnergy Corp. Board of Directors (Investigation Report).

{¶ 15} On July 19, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a motion to quash the subpoenas duces tecum. They argue that the subpoenas seek information outside the scope of the proceedings and privileged information. They also note that OCC has not tailored its requests in a way that would limit the burden of nonparty discovery. Finally, they argue that the only relevant, non-privileged information was already provided to OCC, including the consulting agreement and its amendments, as well as the vendor payments and associated details. The attorney examiner notes that a similar motion was filed in *In re 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.

{¶ 16} On August 3, 2021, OCC filed a memorandum contra the motion to quash the subpoenas. OCC argues that its document requests are reasonably calculated to lead to the discovery of admissible evidence and that FirstEnergy already agreed to make its affiliates' records available to the Commission and OCC in its merger commitment. OCC also argues

that a privilege log has not been provided and that the privilege was waived for certain documents when the documents were discussed publicly. OCC asserts that although certain documents that were requested in the subpoenas were already produced by the Companies, those documents may be different versions of the documents in the possession of FirstEnergy Corp. and FirstEnergy Service Company.

{¶ 17} On August 10, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a reply in support of their motion to quash the subpoenas. They argue that OCC failed to address in its memorandum contra the significant burden imposed by the subpoenas. They also reaffirm their arguments as to privilege and that the subpoenas are moot as to the documents already produced.

{¶ 18} On September 13, 2021, Daymark filed the final audit report with the Commission.

{¶ 19} On September 14, 2021, a prehearing conference was held. During that conference, deadlines for the comment period and hearing dates were discussed to determine mutually agreeable dates. Additionally, FirstEnergy Corp. and FirstEnergy Service Company were ordered to produce to the attorney examiners a privilege log and a copy of the Investigation Report for an *in camera* review.

{¶ 20} After conducting the *in camera* review of the Investigation Report, the attorney examiner finds that the Investigation Report is (1) a communication; (2) made between privileged persons, the committee of independent directors of FirstEnergy Corp. and counsel; (3) in confidence; and (4) for the purpose of providing legal assistance to the client. Moreover, the Investigation Report is clearly prepared in reasonable anticipation of litigation. Therefore, the Investigation Report is protected from disclosure by both attorney-client privilege and the attorney-work-product doctrine. To the extent that the Investigation Report contains attorney work product, the attorney examiner finds that OCC has not demonstrated a need for the materials; OCC has not demonstrated that the information contained in the Investigation Report is relevant to this proceeding and is otherwise

unavailable. Accordingly, the motion to quash, as to the Investigation Report, should be granted.

{¶ 21} On September 17, 2021, the attorney examiner set a comment period and procedural schedule for this proceeding.

{¶ 22} On October 1, 2021, IGS filed a motion to extend the comment period and procedural schedule. The motion was filed with a request for expedited treatment. IGS contends that the additional time will allow the parties time to adequately conduct and review discovery. IGS also certifies that no party opposes an expedited ruling on the motion.

{¶ 23} The attorney examiner finds good cause to grant the motion to extend the comment period and procedural schedule. Accordingly, all interested parties should file initial and reply comments regarding the auditor's report by November 8, 2021, and November 22, 2021, respectively.

{¶ 24} Additionally, the parties should adhere to the following revised procedural schedule:

- a. The deadline for the service of discovery, except for notices of deposition, shall be set for November 24, 2021.
- b. The Companies should file testimony by January 13, 2022.
- c. Intervenors should file testimony by January 27, 2022.
- d. The evidentiary hearing shall convene on February 10, 2022, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215. The parties should register at the lobby desk and then proceed to the 11th floor in order to participate in the hearing.

{¶ 25} Consistent with CDC Guidelines and the May 17, 2021 Ohio Department of Health Order, individuals who are not fully vaccinated should continue to wear a face covering and socially distance. Any accommodations necessary to ensure availability of social distancing and plexiglass dividers should be made in advance of the hearing. As pandemic restrictions are evolving, additional instructions regarding further safety requirements or accommodations for the hearing room will be forthcoming, either posted on the Commission's website or communicated to the parties.

{¶ 26} The attorney examiner finds that a prehearing conference should be scheduled for December 6, 2021, at 10:00 a.m., to be held via Webex. Instructions for participation in the prehearing conference shall be emailed to the parties. Anyone interested in observing the prehearing conference as a nonparty can access the prehearing using the link <https://bit.ly/17-974-PHC4>, and entering the password PUCO, or by calling 1-408-418-9388, and entering code 2343 538 0446.

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That the motion to quash, as to the Investigation Report, be granted as set forth in Paragraph 20. It is, further,

{¶ 29} ORDERED, That all interested parties file initial and reply comments as directed in Paragraph 23. It is, further,

{¶ 30} ORDERED, That parties adhere to the revised procedural schedule set forth in Paragraph 24. It is, further,

{¶ 31} ORDERED, That a prehearing conference be scheduled in accordance with Paragraph 26. It is, further,

{¶ 32} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

GAP/mef

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in

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

Summary: Attorney Examiner Entry granting the motion to quash as to paragraph 20; directing interested parties to file initial and reply comments as to paragraph 23; setting the procedural schedule as to paragraph 24; and, scheduling a prehearing conference for 12/6/21 at 10:00am electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

Entered in the Journal on October 12, 2021

{¶ 1} In this Entry, the attorney examiner finds that the internal investigation report is privileged after conducting an *in camera* review.

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or Companies) are electric distribution utilities as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with R.C. 4928.143.

{¶ 4} On August 25, 2010, the Commission issued an Opinion and Order approving FirstEnergy's second electric security plan. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 10-388-EL-SSO (ESP II Case), Opinion and Order (Aug. 25, 2010). In that Order, the Commission approved a joint stipulation, as modified, authorizing FirstEnergy to establish a delivery capital recovery rider (Rider DCR) effective January 1, 2012. Additionally, under the terms of the stipulation, FirstEnergy agreed to submit to an annual audit review process of Rider DCR.

Subsequently, on July 18, 2012, in Case No. 12-1230-EL-SSO, the Commission issued an Order approving a joint stipulation extending, with modification, the terms of the joint stipulation approved by the Commission in the *ESP II Case. In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012). Thereafter, by Order issued on March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved an extension, with modification, of FirstEnergy's Rider DCR. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016).

{¶ 5} On November 4, 2020, the Commission issued an Entry directing Staff to issue a request for proposal for the audit services necessary to assist with the compliance audit of the Companies. Prospective bidders were directed by the Commission to submit proposals to Staff by December 2, 2020.

{¶ 6} By Entry issued December 16, 2020, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) from the submitted proposals to complete the required audit services.

{¶ 7} According to the timeline ordered by the Commission, Blue Ridge was required to submit a draft audit report to Staff by May 5, 2021, and file a final audit report with the Commission by May 17, 2021.

{¶ 8} By Entry issued March 10, 2021, the Commission granted a request from Staff and directed Blue Ridge to expand the scope of the audit to include payments made to a number of vendors disclosed by FirstEnergy Corp. in its annual 10-K filing with the Securities and Exchange Commission.

{¶ 9} After two extensions of the deadline were granted, Blue Ridge filed the final audit report with the Commission on August 3, 2021.

{¶ 10} On June 25, 2021, Ohio Consumers' Counsel (OCC) filed a motion for subpoena duces tecum for FirstEnergy Corp., FirstEnergy Service Company, and FirstEnergy Foundation. Those subpoenas were issued to the respective companies on June 25, 2021. Among other documents, the subpoenas seek the production of an internal investigation report by a committee of independent members of the FirstEnergy Corp. Board of Directors (Investigation Report).

{¶ 11} On July 19, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a motion to quash the subpoenas duces tecum. They argue that the subpoenas seek information outside the scope of the proceedings and privileged information. They also note that OCC has not tailored its requests in a way that would limit the burden of nonparty discovery. Finally, they argue that the only relevant, non-privileged information was already provided to OCC, including the consulting agreement and its amendments, as well as the vendor payments and associated details. The attorney examiner notes that a similar motion was filed in *In re 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.

{¶ 12} On August 3, 2021, OCC filed a memorandum contra the motion to quash the subpoenas. OCC argues that its document requests are reasonably calculated to lead to the discovery of admissible evidence and that FirstEnergy already agreed to make its affiliates' records available to the Commission and OCC in its merger commitment. OCC also argues that a privilege log has not been provided and that the privilege was waived for certain documents when the documents were discussed publicly. OCC asserts that although certain documents that were requested in the subpoenas were already produced by the Companies, those documents may be different versions of the documents in the possession of FirstEnergy Corp. and FirstEnergy Service Company.

{¶ 13} On August 10, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a reply in support of their motion to quash the subpoenas. They argue that OCC failed to address in its memorandum contra the significant burden imposed by the subpoenas. They also reaffirm their arguments as to privilege and that the subpoenas are moot as to the documents already produced.

{¶ 14} On August 26, 2021, OCC filed a motion to compel the Companies to answer discovery requests as to its second and third sets of discovery.

{¶ 15} On September 14, 2021, a prehearing conference was held. During that conference, deadlines for the comment period and hearing dates were discussed to determine mutually agreeable dates. Additionally, FirstEnergy Corp. and FirstEnergy Service Company were ordered to produce to the attorney examiners a privilege log and a copy of the Investigation Report for an *in camera* review.

{¶ 16} After conducting the *in camera* review of the Investigation Report, the attorney examiner finds that the Investigation Report is (1) a communication; (2) made between privileged persons, the committee of independent directors of FirstEnergy Corp. and counsel; (3) in confidence; and (4) for the purpose of providing legal assistance to the client. Moreover, the Investigation Report is clearly prepared in reasonable anticipation of litigation. Therefore, the Investigation Report is protected from disclosure by both attorney-client privilege and the attorney-work-product doctrine. To the extent that the Investigation Report contains attorney work product, the attorney examiner finds that OCC has not demonstrated a need for the materials; OCC has not demonstrated that the information contained in the Investigation Report is relevant to this proceeding and is otherwise unavailable. Accordingly, the motion to quash, as to the Investigation Report, should be granted.

{¶ 17} It is, therefore,

{¶ 18} ORDERED, That the motion to quash, as to the Investigation Report be granted as set forth in Paragraph 16. It is, further,

{¶ 19} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

GAP/mef

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in

Case No(s). 20-1629-EL-RDR

Summary: Attorney Examiner Entry granting the motion to quash as set forth in Paragraph 16 electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio

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in

Case No(s). 17-0974-EL-UNC, 20-1629-EL-RDR

Summary: Request Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.