

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Ohio Edison	)	
Company, the Cleveland Electric	)	
Illuminating Company, and the Toledo	)	Case No. 17-974-EL-UNC
Edison Company's Compliance with	)	
R.C. 4928.17 and the Ohio Adm. Code	)	
Chapter 4901:1-37.	)	

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**MEMORANDUM CONTRA TO FIRSTENERGY CORP.'S MOTION FOR A  
PROTECTIVE ORDER  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

“Sunlight is said to be the best of disinfectants.”<sup>1</sup> The words of Louis Brandeis, later to become U.S. Supreme Court Justice Brandeis, ring true today as they did in 1913. FirstEnergy Corp. has avoided the light and wants the PUCO to do the same. The PUCO should not follow the lead of FirstEnergy Corp. It’s a company that is charged with a corruption-related federal crime and that agreed “the United States would prove the facts set forth below beyond a reasonable doubt...if this case had proceeded to trial.”<sup>2</sup>

As noted by U.S. District Judge John Adams, presiding over a shareholder suit against FirstEnergy,<sup>3</sup> the H.B. 6 bribery has “undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials.”<sup>4</sup> Transparency is needed to restore public trust.

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<sup>1</sup> Louis D. Brandeis, *What Publicity Can Do*, Harpers Weekly, Vol. 58, No. 2974 (Dec. 20, 1913).

<sup>2</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement at 14 (Jul. 22, 2021).

<sup>3</sup> *Miller v. Anderson*, Case No. 5:20CV1743 (N.D. Ohio).

<sup>4</sup> *Id.* at 8.

FirstEnergy Corp. has moved the PUCO for a protective order.<sup>5</sup> It broadly alleges that its documents are trade secrets,<sup>6</sup> and were produced in the ongoing federal investigations, and thus must be kept secret to avoid “compromising or interfering with ongoing federal investigations[.]”<sup>7</sup> But Ohio Attorney General Yost noted, in a recent civil court pleading seeking to reengage in discovery regarding FirstEnergy, “[t]he cows have left the barn. It is time to stop manning the only closed barn door.”<sup>8</sup>

FirstEnergy Corp. has not followed the proper process in its protective agreement with OCC. That process that FirstEnergy Corp. agreed to was an *in camera* review of documents to resolve arguments on the confidentiality of discovery documents. Nor has it met its burden to show that the documents should be kept secret. Accordingly, the PUCO should deny FirstEnergy Corp.’s Motion that would keep discovery documents secret.

If the PUCO does not outright deny FirstEnergy Corp.’s Motion, it should proceed to examine each of the documents, through an *in camera* review, where parties will be heard on the merits of FirstEnergy Corp.’s claims. Such an *in camera* inspection is consistent with the FirstEnergy Corp./OCC protective agreement. And it is necessary to determine whether all the materials claimed by FirstEnergy are entitled to protection from disclosure. *State ex rel Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St.3d 772.

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<sup>5</sup> Motion for Protective Order (Mar. 10, 2022).

<sup>6</sup> *Id.* at 4-7.

<sup>7</sup> *Id.* at 7-10.

<sup>8</sup> *State of Ohio v. FirstEnergy Corp., et al.*, Case No. 20 CV 006281, Combined Reply of the State to Memos in Opposition to Request for a Status Conference & Supplemental Memorandum in Support of Motion to Partially Lift the Stay of Proceedings at 1 (Feb. 22, 2022).

## II. ARGUMENT

### A. FirstEnergy Corp.'s motion to keep documents secret from the public is improper and should be denied because FirstEnergy did not follow the process of the protective agreement.

As FirstEnergy Corp. explains, FirstEnergy Corp. and OCC entered a protective agreement that is typical for PUCO cases. The agreement enables OCC to have sooner access to FirstEnergy information on a confidential basis through discovery when FirstEnergy claims the information is confidential. The agreement provides a process for OCC to demand that FirstEnergy prove to the PUCO that any particular information is truly confidential or for FirstEnergy to concede that such information is not confidential.<sup>9</sup> Although FirstEnergy Corp. asserts that the PUCO should enforce the protective agreement by protecting the sensitive information,<sup>10</sup> it has *not* followed the protective agreement itself. Accordingly, its motion for protective order should be denied.

Under the protective agreement, OCC exercised its right to give notice to FirstEnergy Corp. that certain documents it claims to be confidential are not in fact confidential. FirstEnergy Corp. then filed its Motion to keep the documents secret. Paragraph 10 of the protective agreement comes into play. It provides:

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.<sup>11</sup>

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<sup>9</sup> Motion at 1. The protective agreement was attached to FirstEnergy Corp.'s Motion as Exhibit 5.

<sup>10</sup> Motion at 4.

<sup>11</sup> Protective Agreement at ¶ 10.

Accordingly, FirstEnergy Corp. is required to seek *in camera* proceedings and argument on its claims that certain discovery documents should be kept secret. It has not done so. Its Motion should therefore be denied.

Further, FirstEnergy Corp. bears the burden of showing that the discovery documents should be kept secret.<sup>12</sup> It has not met that burden.

R.C. 4905.07 provides that “[e]xcept as provided in section 149.43 of the Revised Code and as consistent with the purposes of Title XLIX of the Revised Code, all facts and information in the possession of the public utilities commission shall be public \*\*\*.”

R. C 4901.12 requires that “all proceedings of the public utilities commission and all documents and records in its possession are public records, except as provided in the exceptions under R.C. 149.43.” The PUCO has noted that R.C. 4901.12 and R.C. 4905.07 “provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome.”<sup>13</sup>

When determining whether to issue a protective order, the PUCO has found it necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be consistent with the purposes of Title 49 Revised Code; and to evaluate whether the confidential material can reasonably be redacted.<sup>14</sup> The PUCO has also noted that “it is necessary to strike a balance between competing interests. On the one hand,

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<sup>12</sup> Protective Agreement at ¶ 12.

<sup>13</sup> *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 (Oct. 18, 1990).

<sup>14</sup> *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates*, Case No. 03-93-EL-ATA, Order on Remand at 23 (Oct. 24, 2007).

there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."<sup>15</sup> Public scrutiny in this case is especially needed, as noted by U.S. District Judge John Adams, where "[t]his bribery scheme has undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials. The public has a right to know how it is that the political process was so easily corrupted."<sup>16</sup>

But FirstEnergy Corp. wants to short-circuit the process and avoid the deliberate review that must occur before the PUCO makes a ruling on FirstEnergy Corp.'s motion for secrecy. All that FirstEnergy Corp. has provided to the PUCO are its untested assertions. FirstEnergy Corp.'s assertions in its Motion have not been subject to questioning, either by the PUCO or OCC (as required under the protective agreement).

FirstEnergy Corp.'s Motion should be denied.

**B. If the PUCO does not deny FirstEnergy Corp.'s motion as being in noncompliance with the protective agreement, the PUCO should conduct an *in camera* review of, and hear arguments on, the documents that FirstEnergy Corp. wants kept secret.**

FirstEnergy Corp.'s description of the protective agreement is incomplete.<sup>17</sup> Now that OCC has given notice to FirstEnergy Corp. about its intent to be transparent and

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<sup>15</sup> *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity*, Case No. 99-890-TP-ACE, Entry at 2-3 (Oct. 1, 1990); *see also In the Matter of Joint Application of Ohio Bell Telephone Company and Ameritech Mobile Services, Inc.*, Case No. 89-365-RC-ATR at 7 (Oct. 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.").

<sup>16</sup> *Miller v. Anderson*, Case No. 5:20CV1743, Order at 8 (Mar. 22, 2022).

<sup>17</sup> *See* Motion at 3.

disclose certain documents, and FirstEnergy Corp. has filed its Motion to keep the documents secret, paragraph 10 of the protective agreement controls. It provides:

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.<sup>18</sup>

It could not be otherwise. FirstEnergy Corp. has not attached the documents it seeks to keep secret to the Motion. The PUCO has no way of evaluating FirstEnergy Corp.'s purported justifications to keep the documents secret. Under the protective agreement, the PUCO must<sup>19</sup> hold *in camera* proceedings to review the documents and for argument.<sup>20</sup>

The PUCO should require that the affiants supporting FirstEnergy Corp.'s Motion appear at the *in camera* proceeding and be subject to questioning under oath. *If the PUCO does not provide this opportunity, then OCC should be provided with the time to depose the FirstEnergy affiants before the PUCO makes a ruling.* Consistent with the protective agreement, FirstEnergy Corp. filed affidavits purportedly supporting the

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<sup>18</sup> Protective Agreement at ¶ 10.

<sup>19</sup> The Ohio Supreme Court has found that an *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St.3d 772 (1992).

<sup>20</sup> *Id.* As FirstEnergy points out, “[p]rotective agreements or analogous protective orders are routinely upheld.” Motion at 2. “And the Commission, under O.A.C. 4901-1-24, has the authority to fashion appropriate protective remedies, including enforcing protective agreements where necessary.” *Id.*

reasons for keeping the documents secret.<sup>21</sup> A number of assertions are made in those affidavits that necessitate questioning.

For example, FirstEnergy Corp. asserts based on the Lee Affidavit that the documents “are currently afforded confidential treatment in *all* House Bill-6 related civil proceedings.”<sup>22</sup> That may or may not be germane to the PUCO’s consideration of the Motion. Is there a process for making the documents public in the civil proceedings? Has anyone sought to make the documents public in the civil proceedings? If so, was there a ruling? If there is no process for making the documents public in the civil proceedings, or if no one has sought to make the documents in the civil proceeding public, then FirstEnergy Corp.’s assertion should have little bearing on the PUCO’s evaluation of the Motion.

And just this week a U.S. District Judge, in a federal lawsuit by shareholders against FirstEnergy officials, demanded to know information about FirstEnergy corruption that was being kept from the public in a settlement.<sup>23</sup> The Judge then got the information in 24 hours, in the public domain.<sup>24</sup>

Questioning the affiants about what is *not* in their affidavits is equally important. For example, FirstEnergy asserts that the documents should be kept secret so as not to interfere with the federal criminal investigation.<sup>25</sup> That neither affiant even remotely hints at any facts supporting a claim of “interference” needs exploring.

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<sup>21</sup> See Motion at Exhibit D (Affidavit of Tracy M. Ashton); Exhibit E (Affidavit of E).

<sup>22</sup> *Id.* at 8 (citing Lee Affidavit at ¶ 6).

<sup>23</sup> *Miller v. Anderson*, Case No. 5:20CV1743, Order (Mar. 22, 2022).

<sup>24</sup> *Id.*, Affidavit (Mar. 23, 2022).

<sup>25</sup> See *Id.* at 9; see generally section A, *supra*.

FirstEnergy does not include any purported facts to support a claim of “interference.” FirstEnergy Corp. merely asserts that “counsel for FirstEnergy contacted the Assistant United States Attorneys prosecuting the criminal case to clarify the government’s position, if any, on the confidentiality of records produced during the investigation, and the government supports maintaining the confidential nature of those records to preserve the integrity of the ongoing investigation.”<sup>26</sup>

FirstEnergy Corp. provides no statement under oath to support this assertion about a call with the U.S. Attorney. The PUCO should require a sworn affidavit by the person making the call, with all the specifics of the call including the exact information discussed and shared with the U.S. Attorney. And then the PUCO should allow OCC to voir dire the FirstEnergy affiant. A factual assertion without affiant support or context is no reason to keep the public in the dark by keeping documents secret.<sup>27</sup> There already has been too much darkness regarding the FirstEnergy scandals – and that in part enabled the scandals.

If the PUCO does not outright deny FirstEnergy Corp.’s Motion, FirstEnergy Corp.’s assertions regarding relevancy need to be probed at an *in camera* proceeding with argument, per the protective agreement. Because the PUCO has not seen the documents, it cannot possibly rule on FirstEnergy Corp.’s relevancy assertions based only on the Motion. FirstEnergy Corp. merely says the documents are irrelevant, cites them, but does not provide them.

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<sup>26</sup> Motion at 9.

<sup>27</sup> Especially because the protective agreement calls for affiant support. *See* Protective Agreement at 9.



### III. CONCLUSION

As Attorney General Yost advised, ‘[g]overnment of, by and for the people also must be *open* to the people.’<sup>28</sup> FirstEnergy Corp. has not followed the process that it agreed to in its protective agreement with OCC. It has not met its burden to show that the discovery documents should be kept secret. Its Motion should be denied as in noncompliance with the protective agreement.

If the PUCO does not deny the Motion outright, it should require an *in camera* review of the claimed secret documents, consistent with PUCO precedent, Ohio Supreme Court precedent and the OCC/FirstEnergy Corp. protective agreement. During the *in camera* review, the PUCO should allow parties, including OCC, to be heard on these matters.

Respectfully submitted,

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<sup>28</sup> *Protecting the unprotected*, Ohio Sunshine laws at i (2022).

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Memorandum Contra to FirstEnergy Corp.'s Motion for a Protective Order was served on the persons stated below via electric transmission this 25<sup>th</sup> day of March 2022.

/s/ Maureen R. Willis  
Maureen R. Willis  
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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