BEFORE
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. 17-0974-EL-UNC**

FIRSTENERGY CORP.'S REPLY IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER

I. Introduction

OCC seeks to disclose publicly certain confidential documents that were produced by FirstEnergy Corp. ("FirstEnergy") as part of an agreement with OCC to resolve a subpoena. Included in these FirstEnergy productions are all documents produced to the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), as well as additional documents produced to the securities plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio). FirstEnergy and OCC's Protective Agreement requires continuing protective treatment over the non-public documents at issue since they have been maintained in a confidential manner and injury would result from disclosure.[1] State and federal law confirm this.

OCC in opposition does nothing to challenge the underlying merits of the confidentiality designations. Instead, OCC simply cites to Commission precedent to note that there is a presumption in favor of disclosure. OCC otherwise claims that FirstEnergy has not followed the procedure for filing a motion for protective order. All of OCC's arguments are misguided.

[1] The Protective Agreement is attached as Exhibit B to FirstEnergy's Motion for a Protective Order and Memorandum in Support (hereinafter "Ex. B").

First, OCC relies on the wrong standard. ***Second***, OCC offers no meaningful response to the continued safeguards applicable to commercially sensitive information under the Protective Agreement. ***Third***, disclosure of non-public documents produced to the DOJ or SEC, which are not even relevant to this proceeding, could interfere with ongoing federal investigations. ***Finally***, OCC's arguments that FirstEnergy failed to request a required *in camera* hearing are unsupported by the plain terms of the Protective Agreement. Accordingly, pursuant to Ohio Administrative Code 4901-1-24(A), and for the reasons stated below and more fully in FirstEnergy's Motion for Protective Order and Memorandum in Support ("Motion"), FirstEnergy respectfully requests continuing protective treatment over documents:

> 0002211, 0002212, 0002213, 0004318, 0004320, 0005187, 0005204, 0005205, 0005206, 0005207, 0005208, 0005209, 0005211, 0005212, 0005216, 0005218, 0005233, 0005234, 0005235, 0005236, 0005237, 0005238, 0005239, 0005240, 0005241, 0005242, 0005243, 0005244, 0005245, 0005246, 0005247, 0005248, 0005249, 0005250, 0005251, 0005252, 0005253, 0005254, 0005255, 0005423, 0005424, 0005426, 0005427, 0005431, 0005508, 0005850, 0005852, 0005853, 0006441, 0006467, 0006480, 0006863, 0006864, 0006890, 0006891, 0006892, 0006893, 0007266, 0007414, 0007416, 0007420, 0007422, 0007424, 0007426, 0007429, 0007430, 0007433, 0007435, 0007437, 0007439, 0007441, 0007443, 0007445, 0007448, 0007451, 0010256, 0298790, 0298792, 0298794, 0298796.[2]

II. Argument.

A. The Protective Agreement Governs The Standard For FirstEnergy's Motion for Protective Order.

OCC has ignored the standard that applies to a motion for protective order brought pursuant to Paragraph 9 of the Protective Agreement. Instead, OCC incorrectly cites and relies on the standards from R.C. 4905.07 and R.C. 4901.12.[3] But those are inapposite. OCC filed a notice of

[2] Number references throughout this motion and accompanying memorandum are to the first Bates stamps of each document, produced as "FE_CIV_SEC_#######." OCC, in its notice, lists the documents at issue by specific page ranges. To avoid any confusion, Exhibit A to FirstEnergy's Motion and Memorandum in Support lists the page ranges for each document on which FirstEnergy is moving for protective treatment.

[3] Case No. 17-974-EL-UNC, OCC Memorandum Contra FirstEnergy Corp.'s Motion for Protective Order ("OCC Mem.") (Mar. 25, 2022), at 4.

intent to disclose under Paragraph 9, and accordingly the standard set in the Protective Agreement governs. Pursuant to its terms, FirstEnergy need only show that the "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."[4] As for procedure, Paragraph 9 only requires that the movant support this showing with affidavits. FirstEnergy submitted affidavits describing how the materials have been maintained in a confidential manner and explained how disclosure of this information could result in injury: (1) disclosure of the commercially sensitive materials could result in economic harm because this information is not generally known to the public; and (2) disclosure of confidential documents produced to the DOJ or SEC could interfere with ongoing federal investigations.[5] Accordingly, FirstEnergy has met its burden under Paragraph 9 to show that continued safeguards are necessary. This is particularly so since documents OCC seeks to disclose are not relevant to this proceeding.[6]

B. Commercially Sensitive Information Is Protected From Disclosure.

A category of documents OCC seeks to disclose contain commercially sensitive and proprietary business information (referred to as the "Commercially Sensitive Documents"), which include, among other things, financial analytics, forecasting, and financial modeling extending out to 2024.[7] Under the Protective Agreement, "Protected Materials" "include, *but are not limited to*, materials meeting the definition of 'trade secret' under Ohio law and material nonpublic information under Regulation FD, 17 C.F.R. 243."[8]

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[4] Case No. 17-974-EL-UNC, FirstEnergy Motion for Protective Order ("FirstEnergy Mot.") and Memorandum in Support ("FirstEnergy Mem.") (Mar. 10, 2022), Ex., B, at ¶ 9.

[5] FirstEnergy Mem., at 4-10.

[6] *Id*., at 9-10.

[7] *Id*., at 4-7.

[8] FirstEnergy Mot., Ex. B, at ¶ 3(A).

OCC launches no substantive challenge to the Commercially Sensitive Documents and, in fact, does not even address this category of documents, apart from one passing reference to "trade secrets."[9] Even under the statutes that OCC cites—R.C. 4905.07 and 4901.12 (which are not the governing standard for this motion)—OCC must concede that trade secrets are shielded from public disclosure (setting aside an operative protective agreement). *See In re General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb. 17, 1982); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, ¶ 30. And FirstEnergy noted that the majority of the Commercially Sensitive Documents would qualify as trade secrets.[10] But in any event, the Protective Agreement controls and it protects confidential information not limited to trade secrets. A point OCC chose to ignore.

C. Non-Public Documents Produced In Ongoing Federal Investigations Should Be Protected From Disclosure.

Two separate reasons require continued protective treatment for non-public documents that were produced to the DOJ or SEC. First, as "a general proposition, courts have repeatedly recognized that materials, including even judicial documents which are presumptively accessible, can be kept from the public if their dissemination might adversely affect law enforcement interests."[11] These cases expressly acknowledge OCC's concern that judicial (or Commission) "documents . . . are presumptively accessible."[12] But even taking this concern into account, courts have found that the potential of "impairing law enforcement" can be a "countervailing factor

[9] OCC Mem., at 2.

[10] FirstEnergy Mem., at 5-6.

[11] *United States v. Smith*, 985 F. Supp. 2d 506, 531 (S.D.N.Y. 2013) (collecting cases); *Flagg ex rel. Bond v. City of Detroit*, 268 F.R.D. 279, 294 (E.D. Mich. 2010) ("[T]o date, the Court's first and foremost concern in restricting public access to certain discovery materials and processes has been to ensure that the parties' discovery efforts do not interfere with the active and ongoing investigation . . . .").

[12] *Smith*, 985 F. Supp. 2d at 531.

outweighing the qualified right of [public] access."[13] OCC does not address the precedent set out in these cases. Second, the non-public documents at issue produced to the DOJ or SEC are not relevant, which bolsters the need for continued protection.[14] Relevance is the touchstone for discovery (and thus a precursor to the presumption of public access),[15] and even OCC appears to acknowledge relevance is a prerequisite to disclosure.[16]

OCC's primary response is that more information is needed about the details surrounding the confidentiality of the documents produced as part of ongoing federal investigations. For example, OCC wants to know if any civil parties have sought to disclose these documents and if any court has ruled on the documents' confidentiality. If not, OCC claims that whether or not the documents have been disclosed in other civil proceedings "should have little bearing on the PUCO's evaluation of the Motion."[17] Exactly the opposite is true. It's highly relevant that documents designated confidential have not been disclosed in any of the HB 6-related civil proceedings. The Protective Agreement requires FirstEnergy to show that, as part of its burden for this Motion, the documents "have been maintained in a confidential manner," and they have.

D. The Protective Agreement Does Not Mandate An *In Camera* Hearing As Part Of A Motion For Protective Order.

Citing to Paragraph 10 of the Protective Agreement, OCC claims that FirstEnergy failed to request an *in camera* hearing as part of its Motion, and for this reason, FirstEnergy's Motion

[13] *Id.* (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)) (emphasis added).

[14] FirstEnergy Mem., at 9-10.

[15] O.A.C. 4901-1-16 (Discovery is permitted of "matters, not privileged, which [are] *relevant* to the subject matter of the proceeding.") (emphasis added); *see also* Ohio Civ. R. 26.

[16] *See* OCC Mem., at 8 ("FirstEnergy Corp.'s assertions regarding relevancy need to be probed . . . .").

[17] OCC Mem., at 7.

should be denied.[18] OCC's assertion finds no support in Paragraph 10 or the Protective Agreement as a whole.

Ohio courts interpret contracts "according to their plain and ordinary meaning unless another meaning is evident from the face or overall content of the contract."[19] The plain language of Paragraph 10 does not require a hearing on a motion brought pursuant to Paragraph 9, and it certainly does not require FirstEnergy to request an *in camera* hearing as part of its Motion. Paragraph 10 does not reference Paragraph 9, even implicitly, nor does it contain any reference to a "motion" at all. Rather, under Paragraph 10, the parties have agreed to "seek *in camera* proceedings . . . for arguments or for the examination of a witness *that would disclose Protected Materials*."[20] By its plain terms, this provision governs how the Protected Materials should be treated at *any* hearing where arguments or witnesses "would disclose Protected Materials." It does not require a hearing for any matter, including a Paragraph 9 motion.

The "overall content of the" Protective Agreement confirms this.[21] No other provision in the Protective Agreement addresses how Protected Materials should be safeguarded in the event arguments or witnesses would need to disclose their contents. So Paragraph 10 provides the answer: testimony and argument must be conducted *in camera*. Thus, if the Commission were to order any type of hearing or oral arguments on a motion for protective order, then, yes, Paragraph 10 would apply in that instance to ensure the hearing is an *in camera* one—as FirstEnergy and OCC agreed.

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[18] OCC Mem., at 3-5.

[19] *Cheatham I.R.A. v. Huntington Nat'l Bank*, 2019-Ohio-3342, 157 Ohio St. 3d 358, 365, 137 N.E.3d 45, 54 (Ohio 2019); *see also Sunoco, Inc. (R & M) v. Toledo Edison Co.*, 2011-Ohio-2720, ¶ 37, 129 Ohio St. 3d 397, 404, 953 N.E.2d 285, 292 (Ohio 2011).

[20] FirstEnergy Mot., Ex. B, at ¶ 10 (emphasis added).

[21] *See Cheatham I.R.A.*, 137 N.E.3d at 54.

Here, if the Commission finds review of the documents is necessary, FirstEnergy has no objection to submitting the documents for *in camera* review.[22] In fact, the Protective Agreement allows OCC to file the documents under seal.[23] However, OCC's request for witness examination or depositions is improper and unnecessary. Paragraph 10 (or Paragraph 9) of the protective agreement by no means requires examination of witnesses. And OCC's request would require the appearance of *non-party* witnesses, including the appearance of a non-party's *counsel* as a witness. This is particularly improper where the confidential documents could be provided for *in camera* inspection and parties would have an opportunity to present their arguments with respect to those documents. OCC offers no explanation why an *in camera* review of the documents coupled with oral arguments would not be sufficient. Instead, OCC states that it needs to ask FirstEnergy's counsel questions about how these confidential documents are treated in other proceedings. The public dockets, coupled with oral arguments, are more than adequate. Here, witness examination or depositions of non-party witnesses, including a non-party's counsel, would be unduly burdensome, duplicative, and unnecessary, and the Commission has rejected and cautioned against such burdensome and duplicative requests on non-parties.[24]

[22] OCC appears to assert that FirstEnergy, as part of its Motion, was required to attach or submit the Protected Materials at issue as a condition to properly filing its Motion. To the extent OCC is arguing this, Paragraph 10 does not require this in the least. It contains no reference to Paragraph 9 nor the term "motion."

[23] FirstEnergy Mot., Ex. B, at ¶ 4 ("Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.").

[24] *See In the Matter of the Application of Ohio Power Co. to Cancel Certain Special Power Agreements & for Other Relief.*, No. 75-161-EL-SLF, 1976 WL 407711, at ¶ 5, 8 (P.U.C.O Apr. 21, 1976) (quashing subpoena requiring attendance at hearing, noting the volume of data and documents already provided); *In the Matter of the Application & Complaint & Appeal of Columbus & S. Ohio Elec. Co. to Amend & Increase Certain of Its Rates & Charges for Elec. Serv.*, No. 77-545-EL-AIR, 1977 WL 424253, at ¶ 16 (P.U.C.O Dec. 7, 1977) (finding Consumers' Counsel used ineffective means of compelling attendance of a non-party for a deposition, and, in general, noting "the importance of avoiding repetitious and duplicative questioning during any depositions").

III. CONCLUSION

For these reasons, and those explained more fully in FirstEnergy's Motion and Memorandum in Support, FirstEnergy respectfully requests that the documents specifically listed in its Motion be protected from disclosure.

Dated: April 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on April 1, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee
Attorney for FirstEnergy Corp.

Summary: Reply in Support of Motion for Protective Order electronically filed by Mr. Corey Lee on behalf of FirstEnergy Corp.