

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

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Bruce Weston (0016973)  
Ohio Consumers' Counsel

Maureen R. Willis (0020847)  
Counsel of Record  
John Finnigan (0018689)  
Connor D. Semple (0101102)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**  
65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Willis]: (614) 466-9567  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Semple]: (614) 466-9565  
[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)  
(willing to accept service by email)

June 27, 2022

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The PUCO should certify this interlocutory appeal and the PUCO Commissioners should reverse or modify the June 22, 2022 ruling by PUCO Attorney Examiner Megan Addison. The Commissioners' reversal or modification is needed to correct for the ruling's missing due process and public process for OCC and others to contest FirstEnergy Corp.'s claims for secrecy. Further, the Commissioners should require FirstEnergy Corp. to supplement its motion for protection with an affidavit sworn under oath describing in detail its claim that the U.S. Attorney's office stated in a phone call that the documents at issue should be held as confidential. We note that in another recent FirstEnergy Utilities' motion for protection, the FirstEnergy Utilities did not even file the required affidavit.<sup>1</sup>

OCC is seeking a fair process that includes the opportunity for advocacy (by OCC and others) to object to FirstEnergy Corp.'s claims for documents to be withheld from the

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<sup>1</sup> *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, FirstEnergy Utilities' Motion for Partial Protective Order (May 9, 2022).*

public record and the opportunity for the public to view the arguments. The Examiner ordered FirstEnergy Corp. to produce its claimed confidential documents for an *in camera* review by the PUCO, to be made after production of the documents on June 29, 2022.

But Examiner Addison declined to require both due process for parties' advocacy and a public (transparent) process for consumers that OCC sought. More specifically, that should be due process where parties can challenge (by argument and cross-examination, etc.) the confidentiality claims by FirstEnergy Corp. while the Examiners are reviewing the documents. And it should be a hearing process in the public light, that is not closed to the public unless there is a need to reference something that is claimed to be confidential.

As alluded to above, FirstEnergy Corp. says that it called the U.S. Attorney's office. It says that FirstEnergy "counsel . . . 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>2</sup>

Notably, FirstEnergy Corp. did not state these claims in a sworn affidavit. The PUCO Commissioners should require FirstEnergy Corp., in a public filing, to provide an affidavit sworn under oath describing its call to the U.S. Attorney. That affidavit should include the date, time of the call, identity of parties on the call and specifically what was said and by whom, etc. It should then be subject to OCC cross-examination (*voir dire*). Further, no doubt one or more participants for FirstEnergy would have taken notes. The FirstEnergy

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<sup>2</sup> *Id.*

notes should be required to be produced to OCC. The Attorney Examiner's ruling does not require these things. The Commissioners should require all of them.

This nonpublic process for the PUCO's review of FirstEnergy's confidentiality claims is an especially bad fit for this PUCO case investigating FirstEnergy. That is so given the shocking secrecy and scandal involving FirstEnergy's relationship with prior PUCO Chair Randazzo and the secret dealings that the U.S. Attorney also revealed about FirstEnergy and House Bill 6. After all, FirstEnergy Corp. is charged with a federal crime and admitted that the federal government can prove it.<sup>3</sup> As noted by U.S. District Judge John Adams, presiding over a shareholder suit against FirstEnergy Corp.,<sup>4</sup> the H.B. 6 bribery scandal has "undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials."<sup>5</sup> Transparency is needed for public trust.

In the interest of truth and justice, the Office of the Ohio Consumers' Counsel ("OCC") appeals the Attorney Examiner's June 22, 2022 ruling.<sup>6</sup> The PUCO Examiner should certify this appeal. The PUCO Commissioners should then reverse or modify the Examiner's ruling.

The PUCO Commissioners should order *due process* that includes advocacy by parties where they can contest FirstEnergy Corp.'s claims of secrecy with arguments, cross-examination of witnesses, and so forth. That due process should occur in a *public process*. A public process is consistent with R.C. 4901.12 which provides that all proceedings before the PUCO shall be public, subject to limited exceptions. Most

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<sup>3</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

<sup>4</sup> *Miller v. Anderson*, Case No. 5:20CV1743 (N.D. Ohio).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *See* Entry attached.

arguments about whether FirstEnergy Corp. should keep documents from the public can be made without revealing allegedly confidential information.

In this regard we note the precedent of a 2011 PUCO proceeding where OCC was seeking to protect its documents from disclosure to FirstEnergy Utilities (under OCC's privilege claims that included a joint defense agreement). During the *in camera* hearing, PUCO Attorney Examiners Gregory Price and Henry Phillips-Gary allowed the FirstEnergy Utilities to argue for disclosure against OCC, document by document, on the open record.<sup>7</sup>

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

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<sup>7</sup> *In the Matter of the Application of the 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-ATA, Hearing Transcript, at 10-73 (January 18, 2011).

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)  
Counsel of Record  
John Finnigan (0018689)  
Connor D. Semple (0101102)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Willis]: (614) 466-9567  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Semple]: (614) 466-9565  
[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)  
(willing to accept service by email)

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

“Sunlight is said to be the best of disinfectants.”<sup>8</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 regarding FirstEnergy’s motion to “protect” documents. The PUCO should not follow the lead of FirstEnergy Corp. on transparency. Transparency is needed for public trust.

FirstEnergy Corp. has moved the PUCO for a protective order. Its motion followed OCC’s notice (under the FirstEnergy Corp./OCC protective agreement) to make certain documents public.<sup>9</sup> FirstEnergy Corp. wants to keep the documents secret. FirstEnergy Corp. broadly alleges that its documents are trade secrets,<sup>10</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>11</sup> FirstEnergy Corp. also claims that it spoke with the U.S. Attorney’s office and “the government supports

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<sup>8</sup> Louis D. Brandeis, What Publicity Can Do, Harpers Weekly, Vol. 58, No. 2974 (December 20, 1913).

<sup>9</sup> Motion for Protective Order (March 10, 2022).

<sup>10</sup> *Id.* at 4-7.

<sup>11</sup> *Id.* at 7-10.



maintaining the confidential nature of those records to preserve the integrity of the ongoing investigation.”<sup>12</sup> But FirstEnergy provided very few details of its conversation with the U.S. Attorney’s office. And it should have fully recounted such a conversation in a sworn affidavit. It didn’t. But the PUCO Commissioners should require it.

As 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>13</sup>

Examiner Addison’s June 22nd ruling required FirstEnergy Corp. to submit documents for an *in camera* (private) review to determine if they should be kept secret as requested by FirstEnergy Corp.<sup>14</sup> The Attorney Examiners will conduct their *in camera* review in isolation, without context or insight from parties. And outside the public’s view.

The Attorney Examiner’s ruling did not provide for the process sought by OCC.<sup>15</sup> OCC sought a hearing that allows argument, witnesses, cross-examination, etc. This process fails due process for OCC and others. And it fails for transparency as not being a public process. The process ordered by Attorney Examiner Addison is contrary to R.C. 4901.12 that “*all proceedings* of the public utilities commission and all documents and records in its possession are public records,” subject to limited exceptions. (Emphasis added.)

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<sup>12</sup> *Id.* at 9.

<sup>13</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 (February 22, 2022).

<sup>14</sup> Entry at ¶ 30.

<sup>15</sup> See Entry; see also OCC’s Memorandum Contra (March 25, 2022) at 5-8.

These issues are preceded by the shocking scandal involving FirstEnergy's relationship with the prior PUCO Chair and the shocking secret dealings revealed about FirstEnergy and House Bill 6. After all, FirstEnergy Corp. is charged with a federal crime and admitted that the federal government can prove it.<sup>16</sup>

The PUCO should grant this interlocutory appeal. The PUCO should require the *in camera* review to be conducted through an open public process where parties can offer arguments, cross-examine witnesses, and examine FirstEnergy Corp.'s statements, under oath, as recommended by OCC.

The PUCO Commissioners should also require FirstEnergy Corp., in a public filing, to submit an affidavit sworn under oath describing the call it says it made to the U.S. Attorney's office. FirstEnergy claims the U.S. Attorney's office supported keeping the documents confidential. That affidavit/testimony should include the date, time of the call, identity of parties on the call and specifically the details of what was said and by whom, etc. No doubt one or more participants for FirstEnergy would have taken notes about its call with the U.S. Attorney's office. The PUCO should require FirstEnergy to produce the notes of the FirstEnergy/U.S. Attorney call to OCC.

## **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.<sup>17</sup> The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation,

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<sup>16</sup> *United States of America v. FirstEnergy Corp.*, Case No. 1:21-cr-86, Deferred Prosecution Agreement (July 22, 2021).

<sup>17</sup> O.A.C. 4901-1-15(B).

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 or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.”<sup>18</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>19</sup>

### III. REQUEST FOR CERTIFICATION

**A. Examiner Addison’s failure to provide for the due process and the public process recommended by OCC presents a new or novel question of interpretation, law or policy and a departure from past precedent, for this landmark case in the shadow of FirstEnergy’s House Bill 6 and PUCO scandals.**

In its Memorandum Contra FirstEnergy Corp.’s motion for protective order, OCC recommended that “[t]he 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.*”<sup>20</sup>

OCC pointed out with specificity that a number of assertions made in FirstEnergy Corp.’s pleading necessitate questioning.<sup>21</sup> Equally as important, OCC pointed out with specificity that questioning the affiants about what is *not* in their affidavits is equally important.<sup>22</sup> For instance, there is no affidavit documenting the conversation FirstEnergy

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<sup>18</sup> *Id.*

<sup>19</sup> O.A.C. 4901-1-15(E).

<sup>20</sup> OCC’s Memorandum Contra at 6.

<sup>21</sup> *Id.* at 7 (internal quotations and citations omitted).

<sup>22</sup> *Id.* at 7-8 (internal quotations and citations omitted).

says it had with the U.S. Attorney's office where FirstEnergy says the U.S. government supports maintaining secrecy of the documents.

But Attorney Examiner Addison ruled that the *in camera* review will occur without a public hearing. And the Examiner ruled that OCC will not be afforded the opportunity to participate in the *in camera* review to challenge FirstEnergy Corp.'s claims of the need for secrecy.<sup>23</sup> FirstEnergy Corp. was merely directed to provide copies of the documents in question within seven days (by June 29, 2022).<sup>24</sup> The Examiner further stated that the PUCO will issue a decision or provide instructions for additional process it deems necessary to resolve the issue.<sup>25</sup>

This appeal should be certified, per O.A.C. 4901-1-15(B). It represents a new or novel question of interpretation, law or policy and departs from past precedent, though only one of those elements is required by the rule.

Indeed, there is a past PUCO precedent for conducting an *in camera* review of documents in an open process where parties have an opportunity to challenge the documents and claims made by those seeking to prevent disclosure or discovery.<sup>26</sup> The Examiner's ruling departs from that precedent.

We are referencing the precedent of a 2011 PUCO proceeding where OCC was seeking to protect its documents from disclosure to FirstEnergy Utilities (under OCC

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<sup>23</sup> *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 (June 22, 2022) at ¶ 30, 31.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *In the Matter of the Application of the 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-ATA, Hearing Transcript, at 10-73 (January 18, 2011).

privilege claims that included claims related to a joint defense agreement). During the *in camera* hearing, PUCO Attorney Examiners Gregory Price and Henry Phillips-Gary allowed the FirstEnergy Utilities to argue for disclosure, document by document, against OCC. The Examiners conducted the *in camera* review *on the open record*.<sup>27</sup> Additionally, there was detailed examination of OCC Counsel by the Attorney Examiners during the *in camera* public hearing.

Here, the shoe is on the other foot – FirstEnergy Corp. is seeking secrecy and OCC wants the documents made public. OCC wants to be heard with a similar public process that the PUCO allowed for the FirstEnergy Utilities in 2011.

It would not be justice for the PUCO to have two opposing standards on this issue between OCC and FirstEnergy Corp. – where FirstEnergy benefits by both standards.

Examiner Addison’s ruling departs from this precedent by conducting an *in camera* review outside of a public hearing, contrary to R.C. 4901.12 for public PUCO proceedings. And, unlike the 2011 precedent, Examiner Addison’s ruling will not allow parties such as OCC to challenge FirstEnergy’s claims of confidentiality during the *in camera* review. Accordingly, this appeal “presents a new or novel question of interpretation, law, or policy, . . .” and a departure from past precedent, per O.A.C. 4901-1-15(B), though only one of the elements is required by the rule. The appeal should be certified for Commissioner review.

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<sup>27</sup> *Id.*

**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 prejudice<sup>28</sup> to OCC and Ohio consumers. If the Attorney Examiners conduct the *in camera* review without the benefit of the process recommended by OCC, parties and consumers will be prejudiced.

The public will be prejudiced by the denial of transparency for arguments about information in this case that should be public under R.C. 4901.12. The time for the public to have access to the information is now while the PUCO is processing the case. The public can then do with that information as it sees fit, while the PUCO is still considering the case.

And OCC is prejudiced by being denied the opportunity to argue in an *in camera* hearing why the FirstEnergy documents should be public. The PUCO will issue a ruling without the benefit of hearing parties’ challenges to secrecy claims during the review of documents, which is prejudicial to OCC for the ultimate result it seeks – a ruling that the documents are in the public domain.

Therefore, an immediate PUCO determination is needed to avoid undue prejudice to the Ohio public and to OCC.

**IV. APPLICATION FOR REVIEW**

The PUCO Commissioners should reverse or modify the ruling by PUCO Examiner Addison, per O.A.C. 4901-1-15(E).

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<sup>28</sup> O.A.C. 4901-1-15(B).

In its Memorandum Contra FirstEnergy Corp.’s motion for a protective order, OCC recommended that “[t]he 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.*”<sup>29</sup>

OCC pointed out with specificity that a number of the FirstEnergy Corp. assertions in those affidavits 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. 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.<sup>30</sup>

We know from experience that FirstEnergy likes to mark lots of documents as confidential.

Equally as important, OCC pointed out with specificity that 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. That neither affiant even remotely hints at any facts supporting a claim of interference needs exploring.

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<sup>29</sup> OCC’s Memorandum Contra at 6.

<sup>30</sup> *Id.* at 7 (internal quotations and citations omitted).

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. **FirstEnergy Corp. provides no statement under oath to support this assertion about a call with the U.S. Attorney.**<sup>31</sup>

In this regard, we note that FirstEnergy Corp. did not include a sworn affidavit or testimony describing the details of its call with the U.S. Attorney. The PUCO Commissioners should require FirstEnergy Corp., in a public filing, to provide an affidavit sworn under oath describing details of its call to the U.S. Attorney. That affidavit/ testimony should include the date, time of the call, identity of parties on the call and specifically the details of what was said and by whom, etc. It should then be subject to OCC cross-examination (*voir dire*). No doubt one or more participants for FirstEnergy would have taken notes during the call. The PUCO should require FirstEnergy to produce such notes to OCC.

There is interesting precedent for OCC's position, that was not used here. There is a 2011 PUCO proceeding in which FirstEnergy was seeking documents from OCC, where OCC asserted the documents were privileged under a joint defense agreement. During the *in camera* hearing, PUCO Attorney Examiners Gregory Price and Henry Phillips-Gary allowed the FirstEnergy Utilities a process to argue for disclosure, document by document, against OCC. The Examiners conducted the *in camera* review on

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<sup>31</sup> *Id.* at 7-8 (internal quotations and citations omitted) (emphasis added).



*the open record*.<sup>32</sup> Additionally, there was detailed examination of OCC Counsel by the Attorney Examiners during the *in camera* public hearing.

Here, the shoe is on the other foot. OCC is seeking that documents be made public. FirstEnergy Corp. is seeking secrecy. OCC wants to be heard and heard in a public process, similar to what the PUCO allowed for FirstEnergy in 2011. It would not be justice for the PUCO to have two opposing standards on this issue in two processes between OCC and FirstEnergy Corp. –where FirstEnergy benefits under *both* opposing standards and OCC is denied on both counts.<sup>33</sup>

The Attorney Examiner’s ruling should be overturned. The Commissioners should require due process and a public process for OCC and the Ohio public.

The PUCO has noted that “it is necessary to strike a balance between competing interests. On the one hand, 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>34</sup>

Under the *in camera* process ordered by the Examiner, it will be problematic to “strike a balance” as described above from PUCO precedent. The Attorney Examiners

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<sup>32</sup> *Id.*

<sup>33</sup> *In the Matter of the Application of the 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-ATA, Transcript at 10-73 (January 18, 2011).

<sup>34</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 (October 1, 1990); *see also In the Matter of Joint Application of Ohio Bell Telephone Company and Ameritech Mobile Services, Inc.*, Case No. 89-365-RCATR at 7 (October 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.”).

will be left conducting their *in camera* review in isolation, without hearing arguments from OCC. The due process (in a public process) recommended by OCC is needed for such a balance between the competing interests.

A transparent process is especially needed in these times of the PUCO and House Bill 6 scandals involved secrecy and a company, FirstEnergy Corp., that now stands charged with a federal corruption-related crime. Keeping documents secret, as FirstEnergy Corp. has asked the PUCO to do, is contrary to what the PUCO says is its effort to escape the “black cloud” of the H.B. 6 scandal.<sup>35</sup>

The PUCO Commissioners should order due process and a public process in this case, and it should require the process for the Attorney Examiners’ *in camera* review that is recommended by OCC. The PUCO Commissioners should order an *in camera* inspection that will be conducted through a public process. And parties should be provided due process so they can offer arguments, cross-examine witnesses, and examine FirstEnergy Corp.’s statements, under oath.

## **V. CONCLUSION**

This interlocutory appeal of the PUCO Attorney Examiner’s June 22, 2022 ruling meets the legal standards for certification and for PUCO Commissioners to reverse or modify the Attorney Examiner’s ruling. For millions of Ohio consumers who deserve justice regarding the FirstEnergy scandals, the PUCO should promptly reverse or modify the Attorney Examiner’s ruling and order OCC’s recommendations for due process and a public process.

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<sup>35</sup> J. Pelzer, New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of [the] HB 6 scandal, Cleveland.com (May 18, 2021).

Respectfully submitted,

Bruce Weston (0016973)  
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis (0020847)  
Counsel of Record  
John Finnigan (0018689)  
Connor D. Semple (0101102)  
Assistant Consumers' Counsel

**Office of the Ohio Consumers' Counsel**

65 East State Street, Suite 700  
Columbus, Ohio 43215  
Telephone [Willis]: (614) 466-9567  
Telephone [Finnigan]: (614) 466-9585  
Telephone [Semple]: (614) 466-9565  
[maureen.willis@occ.ohio.gov](mailto:maureen.willis@occ.ohio.gov)  
[john.finnigan@occ.ohio.gov](mailto:john.finnigan@occ.ohio.gov)  
[connor.semple@occ.ohio.gov](mailto:connor.semple@occ.ohio.gov)  
(willing to accept service by email)

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review was provided electronically to the persons listed below this 27<sup>th</sup> day of June 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:

### **SERVICE LIST**

[thomas.lindgren@ohioAGO.gov](mailto:thomas.lindgren@ohioAGO.gov)  
[werner.margard@ohioAGO.gov](mailto:werner.margard@ohioAGO.gov)  
[joliker@igsenergy.com](mailto:joliker@igsenergy.com)  
[Mnugent@igsenergy.com](mailto:Mnugent@igsenergy.com)  
[bethany.allen@igs.com](mailto:bethany.allen@igs.com)  
[evan.betterton@igs.com](mailto:evan.betterton@igs.com)  
[gkrassen@bricker.com](mailto:gkrassen@bricker.com)  
[dstinson@bricker.com](mailto:dstinson@bricker.com)  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[trent@hubaydougherty.com](mailto:trent@hubaydougherty.com)  
[mwise@mcdonaldhopkins.com](mailto:mwise@mcdonaldhopkins.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)  
[kboehm@BKLawfirm.com](mailto:kboehm@BKLawfirm.com)  
[jkylercohn@BKLawfirm.com](mailto:jkylercohn@BKLawfirm.com)  
[talexander@beneschlaw.com](mailto:talexander@beneschlaw.com)  
[khehmeyer@beneschlaw.com](mailto:khehmeyer@beneschlaw.com)

Attorney Examiners:

[megan.addison@puco.ohio.gov](mailto:megan.addison@puco.ohio.gov)  
[jacqueline.st.john@puco.ohio.gov](mailto:jacqueline.st.john@puco.ohio.gov)

[edanford@firstenergycorp.com](mailto:edanford@firstenergycorp.com)  
[cwatchorn@firstenergycorp.com](mailto:cwatchorn@firstenergycorp.com)  
[bknipe@firstenergycorp.com](mailto:bknipe@firstenergycorp.com)  
[mrgladman@jonesday.com](mailto:mrgladman@jonesday.com)  
[mdengler@jonesday.com](mailto:mdengler@jonesday.com)  
[radoringo@jonesday.com](mailto:radoringo@jonesday.com)  
[marcie.lape@skadden.com](mailto:marcie.lape@skadden.com)  
[iavalon@taftlaw.com](mailto:iavalon@taftlaw.com)  
[kverhalen@taftlaw.com](mailto:kverhalen@taftlaw.com)  
[mpritchard@mcneelaw.com](mailto:mpritchard@mcneelaw.com)  
[rdove@keglerbrown.com](mailto:rdove@keglerbrown.com)  
[bojko@carpenterlipps.com](mailto:bojko@carpenterlipps.com)  
[tdougherty@theOEC.org](mailto:tdougherty@theOEC.org)  
[ctavenor@theOEC.org](mailto:ctavenor@theOEC.org)  
[knordstrom@theoec.org](mailto:knordstrom@theoec.org)  
[jweber@elpc.org](mailto:jweber@elpc.org)  
[trhayslaw@gmail.com](mailto:trhayslaw@gmail.com)  
[leslie.kovacik@toledo.oh.gov](mailto:leslie.kovacik@toledo.oh.gov)  
[sgoyal@jonesday.com](mailto:sgoyal@jonesday.com)  
[calee@jonesday.com](mailto:calee@jonesday.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)  
[rmains@bricker.com](mailto:rmains@bricker.com)

# 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 June 22, 2022

### I. SUMMARY

{¶ 1} The attorney examiner finds an in-camera review of certain documents subject to the motion for protective order should be conducted and directs FirstEnergy Corp. to arrange for the delivery of said documents to the attorney examiners within seven days of this Entry.

### II. DISCUSSION

#### A. *Procedural History*

{¶ 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} 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.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} In light of these disclosures, 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.

{¶ 12} 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 subsequently filed and granted.



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

{¶ 14} By Entry issued April 7, 2022, the hearing in this case is currently scheduled to commence on August 22, 2022.

{¶ 15} In response to OCC's September 24, 2021 subpoena, FirstEnergy Corp. and OCC negotiated a protective agreement to facilitate the exchange of certain proprietary or confidential information during discovery, including all productions to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation*,<sup>1</sup> which include all documents produced by FirstEnergy Corp. to the United States District Attorney for the Southern District of Ohio (DOJ) and the Securities and Exchange Commission (SEC) as part of ongoing federal investigations. Under the negotiated protective agreement, OCC is required to notify FirstEnergy Corp. of any intent to disclose publicly any documents with a confidential designation, after which FirstEnergy Corp. is provided an opportunity to seek a motion for protective order.

{¶ 16} On March 3, 2022, OCC notified FirstEnergy Corp. that it seeks to publicly disclose certain documents from the productions noted above. Specifically, OCC indicated it intends to release the following documents into the public domain: documents containing Bates numbers 0298780-0298799 and documents containing Bates numbers 0002211-0002213, 0004317-004319, 0004324-0004329, 0005187-0005188, 0005204-0005255, 0005423-0005431, 0005508-0005509, 0005850-0005853,<sup>2</sup> 0006441-0006468, 0006480-0006481, 0006851-0006893, 0007267-0007268, 0007414-0007453, 0007481-0007487, 0009798-0009819 and 0010256.

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<sup>1</sup> Case No. 2:20-cv-3785 (S.D. Ohio).

<sup>2</sup> While OCC's notice indicated it would be releasing documents with Bates numbers 0005850-0005253, the attorney examiner believes this was an error and the correct reference is 0005850-0005853.



{¶ 17} On March 10, 2022, FirstEnergy Corp. filed a motion for protective order seeking to protect from public disclosure certain documents produced in discovery that (1) contain commercially sensitive information and/or (2) are non-public documents produced to the DOJ and SEC as part of ongoing federal investigations. Specifically, FirstEnergy Corp. moves to protect the following documents: Documents with Bates numbers 0002211-0002213, 0004318, 0004320-0004330, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005433, 0005508-0005510, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006469, 0006480-0006483, 0006863-0006888, 0006890-0006893, 0007266-0007272, 0007414-0007453, 0010256, 0298773-0298782, 0298784-0298787, 0298790-0298797.

{¶ 18} OCC filed a memorandum contra FirstEnergy Corp.'s motion for protective order on March 25, 2022.

{¶ 19} FirstEnergy Corp. filed a reply in support of its motion for protective order on April 1, 2022.

#### **B. Summary of the Arguments**

{¶ 20} As to the first group of documents, FirstEnergy Corp. asserts that the protective agreement specifically shields from disclosure any information that is "commercially sensitive" or "proprietary," which "include[s], but [is] 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." FirstEnergy Corp. notes that, under Ohio Adm.Code 4901-1-24, the Commission has the authority to enforce the terms of a protective agreement to protect sensitive information. *In re the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry (Aug. 25, 2003). Further, FirstEnergy Corp. asserts that these commercially sensitive documents<sup>3</sup> include financial analytics, forecasting, and

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<sup>3</sup> Documents with Bates numbers 0004318, 0004320, 0005233, 0005234, 0005235, 0005236, 0005237, 0005238, 0005239, 0005240, 0005241, 0005242, 0005243, 0005244, 0005245, 0005246, 0005247, 0005248, 0005249,

financial modeling extending out to 2024; communications among FirstEnergy Corp. personnel discussing those financials; earnings forecasts and communications discussing those forecasts; communications discussing forecasted operations and maintenance expenses, including, in some instances, out to the year 2023; detailed and sensitive financials for the Companies, not limited to the Ohio utilities; FirstEnergy Corp. Board materials containing commercially sensitive and proprietary information and comments on and discussions surrounding draft Board materials; and other proprietary information, including draft policies, procedures, and analyses. While the protective agreement applies to information that is commercially sensitive or proprietary, FirstEnergy Corp. asserts the majority of the information within these documents contain trade secrets, pursuant to R.C. 1333.61(D). *See In re General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb. 17, 1982). According to FirstEnergy Corp., the Commission has historically protected trade secrets such as forecasts and growth projections. *See, e.g., In re the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Entry (Jan. 25, 2012); *In re the Application of the Elyria Tel. Co. for Pre-approval of Contractual Arrangements for Competitive Telecommunications Services*, Case No. 89-965-TP-AEC, et al., Finding and Order (Sept. 21, 1989); *In re the Application of The Ohio Bell Tel. Co. to Revise its Exchange and Network Services Tariff to Establish New Centrex Service With Monthly Rates for Centrex Exchange Access Which Are Not Distance Sensitive and Which Include a Component for Direct Inward Dialing and Touch-Tone*, Case No. 89-718-TP-ATA, et al., Finding and Order (May 31, 1989); *In re the Joint Application of Sprint Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry (Apr. 27, 2007).

{¶ 21} FirstEnergy Corp. further contends that the designated information is also subject to efforts to maintain its secrecy both in this proceeding as well as in several pending civil proceedings, including state and federal civil RICO, derivatives, and securities suits. In



fact, FirstEnergy Corp. notes that the majority of the commercially sensitive documents are designated “Attorneys’ Eyes Only” here and in other civil proceedings and, thus, afforded maximum protection. Moreover, FirstEnergy Corp.’s counsel has averred that, to his knowledge, these documents have not been disclosed publicly by any other civil litigant in the HB 6-related proceedings. FirstEnergy Corp. also asserts that disclosure of this information could result in economic harm, as it derives actual, independent value as a result of it not being generally known or readily ascertainable or is otherwise commercially sensitive such that disclosure could provide competitors with a window into FirstEnergy Corp.’s internal business operations. Finally, FirstEnergy Corp. believes the requested protective order balances its interests in protecting its commercially sensitive and proprietary information with the interests of OCC (and other parties who have signed a protective agreement) in accessing and utilizing the materials in conjunction with this proceeding.

{¶ 22} As to the second category of documents,<sup>4</sup> or those produced to the DOJ and SEC as part of their ongoing investigations, FirstEnergy Corp. states that it agreed to provide OCC with all the securities productions but only pursuant to a protective agreement so that current confidentiality designations on the documents could be maintained. FirstEnergy Corp. maintains that this information warrants protective status because the protective agreement safeguards various types of sensitive information, and its purpose is to protect non-public DOJ or SEC productions in these Commission proceedings from disclosure. Again, FirstEnergy Corp.’s counsel emphasizes that these documents are currently afforded confidential treatment in all House Bill-6 related civil proceedings. Further, FirstEnergy Corp. claims that public disclosure risks compromising or interfering with ongoing federal investigations, which the Commission has been mindful of in prior rulings related to the

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<sup>4</sup> Documents with Bates numbers 0002211-0002213, 0004318, 0004320-0004330, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005433, 0005508-0005510, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006469, 0006480-0006483, 0006863-0006888, 0006890-0006893, 0007266-0007272, 0007414-0007453, 0010256, 0298773-0298782, 0298784-0298787, 0298790-0298797. In other words, all of the documents for which FirstEnergy Corp. is requesting protective treatment fall into this category.



four pending investigations of the Companies. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1629-EL-RDR, Entry (Feb. 9, 2022) at ¶ 20. According to FirstEnergy Corp., “to allow public disclosure of these documents now runs afoul of the purpose of the [p]rotective [a]greement, the Commission’s express concerns, and the general rule that materials should remain confidential ‘if their dissemination might adversely affect law enforcement interests.’” Motion for Protective Order at 9, quoting *United States v. Smith*, 985 F. Supp. 2d 506, 531 (S.D.N.Y. 2013). Further, as noted in the affidavit attached to the motion for protective order, counsel for FirstEnergy Corp. indicates that he contacted the DOJ 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. Finally, FirstEnergy Corp. argues that the protective agreement prohibits the use of the documents beyond this proceeding; thus, prohibits OCC from making documents publicly available that are related to the ongoing federal investigations but are not relevant to this proceeding. FirstEnergy Corp. also suggests that OCC’s disclosure is unduly burdensome in that it forces a non-party to contend with the public disclosure of irrelevant confidential information that has otherwise been kept confidential in all other HB 6-related proceedings.

{¶ 23} OCC argues that the Commission should deny FirstEnergy Corp.’s motion for protective order for three distinct reasons. The first, argues OCC, is because FirstEnergy Corp.’s motion is improper and does not follow the explicit process discussed in the protective agreement, contending that the agreement requires FirstEnergy Corp. to seek an in-camera proceeding in order to maintain certain discovery documents be kept confidential. Nonetheless, even if the Commission does not deny the motion for protective order on the basis that FirstEnergy Corp. failed to adhere to the process laid out in the protective agreement, OCC argues that “[u]nder the protective agreement, the [Commission] must hold in-camera proceedings to review the documents and for argument.” OCC Memorandum Contra (Mar. 25, 2022) at 6. Moreover, OCC claims that the

Commission should also require that the affiants supporting FirstEnergy Corp.'s motion for protective order appear at an in-camera proceeding and be subject to questioning under oath or, alternatively, allow OCC an opportunity to depose the affiants before making a ruling. Notably, OCC emphasizes that the motion for protective order does not include any facts to support its claim that disclosure of these documents will interfere with ongoing federal investigations and that the assertions made in the affidavit fall short of demonstrating that these documents should remain confidential. OCC also claims that the Commission cannot make a determination as to relevancy without reviewing the documents themselves.

{¶ 24} In its reply, FirstEnergy Corp. reiterates that the protective agreement, and not the statutory authority cited by OCC, should be the controlling standard for determining whether information should be publicly disclosed. Further, FirstEnergy Corp. argues that OCC fails to challenge the continuing protection of the commercially sensitive documents, noting again that the protective agreement goes beyond protecting information considered trade secrets. Additionally, FirstEnergy Corp. notes that the documents produced to the DOJ and SEC have not been disclosed in any of the HB 6-related civil proceedings. Finally, while FirstEnergy Corp. maintains that the protective agreement does not require in-camera proceedings in relation to a motion for protective order filed pursuant to Paragraph 9 of that agreement, FirstEnergy Corp. states that, if the Commission finds review of the documents is necessary, it has no objection to submitting the documents for in-camera review. However, FirstEnergy Corp. claims that OCC's additional request for witness examination or depositions is improper or unnecessary.

### C. *Conclusion*

{¶ 25} Interestingly, both parties to some extent attempt to argue that the negotiated protective agreement should control the outcome of this dispute. Importantly, the protective agreement explicitly states that it "is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any



resolution of the Producing Parties' obligation to produce (including the manner of production) any requested information or material." Further, Paragraph 1 of the protective agreement notes that "[t]he purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, *without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.*" (emphasis added). Thus, this agreement provides a mechanism through which parties can exchange confidential information without needlessly requiring the Commission's intervention, consistent with the stated purpose of Ohio Adm.Code 4901-1-16. It does not, however, strip the Commission of its authority from subsequently determining whether information should or should not be disclosed in the public domain. While OCC does not cite any case law in support of its arguments on this issue, the case cited by FirstEnergy Corp. in support of its claim is unpersuasive, as the attorney examiner in that case merely granted protective treatment as "the information provided by the [parties] is of the kind typically accorded protective treatment in Commission proceedings," and did not speak to the terms of the protective agreement in that case. *In re the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry (Aug. 25, 2003). As to the protective agreement filed in this proceeding, the Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection and is the final arbiter as to whether information subject to discovery in this proceeding should be publicly disclosed. Further, while the Commission encourages parties to enter into protective agreements for the expeditious exchange of otherwise confidential information during discovery, the Commission is not a party to that agreement and, thus, is not bound by the terms of such an agreement, including what information is subject to protection or the process utilized by the attorney examiners or the Commission to resolve disputes over such designations. The motion for protective order and responsive pleadings have been filed and this issue is now ripe for a decision.



{¶ 26} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term “public records” excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex. rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Pursuant to Ohio Adm.Code 4901-1-24(D), the Commission may issue any order which is necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of that information, including trade secret information, as well as where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, regarding trade secret information, R.C. 1333.61(D) holds that a “trade secret” is “any information, including . . . any business information or plans, financial information, or listing of names . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and, (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

{¶ 27} As an initial matter, the attorney examiner notes that there are several documents that fall outside those requested to be publicly disclosed by OCC but were listed in FirstEnergy Corp.’s motion for protective order and, thus, will not be addressed in this Entry, as they are still subject to the protective agreement. These include documents with Bates numbers 0004320-0004323, 0004330, 0005432-0005433, 0005510, 0006469, 0006482-0006483, 0007266, 0007269-0007272, and 0298773-0298779.

{¶ 28} Further, there are several documents OCC indicated in its notice that it was going to release in the public domain that were not mentioned in FirstEnergy Corp.’s motion for protective order. These include documents with Bates numbers 0004317, 0004319, 0005222-0005232, 0005851, 0006443-0006466, 0006851-0006862, 0006889, 0007481-0007487,



0009798-0009819, 0298783, 0298788-0298789, and 0298798-0298799. As such, the attorney examiner must presume that Paragraph 9 of the protective agreement applies, and these materials should be deemed non-confidential and not subject to further protection.

{¶ 29} The Supreme Court of Ohio 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, 591 N.E.2d 708 (1992). Ohio Adm.Code 4901-1-24(D)(1) also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Thus, in order to determine whether to issue a protective order, it is 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. *In re the Application of Cincinnati Gas & Elec. Co. to Modify its Nonresidential Generation Rates to Provide for Market-Based Std. Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al., Order on Remand (Oct. 24, 2007) at 10.

{¶ 30} Given the circumstances in this case, and also recognizing that FirstEnergy Corp. indicated that it has no objection to submitting the documents for in-camera review, the attorney examiner will conduct an in-camera review of the documents before issuing a ruling on the motion for protective order. As such, FirstEnergy Corp. is directed to provide the attorney examiners copies of the following documents for an in-camera review within seven days of this Entry: Documents with Bates numbers 0002211-0002213, 0004318, 0004324-0004329, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005431, 0005508-0005509, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006468, 0006480-0006481, 0006863-0006888, 0006890-0006893, 0007267-0007268, 0007414-0007453, 0010256, 0298780-0298782, 0298784-0298787, 0298790-0298797. Following the in-camera review, the



attorney examiner will issue a decision or provide instructions for any additional process the attorney examiner deems necessary to resolve this issue via subsequent entry.

{¶ 31} As an in-camera review will be held for the documents in dispute, any arguments submitted by the parties as to whether FirstEnergy Corp. violated the terms of the protective agreement are now moot.

### III. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That FirstEnergy Corp. arrange for the delivery of certain documents to the attorney examiners for the purpose of an in-camera review, consistent with Paragraph 30. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison  
Attorney Examiner

NJW/mef

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**in**

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

Summary: Attorney Examiner Entry finding an in-camera review of documents subject to the motion for protective order should be conducted and directing FirstEnergy Corp. to arrange for delivery accordingly, as detailed herein electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio

**This foregoing document was electronically filed with the Public Utilities  
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**6/27/2022 4:06:08 PM**

**in**

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

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