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 MOTION FOR A PROTECTIVE ORDER

Pursuant to Ohio Administrative Code 4901-1-24(A), FirstEnergy Corp. ("FirstEnergy") moves for a protective order finding that documents produced by FirstEnergy to the Office of the Ohio Consumers' Counsel ("OCC") in response to OCC's September 24, 2021 subpoena are protected from disclosure. FirstEnergy recognizes that the Commission's August 24, 2022 Entry "stay[ed] of these cases in their entirety, including, but not limited to, all discovery and motion practice during a six-month period…."[1] Since the stay in this proceeding, OCC has notified FirstEnergy that it seeks to disclose thirty-nine documents in response to a public records request. The documents will be produced unless FirstEnergy promptly moves for a protective order. OCC's response to the public records request would be at odds with the Commission's orders that it is "of the utmost importance" to "avoid[] interfer[ing] with the ongoing federal criminal investigation by the U.S. Attorney."[2] Accordingly, and as discussed more fully in the accompanying memorandum, FirstEnergy respectfully requests that the Commission rule that all confidential documents identified in OCC's August 30, 2022 ("Notice") be protected from disclosure.

[1] Case Nos. 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC, 20-1629-EL-RD, Entry, at ¶ 87 (Aug. 24, 2022) ("August 24 Entry").

[2] August 24 Entry at ¶ 85.

Dated: September 7, 2022

Respectfully submitted,

/s/ Corey A. Lee

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On behalf of FirstEnergy Corp.

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**

MEMORANDUM IN SUPPORT OF FIRSTENERGY CORP'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

OCC's Notice identifies for disclosure thirty-nine documents across six productions in *In re FirstEnergy Corp. Securities Litigation* (the "*Securities Litigation*")[3] just days after the Commission's August 24 Entry staying all HB 6-related proceedings against FirstEnergy. While some of the noticed documents contain commercially sensitive information, all have been produced to the SEC and / or the DOJ as part of their ongoing investigations. Public disclosure of these documents risks "thwarting or obstructing the efforts of the DOJ to investigate" the facts surrounding the DPA.[4] Yet OCC's Notice requires that FirstEnergy "seek a ruling that the documents are confidential under Ohio's public records law" to prevent their disclosure to unidentified third-parties.[5] FirstEnergy thus moves to protect these documents on several grounds.

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[3] Case No. 2:20-cv-3785 (S.D. Ohio).

[4] August 24 Entry at ¶ 86.

[5] Exhibit A, Notice at 1. *See also*, Exhibit B, C. Lee Affidavit (documenting efforts to resolve this dispute).

First, OCC's production of documents would undermine the six-month stay of all discovery and motion practice.[6] Under the terms of the parties' Protective Agreement, OCC must notify FirstEnergy of any public records request for confidential materials. To prevent disclosure, FirstEnergy must seek a motion for protective order within five business days.[7]

Second, the noticed documents do not qualify as "public records" which OCC is entitled to disclose under Paragraph 13 of the parties' Protective Agreement. As documents produced in a separate litigation, they are not records kept by OCC and do not serve to document the activities of the Office of the Ohio Consumers' Counsel.

Third, independent grounds exist for protecting those documents which are commercially sensitive. Among the documents OCC asks to disclose are three documents[8] that contain confidential business information, the disclosure of which would unfairly provide a window into FirstEnergy's internal business operations. The Commission can and should exercise its authority under O.A.C. 4901-1-24(A) to issue an order protecting that information.

Finally, disclosure here renders meaningless those rights and protections afforded to FirstEnergy under the court-approved stipulated protective order in the *Securities Litigation*. As FirstEnergy has stated elsewhere, it should not be required to defend confidentiality designations applied in litigation in another jurisdiction before the Commission, especially where the Company agreed to provide OCC with documents produced in the *Securities Litigation* in the spirit of cooperation.

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[6] *Id.* at ¶ 87 ("To be abundantly clear, our decision today includes a stay of these cases in their entirety, including, but not limited to, all discovery and motion practice during a six-month period, except for rehearing applications and responsive memoranda related to any entries the Commission issues today, pursuant to R.C. 4903.10.").

[7] Exhibit C, Protective Agreement, ¶ 13.

[8] FE_CIV_SEC_0013627; FE_CIV_SEC_0022524; FE_CIV_SEC_0045823. FirstEnergy notes that it does not move to protect FE_CIV_SEC_0012557, FE_CIV_SEC_0248905, or FE_CIV_SEC_0249833 as these documents are not designated as confidential.

Accordingly, FirstEnergy respectfully requests that the Commission protect from public disclosure all confidential documents[9] cited in OCC's August 30, 2022 Notice.

II. ARGUMENT

A. OCC's Planned Response To A Public Records Request Would Frustrate The Commission's Stay Of Discovery.

By issuing their August 24 Entry, the Commission struck a "necessary balance to avoid interference with the federal investigations"[10] and stayed "these cases in their entirety, including, but not limited to, *all* discovery and motion practice during a six-month period."[11] The Commission's Entry should end the inquiry there—particularly as the Commission noted it was "clear from the recent activities and filings of intervening parties that [the Commission's] efforts to move forward with [its] investigations while avoiding interference with the DOJ's investigation have met an impasse."[12]

The Commission need only review the documents cited in OCC's Notice to find that public disclosure here is adverse to that ruling. The noticed documents touch upon topics related to HB 6, political and charitable contributions, and former Commission Chairman Randazzo, as well as several other individuals. Like the intervenors' interests in investigating FirstEnergy and its subsidiaries, the public records request to OCC is "inextricably intertwined"[13] with the conduct described in the DPA and the DOJ's federal criminal investigation. To allow public disclosure of the noticed documents while these proceedings are stayed, ignores the purpose of the Protective

[9] *See id.*

[10] August 24 Entry at ¶ 74.

[11] *Id.* at ¶ 87 (emphasis added).

[12] *Id.* at ¶ 74.

[13] *Id.* at ¶ 76.

Agreement,[14] the Commission's express concerns,[15] and the general proposition that materials should remain confidential if their disclosure risks compromising or interfering with an ongoing federal investigation.[16] The mere notification of OCC's intention to disclose certain documents, by necessitating this motion, creates yet another opportunity to discuss confidential information in their public filings.

B. OCC Is Not Entitled To Disclose The Noticed Documents Under the Parties' Protective Agreement.

But in addition to undermining the Commission's stay, the documents described in OCC's Notice would improperly make public documents that are not subject to disclosure under Ohio law or the parties' Protective Agreement. Paragraph 13 of the Protective Agreement addresses the procedure for disclosing documents in response to a public records request received by OCC.[17] The documents—produced in discovery in the *Securities Litigation*—are neither "records" nor "public" as contemplated by the Protective Agreement or the Ohio Revised Code.

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[14] The Protective Agreement permits OCC "prompt access to and review of" the DOJ and SEC materials but in a "controlled manner that will allow their use for the purposes of this [p]roceeding while protecting such data from disclosure." Exhibit C, Protective Agreement, ¶ 1.

[15] *See, generally*, August 24 Entry at ¶ 85. *See also*, Case No. 20-1629-EL-RDR, Entry, at ¶ 20 (Feb. 9, 2022); Case No. 17-974-EL-UNC, Yeboah-Amankwah Dep. Tr., at 188:2-189:15, 192:7-15 (July 21, 2022); Case No. 17-974-EL-UNC, Hr'g Tr., at 10:9-11:5, 13:22-14:6 (June 30, 2021).

[16] *Wickens v. Rite Aid HDQTRS Corp.*, No. 1:19-CV-02021, 2021 WL 5876695, at *2 (M.D. Pa. Feb. 23, 2021) ("With respect to information regarding ongoing investigations by the SEC, the Court finds it is necessary to seal this information because the disclosure of confidential information related to ongoing investigations would harm the SEC's ability to complete these investigations and potentially interfere with the SEC's ability to engage witnesses in future investigations."); *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 . . . ."); *Shelley v. Cty. of San Joaquin*, No. 2:13-CV-0266 MCE DAD, 2015 WL 2082370, at *3 (E.D. Cal. May 4, 2015); *United States v. Smith*, 985 F. Supp. 2d 506, 531 (S.D.N.Y. 2013) ("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.'") (collecting cases).

[17] Exhibit C, Protective Agreement, ¶ 13.

First, the requested documents are not "records" for purposes of Ohio R.C. 149.43. Under Ohio's public records law, a "public record" is defined as "records kept by any public office."[18] The term "records" is defined in Ohio R.C. 149.011(G) as "any document, device, or item, . . . created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."[19]

OCC's noticed documents are not "records" as defined by Ohio R.C. 149.011(G). Critically, R.C. 149.011(G) does "not define 'public record' as any piece of paper received by a public office that might be used by that office."[20] Ohio's Public Record Act is not intended to create the "absurd result that any document received by a public office and retained by that office would be subject to R.C. 149.43."[21] Rather, "the plain language of R.C. 149.011(G) . . . requires more than mere receipt and possession of a document in order for it to be a record for purposes of R.C. 149.43."[22] "To the extent that an item does not serve to document the activities of a public office, it is not a public record and need not be disclosed."[23] In other words, if the document "does little to ensure the accountability of government" then it is not a public record.[24] "[T]he purpose of the Public Records Act . . . is to expose government activity to public scrutiny."[25]

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[18] Ohio R.C. 149.43(A)(1).

[19] Ohio R.C. 149.011(G).

[20] *State ex rel. Cincinnati Enquirer v. Ronan*, 2010-Ohio-5680, ¶ 13, 127 Ohio St. 3d 236, 239, 938 N.E.2d 347, 350.

[21] *Id.*

[22] *Id.*

[23] *State ex rel. Beacon J. Publ'g Co. v. Bond*, 2002-Ohio-7117, ¶ 9, 98 Ohio St. 3d 146, 149, 781 N.E.2d 180, 186.

[24] *Id.* at ¶ 11.

[25] *State ex rel. Dispatch Printing Co. v. Johnson*, 2005-Ohio-4384, ¶ 27, 106 Ohio St. 3d 160, 165, 833 N.E.2d 274, 280. *See also State ex rel. Cmty. J. v. Reed*, 2014-Ohio-5745, ¶ 38, 26 N.E.3d 286, 296 (finding that documents received from a local police department related to Ohio Bureau of Criminal Identification and Investigation's ("BCI") investigation of missing property were not BCI's public records "as the documents were not kept by BCI to 'document

OCC can claim no such purpose. The noticed documents are not kept by OCC "to document the organization, functions, policies, decisions, procedures, operations, or other activities" of OCC. OCC has these documents in its possession because of their production to the DOJ as part of its ongoing federal investigation. FirstEnergy and OCC reached a negotiated agreement to resolve a Commission subpoena, whereby FirstEnergy would produce to OCC all documents produced in the *Securities Litigation*, including those documents confidentially produced to the DOJ. FirstEnergy is not a party to the Commission proceedings and has never conceded that all documents produced to the securities plaintiffs, nor all documents produced to the DOJ, are relevant to these Commission proceedings. It would be an "absurd result" for the productions in the *Securities Litigation* "received by [OCC] and retained by [OCC to] be subject to R.C. 149.43."[26]

Moreover, even if the noticed documents were properly considered "records" under R.C. 149.011(G), they are not "public records" subject to disclosure because they are confidential law enforcement investigatory records. And records gathered by a law enforcement agency for civil or criminal enforcement actions are not subject to public disclosure where their disclosure "could reasonably be expected to interfere with the[] enforcement proceedings."[27]

It cannot be the case that documents—which would be shielded from FOIA requests made directly to the DOJ[28]—may be subject to public discovery through public records requests to

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the organization, functions, policies, decisions, procedures, operations, or other activities' of BCI" and served only to further BCI's criminal investigation of illicit activity occurring at the Police Department).

[26] *Ronan*, 2010-Ohio-5680, ¶ 13.

[27] *Robbins Geller Rudman & Dowd LLP v. United States Sec. & Exch. Comm'n*, No. 3:14-CV-2197, 2015 WL 13677784, at *4 (M.D. Tenn. Oct. 28, 2015), *adhered to on reconsideration*, No. 3:14-CV-2197, 2016 WL 51040 (M.D. Tenn. Jan. 4, 2016) (citing *Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001); *Jones v. F.B.I.*, 41 F.3d 238, 245-46 (6th Cir. 1994)).

[28] *Id.*

intervenors like OCC. The DOJ explicitly requested a stay of discovery because it "believe[d] that continued discovery in the PUCO Proceedings may directly interfere with or impede the United States' ongoing investigation."[29] Therefore, OCC has no basis to disclose the documents cited in its Notice to third parties and FirstEnergy's motion for a protective order must be granted.

C. Certain Documents Are Protected Under Commission, Ohio, and Federal Precedent.

Beyond the stay and any public records criterion, FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 should be protected as they contain commercially sensitive business information. Protective Agreements or analogous protective orders are routinely upheld. Ohio courts have "broad authority to fashion a protective order that protects the security of any sensitive information."[30] As a result, the Commission, under O.A.C. 4901-1-24, has the authority to fashion appropriate protective remedies.[31] Specifically, Attorney Examiners can issue orders that may provide that "a trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way," or "[i]nformation acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons."[32]

Documents FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 satisfy the standard articulated in O.A.C. 4901-1-24(A)(7) and (8). FE_CIV_SEC_0013627 analyzes the economic impact of nuclear generation through 2027.

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[29] Case Nos. 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC, 20-1629-EL-RD, Request of the United States Attorney, Southern District of Ohio, at 2 (Aug. 15, 2022).

[30] *Esparza v. Klocker*, 2015-Ohio-110, ¶ 29, 27 N.E.3d 23, 30 (Ohio Ct. App. 2015).

[31] Case No. 17-974-EL-UNC, Entry, at ¶ 25 (June 22, 2022) ("[T]he Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection.").

[32] O.A.C. 4901-1-24(A)(7), (8).

FE_CIV_SEC_0045823 is an agreement for professional services which if disclosed, could reveal FirstEnergy's bargaining positions with other similarly situated suppliers. FE_CIV_SEC_0022524 is a discussion guide which describes the Company's strategies and key economic indicators. The information contained in these documents are not generally known to the public, or even inside FirstEnergy, and have not been publicly disclosed in any other proceeding.[33] It is afforded maximum protection in the *Securities Litigation*. Courts and the Commission have recognized a "legitimate private interest in maintaining . . . confidential internal studies and analyses under seal." *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prod. Liab. Litig.*, 499 F. Supp. 3d 505, 519 (S.D. Ohio 2020).[34] For this reason alone, continued protective treatment over FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 is necessary.

D. Disclosure Would Undermine FirstEnergy's Rights And Protections Under The Court-Approved Stipulated Protective Order In The *Securities Litigation*.

Finally, as has been previously briefed,[35] disclosure in these proceedings forces non-party FirstEnergy to litigate and defend its confidentiality designations before the Commission despite that its designations were made pursuant to a court-approved protective order in the *Securities Litigation*. Under that protective order, documents designated "Confidential" carry defined

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[33] Exhibit C, C. Lee Affidavit, ¶ 13.

[34] *In the Matter of the Application of Columbus S. Power Co. & Ohio Power Co. for Auth. to Establish A Standard Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Sec. Plan. in the Matter of the Application of Columbus S. Power Co. & Ohio Power Co. for Approval of Certain Acct. Auth.*, No. 11-346-EL-SSO, 2011 WL 3547480, at *2, ¶ 7 (P.U.C.O. Aug. 4, 2011) (protecting internal analyses); *In the Matter of the Application of the E. Ohio Gas Co. for Auth. to Amend Its Filed Tariffs to Increase Its Rates & Charges for Gas Serv.*, No. 80-769-GA-AIR, 1981 WL 703452, at *1, ¶¶ 4-6 (P.U.C.O. May 11, 1981) (allowing discovery of internal studies and analyses prepared by or for East Ohio but only pursuant to a protective order); *Procter & Gamble Co. v. Stoneham*, 140 Ohio App. 3d 260, 273, 747 N.E.2d 268, 277 (Ohio Ct. App. 2000), *cause dismissed*, 91 Ohio St. 3d 1478, 744 N.E.2d 775 (2001) (finding analysis and interpretation of raw data warranted protection when ruling on reasonableness of non-compete agreement).

[35] Case Nos. 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC, 20-1629-EL-RD, Motion for Protective Order, at 3-7 (Aug. 5, 2022)

protections under the stipulated protective order, and those marked "AEO" are afforded additional protection and restricted to a select subset of persons.[36] If there are unresolved disputes as to the confidentiality designations under the protective order, then a designating entity has the right to file a motion with the District Court pursuant to Federal Civil Rule 26(c). And the party who disagrees with the designation must "abide by that designation until the matter is resolved by agreement of the parties or by order of the Court."[37] But because OCC's Notice requires non-party FirstEnergy to litigate the merits of its confidentiality designations in Commission proceedings, protections available under the *Securities Litigation* protective order are eliminated. If left unchecked, FirstEnergy could be called to defend a majority of its confidentiality designations in the *Securities Litigation* in these proceedings when the majority of the documents produced have no relevancy to the matter before the Commission, and despite the fact that the parties agreed that the confidentiality designations would be governed by the *Securities Litigation* protective order.

Accordingly, the Commission should exercise its authority under O.A.C. 4901-1-24(A) to protect confidential documents produced to federal authorities as part of their ongoing investigations.

III. CONCLUSION

For these reasons, FirstEnergy respectfully requests that all confidential documents cited in OCC's August 30, 2022 Notice be protected from public disclosure.

[36] *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio), Stipulated Protective Order, at §§ 6(b)-(c).

[37] *Id.* at § 12.

Dated: September 7, 2022

Respectfully submitted,

/s/ Corey A. Lee

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On behalf of FirstEnergy Corp.

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 September 7, 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.

EXHIBIT A

August 30, 2022

VIA EMAIL

Corey Lee, Attorney
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114

Re: Consumers' Counsel's Notice to FirstEnergy Corp. Under Paragraph 13 of the Protective Agreements Regarding FirstEnergy Corp.'s Allegations of Confidentiality of Documents, PUCO Cases 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC and 20-1629-EL-RDR

Dear Mr. Lee:

The FirstEnergy Corp. protective agreements, in paragraph 13, set forth a process for the Office of the Ohio Consumers' Counsel to notify FirstEnergy Corp. if OCC receives public records requests for protected materials. FirstEnergy Corp. would then have five business days to file in court to seek an order preventing disclosure of the documents.

As you know, FirstEnergy Corp. expected OCC to sign protective agreements (in the above PUCO cases) in order for FirstEnergy Corp. to provide OCC with discovery responses that it claims to be confidential. In signing, OCC reserved rights to dispute confidentiality.

FirstEnergy Corp. has marked as confidential all 470,000 pages of the documents produced to OCC from the securities litigation cases. In fact, it seems that all of the discovery documents produced thus far by FirstEnergy Corp. to OCC have been labeled "confidential." We received these documents through an agreement reached with FirstEnergy Corp. in a letter dated October 13, 2021.

Accordingly, OCC hereby notifies FirstEnergy Corp. that OCC has received a public records request. We have identified the following documents (that we obtained from FirstEnergy Corp. on discovery) as responsive. The documents are identified by the numbers assigned by FirstEnergy Corp. While OCC complies with the protective agreements, OCC does not believe that any of the documents qualify as confidential.

FE_CIV_SEC:
62-63, 925, 4317-4319, 12555-12558, 12863-12864, 13649, 13747-13748, 16077-16081, 16165, 16175-16177, 16179, 16182, 16280-16283, 21481-21483, 22523-22529, 45823-45833, 47053, 62032, 72743-72744, 74655, 191022, 215026, 221735-221738, 235230-235231, 238715-238717, 239530, 239715, 248803-248806, 248905-248906, 249833-249834 and 292696-292697

Therefore, under paragraph 13 of the protective agreements, this OCC notice will result in the above documents becoming unprotected (non-confidential) unless FirstEnergy Corp. files in court within five business days to seek a ruling that the documents are confidential under Ohio's public records law.

Best regards,

/s/ Maureen R. Willis

Maureen R. Willis (0020847)
Senior Counsel

EXHIBIT B

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**

AFFIDAVIT OF COREY A. LEE IN SUPPORT OF FIRSTENERGY CORP.'S MOTION FOR A PROTECTIVE ORDER

I, Corey A. Lee, counsel for FirstEnergy Corp. ("FirstEnergy"), submit this affidavit in support of FirstEnergy Corp.'s Motion for a Protective Order.

1. On September 24, 2021, the Office of the Ohio Consumers' Counsel ("OCC") filed a motion for subpoena for FirstEnergy to produce all productions in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio).
2. FirstEnergy and OCC reached a negotiated resolution of OCC's subpoena, agreeing that FirstEnergy would produce on a rolling basis all documents produced to the securities plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio).
3. FirstEnergy agreed to provide the productions to OCC pursuant to a protective agreement, attached as Exhibit C to FirstEnergy's Motion for a Protective Order.
4. Within the productions provided to OCC, some documents are designated "Confidential," some documents are designated "Attorneys' Eyes Only," and others have no confidential designation. Under FirstEnergy and OCC's agreement, documents designated "Confidential" or "Attorneys' Eyes Only" are treated as "Protected Materials" under the Protective Agreement.

5. OCC is receiving the same productions as received by the securities plaintiffs, so the confidential designations on the documents provided to OCC are the same as those provided to the securities plaintiffs.
6. Pursuant to Paragraph 13 of FirstEnergy and OCC's Protective Agreement, OCC must notify FirstEnergy prior to disclosing any Protected Materials in response to a public records request, after which FirstEnergy has five (5) business days to file a motion for protective order.
7. On August 30, 2022, OCC's counsel sent notice via email that it had identified the noticed documents as responsive to a public records request and indicated that did not "believe that any of the documents qualify as confidential." *See* Exhibit A to FirstEnergy's Motion for a Protective Order.
8. Without any meet and confer, OCC asserted its "notice will result in the above documents becoming unprotected (non-confidential) unless FirstEnergy Corp. files in court within five business days to seek a ruling that the documents are confidential under Ohio's public records law." *Id.*
9. Accordingly, pursuant to Paragraph 13 of the Protective Agreement, this Motion for a Protective Order follows for each document identified in Exhibit A to FirstEnergy's Motion for a Protective Order.
10. Additionally, documents FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 are designated "Confidential" under the court-approved stipulated protective order in *In re FirstEnergy Corp. Securities Litigation*, No. 2:20-cv-03785 (S.D. Ohio) (the "Securities Protective Order").

11. FE_CIV_SEC_0013627 analyzes the economic impact of nuclear generation through 2027.
12. FE_CIV_SEC_0045823 is an agreement for professional services which if disclosed, could reveal FirstEnergy's bargaining positions with other similarly situated suppliers.
13. FE_CIV_SEC_0022524 is a discussion guide which describes the Company's strategies and key economic indicators.
14. The matters addressed within FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 are subject to ongoing investigation by federal regulators.
15. To date, and to the best of my knowledge, FE_CIV_SEC_0013627, FE_CIV_SEC_0045823, and FE_CIV_SEC_0022524 have not been made public by any civil litigant (including, but not limited to, the securities litigants), in federal or state court, in any civil proceeding resulting from the House Bill 6 matters.

STATE OF OHIO)
COUNTY OF ~~CUYAHOGA~~ Summit) **SS:**

I, Corey A. Lee, declare under penalty of perjury that this affidavit is true and correct to the best of my knowledge, information, and belief.

Corey A. Lee

Subscribed, sworn, and witnessed by me this 7th day of September, 2022.

Notary Public

SUSAN KARIMIAN
NOTARY PUBLIC
STATE OF OHIO
SUMMIT COUNTY
My Commission Expires 7/14/2025

EXHIBIT C

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. 17-974-EL-UNC**
In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	**Case No. 20-1629-EL-RDR**

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between FirstEnergy Corp. and FirstEnergy Service Co. ("Producing Parties") and the Office of the Ohio Consumers' Counsel ("Receiving Party" or "OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with Receiving Party of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Producing Parties and Receiving Party as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement 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's obligation to produce (including the manner of production) any requested information or material.

1. The 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.

2. "Proceeding" as used throughout this document means the above-captioned case, including any appeals, remands and other cases related thereto.

3. A. "Protected Materials" means documents, deposition testimony, or any other information designated under this Agreement as "CONFIDENTIAL" that are treated by the Producing Parties or third parties as commercially sensitive, personally sensitive, or proprietary. "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.

B. "Protected Materials" do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Producing Parties and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain.

C. "Protected Materials" that are in writing shall be conspicuously marked with the appropriate designation, or counsel for the Producing Parties may orally state on the deposition record that a response to a question posed at a deposition is considered Protected Materials.

D. "Protected Materials" include documents or information that are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks, or tapes) ("Computerized Material"). The Producing Parties at their discretion may produce

Computerized Material in such form. To the extent that OCC reduces Computerized Material to hard copy, OCC shall conspicuously mark such hard copy as confidential.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. 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.

5. As used in this Agreement, the term "Authorized Representative" includes OCC's counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding

herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this Proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Producing Parties, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Producing Parties will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as 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. If the Producing Parties do not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. 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.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Producing Parties to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Producing Parties notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Producing Parties will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Producing Parties file such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Producing Parties do not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement. Alternatively, the Producing Parties may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

Notwithstanding the foregoing, nothing contained herein shall alter or limit OCC's obligations under Ohio's Public Records Act (Ohio Revised Code § 149.43), to respond to a lawfully issued subpoena, or to otherwise comply with the law with respect to the Protected Materials.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Producing Parties will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC, and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs, and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Producing Parties' determination regarding any material identified as confidential by the Producing Parties and to pursue those remedies that may be available to OCC

before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Producing Parties do not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Producing Parties before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

FirstEnergy Corp. and FirstEnergy Service Co.	The Office of the Ohio Consumers' Counsel
BY:	BY:
/s/ Corey A. Lee	/s/ John Finnigan
Counsel	Counsel
9/24/2021	9/23/2021
Date	Date

Exhibit A

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. 17-974-EL-UNC
In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	Case No. 20-1629-EL-RDR

NON-DISCLOSURE CERTIFICATE FOR
CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2021, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from Protected Materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

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