

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**INTERLOCUTORY APPEAL
AND APPLICATION FOR REVIEW
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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December 19, 2022

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Recently, PUCO Attorney Examiner Megan Addison ruled that FirstEnergy Corp. should be afforded more time to make a court filing to maintain FirstEnergy's claimed secrecy for H.B. 6-related communications.¹ That ruling flatly contradicts and interferes with the controlling Protective Agreement between FirstEnergy Corp. and the Ohio Consumers' Counsel, which allows no such extra time for FirstEnergy. And the ruling improperly interjects PUCO interference into OCC's obligations and duties (as a state agency) under Ohio's public records laws. The PUCO Commissioners should reverse the ruling (per O.A.C. 4901-1-15), putting an end to FirstEnergy Corp.'s circumvention of both Ohio Public Records Law (R.C. 149.43) and the Protective Agreement it signed through counsel.

As background, under the Protective Agreement that FirstEnergy Corp. and OCC negotiated and signed, FirstEnergy Corp. had five business days after OCC notified it of a public records request "to file a pleading before *a court of competent jurisdiction* to

¹ Entry at ¶ 15 (Dec. 12, 2022) (attached).

prevent disclosure of the Protected Materials in question.”² OCC complied with the Protective Agreement when, nearly four months ago on August 30, 2022, it notified FirstEnergy Corp. of a public records request it had received. FirstEnergy Corp. (which stands charged by the U.S. government with a federal corruption crime) violated the Protective Agreement by filing at the PUCO instead of a court.

Specifically, in violation of ¶ 13 of the OCC/FirstEnergy Corp. Protective Agreement, FirstEnergy Corp. *filed at the PUCO (not at a court as required)* on Sept. 7, 2022, to argue against OCC disclosing documents in response to a public records request. A failure by FirstEnergy Corp. to file in a court is addressed in ¶ 13 of the Protective Agreement. There, FirstEnergy Corp. agreed that “[i]f 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.”³ (Emphasis added.)

Given that FirstEnergy Corp. made no court filing, the protected materials – as of September 7, 2022 – “can be deemed by OCC to be non-confidential...” as set forth in the Protective Agreement that FirstEnergy Corp. signed with OCC. Under the OCC/FirstEnergy Corp. Protective Agreement, with the passage of five business days and no court filing, it became OCC’s decision to determine whether to release the records at issue under the Public Records Law. It remains OCC’s decision today.

But rather than “allow the process to unfold as contemplated by both R.C. 149.43 and the protective agreement⁴” (as the Entry claims to do), the Attorney Examiner has

² Entry at ¶ 8 (emphasis added).

³ See OCC Memo Contra FE Corp. Motion for a Protective Order, Attachment (Sept. 22, 2022).

⁴ Entry at ¶ 15.

given FirstEnergy Corp. a second chance to shield H.B. 6 related communication from the public light. Under the Entry, even about *three months* (not just five days) has passed since FirstEnergy Corp.'s filing at the court was due by Sept. 7, 2022), FirstEnergy Corp. is "afforded the opportunity to file a motion for protective order with a court of competent jurisdiction within five business days of this Entry***."⁵ The Entry, thus, extended the time under the Protective Agreement for FirstEnergy to keep H.B. 6 related communications secret by about *103 days*!

The Attorney Examiner's ruling contradicts the OCC/FirstEnergy Corp. Protective Agreement that the Entry recognizes as controlling. It rewards the outlandish forum-shopping by FirstEnergy Corp. in violation of the Protective Agreement. It does so by giving FirstEnergy Corp. even more time to make a court filing to keep secret the HB 6-related records regarding a public records request that OCC is obligated by law to address. The Entry and FirstEnergy Corp.'s tactics may yet (and possibly soon) contribute to OCC being sued by records requesters under Ohio's public records law. And they interfere with OCC's rights under the Protective Agreement and Ohio Public Records law to determine whether to release the documents to the public.

Under O.A.C. 4901-1-15(A), an immediate appeal to the PUCO is warranted, without the need for certification, because the ruling adversely affects OCC and denies a motion for a protective order. Alternatively, the appeal should be certified to the PUCO Commissioners because it also satisfies O.A.C. 4901-1-15(B). The Attorney Examiner's ruling represents a departure from past precedent and an immediate determination is

⁵ *Id.*

needed to prevent the likelihood of undue prejudice or expense to OCC, if the PUCO ultimately reverses the ruling in question.

The ruling is unjust, unreasonable and abuse of discretion – and in error. The PUCO should reverse and do so immediately before a court filing is made by FirstEnergy Corp. If FirstEnergy files under the PUCO's improper ruling, OCC will be forced again to address this public records issue in a filing that is not allowed by the governing Protective Agreement (and be further subject to the potential to be sued under Ohio's public records law by one or more public records requesters). The decision to release or not release the HB 6-related records in response to a public records request is OCC's decision and OCC's decision alone as a state agency. Indeed, the governing Protective Agreement provides that the records can be disclosed by OCC given FirstEnergy's decision not to file in court (but to forum-shop at the PUCO).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

In its December 12, 2022 Entry, the PUCO Attorney Examiner Addison erred by allowing FirstEnergy Corp. unauthorized time to seek to protect HB 6-related records from public disclosure, contrary to the OCC/FirstEnergy Corp. Protective Agreement. And the Attorney Examiner erred by asserting that it can preclude OCC from exercising its rights under the Protective Agreement and Ohio public records law to determine whether to release records to the public records requester.

The alleged basis for the ruling against OCC (and the consumers it represents) was that given the PUCO's decision to stay the proceedings,⁶ "and the underlying rationale for doing so, a court of competent jurisdiction should have the opportunity to consider the merits of the motion to determine whether the public records law applies and the extent to which disclosure of the documents, if any, may be required."⁷ In any event,

⁶ The stay was prompted by a request by the U.S. Attorney. *See* Aug. 16, 2022 Correspondence filed at the PUCO in all four FirstEnergy investigatory proceedings. Interestingly, discovery in certain other FirstEnergy-related litigation involving H.B.6 continues, without such a request for a stay. *See* for example, *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785, Class plaintiffs' notice of withdrawal of objection to the magistrate judge's time-allocation order at 1 (S.D. Ohio) (Dec. 12, 2022).

⁷ Entry at ¶ 15.

the decision over disclosure of these HB 6-related records lies with OCC under the terms of the Protective Agreement it reached with FirstEnergy Corp. (and under Ohio public records law) The PUCO improperly interjected itself, based on an improper FirstEnergy Corp. motion and without authority or jurisdiction, to alter an executed Protective Agreement. That improper action allows FirstEnergy Corp. an already forgone opportunity to keep H.B. 6-related records secret regardless of how a state agency (OCC) exercises its discretion to respond to a public records request.

II. STANDARD OF REVIEW

Under O.A.C. 4901-1-15(A), a party who is adversely affected may take an immediate interlocutory appeal to the PUCO Commissioners if the Attorney Examiner ruling, *inter alia*, denies a motion for a protective order. Additionally, under O.A.C. 4901-1-15(B), an interlocutory appeal can be taken if the appeal is certified by the Examiner. The standard applicable to certifying such an appeal is “that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”⁸ Once an appeal has been taken under O.A.C.4901-1-15(A) or certified under O.A.C. 4901-1-15(B), the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.⁹

⁸ O.A.C. 4901-1-15(B).

⁹ O.A.C. 4901-1-15(E).

A. OCC may take an appeal to the PUCO from the Attorney Examiner ruling, without certification, under O.A.C. 4901-1-15(A).

O.A.C. 4901-1-15(A)(1) allows “*Any party...*” who is adversely affected by denial of a protective order to “take an immediate interlocutory appeal....” FirstEnergy Corp.’s motion should be denied. But in this instance with the unusual form of the denial of the protective order sought by FirstEnergy Corp., OCC is adversely affected. That’s because the denial of FirstEnergy Corp.’s motion created out of whole cloth a right of FirstEnergy Corp. to continue its litigation of the public records issue in civil court.¹⁰

Key findings in this regard were:

- 1) The documents in question were produced in discovery in this proceeding, under an agreement in response to OCC subpoenas (Entry at ¶ 12).
- 2) The provision of the protective agreement that controls is ¶ 13, which sets forth procedures to follow in event of a public records request (Entry at ¶ 13).
- 3) The PUCO is an administrative agency but not a court of competent jurisdiction (Entry at ¶ 13).
- 4) The process set forth in the Protective Agreement for addressing public records requests is consistent with the process under R.C. 149.43 and the PUCO’s past practice for handling disputes (Entry at ¶ 14).
- 5) The PUCO has “routinely abstained from addressing matters involving another state agency’s obligations and duties when responding to public records requests” (Entry at ¶ 14).
- 6) “[N]othing in that Entry did (nor could it have) authorized a stay on public records requests, pursuant to R.C. 149.43” (Entry at ¶ 15).

Yet despite these findings, the Examiner inexplicably went on to give FirstEnergy Corp. an additional five business days to seek protection from the court and ordered OCC

¹⁰ Entry at ¶ 17.

not to publicly disclose the documents until the court provides a decision on the issue (if FirstEnergy Corp. files a motion).

The Examiner's ruling denying FirstEnergy Corp.'s motion for a protective order adversely affects OCC. The Examiner has interfered with OCC's obligations and duties in responding to the public records request. This interferes with OCC's decision whether to release the records at issue under the Public Records law. And the Examiner is interfering with the agreement between FirstEnergy Corp. and OCC by giving FirstEnergy Corp. a second chance and additional time to comply, in violation of the Protective Agreement.

The PUCO should consider this appeal without the need for certification. The Attorney Examiner's ruling denied FirstEnergy Corp.'s motion for a protective order. And the ruling adversely affected OCC, under the rule.

B. Alternatively, OCC's appeal meets the criteria for certification to the PUCO because it departs from past precedent and an immediate determination by the PUCO is needed to prevent the likelihood of undue prejudice or expense to OCC.

In its December 12, 2022 Entry, the Examiner exceeded PUCO authority when granting FirstEnergy Corp. additional time to seek protection from disclosure of H.B. 6 information. The time to for FirstEnergy Corp. to file in court was extinguished three months earlier (Sept. 7, 2022). And the PUCO interfered with OCC's obligations and duties when responding to a public records request.

The Attorney Examiner's ruling represents a departure from past precedent. As the Attorney Examiner noted, "the Commission has routinely abstained from addressing matters involving another state agency's obligations and duties when responding to public records requests under R.C. 149.43. *See, e.g., In re the Review of Ohio Adm. Code*

Chapters 4901-1, 4901-3 and 4901-9, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006); *United Telephone*, Entry (Aug. 10, 2007) at ¶ 7.” But here, the Attorney Examiner’s ruling did interfere with matters involving OCC’s obligations under Ohio public records law. That interference was unprecedented and unreasonable.

An immediate ruling on this issue is needed to prevent the likelihood of undue prejudice to OCC and the FirstEnergy consumers it represents. The information sought under the public records request is information that OCC alone, as a state agency, must decide whether to disclose under Ohio’s public records law in response to a public records request to OCC. And OCC may be sued (and possibly soon) under the records law, with the PUCO’s Entry being a contributing factor.

It is imperative that the PUCO reverse its ruling and allow OCC to determine how to respond to the public records request. That is consistent with OCC’s bargained for protective agreement with FirstEnergy Corp and with Ohio public records law. FirstEnergy Corp. was represented by counsel (if not by many counsel) in signing that agreement.

III. APPLICATION FOR REVIEW

A. The Entry unreasonably and unlawfully interferes with OCC’s rights and obligations under the Ohio Public Records law.¹¹

Several months ago, OCC received a public records request.¹² OCC determined seventy-seven pages of FirstEnergy Corp.’s documents were responsive to the public records request.¹³ Bear in mind that FirstEnergy Corp. claims that most all records it

¹¹ OCC incorporates the previous sections of this filing into this section.

¹² FirstEnergy Corp. Motion at Ex. A.

¹³ *Id.* (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,

provides to OCC are confidential. Consistent with the OCC/FirstEnergy Corp. Protective Agreement, OCC gave FirstEnergy Corp. written notice of the public records request and the documents OCC determined were responsive.¹⁴

In response to OCC's notice, FirstEnergy Corp. filed a motion for protective order at the PUCO.¹⁵ But that was wrong. The FirstEnergy Corp./OCC Protective Agreement – that FirstEnergy Corp. itself expected the Office of the Ohio Consumers' Counsel ("OCC") to sign – set forth a different process in ¶ 13. There, OCC is to notify FirstEnergy Corp. if OCC receives a public records request for protected materials. FirstEnergy Corp. then has five business days "to file a pleading before a *court of competent jurisdiction* to prevent disclosure of the Protected Materials in question." (Emphasis added.) We complied with the Protective Agreement. FirstEnergy Corp. violated the Protective Agreement.

In violation of ¶ 13 in the OCC/FirstEnergy Corp. Protective Agreement, FirstEnergy forum-shopped and *filed at the PUCO (not at a court as required)*. That *filing was* on September 7, 2022 and was to prevent OCC's disclosure of documents. A failure by FirstEnergy Corp. to file in a court is addressed in ¶ 13 of the Protective Agreement. There, it is agreed that "[i]f 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

47053, 62032, 72743-72744, 74655, 191022, 215026, 221735-221738, 235230-235231, 238715-238717, 239530, 239715, 248803-248806, 248905-248906, 249833-249834 and 292696-292697).

¹⁴ See attachment.

¹⁵ FirstEnergy Corp. actually filed the same motion for protective order in all four PUCO cases involving FirstEnergy. See dockets in Case Nos. 20-1502-EL-UNC, 20-1629-EL-UNC; 17-974-EL-UNC, and 17-2474-EL-UNC.

Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement.” (Emphasis added.)

Given that FirstEnergy Corp. did not file at a court, the protected materials – as of September 7, 2022 – “can be deemed by OCC to be non-confidential...” as set forth in the Protective Agreement that FirstEnergy Corp. signed with OCC. After FirstEnergy Corp. did not file in a court, it was and is OCC’s decision to determine whether to release the records at issue under the Public Records Law.

Simply stated, OCC is a governmental agency separate and distinct from the PUCO. Therefore, the PUCO has no authority to order OCC to release, not release, or stay the release of any records in OCC’s possession within the context of Ohio’s public records law.

But the Attorney Examiner’s ruling takes that decision away from OCC by allowing FirstEnergy Corp. to seek protection from disclosure three months after its right to do so has been extinguished. FirstEnergy Corp. yielded its right by its unilateral decision not to seek a court order, and instead forum-shop at the PUCO. The Attorney Examiner’s ruling is unreasonable and interferes with OCC’s duties and obligations under Ohio’s public records law. Ohio’s Public Records law are being contravened, and OCC’s judgment improperly limited.

Left unsaid, but otherwise implied in the Attorney Examiner’s ruling was the notion that the PUCO somehow has authority to prohibit OCC from releasing records unless and until FirstEnergy Corp. decides to file (or not file) a motion for a protective order with a court of competent jurisdiction. *See* Entry, ¶ 15. But the PUCO has no

authority to order the OCC to do, or not do, anything within the context of R.C. 149.43, *et seq.*

Under R.C. Chapter 4911, the Consumers' Counsel is a separate state agency independent from the PUCO. OCC has an appointing authority who reports to an independent Board.

For more than one hundred years, the Ohio Supreme Court has held that the PUCO “is a creation of the General Assembly under the police power of the state, and it has only such jurisdiction and authority to act as is vested in it by statute.” *Ohio Bus Line, Inc. v. Public Utilities Com.*, 29 Ohio St.2d 222, 226, 280 N.E.2d 907, 912 (1972); citing *Cincinnati v. Pub. Util. Comm.*, 96 Ohio St. 270 (1917); *see also Valley Greyhound Lines v. Pub. Util. Comm.*, 148 Ohio St. 603 (1947); *B. & O. Rd. Co. v. Pub. Util. Comm.*, 16 Ohio St.2d 60 (1968).

The General Assembly elected to provide the PUCO with general jurisdiction over public utilities and railroads and the owners and records of those businesses who operate within Ohio. *See* R.C. 4905.05. Conversely, the General Assembly did not provide the PUCO with any jurisdiction or authority to order the release, the non-release, or a stay of the release of any documents held by a separate state agency within the context of R.C. 149.43.

Prior opinions of the PUCO and its December 12, 2022 Attorney Examiner ruling acknowledge this jurisdictional reality. Paragraph 14 of the ruling states, in part, that:

As noted by the OCC, the Commission has routinely abstained from addressing matters **involving another state agency's** obligations and duties when responding to public records requests under R.C. 149.43. *See, e.g., In the Review of Ohio Adm.Code Chapters 4901-1, 4901-3 and 4901-9, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec.*

6., 2006); *United Telephone*, Entry (Aug. 10, 2007) at ¶ 7. (emphasis added).

The *United Telephone* Entry specifically went on to state that “[f]or the reasons articulated by OCC in its memorandum contra, **it seems clear** that including such language would, among other things, contravene the Ohio public records law and **potentially purport to limit the lawful exercise of OCC’s judgment in response to a future public records request.**” (emphasis added). Notably, each of the citations referenced above involved the OCC as the “another state agency.” The OCC is thus a separate state agency independent from the PUCO.

Rhetorically speaking, if an Ohio municipality filed a charge before the PUCO, could the PUCO order them to deny the citizens of that municipality of their right to review public records? Would the PUCO pay opposing counsel’s attorney’s fees if that municipality is successfully sued for denying those public records rights? Would the PUCO reimburse OCC for its legal fees if it were to be successfully sued on the instant public records matter?

OCC cannot be ordered by the PUCO to release or delay the release of any records in OCC’s possession as pertaining to Ohio’s Public Records law. Any suggestion to the contrary -- either explicitly or implicitly -- in the December 12, 2022 ruling is unfounded and lacks a statutory basis. The PUCO’s Entry was therefore unreasonable and unlawful and should be reversed by the PUCO Commissioners.

B. The Entry unreasonably interferes with the OCC/FirstEnergy Corp. Protective Agreement and deprives OCC of the benefit of its negotiated Protective Agreement.

Almost a year ago, OCC served a signed subpoena on FirstEnergy Corp. and instructed that it produce all of the documents that it provided to the plaintiffs in *In re*

FirstEnergy Corp. Securities Litigation, Case No. 2:20-cv-3785 (S.D. Ohio).¹⁶ OCC and FirstEnergy Corp. negotiated a resolution of the subpoena by entering into a Protective Agreement.¹⁷ By its very terms, the Protective Agreement is designed to facilitate and expedite the exchange of information in the discovery process.¹⁸ The Protective Agreement reached between OCC and FirstEnergy Corp. is strikingly similar to protective agreements the PUCO has upheld on other occasions as providing an appropriate balance between competing interests of confidentiality and the public records law.¹⁹

The Protective Agreement reflects OCC and FirstEnergy Corp.’s agreement as to the manner by which alleged “Protected Materials” are treated. The Protective Agreement, in ¶ 13, makes clear what must happen if OCC receives a public records request for Protected Materials. It states:

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 no subject to this Agreement.*** Alternatively, the

¹⁶ FirstEnergy Corp. Motion at Ex. B, ¶ 1.

¹⁷ *Id.* at Ex. C; *see* attachment.

¹⁸ *Id.* at Ex. C, Preamble.

¹⁹ *See, e.g., In the Matter of the Application of United Telephone Company d/b/a Embarq for Approval of an Alternative Form of Regulation*, Case No. 07-760-TP-BLS, Entry (Aug. 10, 2007); *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates*, Case No. 07-589-GA-AIR, Entry (Oct. 26, 2007).

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 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.²⁰

The Attorney Examiner, however, ruled that FirstEnergy Corp. should have more time than the five business days to make its court filing. By the December 12, 2022 ruling, the Attorney Examiner effectively rewrote the Protective Agreement and overrode OCC's rights in the Agreement to address public records requests, by extending the time for FirstEnergy Corp. to file in court by 103 days!

By changing the obligation of FirstEnergy Corp. and the rights of OCC to act upon FirstEnergy Corp.'s non-filing for public records purposes, the PUCO is interfering with and rewriting the OCC/FirstEnergy Corp. Protective Agreement. And the PUCO is depriving OCC of the benefit of its negotiated agreement. This has been done in favor of FirstEnergy Corp. when it was FirstEnergy Corp. that violated the Agreement in the first place. The Entry was therefore unreasonable and unlawful.

IV. CONCLUSION

For the reasons explained above, the PUCO should consider this appeal without the need to certify. Alternatively, this interlocutory appeal should be certified. The PUCO Commissioners should reverse the December 12 Entry and restore OCC's rights under law to independently determine whether to release the records at issue under the Public Records Law.

²⁰ *Id.* at ¶ 13 (emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal was served on the persons stated below via electronic transmission this 19th day of December 2022.

/s/ Maureen R. Willis

Maureen R. Willis
Senior Counsel

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

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THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF OHIO
EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY'S
COMPLIANCE WITH R.C. 4928.17 AND
OHIO ADM.CODE CHAPTER 4901:1-37.

CASE NO. 17-974-EL-UNC

IN THE MATTER OF THE REVIEW OF THE
DISTRIBUTION MODERNIZATION RIDER
OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY.

CASE NO. 17-2474-EL-RDR

IN THE MATTER OF THE REVIEW OF THE
POLITICAL AND CHARITABLE SPENDING
BY OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY.

CASE NO. 20-1502-EL-UNC

IN THE MATTER OF THE 2020 REVIEW OF
THE DELIVERY CAPITAL RECOVERY
RIDER OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY.

CASE NO. 20-1629-EL-RDR

ENTRY

Entered in the Journal on December 12, 2022

I. SUMMARY

{¶ 1} The attorney examiner denies the motion for protective order filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy Corp.) and directs FirstEnergy Corp. to, instead, file a motion for protective order with a court of competent jurisdiction, in accordance with the protective agreement, within five business days of this Entry.

II. DISCUSSION

{¶ 2} Concurrent with the Commission's four above-captioned investigations, the United States Department of Justice's District Attorney for the Southern District of Ohio (DOJ or U.S. Attorney) has been conducting an ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6 and action through the Commission, resulting in a Deferred Prosecution Agreement (DPA)¹ and an indictment of several individuals. Throughout our four investigations, the Commission has sought to balance two principles: one, the Commission will follow the facts wherever they lead; and two, it is of the utmost importance that the Commission's investigations do not interfere with the DOJ's ongoing criminal investigation, or the parallel civil action instituted by Ohio Attorney General Dave Yost.

{¶ 3} On August 16, 2022, the U.S. Attorney filed a letter in the above-captioned proceedings, pursuant to 28 U.S.C. § 517, requesting that the Commission stay these matters for a period of six months, citing its concern that continued discovery in the Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into corruption relating to Am. Sub. H.B. 6.²

{¶ 4} On August 24, 2022, the Commission issued an Entry staying the above-captioned proceedings at the request of the U.S. Attorney for a period of six months, unless otherwise ordered by the Commission. The Commission explicitly stated that the stay applied to "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

¹ The DPA is between FirstEnergy Corp. and the United States Attorney for the Southern District of Ohio. *United States of America v. FirstEnergy Corp.* Case: 1:21-cr-86, July 22, 2021, Doc. 3.

² According to the DOJ: "The United States understands that substantial discovery is underway in the PUCO Proceedings, including written discovery and potential for depositions of numerous individuals and entities. The PUCO's investigations involve issues related to the United States' investigation, and the United States believes that continued discovery in the PUCO Proceedings may directly interfere with or impede the United States' ongoing investigation."

memoranda related to any entries the Commission issued [on August 24, 2022], pursuant to R.C. 4903.10.” Entry (Aug. 24, 2022) at ¶ 87.

{¶ 5} In response to Office of Consumers’ Counsel’s (OCC) September 24, 2021 subpoenas filed in the four investigations, 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 (Securities Litigation)*,³ which include all documents produced by FirstEnergy Corp. to the DOJ and the Securities and Exchange Commission (SEC) as part of ongoing federal investigations. Under the negotiated protective agreement, particularly Paragraph 13, OCC is required to notify FirstEnergy Corp. if OCC receives public records requests for confidential materials, after which FirstEnergy Corp. is provided an opportunity to seek a court order preventing disclosure of the documents.

{¶ 6} On August 30, 2022, OCC notified FirstEnergy Corp. that it received a public records request for protected materials subject to the protective agreement. OCC identified certain documents, initially obtained through discovery from FirstEnergy Corp., as responsive and indicated in its letter that it would release the documents unless FirstEnergy Corp. sought protective treatment pursuant to the terms of the protective agreement. Specifically, OCC indicated it intends to release the following documents in response to the public records request: documents containing Bates numbers 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.

{¶ 7} On September 7, 2022, FirstEnergy Corp. filed a motion for protective order with the Commission seeking to protect from public disclosure confidential documents

³ Case No. 2:20-cv-3785 (S.D. Ohio).

produced in discovery. Initially, FirstEnergy Corp. contends that the production of these documents would undermine the six-month stay of all discovery and motion practice, issued by the Commission on August 24, 2022, as it requires FirstEnergy Corp. to file a motion for protective order within five business days. Again, FirstEnergy Corp. emphasizes that public disclosure risks compromising or interfering with ongoing federal investigations, which the Commission noted several times in its Entry staying these proceedings. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, et al., Entry (Aug. 24, 2022) at ¶ 85. Second, FirstEnergy Corp. argues that the documents in question should not qualify as “public records,” as they are not records kept by OCC nor serve to document the activities of OCC. Third, FirstEnergy Corp. asserts that independent grounds exist for protecting those documents which are commercially sensitive,⁴ for which the Commission should exercise its authority under Ohio Adm.Code 4901-1-24 and issue a protective order. Finally, FirstEnergy Corp. notes that there is a federal court-approved, stipulated protective order in the *Securities Litigation*, further arguing that it should not be expected to defend confidentiality designations applied in another jurisdiction before the Commission, especially where FirstEnergy Corp. agreed to provide OCC with documents produced in the *Securities Litigation* on a cooperative basis. FirstEnergy Corp. moves to protect all documents noted in Paragraph 6, except for documents with Bates numbers 0012557, 0248905, and 0249833, as these documents were not designated as confidential.

{¶ 8} OCC filed a memorandum contra FirstEnergy Corp.’s motion for protective order on September 22, 2022. OCC first argues FirstEnergy Corp.’s motion is improper and does not follow the explicit process discussed in the protective agreement, contending that Paragraph 13 of the agreement requires FirstEnergy Corp. to file a motion for protective order at a court of competent jurisdiction within five business days of OCC notifying them of a public records request for the confidential materials. OCC asserts that the Commission

⁴ FirstEnergy Corp. asserts the following documents contain commercially sensitive business information: documents with Bates numbers 0013627, 0022524, and 0045823.

has acknowledged that the provisions in a protective agreement concerning treatment of a public records request should be upheld to allow OCC to exercise the judgment required of a state agency to determine whether to release information in response to a public records request. *In re United Tel. Co. of Ohio*, Case No. 07-760-TP-BLS (*United Telephone*), Entry (Aug. 10, 2007) at ¶ 7. Without such language, OCC contends that the state's public records law could potentially be contravened, and OCC's judgment improperly limited in response to future public records requests. Due to FirstEnergy Corp.'s alleged failure to abide by the terms of the protective agreement, OCC argues that it "can now decide for itself under the [p]rotective [a]greement whether to release these documents." Further, OCC notes that there is good reason for the protective agreement requiring FirstEnergy Corp. to file for protective treatment with a court, rather than the Commission, in the event OCC receives a public records request. As a separate public agency, OCC asserts that the Commission lacks the authority to dictate how OCC responds to a public records request. In fact, OCC notes that the Commission has previously found that it does not have the statutory authority to add language to the administrative code that would "prevent disclosure of trade secret information protected by a Commission protective order by a party that is subject to a public records statute." *In re the Review of Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006). Further, as the state agency charged with determining what records may be released in response to the request, OCC argues that FirstEnergy Corp. failed to carry its burden and demonstrate to it why these records should be exempted from disclosure, pursuant to R.C. 149.43. Ohio courts, according to OCC, have determined that the public records law "must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 1997-Ohio-349, 684 N.E.2d 1239.

{¶ 9} FirstEnergy Corp. filed a reply in support of its motion for protective order on September 29, 2022. In its reply, FirstEnergy Corp. reiterates that, while it understands OCC has a duty to respond to public records requests, these documents are not records

under R.C. 149.011 and, consequently, do not fall under the requirements of R.C. 149.43. FirstEnergy Corp. alleges that OCC points to no case or authority supporting its position that these documents, which it asserts were only produced to OCC on a collaborative basis and were not the result of discovery in these proceedings, are considered records for purposes of the Ohio public records statute. In fact, contends FirstEnergy Corp., Ohio courts have held the opposite is true. *State ex rel. Cmty. J. v. Reed*, 2014-Ohio-5745, 26 N.E.3d 286, 296-98 (12th Dist.). Further, FirstEnergy Corp. notes OCC's reliance on *United Telephone* is misplaced, as it was OCC's position in that case that a protective agreement "would protect the information whose confidentiality is at stake unless (1) an authority of competent jurisdiction determines that the information could be disclosed publicly; or (2) [the producing party] itself fails to seek a Commission or court ruling." *United Telephone*, Entry (Aug. 10, 2007) at *3. FirstEnergy Corp. adds that there was no question the documents in *United Telephone* qualified as OCC's records, unlike this case. Finally, FirstEnergy Corp. asserts that the protective agreement does not "strip the Commission of its authority from subsequently determining whether information should or should not be disclosed in the public domain" and "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." *In re the Review of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (June 22, 2022) at ¶ 25. As such, FirstEnergy Corp. maintains that the Commission has the authority to issue a protective order prohibiting the release of these documents.

{¶ 10} While the Commission has, in an act of administrative efficiency, chosen to address various motions filed in these cases collectively, the attorney examiner reminds the parties that these cases have not been consolidated. The Supreme Court of Ohio has recognized the Commission's broad discretion to regulate its proceedings and manage its docket. Entry (Aug. 24, 2022) at ¶ 67, citing *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19,

734 N.E.2d 775 (2000). With that in mind, the attorney examiner will address the pending motion for protective order in a collective fashion.

{¶ 11} 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.”

{¶ 12} Initially, the attorney examiner notes that FirstEnergy Corp. cannot genuinely argue that these documents were not produced in discovery in these proceedings, as the agreement to provide OCC copies of documents produced in the *Securities Litigation* was made in response to OCC’s September 24, 2021 subpoenas. See, e.g., *Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Company*, Case No. 17-974-EL-UNC, Prehearing Transcript (Jan. 4, 2022) at 11-13. With that being said, the attorney examiner now moves on to consider the substance of the motion.

{¶ 13} As noted in the June 22, 2022 Entry, the protective agreement utilized in these four proceedings 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 provides “[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.” Thus, the agreement’s intended purpose is to act as 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. However, unlike the motion for protective order at issue in the June 22, 2022 Entry, the motion for protective order filed by FirstEnergy Corp. on September 7, 2022 deals with OCC’s response to a public records request, pursuant to Paragraph 13 of the protective agreement. That paragraph specifically requires any producing party to file a pleading before a court of competent jurisdiction within five business days after service of OCC’s notice of receipt of a public records request for protected materials to prevent disclosure of those protective materials.⁵ Notably, Paragraph 9 of the protective agreement, which was at issue in the June 22, 2022 Entry, allows any producing party upon receipt of a notice from OCC that it intends to use or refer to the protected materials in the public domain to file a motion to maintain the confidentiality of protected materials with “*an administrative agency of competent jurisdiction or court of competent jurisdiction.*” (emphasis added) Accordingly, the motion at issue in this Entry is clearly distinguishable from that at issue in the June 22, 2022 Entry. The Commission is an administrative agency of competent jurisdiction but not a court of competent jurisdiction. Entry (Aug. 24, 2022) at ¶ 72, citing *State Emp. Relations Bd. v.*

⁵ This would not apply to public records requests received by the Commission.

Springfield Local School Dist. Bd. of Edn., SERB No. 93-ULP-07-0397, 11 Ohio Pub. Employee Rep. ¶ 1444 (July 7, 1994). In fact, in that Entry, which denied the motions filed by OCC and the Northwest Ohio Aggregation Coalition, the Commission specifically noted that the Commission is not a court in the true or literal sense of the term, despite applying many principles and rules that govern judicial proceedings. Though both paragraphs are centered on the potential public disclosure of information in these proceedings, this difference in language between these two paragraphs, and the context in which they should be employed, cannot be ignored.

{¶ 14} More importantly, in addition to providing the parties the benefit of their negotiated protective agreement, the attorney examiner agrees with OCC that this difference embodies the process set forth in R.C. 149.43 and the Commission's past practice regarding similar disputes and issues. As noted by OCC, the Commission has routinely abstained from addressing matters involving another state agency's obligations and duties when responding to public records requests under R.C. 149.43. See, e.g., *In re the Review of Ohio Adm.Code Chapters 4901-1, 4901-3 and 4901-9*, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006); *United Telephone*, Entry (Aug. 10, 2007) at ¶ 7. As such, the attorney examiner will not address FirstEnergy Corp.'s arguments regarding whether the responsive documents constitute "records" of OCC, pursuant to R.C. 149.011. Doing so could be interpreted as running contrary to the spirit and intent of the Ohio public records laws.

{¶ 15} Finally, as FirstEnergy Corp. aptly observes, the August 24, 2022 Entry stayed these four proceedings in their entirety; however, nothing in that Entry did (nor could it have) authorized a stay on public records requests, pursuant to R.C. 149.43. Given the Commission's necessary decision to stay these proceedings and the underlying rationale for doing so, a court of competent jurisdiction should have the opportunity to consider the merits of the motion to determine whether the public records law applies and the extent to which disclosure of the documents, if any, may be required. In order to allow the process to unfold as contemplated by both R.C. 149.43 and the protective agreement, FirstEnergy Corp. should be afforded the opportunity to file a motion for protective order with a court

of competent jurisdiction within five business days of this Entry in order to have the court address the merits of the arguments presented by FirstEnergy Corp. and OCC, including, but not limited to, whether the federal court-approved stipulated protective order in the *Securities Litigation* prevents disclosure of the documents at issue. Finally, if FirstEnergy Corp. does file a motion for protective order as described above, OCC is directed to not publicly disclose these documents until such time a court ultimately provides a decision on these issues.

III. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That FirstEnergy Corp.'s September 7, 2022 motion for protective order be denied, consistent with this Entry. It is, further,

{¶ 18} ORDERED, That FirstEnergy Corp. be permitted to file within five business days a motion for protective order with a court of competent jurisdiction pertaining to the documents at issue in its September 7, 2022 motion for protective order. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Megan J. Addison

By: Megan J. Addison
Attorney Examiner

JRJ/mef

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**Case No(s). 17-0974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-
RDR**

Summary: Attorney Examiner Entry denying the motion for protective order filed by FirstEnergy Corp. and directing FirstEnergy Corp. to, instead, file a motion for protective order with a court of competent jurisdiction, in accordance with the protective agreement, within five business days of this Entry electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio

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12/19/2022 5:00:09 PM

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

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