**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Review of Duke Energy Ohio, Inc.’s Distribution Capital Investment Rider. | )  )  ) | Case No. 23-549-EL-RDR |

**MOTION FOR *IN CAMERA* REVIEW**

**AND**

**REQUEST FOR EXPEDITED RULING**

**BY**

**OFFICE OF OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) moves for an *in camera* review of documents withheld by Duke from discovery on privilege grounds. Duke bears the burden of proving the documents are privileged and deserving of protection. It appears that Duke’s privilege claims asserted in its privilege log are overstated. An *in camera* review is requested, consistent with the Supreme Court of Ohio’s decision in [*Peyko v. Frederick*, which ruled that an *in camera* review should be conducted when a party asserts the attorney-client privilege*.*[[1]](#footnote-1)The PUCO has followed the ruling in *Peyko*.[[2]](#footnote-2)](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=1c0cef51-1b14-422d-b560-9a4a2f04e1e2&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pddocid=urn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pdcontentcomponentid=9250&pdislparesultsdocument=false&pdteaserkey=h&pdteaserid=teaser-dXJuOmNvbnRlbnRJdGVtOjQ1TjQtOTRCMC0wMDM5LTQ0REstMDAwMDAtMDA%3D-3-PATH-b3Bpbmlvbi0xNTQ1Nw%3D%3D&pdsearchterms=supreme%20and%20in%20camera%20w/10%20privilege&pdisdocsliderrequired=true&pdpeersearchid=94c9a77f-cbf4-46b9-8070-2057e42a6600-1&ecomp=57ttk&earg=pdpsf&prid=f1509ae5-5250-4d7b-90d5-9f77955045da) OCC requests that the *in camera* review occur in a timely manner so that OCC can include the new documents and emails in its witness testimony due on July 9, 2024.

Under the current procedural schedule, OCC’s testimony is due on July 9, 2024 and the evidentiary hearing is scheduled for July 16, 2024.[[3]](#footnote-3) Therefore, OCC requests that an *in camera* review be scheduled as soon as possible.

This Motion is based on the attached Memorandum in Support. Given the upcoming testimony due date and evidentiary hearing, OCC requests an expedited ruling on this Motion under O.A.C. 4901-1-12(C) so that OCC can include the emails in its testimony and/or introduce them into evidence at the evidentiary hearing. OCC is unable to certify that other parties do not object to this motion or to an expedited ruling.

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**MEMORANDUM IN SUPPORT**

As background, this case involves the annual audit of Duke’s Distribution Capital Investment Rider (“Rider DCI”). The main issue that we have identified for consumers involves Duke’s accounting for Accumulated Deferred Income Taxes (“ADIT”). As OCC explained in its Initial Comments there is a $14 million issue present in this case. Duke apparently undercharged consumers in its base rate case and unilaterally decided to make up for that by overcharging consumers under Rider DCI. It appears that Duke might have acted improperly by: (1) changing its rates without PUCO approval; (2) ignoring that the PUCO’s Order in the base rate case has a collateral estoppel impact; (3) changing the terms of the settlement in the rate base without the consent of other parties; and (4) violating the prohibition against retroactive ratemaking.

In pursuing this issue OCC sought to discover communications involving Jay Brown. Jay Brown is the Director of Rates and Regulatory planning and is thought to be responsible for Duke’s decision to unilaterally self-correct the charges to consumers under Rider DCI. Mr. Brown made the Rider DCI filings with the PUCO that are at issue in this case.

OCC submitted its Seventh Set of Discovery to Duke on May 15, well within the time period allowed for discovery. OCC sought “all emails sent by or received by Jay Brown from November 1, 2023 through the present date which include the term ‘ADIT’.”

Duke’s response to this discovery request was due on June 4, 2024. However, Duke did not respond to OCC’s discovery request until June 14, 2024. Duke’s response included an 18-page privilege log that itself is supposedly privileged (it’s not). Many of the 299 emails in the privilege log do not list an attorney as the sender or recipient. If these e-mails were not between Duke and its attorneys, then Duke cannot properly withhold them from discovery under the attorney-client or work product privilege.

The emails and documents sought by OCC are highly relevant. Mr. Brown is Duke’s Director of Rates and Regulatory Planning. It is thought that these emails and documents include information “relevant to the subject matter of the proceeding [or] reasonably calculated to lead to the discovery of admissible evidence.” [[4]](#footnote-4) We anticipate that the emails may lead to discovering information about the $14 million error in this last rate case filing that Duke now seeks to charge consumers for through its Rider DCI update filing. It is noteworthy that Duke did not refuse to produce the emails on relevancy grounds. Instead, Duke withheld the documents from discovery on privilege grounds.

When a party withholds documents from discovery on privilege grounds, the Ohio Supreme Court’s holding in [*Peyko v. Frederick*[[5]](#footnote-5)requires that](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=1c0cef51-1b14-422d-b560-9a4a2f04e1e2&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pddocid=urn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pdcontentcomponentid=9250&pdislparesultsdocument=false&pdteaserkey=h&pdteaserid=teaser-dXJuOmNvbnRlbnRJdGVtOjQ1TjQtOTRCMC0wMDM5LTQ0REstMDAwMDAtMDA%3D-3-PATH-b3Bpbmlvbi0xNTQ1Nw%3D%3D&pdsearchterms=supreme%20and%20in%20camera%20w/10%20privilege&pdisdocsliderrequired=true&pdpeersearchid=94c9a77f-cbf4-46b9-8070-2057e42a6600-1&ecomp=57ttk&earg=pdpsf&prid=f1509ae5-5250-4d7b-90d5-9f77955045da)an *in camera* review must be held by the Attorney Examiners to determine the validity of the privilege claims.[[6]](#footnote-6) This is also required under PUCO precedent.[[7]](#footnote-7) An *in camera* review is important in this case because many (if not most) of the emails in the privilege log do not even list an attorney as the sender or recipient, calling into question Duke’s privilege claims. OCC requests an expedited ruling on this Motion per O.A.C. 4901-1-12(C). The need for an expedited ruling arises from the importance of the requested discovery to OCC’s case, the impending deadline for filing testimony and the looming hearing date. OCC is unable to certify under O.A.C. 4901-1-12(C) that other parties do not object to this motion or to an expedited ruling. If the *in* *camera* review does not happen expeditiously, then OCC reserves the right to file supplemental testimony to address documents and emails ordered to be produced as a result of the in camera review.

Respectfully submitted,

Maureen R. Willis (0020847)

Ohio Consumers’ Counsel

/s/ *John Finnigan*

John Finnigan (0018689)

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Motion and Memorandum in Support has been served electronically upon those persons listed below this 18th day of June, 2024.

*/s/ John Finnigan*

John Finnigan

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**

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1. [25 Ohio St. 3d 164, 495 N.E.2d 918](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=1c0cef51-1b14-422d-b560-9a4a2f04e1e2&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pddocid=urn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pdcontentcomponentid=9250&pdislparesultsdocument=false&pdteaserkey=h&pdteaserid=teaser-dXJuOmNvbnRlbnRJdGVtOjQ1TjQtOTRCMC0wMDM5LTQ0REstMDAwMDAtMDA%3D-3-PATH-b3Bpbmlvbi0xNTQ1Nw%3D%3D&pdsearchterms=supreme%20and%20in%20camera%20w/10%20privilege&pdisdocsliderrequired=true&pdpeersearchid=94c9a77f-cbf4-46b9-8070-2057e42a6600-1&ecomp=57ttk&earg=pdpsf&prid=f1509ae5-5250-4d7b-90d5-9f77955045da), syllabus, paragraph 2 (1986). [↑](#footnote-ref-1)
2. *In the Matter of the Application of 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, Entry at ¶ 18 (Jan. 27, 2011). [↑](#footnote-ref-2)
3. Entry (May 13, 2024). [↑](#footnote-ref-3)
4. O.A.C. 4901-1-16(B). [↑](#footnote-ref-4)
5. [25 Ohio St. 3d 164, 495 N.E.2d 918](https://plus.lexis.com/document/teaserdocument/?pdmfid=1530671&crid=1c0cef51-1b14-422d-b560-9a4a2f04e1e2&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pddocid=urn%3AcontentItem%3A45N4-94B0-0039-44DK-00000-00&pdcontentcomponentid=9250&pdislparesultsdocument=false&pdteaserkey=h&pdteaserid=teaser-dXJuOmNvbnRlbnRJdGVtOjQ1TjQtOTRCMC0wMDM5LTQ0REstMDAwMDAtMDA%3D-3-PATH-b3Bpbmlvbi0xNTQ1Nw%3D%3D&pdsearchterms=supreme%20and%20in%20camera%20w/10%20privilege&pdisdocsliderrequired=true&pdpeersearchid=94c9a77f-cbf4-46b9-8070-2057e42a6600-1&ecomp=57ttk&earg=pdpsf&prid=f1509ae5-5250-4d7b-90d5-9f77955045da), syllabus, paragraph 2 (1986). [↑](#footnote-ref-5)
6. *See also 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, Entry at ¶ 17 (March 2, 2022). [↑](#footnote-ref-6)
7. *In the Matter of the Application of 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, Entry at ¶ 18 (Jan. 27, 2011). [↑](#footnote-ref-7)