

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan)
)
) **Case No. 14-1297-EL-SSO**
)
)
)

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM
IN OPPOSITION TO ELPC MOTION TO COMPEL**

I. INTRODUCTION

The Motion of the Environmental Law and Policy Center (“ELPC”) to Compel (“Motion”) seeks documents responsive to two discovery requests. Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (“Companies”) have not produced any responsive documents to these two requests for several reasons -- including the fact that there are no complete responsive drafts of the requested documents. ELPC’s requests seek documents regarding a VOLT/VAR study which is being undertaken as part of the Companies’ energy efficiency and peak demand reduction (“EE/PDR”) portfolio plans and a grid modernization business plan (“Plan”). The Companies have not completed work on either the study or the Plan. Because there are no complete or unprivileged responsive documents related to these issues, there is nothing to produce.

After being informed that no unprivileged responsive documents exist, ELPC expanded the requests (i.e., made a request beyond what was originally requested). ELPC now requests drafts and notes regarding the study or the Plan, neither of which is finished, as well as any

document with a “nexus to” these document requests (though it is unclear how that vague instruction provides any assistance whatsoever). The requests would encompass work that was directed by counsel and performed by dozens of individuals preparing the Plan to be filed later this year. Notably, ELPC has not cited any Commission or other precedent requiring notes and draft documents to be produced in discovery, and the Companies are not aware of any such authority. Instead, relevant Ohio authority makes clear that drafts of this nature are neither relevant nor discoverable.

Even if notes and drafts like these were discoverable under Ohio precedent, they would still not be produced in this instance because they are protected by the attorney-client privilege and work product doctrine. The documents requested are being prepared at the instruction of counsel and are subject to the work product doctrine. Many of the communications about those documents are protected by the attorney client privilege. ELPC has failed to acknowledge this issue in its Motion despite it being raised at every instance by the Companies.

Further, there is no prejudice to ELPC if it does not receive the documents that it now requests. The documents ELPC has requested relate to a VOLT/VAR study and a Plan which, as stated above, will be filed in other proceedings later this year. ELPC will have the opportunity to review the Plan when it is filed. The Plan’s only relevance to this proceeding is the agreement to file it. Accordingly, ELPC would not be prejudiced in any way if the Motion is denied. For all of those reasons, the Commission should deny ELPC’s Motion.

II. BACKGROUND

On December 1, 2015, the Companies filed a Third Supplemental Stipulation and Recommendation (“Stipulation”). Section V.D. 2 of the Stipulation describes the potential contents of the Plan and provides:

Within 90 days¹ of the filing of this Third Supplemental Stipulation, the Companies shall file a grid modernization business plan highlighting future initiatives for Commission consideration and approval.

On December 11, 2015, ELPC served discovery on the Companies. The discovery included ELPC Set 6 RPD 004 and ELPC Set 6 RPD 005 (collectively “Requests”).

ELPC Set 6 RPD 004: Please produce any documents relating to any studies or analyses performed by the Companies or at their direction regarding potential deployment of VOLT/VAR technology in their service territories.

ELPC Set 6 RPD 005: Refer to Section V.D.2 of the Third Supplemental Stipulation. Please produce any documents relating to the “grid modernization business plan” contemplated in this provision.

The Companies served timely responses and, for the reasons discussed below, properly objected to ELPC’s Requests.

III. ARGUMENT

A. There Are No Complete Responsive Documents To Produce.

ELPC Set 6-RPD-004 seeks the results of a study into the deployment of VOLT/VAR technology which was undertaken as part of the Companies’ 2012-2015 EE/PDR portfolio plans.² ELPC Set 6-RPD-005 seeks all documents relating to the future Plan outlined in the Stipulation as indicated above.

The Companies have informed ELPC that no complete unprivileged responsive documents exist in response to either request. Specifically, the Companies informed ELPC that they are currently undertaking the VOLT/VAR study. The Companies also informed ELPC that they have not yet determined whether the VOLT/VAR study would be included in the Plan, and therefore the request for “any documents relating to any studies or analyses” was overbroad and

¹ March 1, 2016.

² ELPC acknowledges the VOLT/VAR study was undertaken as part of the Companies’ current EE/PDR portfolio plans. Motion at 3.

sought information not reasonably calculated to lead to the discovery of admissible evidence.³

Also, the Companies informed ELPC that the Plan did not exist yet, and was not due to be created under the terms of the Stipulation for some time.⁴ Because the work done for the documents requested by ELPC is not yet complete, there is nothing for the Companies to produce in response to these Requests.

Realizing the fallacy of its original Requests, ELPC improperly attempted to change its original Requests by subsequently requesting documents related to the “potential contents” of the Plan and “results to date” of the VOLT/VAR study,⁵ not just documents related to the Plan or VOLT/VAR study itself.⁶ In support of this claim, ELPC pointed to the definitional section for the word “Document” (which encompasses a full one and a half pages of text). In the cited portion of that definition, ELPC claims any requests for documents should be read to include a variety of things:

A request for discovery concerning documents addressing, relating or referring to, or discussing a specified matter encompasses documents having a factual, contextual, or logical nexus to the matter, as well as documents making explicit or implicit reference thereto in the body of the documents.⁷

It is improper for the ELPC to issue request for documents which do not exist, then to move the goal post when informed of that fact by requesting notes and drafts with a “nexus” to those issues in the original request.

ELPC’s position is plainly flawed. The record in this case (and in the subsequent proceedings in which the study or the Plan are filed) should consist only of documents that

³ See Response to ELPC Set 6-RPD-004; ELPC Motion, Attachment D (December 23, 2015 email from Carrie Dunn).

⁴ See Response to ELPC Set 6-RPD-005.

⁵ Motion at 6.

⁶ *Id.* at 3.

⁷ Motion Attachment A, p. 2.

represent the Companies' completed work on those documents. Drafts of the study or the Plan will likely change over time, possibly multiple times, before the Plan is filed in March 2016 (and certainly will change after the hearing in this matter has concluded). "FirstEnergy's view"⁸ of the benefits and costs of the Plan will be determined and filed with the Commission when the Plan is filed in March 2016. As of now, the Companies have not completed their work to have a certain view of the benefits and costs of the Plan, what will be contained in the Plan and whether the VOLT/VAR study undertaken for a different case will or won't be utilized for the Plan. Indeed, Ms. Mikkelsen testified to this fact in her deposition.⁹ For those reasons, the Commission should deny the Motion.

B. ELPC Has Cited No Commission Precedent Requiring The Production of Notes or Drafts In Similar Circumstances.

ELPC does not dispute that there is no final study or Plan and that the only documents responsive to ELPC's revised request are either privileged or work product. Apart from the privilege issue, ELPC's Motion fails to cite any authority suggesting that drafts of or notes prepared for the creation of not yet completed documents required by the Commission are discoverable. There is likely good reason for that omission: relevant Ohio authority is otherwise -- notes and drafts are not discoverable in these circumstances. In *In the Matter of the Application of Champaign Wind, LLC, for A Certificate to Construct A Wind-Powered Elec. Generating Facility in Champaign Cty., Ohio.*, 12-160-EL-BGN, 2013 WL 2446463, at *10 (May 28, 2013) the Power Sitting Board considered a similar discovery dispute. A party cited the same broad discovery language relied on by ELPC in requesting correspondence and draft documents related to a proposed project application and drafts of the Staff Report on the project.

⁸ Motion at 2.

⁹ Deposition of Eileen Mikkelsen, December 22, 2015 at 70-71 (Excerpts attached as Exhibit A).

The Board upheld the ALJ's decision to deny those requests for production because only the final application, not drafts of that application before it was finalized, were relevant or the proper subject of discovery.

The Board finds that UNU's request to remand the application for further discovery should be denied. While UNU is correct that Section 4903.082, Revised Code, provides parties with ample rights of discovery, under Ohio Civ.R. 26(B)(1), these rights extend only to matters that are relevant to the subject matter involved in the pending action. As Section 4906.10, Revised Code, sets forth, the Board's responsibility is to render a decision upon the record either granting or denying the application as filed, or modifying and granting the application. The sole consideration of the Board is on the application/ as filed. Accordingly, the admission of any drafts, whether it be an application or staff report, will not make it more or less probable that Champaign's application meets or does not meet the requirements of Section 4906.10, Revised Code. Therefore, UNU's requests to be provided with drafts of the Staff Report and the application should be denied.

Similarly, in *In the Matter of the Application of Buckeye Wind LLC for A Certificate to Construct Wind-Powered Elec. Generation Facilities in Champaign Cty., Ohio*, 08-666-EL-BGN, 2009 WL 3699059, at *2 (Oct. 30, 2009) the ALJ rejected a request for draft documents, on the grounds that those drafts were irrelevant and were protected by the attorney client privilege and work-product doctrines.

Upon reviewing the parties' assertions, the ALJ concludes that this request seeks documents not relevant to the proceeding. Only the current application is under review by the Board, not any alternatives that may have been included in drafts of the application. Moreover, Buckeye correctly states that any drafts of the application that were edited or modified under the advice of counsel would be protected by the work product doctrine and under attorney-client privilege. Accordingly, UNU's motion to compel is denied.

Under relevant Ohio authority, ELPC is not entitled to the drafts or notes which may (or may not) ultimately result in the final versions of these documents. The Motion should be denied.

C. Any Notes Which Would Be Responsive To This Request Are Protected By The Attorney Client Privilege And Work Product Doctrines.

As discussed in *In the Matter of the Application of Buckeye Wind LLC for A Certificate to Construct Wind-Powered Elec. Generation Facilities in Champaign Cty., Ohio* cited above, parties are not entitled to discovery of drafts or notes which would reveal privileged or work product information.¹⁰ Even if ELPC's Requests properly requested notes and communications relating to the Plan, which they did not, those notes and communications are protected by the attorney-client privilege and work product doctrines. Despite the Companies raising this issue in both the discovery responses and communications between counsel, ELPC does not address this issue in its Motion.

The Plan is being created pursuant to the direction of legal counsel.¹¹ Legal counsel is actively involved in determining what provisions will be included in the Plan, how the Plan complies with Ohio law, and whether the Plan meets the criteria established in the Stipulation. The communications with legal counsel would be shown through privileged email correspondence regarding those issues, as well as the notes and drafts which exist regarding what may or may not ultimately be included in the Plan. Accordingly, even if ELPC had properly requested these documents, they would not be produced under the attorney-client privilege and work product doctrines.

D. There Is No Prejudice To ELPC If The Motion Is Denied.

In addition to having no right to these documents, ELPC has not identified any prejudice it would suffer if the Motion were denied. ELPC's Motion only includes a single paragraph addressing why it wants this data. ELPC states that it generally supports grid modernization, but

¹⁰ See also Rule 4901-1-16(B), O.A.C. A party is only permitted to "discovery of any matter, *not privileged*, which is relevant to the subject matter of the proceeding."

¹¹ Deposition of Eileen Mikkelsen at p. 71.

would like the data requested because the Companies’ specific grid modernization steps are “vital for the Commission to evaluate the potential for Section V.D to actually lead to benefits for ratepayers and the public interest.”¹² This misunderstands the Stipulation. There is no need at this stage to quantify the potential benefits to customers from a specific version of the Companies’ grid modernization plan (to be filed in another later proceeding) in this case. The specific benefits to customers for grid modernization is the very issue to be decided in the subsequent proceeding, and is beyond the scope of this case. Indeed, it is impossible to quantify how much customers would benefit from grid modernization programs until the Companies have put forth their proposal.

The terms of the Stipulation on this issue are simple. Section D.2 requires the Companies to file a Plan which meets a variety of criteria. The Stipulation, on its face, already describes what potential topics the Companies should consider for the Plan. There is nothing that obligates the Commission or any signatory party to support that Plan. Instead, the benefit provided by this provision of the Stipulation is the commitment to file the Plan,¹³ not any specific potential item which may or may not be ultimately included in that Plan. ELPC’s overbroad Requests that seek draft, privileged documents that reflect incomplete work by the Companies on the study or the Plan are not relevant to the Commission’s review of the Stipulation especially when, by the time the Commission issues its Order in this proceeding, those documents will change. The Commission will consider the merit of the Plan, and the specific costs and benefits therein, at a later date in another proceeding. ELPC will undoubtedly be a party to that proceeding and can weigh in on the merits of the Plan once work on the Plan has been finalized and the Plan is filed.

¹² Motion, p. 6.

¹³ Staff specifically advocated for the filing of the Plan in its testimony. *See* Testimony of Timothy Benedict.

Moreover, ELPC has already filed its testimony regarding the Third Supplemental Stipulation and did not represent that it could not file testimony with the Companies' drafts and notes. Other than stating, without describing how, that it wants to "use" the documents "in hearing,"¹⁴ ELPC has not demonstrated how draft, incomplete and privileged documents will assist it in rebutting the Companies' position that the Stipulation meets the three-part test. Draft, incomplete and privileged documents regarding the VOLT/VAR Study¹⁵ and Plan will not assist ELPC in demonstrating that the Stipulation, *as a package*, does not benefit ratepayers and the public interest. If ELPC has questions about what is actually included in the Stipulation, it is free to ask about these topics at hearing. However, the ultimate content of the Plan is not part of the Stipulation. Thus, there is no prejudice to ELPC if the Motion is denied because the Motion is nothing more than a fishing expedition to obtain a view of the Companies' incomplete work on the Plan in advance of a formal filing that will occur later this year.

IV. CONCLUSION

For the foregoing reasons, the Motion should be denied.

¹⁴ Motion at 5.

¹⁵ In addition, RPD 4 seeks documents pertaining to a VOLT/VAR Study undertaken as a result of a Commission Order in another case and that may or may not be utilized in a case that has yet to be filed. On its face, RPD 4 is outside the scope of this proceeding and the Attorney Examiner's December 9, 2015 Order.

Respectfully submitted,

/s/ Carrie M. Dunn

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
Email: burkj@firstenergycorp.com
Email: cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
Email: dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
Email: jlang@calfee.com
Email: talexander@calfee.com

ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND ELECTRIC
ILLUMINATING COMPANY, AND THE
TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 5th day of January, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ Carrie M. Dunn
One of the Attorneys for the Companies

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Application of Ohio Edison:
Company, The Cleveland :
Electric Illuminating :
Company, and The Toledo :
Edison Company for : Case No. 14-1297-EL-SSO
Authority to Provide for :
a Standard Service Offer :
Pursuant to R.C. 4928.143 :
in the Form of an Electric:
Security Plan. :

- - -

DEPOSITION

of Eileen M. Mikkelsen, taken before me, Karen Sue
Gibson, a Notary Public in and for the State of Ohio,
at the offices of FirstEnergy Corp., 76 South Main
Street, Akron, Ohio, on Tuesday, December 22, 2015,
at 9:30 a.m.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

- - -

1 (Record read.)

2 A. Yes.

3 Q. Now, when the filing is made -- let me
4 strike that.

5 Under the stipulation a filing for the
6 straight fixed variable rate design is made in
7 April -- is made by April 3, 2017; is that correct?

8 A. Yes.

9 Q. And when the filing is made and rates
10 will be determined, will all the information
11 associated with the 12-month period ended
12 September 30, 2018, be projected information as
13 opposed to actual?

14 A. Yes, I would expect that would be the
15 case with that number then trued up as the actual
16 data becomes available.

17 Q. Now, Ms. Mikkelsen, is it your
18 understanding that the customer impacts from the
19 straight fixed variable rate design proposal will be
20 presented to the Commission in 90 days from the date
21 the stipulation is filed; is that your understanding?

22 A. The companies when they make their filing
23 for the grid modernization business plan within 90
24 days of the third supplemental stipulation will
25 include a plan for the decoupling mechanism. What

1 that plan includes hasn't been determined at this
2 time.

3 Q. So the company has not determined that
4 when it files its plan for the straight fixed
5 variable, that it will present customer impacts from
6 the straight fixed variable proposal; is that
7 correct?

8 A. I don't think that determination has been
9 made yet.

10 Q. Is it also true, Ms. Mikkelsen, that the
11 company has not done a bill impact or analysis of its
12 straight fixed variable rate design proposal?

13 MR. KUTIK: Objection.

14 A. I think that analysis is currently
15 underway at the direction of counsel in anticipation
16 of litigation in order to fulfill the stipulation
17 requirement that a plan be filed within 30 days of
18 the filing of the stipulation.

19 MR. KUTIK: Could you hold on a second,
20 please?

21 MS. WILLIS: Sure.

22 MR. KUTIK: Off the record.

23 (Discussion off the record.)

24 (Record read.)

25 A. I meant 90 days, I apologize.

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/5/2016 4:38:18 PM

in

Case No(s). 14-1297-EL-SSO

Summary: Memorandum in Opposition to ELPC Motion to Compel electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Cleveland Illuminating Company and The Toledo Edison Company