

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the)
Political and Charitable Spending by Ohio)
Edison Company, The Cleveland Electric) Case No. 20-1502-EL-UNC
Illuminating Company, and the Toledo)
Edison Company.)

**REPLY TO FIRSTENERGY’S OPPOSITION TO OCC’S MOTION FOR AN *IN CAMERA* HEARING TO RESOLVE FIRSTENERGY’S CLAIM OF AN ALLEGED
PRIVILEGE AGAINST RESPONDING TO OCC’S DISCOVERY
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

On June 29, 2021, OCC filed a Motion to Compel the FirstEnergy Utilities to answer OCC’s Fifth and Seventh Sets of Discovery. OCC requested the PUCO to conduct an *in camera* review of documents for which the FirstEnergy Utilities are claiming a legal privilege against disclosure to OCC. The *in camera* review is needed to determine if FirstEnergy Utilities’ claim of privilege is really true. In their July 14, 2021 response, the FirstEnergy Utilities opposed OCC’s request for an *in camera* review. For justice to consumers and needed transparency, the Public Utilities Commission of Ohio (“PUCO”) should grant the OCC’s Motion.

The FirstEnergy Utilities argue that an *in camera* review is premature and should not occur until after the PUCO has ruled on the validity of the companies’ discovery objections. The PUCO should reject this argument because it would unreasonably delay the PUCO’s investigation into the FirstEnergy Utilities’ political and charitable spending.

FirstEnergy’s argument is without merit and is inconsistent with PUCO practice. Conducting an *in camera* review will assist the PUCO in resolving this discovery dispute that OCC has raised in its Motion to Compel. The *in camera* review of the documents described in

the privilege log should go forward. And the PUCO should finally put a lid on the FirstEnergy Utilities' tactics of delay.

The FirstEnergy Utilities' approach defeats the very purpose for an *in camera* review – that is, to give the Attorney Examiner an opportunity to review the actual documents to determine whether the privilege claim is valid. The Ohio Supreme Court has held that if a party asserts the attorney-client privilege regarding the contents of a file sought to be discovered, the trial court before ordering disclosure of the contents “shall” determine by *in camera* inspection which portions of the file, if any, are so privileged.¹

The PUCO's practice, following the Ohio Supreme Court's decision, is to conduct an *in camera* review of *all documents* claimed to be privileged. That enables the PUCO to determine, in response to a party's motion to compel and the assertion of privilege, if the privilege claim is valid.² The PUCO has used this approach on many occasions,³ including to allow the approach for FirstEnergy against OCC.⁴

The PUCO has described privilege logs and *in camera* reviews as assisting it in the discovery process and being consistent with the Federal Rules of Civil Procedure.⁵ This is the

¹ *Peyko v. Frederick*, (1986), 25 Ohio St.3d 164, 167.

² See, e.g. *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider contained in the Tariffs of Ohio Edison Co. et al.*, Case No. 15- 1739-EL-RDR, Entry (Dec. 19, 2016).

³ See, e.g., *Citizens Against Clear Cutting, et al., v Duke Energy Ohio, Inc.*, Case No. 17-2344-EL-CSS, Entry ¶18 (Aug. 24, 2018); *In the Matter of the Joint Application of the Timken Company and the Ohio Power Company for Approval of a Unique Arrangement for the Timken Company's Canton, Ohio Facilities*, Case No. 10-366-EL-AEC, Entry (Mar. 22, 2011); *In the Matter of Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer*, Case No. 14-941-EL-SSO, Entry (Oct. 21, 2014); *In the Matter of the Complaint of Cameron Creek Apartments v. Columbia Gas of Ohio, Inc.*, Case No. 08-1091-GA-CSS, Entry (June 8, 2009).

⁴ *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-RDR, Entry (Jan. 3, 2011); Pre-hearing Conference held, transcript filed Jan. 21, 2011.

⁵ See, e.g., *In the Matter of the Complaints of S.G. Goods, et al. v. The Cleveland Electric Illuminating Company, et al.*, Case No. 04-28-EL-CSS, Entry at 10 (Apr. 30, 2007).

only way the PUCO can judge the validity of a party's privilege claims. An *in camera* hearing will allow both OCC and the FirstEnergy Utilities to present their respective views on the documents responsive to OCC's discovery, but that the FirstEnergy Utilities seek to withhold from OCC.

Under the FirstEnergy Utilities' laborious proposal for delay, the PUCO would hold a prehearing conference to rule on discovery objections. Then the FirstEnergy Utilities would take additional time to file a privilege log. Then the PUCO would schedule another prehearing conference. And then the FirstEnergy Utilities would take additional time to produce the documents arising from the second prehearing conference. The FirstEnergy Utilities' proposal is nonsensical other than in a motivation for more delay. It is inconsistent with the PUCO's normal procedure.⁶

The PUCO's normal procedure is to require the parties to file a privilege log prior to the prehearing conference where the PUCO rules on the discovery responses. Under this normal approach, the PUCO rules on the discovery objections and the privilege claims in a single prehearing conference. This approach is fair and efficient. It is not burdensome to the FirstEnergy Utilities because they already identified that some documents may be privileged when they reviewed documents to prepare their discovery objections.

Based on the foregoing, the PUCO should grant OCC's Motion for an *in camera* hearing. To preserve OCC's discovery rights under R.C. 4903.082 and Ohio rules, the PUCO should resolve the FirstEnergy Utilities' privilege claims using the ordinary PUCO process proposed by OCC.

⁶ See footnote 3, *supra*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Compel Fifth and Seventh Sets was served on the persons stated below via electronic transmission, this 21st day of July 2021.

/s/ Maureen R. Willis
Maureen R. Willis
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Summary: Reply Reply to FirstEnergy's Opposition to OCC's Motion for an In Camera Hearing to Resolve FirstEnergy's Claim of an Alleged Privilege Against Responding to OCC's Discovery by Office of the Ohio Consumers' Counsel electronically filed by Ms. Patricia J Mallarnee on behalf of Willis, Maureen Ms.