THE PUBLIC UTILITIES COMMISSION OF OHIO

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 October 12, 2021

{¶ 1} In this Entry, the attorney examiner finds that the internal investigation report is privileged after conducting an *in camera* review.

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or Companies) are electric distribution utilities as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with R.C. 4928.143.

{¶ 4} On August 25, 2010, the Commission issued an Opinion and Order approving FirstEnergy's second electric security plan. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 10-388-EL-SSO (*ESP II Case*), Opinion and Order (Aug. 25, 2010). In that Order, the Commission approved a joint stipulation, as modified, authorizing FirstEnergy to establish a delivery capital recovery rider (Rider DCR) effective January 1, 2012. Additionally, under the terms of the stipulation, FirstEnergy agreed to submit to an annual audit review process of Rider DCR.

Subsequently, on July 18, 2012, in Case No. 12-1230-EL-SSO, the Commission issued an Order approving a joint stipulation extending, with modification, the terms of the joint stipulation approved by the Commission in the *ESP II Case*. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan,* Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012). Thereafter, by Order issued on March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved an extension, with modification, of FirstEnergy's Rider DCR. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016).

{¶ 5} On November 4, 2020, the Commission issued an Entry directing Staff to issue a request for proposal for the audit services necessary to assist with the compliance audit of the Companies. Prospective bidders were directed by the Commission to submit proposals to Staff by December 2, 2020.

{¶ 6} By Entry issued December 16, 2020, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) from the submitted proposals to complete the required audit services.

{¶ 7} According to the timeline ordered by the Commission, Blue Ridge was required to submit a draft audit report to Staff by May 5, 2021, and file a final audit report with the Commission by May 17, 2021.

{¶ 8} By Entry issued March 10, 2021, the Commission granted a request from Staff and directed Blue Ridge to expand the scope of the audit to include payments made to a number of vendors disclosed by FirstEnergy Corp. in its annual 10-K filing with the Securities and Exchange Commission.

{¶ 9} After two extensions of the deadline were granted, Blue Ridge filed the final audit report with the Commission on August 3, 2021.

{¶ 10} On June 25, 2021, Ohio Consumers' Counsel (OCC) filed a motion for subpoena duces tecum for FirstEnergy Corp., FirstEnergy Service Company, and FirstEnergy Foundation. Those subpoenas were issued to the respective companies on June 25, 2021. Among other documents, the subpoenas seek the production of an internal investigation report by a committee of independent members of the FirstEnergy Corp. Board of Directors (Investigation Report).

{¶ 11} On July 19, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a motion to quash the subpoenas duces tecum. They argue that the subpoenas seek information outside the scope of the proceedings and privileged information. They also note that OCC has not tailored its requests in a way that would limit the burden of nonparty discovery. Finally, they argue that the only relevant, non-privileged information was already provided to OCC, including the consulting agreement and its amendments, as well as the vendor payments and associated details. The attorney examiner notes that a similar motion was filed in *In re 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.

{¶ 12} On August 3, 2021, OCC filed a memorandum contra the motion to quash the subpoenas. OCC argues that its document requests are reasonably calculated to lead to the discovery of admissible evidence and that FirstEnergy already agreed to make its affiliates' records available to the Commission and OCC in its merger commitment. OCC also argues that a privilege log has not been provided and that the privilege was waived for certain documents when the documents were discussed publicly. OCC asserts that although certain documents that were requested in the subpoenas were already produced by the Companies, those documents may be different versions of the documents in the possession of FirstEnergy Corp. and FirstEnergy Service Company.

{¶ 13} On August 10, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a reply in support of their motion to quash the subpoenas. They argue that OCC failed to address in its memorandum contra the significant burden imposed by the subpoenas. They also reaffirm their arguments as to privilege and that the subpoenas are moot as to the documents already produced.

{¶ 14} On August 26, 2021, OCC filed a motion to compel the Companies to answer discovery requests as to its second and third sets of discovery.

{¶ 15} On September 14, 2021, a prehearing conference was held. During that conference, deadlines for the comment period and hearing dates were discussed to determine mutually agreeable dates. Additionally, FirstEnergy Corp. and FirstEnergy Service Company were ordered to produce to the attorney examiners a privilege log and a copy of the Investigation Report for an *in camera* review.

{¶ 16} After conducting the *in camera* review of the Investigation Report, the attorney examiner finds that the Investigation Report is (1) a communication; (2) made between privileged persons, the committee of independent directors of FirstEnergy Corp. and counsel; (3) in confidence; and (4) for the purpose of providing legal assistance to the client. Moreover, the Investigation Report is clearly prepared in reasonable anticipation of litigation. Therefore, the Investigation Report is protected from disclosure by both attorney-client privilege and the attorney-work-product doctrine. To the extent that the Investigation Report contains attorney work product, the attorney examiner finds that OCC has not demonstrated a need for the materials; OCC has not demonstrated that the information contained in the Investigation Report is relevant to this proceeding and is otherwise unavailable. Accordingly, the motion to quash, as to the Investigation Report, should be granted.

{¶ 17} It is, therefore,

{¶ 18} ORDERED, That the motion to quash, as to the Investigation Report be granted as set forth in Paragraph 16. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

GAP/mef

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Case No(s). 20-1629-EL-RDR

Summary: Attorney Examiner Entry granting the motion to quash as set forth in Paragraph 16 electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio