BEFORE
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 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**

FIRSTENERGY CORP. AND FIRSTENERGY SERVICE COMPANY'S MEMORANDUM CONTRA INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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INTRODUCTION

The Attorney Examiners should deny the Request for Certification (the "Request") filed by the Office of the Ohio Consumers' Counsel ("OCC").[1] OCC's Request seeks certification of an interlocutory appeal from the Attorney Examiners' ruling on October 12, 2021.[2] In relevant part, the ruling grants FirstEnergy Corp. and FirstEnergy Service Company's (collectively "FirstEnergy") Motion to Quash a June 25, 2021 subpoena served by OCC seeking the internal investigation report provided to FirstEnergy's Independent Committee of the Board of Directors concerning the Company's decision to terminate certain of its executives ("Investigation Report").[3] The Attorney Examiners' ruling followed an *in camera* review of the Investigation Report.[4]

As more fully explained herein, OCC's interlocutory appeal is misguided. The Attorney Examiners' ruling does not satisfy the test for certification under O.A.C. 4901-1-15(B), given broad discretion is granted to the Attorney Examiners with respect to discovery. Consistent with the Attorney Examiners' findings, the Investigation Report is a privileged communication containing the legal advice of outside counsel and made in anticipation of litigation for which OCC has no need. This is particularly true where FirstEnergy has already agreed to produce to OCC more than 40,000 documents previously produced to the DOJ and/or the SEC which provide the underlying facts[5] for FirstEnergy's SEC disclosures and the Deferred Prosecution Agreement. It is unreasonable for OCC to seek the same information in a protected format.

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[1] Request Interlocutory Appeal, Request for Certification to the PUCO Commissioners, Application for Review and Memorandum in Support by Office of the Ohio Consumers' Counsel, Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR (10/18/2021). Citations to the Request are identified as "Request at __."

[2] Entry, Case No. 17-974-EL-UNC (Oct. 12, 2021) ("Entry").

[3] Entry at ¶ 14.

[4] Entry at ¶ 19.

[5] Request at 14-15.

OCC's Application for Review should be denied for these same reasons and also because the Investigation Report is not relevant to the PUCO proceedings involving Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

At bottom, OCC impermissibly seeks to invade the privileged internal investigation of FirstEnergy's Board of Directors. Accordingly, FirstEnergy respectfully requests that OCC's Request to certify its interlocutory appeal be denied and OCC's Application for Review be rejected.

ARGUMENT

I. OCC's Request For Certification Fails to Meet the Requirements of O.A.C. 4901-1-15(B) and Therefore Should Be Denied.

Pursuant to Rule 4901-1-15(B), a party may take an interlocutory appeal "from any ruling issued under [R]ule 4901-1-14 of the Administrative Code." But prior to consideration by the Commission, the party's request must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." Rule 4901-1-15(B), O.A.C. Certification of a request for an interlocutory appeal requires an applicant to satisfy both of the following requirements:

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
>
> [1] 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
>
> [2] an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

O.A.C. 4901-1-15(B).[6] Requests for certification that fail to meet ***both*** of these requirements are summarily denied, as OCC's Request should be too.[7]

A. OCC's Request Neither Presents a New or Novel Question of Law Nor Identifies a Departure From Past Commission Precedent.

After conducting an *in camera* review of the Investigation Report, the Attorney Examiners determined that (i) the Report was protected by the attorney-client and work product privileges and (ii) OCC had not demonstrated a need for these materials as relevant and otherwise unavailable such that it is entitled to disclosure.[8] Such a decision is not subject to review under Rule 4901-1-15(B)(1).

First, no new or novel question of law is presented by the Attorney Examiners' Entry. As settled Commission precedent illustrates, run-of-the-mill procedural decisions, including those concerning privilege issues, hardly form the basis for certifying an interlocutory appeal. Resolving privilege issues are within the Attorney Examiners' ordinary exercise of discretion under the Commission's procedural rules. And certification requests, such as OCC's here, are regularly denied because "implementing the Commission's procedural rules delineated in Chapter 4901-1, O.A.C., are routine matters with which the Commission and its attorney examiners have had extensive experience in Commission proceedings." *See In re Vectren Energy Delivery of Ohio,*

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[6] *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at ¶ 8 (Oct. 21, 2008) ("In order to certify an interlocutory appeal to the Commission, both requirements need to be met.").

[7] *See, e.g.*, *In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018); *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012).

[8] Entry at ¶ 20.

Inc., Case No. 05-1444-GA-UNC, Entry, at 6 (March 7, 2007) (denying OCC's certification of an interlocutory appeal); *In Re Time Warner Commc'ns of Ohio, L.P.*, No. 68837, 1995 WL 311779 (F.E.D.A.P.J.P. Apr. 26, 1995) (denying application for certification as the attorney examiners' decision granting, in part, Time Warner's motion for a protective order concerned the "appropriate scope of discovery" and squarely applied Rule 4901-1-16(B) without presenting new or novel issues of law). That OCC disagrees with the Attorney Examiners' application of discovery rules does not render the Attorney Examiners' decision ripe for review.

More to the point, decisions concerning the discovery of privileged material previously submitted for *in camera* review do not present the questions of novelty needed to certify an interlocutory appeal. *See In the Matter of the Complaint of Toledo Premium Yogurt, Inc., DBA Freshens Yogurt, Complainant*, No. 91-1528-EL-CSS, 1993 WL 13744538, at *2 (F.E.D.A.P.J.P. Sept. 22, 1993). In *Freshens Yogurt*, the Commission denied Freshens' application for certification related to the attorney examiners' decision blocking the discovery of documents deemed to be attorney-client communications and attorney work-product. *Id.* at *2. In reaching its decision, the Commission noted that Freshens' motion "fail[ed] to identify any new or novel questions of law" even after addressing the potential waiver of privilege based on a previous inadvertent disclosure of the same documents. *Id.* at *1. OCC raises no argument as to why this appeal should be treated differently.

Second, OCC fails to satisfy its burden that the Attorney Examiners' ruling is a departure from precedent. While OCC does not challenge that the Investigation Report is privileged, it argues the Entry represents a departure from "precedent that privileges shielding communications from discovery can be waived."[9] Not so. At the outset, a departure from precedent is a departure

[9] Request at 4.

from *governing precedent.* Waiver of privilege is not the norm. The Attorney Examiners' October 12th ruling follows centuries of precedent protecting communications between an attorney and its client. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 2009-Ohio-1767, ¶ 21, 121 Ohio St. 3d 537, 541, 905 N.E.2d 1221, 1226 ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications.") (quotations and citations omitted). The purpose of the attorney-client privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Id.* (quotation omitted). "In modern law, the privilege is founded on the premise that confidences shared in the attorney-client relationship are to remain confidential." *Id.* (quotation omitted). Exposure of information protected by attorney-client privilege can be catastrophic because the exposure "destroys the confidentiality of possibly highly personal or sensitive information that must be presumed to be unreachable." *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶ 25, 151 Ohio St. 3d 356, 363, 89 N.E.3d 536, 543.

In fact, OCC's argument calling for the disclosure of a privileged internal investigation report is in direct conflict with binding Ohio Supreme Court precedent. In *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority*, the Ohio Supreme Court found that the entirety of an investigation report prepared by an attorney for purposes of providing legal advice to its client was protected from disclosure under the attorney-client privilege. 2009-Ohio-1767, at ¶ 23-34.

Despite this binding precedent, OCC argues the Attorney Examiners' ruling is an unreasonable departure from past precedent.[10] To make its point, OCC states FirstEnergy Corp.

[10] Request at 7, 9-12 (citing *In re Dominion Purchased Gas Adjustment Case*, 42 Ohio St.2d 403, 431 (1975) and *Westmoreland v. CBS*, Inc., 97 F.R.D. 703, 706 (S.D.N.Y. 1983)).

waived any privilege over the materials at issue by "disclos[ing] the results of the internal investigation report."[11] But "[t]he attorney-client privilege does not prevent disclosure of the underlying fact[s]." *Ingram v. Adena Health Sys.*, 2002-Ohio-4878, ¶ 14, 149 Ohio App. 3d 447, 451, 777 N.E.2d 901, 904; *Pales v. Fedor*, 2018-Ohio-2056, ¶ 23, 113 N.E.3d 1019, 1029. And when a party discloses information "not covered by the attorney-client privilege, there is no waiver of that privilege." *Sutton v. Stevens Painton Corp*., 2011-Ohio-841, ¶ 13, 193 Ohio App. 3d 68, 74, 951 N.E.2d 91, 95.

Here, FirstEnergy's disclosure of non-privileged, factual information does not waive privilege with respect to the Investigation Report. Releasing the findings or results of an internal investigation, as FirstEnergy Corp. did with its Form 10-K, does not waive attorney-client privilege over the evidence, communications, or internal materials related to investigation, nor does it waive the protection provided by the work product doctrine.[12]

Moreover, the caselaw to which OCC cites is either off-base or misrepresented. *Westmoreland v. CBS* is a case about "self-evaluation" privilege that is inapplicable here and *In re Dominion Purchased Gas Adjustment Case* does not stand for the proposition that the Investigation Report should be disclosed. Instead, *Dominion* acknowledges that "the U.S. Supreme Court has held that internal investigations for a legal purpose and conducted in anticipation of litigation, generally fall within the ambit of attorney-client privilege." 2006 WL 2380447, at *2. And, try as OCC might to invoke *Dominion* to assert that "any legal advice in the internal report can be

[11] Request at 9-12.

[12] *See In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983) (finding that a press release that "merely released the findings of the report" compiled by a special committee during an internal investigation did not waive attorney-client privilege or work product protections over the report itself); *see also In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) ("And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party.").

redacted, and the redacted report revealing the underlying facts can be produced,"[13] the Attorney Examiners' *in camera* review found not only that the reports contain content protected by the attorney client privilege, but also that the documents were "clearly prepared in reasonable anticipation of litigation," providing additional protection under the work product doctrine.[14]

Third, OCC's desperate attempt to seek privileged materials through the crime-fraud exception should be disregarded. OCC argues, for the first time, the Attorney Examiners failed to consider the crime-fraud exception because FirstEnergy "is using the claim of attorney-client privilege as a shield to conceal wrongdoing . . . even from its own utility subsidiaries."[15] Apart from basing its argument on a falsehood, OCC misconstrues the crime-fraud exception. The crime-fraud exception to privilege applies when "the advice sought by the client and conveyed by the attorney relates to some *future* unlawful or fraudulent transaction." *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 2010-Ohio-4469, ¶ 28 (emphasis added). The Investigation Report provides legal advice concerning *past* actions, alleged wrongdoing related to H.B. 6. OCC's own case law notes that advice of this nature is distinguishable from advice provided in furtherance of a crime. *In re Grand Jury Subpoena*, 642 F. App'x 223, 226 (4th Cir. 2016) (noting the difference between "legal advice given on how one may conform one's actions to the requirements of the law" and "contemplated or actual illegal prospective or on-going action"). Any insinuation that FirstEnergy's attorneys are currently assisting FirstEnergy in participating in illegal action, or that the Attorney Examiners' *in camera* review implicitly condoned this, is a bad faith attempt to access information OCC is not entitled to as a matter of law.

[13] Request at 15.

[14] Entry at ¶ 20.

[15] Request at 14.

Accordingly, the Attorney Examiner's decision to deny OCC's motion to compel the Investigation Report, after using its broad discovery powers to conduct an *in camera* review, neither presents new or novel issues of law nor amounts to a departure from precedent. OCC's Request for certification should be denied.

B. OCC Fails to Show It Is Unduly Prejudiced by the Attorney Examiners' October 12 Ruling.

With respect to prejudice, OCC's arguments falls flat. Protecting the disclosure of privileged information (which is irrelevant to this proceeding in any event)[16] does not present any undue prejudice nor hamper OCC's ability to obtain relevant information in this proceeding. Indeed, OCC has already received document productions concerning former PUCO Chairman Sam Randazzo.

OCC's cries for an "immediate determination" are further undermined by its agreement with FirstEnergy to receive documents produced to the SEC and/or DOJ—documents that contain the very facts OCC seeks from the Investigation Report. The agreement, which FirstEnergy and OCC reached prior to the filing of this interlocutory appeal, will provide OCC with documents produced by FirstEnergy related to litigation or regulatory proceedings arising out of the HB 6 bribery scheme that are provided to the parties in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio). To the extent OCC needs documents it believes are related to its claims that "[c]onsumers may have funded the illegal activities alleged in the criminal complaint,"[17] OCC will receive thousands of non-privileged documents in the coming weeks. It is therefore irrational for OCC to suggest that it is unduly prejudiced because it does not have access to information underlying FirstEnergy's Investigation Report.

[16] *See infra*, at 9.

[17] Request at 4-5.

II. OCC's Application for Review Should Be Rejected.

OCC's Application for Review should be rejected for all the reasons stated above, which FirstEnergy fully incorporates herein. Despite what OCC would lead this Commission to believe, the Attorney Examiners properly exercised their discretion to deny OCC's motion to compel.[18] First, privileged materials are routinely protected by Ohio law and in PUCO proceedings. *See supra*, at 3-8. Second, it is the role of the Attorney Examiners to conduct discovery and decide questions of privilege. *See In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry, at 6 (March 7, 2007). Not only did the Attorney Examiners consider the parties arguments on brief and at oral argument, they went beyond what is traditionally called for in privilege determinations and conducted an *in camera* review. Following that review, the Attorney Examiners clearly set forth the reasoning for why the materials were protected from disclosure under the attorney-client and work product privileges.[19]

In addition to the fact that the Attorney Examiners' ruling is in line with centuries of precedent protecting the attorney-client privilege, OCC's remaining arguments fail. Contrary to OCC's assertions, the Investigation Report is relevant to neither the Corporate Separation nor the Rider DCR proceedings and the Commission does not have general jurisdiction to regulate FirstEnergy Corp.

A. The Investigation Report Is Not Relevant to the Corporate Separation or Rider DCR Proceedings.

OCC's request for the Investigation Report seeks irrelevant information. While OCC makes the bald assertion that the "internal investigation report covers the same subject matter as

[18] Request at 6-8, 11, 13-15.

[19] Entry at ¶ 20.

this proceeding" it offers no specific facts or argument to support is assertion beyond merely stating that "without question, corporate separation violations have occurred"[20] and claiming the Investigation Report "is highly relevant to the PUCO's H.B. 6-related investigations and would likely lead to admissible evidence in these proceedings."[21] Also, OCC, again, conveniently omits that FirstEnergy has already agreed to provide it with the documents related to litigation or regulatory proceedings arising out of the HB 6 bribery scheme that are provided to the parties in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio). *See supra*, at 8. The Commission should reject OCC's Request as irrelevant and duplicative.

B. FirstEnergy Is Beyond the Commission's Jurisdiction and OCC's Authority.

The Commission does not have expansive jurisdiction to regulate or supervise FirstEnergy as OCC claims.[22] OCC points to R.C. 4905.06's language which states that the Commission "has general supervision over all public utilities within its jurisdiction" in support of its argument that the Commission has jurisdiction over FirstEnergy, but OCC ignores the fact that this authority is limited to utilities as defined by 4905.05.

The Commission does not have authority to examine FirstEnergy's documents under the Public Utilities Holding Company Act of 1935 ("PUHCA"). Under the PUHCA, the Commission has authority to examine the records and accounts of only those holding companies and their affiliates that are exempt from federal regulation if those records and accounts relate to a regulated public utility's cost of service.[23] The PUHCA was repealed by the Energy Policy Act of 2005,

[20] Request at 4.

[21] Request at 2.

[22] *See* R.C. 4905.05.

[23] R.C. 4905.05.

effective February 2006, and, thus, no companies currently are exempt under sections 3(a)(1) or (2) thereof.[24] Prior to the repeal of the PUHCA, sections 3(a)(1) and (2) of the PUHCA permitted the Securities and Exchange Commission ("SEC") to exempt holding companies and subsidiaries from the provisions of the PUHCA if the holding company and its subsidiaries were predominantly intrastate in character.[25] While the PUHCA was in effect, FirstEnergy Corp. became a non-exempt registered holding company operating across multiple states. Thus, its records and accounts have not been subject to the Commission's jurisdiction limited by R.C. 4905.05 for many years. When the PUHCA was still in effect, the Commission stated that it "is well aware of the limitations of its jurisdiction imposed by Section 4905.05, Revised Code, and it does not intend to manage the affairs of holding companies."[26]

The Commission's limited jurisdiction is to regulate the business of supplying or transmitting services—neither of which FirstEnergy Corp. or FirstEnergy Service Company does.[27] The Supreme Court of Ohio has made clear that the Commission's jurisdiction is restricted to overseeing a ***public utility*** only when it "act[s] as a ***public utility***."[28] Here, OCC ignores those well-settled limitations and incorrectly asserts that the Commission has jurisdiction to investigate their compliance with all laws, so that the commission would have authority on par with the SEC or Department of Justice.[29] Because declining to exercise jurisdiction over FirstEnergy in the

[24] *See* Pub. L. No. 109-58, 119 Stat. 594, 974, Sec. 1263 (2005).

[25] *See* 15 U.S.C. §§ 79c(a)(1), (2).

[26] *In re Financial Condition of Ohio's Regulated Public Utilities*, Case No. 02-2627-AU-COI, Entry at p. 1 (Oct. 10, 2002).

[27] *In re Complaint of Direct Energy Bus., L.L.C. v. Duke Energy Ohio, Inc.*, 161 Ohio St. 3d 271, 273 (2020) ("And if Duke Energy did not act as a public utility under the facts of this case, then the PUCO has no jurisdiction to hold Duke Energy liable for failing to furnish adequate service.").

[28] *Duke Energy Ohio, Inc.*, 161 Ohio St. 3d at 276 (emphasis added).

[29] Request at 8-9.

manner OCC demands is not a departure from precedent, and is consistent with Ohio law, OCC's application for certification should be denied.

CONCLUSION

OCC's Request and Application for Review should be denied for the reasons provided above.

Dated: October 25, 2021

Respectfully submitted,

/s/ Corey Lee

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on October 25, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey Lee
Attorney for FirstEnergy Corp. and FirstEnergy Service Company

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Request Interlocutory Appeal, Request for Certification to the PUCO Commissioners, Application for Review electronically filed by Mr. Corey Lee on behalf of FirstEnergy Corp. and FirstEnergy Service Company