

**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) Case No. 17-974-EL-UNC
Edison Company's Compliance with)
R.C. 4928.17 and Ohio Adm. Code)
Chapter 4901:1-37)**

**In the Matter of the 2020 Review of the)
Delivery Capital Recovery Rider of Ohio)
Edison Company, The Cleveland Electric) Case No. 20-1629-EL-RDR
Illuminating Company, and The Toledo)
Edison Company.)
)**

**FIRSTENERGY CORP. AND FIRSTENERGY SERVICE COMPANY'S
MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S
MOTION TO ACCEPT STATEMENT OF ADDITIONAL AUTHORITY**

I. Introduction

FirstEnergy Corp. and FirstEnergy Service Company (collectively, "FirstEnergy") respectfully request that the Office of the Ohio Consumers' Counsel's ("OCC") Motion to Accept Statement of Additional Authority Regarding OCC's October 18, 2021 Interlocutory Appeal be denied. OCC's pending October 18 Interlocutory Appeal challenges the Attorney Examiners' ruling that an investigation report provided to FirstEnergy Corp.'s Board of Directors is protected from disclosure by the attorney-client privilege and work product doctrines.¹ The Attorney Examiners' finding was correct, as explained more fully in FirstEnergy's Memorandum Contra OCC's Interlocutory Appeal.² Now, OCC seeks to supplement its Interlocutory Appeal with a

¹ Case No. 17-974-EL-UNC, Entry, at ¶ 20 (Oct. 12, 2021); Case No. 20-1629-EL-UNC, Entry, at ¶ 16 (Oct. 12, 2021).

² Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, Memorandum Contra the Office of the Ohio Consumers' Counsel's Request for Interlocutory Appeal (Oct. 25, 2021).

non-binding, proposed order by a Commissioner for the Maryland Public Service Commission (“Maryland Proposed Order”), which was issued in a proceeding involving an entirely separate FirstEnergy entity, Potomac Edison. For at least three reasons, OCC’s Motion should be denied. **First**, the Maryland Proposed Order is not final because it is subject to a pending appeal. **Second**, the Maryland Proposed Order is in direct conflict with the Attorney Examiners’ October 12 ruling, which followed an *in camera* review. **Third**, rulings from the Maryland Public Service Commission are not binding on the Public Utilities Commission of Ohio nor Ohio courts.

II. Argument

A. The Maryland Proposed Order Is Not Final And Is Subject To A Pending Appeal.

The Maryland Public Service Commission delegated to a single Commissioner the task of overseeing a discovery dispute between Potomac Edison and intervenor-party the Office of People’s Counsel.³ Following oral argument, the Maryland Commissioner issued a proposed order, which OCC now claims supports its request for the production of a privileged internal investigation report—a request the Attorney Examiners have already denied. *See infra*, at 3. At this time, however, Potomac Edison is not compelled to produce any FirstEnergy Corp. internal investigation report, nor has it done so. The Maryland Proposed Order is not final, as even OCC recognizes, given it is subject to appeal.⁴ On November 29, 2021, Potomac Edison filed an appeal as to the ruling regarding FirstEnergy Corp.’s internal investigation, asserting, among many other

³ Case No. 9667, Order No. 89970 (Md. Public Service Commission Oct. 22, 2021), available at <https://www.psc.state.md.us/search-results/?q=9667&x.x=22&x.y=7&search=all&search=case>.

⁴ Case No. 9667, Order No. 89990, at 11 (Md. Public Service Commission Nov. 18, 2021), available at <https://www.psc.state.md.us/search-results/?q=9667&x.x=27&x.y=14&search=all&search=case>.

arguments, that the proposed order denies FirstEnergy Corp. its due process rights to properly challenge the production of any of *its* privileged materials.⁵

As it stands, the Maryland Proposed Order is not supplemental authority on which OCC can rely to further its request for privileged materials.⁶ For this reason alone, OCC's Motion should be denied.

B. The Maryland Proposed Order Is In Direct Conflict With the Attorney Examiners' Correct Ruling.

In this proceeding, the Attorney Examiners ordered FirstEnergy Corp. to produce an investigation report for *in camera* inspection before the Attorney Examiners ruled upon any privilege issues. Following the *in camera* review, and considering FirstEnergy's and OCC's briefing on the privilege issues, the Attorney Examiners found that the investigation report was "protected from disclosure by both attorney-client privilege and the attorney-work-product doctrine."⁷ For the reasons explained in FirstEnergy's Memorandum Contra OCC's Interlocutory Appeal, this decision was correct.⁸ Unlike here, the Maryland Commissioner did not conduct an *in camera* review. Rather, the Maryland Proposed Order was based on a "mistaken conclusion" resulting from confusion created by the Office of People's Counsel's "newly minted argument" raised for the first time at oral argument.⁹

⁵ Case No. 9667, The Potomac Edison Company – Notice of Appeal and Memorandum in Support of its Appeal, at 31 (Md. Public Service Commission Nov. 29, 2021) ("Potomac Edison Appeal"), available at <https://www.psc.state.md.us/search-results/?q=9667&x.x=22&x.y=7&search=all&search=case>.

⁶ *In Re Glob. Naps Inc.*, No. 02-876-TP-ARB, 2002 WL 32094686 (PUCO Sept. 5, 2002) ("[T]he FCC WCB's Virginia Arbitration Order is neither a final decision nor a legally binding precedent in this case.").

⁷ Case No. 17-974-EL-UNC, Entry, at ¶ 20 (Oct. 12, 2021); Case No. 20-1629-EL-UNC, Entry, at ¶ 16 (Oct. 12, 2021).

⁸ Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, Memorandum Contra the Office of the Ohio Consumers' Counsel's Request for Interlocutory Appeal (Oct. 25, 2021).

⁹ Potomac Edison Appeal, at 18-25.

C. Rulings From The Maryland Public Service Commission Are Not Binding.

In any event, rulings and orders from the Maryland Public Service Commission are not binding on the PUCO.¹⁰ In fact, the Maryland Proposed Order is in direct conflict with binding Ohio Supreme Court precedent protecting privileged investigation reports from disclosure.¹¹

III. Conclusion

For the reasons provided above, FirstEnergy respectfully requests that OCC's Motion be denied.

Dated: December 6, 2021

Respectfully submitted,

/s/ Corey Lee

Corey Lee (0099866)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
calee@jonesday.com

*On behalf of FirstEnergy Corp. and FirstEnergy
Service Company*

¹⁰ *Dennewitz v. East Ohio Gas Co.*, No. 07-517-GA-CSS, 2007 WL 3119493, at *4 (PUCO Oct. 24, 2007) (finding a New Jersey case “not binding precedent in Ohio and . . . inconsistent with the Commission’s rulings in similar situations”).

¹¹ Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, Memorandum Contra the Office of the Ohio Consumers’ Counsel’s Request for Interlocutory Appeal, at 4-5 (Oct. 25, 2021) (citing *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 2009-Ohio-1767, 121 Ohio St. 3d 537, 905 N.E.2d 1221).

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 December 6, 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*

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

12/6/2021 4:28:07 PM

in

Case No(s). 17-0974-EL-UNC, 20-1629-EL-RDR

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's
Motion to Accept Statement of Additional Authority electronically filed by Mr. Corey
Lee on behalf of FirstEnergy Corp. and FirstEnergy Service Company