

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

ENTRY

Entered in the Journal on June 22, 2022

I. SUMMARY

{¶ 1} The attorney examiner finds an in-camera review of certain documents subject to the motion for protective order should be conducted and directs FirstEnergy Corp. to arrange for the delivery of said documents to the attorney examiners within seven days of this Entry.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the 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} To assist the Commission with the review of FirstEnergy's compliance with the corporate separation rules set forth in Ohio Adm.Code Chapter 4901:1-37, the Commission directed Staff, on May 17, 2017, to issue a request for proposal (RFP) for audit services. On July 5, 2017, the Commission issued an Entry selecting Sage Management Consultants, LLC (Sage) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a draft audit report was to be submitted by February 28, 2018, with the final audit report due on March 14, 2018. The

deadline for the draft audit report and final audit report was extended to April 30, 2018, and May 14, 2018, respectively. Sage filed the final audit report on May 14, 2018.

{¶ 4} Comments regarding the Sage audit report were timely filed by Interstate Gas Supply, Inc. (IGS), Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council (NOPEC), the Companies, and Retail Energy Supply Association (RESA). Reply comments were filed by NOPEC, FirstEnergy Solutions Corp. (FES), OCC, and the Companies. Joint reply comments were filed by RESA and IGS.

{¶ 5} In their comments, the Companies noted that, on March 20, 2018, FES filed a voluntary petition in the United States Bankruptcy Court for relief pursuant to Chapter 11 of Title 11 of the United States Code. Further proceedings in this case were deferred until the resolution of FES' bankruptcy proceeding.

{¶ 6} On March 20, 2020, the Companies filed a notice in this proceeding. The Companies represented that FES had emerged from bankruptcy as Energy Harbor Corp. (Energy Harbor) and that Energy Harbor is no longer an affiliate of the Companies' parent, FirstEnergy Corp.

{¶ 7} On April 29, 2020, the attorney examiner established a supplemental comment period regarding the audit report filed in this proceeding. Supplemental comments were timely filed by Vistra Energy Corp., NOPEC, IGS, OCC, RESA, and the Companies. Supplemental reply comments were timely filed by OCC, NOPEC, IGS, RESA, and the Companies.

{¶ 8} On September 8, 2020, the OCC filed motions in this proceeding for an investigation and management audit of FirstEnergy, its corporate governance, and its activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from consumers or violate any utility regulatory laws, rules, or orders in its activities regarding Am. Sub. H.B. 6. The Companies filed a

memorandum contra OCC's motions on September 23, 2020. OCC filed a reply on September 30, 2020.

{¶ 9} On September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC.

{¶ 10} On October 29, 2020, FirstEnergy Corp., the corporate parent of the Companies, filed a Form 8-K with the United States Securities and Exchange Commission reporting the termination of certain officers and appointment of new interim chief executive officers. The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

{¶ 11} In light of these disclosures, on November 4, 2020, the Commission issued an Entry directing, in the instant case, Staff to issue an RFP to acquire audit services to assist the Commission with the review of FirstEnergy's compliance with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans for the period between November 1, 2016, and October 31, 2020.

{¶ 12} On January 27, 2021, the Commission selected Daymark Energy Advisors, Inc. (Daymark) and directed the Companies to enter into a contract with Daymark to perform the audit services described in the RFP and its proposal. In the Entry, the Commission also set the deadline for the completion of the audit report as June 21, 2021. Motions to extend the filing date of the audit report were subsequently filed and granted.

{¶ 13} On September 13, 2021, Daymark filed the final audit report with the Commission.

{¶ 14} By Entry issued April 7, 2022, the hearing in this case is currently scheduled to commence on August 22, 2022.

{¶ 15} In response to OCC's September 24, 2021 subpoena, FirstEnergy Corp. and OCC negotiated a protective agreement to facilitate the exchange of certain proprietary or confidential information during discovery, including all productions to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation*,¹ which include all documents produced by FirstEnergy Corp. to the United States District Attorney for the Southern District of Ohio (DOJ) and the Securities and Exchange Commission (SEC) as part of ongoing federal investigations. Under the negotiated protective agreement, OCC is required to notify FirstEnergy Corp. of any intent to disclose publicly any documents with a confidential designation, after which FirstEnergy Corp. is provided an opportunity to seek a motion for protective order.

{¶ 16} On March 3, 2022, OCC notified FirstEnergy Corp. that it seeks to publicly disclose certain documents from the productions noted above. Specifically, OCC indicated it intends to release the following documents into the public domain: documents containing Bates numbers 0298780-0298799 and documents containing Bates numbers 0002211-0002213, 0004317-004319, 0004324-0004329, 0005187-0005188, 0005204-0005255, 0005423-0005431, 0005508-0005509, 0005850-0005853,² 0006441-0006468, 0006480-0006481, 0006851-0006893, 0007267-0007268, 0007414-0007453, 0007481-0007487, 0009798-0009819 and 0010256.

¹ Case No. 2:20-cv-3785 (S.D. Ohio).

² While OCC's notice indicated it would be releasing documents with Bates numbers 0005850-0005253, the attorney examiner believes this was an error and the correct reference is 0005850-0005853.

{¶ 17} On March 10, 2022, FirstEnergy Corp. filed a motion for protective order seeking to protect from public disclosure certain documents produced in discovery that (1) contain commercially sensitive information and/or (2) are non-public documents produced to the DOJ and SEC as part of ongoing federal investigations. Specifically, FirstEnergy Corp. moves to protect the following documents: Documents with Bates numbers 0002211-0002213, 0004318, 0004320-0004330, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005433, 0005508-0005510, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006469, 0006480-0006483, 0006863-0006888, 0006890-0006893, 0007266-0007272, 0007414-0007453, 0010256, 0298773-0298782, 0298784-0298787, 0298790-0298797.

{¶ 18} OCC filed a memorandum contra FirstEnergy Corp.'s motion for protective order on March 25, 2022.

{¶ 19} FirstEnergy Corp. filed a reply in support of its motion for protective order on April 1, 2022.

B. Summary of the Arguments

{¶ 20} As to the first group of documents, FirstEnergy Corp. asserts that the protective agreement specifically shields from disclosure any information that is "commercially sensitive" or "proprietary," which "include[s], but [is] not limited to, materials meeting the definition of 'trade secret' under Ohio law and material nonpublic information under Regulation FD, 17 C.F.R. 243." FirstEnergy Corp. notes that, under Ohio Adm.Code 4901-1-24, the Commission has the authority to enforce the terms of a protective agreement to protect sensitive information. *In re the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry (Aug. 25, 2003). Further, FirstEnergy Corp. asserts that these commercially sensitive documents³ include financial analytics, forecasting, and

³ Documents with Bates numbers 0004318, 0004320, 0005233, 0005234, 0005235, 0005236, 0005237, 0005238, 0005239, 0005240, 0005241, 0005242, 0005243, 0005244, 0005245, 0005246, 0005247, 0005248, 0005249,

financial modeling extending out to 2024; communications among FirstEnergy Corp. personnel discussing those financials; earnings forecasts and communications discussing those forecasts; communications discussing forecasted operations and maintenance expenses, including, in some instances, out to the year 2023; detailed and sensitive financials for the Companies, not limited to the Ohio utilities; FirstEnergy Corp. Board materials containing commercially sensitive and proprietary information and comments on and discussions surrounding draft Board materials; and other proprietary information, including draft policies, procedures, and analyses. While the protective agreement applies to information that is commercially sensitive or proprietary, FirstEnergy Corp. asserts the majority of the information within these documents contain trade secrets, pursuant to R.C. 1333.61(D). *See In re General Telephone Co.*, Case No. 81-383-TP-AIR, Entry (Feb. 17, 1982). According to FirstEnergy Corp., the Commission has historically protected trade secrets such as forecasts and growth projections. *See, e.g., In re the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, Entry (Jan. 25, 2012); *In re the Application of the Elyria Tel. Co. for Pre-approval of Contractual Arrangements for Competitive Telecommunications Services*, Case No. 89-965-TP-AEC, et al., Finding and Order (Sept. 21, 1989); *In re the Application of The Ohio Bell Tel. Co. to Revise its Exchange and Network Services Tariff to Establish New Centrex Service With Monthly Rates for Centrex Exchange Access Which Are Not Distance Sensitive and Which Include a Component for Direct Inward Dialing and Touch-Tone*, Case No. 89-718-TP-ATA, et al., Finding and Order (May 31, 1989); *In re the Joint Application of Sprint Nextel Corporation and LTD Holding Company for Consent and Approval of a Transfer of Control*, Case No. 05-1040-TP-ACO, Entry (Apr. 27, 2007).

{¶ 21} FirstEnergy Corp. further contends that the designated information is also subject to efforts to maintain its secrecy both in this proceeding as well as in several pending civil proceedings, including state and federal civil RICO, derivatives, and securities suits. In

fact, FirstEnergy Corp. notes that the majority of the commercially sensitive documents are designated “Attorneys’ Eyes Only” here and in other civil proceedings and, thus, afforded maximum protection. Moreover, FirstEnergy Corp.’s counsel has averred that, to his knowledge, these documents have not been disclosed publicly by any other civil litigant in the HB 6-related proceedings. FirstEnergy Corp. also asserts that disclosure of this information could result in economic harm, as it derives actual, independent value as a result of it not being generally known or readily ascertainable or is otherwise commercially sensitive such that disclosure could provide competitors with a window into FirstEnergy Corp.’s internal business operations. Finally, FirstEnergy Corp. believes the requested protective order balances its interests in protecting its commercially sensitive and proprietary information with the interests of OCC (and other parties who have signed a protective agreement) in accessing and utilizing the materials in conjunction with this proceeding.

{¶ 22} As to the second category of documents,⁴ or those produced to the DOJ and SEC as part of their ongoing investigations, FirstEnergy Corp. states that it agreed to provide OCC with all the securities productions but only pursuant to a protective agreement so that current confidentiality designations on the documents could be maintained. FirstEnergy Corp. maintains that this information warrants protective status because the protective agreement safeguards various types of sensitive information, and its purpose is to protect non-public DOJ or SEC productions in these Commission proceedings from disclosure. Again, FirstEnergy Corp.’s counsel emphasizes that these documents are currently afforded confidential treatment in all House Bill-6 related civil proceedings. Further, FirstEnergy Corp. claims that public disclosure risks compromising or interfering with ongoing federal investigations, which the Commission has been mindful of in prior rulings related to the

⁴ Documents with Bates numbers 0002211-0002213, 0004318, 0004320-0004330, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005433, 0005508-0005510, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006469, 0006480-0006483, 0006863-0006888, 0006890-0006893, 0007266-0007272, 0007414-0007453, 0010256, 0298773-0298782, 0298784-0298787, 0298790-0298797. In other words, all of the documents for which FirstEnergy Corp. is requesting protective treatment fall into this category.

four pending investigations of the Companies. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1629-EL-RDR, Entry (Feb. 9, 2022) at ¶ 20. According to FirstEnergy Corp., “to allow public disclosure of these documents now runs afoul of the purpose of the [p]rotective [a]greement, the Commission’s express concerns, and the general rule that materials should remain confidential ‘if their dissemination might adversely affect law enforcement interests.’” Motion for Protective Order at 9, quoting *United States v. Smith*, 985 F. Supp. 2d 506, 531 (S.D.N.Y. 2013). Further, as noted in the affidavit attached to the motion for protective order, counsel for FirstEnergy Corp. indicates that he contacted the DOJ to clarify the government’s position, if any, on the confidentiality of records produced during the investigation, and the government supports maintaining the confidential nature of those records to preserve the integrity of the ongoing investigation. Finally, FirstEnergy Corp. argues that the protective agreement prohibits the use of the documents beyond this proceeding; thus, prohibits OCC from making documents publicly available that are related to the ongoing federal investigations but are not relevant to this proceeding. FirstEnergy Corp. also suggests that OCC’s disclosure is unduly burdensome in that it forces a non-party to contend with the public disclosure of irrelevant confidential information that has otherwise been kept confidential in all other HB 6-related proceedings.

{¶ 23} OCC argues that the Commission should deny FirstEnergy Corp.’s motion for protective order for three distinct reasons. The first, argues OCC, is because FirstEnergy Corp.’s motion is improper and does not follow the explicit process discussed in the protective agreement, contending that the agreement requires FirstEnergy Corp. to seek an in-camera proceeding in order to maintain certain discovery documents be kept confidential. Nonetheless, even if the Commission does not deny the motion for protective order on the basis that FirstEnergy Corp. failed to adhere to the process laid out in the protective agreement, OCC argues that “[u]nder the protective agreement, the [Commission] must hold in-camera proceedings to review the documents and for argument.” OCC Memorandum Contra (Mar. 25, 2022) at 6. Moreover, OCC claims that the

Commission should also require that the affiants supporting FirstEnergy Corp.'s motion for protective order appear at an in-camera proceeding and be subject to questioning under oath or, alternatively, allow OCC an opportunity to depose the affiants before making a ruling. Notably, OCC emphasizes that the motion for protective order does not include any facts to support its claim that disclosure of these documents will interfere with ongoing federal investigations and that the assertions made in the affidavit fall short of demonstrating that these documents should remain confidential. OCC also claims that the Commission cannot make a determination as to relevancy without reviewing the documents themselves.

{¶ 24} In its reply, FirstEnergy Corp. reiterates that the protective agreement, and not the statutory authority cited by OCC, should be the controlling standard for determining whether information should be publicly disclosed. Further, FirstEnergy Corp. argues that OCC fails to challenge the continuing protection of the commercially sensitive documents, noting again that the protective agreement goes beyond protecting information considered trade secrets. Additionally, FirstEnergy Corp. notes that the documents produced to the DOJ and SEC have not been disclosed in any of the HB 6-related civil proceedings. Finally, while FirstEnergy Corp. maintains that the protective agreement does not require in-camera proceedings in relation to a motion for protective order filed pursuant to Paragraph 9 of that agreement, FirstEnergy Corp. states that, if the Commission finds review of the documents is necessary, it has no objection to submitting the documents for in-camera review. However, FirstEnergy Corp. claims that OCC's additional request for witness examination or depositions is improper or unnecessary.

C. *Conclusion*

{¶ 25} Interestingly, both parties to some extent attempt to argue that the negotiated protective agreement should control the outcome of this dispute. Importantly, the protective agreement explicitly states that it "is not intended to constitute any resolution of the merits concerning the confidentiality of any of the Protected Materials or any

resolution of the Producing Parties' obligation to produce (including the manner of production) any requested information or material." Further, Paragraph 1 of the protective agreement notes that "[t]he purpose of this Agreement is to permit prompt access to and review of such Protected Materials in a controlled manner that will allow their use for the purposes of this Proceeding while protecting such data from disclosure to non-participants, *without a prior ruling by an administrative agency of competent jurisdiction or court of competent jurisdiction regarding whether the information deserves protection.*" (emphasis added). Thus, this agreement provides a mechanism through which parties can exchange confidential information without needlessly requiring the Commission's intervention, consistent with the stated purpose of Ohio Adm.Code 4901-1-16. It does not, however, strip the Commission of its authority from subsequently determining whether information should or should not be disclosed in the public domain. While OCC does not cite any case law in support of its arguments on this issue, the case cited by FirstEnergy Corp. in support of its claim is unpersuasive, as the attorney examiner in that case merely granted protective treatment as "the information provided by the [parties] is of the kind typically accorded protective treatment in Commission proceedings," and did not speak to the terms of the protective agreement in that case. *In re the Commission's Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services*, Case No. 96-1310-TP-COI, Entry (Aug. 25, 2003). As to the protective agreement filed in this proceeding, the Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection and is the final arbiter as to whether information subject to discovery in this proceeding should be publicly disclosed. Further, while the Commission encourages parties to enter into protective agreements for the expeditious exchange of otherwise confidential information during discovery, the Commission is not a party to that agreement and, thus, is not bound by the terms of such an agreement, including what information is subject to protection or the process utilized by the attorney examiners or the Commission to resolve disputes over such designations. The motion for protective order and responsive pleadings have been filed and this issue is now ripe for a decision.

{¶ 26} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term “public records” excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex. rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Pursuant to Ohio Adm.Code 4901-1-24(D), the Commission may issue any order which is necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of that information, including trade secret information, as well as where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, regarding trade secret information, R.C. 1333.61(D) holds that a “trade secret” is “any information, including . . . any business information or plans, financial information, or listing of names . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and, (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

{¶ 27} As an initial matter, the attorney examiner notes that there are several documents that fall outside those requested to be publicly disclosed by OCC but were listed in FirstEnergy Corp.’s motion for protective order and, thus, will not be addressed in this Entry, as they are still subject to the protective agreement. These include documents with Bates numbers 0004320-0004323, 0004330, 0005432-0005433, 0005510, 0006469, 0006482-0006483, 0007266, 0007269-0007272, and 0298773-0298779.

{¶ 28} Further, there are several documents OCC indicated in its notice that it was going to release in the public domain that were not mentioned in FirstEnergy Corp.’s motion for protective order. These include documents with Bates numbers 0004317, 0004319, 0005222-0005232, 0005851, 0006443-0006466, 0006851-0006862, 0006889, 0007481-0007487,

0009798-0009819, 0298783, 0298788-0298789, and 0298798-0298799. As such, the attorney examiner must presume that Paragraph 9 of the protective agreement applies, and these materials should be deemed non-confidential and not subject to further protection.

{¶ 29} The Supreme Court of Ohio has found that an in-camera inspection is necessary to determine whether materials are entitled to protection from disclosure. *State ex rel Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St.3d 772, 591 N.E.2d 708 (1992). Ohio Adm.Code 4901-1-24(D)(1) also provides that, where confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Thus, in order to determine whether to issue a protective order, it is necessary to review the materials in question; to assess whether the information constitutes a trade secret under Ohio law; to decide whether nondisclosure of the materials will be consistent with the purposes of Title 49, Revised Code; and to evaluate whether the confidential material can reasonably be redacted. *In re the Application of Cincinnati Gas & Elec. Co. to Modify its Nonresidential Generation Rates to Provide for Market-Based Std. Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, et al., Order on Remand (Oct. 24, 2007) at 10.

{¶ 30} Given the circumstances in this case, and also recognizing that FirstEnergy Corp. indicated that it has no objection to submitting the documents for in-camera review, the attorney examiner will conduct an in-camera review of the documents before issuing a ruling on the motion for protective order. As such, FirstEnergy Corp. is directed to provide the attorney examiners copies of the following documents for an in-camera review within seven days of this Entry: Documents with Bates numbers 0002211-0002213, 0004318, 0004324-0004329, 0005187-0005188, 0005204-0005221, 0005233-0005255, 0005423-0005431, 0005508-0005509, 0005850, 0005852-0005853, 0006441-0006442, 0006467-0006468, 0006480-0006481, 0006863-0006888, 0006890-0006893, 0007267-0007268, 0007414-0007453, 0010256, 0298780-0298782, 0298784-0298787, 0298790-0298797. Following the in-camera review, the

attorney examiner will issue a decision or provide instructions for any additional process the attorney examiner deems necessary to resolve this issue via subsequent entry.

{¶ 31} As an in-camera review will be held for the documents in dispute, any arguments submitted by the parties as to whether FirstEnergy Corp. violated the terms of the protective agreement are now moot.

III. ORDER

{¶ 32} It is, therefore,

{¶ 33} ORDERED, That FirstEnergy Corp. arrange for the delivery of certain documents to the attorney examiners for the purpose of an in-camera review, consistent with Paragraph 30. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison
Attorney Examiner

NJW/mef

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in

Case No(s). 17-0974-EL-UNC

Summary: Attorney Examiner Entry finding an in-camera review of documents subject to the motion for protective order should be conducted and directing FirstEnergy Corp. to arrange for delivery accordingly, as detailed herein electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio