

**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. 17-0974-EL-UNC
Edison Company's Compliance with)	
R.C. 4928.17 and Ohio Adm. Code)	
Chapter 4901:1-37.)	

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

I. INTRODUCTION

In their June 22 Entry¹ the Attorney Examiners exercised their discretion to conduct an *in camera* review of documents subject to FirstEnergy Corp.’s Motion for a Protective Order.² Despite reaching no decision as to the confidentiality of the documents themselves, the Office of the Ohio Consumers’ Counsel (“OCC”) asks the Attorney Examiners to certify its interlocutory appeal to the Commission to reverse the June 22 Entry to restore its due process rights to a public *in camera* review hearing and demand an unnecessary and duplicative affidavit from counsel. OCC’s request for Commission review should be rejected.

The June 22 Entry is not a “ruling” and therefore is not ripe for interlocutory appeal under O.A.C. 4901-1-15. The Entry does not decide anything about the Motion itself—it merely sets forth the next step in adjudicating the determination of confidentiality. But even if the June 22 Entry amounted to a “ruling,” OCC does not satisfy the requirements of O.A.C. 4901-1-15. OCC’s arguments that a new or novel question exists or that the Attorney Examiners have departed from past Commission precedent are unpersuasive. The Attorney Examiners’ order is a standard discovery decision not worthy of interlocutory review. Nor is OCC prejudiced by the Attorney Examiners’ decision or denied due process. Further, OCC’s application prematurely seeks relief which may be mooted by subsequent entry.

For all these reasons, and those more fully described herein, OCC’s Application for Review should be denied.

¹ Case No. 17-974-EL-UNC, Entry at ¶¶ 30-31 (June 22, 2022), (“June 22 Entry” or “Entry”).

² Case No. 17-974-EL-UNC, Motion for Protective Order and Memorandum (Mar. 10, 2022), (“Motion” or “Mot.”).

II. ARGUMENT

A. OCC's Request Does Not Meet The Requirements Of O.A.C. 4901-1-15(B).

O.A.C. 4901-1-15(B) permits a party to take an interlocutory appeal “from any ruling issued under rule 4901-1-14 of the Administrative Code.” Prior to Commission consideration, the party’s request must first be certified by the “legal director, deputy legal director, attorney examiner, or presiding hearing officer.”³ Certification of a request under O.A.C. 4901-1-15(B) 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.⁴

Requests for certification that do not meet both requirements must be denied. Because OCC’s Request can satisfy neither requirement, it too should be denied.⁵

³ O.A.C. 4901-1-15(B).

⁴ See *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 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) (“[T]o certify an interlocutory appeal to the Commission, both requirements need to be met.”).

⁵ See, e.g., *id.*; *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).

1. OCC's Request for Certification is Premature.

As an initial matter, there is no “ruling” from which OCC may take an interlocutory appeal under O.A.C. 4901-1-14 and 4901-1-15(B).⁶ The Attorney Examiners have not yet decided FirstEnergy Corp.’s Motion, instead finding that “it is necessary to review the materials in question” and requiring “an in-camera review of the documents *before issuing a ruling* on the motion for protective order.”⁷ No decision stripped OCC of any rights or denied them due process. In fact, the Attorney Examiners acknowledged that “[f]ollowing 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.”⁸ Interpreting the June 22 Entry to imply otherwise ignores its express language. OCC therefore has no basis to request certification.

2. Even if Proper, OCC's Request for Certification Implicates No New or Novel Question of Law or Results in a Departure From Past Commission Precedent.

Setting aside that the Attorney Examiners’ Entry did not rule on FirstEnergy Corp.’s Motion, OCC’s Request fails on the merits. OCC asserts the Attorney Examiners’ decision to “conduct[] an in camera review outside of a public hearing” departs from Commission precedent and is “contrary to R.C. 4901.12 for public PUCO proceedings.”⁹ It further argues that the

⁶ See *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, et al., Opinion and Order, at 11 (March 31, 2016) (denying interlocutory appeal purportedly taken from the attorney examiners’ “constructive denial” of a motion because there was no ruling under Rule 4901-1-14). And, a “ruling” means “an official or authoritative, decision, decree, statement, or interpretation (as by a judge on a point of law).” Merriam-Webster Dictionary (online), available at <https://www.merriam-webster.com/dictionary/ruling> (accessed Dec. 17, 2020).

⁷ June 22 Entry, at ¶¶ 29-30 (emphasis added).

⁸ June 22 Entry, at ¶ 30 (emphasis added).

⁹ OCC Mem. at 6.

Commission “should require FirstEnergy Corp., in a public filing, to provide an affidavit sworn under oath describing its call to the U.S. Attorney” concerning the confidentiality of records at issue.¹⁰ Neither argument satisfies the requirements for interlocutory appeal.

There is nothing novel about the Attorney Examiners exercising their authority to manage and oversee motions for protective orders and *in camera* reviews in Commission proceedings.¹¹ “[T]he 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.”¹² This is precisely why such certification requests 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.”¹³ As settled Commission precedent illustrates, the Attorney Examiners’ routine procedural decision cannot serve as the basis for certifying an interlocutory appeal.¹⁴

¹⁰ OCC Mot. at 2; OCC Mem. at 9.

¹¹ *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry, at 6 (March 7, 2007) (denying certification of interlocutory appeal and recognizing that “motions to compel discovery . . . and motions for protective orders are . . . routine matters with which the Commission and its examiners have had long experience in Commission proceedings.”).

¹² June 22 Entry, at ¶ 25.

¹³ *In the Matter of the Application of P.H. Glatfelter Company for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, p. 3 (Oct. 15, 2009) (denying request for certification of an interlocutory appeal).

¹⁴ See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operations of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, 2005 Ohio PUC LEXIS 234 at *3 (May 10, 2005) (denying request to certify an interlocutory appeal regarding the setting of a procedural schedule); *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-ATA, 2010 Ohio PUC LEXIS 1400 at *8-10 (Dec. 22, 2010) (denying request for certification of an interlocutory appeal from a procedural ruling because Commission rules vest Attorney Examiners with discretion “to assure an orderly and expeditious proceeding”).

Nor is the Attorney Examiners' decision a departure from past precedent. Under Commission rules, an Attorney Examiner may, "[u]pon motion of any party or person from whom discovery is sought . . . issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."¹⁵ Any motion for a protective order must be accompanied by:

- (1) A memorandum in support, setting forth the specific basis of the motion and citations of any authorities relied upon[;]
- (2) Copies of any specific discovery requests that are the subject of the request for a protective order[; and]
- (3) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts that have been made to resolve any differences with the party seeking discovery.¹⁶

"[A]n *in camera* inspection is necessary to determine whether materials are entitled to protection from disclosure."¹⁷

Nothing in FirstEnergy Corp.'s Motion or the Attorney Examiners' June 22 Entry departs from these rules. FirstEnergy Corp. properly filed its Motion which laid out the grounds for seeking protective treatment—namely that the materials "(1) contain commercially sensitive information and/or (2) are non-public documents produced to the DOJ or SEC as part of ongoing federal investigations."¹⁸ A copy of OCC's Notice to Disclose was attached to FirstEnergy Corp.'s Motion, as well as an affidavit from counsel documenting efforts to negotiate an agreement with OCC. To determine whether to grant FirstEnergy Corp.'s Motion, the Attorney Examiners are simply adhering to Ohio Supreme Court precedent by ordering an *in camera* review.

¹⁵ Rule 4901-1-24(A).

¹⁶ Rule 4901-1-24(B).

¹⁷ June 22 Entry, at ¶ 29 (citing *State ex rel Allright Parking of Cleveland Inc. v. Cleveland*, 63 Ohio St.3d 772, 591 N.E.2d 708 (1992)).

¹⁸ Mot. at 1.

Yet OCC claims that the “Commissioners’ reversal or modification is needed to correct for the ruling’s missing due process and public process for OCC and others to contest FirstEnergy Corp.’s claims for secrecy.”¹⁹ But there is no rule that *in camera* reviews must be held publicly. O.A.C. 4901-1-12 (G) states only that “[t]he presiding hearing officer may direct that any motion made at a public hearing or transcribed prehearing conference be reduced to writing and filed and served in accordance with this rule.” The rule does not require that motions be heard at a public hearing, it merely grants the Attorney Examiners authority to require that oral motions be reduced to writing. This is why the Commission has decided motions for protective order based on an *in camera* review without a public hearing.²⁰ And there is no requirement that the affidavit contemplated by O.A.C. 4901-1-24(B)(3) provide the detail OCC seeks. OCC cites to no case law to support its position that the Attorney Examiners’ actions amount to a due process violation.²¹

In this instance, an *in camera* review accompanied by argument on the legal question of confidentiality is sufficient given that OCC does not appear to challenge FirstEnergy Corp.’s Motion as to those documents which FirstEnergy Corp. maintains are commercially sensitive. In fact, OCC recently withdrew most of its objections as to those documents.²² Additionally, counsel’s affidavit sufficiently describes FirstEnergy Corp.’s efforts to meet and confer with OCC and its Motion sets forth the basis for seeking confidential treatment of the non-public documents

¹⁹ OCC Mot. at 1.

²⁰ See, e.g., *In the Matter of the Application of Columbus S. Power Co. & Ohio Power Co. for Auth. to Establish A Standard Serv. Offer Pursuant to Section 4928.143*, No. 10-2376-EL-UNC, 2012 WL 252225 (F.E.D.A.P.J.P. Jan. 20, 2012); *In the Matter of the Application of Ohio Power Co. & Columbus S. Power Co. for Auth. to Merge & Related Approvals to Establish A Standard Serv. Offer Pursuant to Section 4928.143*, No. 10-2376-EL-UNC, 2011 WL 5879468 (F.E.D.A.P.J.P. Nov. 18, 2011); *In the Matter of the Application of Dte Energy Trading, Inc. for Certification As A Competitive Retail Nat. Gas Supplier.*, No. 08-1249-GA-CRS, 2009 WL 2460897 (F.E.D.A.P.J.P. July 27, 2009); *In the Matter of the Application of Nopec, Inc. for Auth. to Operate As A Certified Retail Elec. Supplier in the State of Ohio.*, No. 07-891-EL-CRS, 2009 WL 3315131 (F.E.D.A.P.J.P. Oct. 7, 2009).

²¹ OCC Mem. at 2.

²² See Case No. 17-974-EL-UNC, Letter from OCC to Attorney Examiners (June 28, 2022).

provided to the DOJ. To be sure, FirstEnergy Corp. does not object to a prehearing conference between the parties on this issue. But asking “FirstEnergy to produce the notes of the FirstEnergy/U.S. Attorney call to OCC”²³ is beyond the scope of the rule and likely an attempt to seek untimely discovery on other issues which are irrelevant to the FirstEnergy Ohio Utilities’ compliance with corporate separation rules and regulations. For the same reasons, OCC’s requests to cross-examine any affiant should be denied.

No ruling has been made on the merits of FirstEnergy Corp.’s Motion—and the Attorney Examiners’ decision is not one from which interlocutory appeal may be taken. Characterizing this corporate separation proceeding as a “landmark case in the shadow of FirstEnergy’s House Bill 6 and PUCO scandals” does not alter that. For these reasons, OCC has failed to present a new or novel question or show a departure from past Commission precedent warranting certification. Their request must be denied.

3. Joint Movants Fail to Show They Are Unduly Prejudiced by the Attorney Examiners’ Ruling.

OCC’s claims of prejudice fair no better. Though OCC claims “[t]he public will be prejudiced by the denial of transparency for arguments about information in this case” and that it has been “denied the opportunity to argue in an in camera hearing why the FirstEnergy documents should be public,”²⁴ there is simply no prejudice to the public or OCC where there has been no ruling denying any rights. This is particularly true where OCC is not entitled to discovery in the form of an affidavit and Attorney Examiners have addressed other discovery disputes in proceedings against the FirstEnergy Ohio Utilities (wherein OCC is a party) without the cross-

²³ OCC Mem. at 2.

²⁴ OCC Mem. at 7.

examination of witnesses.²⁵ The Attorney Examiners can still set a prehearing conference—as they have done many times to adjudicate disputes between the parties. *See* Section II.A.1.

If anything, what OCC seeks is prejudicial to FirstEnergy Corp. as it forces the Company to litigate the terms of its protective agreement with securities class action plaintiffs²⁶ in an entirely separate proceeding before the PUCO. And to the extent OCC continues to object to the nondisclosure of the at-issue commercially sensitive documents, a public hearing undermines FirstEnergy Corp.’s ability to seek protective treatment under O.A.C. 4901-1-24 in the first instance.

As it stands, the Attorney Examiners’ decision to conduct an *in camera* review before entering its ruling is not the type of decision that warrants certification. OCC thus fails to meet either requirement under O.A.C. 4901-1-15(B) and its request must be rejected.

B. The Application For Review Should Be Denied.

OCC’s Application for Review, like its Request, is similarly based on the incorrect premise that the Attorney Examiner issued a ruling on FirstEnergy Corp.’s Motion. OCC asks the Commission to afford it due process by “revers[ing] or modify[ing] the ruling by PUCO Examiner Addison”²⁷ and requiring that the Commission (1) “order an in camera inspection that will be conducted through a public process,”²⁸ and (2) “require FirstEnergy Corp., in a public filing, to provide an affidavit sworn under oath describing details of its call to the U.S. Attorney . . . [and] then be subject to OCC cross-examination (voir dire).”²⁹ The relief OCC seeks is improper here.

²⁵ *See, e.g.*, Case No. 17-974-EL-UNC, Entry at ¶¶ 19-21 (Oct. 12, 2021); Case No. 20-1502-EL-UNC, Hearing (Mar. 10, 2022) (addressing privilege log issues).

²⁶ *See In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio).

²⁷ OCC Mem. at 7.

²⁸ OCC Mem. at 11.

²⁹ OCC Mem. at 9.

Beyond the fact that further affidavits from FirstEnergy Corp.’s counsel are unnecessary here, *see* Section II.B., OCC’s requests may be mooted by further orders from the Attorney Examiners.³⁰ It is within the Attorney Examiners’ discretion to hold hearings on this matter—a remedy they have not yet foreclosed. This is exactly why a party may only take an interlocutory appeal from a final *ruling*.³¹

Moreover, counsel for FirstEnergy Corp. put forth the basis for claiming confidentiality over documents submitted to the DOJ in its signed Motion filed on the public docket. If OCC’s argument is accepted, counsel for all parties would be required to file an affidavit supporting each legal argument made in a motion or pleading. That is not the standard and the Commission should curb OCC’s efforts to rewrite Commission rules by granting OCC’s Application for Review.

III. CONCLUSION

Since no ruling on FirstEnergy Corp.’s Motion for a Protective Order has been issued, an interlocutory appeal from the June 22 Entry is not authorized by O.A.C. 4901-1-15(B). But in any event, OCC’s Request fails to meet either requirement for certification. Accordingly, the Attorney Examiners should deny OCC’s Motion for Interlocutory Appeal, Request for Certification, and Application for Review.

³⁰ *See, e.g.*, Case No. 20-1502-EL-UNC, Entry at ¶ 17 (May 13, 2021).

³¹ *Id.* at ¶ 18.

Dated: July 5, 2022

Respectfully submitted,

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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 July 5, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey Lee

Corey Lee
On behalf of FirstEnergy Corp.

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