

**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.)

**MEMORANDUM CONTRA TO FIRSTENERGY CORP.'S MOTION FOR
PROTECTIVE ORDER
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL
PUBLIC VERSION**

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I. INTRODUCTION

Public scrutiny of this case should not be forfeited in favor of FirstEnergy Corp.’s effort to keep secrets. FirstEnergy Corp.’s bribery scandals involved dark money and back-room deals. Details of these bad acts are shocking, but they are not trade secrets. The public has a right to know what’s in the accounting research memo FirstEnergy Corp. seeks to keep confidential.

FirstEnergy Corp. has abused the confidentiality process throughout this case. FirstEnergy Corp. produced to OCC over 470,000 pages of documents from *In re FirstEnergy Corp. Securities Litigation* (the “*Securities Litigation*”).¹ Of the 470,000 pages it produced, FirstEnergy Corp. labeled 470,000 pages confidential. FirstEnergy believes that *all half-million pages* are secret.

Some of the pages FirstEnergy considers secret are *publicly filed*, including copies of FirstEnergy Corp. annual reports, legislation, U.S. Securities and Exchange

¹ Case No. 2:20-cv-3785 (S.D. Ohio).

Commission (“SEC”) filings, Federal Energy Regulatory Commission filings, and Public Utilities Commission of Ohio (“PUCO”) filings. This is an abuse of the state’s process for public proceedings. FirstEnergy Corp. has shown, including through what its Deferred Prosecution Agreement with the United States reveals, that it cannot be trusted to decide what Ohioans should know.

FirstEnergy Corp. built its House Bill 6 scandal and PUCO scandal by keeping Ohioans in the dark. “Sunlight is said to be the best of disinfectants,”² as Louis Brandeis wrote before his appointment to the U.S. Supreme Court.

FirstEnergy Corp. has moved the PUCO for a protective order,³ alleging that an accounting research memo (FE_CIV_SEC_0266685) should be kept secret.⁴ OCC opposes FirstEnergy’s Corp.’s attempt to hide from Ohioans details ██████████

██████████. OCC properly sought to disclose the memo under the Protective Agreement⁵ FirstEnergy Corp. reached with OCC.

FirstEnergy Corp. bears the burden of showing that FE_CIV_SEC_0266685 (the “Accounting Report”) should remain secret.⁶ It has not met that burden. FirstEnergy Corp. has failed to show disclosure of the document will interfere with other proceedings or otherwise harm the utility. And even if the document could be shown to be deserving of protection (it’s not), the public’s interest in viewing the document far outweighs the

² Louis D. Brandeis, *What Publicity Can Do*, Harpers Weekly, Vol. 58, No. 2974 (Dec. 20, 1913)

³ Memorandum in Support of FirstEnergy Corp.’s Motion for a Protective Order (“FirstEnergy Corp. Memo”).

⁴ *Id.* at 2.

⁵ *Id.* at Exhibit A.

⁶ *Id.* at Exhibit A, ¶ 12.

utility's interest in keeping it secret. As a result, the PUCO should deny FirstEnergy Corp.'s motion.

II. ARGUMENT

A. **The Protective Agreement authorized public disclosure by OCC and the potential for conflicting rulings in the Securities Litigation is not reason to grant FE Corp's motion for protection.**

FirstEnergy Corp. erroneously argues⁷ that disclosure of the Accounting Report would conflict with a stipulated protective order⁸ the United States District Court for the Southern District of Ohio ("The District Court") approved in the *Securities Litigation*. FirstEnergy provides three reasons for its position, all of which are meritless.

Initially, FirstEnergy Corp. warns that courts are reluctant to permit wholesale transfer of discovery from one proceeding to another.⁹ FirstEnergy Corp. badly overstates OCC's request. OCC notified FirstEnergy on June 24, 2022 that it intended to disclose 19 documents from the *Securities Litigation*.¹⁰ FirstEnergy has so far sent OCC over 470,000 pages of documents produced in that case and continues to send more. The 19 documents OCC requests to disclose include just a fraction of those 470,000 pages. OCC did not initiate a "wholesale transfer of discovery" by seeking to disclose those documents.

Second, FirstEnergy Corp. accuses OCC of improperly forcing it to litigate confidentiality designations it made under a protective order in the *Securities Litigation*.¹¹

⁷ *Id.* at 3.

⁸ *Id.* at Exhibit D.

⁹ *Id.* at 4.

¹⁰ *Id.* at Exhibit B.

¹¹ *Id.* at 4.

However, it is entirely proper for OCC to pursue disclosure of protected materials before a different body, the PUCO. The Protective Agreement between FirstEnergy Corp. and OCC explicitly permits it.

OCC may seek to use “in the public domain” “*any* Protected Materials...”¹² This includes materials FirstEnergy Corp. designated as confidential in the *Securities Litigation*. To initiate disclosure, OCC need only inform FirstEnergy Corp. what documents it seeks to use and allow the utility 5 days to seek a protective order.¹³ That is what OCC did. That is what FirstEnergy Corp. agreed to in this case by signing the Protective Agreement. The PUCO should require FirstEnergy to honor its protective agreement with OCC.

FirstEnergy Corp. also objects to the form of OCC’s notification, stating that OCC failed to explain both its reason for seeking disclosure and the documents’ relevance to this proceeding.¹⁴ FirstEnergy Corp. cites no provision in the Protective Agreement requiring OCC to do this. None exists. OCC is required only to provide notice “specifically identifying each of the Protected Materials that could be disclosed in the public domain.”¹⁵ By listing the Bates-stamp of each document it seeks to disclose, OCC met this requirement.

FirstEnergy Corp. also objects that OCC captioned its notice with all four PUCO investigative proceedings. The same Protective Agreement governs all four cases. OCC has the same rights to seek disclosure of the same documents, regardless of the

¹² *Id.* at Exhibit A, ¶ 9.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

investigative proceeding, consistent with its agreement in each of the four cases. Consequently, OCC's notice is sufficient.

Third, FirstEnergy Corp. argues the PUCO should not order disclosure of the Accounting Report because the District Court might order otherwise in the *Securities Litigation*.¹⁶ That possibility is no basis for granting protection to the document in this proceeding.

The PUCO, not the District Court, has jurisdiction “to supervise and regulate public utilities.”¹⁷ The PUCO, not the District Court, decides what documents are disclosed in its regulation of the FirstEnergy Utilities.¹⁸ The PUCO should not cede jurisdiction to the District Court, as FirstEnergy Corp. requests. Litigating confidentiality before two tribunals with different jurisdictions is not an *undue* burden; it's due process.

Further, the PUCO should not permit FirstEnergy Corp. to avoid disclosing a document on the sole basis that conflicting rulings are *possible*. Protective orders must be “*necessary* to protect” a party “from annoyance, embarrassment, oppression, or undue burden or expense.” (Emphasis added)¹⁹. FirstEnergy Corp. has not yet litigated the merits of its confidentiality designation in the District Court.²⁰ The District Court has issued no ruling on this document's confidentiality. It may never, and any ruling it does issue may not conflict with the PUCO's. The possibility that the PUCO's ruling *might*

¹⁶ *Id.* at 6.

¹⁷ R.C. 4905.04.

¹⁸ *See*: O.A.C. Rule 4901-1-24.

¹⁹ *Id.*

²⁰ FirstEnergy Corp. Memo at 5.

conflict with a ruling the District Court *might* make at an undetermined future time does not make a protective order “necessary,” as O.A.C. Rule 4901-1-24 requires.

B. Disclosure to the public of the accounting report will not compromise or interfere with ongoing federal investigations.

Next, FirstEnergy Corp. wrongly argues the Accounting Report should remain secret because its public disclosure would disrupt investigations the U.S. Department of Justice (DOJ) and the SEC are undertaking.²¹ This is not so.

[REDACTED]

This information has largely been made public already. FirstEnergy Corp. disclosed the conclusions of its Board of Director’s investigation in a 10-Q Form filed publicly with the SEC, stating “The management of FirstEnergy...have reviewed and evaluated the effectiveness of its disclosure controls and procedures.”²² The 10-Q also makes public the Board’s conclusion that FirstEnergy’s “disclosure controls and procedures were not effective...solely as the result of the material weakness in FirstEnergy’s internal controls over financial reporting....”²³ Under the First Energy Corp./OCC protective agreement, information that is already in the public domain does

²¹ FirstEnergy Corp. Memo at 7.

²² FirstEnergy Corp., *Form 10-Q*, Securities and Exchange Commission (Nov. 19, 2020), <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001031296/d4e7bccb-1aeb-4c6d-a9cd-0fcfb1984ecb.pdf>.

²³ *Id.*

not merit protection.²⁴ And disclosure of the Accounting Report will not likely compromise ongoing DOJ or SEC investigations because FirstEnergy Corp. has largely publicized its contents already.

C. The accounting report is not protected because FirstEnergy Corp. has not articulated specific injury that would result from disclosure.

Finally, FirstEnergy argues the Accounting Report should be kept secret because it is an “internal control analysis and memorandum,” which has previously been kept confidential.²⁵ However, that a document contains “internal” analysis is not alone sufficient to qualify it as a trade secret, deserving of protection. Internal analyses are protected when “the defendant has shown a specific injury that would result from unsealing the documents.”²⁶ As demonstrated above, FirstEnergy Corp. has failed to make such a showing.

OCC request was not burdensome. Contrary to FirstEnergy Corp.’s assertions otherwise, OCC’s request is not for a “wholesale transfer of discovery.” OCC’s request was consistent with its rights under the protective agreement FirstEnergy Corp. reached with OCC. Because no District Court ruling yet exists on the confidentiality of the Accounting Report, a protective order is not “necessary” protect FirstEnergy Corp. against conflicting rulings or duplicative litigation. Finally, the contents of the report are already largely public, so their disclosure will not interfere with ongoing federal investigations of the utility. FirstEnergy Corp. has not demonstrated injury. Therefore, the utility has failed to show the Accounting Report should remain secret.

²⁴ FirstEnergy Corp. Memo at Exhibit A, ¶ 3.B.

²⁵ *Id.* at 7.

²⁶ *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, 499 F. Supp. 3d 505, 519 (Ohio S.D. 2020).

D. The public interest in disclosure of the accounting report outweighs FirstEnergy Corp.’s interest in secrecy.

Lastly, FirstEnergy Corp. ignores that the Accounting Report is protected only if “defendant[’s] interest in keeping this document under seal outweighs the public’s interest in this record document.”²⁷ The public’s interest in disclosure of the Accounting Report unquestionably outweighs FirstEnergy Corp.’s interest in keeping a document that is not a trade secret, secret. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As a result, the contents of the

Accounting Report are highly relevant to the PUCO’s investigation.

This investigation is, in turn, of overwhelming public interest. FirstEnergy Corp.’s wrongdoing is historic in scope. U.S. Attorney David DeVillers described FirstEnergy Corp.’s House Bill 6 scandal as “...likely the largest bribery, money laundering scheme ever perpetrated against the state of Ohio.”²⁸ Further, FirstEnergy Corp.’s actions corrupted public institutions. As noted by U.S. District Judge John Adams, presiding over a shareholder suit against FirstEnergy Corp.,²⁹ “the H.B. 6 bribery has ‘undoubtedly shaken whatever trust that Ohioans may have had in the political process used by their elected officials.’”³⁰

²⁷ *Id.*

²⁸ Teo Armus, *GOP Ohio House speaker arrested in connection to \$60 million bribery scheme*, The Washington Post (Jul. 22, 2020), <https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/>.

²⁹ *Miller v. Anderson*, Case No. 5:20CV1743 (Ohio N.D.).

³⁰ *Id.* at 8.

This Commission should have a strong interest in “deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny....”³¹ To achieve this, the PUCO must not allow FirstEnergy Corp. to hide evidence from the public of its wrongdoing, which involves the former PUCO Chair. Because the Accounting Report addresses core issues in a proceeding of massive public importance, Ohioans’ interest in viewing the document outweighs any FirstEnergy Corp.’s interest in keeping information secret that does not amount to a trade secret.

III. CONCLUSION

FirstEnergy Corp. has failed to justify keeping the Accounting Report secret from the public. The PUCO should deny the utility’s motion for protective order and permit Ohioans to follow the facts where they lead.

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³¹ *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity*, Case No. 99-890-TP-ACE, Entry at 2-3 (Oct. 1, 1990).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra to FirstEnergy Corp.'s Motion for Protective Order (Public Version) was served on the persons stated below via electronic transmission, this 20th day of July 2022.

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Summary: Memorandum Memorandum Contra to FirstEnergy Corp.'s Motion for Protective Order by Office of the Ohio Consumers' Counsel (Public Version) electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.