

**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.)**

**FIRSTENERGY CORP.'S REPLY IN SUPPORT OF ITS
MOTION FOR A PROTECTIVE ORDER**

I. INTRODUCTION

OCC seeks to disclose publicly FE_CIV_SEC_0266685, a non-public, internal memorandum, produced by FirstEnergy Corp. (“FirstEnergy”) as part of an agreement with OCC to resolve a subpoena whereby OCC would receive documents produced to the securities plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio) (the “Securities Litigation”). Included in these FirstEnergy productions are all documents produced to the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”), as well as additional documents produced to the plaintiffs in the Securities Litigation. Despite OCC’s arguments to the contrary, FirstEnergy respectfully requests that the Commission exercise its authority under O.A.C. 4901-1-24 to shield FE_CIV_SEC_0266685 from improper public disclosure.¹

¹ Case No. 17-974-EL-UNC, Entry, at ¶ 25 (June 22, 2022) (“[T]he Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection.”).

First, FirstEnergy and OCC’s Protective Agreement² requires continued protective treatment over FE_CIV_SEC_0266685 and the Commission should enforce that agreement. **Second**, FE_CIV_SEC_0266685 is designated “Attorneys’ Eyes Only” under a court-approved protective order. **Third**, FE_CIV_SEC_0266685 is irrelevant to this corporate separation proceeding and should remain confidential—as it has remained in all civil, regulatory, and investigative proceedings. OCC’s arguments to the contrary are misguided.

II. ARGUMENT

A. FirstEnergy Has Met Its Burden Under The Protective Agreement.

The Protective Agreement creates rights and obligations for both FirstEnergy and OCC. FirstEnergy has a right to file a motion for protective order and is required to show only that documents it seeks to protect “have been maintained in a confidential manner” and “the injury that would result from the disclosure of such information.”³ It has done so here. FirstEnergy explained that the matters addressed within FE_CIV_SEC_0266685 “are subject to ongoing investigation by federal regulators” and, to counsel’s knowledge, have not been publicly disclosed, such that public disclosure risks compromising or interfering with an ongoing federal investigation.⁴ In addition, the Commission has expressly recognized this precise concern and has even stayed *discovery* (not to mention public disclosure) of information on these same grounds.⁵ Like the Commission, courts across the country protect information that is the subject of ongoing government investigations to

² Attached as Exhibit A to FirstEnergy Corp.’s Motion for Protective Order (“FirstEnergy Mot.”), Case No. 17-974-EL-UNC (July 5, 2022).

³ FirstEnergy Mot., Exhibit A, Protective Agreement, ¶ 9.

⁴ FirstEnergy Memorandum in Support (“FirstEnergy Mem.”), at 7-8 (July 5, 2022); *id.* Exhibit C, C. Lee Affidavit, ¶¶ 12-13.

⁵ Case No. 20-1629-EL-RDR, Entry, at ¶ 14 (Dec. 15, 2021).

avoid potential interference,⁶ and OCC has cited no authority to the contrary nor even addressed the Commission's orders or these court rulings.⁷

OCC's ability to disclose produced documents is not unfettered. OCC, under the Protective Agreement, may seek to disclose documents but may only do so "in a controlled manner that will allow their use for the *purposes of this Proceeding*" and "*in conjunction with this Proceeding*."⁸ Despite that FirstEnergy discussed these express obligations in this present Motion and its March 10 Motion for Protective Order,⁹ OCC fails to address or even acknowledge these limitations. Instead, OCC wrongly claims that FirstEnergy has not pointed to any requirement that OCC show the documents' relevance to this proceeding.¹⁰ OCC cannot escape its obligations under the Protective Agreement, which are especially crucial in this instance since OCC has received (and will continue to receive) a voluminous amount of information that is irrelevant to this proceeding and that was provided to OCC only because the documents were produced in the Securities Litigation. OCC has not explained for what relevant "purpose[]" or how it intends to use FE_CIV_SEC_0266685 in this corporate separation case nor why public disclosure is mandatory "in conjunction with this Proceeding."¹¹ OCC's conclusory statements that the document should be public are insufficient, especially given the ongoing federal investigations.

⁶ FirstEnergy Mem., at 8.

⁷ See OCC Mem., at 6-7 (merely stating that disclosure of FE_CIV_SEC_0266685 would not "disrupt investigations the U.S. Department of Justice (DOJ) and the SEC are undertaking").

⁸ FirstEnergy Mot., Exhibit A, Protective Agreement, ¶¶ 1, 4.

⁹ FirstEnergy Mot., at 5; Case No. 17-974-EL-UNC, FirstEnergy Corp. Motion for Protective Order, at 9-10 (March 10, 2022).

¹⁰ OCC Mem., at 4.

¹¹ FirstEnergy Mot., Exhibit A, Protective Agreement, ¶¶ 1, 4.

B. Disclosure Risks Interference With The Securities Protective Order.

The 470,000 pages of documents transferred to OCC were produced in response to discovery in the Securities Litigation—where, unlike here, FirstEnergy Corp. is a *party*—and in accordance with a court-approved stipulated protective order. Some documents are designated “Confidential,” some “Attorneys’ Eyes Only,” and others have no confidentiality designation.¹² When parties in the Securities Litigation dispute confidentiality designations, the parties have rights under the court-approved protective order.¹³

Courts are reluctant in the first place to permit wholesale transfer of discovery from one litigation to another, often because the scope of discovery in two separate proceedings differ, as is certainly the case here.¹⁴ However, in an attempt to avoid a discovery dispute (and with the express acknowledgement that documents designated as “Confidential” or “Attorneys’ Eyes Only” in the Securities Litigation would be Protected Materials), FirstEnergy agreed to transfer to OCC all documents produced to the securities plaintiffs, but FirstEnergy has never conceded that these documents are outright relevant to the PUCO proceedings. When wholesale transfer does occur, courts ensure that safeguards are in place to honor the protective order *where the discovery actually occurred*—here, the securities protective order.¹⁵ OCC cites no case law or Commission precedent disputing these principles.

¹² Case No. 17-974-EL-UNC, FirstEnergy Corp. Motion for Protective Order, Exhibit E, ¶ 4 (March 10, 2022). OCC is incorrect that all 470,000 pages of the securities productions are designated confidential. (OCC Mem., at 1).

¹³ See FirstEnergy Mot., Exhibit D.

¹⁴ FirstEnergy Mem., at 4.

¹⁵ FirstEnergy recognizes that OCC is not seeking to publicly disclose all 470,000 pages. But that is not the point. OCC fails to acknowledge or confront that when wholesale *transfer* of discovery from one proceeding to another does occur, as it is here, courts are careful to ensure that appropriate safeguards are in place. See FirstEnergy Mot., at 4.

OCC's practice, without adherence to the obligations under the Protective Agreement to show relevance, creates an undue burden on non-party FirstEnergy by making FirstEnergy defend its confidentiality designations here—despite that its designations were made pursuant to a separate court-approved protective order. OCC's arguments in opposition are misguided and founded on an incorrect premise.

In discussing the impact of the protective order from the Securities Litigation, OCC fails to recognize that FirstEnergy is not a public utility¹⁶ nor a party to any of the PUCO investigative proceedings. FirstEnergy did not produce the 470,000 pages of documents in response to party discovery in this corporate separation proceeding. Moreover, OCC has never argued that the 470,000 pages of documents are all relevant to this proceeding, as the Commission has pointed out.¹⁷ As a non-party to this proceeding, FirstEnergy and its information are and should be afforded additional protections throughout the discovery process.¹⁸

C. FE_CIV_SEC_0266685 Contains Non-Public Information Irrelevant To This Proceeding.

OCC argues that disclosure is proper here because FE_CIV_SEC_0266685 contains information relevant to this proceeding that “has largely been made public already.”¹⁹ OCC's argument is flawed on multiple fronts. First, as to relevance, OCC points to “FirstEnergy Corp.'s financial statements,” as grounds for public disclosure in this proceeding.²⁰ The PUCO does not have jurisdiction over FirstEnergy Corp.'s financial reporting and, in any event, OCC offers no

¹⁶ See OCC Mem., at 5.

¹⁷ Case No. 17-974-EL-UNC, Entry, ¶ 28 (April 7, 2022) (“[T]he moving parties have failed to identify the specific relevance and importance of those documents to this proceeding.”).

¹⁸ Case No. 17-974-EL-UNC, Hr'g Tr., at 20:22-24, 40:6-9 (discussing burden on non-party); *see also* Ohio Civ. R. 45 (“A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.”).

¹⁹ OCC Mem., at 6, 8.

²⁰ *Id.* at 2.

meaningful explanation for relevance of FirstEnergy Corp.’s financial statements to the corporate separation rules. In fact, the Commission has rejected similar relevance arguments from OCC in this proceeding.²¹ Second, if OCC is right that the information in FE_CIV_SEC_0266685 “has largely been made public already”—which is not true—then OCC has no need to disclose this confidential document and it can cite to the publicly disclosed information.²² Finally, there is no support for OCC’s argument that disclosure of FE_CIV_SEC_0266685 “unquestionably outweighs FirstEnergy Corp.’s interest in keeping” the document “secret.”²³ OCC cites no authority for this proposition nor can it defend it. Rather, as explained above, *see supra* Sections II.A & B, public disclosure of FE_CIV_SEC_0266685 risks interfering with ongoing federal investigations and FirstEnergy’s rights under the protective order in the Securities Litigation.

III. CONCLUSION

For these reasons, and those explained more fully in FirstEnergy’s Motion and Memorandum in Support, FirstEnergy respectfully requests that FE_CIV_SEC_0266685 be protected from disclosure.

²¹ Case No. 17-974-EL-UNC, Hr’g Tr., at 18:7-14 (June 30, 2021).

²² OCC Mem., at 6.

²³ *Id.* at 8.

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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 27, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Corey A. Lee
Attorney for FirstEnergy Corp.

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Summary: Reply in Support of Motion for Protective Order electronically filed by Mr.
Corey Lee on behalf of FirstEnergy Corp.