BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Compliance with R.C. 4928.17 and the Ohio Adm. Code Chapter 4901:1-37.	))))))	Case No. 17-974-EL-UNC

MEMORANDUM CONTRA FIRSTENERGY CORP.'S MOTION FOR A PROTECTIVE ORDER
BY
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I. INTRODUCTION

It is now the Ohio Consumers' Counsel's decision to determine whether to release the records at issue under Ohio's Public Records Law. FirstEnergy Corp.'s motion for a protective order is not properly before the PUCO. We will explain.

FirstEnergy Corp. – the utility holding company that conceded to the U.S. government that it conspired in corruption "to commit honest services wire fraud" – has filed a motion to, in essence, obstruct Ohio's Public Records Law (R.C. 149.43). FirstEnergy Corp. asks the PUCO to determine for another state agency (OCC) how to respond to a public records request.

But the FirstEnergy Corp. Protective Agreement – that it expected the Office of the Ohio Consumers' Counsel ("OCC") to sign – set forth a different process in ¶13. There, OCC is to notify FirstEnergy Corp. if OCC receives a public records request for protected materials. FirstEnergy Corp. then would have five business days "to file a pleading before a *court of competent jurisdiction* to prevent disclosure of the Protected

Materials in question." (Emphasis added.) We did our part with the notice. FirstEnergy Corp. failed its part under the Protective Agreement.

In violation of ¶13 in the OCC/FirstEnergy Corp. Protective Agreement, FirstEnergy *filed at the PUCO (not at a court as required)* on September 7, 2022, to prevent OCC's disclosure of documents. A failure by FirstEnergy Corp. to file in a court is addressed in ¶13 of the Protective Agreement. There, it is agreed that *"[i]f the Producing Parties do not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement."* (Emphasis added.)

Given that FirstEnergy Corp. did not file at a court, the protected materials – as of September 7, 2022 – "can be deemed by OCC to be non-confidential…" as set forth in the Protective Agreement that FirstEnergy Corp. signed with OCC. *Accordingly, OCC presently is giving due consideration, under Ohio's Public Records Law and ¶13 of the Protective Agreement, whether to deem the protected materials as non-confidential and available for release in response to the public records request(s).* It is now OCC's decision to determine whether to release the records at issue under the Public Records Law.

For the PUCO's further information, ¶9 of the Protective Agreement allows FirstEnergy Corp. to file for protection at either a court or the PUCO. But OCC submitted its notice under ¶13, *which limits FirstEnergy Corp. to filing in court.* There is good reason that ¶13 limits FirstEnergy Corp.'s filing to a court. Paragraph 13 is applicable if OCC receives a public records request. The exercise of independent judgment by OCC

(as a state of Ohio agency) for complying with the Public Records law is not subject to the PUCO's utility regulatory authority.[1]

Moreover, OCC does not believe for a minute that FirstEnergy Corp. is anything but fully aware of the terms of its own Protective Agreement including ¶13. FirstEnergy Corp. is *forum-shopping*, preferring the PUCO over a court. But FirstEnergy Corp., by its own signature on the Protective Agreement that includes ¶13 (and under the Public Records Law), cannot forum-shop at the PUCO. Its only option under ¶13 was to file a motion in court, not at the PUCO.

Interestingly, in ¶9 of his sworn affidavit,[2] FirstEnergy Corp. counsel Corey Lee asserts that "pursuant to Paragraph 13 of the Protective Agreement, this Motion for a Protective Order follows…." But it doesn't follow. The PUCO should strike FirstEnergy Corp.'s motion as not properly before it.

Moreover, FirstEnergy Corp. has misused the confidentiality process in the Protective Agreement. For example, FirstEnergy Corp. produced to OCC over 470,000 pages of documents from *In re FirstEnergy Corp. Securities Litigation* (the "*Securities Litigation"*).[3] Of the 470,000 pages it produced to OCC, FirstEnergy Corp. labeled 470,000 pages confidential. FirstEnergy believes that *all half-million pages* are secret.

Some of the pages FirstEnergy Corp. considers secret are *publicly filed*, including copies of FirstEnergy Corp. annual reports, legislation, U.S. Securities and Exchange Commission ("SEC") filings, Federal Energy Regulatory Commission filings, and PUCO

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[1] *In the Matter of the Review of Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006); *In the Matter of United Telephone*, Case No. 07-760-TP-BLS, Entry at 3-6 (Aug. 10, 2007).

[2] The affidavit is attached to FirstEnergy Corp.'s motion as Exhibit B.

[3] Case No. 2:20-cv-3785 (S.D. Ohio).

filings. This is contrary to the state's process for public PUCO proceedings under R.C. 4901.12.

FirstEnergy Corp. has failed its burden to show that the documents are "secret" under Ohio law, per Protective Agreement ¶12. And FirstEnergy Corp. has failed to prove that the public records it seeks to protect are exempt from disclosure under Ohio's Public Records law.

"Sunlight is said to be the best of disinfectants," wrote Louis Brandeis before his appointment to the U.S. Supreme Court. FirstEnergy Corp.'s motion for protective order should be struck or denied.

II. BACKGROUND

A. FirstEnergy Corp.'s motion is governed by its September 24, 2021 protective agreement with the Ohio Consumers' Counsel.

Almost a year ago, OCC served a signed subpoena on FirstEnergy Corp. and instructed that it produce all of the documents that it produced to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio).[4] OCC and FirstEnergy Corp. negotiated a resolution of the subpoena by entering into a Protective Agreement.[5] By its very terms, the Protective Agreement is designed to facilitate and expedite the exchange of information in the discovery process.[6] The Protective Agreement reached between OCC and FirstEnergy Corp. is strikingly similar to protective agreements the PUCO has upheld on other occasions as providing an

[4] FirstEnergy Corp. Motion at Ex. B, ¶1.

[5] *Id*. at Ex. C; *see* attachment.

[6] *Id*. at Ex. C, Preamble.

appropriate balance between competing interests of confidentiality and the public records law.[7]

The Protective Agreement reflects OCC and FirstEnergy Corp.'s agreement as to the manner by which alleged "Protected Materials" are treated. The Protective Agreement, however, does not provide a resolution of the merits concerning the confidentiality of any of the Protected Materials or any resolution of OCC's obligation to produce (including the manner of production) any requested information or material.[8]

The Protective Agreement defines "Protected Materials" as

> documents, deposition testimony, or any other information designated under this Agreement as "CONFIDENTIAL" that are treated by the Producing Parties or third parties as commercially sensitive, personally sensitive, or proprietary. "Protected Materials" include, but are 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.[9]

The Protective Agreement, in ¶13, makes clear what must happen if OCC receives a public records request for Protected Materials. It states:

> OCC will give the Producing Parties notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. ***The Producing Parties will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question.*** If the Producing Parties file such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Producing Parties do not file at a court of competent

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[7] *See, e.g., In the Matter of the Application of United Telephone Company d/b/a Embarq for Approval of an Alternative Form of Regulation*, Case No. 07-760-TP-BLS, Entry (Aug. 10, 2007); *In the Matter of the Application of Duke Energy Ohio, Inc, for an Increase in Gas Rates*, Case No, 07-589-GA-AIR, Entry (Oct. 26, 2007).

[8] *Id*.

[9] *See* attachment.

> jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and no subject to this Agreement. Alternatively, the Producing Parties may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request. Notwithstanding the foregoing, nothing contained herein shall alter or limit OCC's obligations under Ohio Public Records Act (Ohio Revised Code § 149.43), to respond to a lawfully issued subpoena, or to otherwise comply with the law with respect to the Protected Materials.[10]

The Protective Agreement, in ¶12, imposes the "burden" on FirstEnergy Corp. to show that Protected Materials "are confidential and deserving of protection from disclosure." It is agreed in ¶12 that this burden applies to ¶13.

The PUCO has acknowledged that the provisions in a protective agreement concerning treatment of a public records request should be upheld to allow OCC to exercise the judgment required of a state agency to determine whether to release information in response to a public records request.[11] Without such language, Ohio's Public Records law could be contravened, and OCC's judgment improperly limited in response to future public records requests.

B. In addition to FirstEnergy Corp. filing its motion in the wrong forum, its motion in response to OCC's notice lacks clarity.

As of August 30, 2022, FirstEnergy Corp. has produced a mountain of paperwork – 470,000 pages of documents.[12] And, almost all of these records have been classified and labeled "confidential."[13]

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[10] *Id*. at ¶13 (emphasis added).

[11] Case No. 07-760-TP-BLS, Entry at ¶7 (Aug. 10, 2007).

[12] FirstEnergy Corp. Motion at Ex. A, p. 1.

[13] *Id*.

Last month, OCC received a public records request.[14] OCC determined seventy-seven pages of FirstEnergy Corp.'s documents were responsive to the public records request.[15] Consistent with the Protective Agreement, OCC gave FirstEnergy Corp. written notice of the public records request and the documents it determined were responsive.[16] FirstEnergy Corp. does not dispute it received proper notice.

In response to this notice, FirstEnergy Corp. filed a motion for protective order.[17] On its face, it is hard to decipher how many of the seventy-seven pages of public records FirstEnergy Corp. believes should not be produced due to alleged confidentiality. As discussed below, FirstEnergy Corp. calls out only three documents in its motion (at footnote 8), but then asks for "all confidential documents cited in OCC's August 30, 2022 Notice be protected from public disclosure."

[14] *Id*.

[15] *Id*. (FE_CIV_SEC: 62-63, 925, 4317-4319, 12555-12558, 12863-12864, 13649, 13747-13748, 16077-16081, 16165, 16175-16177, 16179, 16182, 16280-16283, 21481-21483, 22523-22529, 45823-45833, 47053, 62032, 72743-72744, 74655, 191022, 215026, 221735-221738, 235230-235231, 238715-238717, 239530, 239715, 248803-248806, 248905-248906, 249833-249834 and 292696-292697).

[16] *See* attachment.

[17] FirstEnergy Corp. actually filed the same motion for protective order in all four PUCO cases involving FirstEnergy. *See* dockets in Case Nos. 20-1502-EL-UNC, 20-1629-EL-UNC; 17-974-EL-UNC, and 17-2474-EL-UNC.

III. LAW AND ARGUMENT

A. FirstEnergy Corp.'s motion, filed in the wrong forum, violates the Protective Agreement it signed with OCC. FirstEnergy Corp.'s motion also violates the Protective Agreement and Ohio Public Records Law in mistakenly arguing that the PUCO has authority to consider its motion, which it does not. Given FirstEnergy Corp.'s failure to file its motion in court, the Protective Agreement provides that it is now for OCC to decide whether to release the records as non-confidential in response to a public records request.

Last September, OCC and FirstEnergy Corp. negotiated, and agreed to a process by which questions, concerns, and alleged issues regarding public record requests would be handled. OCC followed that process. FirstEnergy Corp. has not.

According to the Protective Agreement, OCC is required to notify FirstEnergy Corp. if OCC receives a public records request for Protected Materials.[18] Given FirstEnergy Corp. designated almost all of the 470,000 pages of documents that is produced as "Confidential," almost any public records request will trigger Paragraph 13 of the Protective Agreement. OCC met its obligations under the Protective Agreement when it sent FirstEnergy Corp. a letter, as notice, on August 30, 2022.[19] There, OCC advised of a public records request and that FirstEnergy had five business days to file *in court* to prevent disclosure.

Instead, FirstEnergy forum-shopped and filed at the PUCO (not a court) in violation of the Protective Agreement. This decision is fatal to FirstEnergy Corp.'s cause. If FirstEnergy Corp. believes some or all of the seventy-seven pages of public records should not be produced, it was required to file the necessary pleading in court. Because FirstEnergy Corp. did not make a filing in Court, it failed to meet its obligations under

[18] FirstEnergy Corp. Motion at Ex. C, ¶13.

[19] FirstEnergy Corp. Motion at Ex. A.

the Protective Agreement. OCC can now decide for itself under the Protective Agreement whether to release these documents.

Given the Protective Agreement, the PUCO should strike or deny FirstEnergy Corp.'s motion. The motion is not properly before the PUCO.

Further, there is a reason the Protective Agreement limits FirstEnergy Corp. to filing in court. The PUCO lacks purview over this issue. The PUCO is being asked by FirstEnergy Corp. to opine on a public records issue that is outside the PUCO's jurisdiction with regard to another state agency (OCC).

Indeed, the PUCO has noted that it does not have the statutory authority to add language to the administrative code that would "prevent disclosure of trade secret information protected by a Commission protective order by a party that is subject to a public records statute."[20] The PUCO rejected that utility proposal, writing:

> The Commission believes that the establishment of such a procedure, binding upon another government agency, is beyond its statutory authority. The Commission believes that AEP Ohio's remedy is to include in a protective agreement a requirement that notice be provided to AEP Ohio whenever a public records request for the information is received so that AEP Ohio and/or the party that is subject to the public records request may consider the appropriate legal action necessary under the circumstances.[21]

The PUCO should strike or deny FirstEnergy Corp.'s motion as a violation of its Protective Agreement signed with OCC.

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[20] *In the Matter of the Review of Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006).

[21] *Id.* at 34.

B. FirstEnergy Corp. is mistakenly mixing Ohio public records law (applicable here) with PUCO discovery law (inapplicable here), in claiming that disclosing records in response to a public records request would contradict the PUCO's discovery stay in this case. In fact, the PUCO lacks jurisdiction over this public records law issue involving a records request that OCC, not the PUCO, received. Moreover, the PUCO cannot stay Ohio's Public Records Law as it did for discovery in the PUCO cases.

FirstEnergy Corp. claims "OCC's production of documents would undermine the six-month stay of all discovery and motion practice."[22] FirstEnergy Corp. goes on to say, "[u]nder the terms of the parties' Protective Agreement, OCC must notify FirstEnergy of any public records request for confidential materials."[23] FirstEnergy Corp. concludes this thought by stating "[t]o prevent disclosure, FirstEnergy must seek a motion for protective order within five business days."[24]

FirstEnergy Corp. is relying upon O.A.C. 4901-1-24 (a PUCO rule), to seek protection from OCC releasing records in response to a public records request. FirstEnergy Corp. is mistaken in its belief that the PUCO has authority under that rule to prevent disclosure of information requested through a public records request. O.A.C. 4901-1-24 does not provide the PUCO with authority over the Public Records Law. FirstEnergy Corp. is inappropriately mixing the PUCO's regulatory authority over case discovery with OCC's responsibility as a state agency under Ohio's Public Records law.

In this regard, O.A.C. 4901-1-24(A), which FirstEnergy Corp. relies on, relates solely to a motion for protection from *discovery*. Subsection (A) clearly states "[*u]pon motion of any party or person from whom discovery is sought* the commission***may

[22] FirstEnergy Corp. Motion, at 2.

[23] *Id*.

[24] *Id*.

issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Subsections (B) and (C) refer back to subsection (A), and merely explain the requirements of a motion for protection and the PUCO's ability to deny the motion in whole or part.

The thirty-nine documents, that FirstEnergy Corp. does not want OCC to disclose, are not being sought from OCC through discovery. They are being sought from OCC through a public records request. Thus, O.A.C. 4901-1-24 does not provide an opportunity for protection of the information. The PUCO should not try to fit a square peg into a round hole, as FirstEnergy Corp. seems to urge, in mixing the PUCO's regulatory authority with responsibilities under the public records law. FirstEnergy Corp.'s request for protection under O.A.C. 4901-1-24 should be rejected.

Moreover, it would be a mistake for the PUCO to decide this issue based on policy considerations and the balancing of interests it used when it issued its stay order (as FirstEnergy Corp. asks).[25] As the Ohio Supreme Court has opined, exemptions to the broad access afforded public records are provided through narrowly construed statutory exceptions and not through court-related tests concerning policy matters:

> It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.[26]

[25] FirstEnergy Corp. Motion at 3.

[26] *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St.3d 258, 266, 602 N.E.2d 1159.

Similarly, the Court has opined that:

> in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure.[27]

The General Assembly, not the PUCO, is the ultimate arbiter of public policy when it comes to public records. FirstEnergy Corp.'s arguments should be rejected.

C. Per the Protective Agreement's terms, FirstEnergy Corp.'s motion is not properly before the PUCO. The records that FirstEnergy Corp. wants to be kept secret are now subject to OCC's decision about whether to release them as public records. Further, FirstEnergy Corp. failed its burden, under Protective Agreement ¶12, to show that the discovery records at issue are deserving of the protection it claims. The information in the records shows that they are not secret.

As a state agency, OCC is subject to the Ohio Public Records Law in R.C. 149.43. The Ohio Public Records law mandates full access to public records upon request, unless the requested records fall within one of the exceptions specifically enumerated in the law.[28] The Act requires that "upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person***[and] upon request a public office or person responsible for public records shall make copies of the requested public record***."[29]

The Public Records Law reflects the state's policy that 'open government serves the public interest and our democratic system.'"[30] The Public Records Law "must be

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[27] *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶36.

[28] *State ex rel. Lucas Cty Bd. Of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 170, 2000-Ohio-282, 724 N.E.2d 411.

[29] R.C. 149.43(B)(1).

[30] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶13, quoting *State*

construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records."[31]

Under Ohio's Public Records law, public records are defined in part as "records kept by a public office."[32] By virtue of the Consumer's Counsel being a state officer,[33] OCC is a public office in the state of Ohio. There is no dispute that OCC is a "public office" under R.C. 149.011(A), and subject to the Public Records law.

"Public records " are further defined as "[1] ***any document***, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, [2] created or ***received by or coming under the jurisdiction of any public office*** of the state or its political subdivisions, [3] ***which serves to document*** the organization, functions, policies, decisions, procedures, operations, or other ***activities of the office***."[34]

Turning to the documents produced by FirstEnergy Corp. under OCC's subpoena, it is undisputed they are documents received by OCC. Therefore, they meet the first and second prongs of the definition in R.C. 149.011(G). It is the final requirement in R.C. 149.011(G) that FirstEnergy Corp. takes issue with.

FirstEnergy Corp. misinterprets R.C. 149.43(A) and fails its burden of proof under ¶12 of the Protective Agreement. FirstEnergy Corp. argues "[t]he noticed documents are not kept by OCC 'to document the organization, functions, policies,

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ex rel. Dann v. Taft, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶20.

[31] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 1997-Ohio-349, 684 N.E.2d 1239.

[32] R.C. 149.43(A)(1).

[33] R.C. 4911.06.

[34] R.C. 149.011(G) (Emphasis added).

decisions, procedures, operations, or other activities of the office'."[35] FirstEnergy maintains "[i]t would be an 'absurd result' for the productions in the Securities Litigation "received by OCC and retained by OCC to be subject to R.C. 149.43."[36] The PUCO should reject this argument for at least two reasons.

First, OCC and FirstEnergy Corp. contemplated that the documents being produced under the Protective Agreement could be subject to disclosure via a public records request. That is why Paragraph 13 of the Protective Agreement exists. Paragraph 13 clearly sets out a process that must be followed: a filing of "a pleading before a court of competent jurisdiction." Paragraph 13 is the basis for OCC's notice, as shown in Exhibit A of FirstEnergy Corp.'s motion.

In comparison, ¶9 of the Protective Agreement sets out a different process when OCC itself seeks to "include, utilize, refer, or copy any Protected Materials in such a manner,***that might require disclosure of such material." In that situation, FirstEnergy Corp. is permitted the choice to file a motion in a court or "with an administrative agency of competent jurisdiction."

Moreover, the records requester in this situation is not circumventing the request by the Department of Justice or an order of the PUCO. The requester made a request under Ohio's Public Records Law, which the PUCO does not administer for other agencies. Accordingly, the PUCO cannot stay the Ohio Public Records Law, which is independent of the PUCO cases and discovery that it recently stayed. The requester did

[35] FirstEnergy Corp. Motion at 6.

[36] *Id*.

not make a discovery request and did not act in a PUCO case. Rather the requester is exercising its right under Ohio law to seek public records held by a public agency.

Second, FirstEnergy Corp.'s interpretation of R.C. 149.43(A) is much narrower than the Ohio Supreme Court's. For the past thirty-six years, "R.C. 149.43 has been construed broadly to include 'anything a public office utilizes to carry out its duties and responsibilities.'"[37] "There does not have to be a specific statutory provision requiring the government unit to keep such information or document."[38] The "raison d'etre of such a record is to ensure the proper functioning of the unit."[39]

Here, the records at the center of this dispute were received by OCC as part of its duties and responsibilities to Ohio residential utility consumers. OCC is the statewide legal representative for Ohio's residential consumers in matters related to their investor-owned electric, natural gas, telephone, and water services.[40] OCC advocates for consumers in proceedings before the PUCO, federal regulatory agencies, appellate courts, and the Ohio General Assembly. The agency also monitors public utilities' compliance with regulatory standards for consumer protection. OCC is investigating matters related to the FirstEnergy scandal(s) that may have cost Ohio utility consumers money.

FirstEnergy Corp. cites to a number of cases as part of its claim that the discovery is not a "record" and thus not a "public record." FirstEnergy Corp. contends that the

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[37] *State ex rel. Rea v. Ohio Dep't of Educ.* (1997), 81 Ohio St.3d 527, 530, 692 N.E.2d 596 (citations omitted).

[38] *State ex rel. Jacobs v. Prudoff* (1986), 30 Ohio App.3d 89, 90, 506 N.E.2d 927 (citations omitted).

[39] *Id*.; *see, e.g*., *State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-1497, 816 N.E.2d 213 (holding that any record used by the Court to render a decision is a record subject to RC. 149.43); *State ex rel. Bowman v. Jackson City School Dist.*, 4th App. Dist, Case No. 10CA3, 2011-Ohio-2228 at ¶15 (concluding the school district's decision to discipline a teacher related to her inappropriate use of email, discovered during the course of investigation, are public records).

[40] *See* R.C. Chapter 4911.

receipt and possession of any old piece of paper by a public office does not make it a public record. True.

As noted by the Court in *State ex rel. Cincinnati Enquirer v. Ronan,*[41] "[a]gencies must use or rely on the document to perform agency business and integrate it into their files, before it may be deemed an 'agency record.'" In *Ronan*, the school district records were not considered public records because the records were delivered to a post office box leased by the school district, but school officials had not opened or looked inside the post office box.[42] The Ohio Supreme Court agreed with the lower court that after the school district retrieved the documents from the post office box, the contents became public records.[43]

Unlike the school district in *Ronan*, OCC has used the discovery and relied upon it to perform agency business (the filing of motions and pleadings, on behalf of residential consumers). So *Ronan* does not further FirstEnergy Corp.'s cause.

Similarly, FirstEnergy Corp.'s citation to *State ex rel. Beacon J. Publ'g Co. v. Bond*,[44] does little to support FirstEnergy Corp.'s argument that the discovery is not a public record. In that case, the records being sought, from a judge presiding over a criminal trial, included records containing the names and addresses of jurors.[45] The Ohio Supreme Court ruled that personal information regarding prospective jurors was not a "record" utilized by the court in rendering its decision, and thus did not shed light on the

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[41] 127 Ohio St.3d 236, 239, 2010-Ohio-5680, 938 N.E.2d 347.

[42] *Id.* at 237.

[43] *Id.* at 238.

[44] 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180.

[45] 2002-Ohio-7117, ¶4.

trial court's statutory duties.[46] The Ohio Supreme Court did rule that juror questionnaires without responses were public records documenting the activities of a public office.[47]

Here, the records were used by OCC in its statutory duty to represent residential consumers of the FirstEnergy utilities. And the documents do not contain personal information, like those at issue in the *Bond* case.

Similarly, FirstEnergy Corp's citation to *State ex rel. Dispatch Printing Co., v. Johnson*,[48] is not persuasive. Like the *Bond* case, the information requested from the state agency (Department of Administrative Services) involved personal information --state-employee home addresses. The Court held that the addresses were not records under the Public Records law because they did not document the organization, functions, policies, decisions, procedures, operations, or other activities of the state. The Court noted that disclosure of state employee home addresses "would reveal little or nothing about the employing agencies or their activities."[49]

FirstEnergy Corp.'s arguments that the information is not a public record should be rejected. The authority used to bolster its argument is distinguishable and therefore, not controlling. The seventy-seven pages of documents, which FirstEnergy Corp. argues are not public records, are records which OCC can decide to disclose as public records.

FirstEnergy Corp.'s claims fail its burden of proof under Protective Agreement ¶12. Further, FirstEnergy Corp.'s motion is not properly before the PUCO, as already explained.

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[46] *Id*., ¶11, 12.

[47] *Id*., ¶13.

[48] 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274.

[49] *Id.* at ¶27 (citation omitted).

D. FirstEnergy Corp. failed its burden, under Protective Agreement ¶12, to show that the discovery records at issue are deserving of the protection it claims as confidential law enforcement investigatory records. Further, its motion is not properly before the PUCO.

FirstEnergy Corp. claims that the records are not "public" i.e., subject to disclosure, because they are confidential law enforcement investigatory records exempt from disclosure under R.C. 149.11(G).[50] FirstEnergy Corp.'s claims fail its burden of proof under Protective Agreement ¶12.

Under Ohio's Public Records law a "public record" does not include confidential law enforcement investigatory records. However, the exception for such records involves a two-part test,[51] which FirstEnergy Corp. has not satisfied. First, it must be established that the record "pertains to a law enforcement matter" of a criminal, quasi-criminal, civil or administrative nature.

Second, FirstEnergy Corp. must show that the release of the record would create a high probability of disclosure of any of the following information, as detailed in R.C. 149.43(A)(2)(a) through (d): (a) the identity of a suspect who has not been charged with the offense to which the record pertains, or an information source or witness to whom confidentiality has been promised; (b) information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity; (c) specific confidential investigatory techniques or procedures or specific investigatory work product; (d)

[50] *Id*. at 6.

[51] *State ex rel. Miller. Ohio State Highway Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶25.

information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

But FirstEnergy Corp. presents nothing whatsoever to show that it meets the second part of the test --where release of the record presents high probability of disclosure of information under the circumstances detailed in R.C. 149.43(2)(a) through (d). This does not pass muster given that the Ohio Supreme Court has ruled that a public office, claiming an exception based on risks that are not evident within the records themselves, must provide more than conclusory statements in affidavits to support that claim.[52] Here FirstEnergy Corp. did not even provide conclusory statements.

FirstEnergy Corp.'s claims fail its burden of proof under Protective Agreement ¶12. Further, FirstEnergy Corp.'s motion is not properly before the PUCO, as already explained.

E. The Protective Agreement, in ¶13, authorizes public disclosure by OCC under the circumstances of FirstEnergy Corp's failure to file its motion in court. The potential for conflicting rulings in the Securities Litigation is not reason to grant FirstEnergy Corp's motion for protection. Also, FirstEnergy Corp. failed its burden, under Protective Agreement ¶12, to show that the discovery records at issue are deserving of the protection it claims. Further, FirstEnergy Corp.'s motion is not even properly before the PUCO for a decision.

With its fourth and final argument, FirstEnergy claims "disclosure here renders meaningless those rights and protections afforded to FirstEnergy under the court-approved stipulated protective order in the *Securities Litigation*."[53] Ironically, by filing the instant motion, FirstEnergy is the party rendering its Protective Agreement with OCC, which governs the issues before the PUCO, meaningless. That is wrong.

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[52] *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 400-404, 200-Ohio-207, 732 N.E.2d 373.

[53] FirstEnergy Corp. Motion at 2.

Indeed, OCC takes great umbrage at FirstEnergy Corp.'s brazen violation of the Protective Agreement it signed with OCC. OCC is a state agency that is subject to Ohio's public records law. The Protective Agreement is written with an acknowledgement of that reality and contains a process to use when a public records request is made. OCC complied with the Protective Agreement. FirstEnergy is violating our Agreement. Its motion should be struck or at least denied.

Additionally, FirstEnergy Corp. argues the PUCO should not order disclosure of the documents because the District Court might order otherwise in the *Securities Litigation*.[54] That possibility of a contrary order is no basis for denying the public records request in favor of a protective order. For example, the PUCO did not hesitate, out of fear of a disapproving order by FERC, to approve the FirstEnergy utilities' infamous multi-billion application for a power purchase agreement (PPA) for its coal and nuclear power plants some years ago. Upon filings at FERC by EPSA, OCC and others, FERC did reject the PUCO's order[55]

The PUCO should not permit FirstEnergy Corp. to avoid disclosing a document on the sole basis that conflicting rulings are *possible*. FirstEnergy Corp. has not yet litigated the merits of its confidentiality designation in the District Court.[56] The District Court has issued no ruling on the confidentiality of the materials. Nor has the District Court issued any ruling on a public records request for the materials. It may never. The possibility that the PUCO's ruling (or a court of competent jurisdiction's ruling) *might*

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[54] *Id.* at 6.

[55] *EPSA v. FirstEnergy Solutions, et al*. FERC Docket No. EL16-34-000, Order Granting Complaint at 19 (April 27, 2016).

[56] 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. But as explained above, this PUCO rule is inapplicable to the Public Records Law.

FirstEnergy Corp.'s claims about the possibility of conflicting orders shows it is grasping at straws. It has failed its burden of proof under Protective Agreement ¶12. And its motion is not properly before the PUCO under Protective Agreement ¶13, as already explained.

IV. CONCLUSION

FirstEnergy Corp. has adopted a tactic of *forum-shopping.* It seeks a ruling from the PUCO, its apparent favored forum. But FirstEnergy Corp. is required by its Protective Agreement to file *in court* to try to prevent OCC from disclosing documents in response to a public records request. The PUCO has no role in this process under ¶13 of the Protective Agreement nor under the Public Records Law with regard to another agency (OCC).

Under ¶13 of the Protective Agreement, OCC can now decide whether to disclose the records at issue in response to the public records request(s). Further, FirstEnergy Corp.'s claims fail its burden of proof under Protective Agreement ¶12.

"Sunlight is said to be the best of disinfectants," wrote Louis Brandeis before his appointment to the U.S. Supreme Court. FirstEnergy Corp.'s motion for protective order should be struck or denied.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra FirstEnergy Corp.'s Motion for a Protective Order was served on the persons stated below via electronic transmission, this 22nd day of September 2022.

/s/ Maureen R. Willis
Maureen R. Willis
Senior Counsel

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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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 Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.	)	**Case No. 17-974-EL-UNC**
In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	**Case No. 20-1629-EL-RDR**

PROTECTIVE AGREEMENT

This Protective Agreement ("Agreement") is entered into by and between FirstEnergy Corp. and FirstEnergy Service Co. ("Producing Parties") and the Office of the Ohio Consumers' Counsel ("Receiving Party" or "OCC") (collectively, "the Parties"). This Agreement is designed to facilitate and expedite the exchange with Receiving Party of information in the discovery process in this proceeding, as this "Proceeding" is defined herein. It reflects agreement between the Producing Parties and Receiving Party as to the manner in which "Protected Materials," as defined herein, are to be treated. This Agreement 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's obligation to produce (including the manner of production) any requested information or material.

1. The 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.

2. "Proceeding" as used throughout this document means the above-captioned case, including any appeals, remands and other cases related thereto.

3. A. "Protected Materials" means documents, deposition testimony, or any other information designated under this Agreement as "CONFIDENTIAL" that are treated by the Producing Parties or third parties as commercially sensitive, personally sensitive, or proprietary. "Protected Materials" include, but are 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.

B. "Protected Materials" do not include any information or documents contained in the public files of any state or federal administrative agency or court and do not include documents or information which at, or prior to, commencement of this Proceeding, is or was otherwise in the public domain, or which enters into the public domain except that any disclosure of Protected Materials contrary to the terms of this Agreement or protective order or a similar protective agreement made between the Producing Parties and other persons or entities shall not be deemed to have caused such Protected Materials to have entered the public domain.

C. "Protected Materials" that are in writing shall be conspicuously marked with the appropriate designation, or counsel for the Producing Parties may orally state on the deposition record that a response to a question posed at a deposition is considered Protected Materials.

D. "Protected Materials" include documents or information that are stored or recorded in the form of electronic or magnetic media (including information, files, databases, or programs stored on any digital or analog machine-readable device, computers, discs, networks, or tapes) ("Computerized Material"). The Producing Parties at their discretion may produce

Computerized Material in such form. To the extent that OCC reduces Computerized Material to hard copy, OCC shall conspicuously mark such hard copy as confidential.

4. Protected Materials provided in the context of this Proceeding will be provided to OCC for use by OCC in conjunction with this Proceeding. Nothing in this Agreement precludes the use of any portion of the Protected Materials that becomes part of the public record or enters into the public domain. Nothing in this Agreement precludes OCC from filing Protected Materials under seal or otherwise using Protected Material in ways, such as *in camera* proceedings, that do not disclose Protected Materials.

5. As used in this Agreement, the term "Authorized Representative" includes OCC's counsel of record in this Proceeding and other attorneys, paralegals, economists, statisticians, accountants, consultants, or other persons employed or retained by OCC and engaged in this Proceeding.

6. Access to Protected Materials is permitted to OCC's Authorized Representatives who are either a signatory to this Agreement or who have executed a Non-Disclosure Certificate in the form attached hereto as Exhibit A prior to any access. OCC must treat all Protected Materials, copies thereof, information contained therein, and writings made therefrom as proprietary and confidential, and will safeguard such Protected Materials, copies thereof, information contained therein, and writings made therefrom so as to prevent voluntary disclosure to any persons other than OCC's Authorized Representatives.

7. If any OCC Authorized Representative ceases to be engaged in this Proceeding, access to any Protected Materials by such person will be terminated immediately and such person must promptly return Protected Materials in his or her possession to another Authorized Representative of OCC and if there is no such Authorized Representative, such person must treat such Protected Materials in the manner set forth in Paragraph 16 hereof as if this Proceeding

herein had been concluded. Any person who has signed the foregoing Non-Disclosure Certificate will continue to be bound by the provisions of this Agreement even if no longer so engaged.

8. In this Proceeding, OCC may disclose Protected Materials or writings regarding their contents to any individual or entity that is in possession of said Protected Materials or to any individual or entity that is bound by a Protective Agreement or Order with respect to the Protected Materials. OCC may also disclose Protected Materials to employees or persons working for or representing the Public Utilities Commission of Ohio in connection with this Proceeding.

9. OCC may file Protected Materials under seal in this Proceeding whether or not OCC seeks a ruling that the Protected Materials should be in the public domain. If OCC desires to include, utilize, refer, or copy any Protected Materials in such a manner, other than in a manner provided for herein, that might require disclosure of such material, then OCC must first give notice (as provided in Paragraph 15) to the Producing Parties, specifically identifying each of the Protected Materials that could be disclosed in the public domain. The Producing Parties will have five (5) business days after service of OCC's notice to file, with an administrative agency of competent jurisdiction or court of competent jurisdiction, a motion and affidavits with respect to each of the identified Protected Materials demonstrating the reasons for maintaining the confidentiality of the Protected Materials. The affidavits for the motion must set forth facts delineating that the documents or information designated as Protected Materials have been maintained in a confidential manner and the precise nature and justification for the injury that would result from the disclosure of such information. If the Producing Parties do not file such a motion within five (5) business days of OCC's service of the notice, then the Protected Materials will be deemed non-confidential and not subject to this Agreement.

10. The Parties agree to seek *in camera* proceedings by the administrative agency of competent jurisdiction or court of competent jurisdiction for arguments or for the examination of a witness that would disclose Protected Materials. Such *in camera* proceedings will be open only to the Parties, their counsel, other OCC Authorized Representatives, and others authorized by the administrative agency or court to be present; however, characterizations of the Protected Materials that do not disclose the Protected Materials may be used in public.

11. Any portion of the Protected Materials that the administrative agency of competent jurisdiction or court of competent jurisdiction has deemed to be protected and that is filed in this Proceeding will be filed in sealed confidential envelopes or other appropriate containers sealed from the public record.

12. It is expressly understood that upon a filing made in accordance with Paragraph 9 or Paragraph 13 of this Agreement, the burden will be upon the Producing Parties to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure.

13. OCC will give the Producing Parties notice (as provided in Paragraph 15) if OCC receives a public records request for Protected Materials. The Producing Parties will have five (5) business days after service of OCC's notice to file a pleading before a court of competent jurisdiction to prevent disclosure of the Protected Materials in question. If the Producing Parties file such a pleading, OCC will continue to protect the Protected Materials as required by this Agreement pending an order of the court. If the Producing Parties do not file at a court of competent jurisdiction within five (5) business days of service of OCC's notice, then such Protected Materials can be deemed by OCC to be non-confidential, not a trade secret, and not subject to this Agreement. Alternatively, the Producing Parties may provide notice to OCC that the Protected Materials may be disclosed in response to a public records request.

Notwithstanding the foregoing, nothing contained herein shall alter or limit OCC's obligations under Ohio's Public Records Act (Ohio Revised Code § 149.43), to respond to a lawfully issued subpoena, or to otherwise comply with the law with respect to the Protected Materials.

14. If, under Ohio's public records law, a court awards a relator or person or party attorney's fees or statutory damages or court costs in connection with OCC's non-disclosure or delayed disclosure of Protected Materials, then the Producing Parties will pay such awarded fees, statutory damages, and/or court costs to the relator or person or party so that the State of Ohio, OCC, and OCC's employees and officials are held harmless.

15. All notices referenced in Paragraphs 9 and 13 must be served by the Parties on each other by one of the following methods: (1) sending the notice to such counsel of record herein via e-mail; (2) hand-delivering the notice to such counsel in person at any location; or (3) sending the notice by an overnight delivery service to such counsel.

16. Once OCC has complied with its records retention schedule(s) pertaining to the retention of the Protected Materials and OCC determines that it has no further legal obligation to retain the Protected Materials and this Proceeding (including all appeals and remands) is concluded, OCC must return or dispose of all copies of the Protected Materials unless the Protected Materials have been released to the public domain or filed with a state or federal administrative agency or court under seal. OCC may keep one copy of each document designated as Protected Material that was filed under seal and one copy of all testimony, cross-examination, transcripts, briefs, and work product pertaining to such information and will maintain that copy as provided in this Agreement.

17. By entering into this Protective Agreement, OCC does not waive any right that it may have to dispute the Producing Parties' determination regarding any material identified as confidential by the Producing Parties and to pursue those remedies that may be available to OCC

before an administrative agency or court of competent jurisdiction. Nothing in this Agreement precludes OCC from filing a motion to compel.

18. By entering into this Protective Agreement, the Producing Parties do not waive any right it may have to object to the discovery of confidential material on grounds other than confidentiality and to pursue those remedies that may be available to the Producing Parties before the administrative agency of competent jurisdiction or court of competent jurisdiction.

19. This Agreement represents the entire understanding of the Parties with respect to Protected Materials and supersedes all other understandings, written or oral, with respect to the Protected Materials. No amendment, modification, or waiver of any provision of this Agreement is valid, unless in writing signed by both Parties. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

20. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

FirstEnergy Corp. and FirstEnergy Service Co.	The Office of the Ohio Consumers' Counsel
BY:	BY:
/s/ Corey A. Lee	*/s/ John Finnigan*
Counsel	Counsel
9/24/2021	9/23/2021
Date	Date

Exhibit A

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 Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.	)	Case No. 17-974-EL-UNC
In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	Case No. 20-1629-EL-RDR

NON-DISCLOSURE CERTIFICATE FOR
CONFIDENTIAL PROTECTED MATERIALS

I certify my understanding that Protected Materials may be provided to me pursuant to the terms and restrictions of the Protective Agreement, last executed _____ 2021, and certify that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Materials, and any writings, memoranda, or any other form of information regarding or derived from Protected Materials will not be disclosed to anyone other than in accordance with the Protective Agreement and will be used only for the purposes of this Proceeding as defined in Paragraph 2 of the Protective Agreement.

Name: _____

Company: _____
Address: _____
Telephone: _____

Date: _____

August 30, 2022

VIA EMAIL

Corey Lee, Attorney
Jones Day
901 Lakeside Avenue
Cleveland, Ohio 44114

Re: Consumers' Counsel's Notice to FirstEnergy Corp. Under Paragraph 13 of the Protective Agreements Regarding FirstEnergy Corp.'s Allegations of Confidentiality of Documents, PUCO Cases 17-974-EL-UNC, 17-2474-EL-UNC, 20-1502-EL-UNC and 20-1629-EL-RDR

Dear Mr. Lee:

The FirstEnergy Corp. protective agreements, in paragraph 13, set forth a process for the Office of the Ohio Consumers' Counsel to notify FirstEnergy Corp. if OCC receives public records requests for protected materials. FirstEnergy Corp. would then have five business days to file in court to seek an order preventing disclosure of the documents.

As you know, FirstEnergy Corp. expected OCC to sign protective agreements (in the above PUCO cases) in order for FirstEnergy Corp. to provide OCC with discovery responses that it claims to be confidential. In signing, OCC reserved rights to dispute confidentiality.

FirstEnergy Corp. has marked as confidential all 470,000 pages of the documents produced to OCC from the securities litigation cases. In fact, it seems that all of the discovery documents produced thus far by FirstEnergy Corp. to OCC have been labeled "confidential." We received these documents through an agreement reached with FirstEnergy Corp. in a letter dated October 13, 2021.

Accordingly, OCC hereby notifies FirstEnergy Corp. that OCC has received a public records request. We have identified the following documents (that we obtained from FirstEnergy Corp. on discovery) as responsive. The documents are identified by the numbers assigned by FirstEnergy Corp. While OCC complies with the protective agreements, OCC does not believe that any of the documents qualify as confidential.

FE_CIV_SEC:
62-63, 925, 4317-4319, 12555-12558, 12863-12864, 13649, 13747-13748, 16077-16081, 16165, 16175-16177, 16179, 16182, 16280-16283, 21481-21483, 22523-22529, 45823-45833, 47053, 62032, 72743-72744, 74655, 191022, 215026, 221735-221738, 235230-235231, 238715-238717, 239530, 239715, 248803-248806, 248905-248906, 249833-249834 and 292696-292697

Therefore, under paragraph 13 of the protective agreements, this OCC notice will result in the above documents becoming unprotected (non-confidential) unless FirstEnergy Corp. files in court within five business days to seek a ruling that the documents are confidential under Ohio's public records law.

Best regards,

/s/ Maureen R. Willis

Maureen R. Willis (0020847)
Senior Counsel

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/22/2022 4:40:12 PM

in

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

Summary: Memorandum Memorandum Contra FirstEnergy Corp.'s Motion for a Protective Order by Office of the Ohio Consumers' Counsel electronically filed by Ms. Patricia J. Mallarnee on behalf of Willis, Maureen Ms.