

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of the)
Distribution Modernization Rider of Ohio)
Edison Company, The Cleveland Electric) Case No. 17-2474-EL-RDR
Illuminating Company, and The Toledo)
Edison Company)
)**

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

I. INTRODUCTION

On August 24, 2022, the Commission stayed all four investigative proceedings at the request of the United States Department of Justice (“DOJ”) and cited to the potential “harm[]” if “any of the of four Commission proceedings interfered with or impeded the federal investigations.”¹ Six days later, OCC sent notice to FirstEnergy Corp. (“FirstEnergy”) that OCC had received a public records request for certain documents from the productions made to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio) (the “*Securities Litigation*”).² Out of the approximately 500,000 pages of documents produced by FirstEnergy, OCC determined 39 documents were responsive to the public records request.³ Of those 39 documents, all documents designated confidential were produced to the DOJ and/or

¹ Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-RDR, Entry, at ¶ 80 (Aug. 24, 2022).

² Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-RDR, FirstEnergy Corp. Motion for Protective Order (“FirstEnergy Mot.”) and Memorandum in Support (“FirstEnergy Mem.”), Exhibit A (Sept. 7, 2022).

³ *Id.*

the SEC (the “Noticed Documents”).⁴ Accordingly, FirstEnergy filed a motion for protective order with the Commission seeking to prevent the public disclosure of the documents produced to the DOJ and/or SEC as part of their ongoing investigations.

In response, OCC argues that FirstEnergy’s motion is not properly before the Commission and the Commission does not have jurisdiction to determine OCC’s obligations under R.C. 149.43.⁵ However, the Noticed Documents are not “records” under R.C. 149.011 so do not fall under R.C. 149.43’s requirements. As such, OCC’s concerns do not apply.

II. ARGUMENT

FirstEnergy understands that OCC has a statutory duty to respond to public records requests and that its duty is defined by Ohio R.C. 149.43. FirstEnergy also appreciates OCC’s argument regarding Paragraph 13. However, the Noticed Documents are not OCC’s “records”—as defined by R.C. 149.011(G).⁶ Therefore, OCC’s concerns and arguments surrounding R.C. 149.43 are inapposite.

The only reason OCC possesses the Noticed Documents is because those documents were produced by FirstEnergy to the DOJ and/or SEC and subsequently produced to the plaintiffs in the *Securities Litigation*.⁷ These documents were not produced in response to party discovery nor were they ever determined to be wholesale relevant to the Commission investigatory proceedings.

Simply put, these Noticed Documents are not “document[s], device[s], or item[s], . . . created or received by or coming under the jurisdiction of any public office of the state or its

⁴ OCC states at one point that of “the 470,000 pages it produced to OCC, FirstEnergy Corp. labeled 470,000 pages confidential.” (OCC Mem., at 3.) As FirstEnergy has repeatedly stated, not all documents are designated as confidential.

⁵ Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-RDR, The Office of the Ohio Consumers’ Counsel Memorandum Contra (“OCC Mem.”) (Sept. 22, 2022).

⁶ FirstEnergy Mem., at 4-6.

⁷ *Id.* at 6.

political subdivisions, *which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities* of” OCC—as required by R.C. 149.011(G).⁸ OCC points to no case or authority where documents produced to a federal investigator as part of an ongoing federal investigation (and that OCC received solely because of that fact) are OCC’s “records.” Rather, Ohio courts confirm the opposite.⁹ For example, *State ex rel. Community Journal v. Reed* is instructive¹⁰—yet OCC fails to acknowledge or address it.

In *Reed*, a reporter sought records from the Ohio Bureau of Criminal Identification and Investigation (“BCI”) related to BCI’s investigation into missing property from a police department.¹¹ As part of its investigation, BCI received two sets of document productions from the police department, totaling over 700 records.¹² The court found that, under R.C. 149.011(G), “the documents BCI received from the Police Department were not BCI’s ‘public records’ as the documents were not kept by BCI to ‘document the organization, functions, policies, decisions, procedures, operations, or other activities’ of BCI . . . Instead, the documents served only to further BCI’s criminal investigation of illicit activity occurring at the Police Department.”¹³ The public records request OCC has received is indistinguishable from that in *Reed*. OCC argues that the Noticed Documents are “records” under R.C. 149.011 because OCC is “investigating matters related to the FirstEnergy scandal(s)” and that it “has used the discovery and relied upon it to perform agency business (the filing of motions and pleadings, on behalf of residential

⁸ Ohio R.C. 149.011(G) (emphasis added).

⁹ FirstEnergy Mem., at 5-7.

¹⁰ *State ex rel. Cmty. J. v. Reed*, 2014-Ohio-5745, ¶¶ 37-42, 26 N.E.3d 286, 296-98 (12th Dist.).

¹¹ *Id.* at ¶ 1.

¹² *Id.* at ¶ 3.

¹³ *Id.* at ¶ 38.

consumers).”¹⁴ But even taken as true, this still does not make the Noticed Documents here any different than those requested in *Reed*. As OCC is purportedly using the documents to investigate,¹⁵ so too was BCI. Yet that does not make a document a “record” of a state agency.

As such, R.C. 149.43 and OCC’s cited authority do not apply. It is true that the Commission has addressed its limited jurisdiction with respect to public records requests that OCC, as a separate state agency, receives. The Commission has explained in *United Telephone Co. of Ohio* that it cannot “limit the lawful exercise of OCC’s judgment in response to a . . . public records request.”¹⁶ But there it was OCC’s position that a protective agreement “would protect the information whose confidentiality is at stake unless (1) an authority of competent jurisdiction determines that the information *could* be disclosed publicly; or (2) [the producing party] itself fails to seek a *Commission* or court ruling.”¹⁷ Moreover, in *United Telephone Co. of Ohio*, the documents at issue were ones the applicant produced to OCC and there was no question as to whether they were “records” governed by R.C. 149.43. The documents there were not ones produced to a federal investigator, that were in turn produced in a federal civil proceeding, and that were in turn produced wholesale to OCC.¹⁸ Indeed, at the request of the DOJ, the Commission here has stayed these four proceedings so as to not risk interfering with the ongoing criminal

¹⁴ OCC Mem., at 15-16.

¹⁵ *Id.* at 15.

¹⁶ *In Re United Tel. Co. of Ohio*, No. 07-760-TP-BLS, 2007 WL 2297344, at *4 (P.U.C.O. Aug. 10, 2007).

¹⁷ *Id.*, at *3 (emphasis added).

¹⁸ It cannot be the case that documents—which would be shielded from FOIA requests made directly to the DOJ—may be subject to public disclosure through a public records request to OCC. (FirstEnergy Mem., at 6-7.) OCC’s arguments surrounding law enforcement investigatory records do not address this issue. (*See* OCC Mem., at 18-19.)

investigation.¹⁹ And the Commission itself has recognized the unique posture of discovery in these proceedings running in parallel to pending civil and criminal proceedings.²⁰

The Commission has authority to enforce its own stay, rule on the confidentiality of documents exchanged in these four PUCO proceedings, and issue a protective order pursuant to O.A.C. 4901-1-24.²¹ In the Commission's own words: FirstEnergy and OCC's protective agreement does not "strip the Commission of its authority from subsequently determining whether information should or should not be disclosed in the public domain" and "the Commission is certainly an administrative agency of competent jurisdiction to determine whether the information deserves protection and is the final arbiter as to whether information subject to discovery in this proceeding should be publicly disclosed."²² Ohio R.C. 149.43 does not apply given that the Noticed Documents are not "records" and they should therefore be shielded from public disclosure.

III. CONCLUSION

For these reasons, and those explained more fully in FirstEnergy's Motion and Memorandum in Support, FirstEnergy respectfully requests that all confidential documents cited in OCC's August 30, 2022 Notice²³ be protected from public disclosure.

¹⁹ Case Nos. 17-974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-RDR, Entry (Aug. 24, 2022).

²⁰ *Id.* at ¶ 70, 79.

²¹ Case No. 17-974-EL-UNC, Entry (June 22, 2022).

²² *Id.* at ¶ 25.

²³ FirstEnergy Mot., Exhibit A.

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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 September 29, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

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