

## 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 REVIEW OF THE  
DISTRIBUTION MODERNIZATION RIDER  
OF OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 17-2474-EL-RDR

IN THE MATTER OF THE REVIEW OF THE  
POLITICAL AND CHARITABLE SPENDING  
BY OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 20-1502-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

### ENTRY

Entered in the Journal on December 12, 2022

#### I. SUMMARY

{¶ 1} The attorney examiner denies the motion for protective order filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy Corp.) and directs FirstEnergy Corp. to, instead, file a motion for protective order with a court of competent jurisdiction, in accordance with the protective agreement, within five business days of this Entry.

## II. DISCUSSION

{¶ 2} Concurrent with the Commission's four above-captioned investigations, the United States Department of Justice's District Attorney for the Southern District of Ohio (DOJ or U.S. Attorney) has been conducting an ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6 and action through the Commission, resulting in a Deferred Prosecution Agreement (DPA)<sup>1</sup> and an indictment of several individuals. Throughout our four investigations, the Commission has sought to balance two principles: one, the Commission will follow the facts wherever they lead; and two, it is of the utmost importance that the Commission's investigations do not interfere with the DOJ's ongoing criminal investigation, or the parallel civil action instituted by Ohio Attorney General Dave Yost.

{¶ 3} On August 16, 2022, the U.S. Attorney filed a letter in the above-captioned proceedings, pursuant to 28 U.S.C. § 517, requesting that the Commission stay these matters for a period of six months, citing its concern that continued discovery in the Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into corruption relating to Am. Sub. H.B. 6.<sup>2</sup>

{¶ 4} On August 24, 2022, the Commission issued an Entry staying the above-captioned proceedings at the request of the U.S. Attorney for a period of six months, unless otherwise ordered by the Commission. The Commission explicitly stated that the stay applied to "these cases in their entirety, including, but not limited to, all discovery and motion practice during a six-month period, except for rehearing applications and responsive

---

<sup>1</sup> The DPA is between FirstEnergy Corp. and the United States Attorney for the Southern District of Ohio. *United States of America v. FirstEnergy Corp.* Case: 1:21-cr-86, July 22, 2021, Doc. 3.

<sup>2</sup> According to the DOJ: "The United States understands that substantial discovery is underway in the PUCO Proceedings, including written discovery and potential for depositions of numerous individuals and entities. The PUCO's investigations involve issues related to the United States' investigation, and the United States believes that continued discovery in the PUCO Proceedings may directly interfere with or impede the United States' ongoing investigation."

memoranda related to any entries the Commission issued [on August 24, 2022], pursuant to R.C. 4903.10.” Entry (Aug. 24, 2022) at ¶ 87.

{¶ 5} In response to Office of Consumers’ Counsel’s (OCC) September 24, 2021 subpoenas filed in the four investigations, FirstEnergy Corp. and OCC negotiated a protective agreement to facilitate the exchange of certain proprietary or confidential information during discovery, including all productions to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation (Securities Litigation)*,<sup>3</sup> which include all documents produced by FirstEnergy Corp. to the DOJ and the Securities and Exchange Commission (SEC) as part of ongoing federal investigations. Under the negotiated protective agreement, particularly Paragraph 13, OCC is required to notify FirstEnergy Corp. if OCC receives public records requests for confidential materials, after which FirstEnergy Corp. is provided an opportunity to seek a court order preventing disclosure of the documents.

{¶ 6} On August 30, 2022, OCC notified FirstEnergy Corp. that it received a public records request for protected materials subject to the protective agreement. OCC identified certain documents, initially obtained through discovery from FirstEnergy Corp., as responsive and indicated in its letter that it would release the documents unless FirstEnergy Corp. sought protective treatment pursuant to the terms of the protective agreement. Specifically, OCC indicated it intends to release the following documents in response to the public records request: documents containing Bates numbers 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.

{¶ 7} On September 7, 2022, FirstEnergy Corp. filed a motion for protective order with the Commission seeking to protect from public disclosure confidential documents

---

<sup>3</sup> Case No. 2:20-cv-3785 (S.D. Ohio).

produced in discovery. Initially, FirstEnergy Corp. contends that the production of these documents would undermine the six-month stay of all discovery and motion practice, issued by the Commission on August 24, 2022, as it requires FirstEnergy Corp. to file a motion for protective order within five business days. Again, FirstEnergy Corp. emphasizes that public disclosure risks compromising or interfering with ongoing federal investigations, which the Commission noted several times in its Entry staying these proceedings. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, et al., Entry (Aug. 24, 2022) at ¶ 85. Second, FirstEnergy Corp. argues that the documents in question should not qualify as “public records,” as they are not records kept by OCC nor serve to document the activities of OCC. Third, FirstEnergy Corp. asserts that independent grounds exist for protecting those documents which are commercially sensitive,<sup>4</sup> for which the Commission should exercise its authority under Ohio Adm.Code 4901-1-24 and issue a protective order. Finally, FirstEnergy Corp. notes that there is a federal court-approved, stipulated protective order in the *Securities Litigation*, further arguing that it should not be expected to defend confidentiality designations applied in another jurisdiction before the Commission, especially where FirstEnergy Corp. agreed to provide OCC with documents produced in the *Securities Litigation* on a cooperative basis. FirstEnergy Corp. moves to protect all documents noted in Paragraph 6, except for documents with Bates numbers 0012557, 0248905, and 0249833, as these documents were not designated as confidential.

{¶ 8} OCC filed a memorandum contra FirstEnergy Corp.’s motion for protective order on September 22, 2022. OCC first argues FirstEnergy Corp.’s motion is improper and does not follow the explicit process discussed in the protective agreement, contending that Paragraph 13 of the agreement requires FirstEnergy Corp. to file a motion for protective order at a court of competent jurisdiction within five business days of OCC notifying them of a public records request for the confidential materials. OCC asserts that the Commission

---

<sup>4</sup> FirstEnergy Corp. asserts the following documents contain commercially sensitive business information: documents with Bates numbers 0013627, 0022524, and 0045823.

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. *In re United Tel. Co. of Ohio*, Case No. 07-760-TP-BLS (*United Telephone*), Entry (Aug. 10, 2007) at ¶ 7. Without such language, OCC contends that the state's public records law could potentially be contravened, and OCC's judgment improperly limited in response to future public records requests. Due to FirstEnergy Corp.'s alleged failure to abide by the terms of the protective agreement, OCC argues that it "can now decide for itself under the [p]rotective [a]greement whether to release these documents." Further, OCC notes that there is good reason for the protective agreement requiring FirstEnergy Corp. to file for protective treatment with a court, rather than the Commission, in the event OCC receives a public records request. As a separate public agency, OCC asserts that the Commission lacks the authority to dictate how OCC responds to a public records request. In fact, OCC notes that the Commission has previously found 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." *In re 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). Further, as the state agency charged with determining what records may be released in response to the request, OCC argues that FirstEnergy Corp. failed to carry its burden and demonstrate to it why these records should be exempted from disclosure, pursuant to R.C. 149.43. Ohio courts, according to OCC, have determined that the public records law "must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 1997-Ohio-349, 684 N.E.2d 1239.

{¶ 9} FirstEnergy Corp. filed a reply in support of its motion for protective order on September 29, 2022. In its reply, FirstEnergy Corp. reiterates that, while it understands OCC has a duty to respond to public records requests, these documents are not records

under R.C. 149.011 and, consequently, do not fall under the requirements of R.C. 149.43. FirstEnergy Corp. alleges that OCC points to no case or authority supporting its position that these documents, which it asserts were only produced to OCC on a collaborative basis and were not the result of discovery in these proceedings, are considered records for purposes of the Ohio public records statute. In fact, contends FirstEnergy Corp., Ohio courts have held the opposite is true. *State ex rel. Cmty. J. v. Reed*, 2014-Ohio-5745, 26 N.E.3d 286, 296-98 (12th Dist.). Further, FirstEnergy Corp. notes OCC's reliance on *United Telephone* is misplaced, as it was OCC's position in that case 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." *United Telephone*, Entry (Aug. 10, 2007) at \*3. FirstEnergy Corp. adds that there was no question the documents in *United Telephone* qualified as OCC's records, unlike this case. Finally, FirstEnergy Corp. asserts that the 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." *In re the Review of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (June 22, 2022) at ¶ 25. As such, FirstEnergy Corp. maintains that the Commission has the authority to issue a protective order prohibiting the release of these documents.

{¶ 10} While the Commission has, in an act of administrative efficiency, chosen to address various motions filed in these cases collectively, the attorney examiner reminds the parties that these cases have not been consolidated. The Supreme Court of Ohio has recognized the Commission's broad discretion to regulate its proceedings and manage its docket. Entry (Aug. 24, 2022) at ¶ 67, citing *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19,

734 N.E.2d 775 (2000). With that in mind, the attorney examiner will address the pending motion for protective order in a collective fashion.

{¶ 11} R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purposes of Title 49 of the Revised Code. R.C. 149.43 specifies that the term “public records” excludes information that, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex. rel. Besser v. Ohio State*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000). Pursuant to Ohio Adm.Code 4901-1-24(D), the Commission may issue any order which is necessary to protect the confidentiality of information contained in documents filed with the Commission’s Docketing Division to the extent that state or federal law prohibits the release of that information, including trade secret information, as well as where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, regarding trade secret information, R.C. 1333.61(D) holds that a “trade secret” is “any information, including . . . any business information or plans, financial information, or listing of names . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and, (2) it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

{¶ 12} Initially, the attorney examiner notes that FirstEnergy Corp. cannot genuinely argue that these documents were not produced in discovery in these proceedings, as the agreement to provide OCC copies of documents produced in the *Securities Litigation* was made in response to OCC’s September 24, 2021 subpoenas. See, e.g., *Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Company*, Case No. 17-974-EL-UNC, Prehearing Transcript (Jan. 4, 2022) at 11-13. With that being said, the attorney examiner now moves on to consider the substance of the motion.

{¶ 13} As noted in the June 22, 2022 Entry, the protective agreement utilized in these four proceedings explicitly states that it “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’ obligation to produce (including the manner of production) any requested information or material.” Further, Paragraph 1 of the protective agreement provides “[t]he 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.” Thus, the agreement’s intended purpose is to act as a mechanism through which parties can exchange confidential information without needlessly requiring the Commission’s intervention, consistent with the stated purpose of Ohio Adm.Code 4901-1-16. However, unlike the motion for protective order at issue in the June 22, 2022 Entry, the motion for protective order filed by FirstEnergy Corp. on September 7, 2022 deals with OCC’s response to a public records request, pursuant to Paragraph 13 of the protective agreement. That paragraph specifically requires any producing party to file a pleading before a court of competent jurisdiction within five business days after service of OCC’s notice of receipt of a public records request for protected materials to prevent disclosure of those protective materials.<sup>5</sup> Notably, Paragraph 9 of the protective agreement, which was at issue in the June 22, 2022 Entry, allows any producing party upon receipt of a notice from OCC that it intends to use or refer to the protected materials in the public domain to file a motion to maintain the confidentiality of protected materials with “*an administrative agency of competent jurisdiction or court of competent jurisdiction.*” (emphasis added) Accordingly, the motion at issue in this Entry is clearly distinguishable from that at issue in the June 22, 2022 Entry. The Commission is an administrative agency of competent jurisdiction but not a court of competent jurisdiction. Entry (Aug. 24, 2022) at ¶ 72, citing *State Emp. Relations Bd. v.*

---

<sup>5</sup> This would not apply to public records requests received by the Commission.



*Springfield Local School Dist. Bd. of Edn.*, SERB No. 93-ULP-07-0397, 11 Ohio Pub. Employee Rep. ¶ 1444 (July 7, 1994). In fact, in that Entry, which denied the motions filed by OCC and the Northwest Ohio Aggregation Coalition, the Commission specifically noted that the Commission is not a court in the true or literal sense of the term, despite applying many principles and rules that govern judicial proceedings. Though both paragraphs are centered on the potential public disclosure of information in these proceedings, this difference in language between these two paragraphs, and the context in which they should be employed, cannot be ignored.

{¶ 14} More importantly, in addition to providing the parties the benefit of their negotiated protective agreement, the attorney examiner agrees with OCC that this difference embodies the process set forth in R.C. 149.43 and the Commission's past practice regarding similar disputes and issues. As noted by OCC, the Commission has routinely abstained from addressing matters involving another state agency's obligations and duties when responding to public records requests under R.C. 149.43. See, e.g., *In re the Review of Ohio Adm.Code Chapters 4901-1, 4901-3 and 4901-9*, Case No. 06-685-AU-ORD, Finding and Order at 33 (Dec. 6, 2006); *United Telephone*, Entry (Aug. 10, 2007) at ¶ 7. As such, the attorney examiner will not address FirstEnergy Corp.'s arguments regarding whether the responsive documents constitute "records" of OCC, pursuant to R.C. 149.011. Doing so could be interpreted as running contrary to the spirit and intent of the Ohio public records laws.

{¶ 15} Finally, as FirstEnergy Corp. aptly observes, the August 24, 2022 Entry stayed these four proceedings in their entirety; however, nothing in that Entry did (nor could it have) authorized a stay on public records requests, pursuant to R.C. 149.43. Given the Commission's necessary decision to stay these proceedings and the underlying rationale for doing so, a court of competent jurisdiction should have the opportunity to consider the merits of the motion to determine whether the public records law applies and the extent to which disclosure of the documents, if any, may be required. In order to allow the process to unfold as contemplated by both R.C. 149.43 and the protective agreement, FirstEnergy Corp. should be afforded the opportunity to file a motion for protective order with a court

of competent jurisdiction within five business days of this Entry in order to have the court address the merits of the arguments presented by FirstEnergy Corp. and OCC, including, but not limited to, whether the federal court-approved stipulated protective order in the *Securities Litigation* prevents disclosure of the documents at issue. Finally, if FirstEnergy Corp. does file a motion for protective order as described above, OCC is directed to not publicly disclose these documents until such time a court ultimately provides a decision on these issues.

### III. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That FirstEnergy Corp.'s September 7, 2022 motion for protective order be denied, consistent with this Entry. It is, further,

{¶ 18} ORDERED, That FirstEnergy Corp. be permitted to file within five business days a motion for protective order with a court of competent jurisdiction pertaining to the documents at issue in its September 7, 2022 motion for protective order. It is, further,

{¶ 19} ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Megan J. Addison

By: Megan J. Addison  
Attorney Examiner

JRJ/mef

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on  
12/12/2022 3:47:34 PM**

**in**

**Case No(s). 17-0974-EL-UNC, 17-2474-EL-RDR, 20-1502-EL-UNC, 20-1629-EL-RDR**

Summary: Attorney Examiner Entry denying the motion for protective order filed by FirstEnergy Corp. and directing FirstEnergy Corp. to, instead, file a motion for protective order with a court of competent jurisdiction, in accordance with the protective agreement, within five business days of this Entry electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio