BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	)	Case No. 23-301-EL-SSO

REPLY TO FIRSTENERGY'S MEMORANDUM CONTRA OCC'S MOTION TO COMPEL DISCOVERY ON UTILITY SIDE DEALS
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

OCC filed a Motion to Compel to obtain discovery that sought information about side agreements between the FirstEnergy Utilities and the parties in this case.[1] R.C. 4928.145 requires utilities to provide copies of relevant agreements they or their affiliates have with parties to electric security plan proceedings.[2] The FirstEnergy Utilities failed to provide information about side deals which OCC is entitled to obtain under Ohio law.

The FirstEnergy Utilities' response to OCC's discovery request, and argument in its Memorandum Contra, is that because it says there are no "relevant" side deals there is no discovery dispute. To the contrary, the FirstEnergy Utilities' position is inconsistent with Ohio law. The FirstEnergy utilities have failed to establish that the requested information is not relevant and/or would not lead to the discovery of admissible

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[1] OCC Memorandum in Support of the Motion to Compel Discovery, at p. 2.

[2] R.C. 4928.145.

evidence.[3] Accordingly, the PUCO should grant OCC's Motion to Compel discovery responses from the FirstEnergy Utilities.

II. ARGUMENT

The FirstEnergy Utilities seek to improperly restrict both OCC's discovery request and the scope of discovery itself, while overstating the burden of replying to OCC's request for a contract log. An in-camera review of the contract log, as proposed by OCC as a way to resolve this dispute, could allow OCC and the PUCO to identify documents that should be produced in discovery but have not been so far.

A. First Energy improperly restricts OCC's discovery request.

The FirstEnergy Utilities claim that a discovery dispute does not exist based upon how they improperly interpret and narrow the supposed purpose of OCC discovery (RPD-01-005, "RFP 5"). The FirstEnergy Utilities restrictively define the purpose of OCC RFP 5 as identifying any "agreement, either directly or through an affiliate, which would have the effect of preventing or resolving litigation of any issue in ESP V. -This answer directly and fully addresses the purpose of RFP 5 to determine whether there are any utility side agreements in this case."[4]

But the law does not define "relevant" to only mean related to matters having the effect of presenting or resolving the litigation of ESP IV issues. OCC may still raise additional issues arising from the side agreements, including its allegations of discrimination, inadequate corporate separation, and unlawful discounting of charges.[5]

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[3] OCC Memorandum in Support of the Motion to Compel Discovery, at p. 2.

[4] First Energy Memo Contra OCC Motion to Compel, at p. 1.

[5] *Ohio Consumers' Couns. v. Pub. Util. Comm.,* 121 Ohio St.3d 362, 2009-Ohio-604, at ¶ 18.

Further, as argued previously by OCC, in the event of a settlement in this case, side agreements are also relevant under the PUCO's three-prong test.[6]

B. First Energy incorrectly restricts the scope of discovery.

The FirstEnergy Utilities claim that OCC seeks irrelevant information and that such information is beyond the scope of discovery. However, Ohio Supreme Court precedent holds that "a party may obtain discovery regarding non-privileged information relevant to the claim or defense of a proceeding. This includes determining the existence of documents and the identity of persons having knowledge of any discoverable matter."[7]

The scope of discovery is broad in PUCO proceedings. Under the Ohio Administrative Code, all matters reasonably calculated to lead to the discovery of admissible evidence are discoverable.[8]

There is no question that the evidence sought fits within the scope of discovery. In addition to the additional issues arising from side arrangements identified above, OCC seeks to determine whether the documents identified pertain to side dealing, or prejudice or bias of witnesses. These issues are relevant to this proceeding.[9]

C. First Energy overstates the burden of creating a contract log.

The FirstEnergy Utilities object that it is overly burdensome to respond to OCC's discovery request for a contract log. That objection should be overruled.

During a meet-and-confer to discuss the FirstEnergy Utilities' discovery responses, counsel for OCC proposed that the FirstEnergy Utilities produce a log, similar

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[6] OCC's Memorandum in Support of the Motion to Compel Discovery, at p. 4.

[7] *Ohio Consumers' Couns. v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, at ¶ 83.

[8] O.A.C. 4901-1-16.

[9] OCC's Memorandum in Support of the Motion to Compel Discovery, at p. 5.

to a privilege log, of side deals the FirstEnergy Utilities and their affiliates have with parties to this case.[10] The First Energy Utilities' argument that a contract log is overly burdensome is based upon a presumption that the requested contract log *includes entities that are not parties to this case.* OCC merely requested a log of agreements between First Energy Utilities and *parties to this proceeding*.[11] That much narrower request is reasonable and not unduly burdensome.

D. An in-camera review could provide additional information to assist in determining information to be produced to OCC.

Because OCC is concerned that its interpretation of "relevant" could differ from the First Energy Utilities' interpretation,[12] an *in-camera* review process may be necessary. If necessary, the in-camera review could be used to determine whether the documents identified should be produced to OCC in discovery.

Under R.C. 4928.145, FirstEnergy Utilities are only required to produce "relevant" side deals. "Relevant" is not defined in the statute. However, under the PUCO rules (found in the Ohio Administrative Code) and Ohio law (R.C. 4903.082) all parties to PUCO proceedings have broad discovery rights. The broad discovery rights are meant to assist parties in adequately preparing for PUCO proceedings.

As the Supreme Court of Ohio recently stated:

> We have recognized PUCO's broad discretion to regulate its proceedings and manage its docket. But intervening parties in proceedings before PUCO also have a statutory right to discovery under R.C. 4903.082. And we have

[10] *Id.*, at p. 4.

[11] *Id.*, at p. 6.

[12] Affidavit of John Finnigan in support of Motion to Compel Response to First Set of Discovery, at p. 2.

> construed these provisions as allowing broad discovery of nonprivileged matters.[13]

Consistent with the broad discovery rights under Ohio law, PUCO rules and Supreme Court precedent, the PUCO should compel production of all side agreements as requested by OCC.

III. CONCLUSION

In its discovery request and Motion to Compel, OCC sought information which is well within the scope of its right to conduct "broad discovery of nonprivileged matters." In fact, if a utility company were permitted to provide no information about side deals by simply claiming the side deals aren't "relevant," this would destroy the right of OCC and other stakeholders to obtain any information about side deals, contrary to R.C. 4938.145.

A PUCO-approved auditor in another FirstEnergy Utilities proceeding recently noted: "FirstEnergy will not provide information important in placing informed, reasonable limits on the extent of what has happened or may happen, and on its implications for [the utility company] and its customers."[14] Such is the case here too. The PUCO should grant OCC's Motion to Compel.

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[13] *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, 166 Ohio St.3d 519, 2021-Ohio-3630 at ¶ 42 (citations omitted).

[14] *In the Matter of an Audit of the Affiliate Transactions Between Jersey Central Power & Light Company, FirstEnergy Corp. and Its Affiliates,* Docket No. EA20110733, Audit Report at ES19 (April 12, 2023).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply to FirstEnergy's Memorandum Contra OCC's Motion to Compel Discovery on Utility Side Deals was served on the persons stated below via electronic transmission, this 3rd day of July 2023.

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Summary: Reply Reply to FirstEnergy's Memorandum Contra OCC's Motion to Compel Discovery on Utility Side Deals by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Finnigan, John.