BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Annual Review of Duke Energy Ohio, Inc.'s Distribution Capital Investment Rider.	)))	Case No. 23-549-EL-RDR

MEMORANDUM CONTRA OF DUKE ENERGY OHIO, INC. TO SECOND MOTION OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL FOR *IN CAMERA* REVIEW AND REQUEST FOR EXPEDITED RULING

I. INTRODUCTION AND BACKGROUND

Pursuant to the authority granted under Ohio Administrative Code (O.A.C.) 4901-1-12(C), Duke Energy Ohio, Inc. (Duke Energy Ohio or the Company) hereby files its memorandum contra (Memorandum Contra) the Office of the Ohio Consumers' Counsel's (OCC) Second Motion for *In Camera* Review and Request for Expedited Ruling (Second Motion).

On May 15, 2024, OCC submitted its Seventh Set of Discovery in this case to Duke Energy Ohio in which it sought "all Emails sent or received by Jay Brown that included the term ADIT within the period of November 1, 2023, to present." Duke Energy Ohio submitted its response to OCC on June 14, 2024, producing upwards of a thousand documents and an accompanying privilege log listing 479 documents, 301 of which were emails. Among other things, the fields for emails included the sender and recipient(s), whether "To," "CC" or "BCC," and indicated attorneys present on emails with an asterisk (*). Of the 301 emails identified in the privilege log, the majority (184) included an attorney as the sender or a recipient of such communications (Attorney Documents).

On June 15, 2024, counsel for OCC demanded that all emails on which an attorney was not either a sender or recipient be produced by Monday, June 17, 2024 (Non-Attorney Documents). Counsel for Duke Energy Ohio explained why this was an overbroad challenge to privilege, given

that the document request covered a time period during which the Company was actively litigating this proceeding, when counsel for the Company were involved in extensive attorney-client discussions, and also when work product was being prepared and/or revised with input from non-attorney subject-matter experts such as Jefferson "Jay" Brown and others. OCC counsel did not express any interest in discussing the matter with the Company and shortly thereafter filed a motion that seeking *in camera* review of <u>all</u> 479 documents in the privilege log (First Motion).[1]

Duke Energy Ohio opposed the First Motion and attached a supplemented privilege log containing email subjects and attachment filenames (First Memo Contra and Exhibit A), in hopes that OCC might use this information to request a more targeted review.[2] Although OCC agreed to limit the scope of its request to the Non-Attorney Documents for immediate purposes, it did not use any of the additional information provided to formulate a more targeted request. Furthermore, OCC reserved the right to seek *in camera* review of all the Attorney Documents in the future. The administrative law judge (ALJ) scheduled a prehearing conference for July 1, 2024, to discuss the issues in the motions. An *in camera* review of the non-attorney documents was performed by the ALJ and an entry issued on July 2, 2024, explaining why only four emails (with attachments, totaling 16 documents) were required to be produced after the review:

> Upon in camera review of the hundreds of documents provided to the ALJ, the ALJ finds that ***only a handful*** of the documents should be produced by Duke for discovery purposes. . . .
>
> In regard to the remaining documents, the ALJ finds that they were properly withheld from production since they are protected by the attorney-client and/or work product privileges. . . . ***These communications,*** the vast majority of which were between non-attorney Duke employees or consultants, ***were all <u>clearly</u> prepared in the anticipation of litigation.*** The emails and documents were prepared well after the commencement of this case on June 14, 2023,

[1] The First Motion did not appear to be limited to those documents for which no attorney is listed as sender or recipient, although it mentions such emails as a supporting argument.
[2] Memorandum Contra of Duke Energy Ohio, Inc. to Motion of the Office of the Ohio Consumers' Counsel For *In Camera* Review and Request for Expedited Ruling (June 25, 2024).

> and the emails and documents involved discussions contemplating and/or development of analysis supporting Duke's litigation position, such as developing responses to discovery requests or to filings made in the case docket. Therefore, the ALJ finds that these emails and documents are work-product and protected by the work-product privilege.[3]

None of the documents required to be produced were of any added value with regard to OCC's ability to make its case: (1) a non-substantive cover email attaching a public filing (DEO23549ELRDR000117); (2) an email responding to a request to provide copies of previously provided discovery responses, attaching copies of those responses, which OCC should have already had (DEO23549ELRDR001809 – 1815 and DEO23549ELRDR_001815_Native); (3) a similar email providing copies of different previously provided discovery responses, which OCC should have also already had (DEO23549ELRDR001816 – 1856); and (4) an internal email with nothing in the body, forwarding a copy of the draft audit report, which OCC should also already have (DEO23549ELRDR001986).

On July 8, OCC filed the Second Motion, seeking *in camera* review of all of the Attorney Documents, which reprises OCC's claims in the First Motion that a party is entitled to *in camera* review of any and all documents which are withheld on privilege grounds.[4] This is simply not the case and runs contrary to the intent of the Commission's discovery rules, which are "intended to minimize commission intervention in the discovery process."[5] For the reasons given below, OCC's Second Motion is unreasonable and should be denied.

In the event that the Commission believes any additional *in camera* review is warranted, such review should be targeted based on additional information provided in the supplemented privilege log provided with the First Memo Contra and fully incorporated by reference herein.[6]

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[3] Entry, pp. 3-4 (July 2, 2024) (emphasis added).
[4] *See* Second Motion, pp. 2-3.
[5] OAC 4901-1-16(A).
[6] First Memo Contra, Exhibit A.

II. LAW & ARGUMENT

A. The Standards for Consideration of the Attorney Client Privilege and Work Product Doctrine Do Not Support nor Dictate *In Camera Review.*

Under Rule 4901-1-16(B), Ohio Admin. Code, a "party may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding and which appears to be reasonably calculated to lead to the discovery of admissible evidence."[7] The Supreme Court of Ohio has held that this standard "is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases."[8] Under the rules of the Public Utilities Commission of Ohio, a party to a commission proceeding may not obtain discovery of any matter that is privileged.[9]

In this matter, as discussed above, Duke Energy Ohio is asserting both the attorney-client privilege and the work-product doctrine in response to various document requests contained in OCC's Seventh Set of Discovery. Because the Attorney Documents requested by OCC for *in camera* review implicate both types of privilege, a brief discussion of both attorney-client privilege and the work-product doctrine is warranted.

The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients."[10] While the privilege can be one of statute, "precluding an attorney from testifying about confidential communications,"[11] common law attorney-client privilege applies during discovery "wherever a claim of privilege would be proper at the actual

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[7] *In the Matter of the Complaint of the Cleveland Electric Illuminating Co. v. Medical Center Co. et al*., Case No. 95-458-EL-UNC, Entry at 3 (Oct. 15, 1998).
[8] *Ohio Consumers' Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 300, 2006-Ohio-5789, ¶ 83; *see also,* R.C. 4903.082 ("[T]he Rules of Civil Procedure should be used wherever practicable.").
[9] *See* O.A.C. Rule 4901-1-16(B).
[10] *Boone v. Vanliner lns. Co.* (2001), 91 Ohio St.3d 209, 210 n.2, 2001-Ohio-27, quoting *Upjohn Co. v. United States*, 449 U.S. 383, 387 (1984).
[11] *State ex rel. Leslie V. Ohio House. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, at ¶ 26. *See also, State ex rel Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth*, Sup. Ct. Slip Opinion No. 2009-Ohio-1767, at 24 (citations omitted).

trial of the case[.]"[12] Likewise, "[t]he confidential communications between in-house counsel and the client are privileged to the same extent as communications between outside retained counsel and the clients who have consulted them for legal advice or assistance."[13] And Supreme Court of Ohio jurisprudence makes clear that the privilege covers more than just specific requests for legal advice from a client and specific communications of legal advice from an attorney; the common-law privilege more broadly "protects against any dissemination of information obtained in the confidential relationship"[14] and "if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged."[15]

On the other hand, Ohio Civil Rule 26(B)(3) sets forth the work product doctrine in Ohio:

> Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. Thus, a party must meet three conditions in order to establish work-product protection: that the allegedly protected material (1) is a document or tangible thing, (2) was prepared in anticipation of litigation, and (3) was prepared by or for a party or its representative.[16]

Protection under the doctrine may be asserted by the party or by the agent that created the work-product materials, *e.g.*, the party's attorney, or representative acting at the attorney's direction.[17] Ohio's Civil Rules explain that the purpose underlying the work-product doctrine is "(1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary

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[12] *Geggie v. Cooper Tire & Rubber Co*., 3rd Dist. No. 5-05-01, 2005-Ohio-4750, at 32, quoting *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc*., 82 Ohio App.3d 322, 329, 612 N.E.2d 442 (1992), citing 36 Ohio Jurisprudence 3d (1982), Discovery and Depositions, Section 33.
[13] *State ex rel. Leslie* at 22, quoting Rice, Attorney-Client Privilege in the United States, at 53, § 3:14.
[14] *State ex rel. Toledo Blade* at 24, quoting *State ex rel. Leslie* at 26, quoting *Am. Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991) (holding that the attorney-client privilege protects more than just "confidences [ ] supplied to the lawyer by the client" and the attorney's "legal analysis or advice.").
[15] *Id.* (quotations omitted).
[16] *See Woodruff v. Concord City Discount Clothing Store*, Ohio App. LEXIS 5914, at *8 (1987) (citation omitted).
[17] *See State v. Today's Bookstore, Inc*., 86 Ohio App.3d 810, 820, 621 N.E.2d 1283.

to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."[18] The work-product doctrine also precludes discovery of the mental impressions, conclusions, opinions, strategies, and legal theories, both tangible and intangible, generated or commissioned by counsel in anticipation of litigation or preparation for trial.[19]

The consulting expert privilege is a subset of the work product doctrine. An expert consultant's work product — the expert consultant's knowledge of facts, opinions, and conclusions — are part of the work product of the attorney who engaged the expert.[20] As a part of its limits on discovery, Civil Rule 26(B) sets forth protections from discovery for both attorney work product and the work product of experts. In Ohio, protection for an attorney's work product is codified in Civ. R. 26, which notably recognizes work product as separate from other privileged matters.[21]

As explained in the July 2 Entry, after the first *in camera* review of the Non-Attorney documents, work product privilege protects material "clearly prepared in the anticipation of litigation."[22] Factors to consider are whether the materials were prepared "after the commencement of this case on June 14, 2023," and whether they "involve[] discussions contemplating and/or development of analysis supporting Duke's litigation position, such as developing responses to discovery requests or to filings made in the case docket."[23] Put the most simply, "[w]ork product

[18] Civ.R. 26(A).
[19] *Squire, Sanders & Dempsey, L.L.P., v. Givaudan Flavors Corp*., 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 56-60.
[20] *DMS Constr. Enters., L.L.C. v. Homick*, 2020-Ohio-4919, ¶ 29.
[21] *Burnham v. Cleveland Clinic*, 151 Ohio St.3d 356, 2016-Ohio-8000, 89 N.E.3d 536, ¶ 18.
[22] Entry, p. 4 (July 2, 2024).
[23] *Id.*

consists of documents and tangible things prepared in anticipation of litigation or for trial[,] by or for another party or by or for that other party's representative[.]"[24]

B. OCC Fails to Demonstrate that an *In Camera* Review is Warranted or Necessary, or that Documents from the Privilege Log were Improperly Withheld.

Generally speaking, "[b]efore an in camera review is warranted, the party seeking in camera review must make some threshold showing that such review is appropriate."[25] Although the required showing for *in camera* review is "lesser" than what is "ultimately required to overcome the privilege," the party seeking *in camera* review is not permitted to engage in "groundless fishing expeditions."[26] The Commission should consider four non-exhaustive factors to consider in determining whether *in camera* review is warranted:

> (1) the facts and circumstances of the particular case; (2) the volume of materials the moving party has asked the court to review; (3) the relative importance of the alleged privileged information to the case; and (4) the likelihood that review will reveal the documents are not shielded by the privilege.[27]

In this case, three of the factors militate against *in camera* review, especially a wholesale one of all remaining privilege-withheld documents, and one factor can be considered neutral. First, as recognized in the July 2 Entry, the facts and circumstances of this case are such that the dispute over the ADIT adjustment is primarily a legal one.[28] There is no dispute that an adjustment was made and no dispute regarding the amount of the adjustment. There is only a dispute over whether

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[24] *Schiff v. Dickson*, 8th Dist. Cuyahoga, Nos. 96539 and 96541, 2011-Ohio-6079, at ¶ 45.
[25] *MD Auto Grp. LLC v. Nissan N. Am. Inc.*, Case No. 1:21-CV-01584-CEF, 2023 U.S. Dist. LEXIS 109996, at *3 (N.D. Ohio June 26, 2023) (internal quotations and citations omitted).
[26] *Id.* (internal quotations and citations omitted).
[27] *Id.* (citing *Zolin*, 491 U.S. at 572).
[28] *See* Entry, p. 5 ("We agree with Duke that the issue related to ADIT is ***primarily a legal question***. Moreover, the public audit, parties' comments, quarterly DCI filings, and filed testimony (likely certain discovery responses as well) all set forth the facts and data supporting, examining, and/or probing Duke's position in this case related to its adjustment to ADIT in its Rider DCI filings, all of which is available to OCC. Thus, ***the privileged emails and documents at issue,*** the content of which largely consists of the development of Duke's litigation position ultimately set forth in the above-mentioned filings, ***are of little relevance here***.") (emphasis added). Although the ALJ was speaking of the Non-Attorney documents, the same reasoning would apply to the Attorney Documents.

it was appropriate under applicable law, precedent, and regulations. Second, the Second Motion requests review of a couple hundred documents, not a tiny number, but not a small number either, especially the week before hearing is due to commence; thus, this factor should be considered neutral. Third, just as the first *in camera* review did not reveal anything of material importance as discussed *supra*, the Attorney Documents are also not of importance to the case. The existence, date, and amount of the disputed adjustment are known. Documents pertaining to the Company's approach and litigation strategy in this proceeding have no bearing on whether the adjustment is appropriate and reasonable or whether the Stipulation is reasonable.[29] Fourth and finally, the likelihood of any material non-privileged documents being disclosed is very low, as demonstrated by the first *in camera* review. OCC's Second Motion is a pure fishing expedition.

In this case, via the production of a privilege log, the Company has (1) asserted attorney-client and/or work product privileges for communications and documents exchanged between its employees, officers, or agents and in-house counsel relating to the underlying proceeding, and (2) withheld communications and/or documents exchanged at the request and direction of counsel, and in furtherance of this audit and litigation, under the work product doctrine. Contrary to OCC's assertion,[30] the Company did not assert that its privilege log was privileged, but only marked it confidential.

The Attorney Documents for which Duke Energy Ohio has asserted attorney-client and/or work product privilege overwhelmingly involve the Company's in-house counsel who are handling the underlying matter, *i.e.*, Larisa Vaysman and Rocco D'Ascenzo, Deputy General Counsel. Ms. Vaysman and Mr. D'Ascenzo have been involved in DCI Audits (past and present), and in their roles as counsel for Duke Energy Ohio, have offered instruction, advice, and guidance

[29] *See supra* n.28.
[30] Second Motion, Memorandum in Support, p. 2.

to the Company's officers and employees regarding the underlying matter. Additional in-house counsel have been consulted on an as-needed basis. The Attorney Documents, withheld on the basis of privilege as mentioned above, relate to the underlying litigation and audit, and each "is generally related to the provision of legal services."[31] The Company is claiming privilege based on the nature of the communications not, as OCC implies, merely because an attorney is party to the communication. OCC's Second Motion does not make a demonstration or provide reasoning that would call the withholding of these communications into question, and the Commission should decline to perform an *in camera* review for that reason alone.

OCC has made no showing that *in camera* review is warranted here and only cites *Peyko* (discussed and distinguished below) for its argument that an *in camera* review should be automatically undertaken when requested. Thus, there is no basis for *in camera* review of all the Attorney Documents.

C. The Only Precedent Cited by OCC in Support of its Motion for *In Camera* Review Does Not Mandate Such Review be Undertaken if Requested.

Finally, OCC cites *Peyko v. Frederick* for its argument that "[w]hen a party withholds documents from discovery on privilege grounds . . . an in camera review must be held by the Attorney Examiners to determine the validity of the privilege claims."[32] The facts and procedural posture of *Peyko*, however, are inapposite. The Ohio Supreme Court's holding in that instance was limited to a particular statutory scheme, procedural posture, and litigation context:

> [W]e hold that when a plaintiff, having obtained a judgment against a defendant, files a motion for prejudgment interest on the amount of that judgment pursuant to R.C. 1343.03(C), the plaintiff, upon a showing of "good cause" pursuant to Civ. R. 26(B)(3), may have access through discovery to those portions of the defendant's insurer's "claims file" that are not shown by the defense to be privileged attorney-client communications. If the defense asserts the

[31] *State ex rel. Toledo* at 31.
[32] First Motion, Memorandum in Support, p. 2.

> attorney-client privilege with regard to the contents of the "claims file," the trial court shall determine by in camera inspection which portions of the file, if any, are so privileged. The plaintiff then shall be granted access to the non-privileged portions of the file.[33]

This case does not involve an insurance claims file or, more importantly, a plaintiff who has already prevailed on the merits—thus arguably making work product less material—but, rather, an open litigated proceeding. Furthermore, a "claims file" assembled by an insurer is not typically a document that is prepared in anticipation of and/or for the purpose of litigation; on the other hand, many of the documents sought by OCC were prepared by the Company during and in anticipation of litigation, in response to discovery and auditor inquiry. OCC cites a case where the Commission applied *Peyko* to conduct an *in camera* review;[34] however in that case the party asserting privilege had not provided a privilege log that would enable a targeted review, as is an option here.[35] Thus, *Peyko* is not controlling.

Duke Energy Ohio is open to discussion and compromise to resolve the instant dispute, but demanding *in camera* review of all the Attorney Documents is inherently an unreasonable starting point. OCC's Second Motion should be denied.

III. CONCLUSION

WHEREFORE, for all the above reasons, Duke Energy Ohio respectfully requests that OCC's Second Motion be denied.

[33] *Peyko v. Frederick*, 25 Ohio St. 3d 164, 495 N.E.2d 918.
[34] *See* Second Motion, p. 2.
[35] *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry, pp. 5-6 (January 27, 2011).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memo Contra was served via electronic mail or ordinary mail on the following this 10th day of July, 2024.

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Summary: Memorandum Memorandum Contra of Duke Energy Ohio, Inc. to Second Motion of the Office of the Ohio Consumers' Counsel for In Camera Review and Request for Expedited Ruling electronically filed by Mrs. Minna Sunderman on behalf of Duke Energy Ohio, Inc. and D'Ascenzo, Rocco and Kingery, Jeanne and Vaysman, Larisa and Akhbari, Elyse.