

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

Entered in the Journal on November 1, 2018

I. SUMMARY

{¶ 1} The attorney examiner finds that Ohio Energy Group's and Ohio Consumers' Counsel motions to intervene be granted and the motion to compel filed by Ohio Consumers' Counsel be denied.

II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities (EDUs) as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with R.C. 4928.143.

{¶ 4} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for an ESP. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) (ESP IV Case). Further, on October 12, 2016, the Commission issued the Fifth Entry on

Rehearing in the *ESP IV Case*. On rehearing, the Commission authorized FirstEnergy to implement a distribution modernization rider (Rider DMR). *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶185. Additionally, the Commission ruled that Staff will review the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282.

{¶ 5} Subsequently, the Commission directed Staff to prepare a request for proposal (RFP) for a third-party monitor to assist Staff in the review of Rider DMR. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113.

{¶ 6} Thereafter, by Entry issued on December 13, 2017, in this proceeding, the Commission directed Staff to issue a RFP for a third-party monitor to assist Staff in the review of Rider DMR, consistent with the Commission's previous directives. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113.

{¶ 7} On January 24, 2018, the Commission issued an Entry in this proceeding selecting Oxford Advisors, LLC (Oxford) as the third-party monitor to assist the Commission and Staff with the review of FirstEnergy's distribution modernization rider. The Commission directed the Companies to enter into a contract with Oxford by February 15, 2018, for the purpose of providing payment for its services.

{¶ 8} On March 1, 2018, the Ohio Energy Group (OEG) moved to intervene in this proceeding. In support of its motion, OEG averred it has a real and substantial interest in the proceeding because it represents the interests of large industrial customers that purchase electric distribution services from FirstEnergy. OEG further asserts that the Commission's disposition of this proceeding may impair or impede OEG's ability to protect said interest. No memoranda contra OEG's motion to intervene were filed.

{¶ 9} On March 14, 2018, the Ohio Consumers' Counsel (OCC) moved to intervene in this proceeding. In support of its motion, OCC asserts that it is the state agency that represents Ohio's residential utility consumers and that it seeks intervention to protect the interests of FirstEnergy customers. OCC adds that it satisfies the intervention standard in R.C. 4903.221 because the interest of Ohio's residential customers may be "adversely affected" by this case. OCC avers that its role as a residential utility consumer advocate complies with the standards set forth in Ohio Adm.Code 4901-1-11(A)(2), which require that a party must have a real and substantial interest in a proceeding to intervene. Further, OCC asserts that the Supreme Court of Ohio has confirmed OCC's right to intervene. See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, at ¶¶ 13-20. No memoranda contra OCC's motion to intervene were filed.

{¶ 10} On June 21, 2018, OCC moved to compel discovery responses from FirstEnergy. Specifically, OCC requests that the Commission compel FirstEnergy to respond to OCC's first set of discovery, served on March 22, 2018, seeking requests and responses between FirstEnergy and others (including Staff, Oxford, and other parties) as well as copies of the draft audit report. In support of its motion, OCC states that FirstEnergy misinterprets Ohio Adm.Code 4901-1-16 by adding qualifications to a Commission proceeding that do not exist, thereby impeding case preparation for the consumers' advocate. OCC avers that the Commission's rules are designed to allow broad discovery of material that is relevant to the proceeding and to allow parties to prepare thoroughly and adequately and that discovery may begin immediately after a proceeding is commenced. Therefore, OCC asserts that it could seek discovery from FirstEnergy immediately following the Commission's Entry commencing this proceeding on December 13, 2017. Further, OCC opines that the information it seeks is reasonably calculated to lead to the discovery of admissible evidence for protecting consumers, and FirstEnergy has failed to show how OCC's requests are overly broad and/or unduly burdensome. Additionally, OCC suggests that FirstEnergy misinterprets R.C. 4901.16,

which has no basis for the Companies to withhold documents from OCC. Lastly, OCC states that it undertook reasonable efforts to resolve the discovery dispute.

{¶ 11} On July 6, 2018, FirstEnergy filed a memorandum contra OCC's motion to compel. In its memorandum contra, FirstEnergy states that OCC's motion to compel should be denied because OCC is not entitled to discovery as its requests are untimely, irrelevant, overbroad, and unduly burdensome. Specifically, FirstEnergy states that OCC failed to show why it needs discovery now given that no hearings have been set, no procedural schedule has been established, and no conclusions, recommendations, or reports have been filed by Oxford or Staff. Further, FirstEnergy states that R.C. 4901.16 prohibits the disclosure of information until, at least, a final report has been filed. FirstEnergy opines that granting OCC's motion to compel would have serious adverse consequences for future similar reviews stating that should the Companies (and future similarly situated companies) be required to provide to OCC (or any other potential party) everything that was provided to Staff or its agent, then the Companies will naturally be more limited and circumspect in responding to requests.

{¶ 12} In response to FirstEnergy's memorandum contra, OCC filed a reply in support of its motion to compel on July 13, 2018. In its reply, OCC reasserts that it is entitled to discovery. Specifically, OCC states that under Ohio law and Commission rules, a party's discovery of information about a utility's charges – including discovery by the state-designated advocate for consumers – can begin immediately after a proceeding has commenced.

{¶ 13} The attorney examiner has reviewed and considered all of the arguments raised in the filings and addresses them below. Any argument raised that is not specifically discussed herein has been thoroughly and adequately considered by the attorney examiner.

{¶ 14} As an initial matter, the attorney examiner finds that OEG and OCC have satisfied the intervention requirements set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11. Accordingly, the attorney examiner finds that OEG's and OCC's motions to intervene are reasonable and should be granted.

{¶ 15} At this time, the attorney examiner finds that it is appropriate, and consistent with Commission precedent, to deny OCC's motion to compel discovery. The attorney examiner is not persuaded by OCC's claim that discovery always begins immediately after a proceeding is commenced. The attorney examiner notes that Case No. 15-1739-EL-RDR (*2015 DCR Case*) presented a similar situation where OCC filed a motion to compel discovery regarding the 2015 audit of FirstEnergy's Delivery Capital Recovery Rider (Rider DCR). The issue of whether OCC was entitled to discovery prior to the filing of the audit report was discussed at the prehearing conference in that case. Although the Commission had held in *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) that all parties would have ample rights of discovery in any proceeding resulting from the Rider DCR audit process, the attorney examiner noted that the Commission intended that non-signatory parties have limited rights to, or extraordinary participation in, the audit process up until the filing of an audit report. Thus, the examiner concluded that such discovery should occur *after* the filing of the audit report. However, in that case, the audit report had already been filed, and so, the attorney examiner granted OCC's motion to compel. *2015 DCR Case*, Prehearing Conference Transcript (Dec. 1, 2016) at 20, 21. Although this case involves a different rider, the attorney examiner finds that applying the same reasoning to the facts and circumstances of this proceeding provides consistency for discovery in the audit proceeding and future proceedings before the Commission. In this case, the filing of an audit report is contingent upon one of two events: the filing of an extension of the DMR or the termination of the DMR. Given that no application for extension has been filed and that the DMR has not been terminated, OCC's motion to compel discovery is premature and should be denied. *ESP IV Case*, Eighth Entry on

Rehearing (Aug. 16, 2017) at ¶ 113 (where the Commission directed that reports be docketed following the termination of Rider DMR or the filing of an application seeking an extension of Rider DMR). Furthermore, R.C. 4903.082 and Ohio Adm.Code 4901-1-16(B) provide liberal standards for discovery in Commission cases and the attorney examiner notes that all parties to this proceeding will have the opportunity to engage in ample discovery prior to the preparation of any responsive comments or other procedure deemed necessary by the Commission if and when an audit report is filed.

III. ORDER

{¶ 16} It is, therefore,

{¶ 17} ORDERED, That OEG's and OCC's motions to intervene be granted. It is, further,

{¶ 18} ORDERED, That OCC's motion to compel discovery be denied. It is, further,

{¶ 19} ORDERED, That a copy of this Entry be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Gregory Price

By: Gregory A. Price
Attorney Examiner

JRJ/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/1/2018 3:40:29 PM

in

Case No(s). 17-2474-EL-RDR

Summary: Attorney Examiner Entry granting OEG's and OCC's motions to intervene and denying OCC's motion to compel discovery - electronically filed by Sandra Coffey on behalf of Gregory Price, Attorney Examiner, Public Utilities Commission of Ohio