BEFORE
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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA MOTION TO COMPEL BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") motion to compel ("Motion") demonstrates another attempt by OCC to bypass the Commission's established audit process. Rather than letting the audit take its due course, OCC served dozens of premature discovery requests upon Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"), many of which have nothing to do with compliance with the Commission's corporate separation rules. Instead, OCC's requests and its Motion would fashion OCC as the ultimate auditor in this matter.

The fundamental problem with OCC's approach is that the Attorney Examiner has set forth a common-sense approach to discovery in audit cases: "[D]iscovery should occur *after* the filing of the audit report."[1] Indeed, as the Attorney Examiner has already recognized, discovery does not always begin immediately after a proceeding is commenced, and the rule that discovery may begin after the filing of the audit report "provides consistency for discovery in [this] audit proceeding

[1] *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* (the "*Rider DMR Case*"), Case No. 17-2474-EL-RDR, Entry at ¶ 15 (Nov. 1, 2018) (denying OCC's motion to compel discovery as premature).

and future proceedings before the Commission."[2] That is to say, the Attorney Examiner's approach strikes a balance between the need for an efficient and orderly audit process and the rights to discovery afforded by R.C. 4903.082 and Ohio Adm. Code 4901-1-16(B).[3]

The rule also makes discovery itself more efficient. The touchstone limiting principle of discovery in Commission cases is that the discovery sought must be "relevant to the subject matter of the proceeding."[4] In audit cases, the boundaries of relevance are set by the audit report, which guides the parties' post-report exchange of information. Here, the report has not been filed, and there are no auditor findings and recommendations. This leaves the parties to speculate entirely about the proper scope of discovery at this point. Any discovery now is therefore premature and inefficient.

For these reasons and those further explained below, the Attorney Examiner should deny OCC's Motion.

II. ARGUMENT

A. OCC Is Not Entitled To Discovery Now.

The Attorney Examiner has already determined that discovery may not commence until after the final audit report is filed. In the *Rider DMR Case*, the Attorney Examiner considered, and rejected, the same arguments OCC raises here.[5] There, OCC intervened and served pre-report discovery requests on the Companies.[6] The Companies objected to OCC's discovery as premature, and OCC moved to compel.[7] OCC argued that the Commission's rules allow for broad discovery

[2] *Id.*
[3] *Id.*
[4] Ohio Adm. Code § 4901-1-16(B).
[5] *See* Entry at ¶¶ 10–13.
[6] *Id.* at ¶ 10.
[7] *Id.* at ¶¶ 10–11.

immediately after a proceeding is commenced.[8] But the Attorney Examiner was "not persuaded" by OCC's arguments "that discovery always begins immediately after a proceeding is commenced."[9] Instead, the Attorney Examiner reasoned that the rules do not provide all entities unlimited rights to, or extraordinary participation in, the audit process before a report is filed, and therefore, to ensure "consistency for discovery in [that] audit proceeding and future proceedings before the Commission," no discovery should occur before the final audit report is filed.[10]

That decision comports with the Commission's discovery rules, which do not require discovery to begin at the outset of every matter. Rather, the rules contemplate that discovery is meant to move towards a "proceeding," "hearing," or some other process for admitting evidence. The rules aim "to encourage the prompt and expeditious use of *prehearing* discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings."[11] Similarly, Rule 4901-1-17 allows for prehearing discovery to begin "immediately after a *proceeding* is commenced" such that discovery "must be completed prior to the commencement of a *hearing*."[12] These rules anticipate at least two limiting principles on discovery. First, a hearing or some other opportunity to take evidence must be scheduled to occur. If there is no such opportunity, then it follows that there will be nothing to lead to the discovery of admissible evidence. Second, the discovery requests must be "relevant to the subject matter of the proceeding" such that the discovery sought is reasonably calculated to "lead to … admissible evidence."[13]

Neither of those two limiting principles exist here. At this time, there is no procedural schedule, beyond deadlines for the audit. There is no open comment period, and no hearing set.

[8] *Id.* at ¶ 10.
[9] *Id.* at ¶ 15.
[10] *Id.*
[11] Ohio Adm. Code § 4901-1-16(A) (emphasis added).
[12] *Id.* at § 4901-1-17(A) (emphasis added).
[13] *Id.* at § 4901-1-16(B).

And the final audit report, the findings and recommendations of which will frame the relevant issues, is not due until June. Therefore, the parties do not know what issues will be relevant, leaving them to guess as to the scope of discovery. OCC is only entitled to discovery that is relevant and reasonably calculated to lead to "admissible evidence," and if neither party knows what issues the final audit report will cover, then they could not possibly determine what evidence would be relevant to those issues.

The discovery requests OCC attaches to its Motion illustrate this point. OCC requests discovery to investigate a broad range of topics such as "all travel and entertainment expenses incurred" by the Companies related to House Bill 6 and the reasons why FirstEnergy Corp. made certain employment decisions.[14] As it stands, neither of those issues relate to whether the Companies abided by the Commission's corporate separation rules.

OCC's attempts to explain away the precedent set in the *Rider DMR Case* are unavailing. First, OCC claims the case is "distinguishable." Not so. The Attorney Examiner did not cabin the holding to the facts. Instead, the Attorney Examiner set out a general common-sense rule and explicitly stated it applied to future audit cases. Being unable to avoid binding precedent, OCC insinuates the Commission should nevertheless distance itself from this "infamous PUCO case," citing the Ohio Supreme Court's reversal of the Commission's authorization of Rider DMR. But the Supreme Court's ruling had nothing to do with the Commission's broad discretion to manage discovery or to conduct an orderly audit process.

OCC next claims that Attorney Examiners have ruled in the past that parties may commence discovery prior to the issuance of an audit report.[15] But the cases OCC cites do not support its position. In fact, the Attorney Examiner in the *Rider DMR Case* used one of those cases

[14] *See* OCC's Mem. in Supp., Attach. 1, INT 4-8, INT 4-19, pp. 12, 22.
[15] *See* OCC's Mem. in Supp., p. 12, n.29.

as an example of why discovery should occur *after* the filing of the audit report.[16] In *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR, the Attorney Examiner stated that "clearly the commission[,] when it said ample discovery[,] was intending that there be discovery after the filing of the audit report."[17] In that particular case, because the audit report had been filed, the Attorney Examiner granted the motion to compel.[18] As for the other case on which OCC relies, the Commission had already initiated a procedure—a comment period—when it initiated the audit.[19] The Attorney Examiner even cited to the pending comment period as part of the reason for permitting discovery.[20] Thus, neither case supports OCC's right to discovery now.

Regardless, OCC has failed to show why it needs discovery "immediately." Speculating about FirstEnergy Corp.'s recent employment decisions, OCC argues that it may be unable to obtain information "from individuals no longer employed by FirstEnergy Corp."[21] But that does not justify OCC's expansive and premature requests. Indeed, OCC cites no authority supporting the idea that a company's hypothetical future employment decisions justifies accelerating discovery. OCC also does not specify any relevant information that it may be unable to obtain at a later date—nor could it since the audit report has not been filed. Further, the auditor is currently

---

[16] *See Rider DMR Case*, Entry at ¶ 15 (Nov. 1, 2018) (citing *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR (applying "the same reasoning" of that case in concluding that discovery should occur after the final audit report)).

[17] *See In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR, Prehr'g Conference, p. 21 (Nov. 30, 2016).

[18] *Id.*

[19] *See In the Matter of the Audit of Transportation Migration Rider – Part B of the East Ohio Gas Company*, Case No. 17-219-GA-EXR, Entry at ¶ 15 (Apr. 19, 2017).

[20] *See In the Matter of the Audit of Transportation Migration Rider – Part B of the East Ohio Gas Company*, Case No. 17-219-GA-EXR, Entry at ¶ 13 (Sept. 28, 2017).

[21] *See* OCC's Mem. in Supp. at p. 12.

engaged in its work, and any information relevant to its findings and conclusions will surely be preserved. And beyond all this, OCC is not faced with some indefinite delay to discovery. The audit report is due in June, and after it is filed, the parties "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."[22]

B. The Companies Have Not Waived Any Objections To OCC's Premature Requests.

Finally, contrary to OCC's arguments, the Companies have not waived any objections by reserving them until the time at which discovery may begin in this matter. For starters, the Companies cannot waive objections to discovery requests that are plainly improper and premature. In addition, OCC's argument that the Companies have waived their objections further reinforces why the Attorney Examiner's approach that there is no discovery before the filing of an audit report makes sense. Requiring the Companies to immediately state all of their objections on relevance, overbreadth, and burden grounds would place the Companies in the impossible position of having to speculate about what the scope of this case will be when the audit report is issued in June. And this, in turn, would cause needless discovery disputes between the parties about information that currently is not, and may never be, relevant to this case.

This is why the approach set forth in the *Rider DMR Case* promotes efficiency. It reserves discovery until the time the audit report has set the issues for the parties' and the Commission's consideration. To frame it another way, because the audit report has not yet been filed, all of OCC's requests are necessarily irrelevant and overbroad and any burden in responding to OCC's improper

[22] *Rider DMR Case*, Entry at ¶ 15 (Nov. 1, 2018).

requests is necessarily undue, especially while the Companies are concurrently working with the auditor to provide the information it has requested.[23]

III. CONCLUSION

OCC misunderstands its role in this matter. It is not entitled to conduct an investigation independent of the audit and to usurp the role of the auditor. Rather, the Attorney Examiner has established an orderly process in this and other audit cases under which the audit is conducted, the report is filed, discovery commences, and then parties have an opportunity to comment. OCC's discovery requests are unauthorized and premature. The Attorney Examiner should deny OCC's Motion.

[23] OCC's reliance on Rule 4901-1-19 is likewise misplaced. That rule requires a party to answer interrogatories "separately and fully, … unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer." The Companies did just that, objecting to each request because the requests were premature, which satisfied the rule. Because OCC's discovery is premature and unauthorized, the Companies reserved their right to raise other objections later, when the scope of discovery is known. The text of Rule 4901-1-19 does not forbid that.

Dated: March 9, 2021

Respectfully submitted,

/s/ Ryan A. Doringo

Brian J. Knipe (0090299)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 384-5795
bknipe@firstenergycorp.com

Michael R. Gladman (0059797)
Margaret M. Dengler (0097819)
Jones Day
325 John H. McConnell Blvd
Suite 600
Columbus, Ohio 43215
Tel: (614) 469-3939
Fax: (614) 461-4198
mrgladman@jonesday.com
mdengler@jonesday.com

Ryan A. Doringo (0091144)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
radoringo@jonesday.com

On behalf of the Companies

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 March 9, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
Attorney for the Companies

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel's Motion to Compel electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company