

# 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

## ENTRY

Entered in the Journal on February 10, 2022

### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies certification of the interlocutory appeal, request for certification, and application for review filed on January 14, 2022, and extends the procedural schedule of this case.

### II. HISTORY OF THE PROCEEDING

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, 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} To assist the Commission with the review of FirstEnergy's compliance with the corporate separation rules set forth in Ohio Adm.Code Chapter 4901:1-37, the Commission directed Staff, on May 17, 2017, to issue a request for proposal (RFP) for audit services. On July 5, 2017, the Commission issued an Entry selecting Sage Management Consultants, LLC (Sage) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a draft audit report was to be submitted by February 28, 2018, with the final audit report due on March 14, 2018. The deadline for the draft audit report and final audit report was extended to April 30, 2018, and May 14, 2018, respectively. Sage filed the final audit report on May 14, 2018.

{¶ 4} Comments regarding the Sage audit report were timely filed by Interstate Gas Supply, Inc. (IGS), Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council

(NOPEC), the Companies, and Retail Energy Supply Association (RESA). Reply comments were filed by NOPEC, FirstEnergy Solutions Corp. (FES), OCC, and the Companies. Joint reply comments were filed by RESA and IGS.

{¶ 5} In their comments, the Companies noted that, on March 20, 2018, FES filed a voluntary petition in the United States Bankruptcy Court for relief pursuant to Chapter 11 of Title 11 of the United States Code. Further proceedings in this case were deferred until the resolution of FES' bankruptcy proceeding.

{¶ 6} On March 20, 2020, the Companies filed a notice in this proceeding. The Companies represented that FES had emerged from bankruptcy as Energy Harbor Corp. (Energy Harbor) and that Energy Harbor is no longer an affiliate of the Companies' parent, FirstEnergy Corp.

{¶ 7} On April 29, 2020, the attorney examiner established a supplemental comment period regarding use of a trade name by an affiliate of the Companies and with compliance with the corporation separation requirements by the Companies and other affiliates of FirstEnergy Corp. Supplemental comments were timely filed by Vistra Energy Corp., NOPEC, IGS, OCC, RESA, and the Companies. Supplemental reply comments were timely filed by OCC, NOPEC, IGS, RESA, and the Companies.

{¶ 8} On September 8, 2020, the OCC filed motions in this proceeding for an investigation and management audit of FirstEnergy, its corporate governance, and its activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from consumers or violate any utility regulatory laws, rules, or orders in its activities regarding Am. Sub. H.B. 6. The Companies filed a memorandum contra OCC's motions on September 23, 2020. OCC filed a reply on September 30, 2020.

{¶ 9} On September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In re the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC (*FirstEnergy Political and Charitable Contribution Case*).

{¶ 10} On October 29, 2020, FirstEnergy Corp., the corporate parent of the Companies, filed a Form 8-K with the United States Securities and Exchange Commission reporting the termination of certain officers and appointment of new interim chief executive officers. The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

{¶ 11} In light of these disclosures, on November 4, 2020, the Commission issued an Entry directing, in the instant case, Staff to issue an RFP to acquire audit services to assist the Commission with the review of FirstEnergy's compliance with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans for the period between November 1, 2016, and October 31, 2020.

{¶ 12} On January 27, 2021, the Commission selected Daymark Energy Advisors, Inc. (Daymark) and directed the Companies to enter into a contract with Daymark to perform the audit services described in the RFP and its proposal. In the Entry, the Commission also set the deadline for the completion of the audit report as June 21, 2021. Motions to extend the filing date of the audit report were subsequently filed and granted.

{¶ 13} On September 13, 2021, Daymark filed the final audit report with the Commission.

{¶ 14} On September 17, 2021, the attorney examiner set a comment period and procedural schedule for this proceeding, which was extended by Entry dated October 12, 2021. Pursuant to the October 12, 2021 Entry, the hearing in this matter was scheduled for February 10, 2022.

{¶ 15} A prehearing conference was held on January 4, 2022. During that conference, numerous rulings were issued, including an extension of the procedural schedule and the evidentiary hearing. The Companies' testimony deadline was set for February 14, 2022, the intervenors' testimony deadline was set for February 28, 2022, and the evidentiary hearing was rescheduled for March 14, 2022. (Tr. (Jan. 4, 2022) at 25-26.)

{¶ 16} OCC and NOPEC filed a document on January 10, 2022, which OCC and NOPEC represented to be an interlocutory appeal of certain rulings made at the January 4, 2022 prehearing conference. The document file was corrupted, and the document is illegible.

{¶ 17} On January 12, 2022, OCC and NOPEC filed a motion for the Commission to resolve the issue with the interlocutory appeal document and to consider it as timely filed. On January 12, 2022, the attorney examiner contacted the parties via email to schedule an informal prehearing conference to be held on January 13, 2022, to discuss a resolution for the corrupted document and corresponding motion.

{¶ 18} At the prehearing conference on January 13, 2022, the attorney examiner stated that the filing deadline for interlocutory appeals of rulings made at the January 4, 2022 prehearing conference would be extended to January 14, 2022, which would give OCC and NOPEC an opportunity to timely file the interlocutory appeal. Additionally, the attorney examiner directed that OCC and NOPEC should file their interlocutory appeal via hard copy to ensure that no further filing issues arise with this document. The attorney examiner also requested that OCC and NOPEC work with the docketing division to determine the source of the corruption issue in order to prevent this issue from occurring in

the future. On January 13, 2022, an Entry was issued memorializing the rulings by the attorney examiners.

{¶ 19} On January 14, 2022, an interlocutory appeal, request for certification, and application for review was filed by OCC and NOPEC regarding two rulings at the January 4, 2022 prehearing conference: the attorney examiner's ruling extending the procedural schedule in this case; and the attorney examiner's statement that a ruling on the request by OCC and NOPEC for a supplemental audit would be deferred until after the evidentiary hearing to be held in this case.

### III. DISCUSSION

{¶ 20} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. The rulings which are the subject of the interlocutory appeal are not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

A. *The interlocutory appeal of the ruling extending the procedural schedule should not be certified to the Commission.*

{¶ 21} The attorney examiner finds that the interlocutory appeal of the ruling extending the procedural schedule does not present a new or novel question of interpretation, law, or policy.<sup>1</sup> The interlocutory appeal seeks Commission review of a decision by the attorney examiner to extend the hearing schedule rather than grant an indefinite delay of the hearing date, but it is well-established that the Commission and its

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<sup>1</sup> With respect to the ruling extending the procedural schedule, OCC and NOPEC provide no argument that the interlocutory appeal is taken from a ruling that departs from past precedent.

attorney examiners have extensive experience with respect to establishing procedural schedules and addressing other procedural issues, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2.

{¶ 22} Further, the attorney examiner finds that OCC and NOPEC cannot demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the ruling extending the procedural schedule during the January 4, 2022 prehearing conference. Counsel for OCC and NOPEC attended the January 4, 2022 prehearing conference (Tr. (Jan. 14, 2022) at 6-7, 8). Counsel for OCC duly reported on the status of the production of documents by FirstEnergy Corp. in response to a subpoena requested by OCC (*Id.* at 11-13). However, neither OCC nor NOPEC objected to the new procedural schedule (*Id.* at 25-26). OCC and NOPEC now characterize the document production by FirstEnergy Corp. as a “mountain of evidence” necessitating an indefinite continuance of the hearing while OCC and others “wade” through the documents. Interlocutory Appeal, Request for Certification, and Application for Review (Jan. 14, 2022) at 13-14. However, at the prehearing conference, neither OCC nor NOPEC represented that the document production would prevent them from being prepared for hearing on the date proposed by the attorney examiner. The failure of OCC and NOPEC to raise an objection or suggest a new date for hearing at the prehearing conference is

inexplicable.<sup>2</sup> Having failed to raise any objection at the prehearing conference, OCC and NOPEC cannot demonstrate undue prejudice from the ruling.

{¶ 23} Further, the attorney examiner finds that OCC and NOPEC cannot demonstrate any undue prejudice resulting from the extension of the hearing schedule at the January 4, 2022 prehearing conference because OCC and NOPEC failed to file a motion seeking an additional extension of the hearing schedule. Ohio Adm.Code 4901-1-13(A) provides that “extensions of time to file pleadings or other papers may be granted upon motion of any party *for good cause shown* \* \* \* [emphasis added]”. In this case, OCC made no effort to demonstrate good cause why the procedural schedule should be further extended, as specifically provided by Ohio Adm.Code 4901-1-13(A). Thus, the attorney examiner finds that the failure to file a motion demonstrating good cause for an extension is fatal to the effort by OCC and NOPEC to demonstrate undue prejudice from the ruling made at the January 4, 2022 prehearing conference. *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶ 22.

{¶ 24} As OCC and NOPEC have failed to meet either requirement for the certification of an interlocutory appeal set forth in Ohio Adm.Code 4901-1-15(B), the attorney examiner finds that the interlocutory appeal of the ruling extending the hearing schedule should not be certified to the Commission.

***B. The interlocutory appeal of the “ruling” deferring ruling on the request for an additional audit should not be certified to the Commission.***

{¶ 25} The attorney examiner finds the interlocutory appeal should be rejected as improper. The interlocutory appeal was not taken from a “ruling” by the attorney examiner issued under Ohio Adm.Code 4901-1-14. OCC and NOPEC claim that the attorney examiner erred at the January 4, 2022 prehearing conference by deferring ruling on the motion for a supplemental audit filed on November 5, 2021. However, the attorney

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<sup>2</sup> At the prehearing conference, the attorney examiner even inquired whether the proposed hearing date interfered with counsel’s spring vacation plans (Tr. (Jan. 4, 2022) at 26).

examiner did not rule on the motion at the January 4, 2022 prehearing conference. The attorney examiner stated that a ruling on the motion should not be made until after the evidentiary hearing to be held in this matter; thus, the attorney examiner expressly deferred ruling on the motion for a supplemental audit. (Tr. (Jan. 4, 2021) at 23-24.) Therefore, the interlocutory appeal is improper because it was not filed in response to a “ruling” by the attorney examiner and should be denied on that basis. *In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al., Opinion and Order (Mar. 31, 2016) at 11; *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶ 18.

{¶ 26} Even if the interlocutory appeal was not improper, the attorney examiner would not certify the interlocutory appeal to the Commission. The interlocutory appeal does not present a new or novel question of interpretation, law, or policy and is not taken from a ruling which represents a departure from past precedent. The interlocutory appeal seeks Commission review of a decision by the attorney examiner to defer ruling on a motion for a supplemental audit, but there is nothing new or novel about deferring ruling on a motion until a more appropriate time. *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶ 18.

{¶ 27} Further, the “ruling” by the attorney examiner does not represent a departure from past precedent. OCC and NOPEC state that the supplemental audit was requested so that FirstEnergy Corp.’s admittedly unlawful activities related to H.B. 6 can be evaluated as part of the corporate separation review. However, these same arguments were raised by OCC in its application for rehearing filed on December 4, 2020, in this proceeding. The Commission considered, and rejected, those arguments. Application for Rehearing (Dec. 4, 2020) at 11-14 (*denied by operation of law*). Thus, the attorney examiner’s “ruling” does not depart from past precedent but was consistent with the Commission’s rejection of the same arguments previously raised by OCC in this case.

{¶ 28} Moreover, the attorney examiner finds that OCC and NOPEC have not demonstrated any undue prejudice by deferring a ruling on the requested supplemental



audit until after the evidentiary hearing. The attorney examiner notes that two audits have been conducted in this proceeding. An initial audit was conducted by Sage and filed on May 14, 2018. Due to the disclosures by FirstEnergy Corp. cited above, a second audit<sup>3</sup> was conducted by Daymark to cover the entire period leading up to the passage of H.B. 6; this audit was filed on September 13, 2021. The auditors will testify at the hearing in support of their audit reports. OCC and NOPEC raise questions regarding a statement made in the Daymark final report. OCC and NOPEC both will have a full and fair opportunity to cross-examine the auditor regarding this statement at the evidentiary hearing.

{¶ 29} As noted above, the Commission has already considered and rejected the same arguments regarding a supplemental audit raised on rehearing by OCC, but, if new facts emerge during the evidentiary hearing, the Commission will consider a supplemental audit if the record *evidence*, not speculation or conjecture, supports a need for such supplemental audit.

*C. The procedural schedule should be further extended.*

{¶ 30} The attorney examiners are mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. in response to the broad subpoena issued by the attorney examiner at the request of OCC. The attorney examiners would have taken the document production into consideration at the prehearing conference on January 7, 2022, if OCC and NOPEC had raised an objection to the proposed date for the hearing or

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<sup>3</sup> OCC and NOPEC attach an email from Staff advising potential bidders that the bids need not include an examination of the source of funds for H.B. 6 political and charitable spending by the Companies. This email was in response to a question regarding whether the RFP included “whether the source of funds for political and charitable spending by the Companies” in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers. However, the question of whether the source of funds for political and charitable spending by the Companies in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers is being thoroughly addressed in a separate investigation. *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021). There is nothing in the attached email which suggests that any *corporate separation issues* related to FirstEnergy’s H.B. 6 related activities were out of bounds in the audit.

suggested a different hearing date. Therefore, the attorney examiner finds that the procedural schedule should be further extended as follows:

- a. The Companies should file testimony by April 17, 2022;
- b. Intervenors should file testimony by May 1, 2022; and
- c. The evidentiary hearing will commence on May 9, 2022, at 10:00 a.m. The hearing shall take place at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio 43215. The parties should register at the lobby desk and then proceed to the 11th floor to participate in the hearing.

The attorney examiners will entertain reasonable requests for further extension of the procedural schedule if OCC and NOPEC, or any other party, provide meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

#### IV. ORDER

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That the interlocutory appeal filed by OCC and NOPEC on January 14, 2022, be denied. It is, further,

{¶ 33} ORDERED, That the procedural schedule be extended as set forth in Paragraph 30. It is, further,

{¶ 34} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price  
Attorney Examiner

SJP/hac

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Summary: Attorney Examiner Entry ordering that the interlocutory appeal filed by OCC and NOPEC on January 14, 2022, be denied and that the procedural schedule be extended as set forth in Paragraph 30 electronically filed by Heather A. Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio