

**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 ) Case No. 17-0974-EL-UNC  
Edison Company's Compliance with )  
R.C. 4928.17 and Ohio Adm. Code )  
Chapter 4901:1-37. )**

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
OHIO MANUFACTURES' ASSOCIATION ENERGY GROUP,  
AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
MOTION FOR AN INDEFINITE CONTINUANCE OF THE HEARING AND  
PROCEDURAL SCHEDULE**

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**I. INTRODUCTION**

This docket has been open for nearly five years.<sup>1</sup> During that time, the Intervenors have engaged in voluminous discovery, two audit reports have been filed, the parties have provided hundreds of pages of comments, and the Attorney Examiners have twice afforded additional time for parties to prepare for the hearing.<sup>2</sup> As Chair French recently recognized with respect to this and other House Bill 6-related cases, "OCC has been provided with considerable amounts of information, which they have asked for and been given additional time to review," and the Attorney Examiners, in ruling on a number of disputed issues, "have been extremely accommodating to the parties, including OCC."<sup>3</sup> Beyond that, the Companies are engaged in improving compliance and ethics and all aspects of business, including in the area of corporate

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<sup>1</sup> Case No. 17-0974-EL-UNC, Memorandum (Apr. 12, 2017) (requesting that the Docketing Division open a new docket for this matters).

<sup>2</sup> Case No. 17-0974-EL-UNC, Hearing Transcript (Jan. 4, 2022), at 24:1-11.

<sup>3</sup> See Recording of March 9, 2022 PUCO Commission Meeting, available at <https://www.youtube.com/watch?v=0YZcYX-tGDI>.

separation,<sup>4</sup> and the Commission’s final Order concerning the procedural schedule will represent an important step in that effort.

Despite all this, OCC, NOPEC, and OMAEG (collectively, the “Joint Movants”) seek to “enlarge” discovery and to indefinitely delay the evidentiary hearing.<sup>5</sup> But, as explained below, the Joint Movants fail to show good cause for the Attorney Examiners to take either step. The Joint Movants have already had months to review discovery produced in this case. And the evidentiary hearing does not begin until May 9, leaving ample time for the parties to finish any remaining review and to conclude appropriate depositions. The Joint Movants’ motion should be denied—in the words of the Attorney Examiners, “the time has come to hold the hearing.”<sup>6</sup>

## **II. ARGUMENT**

### **A. Joint Movants Fail To Show Good Cause For Either Indefinitely Continuing The Hearing Or Extending The Discovery Period.**

The Joint Movants’ requests to indefinitely continue the hearing date and to extend the discovery period should be rejected out of hand. To be sure, “[a]ll parties and intervenors shall be granted ample rights of discovery” in Commission cases.<sup>7</sup> But any suggestion that the parties here have been denied ample discovery rights or ample time to prepare cannot withstand the slightest scrutiny. To the contrary, OCC itself has characterized discovery in this case as a “mountain of evidence,” and the Attorney Examiners have already twice provided lengthy extensions for OCC

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<sup>4</sup> See Case No. 17-0974-EL-UNC, Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Nov. 22, 2021); Case No. 17-0974-EL-UNC, Reply Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (Dec. 13, 2021).

<sup>5</sup> Case No. 17-0974-EL-UNC, Motion for an Indefinite Continuance of the Hearing, Motion to Enlarge the Time Period for Discovery, Request for Expedited Ruling and Memorandum in Support (“Mot.” or “Mem.”) at 3, 5-6 (Mar. 14, 2022).

<sup>6</sup> Case No. 17-0974-EL-UNC, Hearing Transcript (Jan. 4, 2022), at 24:10-11.

<sup>7</sup> R.C. 4903.082.

and other parties to review what has been produced and to otherwise prepare for the hearing.<sup>8</sup> The Joint Movants offer no reasonable, let alone compelling, grounds for reopening document discovery, extending the remainder of the discovery period, or delaying the evidentiary hearing.

Indeed, the Joint Movants do not supply the Commission with any particularized reason as to why the procedural schedule should once again be extended. They do not cite any specific need for additional documents, any relevant topic on which they believe discovery is lacking, or any deficiencies in document productions to date. Nor, during the last prehearing status conference in this case, did OCC or either of the other movants raise any outstanding discovery issues.<sup>9</sup>

What's more, the Joint Movants ignore that document discovery in this case has been closed since November<sup>10</sup> and that their request to "enlarge" the schedule comes nearly four months too late.<sup>11</sup> On October 12, 2021, the Attorney Examiners, upon motion of the parties, extended the discovery cutoff to November 24 to provide "additional time . . . to adequately conduct and review discovery."<sup>12</sup> Despite this, only NOPEC—who served its last set of discovery requests on November 24 itself—made any effort to take additional discovery during the extension period. And though OCC and NOPEC moved on November 5, 2021 "for an extension on the comment

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<sup>8</sup> Case No. 17-0974-EL-UNC, Entry (Feb. 10, 2022), at ¶¶ 14-15, 22, 30.

<sup>9</sup> Case No. 17-0974-EL-UNC, Entry (Feb. 10, 2022), at ¶ 22 ("[N]either 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>10</sup> Case No. 17-974-EL-UNC, Entry (Oct. 12, 2021), at ¶ 24(a).

<sup>11</sup> See *In the Matter of the Commissions Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162.*, No. 10-2387-TP-COI, 2011 WL 2488941, at \*2 (F.E.D.A.P.J.P. June 16, 2011) ("The filing of the motion for an extension of time eight days following the end of the discovery period certainly does not comport with the Commission's requirement to expeditiously file applicable motions related to discovery issues. To the extent that OCC was experiencing difficulties related to discovery, the appropriate motion should have been filed in a timely manner, and not eight days after the fact.") (decision attached as Exhibit A).

<sup>12</sup> Case No. 17-974-EL-UNC, Entry (Oct. 12, 2021), at ¶ 22.

deadlines and evidentiary hearing,”<sup>13</sup> nowhere in their motion did they ask the Commission to allow additional time for document discovery.

Yet, the Joint Movants now contend that the Attorney Examiners did not already extend document discovery due to “an oversight.” That argument holds no water. The Attorney Examiners knew well the procedural deadlines they had imposed, and the two past extensions granted to OCC and NOPEC were unambiguous accommodations for the parties to review information obtained in discovery—not extensions meant to permit new rounds of broad discovery requests.<sup>14</sup>

Moreover, that productions from FirstEnergy Corp. and Commission Staff remain ongoing does not require a hearing continuance or discovery extension. As the Joint Movants note, OCC and FirstEnergy Corp. entered into an agreement on October 13, 2021—the day after the document discovery deadline was extended—for documents FirstEnergy Corp. produced to the plaintiffs in the *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio) (the “Securities Litigation”), which include documents produced to the DOJ and SEC. FirstEnergy Corp. explained to OCC and to the Attorney Examiners that discovery would be ongoing in the Securities Litigation for some time, since discovery in that case had just begun, and that productions would therefore be made on a rolling basis.<sup>15</sup> Thus, the parties were well informed long before discovery closed here on November 24 that FirstEnergy Corp. would continue to produce documents as they were exchanged in the Securities Litigation. The Joint Movants cannot now use this as an excuse to keep discovery in this case open indefinitely and to delay the

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<sup>13</sup> Case No. 17-974-EL-UNC, Motion for Supplemental Audit, Motion to Extend Deadlines for Comments, Reply Comments and Hearing-Related Matters, Request for Expedited Ruling, at 3 (Nov. 5, 2021).

<sup>14</sup> See Case No. 17-0974-EL-UNC, Entry (Feb. 10, 2022), at ¶ 30.

<sup>15</sup> See Case No. 17-0974-EL-UNC, Hr’g Tr., at 13:10-20 (Jan. 4, 2022).

resolution of issues.<sup>16</sup> And on top of this, the Joint Movants have not even attempted to explain why documents to be produced by FirstEnergy Corp. in the Securities Litigation would be of any relevance to Ohio corporate separation issues, which have already been covered extensively in discovery to date, the two audit reports, and the parties' voluminous comments.

The same is true of Joint Movants' arguments with respect to Staff's response to OCC's public records request for documents produced by the Commission pursuant to government subpoenas. Joint Movants claim they need time to review these documents and cannot adequately prepare for the hearing until Staff's production is complete. Absent from their motion, however, is any reason why this is so. Despite already having 16,000 pages of documents from the Commission in hand, Joint Movants offer no reasonable explanation for why these documents would be relevant to the Companies' compliance with Ohio corporate separation law.

The Joint Movants' claim that they need time to review certain FERC-audit materials the Attorney Examiners ordered produced in Case No. 20-1502-EL-UNC also misses the mark.<sup>17</sup> At the outset, the Joint Movants have not made any showing that these materials would be relevant to this Commission's review of the Companies' compliance with Ohio corporate separation law or the findings and recommendations of the audit reports. Instead, they merely rely on conjecture and speculation that the documents "may provide relevant evidence."<sup>18</sup> But the Joint Movants

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<sup>16</sup> The Joint Movants' representation that FirstEnergy Corp. "produced about 100,000 fewer pages of documents to OCC and the parties as compared to what FirstEnergy Corp. had produced to the civil plaintiffs," Mem. at 3, is incorrect and should be disregarded. Despite FirstEnergy Corp.'s many attempts to explain to OCC that the Securities Litigation is entirely separate from the derivative litigation, *Miller, et al. v. Anderson, et al.*, No. 5:20-cv-01743 (N.D. Ohio), see Mot. Attachment B, the Joint Movants continue to assert they are entitled to documents produced by FirstEnergy Corp. to *any* civil litigant. This was not FirstEnergy Corp.'s agreement with OCC. In any event, as FirstEnergy Corp.'s counsel explained, "all documents produced to the plaintiffs in the derivative litigation will be produced to the securities plaintiffs," which means OCC will receive them as well at the appropriate time. *Id.*

<sup>17</sup> The Companies note that they have filed an interlocutory appeal in Case No. 20-1502-EL-UNC with respect to the Attorney Examiners' ruling on certain of the FERC audit materials.

<sup>18</sup> Mot. at 5.

already have all the Companies' communications with Daymark and audit responses provided to the auditors in *this case*. And, just as fundamentally, the fact that documents may be produced in another docket directed at separate issues is no reason to delay the resolution of this matter. This point is reinforced by the Attorney Examiners' past statements about this case's scope, which is dictated by R.C. 4928.17, O.A.C. 4901:1-37, and the two audit reports addressing the Companies' compliance with corporate separation rules.<sup>19</sup>

The Joint Movants' arguments with respect to the FirstEnergy Corp., Staff, and FERC-related productions all reflect a theme underlying the entirety of their motion. The motion strongly suggests that because the Commission did not grant the request for a "supplemental audit" as submitted by OCC and NOPEC, the Joint Movants must now review every document anywhere produced by FirstEnergy Corp., its subsidiaries, or the Commission that may somehow relate to House Bill 6.<sup>20</sup> But this idea has been directly and unanimously rejected by the Commission.

Finding it "necessary again to provide an overview of the purpose of these proceedings for the benefit of OCC," the Commission recently explained in the review of Rider DMR that "[t]he question of whether the source of funds for political and charitable spending by the Companies in support of H.B. 6 was included, directly or indirectly, in rates and charges paid by Ohio ratepayers is being thoroughly addressed in" Case No. 20-1502-EL-UNC.<sup>21</sup> And the Commission further reminded OCC "that its arguments regarding the scope of the audit" in this corporate separation case "have been considered and rejected by the Commission."<sup>22</sup> The Joint Movants' motion is just

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<sup>19</sup> Case No. 17-0974-EL-UNC, Hr'g Tr., at 27:14-20 (Jan. 4, 2022).

<sup>20</sup> See Mot. at 2-3.

<sup>21</sup> Case No. 17-2474-EL-RDR, Entry (March 9, 2022), at ¶ 34.

<sup>22</sup> *Id.*

the latest attempt to blur the lines between these proceedings and to make this case, in particular, something other than what is.

At bottom, the Attorney Examiners have generously afforded the Joint Movants with ample time to take discovery and prepare for the hearing.<sup>23</sup> The continued calls for endless discovery are contradicted by OCC's complaints regarding the "mountain" of information already received and the Joint Movants have failed to articulate the relevance of any information they believe they do not have. Discovery here has been more than thorough; the Commission should move swiftly toward a resolution of this five-year-long audit.

**B. The Joint Movants Have Ample Time To Take Depositions.**

The Joint Movants also complain that depositions will need to be taken before the hearing commences. Assuming for the sake of argument that this is correct, what they omit from their motion, however, is that none of them have noticed a single deposition of any party witness, despite having many months during which they could have done so. Moreover, the Companies informed OCC a month ago that they would be willing to coordinate certain depositions, but OCC has taken no action. Instead, OCC has only sought depositions through third-party subpoenas to FirstEnergy Corp. and another non-party. And in those, OCC attempted to shoe-horn dozens of highly objectionable document requests that are plainly time-barred by the procedural schedule. Even so, there is sufficient time for OCC or other parties to take depositions before the May 9 hearing. OCC's delays in seeking deposition testimony, and its resistance to doing so in an appropriate manner, are no reason to indefinitely continue the hearing or to extend discovery.

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<sup>23</sup> This is true even according to the Joint Movants' own arguments. Citing rules that are inapplicable here, the Joint Movants claim they should have 120 days to 23 weeks between discovery and the hearing to prepare their cases. Mot. at 11. But the Joint Movants have already had that. In fact, there are nearly 24 weeks (or 166 days) between the close of document discovery on November 24, 2021 and the hearing on May 9, 2022.

### III. CONCLUSION

The Joint Movants have failed to articulate any good cause to indefinitely delay the evidentiary hearing or to reopen and extend discovery. Their motion should be denied.

Dated: March 21, 2022

Respectfully submitted,

/s/ Ryan A. Doringo

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**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 21, 2022. The Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Shalini B. Goyal*  
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*Attorney for the Companies*

# **EXHIBIT A**

2011 WL 2488941 (Ohio P.U.C.)

In the Matter of the Commission's Investigation into  
Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162.

No. 10-2387-TP-COI

Ohio Public Utilities Commission

June 16, 2011

ENTRY

BY THE COMMISSION.

\*1 The attorney examiner finds:

(1) Pursuant to the attorney examiner Entry of April 15, 2011, the period for discovery requests was extended for all entities until May 31, 2011, with the deadline for supplemental comments and supplemental reply comments extended until July 1, 2011, and July 15, 2011, respectively.

(2) On June 8, 2011, the office of the Ohio Consumers' Counsel (OCC) filed a motion seeking an extension of the procedural schedule established in this proceeding and a request for an expedited ruling. Specifically, OCC requests that the discovery cut-off be extended until June 24, 2011, and that the deadline for supplemental comments and supplemental reply comments be extended until July 25, 2011, and August 8, 2011, respectively.

In support of its motion, OCC states that, due to difficulties in negotiating confidential agreements, the company-specific information filed under seal by Windstream Ohio, Inc., Windstream Western Reserve Inc., and the Small Local Exchange Carrier Group (SLECG),<sup>1</sup> was not available for review until June 3, 2011. Consistent with [Rule 4901-1-13\(A\)](#), [Ohio Administrative Code](#), OCC submits that, given the fundamental importance of the information in question in this proceeding, good cause for an extension has been demonstrated. OCC also asserts that its motion should be granted in order to allow for ample discovery and for the thorough and adequate preparation for participation in this proceeding relative to the issues identified in this case.

In regard to its request for an expedited ruling, OCC points out that, as of the date of its motion, there are only 23 days until the supplemental comments are due.

(3) On June 9, 2011, the AT&T Entities (AT&T),<sup>2</sup> filed a memorandum contra OCC's motion for an extension of time. In particular, AT&T questions why OCC waited until now to request that the discovery cut-off date be extended. Additionally, AT&T notes that the Entry of April 15, 2011, directed all entities "to expeditiously file the applicable motions to the extent that problems arise relative to discovery issues." Specific to this point, AT&T asserts that OCC should not be rewarded for waiting 54 days to file its motion pertaining to a discovery-related issue. Further, AT&T states that OCC's motion fails to set forth good cause and fails to elaborate on any difficulties that OCC encountered in getting information or the efforts made to secure it. Additionally, AT&T avers that OCC has participated in a significant amount of discovery thus far and, therefore, OCC has not been denied participation in this proceeding and still has ample time to address the information in its comments. Finally, AT&T submits that the Commission needs to continue to move this proceeding along and avoid any further delays in order to expeditiously carry out its goals for access reform consistent with Sub. S.B. 162.

\*2 (4) On June 10, 2011, Windstream Ohio, Inc. and Windstream Western Reserve, Inc. (collectively, Windstream) filed a memorandum contra OCC's motion for additional time. Specifically, Windstream dismisses OCC's assertion that it was "dragging its feet" to provide the information that it had filed under seal in this case to OCC. Windstream explains that the essence of the discovery disputes centered on the negotiation of the terms of a protective agreement between Windstream

and OCC. Windstream represents that it proceeded diligently and in good faith through all of the negotiations and that the final protective agreement was executed on June 1, 2011. According to Windstream, OCC received Windstream's documents shortly thereafter. OCC believes that there is no need for further discovery inasmuch as OCC has received all of Windstream's information and Windstream is unaware of any particular questions that OCC has with respect to the information.

(5) On June 14, 2011, SLECG filed its memorandum contra OCC's motion for an extension of time. Specifically, SLECG submits that sufficient time has passed for all parties to have negotiated protective agreements and conducted discovery on the submitted data as contemplated by the Commission. Further, SLECG represents that, pursuant to the attorney examiner Entry of March 22, 2011, it provided confidential data to every party that requested it, with the exception of OCC. Relative to OCC, the SLECG describes the negotiation process that occurred between the entities relative to a protective agreement, which was finalized on June 3, 2011. Finally, SLECG states that it made its public information available to OCC as early as April 4, 2011, and that only a very minimal amount of information has been deemed as confidential. SLECG believes that there is an ample amount of time remaining for OCC to review the limited amount of confidential information.

(6) Based upon a review of the arguments set forth above, OCC's motion for an extension of the procedural schedule should be denied. In reaching this determination, the attorney examiner notes that, as discussed *supra*, the Entry of April 15, 2011, extended by six weeks the time frames for discovery and the filing of supplemental and supplemental reply comments and clearly delineated the new established deadlines. The entry clearly directed all entities "to expeditiously file the applicable motions to the extent that problems arise relative to discovery issues." Notwithstanding this directive, OCC waited until June 8, 2011, to file its motion. The filing of the motion for an extension of time eight days following the end of the discovery period certainly does not comport with the Commission's requirement to expeditiously file applicable motions related to discovery issues. To the extent that OCC was experiencing difficulties related to discovery, the appropriate motion should have been filed in a timely manner, and not eight days after the fact. Therefore, OCC's motion is denied.

\*3 It is, therefore,

ORDERED, That OCC's motion be denied in accordance with Finding (6). It is, further,

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

### Footnotes

- 1 The participating entities include: Arcadia Telephone Company, Arthur Mutual Telephone Company, Ayersville Telephone Company, Bascom Mutual Telephone Company, Benton Ridge Telephone Company, Buckland Telephone Company, Champaign Telephone Company, Chillicothe Telephone, Columbus Grove Telephone Company, Conneaut Telephone Company, Continental Telephone Company, Doylestown Telephone Company, Farmers Mutual Telephone Company, Fort Jennings Telephone Company, Germantown Independent Telephone Company, Glandorf Telephone Company, Kalida Telephone Company Inc., Little Miami Communications Corporation, McClure Telephone Company, Middle Point Home Telephone Company, Minford Telephone Company, New Knoxville Telephone Company, Nova Telephone Company, Oakwood Telephone Company, Orwell Telephone Company, Ottoville Mutual Telephone Company, Pattersonville Telephone Company, Ridgeville Telephone Company, Sherwood Mutual Telephone Association, Sycamore Telephone Company, Telephone Service Company, Vanlue Telephone Company, Vaughnsville Company, and Wabash Mutual Telephone Company.
- 2 The AT&T Entities include The Ohio Bell Telephone Company d/b/a AT&T Ohio, AT&T Communications of Ohio Inc., TCG Ohio, SBC Long Distance d/b/a AT&T Long Distance, SNET America Inc. d/b/a AT&T long Distance East, AT&T Corp. d/b/a AT&T Advanced Solutions, Cincinnati SMSA L.P., and New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

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**Case No(s). 17-0974-EL-UNC**

Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association Energy Group, and Northeast Ohio Public Energy Council's Motion for an Indefinite Continuance of the Hearing and Procedural Schedule electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company