

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 April 7, 2022

{¶ 1} In this Entry, the attorney examiner grants the motion for continuance and continues the hearing to take place on August 22, 2022, and extends the procedural schedule accordingly. The attorney examiner also denies the motion to extend the discovery deadline in this case.

{¶ 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 the audit report filed in this proceeding. 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 the Matter of 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.

{¶ 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.

{¶ 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 was intended to be an interlocutory appeal of certain rulings made at the January 4, 2022 prehearing conference. The document file was corrupted and most of the document is illegible.

{¶ 17} On January 13, 2022, the attorney examiner ruled that the filing deadline provided by Ohio Adm.Code 4901-1-15 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.

{¶ 18} 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.

{¶ 19} On February 10, 2022, the attorney examiner issued an Entry denying OCC and NOPEC's January 14, 2022 interlocutory appeal. In the same Entry, the procedural schedule was extended, and the evidentiary hearing was rescheduled to commence on May 9, 2022. The attorney examiner also stated that reasonable requests for further extension of the procedural schedule will be entertained if a party provides meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

{¶ 20} On February 7, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.'s Vice President and Chief Ethics and Compliance Officer, Antonio

Fernandez. FirstEnergy Corp. moved to quash the subpoena for Mr. Fernandez on February 28, 2022. OCC filed a memorandum contra the motion to quash on March 15, 2022, and a reply was filed on March 22, 2022.

{¶ 21} Also on February 7, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy's former Chief Ethics Officer, Ebony Yeboah-Amankwah. On March 7, 2022, counsel for Ms. Yeboah-Amankwah moved to quash the subpoena for her testimony, noting that she is not a party to the case and arguing that the documents requested to be brought to the deposition are not in her custody or control, among other matters. OCC filed a memorandum contra the motion to quash on March 22, 2022, and a reply was filed on March 29, 2022.

{¶ 22} On February 22, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer, Jason Lisowski. FirstEnergy Corp. moved to quash the subpoena for Mr. Lisowski on March 10, 2022. OCC filed a memorandum contra the motion to quash on March 25, 2022, and a reply was filed on April 1, 2022.

{¶ 23} On March 10, 2022, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp. to choose one or more of its employees to testify on its behalf at a deposition. FirstEnergy Corp. moved to quash the subpoena on April 6, 2022.

{¶ 24} On March 14, 2022, OCC, Ohio Manufacturers' Association Energy Group, and NOPEC jointly filed a motion for an indefinite continuance of the hearing and a motion to enlarge the time period for discovery. The parties also requested an expedited ruling. As to their request to continue the hearing date, the moving parties assert that document production is not complete, and additional time is needed. Specifically, OCC is waiting on approximately 100,000 pages of additional documents from FirstEnergy Corp., which were subpoenaed by the Department of Justice (DOJ) in October 2021, and will be produced on a rolling basis with no specified completion date. The parties also assert that the DOJ subpoenaed additional documents from the Commission in April 2021 and May 2021, and

OCC is waiting on the complete production of those documents from the Commission, which were requested as public records. The parties also note that OCC has scheduled depositions in this case, some of which include requests for applicable documents. The moving parties point out that motions to quash their subpoenas have been filed, which will further delay the deposition process. They also assert that they could receive additional documents related to the Federal Energy Regulatory Commission (FERC) audit in Case No. 20-1502-EL-UNC, which may provide relevant evidence to this proceeding. They state that document production has continued since the case was scheduled for hearing, so the hearing should be continued to allow time for document review and case preparation. As an aside, the parties note that in Franklin County Common Pleas Court, the trial date is assigned for 23 weeks after the discovery cut-off date, and in one of the Am. Sub. H.B. 6 civil cases, the court ordered that discovery would not be cut off until 120 days after the *U.S. v. Householder* criminal case completion. The moving parties also request that the discovery cut-off date be extended until document production has been completed, depositions have been held, and a new hearing date is scheduled. They note that the existing deadline was set in November 2021, and was not extended when the hearing dates were continued. They generally aver that it would be prejudicial to hold the parties to the existing discovery cut-off date because they need more time for case preparation. The moving parties suggest that not extending the discovery deadline when the hearing date was continued may have been an oversight by the attorney examiners. Alternatively, if the hearing date is not continued, the parties request that the discovery period be extended until the existing hearing date.

{¶ 25} On March 21, 2022, FirstEnergy filed a memorandum contra the March 14, 2022 motions, arguing that the discovery deadline should not be extended, and the hearing date should not be continued. As to the request for continuance, FirstEnergy emphasizes that the docket has been open for many years, OCC has received considerable amounts of information through discovery, and the hearing has already been continued twice. FirstEnergy states that the motions do not cite a specific need for any additional documents, any specific topic, or any deficiencies in document production. The Companies also note

that no party raised outstanding discovery issues in the last prehearing conference, and discovery has been closed since November, so the request to reopen discovery now in March is too late. FirstEnergy points out that when the discovery period was last extended to November 2021, only NOPEC requested additional discovery during that extension. FirstEnergy contends that the rolling discovery production of materials from FirstEnergy Corp. that were subpoenaed by the DOJ should not be a reason now to reopen the discovery period because the agreement was reached in October 2021. Furthermore, FirstEnergy argues that the moving parties have not identified the relevance of those documents, the documents produced by the Commission through a public records request, or the FERC audit materials to be produced in Case No. 20-1502-EL-UNC to the current proceeding that would justify a continuance of the hearing date. The Companies assert that the belief that those documents would be relevant to this proceeding is based on speculation and conjecture, and this hearing should not be delayed because of ongoing document production in other matters. As to the moving parties' argument that a continuance is necessary to effectuate depositions, FirstEnergy contends that OCC's deposition subpoenas were only recently filed but that there will be adequate time to take those before the existing hearing date.

{¶ 26} The attorney examiner notes that the Commission is vested with broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). Likewise, the decision to deny a continuance of a hearing or to set a specific deadline for discovery requests rests in the Commission's discretion. *City of Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 241, 215 N.E.2d 366 (1966).

{¶ 27} The attorney examiner is unpersuaded by the moving parties' arguments for extending the discovery deadline. Although the discovery deadline was set for November

2021, the parties only submitted their request for further discovery on March 14, 2022. The attorney examiners did not extend the discovery deadline when the hearing was previously continued, in part, because no party requested such an extension. To be sure, the decision not to extend the discovery deadline was not due to an oversight by the attorney examiners, as the moving parties suggest. The Commission has extended a hearing date without also extending the deadline for discovery on numerous occasions. *See e.g., In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Entry (May 29, 2015) at 2; *In re the Application of Ohio Power Co. to Update its Transmission Cost Recovery Rider Rates*, Case No. 13-1406-EL-RDR, Entry (Oct. 24, 2013). Moreover, while the OCC and NOPEC questioned the hearing date set by the January 4, 2022 prehearing conference, alleging that discovery responses on a rolling basis rendered the “premature hearing [as] interfer[ing] with parties’ right to ample discovery,” they made no argument at that time that the discovery deadline was insufficient; nor did they allege the discovery deadline should be extended in their subsequent interlocutory appeal filed on January 14, 2022. Additionally, the moving parties acknowledge that they continue to receive documents from previous discovery requests on a rolling basis and have pending deposition requests. Thus, the moving parties continue to gather information as they prepare for hearing even without an extended discovery deadline. The generalized assertion that the discovery deadline should be extended because the parties need more time for case preparation is unpersuasive. The moving parties have not identified any line of inquiry or specific type of documents that would be beneficial to discovery before the hearing. In making this determination, the attorney examiner notes that significant document production has already been accomplished, notably the 230,000 pages of documents referenced during the January 4, 2022 prehearing conference, as well as the approximately 100,000 pages of additional documents FirstEnergy Corp. agreed in October 2021 to produce on a rolling basis,¹ and the moving parties failed to request a discovery extension until less than two months before the scheduled hearing date and nearly four months following the

¹ Tr. (Jan. 4, 2022) at 12-13.

established (and already extended) discovery deadline. See *In re the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162*, Case No. 10-2387-TP-COI, Entry (June 16, 2011) at 3 (where the attorney examiner denied the motion to extend the discovery deadline as OCC's motion was filed eight days after the deadline had passed). Parties have been afforded ample time in which to conduct discovery. For these reasons, the attorney examiner does not find good cause to extend the discovery deadline.

{¶ 28} Furthermore, the argument that the hearing should be continued indefinitely because of ongoing document production is not well taken. Consistent with Commission precedent, the attorney examiner notes that indefinite continuances are discouraged. See, e.g., *In re the Determination of the Existence of Significantly Excessive Earnings for 2017 under the Electric Security Plans of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 18-857-EL-UNC, et al., Entry (Feb. 26, 2021) at ¶ 16. Moreover, although some discovery identified by joint movants continues to be produced in other proceedings, the moving parties have failed to identify the specific relevance and importance of those documents to this proceeding.² The attorney examiner declines to extend the hearing date indefinitely merely because documents continue to be produced. By that logic, the parties may not be ready to proceed to hearing until well into the future. However, the attorney examiner does find good cause to continue the hearing date at this time and doing so will ultimately allow parties ample opportunity to prepare for the hearing. Despite finding that ongoing document production does not warrant an indefinite extension, the attorney examiner will take the ongoing discovery production into account. Additionally, as the moving parties point out, motions for subpoena to take depositions of FirstEnergy Corp. representatives have been filed, and motions to quash are pending. These matters may not be resolved with enough time to allow the parties to adequately prepare for the current hearing date. The pending subpoena matters do not justify the indefinite

² By making this statement, the attorney examiner is not remarking on the admissibility of evidence that may later be introduced during the evidentiary hearing. That determination will be made at that time, following the opportunity for arguments from the parties.

continuance of the hearing date, but the attorney examiner is persuaded that continuance of the hearing to a specified date in the future is reasonable, consistent with prior procedural extensions in this proceeding. Entry (Feb. 10, 2022) at ¶ 22. Along with the decision to continue the hearing date, the attorney examiner emphasizes that this case must move forward.

{¶ 29} At this time, the attorney examiner finds that the procedural schedule should be extended as follows:

- a. The Companies should file testimony by July 25, 2022;
- b. Intervenors should file testimony by August 8, 2022; and
- c. The evidentiary hearing will commence on August 22, 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.

{¶ 30} Further, in order to avoid any unnecessary delays and continue to move toward the expeditious resolution of this proceeding, the Companies are directed to work in conjunction with other parties, namely joint movants, to file a status report on the discovery process in this docket on May 9, 2022, June 13, 2022, and July 11, 2022. The report should detail the progress of discovery review, including, at the very least, the number of documents that have been produced by the Companies on a rolling basis during the interim period, and in the aggregate. The attorney examiner finds these reports will provide the “meaningful, quantified assessments on the progress of reviewing discovery in this proceeding,” as contemplated by the February 10, 2022 Entry. Entry (Feb. 10, 2022) at ¶ 30.

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That the motion to reopen the discovery period be denied. It is, further,

{¶ 33} ORDERED, That the procedural schedule be extended as set forth in Paragraph 29. It is, further,

{¶ 34} ORDERED, That the hearing be rescheduled for August 22, 2022, as set forth in Paragraph 29. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

SJP/kck

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

Summary: Attorney Examiner Entry denying the motion to reopen the discovery period; ordering that the procedural schedule be extended as set forth in Paragraph 29 and ordering that the hearing be rescheduled for August 22, 2022, as set forth in Paragraph 29. electronically filed by Kelli C. King on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio