

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 17-974-EL-UNC
Edison Company's Compliance with)	
R.C. 4928.17 and the Ohio Adm. Code)	
Chapter 4901:1-37.)	

**INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS,
AND
APPLICATION FOR REVIEW
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP,
AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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April 12, 2022

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The PUCO should certify this interlocutory appeal and overturn a ruling by a PUCO Attorney Examiner, per O.A.C. 4901-1-15. The former PUCO Attorney Examiner (who withdrew) set November 24, 2021, as the end of discovery in this case and then did not extend that date despite twice continuing the start of the hearing. With the Attorney Examiner's April 7th ruling in favor of FirstEnergy's position and the ruling's denial of the OCC/NOPEC/OMAEG's motion to extend discovery, the discovery time period now ends an incredible *nine months* prior to the August hearing.¹

O.A.C. 4901-1-17, addressing time periods for discovery, does not contemplate such a wide and unfair time period without discovery. O.A.C. 4901-1-16(A), addressing the "purpose" of discovery, does not contemplate the PUCO's ruling in this case, given that it

¹ Depositions may still occur. Entry, at ¶ 18(a) (Sept. 17, 2021) ("The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021.") OCC has sought numerous depositions, which non-parties have moved to quash. OCC has opposed the motions to quash. The matters await a ruling.

“encourage[s]” the use of discovery “in order to facilitate thorough and adequate preparation for participation in commission proceedings.”

The premature ending of discovery is especially mistaken given the unprecedented gravity of this situation where FirstEnergy Corp. is charged with a federal crime and admitted that the federal government can prove it.² And FirstEnergy Corp. admitted its intent to bribe the former Chair of the PUCO.³ Additionally, the fact that FirstEnergy is delaying production of discovery that has been sought, including moving to quash subpoenas, or is providing discovery on a rolling basis further highlights the need to continue discovery until all responses are received and it is determined whether follow-up discovery is necessary.

Further, this large gap in discovery rights exacerbates the fact-finding deficit in this case. That’s because it comes in this same case where the PUCO Staff prevented the auditor from directly inquiring into House Bill 6 issues in the corporate separation audit.

Also, there is added importance and difficulty that should be considered with conducting discovery on FirstEnergy. As FERC recently (and shockingly) wrote in its audit:

[e]ven more concerning, several factual assertions agreed to by FirstEnergy in DPA [deferred prosecution agreement] and the remedies FirstEnergy agreed to undertake, *point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual*

² United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement (Jul. 22, 2021).

³ United States of America v. FirstEnergy Corp., Case No. 1:21-cr-86, Deferred Prosecution Agreement (Jul. 22, 2021) at 35 (“FirstEnergy Corp. paid the entire \$4,333,333 to Company 1 for Public Official B’s benefit with the intent and for the purpose that, in return, Public Official B would perform official action in his capacity as PUCO Chairman to further FirstEnergy Corp.’s interests relating to passage of nuclear legislation and other specific FirstEnergy Corp. legislative and regulatory priorities, as requested and as opportunities arose.”).

*amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates. (Emphasis added.)*⁴

In the interest of truth and justice, the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association Energy Group ("OMAEG") and the Northeast Ohio Public Energy Council ("NOPEC") appeal that part of the Attorney Examiner's April 7, 2022 ruling that ended our fact-finding nine months prior to the hearing.⁵ The PUCO Commissioners should reverse the ruling as against the public's interest in a full investigation of whether FirstEnergy complied with Ohio law and the PUCO's rules on corporate separation.

Terminating our fact-finding by prematurely ending discovery interferes with parties' right to ample discovery guaranteed under Ohio law (R.C. 4903.082) and PUCO rules (O.A.C. 4901-1-16 et seq.). *The Commissioners should enlarge the time period for discovery to end "prior to the commencement of the hearing" per O.A.C. 4901-1-17(A), except for depositions which should be allowed later than that date.*

The reasons for granting this interlocutory appeal are more fully stated in the following memorandum in support.

⁴ (Docket No. FA19-1-000), Audit Report at 48 (Feb. 4, 2022).

⁵ See Entry attached.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The corporate separation issues regarding FirstEnergy's management and affiliates in the wake of the H.B. 6 scandal are unprecedented in Ohio. Federal prosecutors have called the H.B. 6 scandal "the largest bribery scheme ever" in Ohio.⁶ FirstEnergy Corp. fired its CEO and two other top executives on October 29, 2020. The firings occurred the same day that two of the criminal defendants in *U.S. v. Householder*⁷ entered guilty pleas.⁸ FirstEnergy Corp.'s October 29, 2020 SEC filing explained that a committee of independent members of FirstEnergy's Board of Directors was directing an internal investigation regarding FirstEnergy's H.B. 6 activities. The result was a conclusion that the executives' actions related to H.B. 6 had violated company policies and its code of conduct.⁹

⁶ N. Reimann, *Ohio Speaker of the House Arrested in State's 'Largest Bribery Scheme Ever,'* Forbes.com (Jul. 21, 2020).

⁷ *U.S. v. Larry Householder, et al.*, Case No. 1:20-cr-00077, Complaint (S.D. Ohio) (Jul. 21, 2020).

⁸ J. Mackinnon, *FirstEnergy fires CEO Chuck Jones after 2 plead guilty in Householder bribery scheme*, Akron Beacon-Journal (Oct. 29, 2020).

⁹ FirstEnergy Corp., Form 8-K (Oct. 29, 2020).

Later SEC filings revealed that FirstEnergy, through the course of its internal investigation, had discovered a \$4.3 million payment to a firm controlled by the former PUCO Chair and ten years of misallocated costs to the FirstEnergy Utilities.¹⁰ Costs misallocated to the utilities (and then to their consumers) are costs that should be allocated to other FirstEnergy affiliates. It's the type of cross-subsidization that Ohio's corporate separation law is intended to prohibit, for consumer protection.

FirstEnergy Advisors ("FEA") (the affiliate of the FirstEnergy utilities) disclosed shocking text messages reflecting apparent corporate separation violations and seemingly unlawful ex parte communications. The text messages were between Dennis Chack (then President and Manager of FEA) and Charles Jones (then CEO of FirstEnergy Corp., Manager of FEA, and Director of the Ohio FirstEnergy utilities) and the former Chair of the PUCO (Sam Randazzo) toward securing approval of FEA's application.¹¹

In one text message, former FEA President Chack asked about the status of the FEA energy license: "Any luck on talking with Sam on energy license [W]e just received request for additional comments" (March 3, 2020).¹² The next day former FirstEnergy CEO and Ohio FirstEnergy Utilities director Charles Jones replied to Dennis Chack saying that the former PUCO Chair:

[W]ill get it done for us but cannot just jettison all process. Says the combination of overruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us?

¹⁰ FirstEnergy Corp., Form 10-K (Feb. 18, 2021).

¹¹ See, Certification Case, Motion to Withdraw the Certification Application of Suvon, LLC d/b/a FirstEnergy Advisors as a Competitive Retail Electric Service Power Broker and Aggregator (Nov. 2, 2021), Exhibit A.

¹² *Id.*

He'll move it as fast as he can. Better come up with a short term work around. (Emphasis added.)¹³

These texts seem to document an active process of ex parte violations and potential or likely prima facie corporate separation violations not considered by either of the auditors in this case.

Intervenors have undertaken great efforts to investigate these matters as they arise or as revealed. To date, the parties have received and are reviewing approximately 299,000 pages of documents from FirstEnergy Corp. FirstEnergy Corp. is also producing more documents, on a rolling basis, responsive to OCC's and others' discovery. According to FirstEnergy Corp.'s counsel, the discovery production "is, in fact, ongoing and there is probably no end in sight."¹⁴ On top of that, the parties have been engaged in seeking discovery from the FirstEnergy Utilities as well. This voluminous discovery will require analysis and follow up, which was shut down by the Attorney Examiner's ruling to cut off fact-finding discovery.

The PUCO should grant this interlocutory appeal. The PUCO should allow discovery to continue to assure the Ohio public and Ohio consumers that the PUCO is committed to seeing that all pertinent facts come out. This investigation will complement but not supplant other investigations.

¹³ *Id.*

¹⁴ Prehearing Conference Tr. at 13 (Jan. 4, 2022).

II. STANDARD OF REVIEW

The PUCO will review an attorney examiner’s ruling if the attorney examiner (or other authorized PUCO personnel) certifies the appeal.¹⁵ The standard applicable to certifying an appeal is that “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.”¹⁶ Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.¹⁷

III. REQUEST FOR CERTIFICATION

- A. The Attorney Examiner’s rationale for ruling to prematurely cut off the parties’ fact-finding discovery presents a new or novel question of interpretation, law or policy and a departure from past precedent, in this landmark case involving FirstEnergy’s H.B. 6 scandal.**

This appeal should be certified, per O.A.C. 4901-1-15(B). The Attorney Examiner based her ruling on two grounds – without citing precedent, law or rule. First, the Attorney Examiner said that OCC or the parties had not raised the issue of extending the discovery deadline at the first opportunity – a January 4, 2022 prehearing where scheduling and discovery matters were discussed with the prior Attorney Examiner.¹⁸ Second, the Attorney Examiner said that OCC or the parties had “not identified any line

¹⁵ O.A.C. 4901-1-15(B).

¹⁶ *Id.*

¹⁷ O.A.C. 4901-1-15(E).

¹⁸ Entry at ¶ 27.

of inquiry or specific type of documents that would be beneficial to discovery before the hearing.”¹⁹

The rule under which the movants moved to extend the discovery deadline – O.A.C. 4901-1-17(G) – requires only a showing of “good cause” to enlarge the discovery period. Without citing to precedent, law or rule, the Attorney Examiner created two elements that a party seeking to extend a discovery deadline must meet: 1) the party must raise the issue of extending the discovery deadline at the very first opportunity, and 2) the party must identify a line of inquiry or specific type of documents that would be beneficial to discovery.²⁰

Parties have been requesting extensions of discovery periods for decades. But the Examiner’s two criteria are not found in the PUCO’s rules, in Ohio law, or in past precedent.

The Attorney Examiner cited two cases where the PUCO extended a hearing date without extending the discovery deadline. But those rulings included only modest gaps between the cut-off of discovery and the hearing date, not the incredible gap of *nine months* as here or the unique issues of this case, including FirstEnergy’s slowed production of discovery on a rolling basis.²¹ As stated, the law gives parties the right to ample discovery under R.C. 4903.082 and under O.A.C. 4901-1-16.

¹⁹ *Id.*

²⁰ Entry at ¶ 27.

²¹ O.A.C. 4901-1-15(B). In passing, the attorney examiner cited two cases where the PUCO has extended a hearing date without extending the discovery deadline. *Id.* (citing *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-ELSSO, 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).) In the former, the hearing date was moved a mere month. In the latter, the hearing date was moved a mere handful of days. Here, the hearing date was moved three months.

Accordingly, this appeal “presents a new or novel question of interpretation, law, or policy,...” and a departure from past precedent, per O.A.C. 4901-1-15(B). The appeal should be certified for Commissioner review.

- B. The Attorney Examiner’s ruling to prematurely cut off the parties’ fact-finding discovery was built upon earlier discovery cut-off rulings by the prior Attorney Examiner (Examiner Gregory Price) whose rulings should be reviewed *de novo* because he later determined that his withdrawal from the case was warranted– all of which presents a new or novel question of interpretation, law or policy and a departure from past precedent in this landmark case involving FirstEnergy’s H.B. 6 scandal.**

Alternatively, the PUCO should waive the requirement for certification of this appeal given the extraordinary cause shown under O.A.C. 4901-1-38(B) in this landmark case involving FirstEnergy’s H.B. 6 scandal, and because of the subsequent release of the FERC audit finding material violations of its affiliate accounting rules.

The parties’ fact-finding in this momentous case has been significantly thwarted. The rulings of the Attorney Examiners to limit the discovery period are inversely related to the gravity of this momentous investigation of FirstEnergy.

The Attorney Examiner’s ruling to not enlarge the discovery period is built upon the earlier rulings of the previous Attorney Examiner who has withdrawn from the case. His ruling to not enlarge the discovery period despite extending the hearing date should be re-visited. The previous Attorney Examiner’s rulings, prior to his withdrawal, prematurely ended the discovery fact-finding process, preventing a full and proper investigation of FirstEnergy.

Indeed, the PUCO’s rulings to prematurely end discovery have done so *before* FERC even released the shocking findings in its momentous audit of FirstEnergy (issued on February 4, 2022). *The PUCO should be encouraging discovery including discovery*

related to the FERC audit, to increase what the PUCO has said to be its own interest in facts.

Therefore, the criteria in O.A.C. 4901-1-15(B) are met for finding a new or novel question of interpretation, law, or policy or a departure from past precedent. The question presented in this appeal is new or novel, *involving the rare withdrawal of an Attorney Examiner whose rulings were the foundation for the ruling in question*.

And the Attorney Examiner's withdrawal is a departure from past precedent – as is the wide gap (*nine months*) between the discovery cut-off and the hearing date. The two precedents cited by the current Attorney Examiner reflect only modest extensions of the hearing dates, not a nine-month gap as here between the discovery cut-off and the hearing date and do not take into consideration the unique facts of this case.²²

Alternatively, the PUCO should *waive* the requirement for certification of this appeal under O.A.C. 4901-1-38(B)²³ given the extraordinary cause shown. There is the gravity of the corruption that led to the investigation of FirstEnergy. And there is the rare circumstance of an Attorney Examiner's withdrawal.

²² O.A.C. 4901-1-15(B). In passing, the attorney examiner cited two cases where the PUCO has extended a hearing date without extending the discovery deadline. *Id.* (citing *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-ELSSO, 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).) In the former, the hearing date was moved a mere month. In the latter, the hearing date was moved a mere handful of days. Here, the hearing date was moved three months.

²³ This rule empowers the PUCO to “waive any requirement of this chapter for good cause shown, other than a requirement mandated by statute from which no waiver is permitted.”

As he wrote in his withdrawal letter, the Attorney Examiner provided legal review and advice concerning H.B.6.²⁴ As a result, “and in light of the truly unique circumstances presented today,”²⁵ he withdrew from presiding over this case.

Given the PUCO’s stated objective to get at the facts, and the effect of the Attorney Examiner’s ruling preventing parties from getting the facts, the ruling merits consideration by the full PUCO. Certification should be granted or waived.

C. An immediate determination is needed to prevent undue prejudice.

This appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice²⁶ to OCC and Ohio consumers. If the PUCO reverses the Attorney Examiner’s rulings after this matter is heard and briefed, parties and customers will be prejudiced by denial of (1) ample discovery rights under R.C. 4903.082 and O.A.C. 4901-1-16 et seq., and (2) a complete evaluation of whether FirstEnergy’s H.B. 6-related activities and relationship with the former PUCO chair violated Ohio law as well as the corporate separation rules under the Ohio Administrative Code.

IV. APPLICATION FOR REVIEW

The PUCO Commissioners should overturn a ruling by the PUCO’s Attorney Examiner, per O.A.C. 4901-1-15. The prior Attorney Examiner (who has since withdrawn)

²⁴ Mar. 4, 2022 Letter; *see also* Jake Zuckerman, “Ohio judge withdraws from probes into nuclear bailout he helped write”, Ohio Capital Journal (Mar. 7, 2022), <https://ohiocapitaljournal.com/2022/03/07/ohio-judge-withdraws-from-probes-into-nuclear-bailout-he-helped-write/>; Kathiann M. Kowalski, “Ohio regulatory judge steps back from FirstEnergy’s H.B. 6 cases after subpoenaed records reveal his role”, Eye on Ohio (Mar. 7, 2022), <https://eyeonohio.com/ohio-regulatory-judge-steps-back-from-firstenergys-hb-6-cases-after-subpoenaed-records-reveal-his-role/>.

²⁵ *Id.*

²⁶ O.A.C. 4901-1-15(B).

set November 24, 2021 as the end of discovery in this case and then did not extend that date despite twice continuing the start of the hearing. With the current Attorney Examiner's April 7th ruling in favor of FirstEnergy's position and the ruling's denial of the OCC/NOPEC/OMA motion to extend discovery, the discovery time period now ends an incredible *nine months* prior to the August hearing.²⁷

Parties have been requesting extensions of discovery periods for decades. O.A.C. 4901-1-17(G) merely requires a showing of "good cause" to extend discovery. OCC/NOPEC/OMA showed extraordinary cause, not just good cause, for enlarging discovery to the time of the hearing date.

In this regard, the Attorney Examiner created two new criteria for denying the movants' motion to enlarge the discovery period. Notably, the Attorney Examiner did not cite precedent, law or rule for applying these two criteria to OCC, NOPEC and OMAEG. First, the Attorney Examiner said that the parties had not raised the issue of extending the discovery deadline at the first opportunity – a January 4, 2022 prehearing where scheduling and discovery matters were discussed with the former Attorney Examiner.²⁸ Second, the Attorney Examiner said that OCC or the parties had "not identified any line of inquiry or specific type of documents that would be beneficial to discovery before the hearing."²⁹

²⁷ Depositions may still occur. Entry, at ¶ 18(a) (Sept. 17, 2021) ("The deadline for the service of discovery, except for notices of deposition, shall be set for November 1, 2021."). OCC has sought numerous depositions, which non-parties have moved to quash. OCC has opposed the motions to quash. The matters await a ruling.

²⁸ Entry at ¶ 27.

²⁹ *Id.*

These two claimed criteria appear to be new criteria, not based in law or precedent. Discovery is a legal right for case participants. It's a right that PUCO case participants have under law and rule (and the modern system of no-surprise justice). The PUCO should not be adding discovery limits to law and rule that do not exist in law and rule.

Parties typically do not know at the early stages of cases all the discovery that is necessary under such circumstances. They build on what they learn and ask more discovery, which is how case preparation works. In this case, the parties do not even have all of the documents required to produce as FirstEnergy is providing non-disputed discovery on a rolling basis. The Attorney Examiner's two new criteria move the PUCO's process even further in favor of the utilities.

Moreover, as of January 4, 2022, the FERC audit had not been issued, which found, among other violations, FirstEnergy improperly used ratepayers' money to fund H.B. 6 lobbying efforts in Ohio. How would any part to the case be able to predict that subsequent FERC audit report on January 4, 2022? The criteria in the Examiner's ruling should be rejected.

The Attorney Examiner did cite two precedents for having discovery gaps between cut offs and the hearing date. But the Attorney Examiner's precedent included only modest gaps between the cut-off of discovery and the hearing date, not the incredible *nine-month* gap here, and the cases did not involve the unique issues present in this case.³⁰

³⁰ O.A.C. 4901-1-15(B). In passing, the attorney examiner cited two cases where the PUCO has extended a hearing date without extending the discovery deadline. *Id.* (citing *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-ELSSO, Entry (May 29,

In this regard, O.A.C. 4901-1-17, addressing time periods for discovery, does not contemplate such a wide and unfair *nine-month* gap without discovery before a hearing. O.A.C. 4901-1-16(A), addressing the “purpose” of discovery, does not contemplate the discovery cut-off ruling in this case, given that it “encourage[s]” the use of discovery “in order to facilitate thorough and adequate preparation for participation in commission proceedings.” As stated, the law gives parties the right to ample discovery under R.C. 4903.082 and under O.A.C. 4901-1-16.

Further, the Attorney Examiner’s ruling to not enlarge the discovery period is built upon the earlier rulings of the withdrawn Attorney Examiner to not enlarge the discovery period despite extending the hearing date. The prior Attorney Examiner’s rulings, prior to his withdrawal, prematurely ended the discovery fact-finding process, preventing a full and proper investigation of FirstEnergy.

While the Attorney Examiner withdrew from presiding over this case “in light of the truly unique circumstances presented today”³¹ and because he had provided legal review and advice concerning H.B.6,³² he had already made various consequential rulings

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).) In the former, the hearing date was moved a mere month. In the latter, the hearing date was moved a mere handful of days. Here, the hearing date was moved three months.

³¹ *Id.*

³² Attorney Examiner Gregory Price’s Letter of Withdrawal, filed in this case and other cases on March 4, 2022; *see also* Jake Zuckerman, “Ohio judge withdraws from probes into nuclear bailout he helped write”, Ohio Capital Journal (March 7, 2022), <https://ohiocapitaljournal.com/2022/03/07/ohio-judge-withdraws-from-probes-into-nuclear-bailout-he-helped-write/>; Kathiann M. Kowalski, “Ohio regulatory judge steps back from FirstEnergy’s H.B. 6 cases after subpoenaed records reveal his role”, Eye on Ohio (March 7, 2022), <https://eyeonohio.com/ohio-regulatory-judge-steps-back-from-firstenergys-hb-6-cases-after-subpoenaed-records-reveal-his-role/>.

prior to his withdrawal, including on this matter. His rulings regarding this discovery cut-off matter should be reviewed de novo.

Note that discovery was prematurely ended *before* FERC even released the shocking findings in its momentous audit of FirstEnergy (issued on February 4, 2022). *The PUCO should be encouraging discovery including discovery related to the FERC audit*, to increase what the PUCO has said to be its own interest in facts. What FERC shockingly wrote in its audit about FirstEnergy cries out for discovery:

[e]ven more concerning, several factual assertions agreed to by FirstEnergy in DPA [deferred prosecution agreement] and the remedies FirstEnergy agreed to undertake, *point towards internal controls having been possibly obfuscated or circumvented to conceal or mislead as to the actual amounts, nature, and purpose of the lobbying expenditures made, and as a result, the improper inclusion of lobbying and other nonutility costs in wholesale transmission billing rates.* (Emphasis added.)³³

Standard and Poor's, the well-known credit ratings agency, gave this dour assessment of FirstEnergy's management:

We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and in our view, they represent a material deficiency in the company's governance.³⁴

³³ (Docket No. FA19-1-000), Audit Report at 48 (Feb. 4, 2022).

³⁴ See Khalid, U., *S&P downgrades FirstEnergy following \$1.95B draw on revolving credit facility*, S&P Market Intelligence (Nov. 25, 2020).

The PUCO has noted that “it is determined to act in a deliberate manner, based on facts rather than speculation.”³⁵ In order to do so, it has to obtain the facts. But it is difficult to find the facts when preventing parties from looking for them. Here, the PUCO would be putting an end to fact-finding *nine months before hearing*. The PUCO should accordingly allow fact-finding to continue to provide full discovery rights requested by the parties.

A deliberate and transparent process is especially needed in these times where the integrity of state government is at issue. Terminating fact-finding makes little sense when the PUCO says it’s attempting to escape the “black cloud” of the H.B. 6 scandal.³⁶

The Attorney Examiner’s ruling to prematurely cut-off discovery are the inverse of what is needed for justice. The PUCO should restore the parties’ lawful discovery rights and protect due process in this case.

V. CONCLUSION

This interlocutory appeal of the PUCO Attorney Examiner’s April 7, 2022 discovery cut-off ruling meets the legal standards for certification and for reversing the Attorney Examiner’s rulings. For millions of Ohio consumers who deserve justice regarding the FirstEnergy scandals, the PUCO should promptly reverse the Attorney Examiner’s ruling and thereby protect due process. The PUCO should allow the parties’ discovery fact-finding to continue.

³⁵ *In the Matter of the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company’s compliance with R.C. 4928.17*, Case No. 17-974-EL-UNC, Entry at ¶ 17 (Nov. 4, 2020).

³⁶ J. Pelzer, *New PUCO Chair Jenifer French: more transparency needed to lift the ‘black cloud’ of [the] HB 6 scandal*, Cleveland.com (May 18, 2021).

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel and Northeast Ohio Public Energy Council was provided electronically to the persons listed below this 12th day of April 2022.

/s/ Maureen R. Willis
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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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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in

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

Short Message Report

Conversations: 1	Participants: 2
Total Messages: 1	Date Range: 3/3/2020

Outline of Conversations

NODISPLAY 1 message on 3/3/2020 • Charles Jones • Dennis Chack

Messages in chronological order (times are shown in GMT -04:00)



NODISPLAY

DC

Dennis Chack

3/3/2020, 11:23 AM

Any luck on talking with Sam on energy license we just received request for additional comments

Short Message Report

Conversations: 1	Participants: 2
Total Messages: 5	Date Range: 3/4/2020

Outline of Conversations



NODISPLAY 5 messages on 3/4/2020 • Charles Jones • Dennis Chack

Messages in chronological order (times are shown in GMT -05:00)



NODISPLAY

- CJ **Charles Jones** 3/4/2020, 2:57 PM
He will get it done for us but cannot just jettison all process. Says the combination of over ruling Staff and other Commissioners on decoupling, getting rid of SEET and burning the DMR final report has a lot of talk going on in the halls of PUCO about does he work there or for us? He'll move it as fast as he can. Better come up with a short term work around.
- DC **Dennis Chack** 3:05 PM
Ok thanks for discussing with him. How are you feeling
- CJ **Charles Jones** 3:09 PM
[REDACTED]
[REDACTED] Stopped by Sam's today on my walk. He has friends down and has been busy but he was out doing some yard work. Walking about 3 miles a day right now. A little bored since I cant golf or even get in the pool. But better than sitting in Ohio. Weather has been beautiful last 3 days.
- DC **Dennis Chack** 3:14 PM
It was not the best the days we were there
- CJ **Charles Jones** 3:14 PM
I know. Pretty chilly and windy.

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4/12/2022 5:05:49 PM

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

Summary: Application Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel, Ohio Manufacturers' Association Energy Group, and Northeast Ohio Public Energy Council electronically filed by Ms. Patricia J. Mallarnee on behalf of Willis, Maureen Ms.