BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.	**)**	**Case No. 17-0974-EL-UNC**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL

I. INTRODUCTION

OCC, NOPEC, and OMAEG (collectively, the "Joint Movants") concede the parties in this proceeding have obtained "voluminous discovery"[1]—so much so that they previously requested additional time for review and analysis before any hearing.[2] The Attorney Examiners granted the Joint Movants' request and extended the hearing date from May to August 2022—allowing the parties an additional three months to review the "voluminous discovery" already in the parties' possession.[3] Despite this, and still without citing a particularized need for any additional discovery, the Joint Movants claim the Attorney Examiners erred by not extending the discovery deadline to allow for discovery other than depositions. However, the Joint Movants' arguments, which are neither new nor novel, are without merit, and their Request for Certification ("Request") and Application for Review should be denied.

First, the Attorney Examiners' rulings on the procedural schedule do not meet the requirements for an interlocutory appeal under O.A.C. 4901-1-15(B) because such discovery rulings are afforded broad discretion. Joint Movants raise deficient and untimely arguments that do not present "new or novel" questions, and they cannot show any undue prejudice. ***Second***, even if the appeal were certified, the Attorney Examiners correctly found that Joint Movants failed to show good cause to extend the document discovery deadline. And for that reason, Joint Movant's Application for Review should be denied.

[1] *See* Case No. 17-974-EL-UNC, OCC, OMAEG, and NOPEC's Joint Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review (April 12, 2022), at 3.

[2] *See* Case No. 17-974-EL-UNC, OCC, OMAEG, and NOPEC's Joint Motion for an Indefinite Continuance of the Hearing and to Enlarge the Time Period for Discovery ("Joint Motion").

[3] *See* Case No. 17-974-EL-UNC, Entry (April 7, 2022), at ¶ 28.

II. ARGUMENT

A. Joint Movants Fail To Meet The Requirements Of O.A.C. 4901-1-15(B).

Pursuant to Rule 4901-1-15(B), a party may take an interlocutory appeal "from any ruling issued under rule 4901-1-14 of the Administrative Code." But prior to consideration by the Commission, the party's request must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." Rule 4901-1-15(B), O.A.C. Certification of a request for an interlocutory appeal requires an applicant to satisfy both of the following requirements:

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
>
> [1] 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
>
> [2] 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.

O.A.C. 4901-1-15(B).[4] Requests for certification that fail to meet ***both*** of these requirements are summarily denied, as Joint Movant's Request should be, too.[5]

[4] *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at ¶ 8 (Oct. 21, 2008) ("In order to certify an interlocutory appeal to the Commission, both requirements need to be met.").

[5] *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018); *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012).

1. Joint Movant's Request for Certification Does Not Present a New or Novel Question of Law, Nor a Departure From Past Commission Precedent.

In keeping the current document discovery deadline, the Attorney Examiners noted the pending deposition requests in this proceeding and the voluminous discovery received and continuing.[6] Because of this, the Attorney Examiners found that the Joint Movants "continue to gather information as they prepare for hearing even without an extended discovery deadline."[7] The Joint Movants waited until March 2022 to request an extension of document discovery—*four months* after the deadline had passed—despite being on notice since October 2021 of the deadline. And even in their request for an extension at this late date, they offered only "generalized assertion[s]" and no particularized need or line of inquiry that would be "beneficial" for the Joint Movants to receive before the hearing in support for extending the deadline.[8] Accordingly, the Attorney Examiners exercised their "broad discretion to manage [Commission] dockets, including the discretion to decide how, in light of its internal organization and docket considerations, [the Commission] may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort."[9]

There is nothing novel about Attorney Examiners exercising their authority to manage and oversee discovery in Commission proceedings. In truth, Joint Movant's Request addresses only the ordinary exercise of an Attorney Examiner's discretion under the Commission's procedural rules, including "the decision to deny a continuance of a hearing or to set a specific deadline for

[6] Entry, at ¶ 27.

[7] *Id.*

[8] *Id.*

[9] *Id.*, at ¶ 26 (collecting cases).

discovery requests."[10] Such certification requests are regularly denied because "implementing the Commission's procedural rules delineated in Chapter 4901-1, O.A.C., are routine matters with which the Commission and its attorney examiners have had extensive experience in Commission proceedings."[11] Thus, as settled Commission precedent illustrates, run-of-the-mill procedural decisions, including those concerning discovery, hardly form the basis for certifying an interlocutory appeal.[12]

Joint Movants make one primary argument in an attempt to craft a new or novel question or some departure from past Commission precedent. Joint Movants argue that the Attorney Examiners, "[w]ithout citing to precedent, law, or rule," "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."[13] Joint Movants' argument seeks to turn the "good cause" standard on its head and divest the Attorney Examiners of their sound discretion. Moreover, Joint Movants fail to acknowledge that the Attorney Examiners cited extensive Commission precedent speaking to these very issues.

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[10] *Id.* (citing *City of Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 241, 215 N.E.2d 366 (1966)).

[11] *In the Matter of the Application of P.H. Glatfelter Company for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, p. 3 (Oct. 15, 2009) (denying request for certification of an interlocutory appeal).

[12] *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operations of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, 2005 Ohio PUC LEXIS 234 at *3 (May 10, 2005) (denying request to certify an interlocutory appeal regarding the setting of a procedural schedule); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176- EL-ATA, 2010 Ohio PUC LEXIS 1400 at *8-10 (Dec. 22, 2010) (denying request for certification of an interlocutory appeal from a procedural ruling because Commission rules vest Attorney Examiners with discretion "to assure an orderly and expeditious proceeding").

[13] Request, at 5.

First, "good cause" is grounded in the procedural contours and circumstances of each Commission proceeding.[14] Here, Joint Movants: (a) failed to timely raise or request the need for an extension of document discovery; and (b) have not identified a particularized need for more document discovery. The Attorney Examiners properly considered these procedural contours and circumstances and doing so does not create a "new or novel" rule justifying certification of an interlocutory appeal. Indeed, concluding otherwise would mean that nearly *every* discovery ruling is subject to secondary review. Yet, as explained above, weighing these considerations rests within the sound discretion of the Attorney Examiners and is not grounds for certification of an interlocutory appeal.[15]

Second, contrary to Joint Movants' assertion, the Attorney Examiner cited Commission precedent that addresses these issues. With respect to the untimeliness of the document discovery extension request, the Attorney Examiners pointed to *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 examiners did not find good cause to extend a discovery deadline since OCC had filed its extension motion eight days past the deadline.[16] This shows, in

[14] *In the Matter of the Regul. of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the E. Ohio Gas Co. & Related Matters.*, No. 84-10-GA-GCR, 1984 WL 991565, at *2 (P.U.C.O. Nov. 7, 1984) (considering timeliness of extension request); *In the Matter of the Long-Term Forecast Rep. of Ohio Power Co. & Related Matters. in the Matter of the Long-Term Forecast Rep. of Columbus S. Power Co. & Related Matters.*, No. 10-501-EL-FOR, 2012 WL 1066536, at *2 (P.U.C.O. Mar. 19, 2012) (finding parties failed to show good cause to enlarge the time periods of discovery based on the timeline of the proceeding); *In the Matter of the Application of the Ohio Bell Tel. Co. for Auth. to Amend Certain of Its Intrastate Tariffs to Increase & Adjust Its Rates & Charges in Its Entire Serv. Area Within the State of Ohio & to Change Reguls. & Pracs. Affecting the Same.*, No. 81-436-TP-AIR, 1982 WL 974838, at *1 (P.U.C.O. Jan. 13, 1982) (finding no special "specific circumstances" which would constitute good cause for enlarging the time period for discovery).

[15] *See supra* fn. 10-12.

[16] Entry, at ¶ 27 (citing *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).

fact, that the Attorney Examiner ruling is in line with past Commission precedent.[17] Further, on the point of failing to show a particularized need, the Commission has refused to enlarge the time period for discovery on similar grounds.[18]

For these reasons, Joint Movants have failed to present a new or novel question or a departure from past Commission precedent warranting certification.

2. Joint Movants Fail to Show They Are Unduly Prejudiced by the Attorney Examiners' Ruling.

Joint Movants concede they are in possession of "voluminous discovery."[19] There is simply no undue prejudice from the close of document discovery in this proceeding—especially, since discovery *continues* through depositions and extensions have already been granted to the Joint Movants. As the Attorney Examiners noted, Joint Movants continue "to gather information."[20] So Joint Movants have ample opportunity and information to "prepare for hearing even without an extended document discovery deadline."[21] If anything, allowing the Joint Movants additional time will only exacerbate their complaints—extending the discovery period will just add to the "mountain of evidence" the Joint Movants lament having to "wade" through.[22]

At bottom, Joint Movants have had ample discovery and time to allow for "thorough and adequate preparation for participation in Commission proceedings."[23] Indeed, discovery in this

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[17] *See also In the Matter of the Regul. of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the E. Ohio Gas Co. & Related Matters.*, No. 84-10-GA-GCR, 1984 WL 991565, at *2 (P.U.C.O. Nov. 7, 1984).

[18] *In the Matter of the Application of Gte N. Inc. for Auth. to Adjust Its Rates & Charges & to Change Its Tariffs.*, No. 87-1307-TP-AIR, 1988 WL 1620809, at *1 (P.U.C.O. June 9, 1988) (finding party failed to show good cause to enlarge time for discovery absent a request for "the identify of, or subject matter to be addressed by, the OCC witnesses").

[19] Request, at 3.

[20] Entry, at ¶ 27.

[21] *Id.* at ¶ 27.

[22] Case No. 17-0974-EL-UNC, Entry (Feb. 10, 2022), at ¶¶ 22, 30.

[23] Request, at 2 (citing O.A.C. 4901-1-16(A)).

proceeding has not closed, as parties are still permitted to take depositions. Regardless, Commission rules do not mandate that document discovery continue up until any date certain prior to a hearing.[24] Any other reading is contrary to the plain language of Commission rules.[25] Without a showing of any particularized need for relevant documents in this proceeding, and with the "voluminous discovery" and the opportunity to take depositions, Joint Movants are not unduly prejudiced by the Attorney Examiners' ruling.

B. The Application For Review Should Be Denied.

During the five years this proceeding has been open,[26] 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.[27] Yet *four months* after the close of document discovery and *five* months after notice of the document discovery deadline, Joint Movants file their untimely request. That alone is grounds for denial.[28] Setting that aside, Joint Movants 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. Instead, Joint Movants claim that parties "typically

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[24] O.A.C. 4901-1-17(A) ("[D]iscovery *may* begin immediately after a proceeding is commenced and *should be completed as expeditiously as possible*. Unless otherwise ordered for good cause shown, discovery *must be completed prior to the commencement of the hearing*.") (emphasis added).

[25] OCC suggests that the time period for document and written discovery should end *just prior to* the commencement of any hearing. This is not a reasonable reading of O.A.C. 4901-1-17(A), which directs the parties to complete discovery "as expeditiously as possible." *See id.* Moreover, that "discovery must be completed prior to the commencement of the hearing" is clearly meant to serve as an upper limit on discovery periods and should not be read as an endorsement of OCC's position.

[26] Case No. 17-0974-EL-UNC, Memorandum (Apr. 12, 2017) (requesting that the Docketing Division open a new docket for this matters).

[27] Case No. 17-0974-El-UNC, Hearing Transcript (Jan. 4, 2022), at 24:1-11.

[28] *In the Matter of the Regul. of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of the E. Ohio Gas Co. & Related Matters.*, No. 84-10-GA-GCR, 1984 WL 991565, at *2 (P.U.C.O. Nov. 7, 1984); *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.

do not know at the early stages of cases all the discovery that is necessary under such circumstances."[29] This case nor discovery is at its "early stages"—this docket has been open for five years.[30]

To create grounds for reopening document discovery, Joint Movants cite to two purported "new" pieces of information. Both are unpersuasive. ***First***, Joint Movants cite to a FirstEnergy Advisors filing in a CRES certification proceeding.[31] However, that filing was made on November 2, 2021. Document discovery closed nearly a month after that. Joint Movants did not request additional information nor seek an extension at that time. Instead they brought their untimely request four months later. In any event, Joint Movants do not even argue they lack discovery on any particular topic related to that November 2021 filing.

Second, Joint Movants cite to the FERC Audit Report filed in February 2022 as "new" grounds for reopening discovery. Apart from the apparent relevance deficiencies in that argument, which the Companies have reiterated,[32] the parties have known about the FERC Audit for months and even requested those documents in separate proceedings last summer—a point the Joint Movants fail to acknowledge.

For these reasons, Joint Movants' untimely and unsupported Application for Review to enlarge the time period for document discovery should be denied.

[29] Request, at 10.

[30] *Supra* n. 23.

[31] Request, at 2.

[32] Case No. 17-0974-EL-UNC, Companies Memorandum Contra Joint Motion for an Indefinite Continuance and to Enlarge the Time Period for Discovery (Mar. 21, 2022), at 5-6.

C. There Is No Basis To Waive The Certification Requirement.

Joint Movants argue in the alternative that, pursuant to O.A.C. 4901-1-38(B), the requirements for certification should be waived due to "extraordinary cause." Request, at 6-8. In doing so, they argue that the Commission "prematurely end[ed] discovery" before the FERC audit report findings were released. *Id*. at 6. This argument fails for several reasons. ***First***, "[h]istorically, when the Commission has found good cause to grant waivers of its procedural rules, pursuant to Ohio Adm.Code 4901-1-38, it has been for requests related to ministerial components of [Commission] process," such as "certain service requirements, requirements pertaining to the filing of protected or confidential documents, or permitting responsive memoranda." *In the Matter of the Rev. of the Distribution Modernization Rider of Ohio Edison Co., the Cleveland Elec. Illuminating Co., & the Toledo Edison Co.*, No. 17-2474-EL-RDR, 2022 WL 758282, at *10 (P.U.C.O. Mar. 9, 2022). Joint Movants have "not demonstrated why the Commission should now deviate from its historical application." *Id*. And this is especially so where, like here, "the record demonstrates that [Joint Movants] ha[ve] been provided with ample discovery in this case." *Id*.

Second, parties to this proceeding have known about the FERC audit report well in advance of the document discovery deadline and have even requested FERC audit materials in other proceedings months before the close of document discovery.

Third, contrary to Joint Movants' assertion, the Attorney Examiners have not "end[ed] discovery" in this proceeding, as Joint Movants are still permitted to seek depositions. For these reasons, there is no basis for a waiver of the requirements set forth in O.A.C. 4901-1-15.

III. CONCLUSION

Joint Movants' Request and Application for Review should be denied for the reasons provided above.

Dated: April 18, 2022

Respectfully submitted,

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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 April 18, 2022. The PUCO'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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Summary: Memorandum Contra Interlocutory Appeal, Request for Certification, and Application for Review by OCC, OMAEG, and NOPEC electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company