

## 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

IN THE MATTER OF THE REVIEW OF THE DISTRIBUTION MODERNIZATION RIDER OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.

CASE No. 17-2474-EL-RDR

IN THE MATTER OF THE REVIEW OF THE POLITICAL AND CHARITABLE SPENDING BY OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.

CASE No. 20-1502-EL-UNC

IN THE MATTER OF THE 2020 REVIEW OF THE DELIVERY CAPITAL RECOVERY RIDER OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.

CASE No. 20-1629-EL-RDR

### ENTRY

Entered in the Journal on August 24, 2022

### I. SUMMARY

{¶ 1} The Commission stays the above-captioned proceedings at the request of the United States Department of Justice for a period of six months, unless otherwise ordered by the Commission.

## II. PROCEDURAL HISTORY

{¶ 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.

### A. Case No. 17-974-EL-UNC (*Corporate Separation Audit*)

{¶ 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 the *Corporate Separation Audit* were deferred until the resolution of FES' bankruptcy proceeding.

{¶ 6} On March 20, 2020, the Companies filed a notice in the *Corporate Separation Audit*. 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. 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 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 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. 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. 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.

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

{¶ 11} In response to a subpoena filed by OCC on September 24, 2021, FirstEnergy Corp. and OCC negotiated a protective agreement to facilitate the exchange of certain proprietary or confidential information during discovery, including all productions to the plaintiffs in *In re FirstEnergy Corp. Securities Litigation*,<sup>1</sup> which include all documents produced by FirstEnergy Corp. to the United States Department of Justice's District Attorney for the Southern District of Ohio (U.S. Attorney or DOJ) and the Securities and Exchange Commission (SEC) as part of ongoing federal investigations. Under the negotiated protective agreement, OCC is required to notify FirstEnergy Corp. of any intent to disclose publicly any documents with a confidential designation, after which FirstEnergy Corp. is provided an opportunity to seek a motion for protective order.

{¶ 12} On February 7, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.'s former Chief Ethics Officer, Ebony Yeboah-Amankwah, to testify in a deposition and to produce several documents in advance of the deposition. The subpoena was signed by the attorney examiner. On March 7, 2022, counsel for Ms. Yeboah-Amankwah moved to quash the subpoena pursuant to Ohio Adm.Code 4901-1-25 as unreasonable and oppressive. OCC filed a memorandum contra to the motion to quash on March 22, 2022. Counsel for Ms. Yeboah-Amankwah filed a reply on March 29, 2022.

{¶ 13} Similarly, 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, to testify in a deposition and to produce several documents in advance of the

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<sup>1</sup> Case No. 2:20-cv-3785 (S.D. Ohio).

deposition.<sup>2</sup> The subpoena was signed by the attorney examiner. FirstEnergy Corp. moved to quash the subpoena for Mr. Lisowski on March 10, 2022. OCC filed a memorandum contra to the motion to quash on March 25, 2022, to which FirstEnergy Corp. filed a reply on April 1, 2022, emphasizing that Mr. Lisowski is not responsible for compliance with Ohio corporate separation rules.

{¶ 14} On March 3, 2022, OCC notified FirstEnergy Corp. that it seeks to publicly disclose certain documents from the productions noted above.<sup>3</sup>

{¶ 15} On March 10, 2022, FirstEnergy Corp. filed a motion for protective order seeking to protect from public disclosure certain documents produced in discovery that (1) contain commercially sensitive information and/or (2) are non-public documents produced to the DOJ and SEC as part of ongoing federal investigations.

{¶ 16} OCC filed a memorandum contra FirstEnergy Corp.'s motion for protective order on March 25, 2022.

{¶ 17} FirstEnergy Corp. filed a reply in support of its motion for protective order on April 1, 2022.

{¶ 18} By Entry issued June 16, 2022, the attorney examiner found that the motions to quash as to the Yeboah-Amankwah and Lisowski depositions should be denied, and the depositions may proceed. In making this determination, the attorney examiner declined to opine on relevancy, noting relevancy concerns could be addressed at the hearing. Rather, the attorney examiner found that the depositions may result in information reasonably

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<sup>2</sup> Two additional motions may require rulings from the attorney examiners; however, the attorney examiner found it appropriate to defer ruling on the Fernandez and general FirstEnergy Corp. depositions until the other requested depositions had been conducted and OCC had filed notice in the docket that it will still seek these depositions. June 16, 2022 Entry at ¶ 51, OCC Notice Filing (July 1, 2022).

<sup>3</sup> OCC made a similar notice filing on June 24, 2022, in which it indicated that it sought to publicly disclose approximately 20 documents from the securities productions. FirstEnergy filed a motion for protective order in response to the notice on July 5, 2022.

calculated to lead to the discovery of admissible evidence, pursuant to Ohio Adm.Code 4901-1-16(B).

{¶ 19} The deposition of Ms. Ebony Yeboah-Amankwah was scheduled to take place on July 21, 2022. The attorney examiners were requested by the parties to join the deposition over the phone in order to settle various disputes regarding the questioning being conducted. The attorney examiners directed that parties not be permitted to ask questions regarding non-public information contained in the Deferred Prosecution Agreement (DPA)<sup>4</sup> that may interfere with the federal investigations, despite that portion of the deposition being conducted in the confidential session. However, the attorney examiner also instructed that the discussions in the confidential portion of the transcript be released to the public transcript in an effort to provide additional transparency.

{¶ 20} On July 26, 2022, OCC, OMAEG, IGS and NOPEC filed a joint interlocutory appeal and request for certification regarding the attorney examiner's rulings. According to these joint movants, the attorney examiners' broad ruling is far reaching and devastating for the "Commission and Appellants' investigation" of the Companies and corporate separation violations. Joint movants raise their concerns that counsel for the Companies, FirstEnergy Corp., and former executives subpoenaed in the *Corporate Separation Audit* will use the ruling to argue that most, if not all questions, about "key documents produced in discovery that FirstEnergy Corp. claims are confidential" and should be barred, including documents relating to evidence of FirstEnergy Corp's misallocation of costs for services rendered by the former Chairman of the Commission, and, consequently, evidence of a violation of the corporate separation rules and law, citing FirstEnergy Corp. Form 10-Q (Apr. 22, 2021) at 69. The joint movants note that the misallocations were also a part of the 2020 review of the delivery capital recover rider in Case No. 20-1629-EL-RDR, further alleging that "that investigation proceeded almost unimpeded by the DOJ's criminal investigation," unlike the case here. According to joint movants, the misallocations and the

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<sup>4</sup> The DPA is between FirstEnergy Corp. and the United States Attorney for the Southern District of Ohio. *United States of America v. FirstEnergy Corp.* Case: 1:21-cr-86, July 22, 2021, Doc. 3.

consulting arrangement with Sustainability Funding Alliance (SFA) are germane to the *Corporate Separation Audit* and to the Commission's investigation in Case No. 20-1502-EL-UNC. Furthermore, the joint movants caution that the attorney examiner's rulings "may block the public's right to know how the former [Commission] chair may have disadvantaged Ohio consumers in favor of [the Companies] and their affiliates." As such, the joint movants claim that these "areas of inquiry are crucial to determining whether the FirstEnergy entities violated Ohio's corporate separation law and rules," further arguing that, if costs associated with the Commission's former Chairman and SFA were improperly allocated to the Companies, consumers likely paid unlawful subsidies. In addition to requesting that the Commission reverse the attorney examiner's rulings, OCC further suggests that "any allegations of a concern held by an attorney with the U.S. Attorney's Office should be filed in the public docket and accompanied by a motion for protective order and an affidavit to substantiate any such concern," with parties being afforded a chance to respond. OCC, OMAEG, IGS, and NOPEC filed a motion to amend their interlocutory appeal on August 19, 2022, requesting to add the deposition transcripts of Tracy Ashton, FirstEnergy Corp.'s Assistant Controller, taken in *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio).

{¶ 21} On August 1, 2022, memoranda contra the joint interlocutory appeal were filed by the Companies, FirstEnergy Corp., and counsel for Ms. Yeboah-Amankwah, in which they first allege the appeal is procedurally improper because, contrary to Ohio Adm.Code 4901-1-15(B)'s plain language, it was not taken from (i) a written procedural ruling or (ii) an oral ruling during a public hearing or prehearing conference. Second, regardless of the procedural flaw, they argue the interlocutory appeal should also be rejected because the attorney examiners' July 21, 2022 rulings properly respect the bounds of discovery that the Commission has already crafted, allowing for ample discovery so intervenors can explore issues relevant to each investigation, while ensuring no interference with federal investigations. As noted by the Commission on previous occasions, and reaffirmed by the attorney examiner during the July 21, 2022 deposition, it is of the "utmost

importance” that the Commission’s work not interfere with other investigations being undertaken by state and federal law enforcement authorities. *Corporate Separation Audit*, Deposition Tr. (July 21, 2022) at 13-14.

{¶ 22} Thereafter, on August 4, 2022, OCC filed motions for subpoena duces tecum for the following current and former employees of FirstEnergy Corp.: Eileen Mikkelsen (Former Vice President of Rate and Regulatory Affairs and Acting Vice President of External Affairs); Charles Jones (Former CEO); Justin Biltz (Former Lobbyist and Director of State Regulatory Affairs); Robert Reffner (Former Chief Legal Officer and Senior Vice President); Ty Pine (Former Lobbyist and Director of State Affairs); Steven Strah (Current President and CEO); Michael Dowling (Former Senior Vice President of External Affairs); Joel Bailey (Former Vice President for State and Local Affairs and Economic Development); and Dennis Chack (Former Senior Vice President of Product Development, Marketing and Branding).

{¶ 23} An evidentiary hearing is currently scheduled to commence on January 9, 2023, at the Commission offices in Columbus.

{¶ 24} To date, five prehearing conferences have been held and 30 Commission and attorney examiner entries have been issued, as well as eight interlocutory appeals filed and one application for rehearing filed in the *Corporate Separation Audit* proceeding.

**B. Case No. 17-2474-EL-RDR (Rider DMR Audit)**

{¶ 25} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with 4928.143.

{¶ 26} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy’s application for an ESP. In re Ohio Edison Co., The Cleveland Elec. Illum. Co.,



and The Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) (ESP IV Case). Further, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the ESP IV Case. On rehearing, the Commission authorized FirstEnergy to implement a distribution modernization rider (Rider DMR). ESP IV Case, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶185. Additionally, the Commission ruled that Staff will review the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization. ESP IV Case, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282. Subsequently, the Commission determined that this review should be conducted with the assistance of a third-party monitor and that the monitor should prepare a mid-term report, to inform the Commission when evaluating any proposed extensions of Rider DMR, and a final report. On January 24, 2018, the Commission selected Oxford Advisors, LLC, (Oxford) as the third-party monitor. Entry (Jan. 24, 2018) at ¶7.

{¶ 27} On June 14, 2019, Oxford filed its mid-term report.<sup>5</sup>

{¶ 28} Numerous parties appealed the Commission's decision in the *ESP IV Case*, challenging Rider DMR and other aspects of the Commission's orders. On June 19, 2019, the Supreme Court of Ohio issued its decision in those appeals, affirming the Commission's order in part, reversing it in part as it relates to Rider DMR, and remanding with instructions to remove Rider DMR from FirstEnergy's ESP. Specifically, the Court held that Rider DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of Rider DMR revenues were not sufficient to protect ratepayers. *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131

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<sup>5</sup> The mid-term report was prepared to inform the Commission on whether Rider DMR should be extended and was filed in the *ESP IV Case* docket inadvertently; rather, the mid-term report was meant to be filed in Case No. 19-361-EL-RDR. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 113.

N.E.3d 906 at ¶¶ 14-29 (*Ohio Edison*), reconsideration denied, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458.

{¶ 29} On August 22, 2019, pursuant to the *Ohio Edison* decision, the Commission directed the Companies to immediately file proposed revised tariffs setting Rider DMR to \$0.00. The Companies were further directed to issue a refund to customers for monies collected through Rider DMR for services rendered after July 2, 2019, subject to Commission review. Once the refund had been appropriately issued, the Companies were instructed to file proposed, revised tariffs removing Rider DMR from the Companies' ESP. *ESP IV Case*, Order on Remand (Aug. 22, 2019) at ¶¶ 14-16.

{¶ 30} The Companies complied with the Commission's directives as instructed in the Order on Remand and filed tariffs removing Rider DMR from their ESP on October 18, 2019.

{¶ 31} On February 26, 2020, the Commission issued an Entry in which the Commission stated that the provisions for a final review of Rider DMR were an essential part of the terms and conditions related to Rider DMR in the *ESP IV Case*. *ESP IV Case*, Fifth Entry on Rehearing at ¶282, Eighth Entry on Rehearing at ¶113, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 17-20. Additionally, the Commission cited the Court's objections in *Ohio Edison* to the usefulness of the proposed final review after the Court questioned the lack of an effective remedy resulting from such review. *Ohio Edison* at ¶26. As such, the Commission found that, when the provisions of Rider DMR were eliminated, so too were the provisions requiring a final review of the rider. The Commission then dismissed and closed the case of record. Entry (Feb. 26, 2020) at ¶9. No party filed an application for rehearing regarding the Commission's ruling.

{¶ 32} Thereafter, on September 8, 2020, OCC filed a motion requesting that the Commission reopen the *Rider DMR Audit* and initiate an audit of Rider DMR. On December 30, 2020, the Commission determined that, in the interests of both transparency and state policy, good cause existed to initiate an additional review of Rider DMR.

{¶ 33} Accordingly, by Entry issued December 30, 2020, the Commission directed Staff to prepare a RFP to solicit the services of a third-party monitor to assist Staff with the full review of Rider DMR, as contemplated in the *ESP IV Case*. Due to an insufficient number of submitted proposals, the Commission directed Staff to reissue the RFP for audit services, in accordance with a revised RFP. The Commission specified that the audit to be conducted should also include an examination of the time period leading up to the passage of Am. Sub. H.B. 6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in the *ESP IV Case*. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282.

{¶ 34} On June 2, 2021, the Commission selected Daymark to perform the audit services described in the RFP and its proposal. *Id.* at ¶14. In the Entry, the Commission ordered Daymark and the Companies to incorporate the terms and conditions of the RFP into the contract, which set the deadline for the draft audit report as October 15, 2021, and the deadline to file the final audit report as October 29, 2021. *Id.*; Entry (Apr. 7, 2021), Attachment at 3.

{¶ 35} On September 24, 2021, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp. The subpoena duces tecum was issued by the attorney examiner as requested by OCC.

{¶ 36} On October 14, 2021, Staff filed a motion for an extension of time to file the draft audit report and final audit report, which was granted by Entry on October 22, 2021. In that Entry, the deadlines for Daymark to provide its draft and final audit reports were set for December 2, 2021, and December 16, 2021, respectively.

{¶ 37} On October 20, 2021, OCC filed a motion for a subpoena for any drafts of the final report prepared by Oxford. Staff filed a memorandum contra the motion for subpoena on November 4, 2021. OCC filed its reply to the memorandum contra on November 12, 2021. Subsequently, on December 10, 2021, OCC filed a motion for a second subpoena, a subpoena duces tecum for Oxford to attend and provide testimony at a deposition and for

waiver of Ohio Adm.Code 4901-1-25(D). Staff filed a memorandum contra the motion on December 27, 2021. OCC filed a reply to the memorandum contra on January 3, 2022.

{¶ 38} On December 14, 2021, Staff filed a motion for extension of time to file the final audit report, which was granted by Entry on December 15, 2021. The deadline for Daymark to file its final report was set for January 14, 2022.

{¶ 39} On January 7, 2022, a prehearing conference was held in order to address pending motions and for parties to provide an update as to discovery matters. At the prehearing conference, the attorney examiner deferred ruling on the two motions for subpoenas requested to be issued to Oxford by OCC until after the final report was filed by Daymark.

{¶ 40} Nonetheless, on January 12, 2022, and only two days prior to the filing deadline for Daymark's final audit report, OCC filed an interlocutory appeal of the "ruling" of the attorney examiner to defer ruling on the two motions for subpoenas filed by OCC.

{¶ 41} Subsequently, Daymark filed the final report on January 14, 2022.

{¶ 42} By Entry issued February 18, 2022, the attorney examiner denied the motions for subpoenas duces tecum, directed Staff to produce a witness from Oxford Advisors, LLC, at the hearing to be held in this matter, and extended the comment period, while noting that further reasonable requests for extension of the comment period would be entertained if OCC, or any other party, provided meaningful, quantified assessments on the progress of reviewing discovery in the *Rider DMR Audit*.

{¶ 43} On February 23, 2022, OCC filed an interlocutory appeal and request for certification of the denial of the motions for subpoena in the February 18, 2022 Entry.

{¶ 44} On February 28, 2022, Staff filed a memorandum contra OCC's interlocutory appeal and request for certification of the denial of the motions for subpoena.

{¶ 45} By Entry issued March 8, 2022, the interlocutory appeal was certified to the Commission, pursuant to Ohio Adm.Code 4901-1-15(B). The Commission affirmed the February 18, 2022 Entry in its entirety by Entry issued March 9, 2022.

{¶ 46} Initial comments were filed by the Companies, OMAEG, and OCC on April 19, 2022, and reply comments were filed by The Ohio Hospital Association (OHA), the Companies, OCC, and OMAEG on May 4, 2022.

{¶ 47} To date, no hearing has been scheduled in the *Rider DMR Audit*; however, two prehearing conferences have been held and 20 Commission and attorney examiner entries have been issued, including two interlocutory appeals and an application for rehearing.

C. *Case No. 20-1502-EL-UNC-EL-UNC (Political and Charitable Spending Audit)*

{¶ 48} The Commission opened the *Political and Charitable Spending Audit* on September 15, 2020, to review the political and charitable spending by the Companies in support of Am. Sub. H.B.6 and the subsequent referendum effort. On that same date, the attorney examiner directed the Companies to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state. Further, the attorney examiner directed interested parties to file comments regarding the Companies' response.

{¶ 49} The Companies timely filed their response to the show cause order on September 30, 2020. As part of the response, the Companies included an affidavit of Santino L. Fanelli.

{¶ 50} In a memorandum filed on July 23, 2021, the Companies represented that the DPA entered into between the Companies' parent corporation, FirstEnergy Corp., and the U.S. Attorney may require that the Companies supplement their response to the September

15, 2020 show cause order. Further, the Companies represented that the DPA requires that the Companies supplement certain portions of their discovery responses.

{¶ 51} The Companies filed a supplemental response on August 6, 2021.

{¶ 52} By Entry issued July 29, 2021, the attorney examiner granted a joint motion by parties to indefinitely suspend a previously set comment period.

{¶ 53} By Entry issued October 28, 2021, the attorney examiner established a comment period regarding the Companies' response to the show cause order, as supplemented on August 6, 2021, with initial and reply comments to be filed by November 29, 2021, and December 14, 2021, respectively.

{¶ 54} Initial comments regarding the Companies' show cause order were timely filed by Citizens' Utility Board of Ohio, OCC, and OMAEG on November 29, 2021. Reply comments were timely filed by OCC, OHA, the Companies, and OMAEG. The comments generally supported an update from the Companies to ensure that political and charitable contributions are not recovered in rates.

{¶ 55} By Entry issued May 4, 2022, the Commission selected Marcum LLP to assist Staff in its review. In accordance with the RFP, an audit report is due to be filed on December 16, 2022.

{¶ 56} To date, no hearing has been scheduled in the *Political and Charitable Spending Audit*; however, nine prehearing conferences have been held and over 20 Commission and attorney examiner entries have been issued, including five interlocutory appeals and an application for rehearing.

**D. Case No. 20-1629-EL-UNC (2020 Rider DCR Audit)**

{¶ 57} By Opinion and Order issued on March 31, 2016, in the *ESP IV Case*, the Commission modified and approved stipulations which included an extension, with

modification, of FirstEnergy's delivery capital recovery rider (Rider DCR). *ESP IV Case*, Opinion and Order (Mar. 31, 2016).

{¶ 58} On November 4, 2020, the Commission issued an Entry directing Staff to issue a RFP for the audit services necessary to assist with the annual compliance audit of the Companies. Subsequently, on December 16, 2020, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) from the submitted proposals to complete the required audit services.

{¶ 59} On March 8, 2021, Staff filed a request in the *2020 Rider DCR Audit* to expand its scope. Staff noted that, upon review of FirstEnergy Corp.'s 10-K filed on February 18, 2021, Staff issued a data request to the Companies for additional records related to the disclosure of certain transactions that were either improperly classified, misallocated or lacked supporting documentation. The Company responded to this data request on February 25, 2021. By Entry issued March 10, 2021, the Commission granted the request from Staff and directed Blue Ridge to expand the scope of the audit to include payments made to a number of vendors disclosed by FirstEnergy Corp. in its annual 10-K filing with the Securities and Exchange Commission. Blue Ridge filed the final audit report, which included the expanded scope of investigation, with the Commission on August 3, 2021.

{¶ 60} On September 29, 2021, the Commission requested Staff to direct Blue Ridge to expand the scope of the audit in the *2020 Rider DCR Audit* to determine if the costs of the naming rights for FirstEnergy Stadium have been recovered from ratepayers by the Companies. Subsequently, Blue Ridge filed a supplemental audit report in this docket on November 19, 2021.

{¶ 61} Comments were timely filed by the Companies, the Ohio Cable Telecommunications Association, OHA, OMAEG, and OCC on October 4, 2021. Reply comments were timely filed by OHA, OCC, OMAEG, and the Companies on October 14, 2021.

{¶ 62} On December 15, 2021, the Commission noted that there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies' obligation under R.C. 4928.145 to disclose a "side agreement" during the *ESP IV Case*. This information included the Statement of Facts included in the DPA. Accordingly, the Commission further expanded the scope of *2020 Rider DCR Audit* to include an investigation into whether the Companies violated R.C. 4928.145 by failing to disclose the amended agreement during the proceedings in the *ESP IV Case*. However, having put the Companies and interested parties on notice that the potential violation of R.C. 4928.145 will be investigated by the Commission, we stayed further action, including discovery, until otherwise ordered by the Commission in order to avoid interference with the ongoing criminal investigation by the United States Attorney and the civil action by Ohio Attorney General Dave Yost pursuant to Ohio's civil RICO statute.

{¶ 63} On January 14, 2022, OCC filed an application for rehearing pursuant to R.C. 4903.10, claiming that the Commission erred by indefinitely delaying its and parties' investigations involving a revelation of FirstEnergy's unreasonable and unlawful failure to disclose apparent secret side deals in the *ESP IV Case*.

{¶ 64} The Commission issued an Entry on Rehearing on February 9, 2022, denying OCC's application for rehearing.

{¶ 65} To date, the *2020 Rider DCR Audit* has not been scheduled for hearing; however, two prehearing conferences have been conducted and 12 Commission and attorney examiner entries have been issued, including two interlocutory appeals and an application for rehearing.

***E. Common Filing in the Above-Captioned Proceedings***

{¶ 66} On August 16, 2022, the U.S. Attorney requested that the Commission stay these matters for a period of six months, citing its concern that continued discovery in the



Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into corruption relating to Am. Sub. H.B. 6.

{¶ 67} While the Commission, in an act of administrative efficiency, chooses to address the DOJ's letter for these cases collectively, we remind the parties that these cases have not been consolidated. The Supreme Court of Ohio has recognized the Commission's broad discretion to regulate its proceedings and manage its docket. *See, e.g., Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 19, 734 N.E.2d 775 (2000). To date, no party has presented a formal request to consolidate these proceedings to the Commission, nor do we believe the existing circumstances warrant consolidation.

### III. DISCUSSION

{¶ 68} Concurrent with the Commission's four investigations, the DOJ has been conducting an ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6 and action through the Commission, resulting in the DPA and an indictment of several individuals. Throughout our four investigations, the Commission has sought to balance two principles: one, the Commission will follow the facts wherever they lead; and two, it is of the utmost importance that the Commission's investigations do not interfere with the DOJ's ongoing criminal investigation, or the parallel civil action instituted by Ohio Attorney General Dave Yost.

{¶ 69} As noted above, on August 16, 2022, the DOJ filed a letter in the above-captioned proceedings, pursuant to 28 U.S.C. § 517, to request that the Commission stay these cases and requested prompt attention to its request. In its letter, the DOJ notes that trial for two individuals charged in the indictment is scheduled to begin in January 2023. According to the DOJ: "The United States understands that substantial discovery is underway in the PUCO Proceedings, including written discovery and potential for depositions of numerous individuals and entities. The PUCO's investigations involve issues related to the United States' investigation, and the United States believes that continued discovery in the PUCO Proceedings may directly interfere with or impede the United States'

ongoing investigation.” For this reason, the DOJ respectfully requests that the Commission stay these four proceedings for a period of six months, while also reserving the right to request that the stay be extended beyond that time.

{¶ 70} While no Commission precedent has previously addressed the issue of a stay when parallel civil and criminal proceedings are pending, there exists a considerable body of jurisprudence developed by federal courts for the balancing of the divergent interests involved, and this case law provides us ample guidance when considering the DOJ’s request for a stay. Our review of this case law persuades us that the factors considered by the federal courts supply an appropriate framework for our analysis. While a proper understanding of each case requires close attention to the underlying circumstances, the factors are sensible and provide for a reasonable approach to this issue. The Commission also remains mindful of the broad discretion with which we are vested to manage our dockets to avoid duplication of effort, 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 and eliminate unnecessary duplication of effort. *In re Application of Columbus S. Power Co. and Ohio Power Co.*, Case Nos. 11-346-EL-SSO et al., Opinion and Order (Aug. 8, 2012) at 24 (citing *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).

{¶ 71} Turning our focus to pertinent federal case precedent, “[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants, and the entry of such an order ordinarily rests with the sound discretion of the District Court.” *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 626–27 (6th Cir.2014), quoting *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir.1977); *Landis v. North American Co.*, 299 U.S. 248, 255, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936); *Dietz v. Bouldin*, 579 U.S. 40, 47, 136 S.Ct. 1885, 195 L.Ed.2d 161 (2016). Incident to that inherent authority is the “broad discretion in determining whether to stay a civil action

while a criminal action is pending.” *E.M.A. Nationwide* at 627, quoting *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D.Mich.2007). The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.1995), quoting *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir.1989); *Securities & Exchange Comm. v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C.Cir.1980); *Chao* at 1037. “In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence.” *Dresser* at 1374. “Nevertheless, a court may decide in its discretion to stay civil proceedings \* \* \* ‘when the interests of justice seem [ ] to require such action.’” *Id.* at 1375, quoting *United States v. Kordel*, 397 U.S. 1, 12, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970), fn. 27. A decision about whether to stay a case, however, requires an examination of the specific circumstances of the case. *Id.*; *Molinaro* at 902. While there is no precise test utilized for determining when a stay would be appropriate, courts in the Sixth Circuit consider and balance six factors when determining whether a stay of civil proceedings is appropriate: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *E.M.A. Nationwide* at 627, quoting *Chao* at 1037. In addition to those six factors, the court should consider the extent to which a defendant's Fifth Amendment rights are implicated. *Id.*, citing *Keating* at 324. The Commission will address each of these factors in turn.

## 1. OVERLAP OF THE ISSUES

{¶ 72} First, we address the overlap of issues in the four above-captioned proceedings with that of the investigation currently being conducted by the DOJ. This factor weighs heavily in favor of granting the stay. In weighing this element, the Commission considers the similarities between the legal issues and subject matter such as the charges,

fact issues, witnesses, and evidence. Notably, the DOJ itself has recognized the obvious overlap between the facts and documents sought in discovery in our proceedings and the ongoing criminal investigation, as noted in its request to stay discovery. “[T]he extent to which the issues in the criminal case overlap with those in the civil case, is regarded as ‘the most important factor’ because ‘[i]f there is no overlap, then there would be no danger of self-incrimination and no need for a stay.’” *Chao* at 1039 (internal quotations omitted); *Trustees of Plumbers & Pipefitters Nat. Pension Fund v. Transworld Mechanical*, 886 F. Supp. 1134, 1139 (S.D.N.Y.1995); *In re Adelphia Communications Securities Litigation*, E.D.Pa. No. 02-1781, 2003 WL 22358819, at \* 3 (May 13, 2003) (“The similarity of the issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay.”). Additionally, “[a] stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter and is even more appropriate when both actions are brought by the government.” *Brock v. Tolkow*, 109 F.R.D. 116, 119 (E.D.N.Y.1985).

{¶ 73} We have held that the purpose of our four investigations is to supplement, not replicate, the ongoing criminal investigation by the DOJ. However, despite the fact that these proceedings deal with a litany of separate matters that fall within the regulatory oversight of this Commission, as related to the events surrounding Am. Sub. H.B. 6, it has become abundantly clear that the target of intervening parties’ discovery efforts in the Commission’s four investigations have been the underlying events and evidence at issue in the DOJ investigation. As OCC, OMAEG, IGS, and NOPEC commented in their recent interlocutory appeal filed in the *Corporate Separation Audit* on July 26, 2022, these “areas of inquiry [referring to the consulting arrangement with SFA] are crucial to determining whether the FirstEnergy entities violated Ohio’s corporate separation law and rules.” Moreover, a major contributing factor to this overlap is OCC’s recent filing of nine motions for subpoena requested in the *Corporate Separation Audit*. See *In re David Geisen*, Nuclear Regulatory Comm., CLI-07-06, Doc. No. IA-05-052 (Feb. 1, 2007). The motions cover a number of individuals previously employed by FirstEnergy Corp. who were terminated

from employment following its internal investigation. To the extent these individuals named in the motions for subpoena are, or may be, involved in the ongoing DOJ investigation in any capacity, whether as witnesses, subjects, or targets, permitting the depositions to proceed may interfere in the DOJ's ongoing investigation or place the witnesses in the difficult position of defending themselves in the *Corporate Separation Audit* and thereby potentially exposing themselves to making incriminating statements or invoking their Fifth Amendment rights. Further, any additional indictment "handed down as a result of the investigation may be based on the same factual circumstances" at issue in these four proceedings. *McGee v. Madison County, Tenn.*, W.D.Tenn. No. 1:15-cv-01069, 2015 WL 3648986, at \*3 (June 10, 2015). Because of the substantial overlap between discovery in these proceedings and the pending criminal investigation, there is danger of potential self-incrimination issues. Thus, this factor weighs heavily in favor of granting a stay. We have already noted the factual overlap between the criminal investigation and discovery in our investigations and identified the risk that such overlap could affect witness testimony in the proceedings. *2020 Rider DCR Audit*, Entry on Rehearing (Feb. 9, 2022) at ¶ 20 (where the Commission noted that "key witnesses to the alleged 'side agreement' may be unwilling to testify or may rely upon their Constitutional rights to decline to testify regarding the circumstances surrounding the alleged 'side agreement.' Moreover, there may be additional facts regarding the alleged 'side agreement' which are not presently publicly known; premature disclosure of such facts may inadvertently interfere with the investigation. Nonetheless, even if there is a low risk of interfering in the criminal investigation, the Commission is unwilling to accept that risk. We will err on the side of caution before we run the risk of interference in the ongoing federal criminal investigation.").

{¶ 74} Although there is an obvious commonality of issues between the different proceedings, the Commission has attempted to strike a necessary balance to avoid interference with the federal investigations, yet allow components of our four investigations to proceed expeditiously, as evidenced, for example, by the attorney examiner's attempt to postpone questions pertaining to non-public information related to the DPA, as well as the

decision to bifurcate the potential violation of R.C. 4928.145 from the findings of the audit report filed in the 2020 *Rider DCR Audit*, which the Commission raised for the first time in December of 2021. *Corporate Separation Audit*, Deposition Tr. (July 21, 2022) at 188; 2020 *Rider DCR Audit*, Entry (Dec. 15, 2021) at ¶14-15, Entry on Rehearing (Feb. 9, 2022) at ¶19. However, as noted above, it has become clear from the recent activities and filings of intervening parties that our efforts to move forward with our investigations while avoiding interference with the DOJ's investigation have met an impasse, and the pre-existing case-by-case approach to avoid interference with the DOJ investigation is no longer a feasible alternative to a stay.

{¶ 75} Finally, we also acknowledge that OCC has characterized the document production in these four proceedings as providing a “mountain of evidence” necessitating that other investigations into the Companies’ conduct be held in abeyance, indefinitely, while OCC and others “wade” through the documents. *Corporate Separation Audit*, Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. A stay in these proceedings would provide OCC with ample opportunity to finish its review of the documents already produced by FirstEnergy Corp.

## 2. STATUS OF THE FEDERAL CRIMINAL PROCEEDING

{¶ 76} We also find that the second factor favors a stay. Here, the U.S. Attorney, who is not a party to these proceedings, is conducting an ongoing parallel investigation into corruption relating to Am. Sub. H.B. 6, which has already resulted in the indictment of several individuals. As noted in the August 16, 2022 letter, a trial for two individuals charged in the indictment is scheduled to begin in January 2023, which is the same time the *Corporate Separation Audit* is currently set for hearing. *See Chao*, 498 F. Supp. 2d at 1037 (where the Court held “the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.” (internal quotation omitted)). As we have already discussed, the criminal federal investigation and intervenor’s discovery in these four Commission proceedings are focused on the same

allegations of misconduct and, thus, are inextricably intertwined. “[C]ourts generally do not stay proceedings in the absence of an indictment,” *E.M.A. Nationwide*, 767 F.3d at 628. Instead, a stay is considered most appropriate where a party to the civil case has been indicted for the same conduct because (1) “the likelihood that a defendant may make incriminating statements is greatest after an indictment has [sic] issued; and (2) the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act consideration.” *Id.*, quoting *Plumbers & Pipefitters*, 886 F. Supp. at 1139; see also *Securities and Exchange Comm. v. Bongiorno*, N.D. Ohio No. 1:20-cv-00469, 2022 WL 891811 (Mar. 28, 2022). Furthermore, “ \* \* \* courts may consider the status of criminal proceedings generally and some have granted a stay pre-indictment.” *In re Flint Water Cases*, E.D. Mich. No. 5:16-cv-10444, 2019 WL 5802706, at \*2 (Nov. 7, 2019), citing *Chao* at 1039. Federal courts in Ohio have even recognized that circumstances may warrant a stay when the criminal investigation has “proceeded beyond a generalized investigation.” *National Credit Union Administration v. Satka*, N.D. Ohio No. 12-cv-691, 2013 WL 12284601 (Nov. 12, 2013). The federal criminal case has obviously surpassed the “generalized investigation” phase, evidenced by the DPA entered into between the U.S. Attorney and FirstEnergy Corp. Even if no indictments had yet come to fruition and a criminal trial was not looming in the near future, the existence of the DPA would push the second factor in favor of a stay.

### 3. THE INTERESTS OF THIS COMMISSION

{¶ 77} While the balance of the parties’ hardships is the most important factor in determining whether a stay is appropriate, courts “must also consider whether granting [a] stay will further the interest in economical use of judicial time and resources.” *Internatl. Brotherhood of Elec. Workers v. AT&T Network Sys.*, 879 F.2d 864 (6th Cir.1989) (internal citations omitted). For the sake of judicial economy and efficiency, it is in the Commission’s interest to grant the requested temporary stay at this time. The Commission has the inherent power to control the disposition of the cases before it with economy of time and effort for itself, for counsel, and for litigants. Progress in these four proceedings has been painfully

drawn out due to the conduct of all parties involved. The parties have demonstrated their inability or unwillingness to cooperate on even the most insignificant issues. *See, e.g., Political and Charitable Spending Audit*, Entry (Apr. 13, 2022), Prehearing Conf. Tr. (Apr. 11, 2022) at 8-12. Moreover, OCC and other intervenors profess to be unable to proceed to hearing because they have been unable to review the “mountain” of documents provided by FirstEnergy Corp. Given our experience in these four investigations thus far, the Commission is not optimistic that allowing the cases to proceed while the DOJ continues with its investigation would result in less numerous or contentious filings. Instead, conducting discovery while the criminal investigation is pending will lead to additional motion practice, arguments, and discovery disputes related to invocation of Fifth Amendment rights and disclosure of documents related to the federal criminal and related civil investigations. “It would not be an efficient use of Court resources to deny a stay and then to have to handle disputes regarding [the Defendant’s] assertion of his Fifth Amendment privilege against self-incrimination.” *Boerste v. Ellis, LLC*, W.D.Ky. No. 3:17-CV-298-GNS, 2017 WL 6377976, at \*4 (Dec. 13, 2017); *see also Coley v. Lucas Cnty, Ohio*, N.D.Ohio No 3:09 CV 0008, 2011 WL 5838190, at \*4 (Nov. 18, 2011) (where the court noted a stay also promoted judicial economy, as “the parties and the Court would have to consume time and resources to determine the precise contours of Defendant[s] Fifth Amendment Rights.”). We have already cited to the extensive motion practice in each of the four proceedings before us, and we are loathe to encourage an even greater drain on the Commission’s resources while running the risk of interfering with the federal investigations. Further, staying these proceedings in favor of the criminal case may ultimately reduce or eliminate the need for discovery. Any negative impacts as to the interests of the Commission are further alleviated given the temporary nature of the stay sought by the DOJ. *See Feld Entertainment v. A.S.P.C.A.*, 523 F.Supp.2d 1 (D.D.C.2007).

#### 4. PUBLIC INTEREST

{¶ 78} There is no question that there is a strong public interest in holding responsible individuals involved in criminal misconduct, especially when it involves the



public trust, when the facts and law warrant it. The public interest also requires compliance with the laws and regulations under the jurisdiction of the Commission, including ensuring that funds improperly collected from ratepayers are returned to them, if appropriate under the law.

{¶ 79} The public, of course, also has an interest in the efficient use of Commission resources and the expeditious disposition of actions before the Commission, including these four proceedings. A temporary stay, regardless of its length, will obviously delay that objective. However, due to the unique circumstances of these proceedings, we have discovered that delays are virtually inevitable. For example, OCC and OMAEG filed a motion to stay the comment schedule in the *Political and Charitable Spending Audit*, which was granted on July 29, 2021; OCC, OMAEG, and NOPEC filed motions to continue the hearing and procedural schedule in the *Corporate Separation Audit*, which were granted on April 7, 2022, and August 11, 2022; document production has been completed on a rolling basis, as noted in the *Corporate Separation Audit* January 4, 2022 Transcript; and there have been delays in reviewing produced documents, as noted in the Joint Discovery Status Report filed in *Corporate Separation Audit* on July 11, 2022. Therefore, the temporary nature of the stay will not unduly impact the public's interest in prompt resolution of these matters. To put it simply, it is not a question of if, but when, these interests in the Commission proceedings moving forward will be realized.

{¶ 80} It is also important to examine the “public interest” broadly rather than confining our focus to the narrow lens of the Commission’s authority. The “public interest in effective criminal prosecution generally outweighs any existing civil interests.” *United States Sec. & Exch. Comm. v. Abdallah*, 313 F.R.D. 59, 61 (N.D. Ohio 2016). A temporary stay will allow time for the DOJ investigation and review to be completed, and to the extent the investigation is completed before the stay is lifted, the parties will be able to proceed with more facts and additional clarity. Such a resolution is certainly in the public interest. In fact, in their joint interlocutory appeal filed in the *Corporate Separation Audit*, dated July 26, 2022, OCC, NOPEC, IGS, and OMAEG caution that the attorney examiner’s rulings from

the recent deposition “may block the public’s right to know how the former [Commission] chair may have disadvantaged Ohio consumers in favor of [the Companies] and their affiliates.” But again, allowing the criminal investigation to proceed unimpeded may shed light on that very issue, especially given the DOJ’s broader and more extensive legal authority beyond the regulatory jurisdiction of this Commission. Importantly, the DOJ has explicitly represented that it has identified risks to the ongoing prosecution of the criminal case in the event discovery in these four investigations proceeds, ultimately necessitating a stay. Furthermore, as the DOJ is actively investigating individuals on corruption relating to Am. Sub. H.B. 6 on behalf of the public, its interests and those of the public are intertwined. To a large extent, the criminal proceeding will serve to protect and advance the interests of transparency through the public dissemination of information in due course, thus potentially eliminating the need for some discovery to be conducted in the first place. We also note that, while the auditor in the *2020 Rider DCR Audit* did recommend that refunds be made to customers as a result of the expanded scope of the audit, and we have indicated our desire to return to customers any dollars due to be refunded as soon as possible, a temporary stay of the four Commission proceedings would not be unjustly detrimental to these interests, especially when considered in conjunction with the interests of the DOJ. *2020 Rider DCR Audit*, Entry (Dec. 15, 2021) at ¶ 15. On the contrary, the public interest would certainly be harmed in the event any of the of four Commission proceedings interfered with or impeded the federal investigations into this alleged corruption relating to Am. Sub. H.B. 6. As such, the sixth factor weighs in favor of a temporary stay.

##### **5. BALANCING THE PRIVATE INTERESTS OF THOSE IMPACTED BY A STAY**

{¶ 81} The third and fourth factors instruct courts to balance the private interests of the parties against the potential prejudice faced by each. *E.M.A. Nationwide*, 767 F.3d at 627. In reviewing these factors, we first note the difficulty in considering the “private interests” of parties and non-parties associated with these four proceedings and question whether these factors, which typically hold considerable weight for civil action plaintiffs, should apply with equal weight in our analysis for the balancing test on whether to impose a stay

in these administrative proceedings. *See, e.g., King v. Olympic Pipeline Co.*, 104 Wash.App. 338, 16 P.3d 45 (2000).

{¶ 82} As we have already discussed, the interests of the DOJ and those of the public are intertwined. As such, we will not reiterate the discussion regarding the public's interest here. However, we add that, based upon the subpoenas sought by OCC, we would expect a number of the same witnesses to be called to testify in both the criminal proceeding as well as the four Commission proceedings. As noted by the DOJ, a criminal trial is currently scheduled to begin in January 2023, approximately the same time the evidentiary hearing in the *Corporate Separation Audit* is scheduled to commence. At this juncture, we are not willing to allow our evidentiary hearing to interfere with the criminal trial.

{¶ 83} To the extent the "private interests" at issue should be evaluated separately, the Commission finds that these factors are largely neutral, as both the DOJ and impacted parties to our proceedings have legitimate and important interests in their respective positions, and either side could be prejudiced, to some degree, if the Commission adopted the opposing position. Federal courts, after determining both plaintiffs and defendants hold legitimate interests, have found that "stays of limited duration" are appropriate. *McGee*, W.D.Tenn. No. 1:15-cv-01069, 2015 WL 3648986, at \*4. Despite our finding that these factors remain somewhat neutral in the overall balancing, we do not lose sight of our continued commitment to avoid interference with the federal investigations and recognize the strong likelihood that, at this point, continued discovery efforts in our proceedings would do just that.

{¶ 84} We recognize that our four proceedings have been ongoing for some time; however, it appears the DOJ is prepared to proceed with the criminal trial and a temporary six-month stay may alleviate many of the already numerous discovery issues in these proceedings. Furthermore, a temporary stay may, in fact, aid parties in their goal of unencumbered discovery opportunities, if the DOJ investigation is completed before the stay is lifted. In response to the interlocutory appeal filed on July 26, 2022 and the suggestion

that we require the DOJ to file an affidavit in support of any concerns regarding interference with its ongoing investigation and subject the federal government to further delay, we find that the DOJ has access to the deposition transcript of Ms. Ebony Yeboah-Amankwah and the subsequent motions for subpoena and attachments thereto filed in the *Corporate Separation Audit*, as these documents have been filed publicly. To the extent the DOJ identified concerns that our discovery process may interfere with their investigation based on a review of those filings, in addition to the plethora of other discovery-related filings available on the dockets of these proceedings, it ultimately remains the DOJ's view to assert. *Geisen*, Nuclear Regulatory Comm., CLI-07-06, Doc. No. IA-05-052, at 4-5 (where the Nuclear Regulatory Commission noted that it was "generally inclined to accommodate an abeyance request from DOJ as long as it provides 'at least some showing of potential detrimental effect on [its parallel] criminal case' \* \* \* and '[w]e do not lightly second-guess DOJ's views on whether, and how, premature disclosure might affect its criminal prosecutions.' " (internal citations omitted)). Like the Nuclear Regulatory Commission, we are similarly hesitant to question the DOJ's views on whether premature disclosure of information in our proceedings may impact its ongoing criminal investigations. Regardless, the substantial and clear overlap of issues and potential evidence as discussed above, renders such detailed, and potentially damaging questioning unnecessary.

#### IV. CONCLUSION

{¶ 85} Balancing the foregoing considerations and cited federal case precedent, the Commission concludes that a stay should be issued. The considerations weighing most heavily in the Commission's analysis are the considerable overlap of the parties' discovery and issues between the Commission's four proceedings and the DOJ's investigation. Moreover, while important interests would be served through the expeditious resolution of these four proceedings, those interests, including transparency for the general public, will be represented in the criminal case. *Abdallah*, 313 F.R.D. at 61 (where the Court noted that the "public interest in effective criminal prosecution generally outweighs any existing civil interests."). Further, while we are determined to follow the facts wherever they may lead

in these four targeted investigations, we will not do so heedless of potential risks. Restraining parties from intruding on the DOJ's investigation, instead of staying within the parameters that the Commission has established for the four investigations, has been a long and arduous battle in these proceedings. *See, e.g., Rider DMR Audit*, Entry (Feb. 18, 2022), Entry on Rehearing (Mar. 9, 2022); *2020 Rider DCR Audit*, Entry on Rehearing (Feb. 9, 2022) at ¶ 20. We have made it clear that avoiding interference with the ongoing federal criminal investigation by the U.S. Attorney or the civil action brought by the Ohio Attorney General Dave Yost is of the utmost importance. *See, e.g., 2020 Rider DCR Audit*, Entry (Dec. 15, 2021) at ¶ 14; *In re the 2021 Review of the Delivery Capital Recovery Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 21-1038-EL-RDR, Entry on Rehearing (Dec. 15, 2021) at ¶ 14; *Corporate Separation Audit*, Prehearing Tr. (June 30, 2021) at 13-14.

{¶ 86} With that effort in mind, we have attempted to move forward without jeopardizing the DOJ's investigations. *See, e.g., 2020 Rider DCR Audit*, Entry (Dec. 15, 2021) at ¶ 15. In their joint interlocutory appeal filed on July 26, 2022, OCC, OMAEG, IGS, and NOPEC have indicated that they are unable, or unwilling, to move forward without the opportunity to inquire about non-public information related to the DPA that may interfere with the DOJ's federal investigation. We do not have to speculate on the commonality of issues between the discovery in our proceedings and the federal investigations; instead, we need only refer to the DOJ letter, highly publicized DPA, and the recent actions undertaken by intervening parties in these cases to assure us that no separation or compartmentalizing of issues remain a viable solution. At this point, this Commission has no other remedy available to us other than staying these proceedings as a last resort to allow the federal investigations to continue unimpeded for the requested six-month period. It is of the greatest importance for this Commission to avoid inadvertently thwarting or obstructing the efforts of the DOJ to investigate and, if appropriate, remedy any underlying alleged criminal behavior. The interest of justice requires continued application of the "practice to 'freeze' civil proceedings when criminal prosecution involving the same facts is warming

up or under way” so as to avoid improper interference with ongoing criminal proceedings. *Peden v. United States*, 512 F.2d 1099, 1103 (Ct.Cl.1975). Furtherance of the public interest on this showing requires nothing less. For the foregoing reasons, the Commission chooses to exercise its discretion to stay these proceedings. Accordingly, the Commission will stay these cases for six months from the date of this Entry, as requested by the DOJ, unless otherwise ordered; however, we will allow for requests of reconsideration and/or extension of the stay, as may be appropriate. Unless other compelling circumstances arise, such as might be identified in a request to extend the stay from the DOJ, the stay will be lifted after the six-month period. No one should misread the intentions of this Commission. Our ongoing review of the Companies and their actions will continue to effectuate our goal, which is to protect the interests of all of the customers of all of the public utilities we regulate, and especially FirstEnergy’s ratepayers. It is important that these proceedings move forward and provide answers, but not at the expense of ensuring effective criminal prosecution and justice. The Commission has not hesitated to follow the facts of these cases where they lead and has made rulings supporting, when legally appropriate, these facts to become public, as demonstrated by our initial expansion of the *2020 Rider DCR Audit* to review vendor transactions involving our former Chairman and the expansion of the audit to include an apparent nondisclosure of a "side agreement" by the utilities that involved the Commission's former Chairman’s contracts.

{¶ 87} Additionally, consistent with our prior instruction regarding the preservation of records relating to the potential violation of R.C. 4928.145 in the *2020 Rider DCR Audit*, in order to ensure that neither OCC nor any other intervenor is prejudiced by the stay on discovery, the Commission directs the Companies to preserve all documents and other records related to these proceedings until the stay has been lifted and these four investigations have been completed, including any evidentiary hearings. Further, the Commission notes that, once the stay is lifted and discovery may proceed, all parties will have reasonable time for discovery and to prepare their cases before any hearing is held; in the four investigations into the Companies’ conduct surrounding the passage of Am. Sub.

H.B. 6, the Commission's attorney examiners have liberally granted extensions in order to resolve discovery disputes, file comments, and allow other parties sufficient time to prepare their cases for hearing. To be abundantly clear, our decision today includes a stay of these cases in their entirety, including, but not limited to, all discovery and motion practice during a six-month period, except for rehearing applications and responsive memoranda related to any entries the Commission issues today, pursuant to R.C. 4903.10.

{¶ 88} Finally, given the stay granted in this Entry, we find any and all procedural schedules, including that issued on August 11, 2022 in the *Corporate Separation Audit*, to be vacated. However, parties should continue to file the status updates pertaining to the review of discovery already produced in these proceedings. *Corporate Separation Audit*, Entry (Aug. 11, 2022) at ¶ 20.

## V. ORDER

{¶ 89} It is, therefore,

{¶ 90} ORDERED, That these four proceedings be stayed for a period of six months, unless otherwise ordered by the Commission, consistent with this Entry. It is, further,

{¶ 91} ORDERED, That a copy of this Entry be served upon each party of record.

### COMMISSIONERS:

#### *Approving:*

Jenifer French, Chair  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

MJA/JWS/mef

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RDR**

Summary: Entry staying the above-captioned proceedings at the request of the United States Department of Justice for a period of six months, unless otherwise ordered by the Commission electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio