

## 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 ON REHEARING

Entered in the Journal on October 18, 2023

#### I. SUMMARY

{¶ 1} The Commission denies the applications for rehearing filed in the above-captioned proceedings by the Office of the Ohio Consumers' Counsel on September 22, 2023.

## II. DISCUSSION

### A. Procedural History

{¶ 2} Concurrent with the Commission's four above-captioned investigations, the United States Department of Justice's District Attorney for the Southern District of Ohio (DOJ or U.S. Attorney) has been conducting an ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6 and action through the Commission, resulting in a Deferred Prosecution Agreement<sup>1</sup> and several convictions. 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.

{¶ 3} On August 16, 2022, the U.S. Attorney filed a letter in the above-captioned proceedings, pursuant to 28 U.S.C. § 517, requesting 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.<sup>2</sup> Specifically, the DOJ referenced the trial for two individuals charged in the indictment was scheduled to begin in January 2023.

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

<sup>2</sup> According to the DOJ: "The United States understands that substantial discovery is underway in the PUCO Proceedings, including written discovery and the potential for depositions of numerous individuals and entities. The PUCO Proceedings 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."

{¶ 4} On August 24, 2022, the Commission issued an Entry staying the above-captioned proceedings at the request of the U.S. Attorney for a period of six months, unless otherwise ordered by the Commission. In the Entry, the Commission made it clear that avoiding interference with the ongoing federal criminal investigation by the U.S. Attorney is of the utmost importance, specifically citing our concerns with discovery in these proceedings interfering with the criminal trial. Moreover, the Commission's Entry made clear that we would allow for requests of reconsideration and/or extension of the stay, as may be appropriate. Entry (Aug. 24, 2022) at ¶¶ 76, 82, 84, 86.

{¶ 5} By letter filed on February 23, 2023, the U.S. Attorney requested that the Commission extend the stay for an additional six months, citing the criminal trial for two individuals charged in the indictment that commenced in January 2023 and was then underway.

{¶ 6} The Commission issued an Entry on March 8, 2023, granting the request of the U.S. Attorney to extend the stay for a period of six months.

{¶ 7} The criminal trial resulted in convictions for the two individuals charged in the indictment, who were later sentenced by federal Judge Timothy Black. *United States v. Larry Householder*, S.D. Ohio No. 1:20-cr-77.

{¶ 8} By letter filed on August 10, 2023, the U.S. Attorney requested a second extension of the existing stay. Similar to its August 16, 2022 request, the U.S. Attorney noted its concern that continued discovery in the Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into alleged corruption relating to Am. Sub. H.B. 6.

{¶ 9} By Entry issued August 23, 2023, the Commission granted the request of the U.S. Attorney to extend the stay for a period of six months. In the Entry, the Commission recognized that the U.S. Attorney's most recent correspondence makes it clear that its investigation is still ongoing and, thus, the interference concerns cited in the August 24, 2022

Entry remain largely at issue. Moreover, the Commission noted that, while the federal criminal trial resulted in two convictions, those convictions are currently being appealed. *United States v. Larry Householder*, Case No. 23-3565 (6th Cir. Ct. App.).

{¶ 10} R.C. 4903.10 provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 11} On September 22, 2023, the Office of the Ohio Consumers' Counsel (OCC), filed an application for rehearing in each proceeding, asserting five separate assignments of error.

{¶ 12} On October 2, 2023, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the Companies or FirstEnergy) filed a memoranda contra the applications for rehearing.

#### ***B. Summary of Application for Rehearing and Memorandum Contra***

{¶ 13} As noted above, OCC raises five separate assignments of error in the applications for rehearing. First, OCC alleges that the Commission erred when, for the third time, it approved the U.S. Attorney's request for a six-month stay of the FirstEnergy investigations without applying the six-factor test to determine whether a stay should be issued. According to OCC, the Commission should move forward with its four investigations to determine the extent of harm experienced by Ohio utility consumers. Moreover, OCC adds that the Commission's stay of its investigations is inconsistent with other civil cases against FirstEnergy that are continuing. Next, OCC similarly claims that the Commission erred in extending the stay of the proceedings which precludes parties from exercising their right to discovery under Ohio law, specifically R.C. 4903.082 and Ohio Adm.Code 4901-1-16. As noted above, OCC contends that discovery is ongoing in the civil H.B. 6-related litigation against FirstEnergy. OCC also alleges that allowing another six-

month stay is unjust and unreasonable because it denies consumers the prompt resolution that consumers should be given. OCC also takes issue with the fact that the Commission failed to require FirstEnergy Corp. to preserve documents and records, claiming that this oversight is unjust and unreasonable and ultimately prejudicial to consumers. Finally, OCC claims that granting the stay without the Commission also staying the proceedings regarding FirstEnergy's applications in Case Nos. 16-481-EL-UNC, et al., 22-704-EL-UNC, and 23-301-EL-SSO was unjust and unreasonable and harmed consumers.

{¶ 14} In response, the Companies raise multiple procedural deficiencies related to OCC's applications for rehearing. First, the Companies argue that OCC has not demonstrated how the Commission's Entry is unlawful or unreasonable and has failed to cite to any intervening events that would alter the Commission's continued rationale for an extended stay of these proceedings in light of the ongoing investigation by the U.S. Attorney's office. Specifically, FirstEnergy claims OCC has not demonstrated the Commission's finding as to the potential interference was unreasonable and unlawful, recognizing it was the U.S. Attorney himself to initially cite the concern. Moreover, the Companies argue that the majority of OCC's arguments were already raised or available to it in its prior two applications for rehearing, which were denied by operation of law, and, thus, are improper. Finally, as OCC raised new issues beyond the scope of the Entry, similar to its prior application for rehearing, FirstEnergy claims these arguments should also be dismissed, noting that R.C. 4903.10 provides that a "party . . . may apply for a rehearing in respect to any matters determined in the proceeding." As such, FirstEnergy respectfully requests that the application for rehearing be denied.

### *C. Commission Conclusion*

{¶ 15} While we agree with most of the procedural elements raised by the Companies, we find it necessary to address the substance of OCC's arguments. The Commission will not disregard the request of the U.S. Attorney's Office to continue the stay of these four investigations. While OCC claims circumstances have changed since the initial

stay was implemented, as no additional indictments have been issued and no criminal trial is currently underway, it is clear from the DOJ's letter that the DOJ's work is not yet complete and additional action may be forthcoming. The interest of justice requires continued application of the "practice to 'freeze' civil proceedings when a 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). Moreover, we are in the unique position of having an express request for a stay from the DOJ filed in our proceedings, unlike the civil proceedings and shareholder class action lawsuits cited by OCC in support of its application for rehearing. *State of Ohio ex rel. Dave Yost, Ohio Attorney General v. FirstEnergy Corp. et al.*, Case No. 20-CV-628, Entry (Mar. 15, 2023); *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785, Opinion and Order (May 19, 2023); *Employees Retirement System of the City of St. Louis v. Jones*, Case No. 2:20-cv-4813, 2021 WL 2414763 (Oct. 20, 2021). As the Commission has previously noted, "we are \* \* \* hesitant to question the DOJ's views on whether premature disclosure of information in our proceedings may impact its ongoing criminal investigations," especially now that Ohio is seeing tangible results of the federal investigation and justice being served. Entry (Aug. 24, 2022) at ¶ 84. We agree that an indefinite stay would be inappropriate and have stated on numerous occasions that these investigations will continue as promptly as possible, but under no circumstances will we jeopardize the efforts of the DOJ to investigate and, if appropriate, address any underlying alleged criminal behavior, especially now that two convictions have been secured. We hope, moving forward, that any parties practicing before us would agree that this is the only acceptable course.

{¶ 16} This is not the first time we have addressed a request to continue our investigations concurrently with the DOJ's criminal investigation. The Commission, through these four investigations, has remained committed to following the facts wherever they may lead in these four targeted investigations, but has not done 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. Entry (Aug. 24, 2022) at ¶85, citing *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co., Case No. 17-2474-EL-RDR*, Entry (Feb. 18, 2022), Entry on Rehearing (Mar. 9, 2022); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co., Case No. 20-1629-EL-RDR (2020 Rider DCR Audit)*, Entry on Rehearing (Feb. 9, 2022) at ¶ 20. With that effort in mind, we initially attempted to move forward without jeopardizing the DOJ's investigations. See, e.g., *2020 Rider DCR Audit*, Entry (Dec. 15, 2021) at ¶ 15.

{¶ 17} As noted in the August 24, 2022 Entry, “[a]lthough 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 Deferred Prosecution Agreement, 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. Entry (Aug. 24, 2022) at ¶74, citing *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co., Case No. 17-974-EL-UNC (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.”

{¶ 18} However, it remains clear from the actions of intervening parties that our efforts to move forward with our investigations while avoiding interference with the DOJ's investigation will continue to be futile, and the prior case-by-case approach to avoid interference with the DOJ investigation is not a feasible alternative to a stay. 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 Ohio Attorney General Dave Yost is of the utmost importance. See, e.g., Entry (Aug. 24, 2022) at ¶¶ 21, 68, 85, citing *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. Despite its prior efforts to do so in these proceedings, OCC cannot supplant the role of the U.S. Attorney's Office. In fact, as noted in the August 24, 2022 Entry, if OCC and other parties had adhered to the Commission's efforts to stay within reasonable parameters so as not to thwart the efforts of the DOJ to continue its investigation, a stay of these proceedings may not have been necessary at all.

{¶ 19} Finally, while OCC essentially requests that the Commission delay any proceeding concerning FirstEnergy, we note that the applications filed in Case Nos. 23-301-EL-SSO, 22-704-EL-UNC, and 16-481-EL-UNC, et al., are completely unrelated to H.B. 6 and OCC presents no rational basis for a delay in any of the three noted proceedings. With respect to Case No. 23-301-EL-SSO in particular, the Companies are required by law to maintain a standard service offer (SSO), and the Companies' current SSO will expire on May 31, 2024. As such, delaying those proceedings would be highly improper and may ultimately harm the very customers of FirstEnergy represented by OCC.

{¶ 20} Ultimately, "a court may decide in its discretion to stay civil proceedings \* \* \* 'when the interests of justice seem [ ] to require such action.'" *Securities & Exchange Comm. v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C.Cir.1980), quoting *United States v. Kordel*, 397 U.S. 1, 12, 90 S.Ct. 763, 769, 25 L.Ed.2d 1 (1970), fn. 27. For the reasons noted above, including the DOJ's noted success in its ongoing criminal investigation, we reject OCC's arguments. As we have expressly stated, "[n]o 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 the 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.” Entry (Aug. 24, 2022) at ¶ 86.

{¶ 21} Accordingly, we deny the applications for rehearing filed by OCC and respectfully honor the request of the DOJ to stay the investigations.

### III. ORDER

{¶ 22} It is, therefore,

{¶ 23} ORDERED, That the applications for rehearing filed by OCC in the four above-captioned proceedings be denied. It is, further,

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

#### COMMISSIONERS:

##### *Approving:*

Jenifer French, Chair  
Daniel R. Conway  
Lawrence K. Friedeman  
Dennis P. Deters  
John D. Williams

MJA/mef

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RDR**

Summary: Entry on Rehearing denying the applications for rehearing filed in the above-captioned proceedings by the Office of the Ohio Consumers' Counsel on September 22, 2023. electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio.