

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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 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 March 15, 2024

#### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies certification of the interlocutory appeal, request for certification, and application for review filed on March 4, 2024, and vacates the hearing date, discovery deadline, and testimony filing deadlines established in the February 26, 2024 Entry. Further, parties are directed to provide discovery status updates consistent with this Entry.

#### II. DISCUSSION

##### A. *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.

{¶ 3} The Commission issued an Entry on February 21, 2024, lifting the then-existing stay and instructing the attorney examiners to issue procedural schedules in Case Nos. 17-

974-EL-UNC (*Corporate Separation Audit*), 17-2474-EL-RDR (*Rider DMR Audit*), 20-1502-EL-UNC (*Political and Charitable Spending Audit*), and 20-1629-EL-RDR (*2020 Rider DCR Audit*) (collectively, the *FirstEnergy Investigation Cases*).

{¶ 4} On February 26, 2024, the attorney examiner issued procedural schedules in the *FirstEnergy Investigation Cases*, pursuant to the Commission’s directives. In the above-captioned proceedings, the attorney examiner set a prehearing conference, testimony filing deadlines, and the evidentiary hearing was scheduled to commence on June 3, 2024.

{¶ 5} On February 29, 2024, in the *Political and Charitable Spending Audit*, the Ohio Consumers’ Counsel (OCC) filed a notice that it would be withdrawing its request for a subpoena duces tecum for Charles E. Jones, which was filed on July 7, 2022, and subsequently signed by the attorney examiner on August 11, 2022.

{¶ 6} Additionally on February 29, 2024, the Office of the Ohio Attorney General (Attorney General)<sup>1</sup> filed a letter in the *FirstEnergy Investigation Cases*, alerting the Commission of a potential issue with the resumption of those proceedings. The Attorney General cited R.C. 4903.08, which states in pertinent part: “No such person shall be prosecuted or subjected to any penalty or forfeiture on account of, any transaction or matter concerning which he has testified or produced any documentary evidence.” Given the potential implications of this statute, the Attorney General requested that no subpoenas for Samuel Randazzo, Charles Jones, and Michael Dowling be enforced while the criminal proceedings remain pending.

{¶ 7} On March 1, 2024, the attorney examiner issued an Entry granting the limited request of the Attorney General and instructing that parties in the *FirstEnergy Investigation*

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<sup>1</sup> The letter is signed by the Deputy Attorney General for Law Enforcement, Carol Hamilton O’Brien, Principal Attorney General, Matthew E. Meyer, and Chief Counsel for the Summit County Prosecutor’s Office, Brad Gessner.

*Cases* were precluded from taking the testimony of, or requiring the production of documents from, Charles Jones, Michael Dowling, and Samuel Randazzo in any Commission proceeding during the pendency of the criminal investigations. In that Entry, the attorney examiner also stressed that the Commission has consistently stated that its “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, \* \* \* .” Entry (Mar. 1, 2024) at ¶6, citing *FirstEnergy Investigation Cases*, Entry (Aug. 24, 2022) at ¶ 86 (emphasis added).

{¶ 8} On March 4, 2024, OCC and the Ohio Manufacturers’ Association Energy Group (OMAEG) jointly filed an interlocutory appeal of the February 26, 2024 Entry and request for certification to the Commission.

{¶ 9} On March 11, 2024, the Companies filed a memorandum contra the interlocutory appeal. On that same date, the Northeast Ohio Public Energy Council (NOPEC) also filed a document entitled “Memorandum in Response to the Interlocutory Appeal of the Office of the Ohio Consumers’ Counsel and the Ohio Manufacturers’ Association Energy Group.” Ohio Adm.Code 4901-1-15(D) provides that, unless otherwise ordered by the Commission, any party may file a memorandum contra within five days after the filing of an interlocutory appeal. As expressly noted, the Commission’s rule is limited in scope to the filing of memorandum contra interlocutory appeals. To the extent that a party believes that it is necessary to inform the Commission of its support for another party’s position raised in an interlocutory appeal, the appropriate motion for leave to file a memorandum in support should be submitted for the Commission's consideration. *In re the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing (Oct.

17, 2007). Alternatively, if NOPEC wanted to join the arguments raised in the interlocutory appeal, it could have theoretically jointly filed with OCC and OMAEG, or filed its own interlocutory appeal, although the attorney examiner observes NOPEC only just filed a motion to intervene in these proceedings on March 4, 2024, nearly three and a half years from the time the *2020 Rider DCR Audit* was initiated, and over six years from the time the *Rider DMR Audit* was initiated.<sup>2</sup> Nonetheless, the attorney examiner finds that the arguments raised by NOPEC are duplicative of OCC and OMAEG and will be addressed herein, so NOPEC will not be prejudiced by the procedurally inappropriate filing.

***B. Interlocutory Appeal and Memorandum Contra***

{¶ 10} In their interlocutory appeal, OCC and OMAEG argue that, despite new information, the February 26, 2024 Entry fails to afford the parties time to conduct meaningful discovery and review the documents produced pursuant to discovery. Additionally, OCC and OMAEG allege that the Entry established an “overly aggressive” procedural schedule that will deprive the Companies’ consumers and manufacturers of the fair and reasonable process to which they are entitled. Moreover, OCC and OMAEG assert that this schedule is even more problematic given the directives of a more recent Entry which precludes oral discovery from key witnesses—Samuel Randazzo, Charles Jones, and Michael Dowling—occurring in these cases. While they do not challenge the preclusion of testimony from these individuals, they note that it may, nonetheless, prevent the public from receiving the answers they deserve. According to OCC and OMAEG, the Entry not only fails to give parties the opportunity to issue additional discovery based upon new evidence learned and new documents produced in related matters, it also fails to allow the parties to review the many new documents, transcripts, and evidence that have yet to be produced by FirstEnergy Corp. OCC and OMAEG allege they were unable to review the approximately 720,000 documents due to the Commission’s stay, which included a stay of

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<sup>2</sup> This motion to intervene remains pending before the Commission.

discovery. Additionally, OCC and OMAEG allege that they may be prejudiced, as the discovery period is set to close on April 19, 2024, and they would arguably be precluded from reviewing the entirety of the additional 720,000 pages of new documents or factual evidence contained in the recent state and federal criminal indictments within the current timeframe or issuing new rounds of discovery requests thereafter. As such, OCC and OMAEG request that this appeal be certified to the Commission and that the Commission extend the discovery period in these cases and afford the parties additional time to conduct discovery and review the documents produced pursuant to the discovery, as the procedural schedule as it stands today allegedly deprives parties of their substantial right to ample discovery under Ohio law and their due process guaranteed under the federal and state constitutions. Moreover, OCC and OMAEG contend that the revised procedural schedule to follow should allow for additional discovery to occur and continue the evidentiary hearing, including testimony filing deadlines, until after the state and federal criminal proceedings have concluded, and after all discovery is produced by FirstEnergy Corp. Finally, OCC and OMAEG request that the Commission require FirstEnergy Corp. to expeditiously produce any discovery owed to them related to pre-existing discovery agreements and/or any additional discovery requests propounded on the Companies.

{¶ 11} In response, the Companies initially note that an indefinite stay is unnecessary. While OCC and OMAEG suggest that resolution of these cases should be postponed until after the conclusion of the criminal cases pending against Samuel Randazzo, Charles Jones, or Michael Dowling, the Companies contend that evidence from those individuals is not needed to ensure a full and transparent resolution of the specific issues in these cases. The Companies stress that extensive discovery has already occurred, and the Companies are committed to producing additional documents pursuant to a prior agreement with the parties. Notably, the Companies state that a large portion of the documents from the separate federal shareholder suit were produced on March 11, 2024, with the balance to be produced by March 28, 2024. The Companies contend that a reasonable extension of the existing procedural schedule is all that is necessary to enable

OCC and OMAEG to identify any new and relevant materials recently produced and to prepare for hearing. The Companies request that the attorney examiner deny certification, but suggest extending the procedural schedule by approximately six weeks to facilitate OCC and OMAEG's review of the documents and allow these proceedings to move toward a resolution. The Companies state that an indefinite continuance of these proceedings, and the unlimited discovery proposed by OCC and OMAEG during that time, is unnecessary and prejudicial to customers and other stakeholders. Notably, FirstEnergy argues that the longer the delay in these proceedings, the greater the risk that the affected customers will not be the customers who ultimately receive relief.

{¶ 12} Specifically, although the Companies acknowledge that FirstEnergy Corp. will be producing roughly 720,000 pages of documents from the securities litigation, they also contend that these materials are only being produced because OCC requested them in a subpoena that allegedly provided no limitation on the relevance to these proceedings of the materials sought. *Corporate Separation Audit*, Motion for Subpoena Duces Tecum for FirstEnergy Corp. to Produce all Discovery Documents that FirstEnergy Corp. was Ordered to Provide by the U.S. Chief District Judge in a Shareholder Lawsuit<sup>3</sup> by Office of the Ohio Consumers' Counsel (Sept. 24, 2021). As such, the Companies question whether FirstEnergy Corp.'s further production of securities litigation materials is likely to yield any new and relevant materials to these proceedings. Regardless, the Companies contend that the document production will be substantially complete at the end of March, so it is much more reasonable to simply extend the existing procedural schedule.

{¶ 13} FirstEnergy also asserts that OCC and OMAEG's request does not satisfy the requisite conditions for certification of its interlocutory appeal. According to the Companies, the Entry setting a procedural schedule does not present any new or novel

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<sup>3</sup> *In re FirstEnergy Corp. Securities Litigation*, Case No. 2:20-cv-3785 (S.D. Ohio).

question of interpretation, law, or policy, nor does it depart from precedent, adding that attorney examiners have express authority to make procedural rulings, and in this instance, complied with the Commission's direction to issue procedural schedules in the *FirstEnergy Investigation Cases* after it lifted the stay, citing Ohio Adm.Code 4901-1-14, 4901-1-26, and 4901-1-27. Furthermore, the Companies assert at the Attorney General's letter should not change this analysis. Additionally, the Companies assert that is also no threat of "undue prejudice" to OCC and OMAEG because there has already been a vast amount of discovery had in these proceedings, including hundreds of thousands of pages produced, hundreds of pieces of written discovery answered, and multiple audit reports accompanied by dozens of party and intervenor comments. The Companies also contend that the three individuals are not "central to the issues" in these proceedings. Finally, the Companies state that OCC and OMAEG "will have every opportunity to present their cases," so they will not be prejudiced.

{¶ 14} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. The rulings which are the subject of the interlocutory appeal are not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B) and, as discussed below, such criteria has not been met here.

{¶ 15} The attorney examiner finds that the interlocutory appeal of the Entry setting the procedural schedule does not present a new or novel question of interpretation, law, or policy. The interlocutory appeal seeks Commission review of a decision by the attorney examiner to set a procedural schedule, but it is well-established that the Commission and its attorney examiners have extensive experience with respect to establishing procedural

schedules and addressing other procedural issues, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. See, e.g., *Corporate Separation Audit*, Entry (Feb. 10, 2022); *In re Ohio Power Co.*, Case No. 23-23-EL-SSO, Entry (Sept. 18, 2023); *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2.

{¶ 16} OCC and OMAEG characterize the Attorney General’s letter as a “game changer” and argue that the letter presents a new and novel question for the Commission to consider; however, the procedural schedule issued in the February 26, 2024 Entry, in tandem with the March 1, 2024 Entry granting the Attorney General’s request and precluding the testimony or production of documents from these three individuals, is completely consistent with the Commission’s approach in the *FirstEnergy Investigation Cases*. The Commission has consistently stated that its “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, \* \* \* .” Entry (Aug. 24, 2022) at ¶ 86 (emphasis added). The Attorney General’s letter, and response thereto, is certainly not a deviation from this effort. The March 1, 2024 Entry merely effectuated the long-standing approach of the Commission in the *FirstEnergy Investigation Cases*.



{¶ 17} As to extending the discovery deadline, the attorney examiner has already addressed a similar request in the *Corporate Separation Audit*. *Corporate Separation Audit*, Entry (Apr. 7, 2022) (where the attorney examiner denied the March 14, 2022 joint motion filed by OCC, OMAEG, and NOPEC for an indefinite continuance of the hearing and a motion to enlarge the time period for discovery), Entry (June 16, 2022) (where the attorney examiner denied certification of the interlocutory appeal of the April 7, 2022 Entry). Just as the attorney examiner noted in that April 7, 2022 Entry, OCC and OMAEG acknowledge that they will continue to receive documents from previous discovery requests on a rolling basis, in addition to the pending deposition requests. Thus, OCC and OMAEG continue to gather information as they prepare for hearing even without an extended discovery deadline. The generalized assertion that the discovery deadline should be extended because the parties need more time for case preparation or may potentially have additional areas of discovery resulting from their document review is unpersuasive. Parties should parse through the hundreds of thousands of documents that have been or will be produced before requesting an extension of the discovery period.

{¶ 18} Further, the attorney examiner fails to find that the Entry establishing a procedural schedule, including determining when the discovery window should be closed, represents a departure from past precedent. Again, the attorney examiner has addressed this very question already in the *Corporate Separation Audit*. See, e.g., *Corporate Separation Audit*, Entry, (Feb. 10, 2022), Entry (Apr. 7, 2022), Entry (June 16, 2022). As has been stated, the Commission is vested with broad discretion to manage its dockets. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). Likewise, the decision to deny a continuance of a hearing or to set a specific deadline for discovery requests rests in the Commission's discretion. *City of Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 241, 215 N.E.2d 366 (1966). The entries setting the procedural schedule, including the April 19, 2024 discovery deadline in question, certainly fall within this discretion. For these reasons, the

interlocutory appeal was not taken from a ruling that represents a departure from past precedent.

{¶ 19} Further, the attorney examiner finds that OCC and OMAEG cannot demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the Entry setting the procedural schedule. It appears the parties are once again faced with a “mountain of evidence,” which they argue necessitates an indefinite continuance of the hearing. However, it is unclear whether how many, if any, documents produced under the agreement between OCC and FirstEnergy Corp. will render relevant information to these proceedings, which has a much more targeted scope than the concurrent federal or state criminal proceedings. Moreover, OCC and OMAEG have had ample time to conduct discovery, submit comments regarding the numerous audit reports at issue,<sup>4</sup> and prepare for hearing and, in short, have not shown that the procedural schedule is unduly prejudicial or unreasonable under the circumstances of these proceedings.

{¶ 20} Additionally, while OCC, OMAEG, and FirstEnergy speculatively opine on the need to take testimony in these proceedings from Samuel Randazzo, Charles Jones, and Michael Dowling, it is premature to make any sort of determination on that issue at this time, especially in light of the allegedly hundreds of thousands of pages of documents produced in discovery that still require review. In addition to this production effort, parties have already been instructed that documents produced in one of the *FirstEnergy Investigation Cases* can be utilized in the other *FirstEnergy Investigation Cases* so as to avoid duplicative

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<sup>4</sup> Daymark Energy Advisors filed its report in the *Rider DMR Audit* on January 14, 2022, which was followed by a comment period. Additionally, in the *2020 Rider DCR Audit*, Blue Ridge Consulting Services, Inc. (Blue Ridge) has filed two separate audit reports, one filed on August 3, 2021, and a supplemental report filed on November 19, 2021, that incorporate the scope of the initial review, as well as the two separate expansions of the scope dealing with vendor payments identified by the Commission and whether the costs of the naming rights for FirstEnergy Stadium have been recovered by the Companies’ ratepayers. Comment periods were held for both the initial and supplemental audit reports.

discovery requests. See *Corporation Separation Audit, 2020 Rider DCR Audit*, Joint Prehearing Tr. (Sept. 14, 2021) at 45-46; *Rider DMR Audit/2020 Rider DCR Audit*, Entry (Feb. 26, 2024) at ¶4. However, the attorney examiner will examine the need to expand the discovery period and determine whether additional limitations on discovery should be imposed, pursuant to the broad authority granted to attorney examiners in R.C. 4901.13 and 4901.18, an authority which OCC and OMAEG did not question upon the preclusion of certain discovery in the March 1, 2024 Entry. The Commission's well-established discovery standards have been, and will continue to be, applied throughout the four *FirstEnergy Investigation Cases*. See, e.g., *Corporate Separation Audit*, Entry (June 12, 2022).

{¶ 21} As OCC and OMAEG have failed to meet either requirement for the certification of an interlocutory appeal set forth in Ohio Adm.Code 4901-1-15(B), the attorney examiner finds that the interlocutory appeal of the Entry setting the procedural schedule should not be certified to the Commission. In summation, the attorney examiner implores OCC and OMAEG to understand that an interlocutory appeal is not an appropriate mechanism when requesting an extension of the hearing date or associated testimony filing deadlines and discovery deadlines.<sup>5</sup> The attorney examiner recognizes that OCC and OMAEG have managed to utilize the correct mechanism on at least two separate occasions previously. See, e.g., *Corporate Separation Audit*, OCC, OMAEG, and NOPEC Joint Motion for an Indefinite Continuance of the Hearing and Motion to Enlarge the Time Period for Discovery (Mar. 14, 2022); *Corporate Separation Audit*, OCC, OMAEG, and NOPEC Joint Motion to Extend and Continue the Procedural Schedule (June 22, 2022).

{¶ 22} Finally, the attorney examiner notes her appreciation that OCC and OMAEG have finally acknowledged the importance of the Commission's long-standing and steadfast

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<sup>5</sup> Ohio Adm.Code 4901-1-13(A) provides that "extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown \* \* \*."

objective to refrain from interfering with the concurrent federal and state investigations,<sup>6</sup> despite earlier attempts to do just that. However, contrary to prior assertions that “justice delayed is justice denied”<sup>7</sup> and demanding that the Commission proceed, it appears OCC and OMAEG are pivoting and suggesting that the Commission be precluded from holding the hearing in this matter until the criminal proceedings have concluded for Charles Jones, Dowling and Samuel Randazzo, the effective equivalent to an indefinite stay. The Commission has already noted that an indefinite stay would be inappropriate in any of the *FirstEnergy Investigation Cases* and has stated on numerous occasions that these investigations will continue as promptly as possible, but under no circumstances will “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.” *FirstEnergy Investigation Cases*, Entry on Rehearing (Oct. 18, 2023). Furthermore, the argument that the hearing should be continued indefinitely because of ongoing document production or that OCC and OMAEG believe the testimony of three individuals is necessary to proceed is not well taken. Consistent with Commission precedent, the attorney examiner notes that indefinite continuances are discouraged. See, e.g., *In re the Determination of the Existence of Significantly Excessive Earnings for 2017 under the Electric Security Plans of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 18-857-EL-UNC, et al., Entry (Feb. 26, 2021) at ¶ 16. As noted above, although some discovery identified by OCC and OMAEG continue to be produced, they have failed to identify the specific relevance and importance of those documents and testimony to these proceedings at this time. The attorney examiner declines to extend the hearing date indefinitely merely because documents continue to be produced or parties believe testimony should be required by the

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<sup>6</sup> OCC and OMAEG state that the “last thing that parties in the [Commission] investigation want to do is interfere with the federal and state criminal cases that are now underway and involve the former [Commission] Chair and/or former FirstEnergy executives.”

<sup>7</sup> *FirstEnergy Investigation Cases*, Ohio Consumers Counsel Application for Rehearing (Sept. 22, 2023) at 2.

three noted individuals. By that logic, the parties may not be ready to proceed to hearing until well into the future. However, the attorney examiner does find good cause to vacate the hearing date at this time, as well as the discovery deadline and associated deadlines for filing testimony, as doing so will ultimately allow parties ample opportunity to prepare for the hearing. All other aspects of the procedural schedule issued on February 26, 2024 should remain unchanged. Despite finding that ongoing document production does not warrant an indefinite extension, the attorney examiner will take the ongoing discovery production into account. The new hearing date, discovery deadline, and testimony filing deadlines will be set at the transcribed prehearing conference currently scheduled for May 21, 2024. Parties are expected to be prepared to discuss those issues at that time.

{¶ 23} Consistent with past directives and in order to avoid any unnecessary delays and continue to move toward the expeditious resolution of these proceedings, the Companies are directed to work in conjunction with other parties, namely OCC, OMAEG, and NOPEC, to file a status report on the discovery process in this docket every two weeks, beginning on March 22, 2024. *Corporate Separation Audit*, Entry (Apr. 7, 2022) at ¶ 30; Entry (June 16, 2022) at ¶ 28. The report should detail the progress of discovery review, including, at the very least, the number of pages of documents that have been produced by the Companies on a rolling basis during each two-week period, and in the aggregate, as well as the number of pages of documents that have been reviewed, and still need reviewed, by OCC, OMAEG, and NOPEC<sup>8</sup> as of the date of the report. These parties should also identify the number of discovery requests that they have issued in these proceedings to date. The report should be limited to a quantitative assessment of discovery only. While affidavits regarding the discovery review will not be required at this time, parties are on notice that the attorney examiner may demand such affidavits at a later date. Ultimately, the attorney

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<sup>8</sup> It is expected that OCC, OMAEG, and NOPEC will each indicate how many pages of produced documents they have reviewed rather than an aggregate estimation amongst all three parties.

examiner finds these reports will continue to provide the “meaningful, quantified assessments on the progress of reviewing discovery” in these proceedings, as previously contemplated by the attorney examiner. *Corporate Separation Audit*, Entry (Feb. 10, 2022) at ¶30, Entry (June 16, 2022) at ¶28. To be clear, these cases will be moving forward, but the attorney examiner recognizes that discovery production and review will be an important component to determining when the hearing is scheduled, consistent with the countless other complex Commission proceedings in which hearings have been held in a timely manner.

{¶ 24} The attorney examiner must also, once again, stress the established scope of the four *FirstEnergy Investigation Cases*, adding that the Commission has expressly stated “that the purpose of our four investigations is to supplement, not replicate, the ongoing criminal investigation by the DOJ.” *FirstEnergy Investigation Cases*, Entry (Aug. 24, 2022).<sup>9</sup> This must also remain true for the state criminal proceedings, as well. The scope of the *Rider DMR Audit* is limited to conducting a full review of the entire duration of Rider DMR as contemplated by the Companies’ fourth electric security plan (ESP IV).<sup>10</sup> *In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶¶185, 282 (where the Commission authorized FirstEnergy to implement Rider DMR and directed Staff to review the expenditure of Rider DMR revenues to ensure that they are used, directly or indirectly, in support of grid modernization). Furthermore, the scope of the 2020 *Rider DCR Audit* is limited to a review of FirstEnergy’s Rider DCR costs incurred during 2020, as later expanded

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<sup>9</sup> There were two Entries issued by the Commission in the *FirstEnergy Investigation Cases* on August 24, 2022. For clarity, this citation is to the initial stay of the four investigations, rather than the Entry denying the July 7, 2022, and August 10, 2022, motions filed jointly by OCC and the Northwest Ohio Aggregation Coalition.

<sup>10</sup> In the Entry directing the additional review of Rider DMR, the Commission noted that the audit to be conducted should also include an examination of the time period leading up to the passage of 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 ESP IV. *Rider DMR Audit*, Entry (Dec. 30, 2020) at ¶23.

by the Commission.<sup>11</sup> The Commission has previously indicated that parties to these proceedings have unremittingly attempted to reach beyond the matters that fall within the regulatory oversight of this Commission and have aimed their discovery efforts into the underlying events and evidence at issue in the DOJ investigation, and it appears now, the state criminal proceedings. *FirstEnergy Investigation Cases*, Entry on Rehearing (Oct. 18, 2023) at ¶18; *FirstEnergy Investigation Cases*, Entry (Aug. 24, 2022) at ¶85, citing *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. As the Commission has previously indicated, no party involved in these proceedings, including OCC and OMAEG, can supplant the role of the U.S. Attorney's Office or Attorney General's Office. *FirstEnergy Investigation Cases*, Entry on Rehearing (Oct. 18, 2023) at ¶18. OCC filed several applications for rehearing requesting that the Commission revisit its complete stay of the *FirstEnergy Investigation Cases*, adding that leaving discovery open or allowing the proceedings to move forward on a more limited basis would serve the public interest. However, if the Commission had not remained steadfast in its approach to these investigations, it is likely the concern raised by the Attorney General would have materialized. See, e.g., *FirstEnergy Investigation Cases*, Ohio Consumers' Counsel Application for Rehearing (Sept. 23, 2022) at 12-13 (where OCC argued that the Commission should have granted the pending motions for subpoenas in the *Corporate Separation Audit*); *Corporate Separation Audit*, Ohio Consumers' Counsel Application for Rehearing (Apr. 7, 2023) at 20-21 (where OCC argued that the Commission "should have, at the very least, required Mr. Jones to respond to OCC's subpoena and produce documents" and alleged that not requiring him to do so was unreasonable). Now

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<sup>11</sup> As noted earlier in this Entry, the Commission expanded the scope of the audit on March 10, 2021, and directed the scope of 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. The attorney examiner also expanded the scope of the audit on September 29, 2021, when requesting that Staff direct Blue Ridge to determine if the costs of the naming rights for FirstEnergy Stadium have been recovered from ratepayers by the Companies. Finally, the Commission bifurcated the alleged "side agreement" violation on December 15, 2021, and discovery was stayed on this issue until the Commission lifted the stay on February 21, 2024.

that the Commission has indicated it may now move forward without jeopardizing the ongoing criminal investigations, subject to the limited request of the Attorney General, OCC and OMAEG suggest that the Commission should halt its efforts to finally bring a long-awaited resolution of these matters to Ohio ratepayers. This was not the intent of the Attorney General's request. As such, the attorney examiner will continue to abide by the Commission's unambiguous directive that the *FirstEnergy Investigation Cases* proceed. This should be understood as a way forward and a triumph for all parties that have been involved and previously pressed the Commission to continue with its investigations in any form. As OCC previously stated, "Ohio consumers deserve to have the agency responsible for regulating the [Companies] – the [Commission]—fulfill its responsibilities in parallel with pending civil litigation just like the regulators elsewhere have." *FirstEnergy Investigation Cases*, Ohio Consumers Counsel Application for Rehearing (Apr. 7, 2023) at 16; see also, *FirstEnergy Investigation Cases*, Ohio Consumers' Counsel Application for Rehearing (Sept. 23, 2022) at 6 (where OCC argued that the "potential harm to consumers is great" and "[p]arties are substantially prejudiced by the delay.")

### III. ORDER

{¶ 25} It is, therefore,

{¶ 26} ORDERED, That certification of OCC and OMAEG's joint interlocutory appeal be denied. It is, further,

{¶ 27} ORDERED, That the hearing date, discovery deadline, and associated testimony filing deadlines set by the February 26, 2024 Entry be vacated. It is, further,



{¶ 28} ORDERED, That parties adhere to the directives related to discovery review set forth in Paragraph 23. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Megan J. Addison

By: Megan J. Addison  
Attorney Examiner

JSA/dmh

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**in**

**Case No(s). 17-2474-EL-RDR, 20-1629-EL-RDR**

Summary: Attorney Examiner Entry that certification of OCC and OMAEG's joint interlocutory appeal be denied; the hearing date, discovery deadline, and associated testimony filing deadlines set by the February 26, 2024 Entry be vacated; that parties adhere to the directives related to discovery review set forth in Paragraph 23 electronically filed by Ms. Donielle M. Hunter on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio.