

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Determination of the	)	
Existence of Significantly Excessive	)	
Earnings for 2019 Under the Electric	)	
Security Plan of Ohio Edison Company,	)	Case No. 20-1034-EL-UNC
The Cleveland Electric Illuminating	)	
Company, and The Toledo Edison	)	
Company.	)	

In the Matter of the Determination of the	)	
Existence of Significantly Excessive	)	
Earnings for 2018 Under the Electric	)	
Security Plan of Ohio Edison Company,	)	Case No. 19-1338-EL-UNC
The Cleveland Electric Illuminating	)	
Company, and The Toledo Edison	)	
Company.	)	

In the Matter of the Quadrennial Review	)	
Required by R.C. 4928.143(E) for the	)	
Electric Security Plans of Ohio Edison	)	Case No. 20-1476-EL-UNC
Company, The Cleveland Electric	)	
Illuminating Company, and The Toledo	)	
Edison Company.	)	

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**INTERLOCUTORY APPEAL,  
REQUEST FOR CERTIFICATION TO THE COMMISSION,  
AND  
APPLICATION FOR REVIEW  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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OCC and the Northeast Ohio Public Energy Council (“NOPEC”) submit this interlocutory appeal<sup>1</sup> to the PUCO Commissioners on their Attorney Examiner’s Entry of September 4, 2020. In the Entry, the Attorney Examiner initiated an entirely new

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<sup>1</sup> Ohio Adm. Code 4901-1-15.

proceeding, Case No. 20-1476-EL-UNC, to conduct the quadrennial review of the electric security plans (“ESPs”) of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively “FirstEnergy”) under R.C. 4928.143(E). The Entry consolidated the quadrennial review case with two pending significantly excessive earnings test (“SEET”) cases, and established a procedural schedule that grossly prejudices OCC, NOPEC and other parties in this case.

The procedural schedule benefits FirstEnergy at the expense of consumers and thwarts OCC’s and NOPEC’s case preparation for consumer protection, including OCC’s and NOPEC’s ability to conduct meaningful discovery. Among other things, the schedule allows OCC, NOPEC and other parties a mere *two weeks* to respond to FirstEnergy’s testimony on this new matter regarding whether, under R.C. 4928.143(E), FirstEnergy’s ESP will be more favorable in the aggregate (“MFA”) than a market rate offer. The tightly constrained procedural schedule is at odds with the PUCO’s practice in Case No. 20-680-EL-UNC where the PUCO is conducting Dayton Power & Light’s (“DP&L”) quadrennial review under R.C. 4928.143(E). The PUCO provided parties in Case No. 20-680-EL-UNC significantly more time to present their cases, permitting multiple rounds of comments on DP&L’s application and testimony and setting a date for intervenor testimony more than six months from when DP&L filed its application.<sup>2</sup>

The PUCO should reverse its Attorney Examiner’s Entry and direct the Attorney Examiner to establish a procedural schedule that provides parties with ample time to

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<sup>2</sup> *In the Matter of the Application of the Dayton Power & Light Company for a Finding That its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC, Entry (April 23, 2020) and Entry (Sept. 3, 2020).

conduct discovery and present their cases for consumer protection. Doing so will serve the interest of justice for customers and administrative efficiency in the cases.

OCC's Interlocutory Appeal of the September 4 Entry should be certified to the PUCO for review, under Ohio Adm. Code 4901-1-15(B). The Entry represents a departure from the PUCO's precedent in Case No. 20-680-EL-UNC. An immediate determination is needed to prevent the likelihood of undue prejudice or expense to OCC and other parties.

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

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The Attorney Examiner issued the September 4<sup>th</sup> Entry, which initiated FirstEnergy’s quadrennial review case pursuant to R.C. 4928.143(E) and consolidated it with the pending SEET cases.<sup>3</sup> FirstEnergy has not filed an application with the PUCO requesting this review or supporting testimony. The quadrennial review will consider whether FirstEnergy’s ESP continues “to be more favorable in the aggregate and under

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<sup>3</sup> Entry at ¶6. The Entry is attached.

the remaining term of the plan as compared to the expected results that would otherwise apply under [a market-rate offer].”<sup>4</sup> The PUCO must also consider “the prospective effect of the electric security plan to determine if that effect is substantially likely to provide [FirstEnergy] with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk . . .”<sup>5</sup>

The question of whether FirstEnergy’s ESP will continue to satisfy the SEET and MFA test in the future cannot be answered for consumers under the Attorney Examiner’s constrained timeline issued in the September 4<sup>th</sup> Entry.<sup>6</sup> As noted, FirstEnergy has not filed an application or testimony supporting a quadrennial review, and parties have had no opportunity whatsoever to conduct discovery on these matters. The Entry directs FirstEnergy to file testimony on these issues on November 2, 2020 almost two months from now.<sup>7</sup> However, the Entry directs OCC, NOPEC and other parties to file responsive testimony a mere two weeks later on November 16, 2020.<sup>8</sup> Under that schedule, parties have zero opportunity to obtain responses to discovery on FirstEnergy’s testimony regarding the quadrennial review under R.C. 4928.143(E) before their responsive testimony is due.

The Entry also establishes a discovery cutoff of November 30, 2020. Under that timeframe, parties will have limited opportunities to conduct discovery on FirstEnergy’s

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<sup>4</sup> R.C. 4928.143(E).

<sup>5</sup> *Id.*

<sup>6</sup> Entry, ¶7.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

November 2 testimony given the timeframes for discovery responses under the PUCO's rules. The Entry's procedural schedule is patently unfair to consumers.

The PUCO should modify the Attorney Examiner's Entry and timeline, and establish a procedural schedule that allows the parties to fully develop the issues regarding the quadrennial review of the FirstEnergy's ESP. OCC and NOPEC suggest the following schedule, which is similar to the schedule adopted in DP&L's quadrennial review case: November 2, 2020, FirstEnergy files testimony and supplemental testimony; January 8, 2021, Initial Comments; January 29, 2021, Reply Comments; February 22, 2021, First Energy supplemental testimony (if necessary); April 5, 2021, Intervenor testimony; May 11, 2021, evidentiary hearings.

## **II. STANDARD OF REVIEW**

The PUCO will review an Attorney Examiner's ruling if the Attorney Examiner (or other authorized PUCO personnel) certifies the appeal.<sup>9</sup> The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question."<sup>10</sup> Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.<sup>11</sup>

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<sup>9</sup> Ohio Adm. Code 4901-1-15(B).

<sup>10</sup> *Id.*

<sup>11</sup> Ohio Adm. Code 4901-1-15(E).



### III. REQUEST FOR CERTIFICATION

#### A. The Entry represents a departure from past precedent.

As noted, the parties in the DP&L quadrennial review case have significantly more time to prepare their cases. DP&L filed its application and testimony on April 1, 2020. The PUCO then provided parties until July 1, 2020 to file comments regarding the application, and reply comments were permitted by July 16, 2020.<sup>12</sup> The Attorney Examiner then issued an Entry permitting DP&L to file supplemental testimony by October 1, 2020 and allowing other parties to file testimony by October 15, 2020.<sup>13</sup> A hearing date was also set for December 1-2, 2020.<sup>14</sup> In other words, parties in the DP&L quadrennial review case not only had the opportunity to file comments on DP&L's application, but they will also have over six months to conduct discovery and prepare testimony and eight months to prepare for the evidentiary hearing.

By contrast, parties to FirstEnergy's quadrennial review will have only *two weeks* to prepare testimony to respond to FirstEnergy's case under R.C. 4928.143(E). The Attorney Examiner provided no reasoning whatsoever in the September 4 Entry for establishing the extremely expedited procedure with respect to FirstEnergy's quadrennial review, or why it was necessary to depart from the procedural precedent established in DP&L's quadrennial review case. Because this Entry is a departs from the precedent established in the DP&L quadrennial review, this interlocutory appeal meets the PUCO criteria allowing for certification to the PUCO.

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<sup>12</sup> Case No. 20-680-EL-UNC, Entry (April 23, 2020).

<sup>13</sup> Case No. 20-680-EL-UNC, Entry (Sept. 3, 2020).

<sup>14</sup> *Id.*

**B. An immediate determination is needed to prevent undue prejudice.**

This Appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice<sup>15</sup> to OCC, NOPEC, other parties, and Ohio’s consumers. The undue prejudice will result because parties will have limited opportunities to conduct discovery and respond to FirstEnergy’s case regarding the quadrennial review under R.C. 4928.143(E) under the schedule established by the Entry.

As noted above, the prospective review regarding whether FirstEnergy’s ESP continues to satisfy the more favorable in the aggregate test involves new and complex issues. OCC, NOPEC (and all parties) are entitled under due process to adequate time to analyze FirstEnergy’s evidence on these issues and prepare their case. The procedural schedule established in the Entry simply does not allow this. Indeed, R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.”

Additionally, R.C. 4903.082 directs the PUCO to ensure that parties are allowed “full and reasonable discovery” under its rules.<sup>16</sup> But under the Entry’s procedural schedule, OCC, NOPEC and other parties will have virtually no opportunity to conduct discovery on FirstEnergy’s testimony regarding quadrennial review issues before OCC’s and NOPEC’s own testimony is due. That is unlawful and denies consumers due process.

This Appeal should be certified to the PUCO. An “immediate determination” by the PUCO is needed to prevent undue prejudice to OCC, NOPEC, and Ohio’s consumers.

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<sup>15</sup> Ohio Adm. Code 4901-1-15(B).

<sup>16</sup> See Ohio Adm. Code 4901-1-16 et seq.

#### **IV. APPLICATION FOR REVIEW**

Electric security plans generally favor electric utilities, like FirstEnergy, to the detriment of consumers. Among the few consumer protections is the requirement set forth in R.C. 4928.143(E) that the PUCO conduct a quadrennial review of the electric utility's ESP to ensure that it continues to satisfy the more favorable in the aggregate test.

Consumers deserve a full and fair quadrennial review of FirstEnergy's ESP. But that is not what they will get if the PUCO upholds the patently unfair procedural schedule established by the Attorney Examiner in the September 4 Entry. Denying parties the opportunity to conduct discovery on FirstEnergy's testimony on the new issues under R.C. 4928.143(E) before responsive testimony must be filed is unlawful, unfair, and would greatly prejudice OCC, NOPEC and consumers if they are forced to adhere to the procedural schedule in the Entry. On the other hand, no party would be prejudiced if the PUCO modified the Entry by establishing a procedural schedule that allows the parties the opportunity to explore and respond to the multiple and complex issues raised by the R.C. 4928.143(E) review.

Further, the Attorney Examiner cited to "administrative efficiency" as justification for consolidating the cases.<sup>17</sup> Administrative efficiency will certainly be enhanced by adopting a procedural schedule that allows the parties to conduct discovery, present their cases, and fully develop the record regarding FirstEnergy's quadrennial review under R.C. 4928.143(E). Parties will not have to litigate without the benefit of the clarity on material issues related to the prospective review of FirstEnergy's ESP.

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<sup>17</sup> Entry, ¶7.

Accordingly, the PUCO should modify the Entry and establish an appropriate procedural schedule that allows the parties to fully present their case under R.C.

4928.143(E).

## V. CONCLUSION

OCC's and NOPEC's interlocutory appeal of the September 4 Entry meets the standard for granting interlocutory appeals. OCC's and NOPEC's appeal should be certified to the PUCO and the PUCO should modify the procedural schedule as OCC and NOPEC recommend.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Interlocutory Appeal, Request for Certification to the Commission, and Application for Review by the Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 9<sup>th</sup> day of September 2020.

/s/ Angela D. O'Brien  
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE DETERMINATION  
OF THE EXISTENCE OF SIGNIFICANTLY  
EXCESSIVE EARNINGS FOR 2018 UNDER  
THE ELECTRIC SECURITY PLANS OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY.

CASE NO. 19-1338-EL-UNC

IN THE MATTER OF THE DETERMINATION  
OF THE EXISTENCE OF SIGNIFICANTLY  
EXCESSIVE EARNINGS FOR 2019 UNDER  
THE ELECTRIC SECURITY PLANS OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY.

CASE NO. 20-1034-EL-UNC

IN THE MATTER OF THE QUADRENNIAL  
REVIEW REQUIRED BY R.C. 4928.143(E)  
FOR THE ELECTRIC SECURITY PLANS OF  
OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 20-1476-EL-UNC

### ENTRY

Entered in the Journal on September 4, 2020

{¶ 1} 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.

{¶ 2} R.C. 4928.141 provides that an electric distribution utility (EDU) 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 a firm supply of electric generation service. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.



{¶ 3} Pursuant to the directives of R.C. 4928.143(F), the Commission is required to evaluate annually the earnings of each electric utility's approved ESP to determine whether the plan produces significantly excessive earnings for the electric utility.

{¶ 4} On July 15, 2019, FirstEnergy filed an application in Case No. 19-1338-EL-UNC for the administration of the significantly excessive earnings test, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2018. Further, on May 15, 2020, FirstEnergy filed an application in Case No. 20-1034-EL-UNC for the administration of the significantly excessive earnings test, as required by R.C. 4928.143(F) and Ohio Adm.Code 4901:1-35-10 for 2019.

{¶ 5} On July 29, 2020, the attorney examiner consolidated Case No. 19-1338-EL-UNC and Case No. 20-1034-EL-UNC and set the consolidated cases for hearing on October 29, 2020.

{¶ 6} Moreover, pursuant to R.C. 4928.143(E), if a Commission-approved ESP has a term that exceeds three years from the effective date of the plan, the Commission must test the plan in the fourth year to determine whether the ESP, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under R.C. 4928.142, i.e., under an MRO. The Commission must also determine the prospective effect of the ESP to determine if that effect is substantially likely to provide the EDU with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with adjustments for capital structure as may be appropriate. The Commission has opened Case No. 20-1476-EL-UNC in order to conduct this quadrennial review for FirstEnergy.

{¶ 7} The attorney examiner finds that these matters should be consolidated for administrative efficiency and set for hearing. Accordingly, the following procedural schedule should be established for the consolidated cases:

- (a) Motions to intervene should be filed by October 5, 2020;
- (b) The Companies should file testimony and supplemental testimony by November 2, 2020;
- (c) Intervenors should file testimony by November 16, 2020;
- (d) Discovery, except for notices of deposition, should be filed by November 30, 2020;
- (e) The evidentiary hearing will commence on January 5, 2021, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Columbus, Ohio 43215-3793.

{¶ 8} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety.

{¶ 9} Given the current COVID-19 health emergency, this hearing may be held remotely. The attorney examiners will provide additional information to the parties at a prehearing conference to be scheduled by subsequent entry.

{¶ 10} On August 5, 2020, Ohio Manufacturers' Association Energy Group (OMAEG) filed a motion to intervene in consolidated Case Nos. 19-1338-EL-UNC and 20-1034-EL-



UNC. The Kroger Co. (Kroger) also filed a motion to intervene, on August 12, 2020, in consolidated Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC. No memoranda contra the motions to intervene were filed.

{¶ 11} Upon review, the attorney examiner finds that OMAEG and Kroger have satisfied the intervention requirements set forth in R.C. 4903.221 and Ohio Adm.Code 4901-1-11. Accordingly, the attorney examiner finds that the motions to intervene filed by OMAEG and Kroger are reasonable and should be granted.

{¶ 12} Further, on July 29, 2020, the attorney examiner granted motions to intervene in Case No. 19-1338-EL-UNC and 20-1034-EL-UNC filed by Ohio Energy Group (OEG) and Ohio Consumers' Counsel (OCC). The attorney examiner clarifies that OEG, OCC, OMAEG, and Kroger will be deemed to have been granted intervention in all of the consolidated cases captioned above.

{¶ 13} On August 3, 2020, OCC filed an interlocutory appeal, request for certification, and application for review regarding the procedural schedule and hearing date established in the July 29, 2020 Entry. The Companies filed a memorandum contra the interlocutory appeal on August 10, 2020. OCC's request for certification of its interlocutory appeal will be addressed by subsequent entry.

{¶ 14} It is, therefore,

{¶ 15} ORDERED, That the motions to intervene filed by OMAEG and Kroger in Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC be granted. It is, further,

{¶ 16} ORDERED, That the parties and interested persons comply with the procedural schedule set forth in Paragraph 7. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price  
Attorney Examiner

NJW/hac

**This foregoing document was electronically filed with the Public Utilities**

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**in**

**Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC, 20-1476-EL-UNC**

Summary: Attorney Examiner Entry ordering that the motions to intervene filed by OMAEG and Kroger in Case Nos. 19-1338-EL-UNC and 20-1034-EL-UNC be granted and ordering that the parties and interested persons comply with the procedural schedule set forth in Paragraph 7 electronically filed by Heather A Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio

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**in**

**Case No(s). 19-1338-EL-UNC, 20-1034-EL-UNC, 20-1476-EL-UNC**

Summary: Request INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE COMMISSION,  
AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL  
electronically filed by Ms. Deb J. Bingham on behalf of O'Brien, Angela Ms.