

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 October 29, 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. Moreover, R.C. 4928.143(E) requires that, 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 (the quadrennial review) 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.

{¶ 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 (SEET), 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 SEET, 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. On August 3, 2020, the Ohio Consumers' Counsel (OCC) filed an interlocutory appeal, request for certification, and application for review (*First Interlocutory Appeal*) to the Commission of the attorney examiner's ruling that the consolidated case should be set for hearing on October 29, 2020. The Companies filed a memorandum contra the interlocutory appeal on August 10, 2020.

{¶ 6} Subsequently, the Commission opened Case No. 20-1476-EL-UNC in order to conduct the quadrennial review for FirstEnergy required by R.C. 4928.143(E). By Entry issued on September 4, 2020, the attorney examiner consolidated all three cases for administrative efficiency, established a procedural schedule, and set the matters for hearing on January 5, 2021. On September 9, 2020, OCC and the Northeast Ohio Public Energy Council (NOPEC) filed an interlocutory appeal, request for certification, and application for review (*Second Interlocutory Appeal*) regarding the procedural schedule and hearing date established in the September 4, 2020 Entry.

{¶ 7} In the *First Interlocutory Appeal*, OCC argues that the procedural schedule set forth in the July 29, 2020 Entry should be placed on hold because of another case pending with the Ohio Supreme Court. In that case, the OCC appealed the Commission's approach to the SEET, particularly the exclusion from the SEET of revenues received by the Companies under their distribution modernization riders (Rider DMR). *In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2017 Under the Electric Security Plans of the Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Supreme Court Case No. 2019-961 (2017 SEET Case). The Court held oral arguments on May 12, 2020, for the 2017 SEET Case but has not yet issued a determination. OCC argues that the Commission should not move forward with the 2018 and 2019 SEET in the present case until the Court rules on the 2017 calculation. OCC asserts that the July 29, 2020 Entry presents a new or novel question – whether the Commission should proceed with the hearing when a related issue is pending before the Ohio Supreme Court. OCC also states that the parties will be prejudiced in proceeding with the current case without a determination on the 2017 SEET Case, which would otherwise guide discovery and affect testimony and briefing.

{¶ 8} In its memorandum contra the *First Interlocutory Appeal*, FirstEnergy states that OCC's interlocutory appeal does not meet the requirements for granting an interlocutory appeal because a scheduling entry is routine and does not present a new or novel question

of law or policy. It also states that the July 29, 2020 Entry does not create undue prejudice or expense for OCC.

{¶ 9} 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 *First Interlocutory Appeal* and the *Second Interlocutory Appeal* are not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the *First Interlocutory Appeal* and the *Second Interlocutory Appeal* should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

{¶ 10} The attorney examiner finds that the *First Interlocutory Appeal* should not be certified to the Commission. Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy *or* is taken from a ruling which represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements need to be met. In this interlocutory appeal, neither provision was satisfied.

{¶ 11} The attorney examiner finds that the *First Interlocutory Appeal* does not present a new or novel question of law or policy.¹ It is well-established that the Commission and the attorney examiners have had long experience establishing appropriate procedural schedules in cases before the Commission; therefore, the appeal does not present a new or novel question of law or policy. *In re Ohio Edison Co., Cleveland Electric Illuminating Co., and*

¹ OCC does not allege that the *First Interlocutory Appeal* is taken from a ruling which represents a departure from past precedent.

Toledo Edison Co., Case No. 08-935-EL-SSO, Entry (Sep. 30, 2008) at 3-4; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. Moreover, the attorney examiner is not persuaded that the question posed by OCC - whether the Commission should proceed to hear the case while a prior case with a similar issue is on appeal - is a new or novel question of law as OCC claims.

{¶ 12} Further, the attorney examiner finds that OCC has failed to demonstrate any undue prejudice resulting from the July 29, 2020 Entry. The question before the Court in the 2017 SEET Case is whether the Commission improperly excluded the Rider DMR revenues from the SEET calculation. The parties to this proceeding are perfectly capable of presenting testimony and making arguments on brief in the alternative, both including Rider DMR revenues from the SEET calculation and excluding Rider DMR revenues from the SEET calculation. The attorney examiner is not persuaded that making these alternative calculations, in testimony or on brief, will result in any undue expense to any party to this proceeding. Accordingly, the *First Interlocutory Appeal* will not be certified to the Commission for review.

{¶ 13} In the *Second Interlocutory Appeal*, OCC and NOPEC argue that the procedural schedule set forth is unfair and suggest the various deadlines be moved to January and February 2021 with the hearing to be held in May 2021. They argue that the procedural schedule is a departure from precedent, citing to the procedural schedule established in *In the Matter of the Application of the Dayton Power & Light Co. 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 (*DP&L Quadrennial Review*), Entry (April 23, 2020) and Entry (Sept. 3, 2020) to justify their claim that the September 4, 2020 Entry departed from precedent where the Commission ordered a more extended timeline. OCC and NOPEC also assert that the schedule as outlined in the September 4, 2020 Entry will allow for insufficient opportunity for discovery.

{¶ 14} In its memorandum contra the *Second Interlocutory Appeal*, FirstEnergy states that the appeal does not meet the requirements for granting an interlocutory appeal because a scheduling entry is routine and does not depart from past precedent. FirstEnergy explains that citing a different procedural schedule in one other case is not sufficient to show that the Commission departed from past precedent. FirstEnergy also identified additional issues under consideration in the cited case that explain the extended procedural schedule. FirstEnergy also states that OCC and NOPEC have not demonstrated that the procedural schedule causes undue prejudice or expense. FirstEnergy emphasizes that the current procedural schedule provides almost three months of discovery and four weeks of discovery after FirstEnergy files its testimony.

{¶ 15} The attorney examiner finds that the *Second Interlocutory Appeal* does not meet the requirements for certification to the Commission under Ohio Adm.Code 4901-1-15(B). The attorney examiner finds that the September 4, 2020 Entry does not represent a departure from past precedent requiring certification to the Commission of the *Second Interlocutory Appeal*.² OCC's and NOPEC's reliance upon the April 23, 2020 Entry in the *DP&L Quadrennial Review* is misplaced. 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. At the time the April 23, 2020 Entry was issued, the Commission had embarked on the complex task of determining how to hold evidentiary hearings safely during the state of emergency, including developing the capability of holding hearings remotely. The April 23, 2020 Entry in the *DP&L Quadrennial Review* set a hearing date for approximately six months after the issuance of the Entry because *no evidentiary hearings were being held* while the Commission developed the capability to hold hearings safely. The attorney examiner

² OCC and NOPEC do not allege that the *Second Interlocutory Appeal* presents a new or novel question of law or policy.

notes that the evidentiary hearing was, in fact, further delayed, in order to hold the hearing remotely with virtual technology. *DP&L Quadrennial Review*, Entry (Sep. 3, 2020) at ¶ 12. With respect to whether the September 3, 2020 Entry in the *DP&L Quadrennial Review* represents a “past precedent” pursuant to Ohio Adm.Code 4901-1-15(B), the attorney examiner notes that the September 3, 2020 Entry was issued the day before the September 4, 2020 Entry in this proceeding.

{¶ 16} Moreover, the attorney examiner finds that the OCC and NOPEC have demonstrated no undue prejudice or expense resulting from the September 4, 2020 Entry in this proceeding. The procedural schedule was reasonable given the issues in this proceeding: the 2018 SEET, the 2019 SEET, and the FirstEnergy quadrennial review. The attorney examiner notes that the September 4, 2020 Entry set the hearing for four months after the issuance of the Entry. The parties were provided over 12 weeks for discovery, except for depositions where parties were provided nine weeks to conduct depositions after the deadline for the Companies to file supplemental testimony. OCC and NOPEC were offered over ten weeks to prepare and file testimony in the consolidated cases. OCC and NOPEC contend that the two-week period between the Companies’ deadline for filing supplemental testimony and intervenors’ deadline for filing testimony is unlawful because it is insufficient to conduct discovery on the Companies’ testimony; however, the September 3, 2020 Entry in the *DP&L Quadrennial Review*, relied upon by OCC and NOPEC as precedent, provides for the exact same two-week period between the filing of the electric distribution utility’s supplemental testimony and the intervenors’ testimony. *DP&L Quadrennial Review*, Entry (Sep. 3, 2020) at ¶ 12. Accordingly, the attorney examiner finds that the *Second Interlocutory Appeal* should not be certified to the Commission.

{¶ 17} Nonetheless, although neither interlocutory appeal will be certified to the Commission, the attorney examiner believes that, in light of the state of emergency, it is appropriate to provide additional time for the parties to prepare for the hearing and that no party will be prejudiced by rescheduling the hearing in this proceeding. Accordingly, the procedural schedule should be modified as follows:

- (a) The Companies should file testimony and supplemental testimony by March 1, 2021;
- (b) Intervenors should file testimony by March 15, 2021;
- (c) Discovery, except for notices of deposition, should be served by March 30, 2021;
- (d) The date for the evidentiary hearing will be set by subsequent entry (but will not be set to commence prior to May 3, 2021).

{¶ 18} 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.

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the request for certification to the Commission of the *First Interlocutory Appeal* and the *Second Interlocutory Appeal* be denied. It is, further,

{¶ 21} ORDERED, That the procedural schedule be modified as set forth in Paragraph 17. It is, further,

{¶ 22} 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

SJP/hac

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

Summary: Attorney Examiner Entry ordering that the request for certification to the Commission of the First Interlocutory Appeal and the Second Interlocutory Appeal be denied and ordering that the procedural schedule be modified as set forth in Paragraph 17 electronically filed by Heather A Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio