BEFORE
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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA MOTION TO COMPEL BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel's ("OCC") motion to compel ("Motion") is OCC's latest attempt to bypass the Commission's orderly audit process and to effectively launch a second, concurrent audit in this proceeding. Dissatisfied with the Commission's deliberate approach in this and other cases, OCC served dozens of premature discovery requests—which it now calls "investigatory questions"—upon Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"). But this is not OCC's "investigation" to direct as it sees fit. Rather, OCC, like all other parties, will have the opportunity to examine "any conclusions, results, or recommendations formulated by the auditor" after the audit report is filed.[1]

Indeed, this is consistent with the orderly approach the Attorney Examiner fashioned earlier in this very proceeding. That approach sets forth a common-sense method for conducting

[1] *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, Entry, ¶ 15 (Feb. 24, 2021).

discovery in audit cases: "[D]iscovery should occur *after* the filing of the audit report."[2] As the Attorney Examiner recognized, discovery does not always begin immediately after a proceeding is commenced, and the rule that discovery may begin after the filing of the audit report "provides consistency for discovery in [this] audit proceeding and future proceedings before the Commission."[3] That is to say, the Attorney Examiner's approach strikes a balance between the need for an efficient and orderly audit process and the rights to discovery afforded by R.C. 4903.082 and Ohio Adm. Code 4901-1-16(B).[4]

The rule also makes discovery itself more efficient. The touchstone limiting principle of discovery in Commission cases is that the discovery sought must be "relevant to the subject matter of the proceeding."[5] In audit cases, the boundaries of relevance are set by the audit report, which guides the parties' post-report exchange of information. Here, despite OCC's arguments to the contrary, the only audit report relevant to this case has not yet been filed. This matter was previously dismissed as moot before the final report came due last year,[6] and the mid-term audit report OCC points to concerned the Companies' application to extend the term of Rider DMR in a separate case that the Commission has also dismissed. Simply put, there are not yet any relevant "conclusions, results, or recommendations" for the parties to examine, which leaves the parties to speculate entirely about the proper scope of discovery at this point. Any discovery now is therefore premature and inefficient.

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[2] *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, Entry, ¶ 15 (Nov. 1, 2018) (denying OCC's motion to compel discovery as premature).
[3] *Id.*
[4] *Id.*
[5] Ohio Adm. Code § 4901-1-16(B).
[6] *See* Case No. 17-2474-EL-RDR, Entry (Feb. 24, 2020).

For these reasons and those further explained below, the Attorney Examiner should deny OCC's Motion.

II. ARGUMENT

A. OCC Is Not Entitled To Discovery Now.

The Attorney Examiner has already determined that discovery may not commence until after the final audit report is filed. Earlier in this proceeding, the Attorney Examiner considered, and rejected, many of the same arguments OCC raises here.[7] The Commission initiated this proceeding in 2017 to issue an RFP for a third-party monitor to review the use of Rider DMR revenues and file a report in any proceeding in which the Companies requested an extension of Rider DMR.[8] OCC intervened and served pre-report discovery requests on the Companies.[9] The Companies objected to OCC's discovery as premature, and OCC moved to compel.[10] OCC argued that the Commission's rules allow for broad discovery immediately after a proceeding is commenced.[11] But the Attorney Examiner was "not persuaded" by OCC's arguments "that discovery always begins immediately after a proceeding is commenced."[12] Instead, the Attorney Examiner reasoned that the rules do not provide all parties unlimited rights to, or extraordinary participation in, the audit process before a report is filed, and therefore, to ensure "consistency for discovery in [this] audit proceeding and future proceedings before the Commission," no discovery should occur before the final audit report is filed.[13]

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[7] *See* Entry at ¶¶ 10–13 (Nov. 1, 2018).
[8] *See* Entry, ¶ 4 (Dec. 13, 2017); Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing, ¶ 113 (Aug. 16, 2017) (The RFP should include "a mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR.").
[9] Entry at ¶ 10 (Nov. 1, 2018).
[10] *Id.* at ¶¶ 10–11.
[11] *Id.* at ¶ 10.
[12] *Id.* at ¶ 15.
[13] *Id.*

That decision comports with the Commission's discovery rules, which do not require discovery to begin at the outset of every matter. Rather, the rules contemplate that discovery is meant to move towards a "proceeding," "hearing," or some other process for admitting evidence. The rules aim "to encourage the prompt and expeditious use of *prehearing* discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings."[14] Similarly, Rule 4901-1-17 allows for prehearing discovery to begin "immediately after a *proceeding* is commenced" such that discovery "must be completed prior to the commencement of a *hearing*."[15] These rules anticipate at least two limiting principles on discovery. First, a hearing or some other opportunity to take evidence must be scheduled to occur. If there is no such opportunity, then it follows that there will be nothing to lead to the discovery of admissible evidence. Second, the discovery requests must be "relevant to the subject matter of the proceeding" such that the discovery sought is reasonably calculated to "lead to … admissible evidence."[16]

Neither of those two limiting principles exist here. At this time, work has yet to commence on the audit, and there are no procedural deadlines, no periods for submitting comments, and no dates for any hearing set. Given that the final audit report's findings and recommendations will frame the relevant issues for discovery, the parties do not and cannot know which issues will ultimately be relevant, leaving them to guess as to the scope of discovery. Put differently, OCC is only entitled to discovery that is relevant and reasonably calculated to lead to "admissible evidence," and if neither party knows what issues the final audit report will cover, then they could not possibly determine what evidence would be relevant to those issues.

[14] Ohio Adm. Code § 4901-1-16(A) (emphasis added).
[15] *Id.* at § 4901-1-17(A) (emphasis added).
[16] *Id.* at § 4901-1-16(B).

OCC's attempts to explain away the precedent set in this proceeding are unavailing. First, OCC claims the earlier ruling is "distinguishable." [17] Not so. The Attorney Examiner did not limit that ruling to any specific factual circumstances. Instead, the Attorney Examiner set out a general common-sense rule and explicitly stated it applied to this particular case and future audit cases.

OCC next argues that the prior mid-term audit is still relevant here, which also distinguishes the earlier ruling. OCC characterizes the audit the Commission ordered this past December as "supplemental" to the mid-term report, insinuating that it is meant to build on that report. [18] But the Commission never called this audit "supplemental." To the contrary, the Commission ordered a "full review" of Rider DMR as called for in the Companies' last ESP case. [19] Likewise, OCC claims the prior ruling is different because there, OCC directed its discovery to the audit report that had not been filed, but here OCC's discovery is meant to "follow[] up" on the mid-term audit report already filed. [20] That distinction is meaningless because the mid-term audit report is not relevant to this proceeding, given that there will be a new report based on the "full review" ordered by the Commission in December. Moreover, the purpose of the mid-term audit report was to inform the Commission's decision in "any proceeding in which the Companies seek an extension of Rider DMR." [21] This, of course, is not such a proceeding, and the Commission dismissed the previous Rider DMR extension case, Case No. 19-0361-EL-RDR, last year. [22] In any event, no final audit report was ever filed before the Commission dismissed this case in early

[17] *See* OCC's Mem. in Supp., p. 15.
[18] *Id.* at p. 14.
[19] Case No. 17-2474-EL-RDR, Entry, ¶ 25 (Dec. 30, 2020).

[20] *Id.* at pp. 15–16.
[21] Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing, ¶ 113 (Aug. 16, 2017).

[22] The Attorney Examiner's Entries in this case also make clear that the mid-term audit report was intended to guide the Commission's consideration in Case No. 19-0361-EL-RDR. *See, e.g.*, Case No. 17-2474-EL-RDR, Entry, ¶ 11 (May 30, 2019) (ordering that "Oxford file the mid-term report . . . in the docket for Case No. 19-361-EL-RDR").

2020, and the Commission never opened a comment period on the mid-term report here (or in Rider DMR extension case). So, even if the mid-term audit report were somehow relevant, OCC's requests would still be premature.

OCC also suggests the Commission should nevertheless distance itself from the Attorney Examiner's prior ruling in this "infamous PUCO case," citing the Ohio Supreme Court's reversal of the Commission's authorization of Rider DMR.[23] But the Supreme Court's ruling had nothing to do with the Commission's broad discretion to manage discovery or to conduct an orderly audit process. The Supreme Court's opinion provides no reason to discard the precedent set by the Attorney Examiner.

OCC next claims that Attorney Examiners have ruled in the past that parties may commence discovery prior to the issuance of an audit report.[24] But the cases OCC cites do not support its position. In fact, the Attorney Examiner in this proceeding used one of those cases as an example of why discovery should occur *after* the filing of the audit report.[25] In *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR, the Attorney Examiner stated that "clearly the commission[,] when it said ample discovery[,] was intending that there be discovery after the filing of the audit report."[26] In that particular case, because the audit report had been filed, the Attorney Examiner granted the

[23] *See* OCC's Mem. in Supp. at p. 15.
[24] *See id.* at p. 17 n.52.
[25] *See* Entry at ¶ 15 (Nov. 1, 2018) (citing *In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR (applying "the same reasoning" of that case in concluding that discovery should occur after the final audit report)).
[26] *See In the Matter of the 2015 Review of the Delivery Capital Recovery Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 15-1739-EL-RDR, Prehr'g Conference, p. 21 (Nov. 30, 2016).

motion to compel.[27] As for the other case on which OCC relies, the Commission had already initiated a procedure—a comment period—when it initiated the audit.[28] The Attorney Examiner even cited to the pending comment period as part of the reason for permitting discovery.[29] Thus, neither case supports OCC's right to discovery now.

Regardless, OCC has failed to show why it needs discovery "immediately." Speculating about FirstEnergy Corp.'s recent employment decisions, OCC argues that it may be unable to obtain information "from individuals no longer employed by FirstEnergy Corp."[30] But that does not justify OCC's expansive and premature requests. Indeed, OCC cites no authority supporting the idea that a company's hypothetical future employment decisions justify accelerating discovery. OCC also does not specify any relevant information that it may be unable to obtain at a later date—nor could it since the audit report has not been filed. And beyond all this, OCC is not faced with some indefinite delay to discovery. Once the audit report is filed, the parties "will have the opportunity to engage in ample discovery prior to the preparation of any responsive comments or other procedure deemed necessary by the Commission."[31]

B. The Companies Have Not Waived Any Objections To OCC's Premature Requests.

Finally, contrary to OCC's arguments, the Companies have not waived any objections by reserving them until the time at which discovery may begin in this matter.[32] For starters, the

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[27] *Id.*
[28] *See In the Matter of the Audit of Transportation Migration Rider – Part B of the East Ohio Gas Company*, Case No. 17-219-GA-EXR, Entry at ¶ 15 (Apr. 19, 2017).
[29] *See In the Matter of the Audit of Transportation Migration Rider – Part B of the East Ohio Gas Company*, Case No. 17-219-GA-EXR, Entry at ¶ 13 (Sept. 28, 2017).
[30] *See* OCC's Mem. in Supp. at p. 17.
[31] Entry at ¶ 15 (Nov. 1, 2018).
[32] OCC cites two cases and an American Bar Association article to argue that the Companies have waived other objections. (OCC's Mem. in Support at 13–14). But both cases and the article discuss their disapproval of *conditional* objections. Conditional objections "occur when a party asserts objections, but then provides a response 'subject to' or 'without waiving' the stated objections." *Meyer v. United States*, No. 16-2411-KGG, 2017 WL 735750, at *1 (D. Kan. Feb. 24, 2017) (quotation omitted); *see also* Flinn Block, LLC v. DESA, LLC, No. 08-6254-

Companies cannot waive objections to discovery requests that are unauthorized and premature. In addition, OCC's argument that the Companies have waived their objections further reinforces why the Attorney Examiner's approach that there is no discovery before the filing of an audit report makes sense. Requiring the Companies to immediately state all of their objections on relevance, overbreadth, and burden grounds would place the Companies in the impossible position of having to speculate about what the scope of this case will be when the audit report is issued. And this, in turn, would cause needless discovery disputes between the parties about information that currently is not, and may never be, relevant to this case.

This is why the approach the Attorney Examiner set forth earlier in this proceeding promotes efficiency. It reserves discovery until the time the audit report has set the issues for the parties' and the Commission's consideration. Because the final audit report has not yet been filed, all of OCC's requests are necessarily irrelevant and overbroad and any burden in responding to OCC's improper requests is necessarily undue.[33]

III. CONCLUSION

OCC misunderstands its role in this matter. OCC is not engaged—or entitled to engage—in an independent investigation of the Companies or their affiliates, and it may not usurp the role of the auditor. Rather, the Attorney Examiner has established an orderly process in this and other audit cases under which the audit is conducted, the report is filed, discovery commences, and then

TC, 2010 WL 11701126, at *5 (D. Or. June 25, 2010). The Companies did not conditionally object to OCC's responses and therefore the cases and American Bar Association article are inapposite.

[33] OCC's reliance on Rule 4901-1-19 is likewise misplaced. That rule requires a party to answer interrogatories "separately and fully, … unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer." The Companies did just that, objecting to each request because the requests were premature, which satisfied the rule. Because OCC's discovery is premature and unauthorized, the Companies reserved their right to raise other objections later, when the scope of discovery is known. The text of Rule 4901-1-19 does not forbid that.

parties have an opportunity to comment. OCC's discovery requests are unauthorized and premature. The Attorney Examiner should deny OCC's Motion.

Dated: March 26, 2021

Respectfully submitted,

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on March 26, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Ryan A. Doringo
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Summary: Memorandum Contra Office of the Ohio Consumers' Counsel's Motion to Compel electronically filed by Ryan A Doringo on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company