

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :  
Review of the Distribution :  
Modernization Rider of :  
Ohio Edison Company, : Case No. 17-2474-EL-RDR  
The Cleveland Electric :  
Illuminating Company, and :  
The Toledo Edison Company. :

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PREHEARING CONFERENCE

before Mr. Gregory Price, Ms. Megan Addison, and  
Ms. Jacky St. John, Attorney Examiners, at the Public  
Utilities Commission of Ohio, conducted via Webex,  
called at 10:04 a.m. on Thursday, April 8, 2021.

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APPEARANCES:

FirstEnergy Service Company  
By Mr. Brian J. Knipe  
76 South Main Street  
Akron, Ohio 44308

Jones Day  
By Mr. Michael R. Gladman  
325 John H. McConnell Boulevard, Suite 600  
Columbus, Ohio 43215

Jones Day  
By Mr. Ryan A. Doringo  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114

On behalf of Ohio Edison Company, The  
Cleveland Electric Illuminating Company,  
and The Toledo Edison Company.

Bruce J. Weston, Ohio Consumers' Counsel  
By Ms. Maureen R. Willis,  
Senior Counsel  
and Mr. John Finnigan,  
Assistant Consumers' Counsel  
65 East State Street, Suite 700  
Columbus, Ohio 43215

On behalf of the Residential Customers of  
Ohio Edison Company, The Cleveland  
Electric Illuminating Company, and The  
Toledo Edison Company.

Carpenter Lipps & Leland LLP  
By Ms. Kimberly W. Bojko  
and Mr. Thomas V. Donadio  
280 North High Street, Suite 1300  
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'  
Association Energy Group.

APPEARANCES: (Continued)

Kegler, Brown, Hill & Ritter Co., LPA  
By Mr. Robert Dove  
65 East State Street, Suite 1800  
Columbus, Ohio 43215

Ohio Partners for Affordable Energy  
By Mr. Dave Rinebolt,  
Executive Director  
P.O. Box 1793  
Findlay, Ohio 45840

On behalf of Ohio Partners for Affordable  
Energy.

McNees, Wallace & Nurick LLC  
By Ms. Rebekah Glover  
and Mr. Matthew R. Pritchard  
21 East State Street, 17th Floor  
Columbus, Ohio 43215

On behalf of the Industrial Energy Users  
of Ohio.

Environmental Law & Policy Center  
By Ms. Caroline Cox  
21 West Broad Street, Suite 800  
Columbus, Ohio 43215

On behalf of the Environmental Law &  
Policy Center.

Dave Yost, Ohio Attorney General  
Mr. John Jones, Section Chief  
By Mr. Werner L. Margard, III,  
Mr. Thomas G. Lindgren,  
and Ms. Kyle Kern  
Assistant Attorneys General  
Public Utilities Section  
30 East Broad Street, 16th Floor  
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

APPEARANCES: (Continued)

Dickinson Wright, PLLC  
By Ms. Madeline Fleisher  
150 East Gay Street, Suite 2400  
Columbus, Ohio 43215

On behalf of the Citizens' Utility Review  
Board of Ohio.

Boehm, Kurtz & Lowry  
By Mr. Kurt Boehm,  
Mr. Michael Kurtz,  
and Ms. Jody Kyler Cohn  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

On behalf of Ohio Energy Group.

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Thursday Morning Session,  
April 8, 2021.

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EXAMINER ST. JOHN: The Public Utilities Commission of Ohio calls for a prehearing conference at this time and place, Case No. 17-2474-EL-RDR, being In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Electrical -- The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

My name is Jacky St. John, and with me are Gregory Price and Megan Addison, and we are the Attorney Examiners assigned to preside over this prehearing conference.

Let's begin by taking appearances, starting with the Companies.

MR. KNIPE: Good morning, Your Honors. Appearing on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, I'm Brian Knipe, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308.

Also appearing with me on behalf of the Companies are -- from the law firm of Jones Day, are Michael Gladman, 325 John H. McConnell Boulevard,

Suite 600, Columbus, Ohio 43215; as well as Ryan Doringo, Northpoint, 901 Lakeside Avenue, Cleveland, Ohio 44114.

EXAMINER ST. JOHN: Thank you.

Next on my list I have Ohio Manufacturers' Association Energy Group.

MS. BOJKO: Thank you, Your Honor. On behalf of the Ohio Manufacturers' Association Energy Group, Kimberly W. Bojko and Thomas Donadio, with the law firm Carpenter Lipps & Leland, 280 North High Street, Suite 1300, Columbus, Ohio 43215.

EXAMINER ST. JOHN: Thank you.

Ohio Consumers' Counsel.

MS. WILLIS: Thank you, Your Honor. On behalf of the nearly 2 million customers of the FirstEnergy Utilities, the Ohio Consumers' Counsel, Bruce Weston, Consumers' Counsel, by Maureen Willis, Senior Counsel, and John Finnigan, Assistant Consumers' Counsel, 65 East State Street, Suite 700, Columbus, Ohio 43215. Thank you.

EXAMINER ST. JOHN: Thank you.

Natural Resources Defense Council.

MR. DOVE: Hello. This is Robert Dove of Kegler Brown Hill & Ritter, on behalf of the Natural Resources Defense Council, at 65 East State Street,

1 Suite 1800, Columbus, Ohio 43215.

2 EXAMINER ST. JOHN: Thank you.

3 And I also have Ohio Partners for  
4 Affordable Energy. Mr. Dove, I believe that you're  
5 representing them as well. Do you have anyone else  
6 with you today representing Ohio Partners for  
7 Affordable Energy?

8 MR. DOVE: Yes, Your Honor. I also have  
9 Dave Rinebolt, Executive Director of Ohio Partners  
10 for Affordable Energy, at P.O. Box 1793, Findlay,  
11 Ohio 45840.

12 EXAMINER ST. JOHN: Thank you.

13 Environmental Law and Policy Center.

14 MS. COX: Good morning, Your Honors.  
15 Appearing on behalf of the Environmental Law and  
16 Policy Center, Caroline Cox, 21 West Broad Street,  
17 Suite 800, Columbus, Ohio 43215.

18 EXAMINER ST. JOHN: Thank you.

19 Industrial Energy Users-Ohio.

20 MS. GLOVER: Thank you, Your Honor. On  
21 behalf of the Industrial Energy Users of Ohio,  
22 Rebekah Glover and Matthew Pritchard from the law  
23 firm of McNees, Wallace & Nurick, 21 East State  
24 Street, 17th Floor, Columbus, Ohio 43215.

25 EXAMINER ST. JOHN: Thank you.

1 Ohio Energy Group.

2 MR. BOEHM: Good morning, Your Honor. On  
3 behalf of the Ohio Energy Group, Kurt Boehm, Mike  
4 Kurtz, and Jody Kyler Cohn, with the law firm Boehm,  
5 Kurtz & Lowry, 36 East Seventh Street, Suite 1510,  
6 Cincinnati, Ohio 45202.

7 EXAMINER ST. JOHN: Thank you.

8 Citizens' Utility Board of Ohio.

9 MS. FLEISHER: Good morning, Your Honors.  
10 Madeline Fleisher on behalf of the Citizens' Utility  
11 Board of Ohio, with the law firm Dickinson Wright,  
12 150 East Gay Street, Suite 2400, Columbus, Ohio  
13 43215.

14 EXAMINER ST. JOHN: Thank you.

15 And last, I have the office of the Ohio  
16 Attorney General.

17 MR. LINDGREN: Good morning. On behalf  
18 of Ohio -- on behalf of the Staff of the Ohio  
19 Attorney General, Dave Yost, by Thomas Lindgren,  
20 Werner Margard, and Kyle Kern. The address is 30  
21 East Broad Street, 26th Floor, Columbus, Ohio 43215.

22 EXAMINER ST. JOHN: Thank you.

23 I believe that was everyone that I had on  
24 my list. Examiner Price, I will go ahead and turn it  
25 over to you.



1 Examiner Price, you're on mute.

2 EXAMINER PRICE: I am on mute no longer.

3 Before we begin, are there any  
4 preliminary matters that people would like to discuss  
5 and has come up since this was scheduled and we  
6 received the pleadings from all the parties?

7 No resolution of the issue, amicable or  
8 otherwise? No? Okay.

9 We have carefully reviewed all of the  
10 pleadings by the parties, but I think we'll go ahead  
11 and give counsel from each side a couple minutes just  
12 to give an overview or any points they'd like to  
13 stress that we maybe didn't properly consider when we  
14 reviewed the pleadings that were filed by the  
15 parties.

16 Ms. Willis, you can begin.

17 MS. WILLIS: Thank you, Your Honor. I'm  
18 not -- not really prepared for a statement given the  
19 last -- the prehearing conference in 2052 -- 1502,  
20 but I will take the opportunity to make a few  
21 comments.

22 I think there's about five issues that  
23 need to be covered this morning in the rulings. The  
24 first and primary issue we have is when should  
25 discovery rights begin in this reopened case. We

1 would note that there's no statute or rule that  
2 prohibits discovery; that the Commission rules  
3 prompt -- encourage prompt and expeditious use of  
4 discovery. We believe discovery should begin now.

5 We understand that with the new RFP  
6 issued for the auditor in this case, that a final  
7 audit report will not be filed before October 29th.  
8 That means that we're pushing things back quite a  
9 bit. If you recall, we filed a September 8th motion,  
10 asking for a number of these proceedings, so we're  
11 now, if we go by what FirstEnergy is insisting we  
12 should go by, we would not be permitted to have any  
13 discovery whatsoever until approximately a year after  
14 we filed a motion for this case and nearly nine or  
15 ten months after the Commission reopened this  
16 proceeding. So, of course, our position is that  
17 discovery rights begin when it -- when the proceeding  
18 commences and we should not have to wait until the  
19 issuance of an audit report.

20 EXAMINER PRICE: Ms. Willis, is there  
21 a -- is there a middle ground here? I mean, I have  
22 to admit I agree with FirstEnergy that having a  
23 motion to compel discovery before we've even selected  
24 an auditor seems an aggressive use of the discovery  
25 rules. So my question for you is -- and I understand

1 your position that, regardless of what happens, the  
 2 next steps after the filing of the audit report,  
 3 you'll need time to prepare for those next steps. My  
 4 guess is we're looking at a comment period, I think  
 5 that's the way we generally handle these audit  
 6 reports, and I can understand why you need -- you  
 7 want to begin discovery prior to the filing of the  
 8 audit report. My question is, is there a date that  
 9 works for you that's not immediate but would give you  
 10 adequate time to prepare for discovery, assuming  
 11 there will be a comment period after the filing of  
 12 the report?

13 I'm sorry. You're muted.

14 MS. WILLIS: Your Honor, I do appreciate  
 15 the thoughtfulness in trying to come to a resolution  
 16 of this and trying to set aside a date that we could  
 17 start discovery. I'm not sure that works with this  
 18 Company. My experience has been -- with these  
 19 Companies. My experience has been we have been  
 20 involved in discovery disputes for months on end  
 21 here, with no resolution in this case. We have --  
 22 the discovery went out in January. It is now --  
 23 we're now into April.

24 Every single discovery request, and this  
 25 is our first set of discovery in the reopening of the

1 case, was objected to. There were no answers  
2 provided. Zero. None. There were 20  
3 interrogatories, 5 requests for admission, and 18  
4 requests for production. It has been my -- it has  
5 been extremely time consuming. And so, can I say  
6 that I would choose to delay discovery for, you know,  
7 another three or four months? I don't think  
8 that's -- I don't think I can say that. It's just  
9 there's been a lack of cooperation. It just has not  
10 worked.

11 And I'm afraid that every step of the  
12 way, in order to get answers, we are going to have to  
13 be coming before the Commission. It's just turned  
14 into a very time-consuming process. So I can see ten  
15 months being eaten up with no discovery at all, and  
16 not being any further along, and not being ready and  
17 adequately prepared for preparing comments in the --  
18 in this case. So, unfortunately, I cannot agree to  
19 push the discovery off to four or five months down  
20 the road, given the lack of cooperation we've seen in  
21 discovery to date.

22 EXAMINER PRICE: Thank you.

23 If you could just briefly go over the  
24 other issues to make sure that we're all on the same  
25 page of what needs to be addressed today. I'm not

1       sure I had five. I may have combined a couple.

2               MS. WILLIS: The second issue is -- that  
3       we flagged that needs to be addressed is, is the  
4       initial audit relevant; that is, is the mid-term  
5       audit of Oxford relevant. The Company claims that  
6       it's not relevant. We believe that given the scope  
7       of this proceeding, which is looking at a full review  
8       of Rider DMR as contemplated by the ESP IV, would  
9       mean that that mid-term audit review is highly  
10      relevant to this proceeding.

11              Issue No. 3 is can a party reserve rights  
12      to make further objections, or does a failure to  
13      state specific objections at the time the discovery  
14      response is served, does that waive those objections.

15              We believe it's highly problematic to  
16      allow the Company to object and tell us that, "Well,  
17      we're not going to tell you what the reason for the  
18      objection is now, but we'll tell you at an  
19      appropriate time in the future." That's just not how  
20      we understand the Commission's rules to work.

21              The fourth issue is the definition of  
22      "this proceeding." This comes into play because the  
23      Company wants to define "this proceeding" as starting  
24      with the reopening of this proceeding and wants to  
25      address only discovery from December -- wants to

1 address these issues only from December 30th forward.  
 2 We believe that's a too-strict definition. The  
 3 proceeding was reopened. We don't think you can only  
 4 treat the reopening as the relevant part of this  
 5 proceeding.

6 EXAMINER PRICE: Ms. Willis, on that  
 7 topic, though, I guess I'm confused. What discovery  
 8 is outstanding from the period before December 30th,  
 9 2020?

10 MS. WILLIS: Well, Your Honor, it's not  
 11 that the discovery is outstanding; it's that we've  
 12 asked for, for instance, communications between the  
 13 auditor and the Staff and other parties related to  
 14 the Oxford mid-term audit report and --

15 EXAMINER PRICE: Ms. Willis, the Oxford  
 16 mid-term audit report is not in this proceeding, is  
 17 it? The Oxford mid-term was filed, if I recall  
 18 correctly, was filed in their DMR-E extension  
 19 proceeding; isn't that correct?

20 MS. WILLIS: That is not correct, Your  
 21 Honor.

22 EXAMINER PRICE: Oh, okay. There you go.

23 MS. WILLIS: It was never filed. That  
 24 was our point. The Company argued, oh, this is an  
 25 extension, it's all about the extension; since

1       there's no extension, it's not relevant.

2               Well, the Oxford report was never filed  
3       in the extension proceeding. It was filed in this  
4       proceeding, so I believe it's highly relevant.

5               In terms -- and I think, Your Honor, if I  
6       may continue on the fifth matter that I have as to  
7       something that needs to be addressed is what is the  
8       duty of a party related to seeking a motion for  
9       protection. We believe that the Company's position  
10      was we're going to be the judge and jury here, we  
11      believe this discovery is inappropriate but we're  
12      going to make OCC come forward with a motion to  
13      compel, we're not going to go and -- we are not going  
14      to -- we are not obliged to seek a motion for  
15      protection from this discovery. And I think that is  
16      sort of related too. It is a question that we would  
17      like responded to and like the Commission to address  
18      here.

19              And I think that concludes the five  
20      issues that we see that need rulings for purposes of  
21      going forward and moving forward in this proceeding.  
22      Thank you.

23              EXAMINER PRICE: Thank you.

24              Mr. Gladman, care to respond? And also  
25      if you don't agree with those are all the five issues

1 or there are additional issues, please feel free to  
2 let us know

3 MR. GLADMAN: Your Honor, I am happy to  
4 defer to my colleague, Mr. Doringo, this morning.  
5 I'm going to let him have the microphone.

6 EXAMINER PRICE: Thank you.

7 Mr. Doringo.

8 MR. DORINGO: Good morning, Your Honor.  
9 Thank you. I'll take those issues in turn.

10 The -- you asked your question of OCC by  
11 initially asking if there was some middle ground that  
12 we could find here, and I think that the November  
13 2018 Entry in this proceeding found that middle  
14 ground. You know, I think it struck a balance  
15 between the Commission and the auditor having the  
16 leeway to fashion the audit process as it sees fit,  
17 without sort of this competing audit process being  
18 conducted by other parties to the proceeding as OCC  
19 seems to want to do and -- but it also respected the  
20 ample rights of discovery that are afforded to  
21 parties under Ohio statute.

22 It's just that the discovery comes after  
23 the report is filed and at a time when the report has  
24 framed the relevant issues for the parties'  
25 consideration, and framed the relevant scope of



1 discovery which I think leads to a more efficient  
2 process for everyone. And -- and --

3 EXAMINER PRICE: Now, can I ask you a  
4 question, Mr. Doringo? I mean, the scope of the case  
5 was set by the Commission when we reopened the case,  
6 and there is a RFP that's been issued twice that has  
7 a detailed work -- scope of work from the audit. Why  
8 is that not sufficient, in your mind, to define the  
9 scope of this case? Why do we need to wait for the  
10 report?

11 MR. DORINGO: So I think -- I think what  
12 the Commission's Entry reopening this case and  
13 issuing the RFP allow for is that parties can analyze  
14 the conclusions, results, or recommendations of the  
15 auditor as stated in that report and that's where the  
16 ample rights to discovery kick in.

17 So I believe that while generally, of  
18 course, this case relates to, you know, the full  
19 review of Rider DMR as directed in the ESP IV, that  
20 the scope of discovery really relates to the finding  
21 and conclusions in the report and that's what's going  
22 to inform the Commission's decision on, you know, in  
23 this case or whatever next steps are to be had in  
24 this case, whether it's a comment period or  
25 proceeding or a hearing, rather, and that the, you

1 know, the opportunity for the parties to comment on  
 2 that is what's going to sort of inform whether there  
 3 might be a hearing or not, and so I think that's the  
 4 scope of discovery in this case. And I think that's  
 5 consistent with the prior ruling in this case and --  
 6 and in the case Your Honor relied upon in that  
 7 November 2018 ruling with the Rider DCR proceeding by  
 8 sort of deferring discovery until -- until the report  
 9 is filed. I think this leads to a more efficient  
 10 process where we know what the issues in play for the  
 11 Commission's consideration are.

12 And in terms of the -- going to this  
 13 initial-Oxford-audit-report point that OCC has  
 14 raised. We do not believe that it is currently  
 15 relevant to this proceeding or that it was ever  
 16 relevant to this proceeding. That report, there's no  
 17 comment period on that report. That report is moot  
 18 now with the termination or I guess the denial of the  
 19 Companies' application to extend Rider DMR and the  
 20 dismissal of that separate case as moot. There's  
 21 going to be, of course, a new audit here, and I don't  
 22 know who it's going to be by, and I guess nobody  
 23 does, but there will be a new audit here that will  
 24 sort of guide our discussions and the Commission's  
 25 consideration.

1           And, Your Honor, OCC is correct that that  
2     report was filed in this proceeding, I think maybe in  
3     error. There are a number of entries on this docket  
4     ordering the filing of that mid-term audit report in  
5     the separate extension case and it just wasn't, for  
6     reasons I don't know. But in any event --

7           EXAMINER PRICE: Mistakes happen, right?  
8     I mean, there is a March 21, 2019 Order saying file  
9     it in the extension case. Mistakes -- you know,  
10    mistakes happen. That should not govern -- if an  
11    error was made by the Staff, that shouldn't govern  
12    our handling of this case, should it?

13          MR. DORINGO: No, I agree. We're not  
14    going to -- I agree mistakes happen. And I'm not  
15    saying that's the only reason why that report isn't  
16    relevant but I do think, under the Eighth Entry on  
17    Rehearing in ESP IV, it is clear, if you look at  
18    paragraph 113 of that Entry, that the mid-term audit  
19    report was intended to inform the extension of Rider  
20    DMR which was addressed in a separate proceeding  
21    until that case was dismissed as moot.

22          On the -- on the issue of whether -- I  
23    guess Maureen's third issue, can a party reserve  
24    rights to assert objections. I think we're maybe  
25    talking past each other a little bit here. Our

1 position was not that we do not have to enter  
 2 discovery until we see fit as OCC suggests. You  
 3 know, our position was based on what we believe is a  
 4 very clear ruling earlier in this very docket that,  
 5 in audit cases, discovery does not begin until the  
 6 report is filed. And that ruling makes a lot of  
 7 sense because at the time the report is filed is when  
 8 we know what the issues are going to be. And trying  
 9 to object on relevance and burden grounds before the  
 10 filing of that report, places us in a position where  
 11 we're sort of having to speculate about which  
 12 objections we may or may not need ultimately in this  
 13 case and which issues may or may not be relevant  
 14 ultimately in this case

15 EXAMINER PRICE: But how do I stop you  
 16 from opening Pandora's box with this action,  
 17 Mr. Doringo? What's to stop FirstEnergy or another  
 18 utility or, frankly, Consumers' Counsel from starting  
 19 to austere put out their objections?

20 You know, first they say, "Objections on  
 21 relevance. We reserve our right to make other  
 22 objections later." Then we rule on relevance. And  
 23 then they come back and say, "Well, now we're going  
 24 to say it's oppressive and burdensome." So then we  
 25 rule on that. And then they come back and say,

1 "Well, now it's privileged."

2 I mean, this is not a process that would  
3 keep the Examiners -- I mean, the spirit of our rule  
4 is to have as little Examiner involvement as  
5 possible. By reserving the right to make certain  
6 objections later, you're simply putting the onus on  
7 the other party and, again, what's good for the goose  
8 is good for the gander in this case. You're putting  
9 the onus on the other party to perhaps have to file  
10 multiple motions to compel and requiring the  
11 Examiners to rule on multiple motions to compel.

12 I believe that -- so how can I prevent --  
13 if I rule in your favor on this issue, how do I  
14 prevent this from becoming some sweeping opportunity  
15 to delay discovery that's taken advantage of in  
16 multiple cases?

17 MR. DORINGO: So I think this goes back  
18 to what we see is the rules set in the November 2018  
19 Entry. I agree with you, Your Honor, that sort of  
20 this iterative process of raising objections and then  
21 raising new ones is not a workable solution for any  
22 Commission proceeding, but what I think we have here  
23 is a rule that we believe was very clear that the  
24 report triggers the start of discovery. And so, in  
25 this case, you know, in our reading of that ruling,

1 we believe that discovery is not authorized yet.

2 I don't think there's a great danger of,  
3 well, if we stick to that ruling and that's the rule  
4 in cases going forward and parties know that, we will  
5 understand when discovery begins, and we will not run  
6 this risk of having sort of these iterative  
7 objections. And that's not what we're trying to do  
8 here. We're just trying to reserve discovery for at  
9 a time when we think the Commission has ordered it to  
10 be appropriate.

11 EXAMINER PRICE: Well, and that raised  
12 the next point that Ms. Willis raised, and I tend to  
13 agree with her, which is, if that is the case, why  
14 didn't you file for a motion for protective order?  
15 You know, there's similar cases that the parties have  
16 cited. I believe three out of the four cases  
17 questioned whether discovery was appropriate to  
18 begin, were rulings on motions for protective order  
19 or motions to stay discovery rather than a motion to  
20 compel, which I believe only one of the four cases,  
21 correct me if I'm wrong, involved an actual motion to  
22 compel. The others involved a party who did not want  
23 to begin discovery coming forward and taking --  
24 taking the burden and filing the motion.

25 MR. DORINGO: Again, on this point, Your

1 Honor, I think the feeling was we had a ruling in  
2 this docket that set a clear rule for this case and  
3 in audit cases in general that OCC was well aware of.  
4 You know, they litigated that with us back in 2018.  
5 So, you know, we felt and still feel that responding  
6 in the fashion that we did was proper and that we get  
7 to essentially the same place.

8 EXAMINER PRICE: Thank you.

9 MR. DORINGO: And then I think that -- I  
10 think those are the five issues that OCC identified.  
11 I wanted to raise one last one. OCC's briefing  
12 suggested sanctions. I think maybe they're dropping  
13 that request. I didn't hear OCC discuss it today.  
14 But I just wanted to point out that the sanctions  
15 they refer to were for failing to comply with an  
16 order on a motion to compel, not objections to  
17 discovery, so I think any sanctions request would be  
18 entirely improper here.

19 EXAMINER PRICE: I just have one question  
20 for you, and that is: Is this the only set of  
21 discovery that's been filed so far in this case since  
22 December 30th?

23 MR. DORINGO: Yes, I believe, Your Honor,  
24 in this case -- I'm sorry. We've got a lot of  
25 discovery. I'm just thinking. I believe this is the

1 only set of discovery that we have in this case.  
 2 That might not be true in the corporate separation  
 3 case but it is in this one.

4 EXAMINER PRICE: Thank you.

5 Okay. At this time we're going to go  
 6 ahead and grant the motion to compel discovery.

7 I'm uncomfortable with how early the  
 8 Consumers' Counsel is beginning discovery in this  
 9 case given that we've not even hired an auditor and  
 10 it looks like discovery requests may have gone out  
 11 before we even had an RFP for an auditor. I do  
 12 believe that this is a very aggressive use of the  
 13 discovery rules. However, I think FirstEnergy's  
 14 alternative, "wait until the audit report," is far  
 15 too long a delay in this case.

16 The order in this case that we discussed  
 17 previously was clearly limited to the facts of the  
 18 nature of the DMR, that it would not be filed until  
 19 two contingencies occurred. Well, one of them has  
 20 occurred, the DMR has now been terminated; and, two,  
 21 the Commission explicitly reopened this case in order  
 22 to do the DMR audit.

23 Likewise, the DCR case is a case where,  
 24 when the rider was set up in the original  
 25 stipulation, the parties to the stipulation agreed to



1 two sets of rights: rights for the signatory parties  
2 and rights for the non-signatory parties. The ruling  
3 in the DCR case was simply attempting to implement  
4 that stipulation which the Commission had approved.

5 I would prefer that there be a middle  
6 ground but I think that's something the Commission  
7 needs to take up on a generic basis in these cases  
8 and not do on a case-by-case basis at this point in  
9 time. So we will grant OCC's motion to compel.

10 With respect to OCC's argument that the  
11 Companies have waived their relevance, burdensome,  
12 and other objections. Again, I think this was a very  
13 aggressive use by the Company -- attempted use by the  
14 Company of the discovery rules to separate out their  
15 objections, and I think it would cause many, many  
16 difficulties in future cases. If nothing else,  
17 people will attempt to follow this and force the  
18 Examiners and the other parties to distinguish those  
19 future cases from this case, so I'd rather not even  
20 set a precedent in this case along those lines.

21 I do believe OCC's remedy, that you've  
22 waived these objections, is too harsh. But, on the  
23 other hand, I don't think we should force them to  
24 file a motion to compel either.

25 If you have relevance objections, if you

1 have burdensome objections, if you have privilege  
2 objections, the onus will be on the Companies to file  
3 a motion for protective order on those objections.  
4 With respect to this discovery set first, the  
5 discovery set, the motion to compel is related to  
6 only in this proceeding and that way we're not  
7 forcing OCC to file multiple motions to compel which  
8 I think would be unfair. At the same time, you'll  
9 have an opportunity to vindicate your rights in case  
10 you have objections.

11 With respect to the relevance of the  
12 mid-term audit report. Clearly that was erroneously  
13 filed in this case. The Examiners, myself actually,  
14 clearly indicated it should be filed in a separate  
15 case. The purpose of the mid-term report was solely  
16 related to that separate case. It was related to  
17 whether or not the DMR should be extended. The DMR  
18 was overturned and there was no extension.

19 I'm not saying it's not irrelevant. I'm  
20 simply saying it's not in the record in this case and  
21 so it's not part of this proceeding. I do not know  
22 if Staff will offer that report in the future.  
23 That's a decision the Staff will have to make. At  
24 this point it's not in this proceeding and we have  
25 not taken administrative notice of it.

1 MR. DORINGO: Your Honor, can I request a  
2 little bit of clarification on that report in terms  
3 of the discovery that's before us right now?

4 EXAMINER PRICE: If you have -- if you  
5 have relevance objections, then you'll need to file a  
6 motion for protective order to -- to get a ruling on  
7 those relevance objections. I'm simply saying the  
8 fact that it's been filed in this case was an error,  
9 it happens, but we're not going to allow that to  
10 govern what should have happened, so we're not going  
11 to consider that to be part of this case at this  
12 time. It's a report that has been or should have  
13 been filed in the other case and it's not clear at  
14 this time if Staff is going to offer that report at  
15 all.

16 MR. DORINGO: Understood. Thank you.

17 EXAMINER PRICE: Now, having said that,  
18 of course the rule is reasonably calculated to lead  
19 to admissible material, so it is a fairly low bar to  
20 discovery on an issue.

21 And finally, and I think this is just a  
22 general issue, I am concerned about the aggressive  
23 use of discovery. If, at some point, it does become  
24 unduly burdensome in this case, we would consider a  
25 pause to allow FirstEnergy to catch up if discovery

1 begins to stack one upon each other.

2 We do have plenty of time. The audit  
3 report is not due, as Ms. Willis pointed out, until  
4 the end of October. I expect we'll have comments,  
5 I'm not guaranteeing it, but I expect that we'll have  
6 a comment period after that. So there's plenty of  
7 time. There's no need to be unfair to each other as  
8 discovery does go both ways. There's no need to be  
9 unfair to each other given the amount of time that we  
10 have on this case.

11 I believe FirstEnergy should be able to  
12 respond to the discovery and the motion to compel in  
13 two weeks. If that is not sufficient, you can  
14 request an extension.

15 Anything we have not covered?

16 MS. WILLIS: Your Honor --

17 MR. DOVE: Your Honor -- sorry. Go  
18 ahead, Maureen.

19 MS. WILLIS: Thank you.

20 Your Honor, with respect to the  
21 definition of "this proceeding," I'm not sure that I  
22 understand that there was a ruling on that.

23 EXAMINER PRICE: Well, I think the ruling  
24 was that the mid-term audit report is not a part of  
25 this proceeding, and I don't know what else is --

1     what else is pending. There's no discovery pending.  
2     We ruled -- we granted the motion -- denied the  
3     motion to compel that was filed in the previous phase  
4     of this proceeding. I -- I just don't know what  
5     more -- what issues there are out there since the  
6     mid-term audit report is not to be considered part of  
7     the proceeding. But, as you explained, I'm happy to  
8     clarify.

9                 MS. WILLIS: Well, Your Honor, if we take  
10    a look at Request for Production of Document No. 2-1,  
11    for instance, we asked for copies of documents  
12    provided by FirstEnergy to Oxford regarding the  
13    compliance review of the DMR. That's a for instance.

14                And then following through, 2-2 through  
15    2-29, similar questions on communications between  
16    Oxford and the Companies related to this proceeding.  
17    Again, the use of "this proceeding." Also documents  
18    and work papers exchanged. Those are all document  
19    requests that use the term "this proceeding,"  
20    "discovery engaged during this proceeding." Quite a  
21    few again. RPD-2 -- 2-1 through 2-9 and 2-11 all  
22    have that woven in.

23                EXAMINER PRICE: And I think they all  
24    suffer from the same fatal flaw of the mid-term audit  
25    report was not meant to be filed in this proceeding

1 as the Examiners made clear in 2019 and we're  
2 reinforcing today. I'm not saying that you can't get  
3 those. I just think that your discovery response is  
4 not properly worded because, as you said, you're  
5 relying on "this proceeding," and nothing to do with  
6 the mid-term audit report is properly a part of this  
7 proceeding.

8 MS. WILLIS: Your Honor, I will try to  
9 digest it. I think we probably will -- I think we do  
10 not see the audit report as -- we do not construe it  
11 as being only related to the extension. I think --  
12 and we need -- you know, briefly, other than to say  
13 we disagree with that ruling, if you look at the  
14 Commission's Order setting up this audit, it was  
15 clear that the audit was supposed to be a periodic  
16 audit, it was a realtime audit, there was to be  
17 monitoring, there was to be reviews, there were to be  
18 reports. This was all --

19 EXAMINER PRICE: All of those were done.  
20 My only qualm is the way you're -- you're relying on  
21 the phrase "in this proceeding" with respect to every  
22 one of the discovery requests you mentioned. My  
23 qualm is it's not properly worded because it's not in  
24 this proceeding. I'm not saying you can't reword it  
25 and ask for everything that was provided in 19-361.

1 That's where -- you know, that's the proper  
2 reference. And at that point, the Company can make a  
3 decision how they care to respond. And if there's a  
4 dispute, then I'm sure it will come before us.

5 MS. WILLIS: Thank you for the  
6 clarification, Your Honor.

7 EXAMINER PRICE: Somebody else had an  
8 issue?

9 MR. DOVE: Your Honor, yes, sir. This is  
10 Robert. I had a quick issue that just arose. I  
11 thought maybe I should address it with you, before we  
12 were potentially off the record, to determine how you  
13 would like me to rectify it.

14 EXAMINER PRICE: Let's make sure we've  
15 got the other topic -- are there any other questions  
16 on the motion to compel?

17 MR. DORINGO: Just, Your Honor, whether  
18 there will be an order, or is this our order that  
19 we're getting right now?

20 EXAMINER PRICE: This is the order.  
21 There will not be -- we will not be memorializing  
22 this further in writing.

23 Mr. Dove.

24 MR. DOVE: Yes, sir. I apologize. At  
25 the outset of this, when the Attorney Examiner

1 requested who was representing NRDC, I was caught off  
2 guard because I didn't think NRDC was a party to this  
3 case, but I didn't want to correct the Attorney  
4 Examiner. Since then, I have confirmed they are not  
5 a party to this case. They are a party to all the  
6 other three FirstEnergy investigations. So I don't  
7 know if you would like me to retract that appearance.  
8 I didn't want to muddy the record.

9 EXAMINER PRICE: I think we've clarified  
10 the record. I think it's clear now that NRDC is not  
11 in this case and that you are not representing NRDC  
12 in this case as opposed to the other three cases that  
13 we're all in together.

14 MR. DOVE: Thank you, Your Honor.

15 EXAMINER PRICE: With that, I will note  
16 that we have, I believe, scheduled for three weeks  
17 from now, another discovery conference in a different  
18 proceeding. I hope the parties take seriously the  
19 rulings in this case as to how we are likely to  
20 proceed, but we will keep that on the schedule in  
21 case it's necessary.

22 Anything further for the Bench?

23 Thank you all. We're adjourned. We are  
24 off the record.

25 (The proceedings concluded at 10:42 a.m.)



CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Thursday, April 8, 2021, and carefully compared with my original stenographic notes.

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Carolyn M. Burke, Registered  
Professional Reporter, and  
Notary Public in and for the  
State of Ohio.

My commission expires July 17, 2023.

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

Summary: Transcript 94641 cmb FirstEnergy DMR, (Page 1:3 to 1:6)  
April 8, 2021

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. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn