

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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1 APPEARANCES:

2 FirstEnergy Service Company
 3 By Mr. Brian J. Knipe
 4 76 South Main Street
 5 Akron, Ohio 44308

6 Jones Day
 7 By Mr. Michael R. Gladman
 8 325 John H. McConnell Boulevard, Suite 600
 9 Columbus, Ohio 43215

10 Jones Day
 11 By Mr. Ryan A. Doringo
 12 North Point
 13 901 Lakeside Avenue
 14 Cleveland, Ohio 44114

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

18 Bruce J. Weston, Ohio Consumers' Counsel
 19 By Ms. Maureen R. Willis,
 20 Senior Counsel
 21 and Mr. John Finnigan,
 22 Assistant Consumers' Counsel
 23 65 East State Street, Suite 700
 24 Columbus, Ohio 43215

25 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.

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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.

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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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1 Thursday Morning Session,
 2 April 8, 2021.

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

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

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

17 MR. KNIPE: Good morning, Your Honors.
 18 Appearing on behalf of Ohio Edison Company, The
 19 Cleveland Electric Illuminating Company, and The
 20 Toledo Edison Company, I'm Brian Knipe, FirstEnergy
 21 Service Company, 76 South Main Street, Akron, Ohio
 22 44308.

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

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

4 EXAMINER ST. JOHN: Thank you.

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

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

12 EXAMINER ST. JOHN: Thank you.

13 Ohio Consumers' Counsel.

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

21 EXAMINER ST. JOHN: Thank you.

22 Natural Resources Defense Council.

23 MR. DOVE: Hello. This is Robert Dove of
24 Kegler Brown Hill & Ritter, on behalf of the Natural
25 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 austerely 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.)

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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.

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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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