

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE  
POLITICAL AND CHARITABLE SPENDING  
BY OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 20-1502-EL-UNC

### ENTRY

Entered in the Journal on May 13, 2021

{¶ 1} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the FirstEnergy Utilities or the Companies) are electric distribution utilities, as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4905.06 states, in relevant part, that the Commission has general supervision over all public utilities within its jurisdiction as defined in R.C. 4905.05, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the Commission, franchises, and charter requirements.

{¶ 3} R.C. 4905.05 states, in relevant part, that the jurisdiction, supervision, powers, and duties of the Commission extend to every public utility, the plant or property of which lies wholly within this state and when the property of a public utility lies partly within and partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities; and to the records and accounts of the business thereof done within this state.

{¶ 4} The Commission opened this proceeding on September 15, 2020, to review the political and charitable spending by the FirstEnergy Utilities in support of Am. Sub. H.B.6 and the subsequent referendum effort. Also on September 15, 2020, the attorney examiner

directed the Companies to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of the Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state. Further, the attorney examiner directed interested parties to file comments regarding the Companies' response by October 29, 2020, and to file reply comments by November 13, 2020.

{¶ 5} On September 21, 2020, the Ohio Consumers' Counsel (OCC) filed an interlocutory appeal and request for certification to the Commission (*First Interlocutory Appeal*) regarding the attorney examiner's September 15, 2020 Entry. The Companies filed a memorandum contra the interlocutory appeal and request for certification to the Commission on September 28, 2020.

{¶ 6} The Companies timely filed their response to the show cause order on September 30, 2020. As part of the response, the Companies included an affidavit of Santino L. Fanelli.

{¶ 7} On October 9, 2020, OCC filed a notice to take deposition and request for production of documents, seeking to depose Mr. Fanelli on October 22, 2020. On October 16, 2020, the Companies filed a motion for protective order to preclude the deposition of Mr. Fanelli. Subsequently, on October 20, 2020, the attorney examiner vacated the deadlines for filing comments and reply comments regarding the Companies response to the show cause order and directed that a prehearing conference be held after the filing of memoranda contra the motion for protective order and replies to any memoranda contra. Entry (Oct. 20, 2020) at ¶ 8, 11. Memoranda contra the motion for protective order were timely filed on November 2, 2020, by: Ohio Manufacturers' Association Energy Group; Ohio Partners for Affordable Energy; Ohio Consumers' Counsel (OCC); and Environmental Law and Policy Center, Natural Resources Defense Council, and Ohio Environmental Council. The Companies filed a reply to the memoranda contra on November 9, 2020. The prehearing

conference was held January 7, 2021. At the prehearing conference, the attorney examiners ruled that the motion for protective order should be denied (Tr. Jan. 7, 2021 at 11, 34-36).

{¶ 8} Further, on November 17, 2020, OCC filed a motion to compel discovery on November 6, 2020, and a revised motion to compel discovery on November 10, 2020. The Companies filed a memorandum contra the motion to compel discovery on November 17, 2020. On December 10, 2020, the attorney examiner directed the parties to reengage discussions to resolve the discovery dispute. On December 15, 2020, OCC filed an interlocutory appeal and request for certification to the Commission (*Second Interlocutory Appeal*). FirstEnergy filed a memorandum contra the interlocutory appeal on December 21, 2021. A prehearing conference was held on March 25, 2021, at which the attorney examiners granted, in part, and denied, in part, the motion to compel filed by OCC (Tr. Mar. 25, 2021 at 9-41, 51).

{¶ 9} At the March 25, 2021 prehearing conference, the attorney examiners also advised the parties that the comment periods to respond to the Companies' September 30, 2020 response to the show cause order would be re-established by subsequent entry, with initial comments likely to be due 30 days after FirstEnergy's deadline to serve discovery responses pursuant to the rulings on the motion to compel and with reply comments to be due 15 days after the filing of initial comments (Tr. Mar. 25, 2021 at 53-55). Subsequently, on April 22, 2021, the attorney examiner directed parties to file initial comments by May 21, 2021, and reply comments by June 4, 2021. Entry (Apr. 22, 2021) at ¶¶ 8, 12. On April 27, 2021, OCC filed an interlocutory appeal and request for certification to the Commission regarding the April 22, 2021 Entry (*Third Interlocutory Appeal*). On May 3, 2021, the Companies filed a memorandum contra the interlocutory appeal.

{¶ 10} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner

pursuant to paragraph (B) of the rule. The rulings which are the subject of the interlocutory appeals are not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeals should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

{¶ 11} Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements need to be met.

***A. The Second Interlocutory Appeal Should Not Be Certified to the Commission.***

{¶ 12} In support of the *Second Interlocutory Appeal*, OCC claims that the interlocutory appeal presents a new and novel question of law and policy and departs from past precedent. OCC claims that the ruling raises a new and novel question of law and policy: whether an attorney examiner can find that parties have not made a good faith effort to resolve their discovery dispute when the parties agree, after a single conversation, that they are at an impasse. OCC distinguishes *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 11-5201-EL-RDR, Entry (Oct. 11, 2012) (*FirstEnergy AER Case*) which was cited in the December 10, 2020 Entry, because in that case, the Companies, rather than the attorney examiner, claimed that OCC did not adequately attempt to resolve the discovery dispute. Thus, the December 10, 2020 Entry presents a new or novel question of law: whether the attorney examiner may make an independent determination of whether good faith efforts to resolve the dispute have been exhausted or whether the attorney examiner is bound by the representations of the parties. Finally, OCC contends that an immediate determination is needed to prevent the likelihood of undue prejudice to OCC because OCC “greatly needs” information from FirstEnergy and, for months, the Companies have blocked access to that information.

{¶ 13} The Companies respond that the *Second Interlocutory Appeal* should not be certified to the Commission. As a preliminary matter, the Companies argue that OCC's interlocutory appeal fails because the attorney examiner did not issue a "ruling" on the motion to compel. The Companies note that an interlocutory appeal may be taken from a "ruling" issued under Ohio Adm.Code 4901-1-14, and the Companies quote the December 10, 2020 Entry in which the attorney examiner states that the examiner "will defer ruling on the motion at this time." Entry (Dec. 10, 2002) at ¶ 12. FirstEnergy argues that, for this reason alone, the *Second Interlocutory Appeal* should be rejected, citing *In re Ohio Power Co.*, Case Nos. 14-1693-EL-RDR et al., Opinion and Order (Mar. 31, 2016) at 11 (denying interlocutory appeal taken from "constructive denial" of a motion because there was no ruling under Ohio Adm.Code 4901-1-14).

{¶ 14} Further, FirstEnergy contends that the Entry does not present a new or novel question of law or policy. The Companies claim that the attorney examiner's directive in the December 10, 2020 Entry was nothing more than the ordinary exercise of an attorney examiner's discretion under the Commission's procedural rules. The Companies argue that settled Commission precedent demonstrates that procedural rulings, including those addressing discovery disputes, do not form the basis for certifying an interlocutory appeal. *In re Vectren Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Mar. 7, 2007) at 6 (denying certification of interlocutory appeal and recognizing that motions to compel discovery and motions for protective order are routine matters with which the Commission and its examiners have had long experience in Commission proceedings).

{¶ 15} The Companies also argue that the December 10, 2020 Entry did not depart from Commission precedent. FirstEnergy claims that the *FirstEnergy AER Case* should not be distinguished solely because, in the *FirstEnergy AER Case*, the parties had not agreed that they were at an impasse and, in the instant case, the parties have agreed according to OCC. The Companies point out that nothing in Ohio Adm.Code 4901-1-23(C) requires the attorney examiner to defer to the movant on whether an impasse truly exists; instead, the Companies argues that this is a matter left to the attorney examiners' discretion.

{¶ 16} The Companies also allege that OCC cannot show that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense. The Companies posit that, because OCC's motion to compel had not been decided, OCC cannot show any deprivation of a supposed right to discovery. Instead, according to the Companies, the December 10, 2020 Entry made a modest request of OCC and the Companies to engage in further discussion and provide an update on the status of those discussions.

{¶ 17} The attorney examiner finds that the *Second Interlocutory Appeal* is moot. In the *Second Interlocutory Appeal*, OCC's seeks reversal of the Entry issued on December 10, 2020, in which the attorney examiner directed OCC and the Companies to reengage in discussions to resolve the discovery dispute and to file letters providing a status report on those discussions. Notwithstanding the interlocutory appeal, OCC and the Companies each filed a letter in the docket on December 30, 2020, reporting that the parties had reengaged in discussions, as directed by the attorney examiner, and that discussions were continuing. At the January 7, 2021 prehearing conference, the parties reported that no resolution had been reached (Tr. Jan. 7, 2021 at 17-21). Subsequently, at a prehearing conference held on March 25, 2021, the attorney examiners granted, in part, and denied, in part, the motion to compel discovery (Tr. Mar. 25, 2021 at 9-41, 51). With the ruling by the attorney examiners on the motion to compel, the *Second Interlocutory Appeal*, which alleged that the attorney examiner erred in the December 10, 2020 Entry by failing to grant the motion to compel, became moot.

{¶ 18} However, the attorney examiner notes that, even if the *Second Interlocutory Appeal* was not moot, the *Second Interlocutory Appeal* should be rejected as improper. As pointed out by the Companies, the *Second Interlocutory Appeal* was not taken from a "ruling" by the attorney examiner issued under Ohio Adm.Code 4901-1-14. In the *Second Interlocutory Appeal*, OCC claims that the attorney examiner erred in the December 10, 2020 Entry, by failing to grant the motion to compel. However, the attorney examiner did not rule on the motion to compel in the December 10, 2020 Entry; the attorney examiner determined that the motion to compel was premature because the single conversation

between the parties (regarding the OCC's first and second sets of discovery) to resolve the discovery dispute did not satisfy the good faith effort required prior to filing a motion to compel by Ohio Adm.Code 4901-1-23. Accordingly, the attorney examiner expressly deferred ruling on the motion to compel. Entry (Dec. 10, 2020) at ¶ 12. Therefore, because it was not filed in response to a "ruling" by the attorney examiner, the *Second Interlocutory Appeal* is improper and should be denied on that basis. *Ohio Power*, Opinion and Order (Mar. 31, 2016) at 11.

**B. *The Third Interlocutory Appeal Should Not Be Certified to the Commission.***

{¶ 19} In support of its *Third Interlocutory Appeal*, OCC alleges that the Companies have fought the release of information at every step and that, despite eight sets of discovery, the Companies substantive responses are not many. OCC claims that the *Third Interlocutory Appeal* presents a new and novel question of law and policy and departs from past policy because, when the attorney examiner issued the April 22, 2021 Entry reinstating the comment periods, the attorney examiner "was unaware of existing, significant discovery disputes between OCC and FirstEnergy." OCC posits that whether an interlocutory appeal may be taken, based upon a discovery dispute of which the attorney examiner had no prior knowledge, is a new or novel question of law or policy. OCC further argues that an immediate ruling is needed on this issue because, absent a stay on comments, OCC will be unduly prejudiced by having to file comments without information from FirstEnergy.

{¶ 20} Although the Companies take no position on the *Third Interlocutory Appeal*, FirstEnergy responds that it has abided by the attorney examiners' rulings on discovery and that it has not impeded OCC's discovery rights. The Companies represent that that OCC has served eight sets of discovery with 212 individual requests (576 requests including

subparts); FirstEnergy states that it has responded to 65 of the 212 requests and agreed to supplement responses to the third and fourth sets of discovery in the near future.<sup>1</sup>

{¶ 21} The attorney examiner finds that the interlocutory appeal does not present a new or novel question of interpretation, law, or policy.<sup>2</sup> It is well-established that the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and determining filing deadlines, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. The *Third Interlocutory Appeal* seeks Commission review of a ruling by the attorney examiner setting a comment period, but there is nothing new or novel about the setting of a comment period. OCC claims that ongoing discovery disputes with the Companies create a new or novel question of law, but there is nothing new or novel about discovery disputes between parties in Commission proceedings.

{¶ 22} Further, the attorney examiner finds that OCC has not demonstrated that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the April 22, 2021 Entry. OCC cannot demonstrate prejudice from the April 22, 2021 Entry because OCC failed to file a motion seeking an extension of

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<sup>1</sup> The attorney examiner notes that OCC filed motions to compel discovery with respect to both the third and fourth sets of discovery on April 28, 2021. The Companies filed memoranda contra the motions to compel on May 5, 2021.

<sup>2</sup> OCC provides no argument that the interlocutory appeal is taken from a ruling that departs from past precedent.



the deadlines for comments set by the April 22, 2021. Ohio Adm.Code 4901-1-13(A) provides that “extensions of time to file pleadings or other papers may be granted upon motion of any party *for good cause shown* \* \* \*”. In this case, OCC made no effort to demonstrate good cause why the May 21, 2021 deadline for filing comments should be extended, as specifically provided by Ohio Adm.Code 4901-1-13(A). Thus, the attorney examiner finds that the failure to file a motion demonstrating good cause for an extension is fatal to OCC’s effort to demonstrate undue prejudice from the April 22, 2021 Entry. As OCC has failed to meet either requirement for the certification of an interlocutory appeal set forth in Ohio Adm.Code 4901-1-15(B), the attorney examiner finds that the interlocutory appeal should not be certified to the Commission.

{¶ 23} The Commission intends to complete this review as expeditiously as possible. Nonetheless, upon review of OCC’s memorandum in support of the interlocutory appeal and of the Companies’ memorandum contra, the attorney examiner finds that the number of discovery requests filed by the parties and the number of outstanding discovery requests demonstrate the need to extend the time for the filing of comments and reply comments and the need to establish an orderly schedule for the response to outstanding discovery requests. OCC claims that the Companies have obstructed OCC’s ample rights of discovery; the Companies respond that OCC has served eight sets of discovery with 212 individual requests (576 requests including subparts). The attorney examiner notes that this is a considerable number of discovery requests, given that this proceeding is only at the comment stage and that no decision has been reached to set this matter for hearing. Further, additional motions to compel discovery have been filed by OCC. Moreover, the attorney examiner notes that this is one of four investigations into the Companies’ activities related to HB 6 and that discovery has commenced in all four proceedings.

{¶ 24} Accordingly, the attorney examiner will extend the deadlines for the filing of initial comments and reply comments by an additional 60 days to July 20, 2021 for initial comments and August 3, 2021 for reply comments. Further, the attorney examiner will stay the filing of additional requests for discovery in this proceeding for 60 days from the

issuance of this Entry. During this 60-day period, the Companies will respond to all outstanding discovery requests within 30 days of the issuance of this Entry unless otherwise ordered by the attorney examiners or the Commission. OCC, and any other party, may continue to file motions to compel discovery and motions for protective order during this 60-day period; to the extent feasible, the attorney examiners will rule on all outstanding motions to compel during this 60-day period, including any filed during the 60-day period. A prehearing conference will be established by subsequent entry to address the motions to compel discovery related to OCC's third and fourth sets of discovery.

{¶ 25} On March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety. Given the current COVID-19 health emergency, the prehearing conference will be held remotely. The attorney examiners will set the date for the prehearing conference and provide additional information on how to participate in the prehearing conference by subsequent entry.

{¶ 26} Finally, the attorney examiner notes that the *First Interlocutory Appeal* will be addressed by subsequent entry.

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That the deadlines for filing initial comments and reply comments be extended by an additional 60 days to July 20, 2021 for initial comments and August 3, 2021 for reply comments. It is, further,

{¶ 29} ORDERED, That the filing of additional requests for discovery in this proceeding be stayed for 60 days from the issuance of this Entry. It is, further,

{¶ 30} ORDERED, That a prehearing conference be held, on a date to be established by subsequent entry, to hear arguments on and address the issues raised in the motions to compel discovery filed on April 28, 2021. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price  
Attorney Examiner

MJA/hac

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Summary: Attorney Examiner Entry ordering that the deadlines for filing initial comments and reply comments be extended by an additional 60 days to July 20, 2021 for initial comments and August 3, 2021 for reply comments; that the filing of additional requests for discovery in this proceeding be stayed for 60 days from the issuance of this Entry; and, that a prehearing conference be held, on a date to be established by subsequent entry, to hear arguments on and address the issues raised in the motions to compel discovery filed on April 28, 2021 electronically filed by Heather A Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio