

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY'S  
COMPLIANCE WITH R.C. 4928.17 AND  
OHIO ADM.CODE CHAPTER 4901:1-37.

CASE NO. 17-974-EL-UNC

### ENTRY

Entered in the Journal on November 12, 2021

{¶ 1} In this Entry, the attorney examiner denies the August 9, 2021 joint interlocutory appeal and grants a two-week extension of the comment period established in the case.

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

{¶ 3} To assist the Commission with the review of FirstEnergy's compliance with the corporate separation rules set forth in Ohio Adm.Code Chapter 4901:1-37, the Commission directed Staff, on May 17, 2017, to issue a request for proposal (RFP) for audit services. On July 5, 2017, the Commission issued an Entry selecting Sage Management Consultants, LLC (Sage) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a draft audit report was to be submitted by February 28, 2018, with the final audit report due on March 14, 2018. The deadline for the draft audit report and final audit report was extended to April 30, 2018, and May 14, 2018, respectively. Sage filed its final audit report on May 14, 2018.

{¶ 4} Comments regarding the Sage audit report were timely filed by Interstate Gas Supply, Inc. (IGS), Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council (NOPEC), the Companies, and Retail Energy Supply Association (RESA). Reply comments

were filed by NOPEC, FirstEnergy Solutions Corp. (FES), OCC, and the Companies. Joint reply comments were filed by RESA and IGS.

{¶ 5} In their comments, the Companies noted that, on March 20, 2018, FES filed a voluntary petition in the United States Bankruptcy Court for relief pursuant to Chapter 11 of Title 11 of the United States Code. Further proceedings in this case were deferred until the resolution of FES' bankruptcy proceeding. On March 20, 2020, the Companies filed a notice in this proceeding. The Companies represented that FES had emerged from bankruptcy as Energy Harbor Corp. (Energy Harbor) and that Energy Harbor is no longer an affiliate of the Companies' parent, FirstEnergy Corp.

{¶ 6} Further, on January 17, 2020, Suvon, LLC d/b/a FirstEnergy Advisors (Suvon) filed an application for certification as a CRES power broker and aggregator in the state of Ohio. *In re Suvon LLC*, Case No. 20-103-EL-AGG. Suvon is an affiliate of the Companies. The Commission approved Suvon's application on April 22, 2020. The Commission also ruled that, although various parties in that case had raised issues both with Suvon's use of a trade name and with compliance with the corporation separation requirements by the Companies and other affiliates of FirstEnergy Corp., those issues were best addressed in this proceeding. *Suvon*, Case No. 20-103-EL-AGG, Finding and Order (Apr. 22, 2020) at ¶ 20, 22.

{¶ 7} On April 29, 2020, the attorney examiner established a supplemental comment period regarding the audit report filed in this proceeding. Supplemental comments were timely filed by Vistra Energy Corp., NOPEC, IGS, OCC, RESA, and the Companies. Supplemental reply comments were timely filed by OCC, NOPEC, IGS, RESA, and the Companies.

{¶ 8} On September 8, 2020, the OCC filed motions in this proceeding for an investigation and management audit of FirstEnergy, its corporate governance, and its activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from consumers or violate any utility regulatory laws,

rules, or orders in its activities regarding Am. Sub. H.B. 6. The Companies filed a memorandum contra OCC's motions on September 23, 2020. OCC filed a reply on September 30, 2020.

{¶ 9} On September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In re the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC.

{¶ 10} On October 29, 2020, FirstEnergy Corp., the corporate parent of the Companies, filed a Form 8-K with the United States Securities and Exchange Commission reporting the termination of certain officers and appointment of new interim chief executive officers. The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

{¶ 11} On November 4, 2020, the Commission issued an Entry directing, in the instant case, Staff to issue an RFP to acquire audit services to assist the Commission with the review of FirstEnergy's compliance with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans for the period between November 1, 2016, and October 31, 2020. On January 27, 2021, the Commission selected Daymark Energy Advisors, Inc. (Daymark) and directed the Companies to enter into a contract with Daymark to perform the audit services described in the RFP and its proposal. In the Entry, the Commission also set the deadline for the completion of the audit report as June 21, 2021.

{¶ 12} On June 11, 2021, Staff filed a motion to extend the time to file the final audit report (Daymark Report) to August 6, 2021, which was granted by the attorney examiner on June 17, 2021.

{¶ 13} Subsequently, on August 3, 2021, Staff filed an amended motion<sup>1</sup> for an extension of time to file the Daymark Report, requesting that the deadline for the final audit report be extended to September 13, 2021. Staff also requested that the Commission grant its motion on an expedited basis pursuant to Ohio Adm.Code 4901-1-12(C). On August 4, 2021, the attorney examiner granted the extension request and directed that the audit report be filed by September 13, 2021.

{¶ 14} On August 9, 2021, OCC and NOPEC filed a joint interlocutory appeal to reverse the ruling in the August 4, 2021 Entry granting the extension request. On August 16, 2021, the Companies filed a response to the joint interlocutory appeal.

{¶ 15} Meanwhile, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp., FirstEnergy Service Company, and FirstEnergy Foundation on June 25, 2021. Those subpoenas were issued to the respective companies on June 25, 2021. On July 19, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a motion to quash the subpoenas duces tecum. A similar motion was filed in *In re the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1629-EL-RDR (*DCR Review*). A prehearing conference was held on September 14, 2021 to address the motion to quash. For administrative convenience, the prehearing conference was held concurrently with a prehearing conference in the *DCR Review*, but the cases have not been consolidated.

{¶ 16} On September 20, 2021, OCC filed an interlocutory appeal and request for certification to the Commission of the attorney examiner ruling on the motion to quash. On

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<sup>1</sup> Staff filed a motion for an extension of time on August 3, 2021, representing that no party opposed the extension. Staff also filed an amended motion for extension of time on August 3, 2021, correcting its prior statement that no party opposed the extension and indicating that OCC and NOPEC opposed the extension.

September 27, 2021, FirstEnergy Corp. and FirstEnergy Service Company filed a memorandum contra the interlocutory appeal.

{¶ 17} Following an *in camera* review of documents produced at the September 14, 2021 prehearing conference, the attorney examiner issued an Entry on October 12, 2021, finding that the documents were protected by the attorney-client privilege and the attorney work product doctrine and granting the motion to quash. On October 18, 2021, OCC filed an interlocutory appeal and request for certification to to the Commission of the attorney examiner ruling in the October 12, 2021 Entry. FirstEnergy Corp. and FirstEnergy Service Company filed a memorandum contra the October 18, 2021 interlocutory appeal on October 26, 2021.

{¶ 18} With respect to the August 9, 2021 joint interlocutory appeal of the attorney examiner's ruling granting an extension to file the Daymark Report, OCC and NOPEC explain that they object to the requested extension of time to file the Daymark Report and that the Entry was issued before they had an opportunity to file a memorandum contra to the request. They argue that the extension request is another stall tactic by the Companies to delay the proceeding. In their memorandum contra the interlocutory appeal, the Companies take no position on the interlocutory appeal but state that they have not delayed responding to data requests or stalled the proceedings as alleged by OCC and NOPEC.

{¶ 19} 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 ruling which is the subject of the interlocutory appeals is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

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

{¶ 21} The attorney examiner finds that the interlocutory appeal does not present a new or novel question of interpretation, law, or policy. 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 Elec. Illum. 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 S. Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. The interlocutory appeal seeks Commission review of a ruling by the attorney examiner extending the filing date for the Daymark Report, but there is nothing new or novel about extending the filing date of an audit report and extending a filing date for an audit report does not represent a departure from past precedent. The attorney examiner had previously granted extensions for the filing of the audit reports in this very proceeding on three prior occasions. *See* Entry (June 17, 2021) ¶ 21; Entry (Mar. 22, 2018) at ¶ 8; Entry (Feb. 9, 2018) at ¶ 7.

{¶ 22} The attorney examiner further finds that OCC and NOPEC cannot demonstrate prejudice resulting from the extension of time to file the Daymark Report. The Daymark Report was timely filed on September 13, 2021. OCC and NOPEC conflate the extension of time for the Daymark Report with stall tactics by the Companies but provide no detailed support for their claims. In fact, there have been subsequent extensions of the procedural schedule requested by the parties. Entry (Oct. 12, 2021) at ¶¶ 22-24. Moreover, OCC and NOPEC now seek a further extension of the procedural schedule, addressed below.

{¶ 23} With respect to the claim that OCC and NOPEC were denied the opportunity to respond to the motion, Ohio Adm. Code 4901-1-12 provides that “the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.” Thus, the attorney examiner would have granted the motion for an extension immediately even if the attorney examiner had been aware that OCC and NOPEC opposed the extension. OCC and NOPEC did not have a substantial right for the filing of the Daymark Report on August 6, 2021; there was no purpose to be served by the premature filing of an incomplete audit report, and there was no harm caused by the brief extension in filing the Daymark Report. Accordingly, the attorney examiner finds that OCC and NOPEC have met neither of the criteria for certification of the August 9, 2021 joint interlocutory appeal and that the certification of the joint interlocutory appeal should be denied.

{¶ 24} On November 5, 2021, OCC and NOPEC filed a motion for supplemental audit, a motion for an extension of the procedural schedule and a request for expedited ruling. In order to allow time for the filing of memorandum contra the motions filed by OCC and NOPEC and for the consideration of the motions, the attorney examiner finds that a brief, two-week extension of the comment period is warranted. Accordingly, comments to the Daymark Report should be filed by November 22, 2021, and reply comments should be filed by December 13, 2021.

{¶ 25} The September 20, 2021 interlocutory appeal and the October 18, 2021 interlocutory appeal will be addressed by subsequent entry.

{¶ 26} It is, therefore,

{¶ 27} ORDERED, That certification of the August 9, 2021 joint interlocutory appeal filed by OCC and NOPEC be denied. It is, further,

{¶ 28} ORDERED, That the deadline for comments to the Daymark Report be extended to November 22, 2021 for initial comments and the deadline for reply comments be extended to December 13, 2021. It is, further,

{¶ 29} 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 certification of the August 9, 2021 joint interlocutory appeal filed by OCC and NOPEC be denied and that the deadline for comments to the Daymark Report be extended to November 22, 2021 for initial comments and the deadline for reply comments be extended to December 13, 2021 electronically filed by Heather A. Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio