

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE 2020 REVIEW OF  
THE DELIVERY CAPITAL RECOVERY  
RIDER OF OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.

CASE NO. 20-1629-EL-RDR

## ENTRY

Entered in the Journal on December 15, 2021

### I. SUMMARY

{¶ 1} In this Entry, the Commission expands the scope of this proceeding to include investigation into a potential violation of R.C. 4928.145 by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; bifurcates this issue from the remaining issues in this case; and stays all further proceedings regarding this issue, including discovery, until otherwise ordered by the Commission.

### II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or 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} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with R.C. 4928.143.

{¶ 4} On August 25, 2010, the Commission issued an Opinion and Order approving FirstEnergy's second electric security plan. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Establish a Std. Serv. Offer Pursuant to*

*Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Case No. 10-388-EL-SSO, Opinion and Order (Aug. 25, 2010) (ESP II Case).* In that Order, the Commission approved a joint stipulation, as modified, authorizing FirstEnergy to establish a delivery capital recovery rider (Rider DCR) effective January 1, 2012. Additionally, under the terms of the stipulation, FirstEnergy agreed to submit to an annual audit review process of Rider DCR. Subsequently, on July 18, 2012, in Case No. 12-1230-EL-SSO, the Commission issued an Order approving a joint stipulation extending, with modification, the terms of the joint stipulation approved by the Commission in the *ESP II Case. In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Case No. 12-1230-EL-SSO, Opinion and Order (July 18, 2012) (ESP III Case).* Thereafter, by Opinion and Order issued on March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission modified and approved stipulations which included an extension, with modification, of FirstEnergy's Rider DCR. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) (ESP IV Case).*

{¶ 5} On November 4, 2020, the Commission issued an Entry directing Staff to issue a request for proposal for the audit services necessary to assist with the compliance audit of the Companies. Subsequently, by an entry issued on December 16, 2020, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) from the submitted proposals to complete the required audit services. According to the timeline ordered by the Commission, Blue Ridge was required to submit a draft audit report to Staff by May 5, 2021 and file a final audit report with the Commission by May 17, 2021.

{¶ 6} On March 8, 2021, Staff filed a request in this proceeding to expand the scope of this proceeding. Staff noted that, upon review of FirstEnergy Corp.'s 10-K filed on February 18, 2021, Staff issued a data request to the Companies for additional records related to the disclosure of certain transactions that were either improperly classified, misallocated

or lacked supporting documentation. The Company responded to this data request on February 25, 2021. Request to Expand Audit Scope (Mar. 8, 2021); Audit Report, Expanded Scope (Aug. 3, 2021) at 30. By Entry issued March 10, 2021, the Commission granted the request from Staff and directed Blue Ridge to expand the scope of the audit to include payments made to a number of vendors disclosed by FirstEnergy Corp. in its annual 10-K filing with the Securities and Exchange Commission. Blue Ridge filed the final audit report, which included the expanded scope of investigation, with the Commission on August 3, 2021.

{¶ 7} On September 29, 2021, the Commission requested Staff to direct Blue Ridge to expand the scope of the audit in this case to determine if the costs of the naming rights for FirstEnergy Stadium have been recovered from ratepayers by the Companies. Subsequently, Blue Ridge filed a supplemental audit report in this docket on November 19, 2021.

{¶ 8} Upon its own initiative, the Commission finds that there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies' obligation to disclose a "side agreement" during the *ESP IV Case*. R.C. 4928.145 provides:

During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

{¶ 9} FirstEnergy Corp. has entered into a Deferred Prosecution Agreement<sup>1</sup> with the United States Attorney for the Southern District of Ohio; this Deferred Prosecution Agreement includes a Statement of Facts admitted by FirstEnergy Corp. The Statement of Facts states, in relevant part:

Public Official B was the Chairman of the Public Utilities Commission of Ohio (“PUCO”) from April 2019 until November 21, 2020, when he resigned. \* \* \* Prior to serving as the Chairman of PUCO, Public Official B worked for a private law firm and served as the general counsel for an industrial group of energy users whose interests often conflicted with FirstEnergy Corp.’s interests. [Deferred Prosecution Agreement at 16].

The Statement of Facts goes on to state:

A 2013 consulting agreement was subsequently amended in 2015. **The 2015 amendment coincided with and was made in exchange for Public Official B’s industrial group withdrawing its opposition to a 2014 PUCO Electric Security Plan settlement package involving FirstEnergy Corp.’s Ohio electric distribution subsidiaries.** The amended agreement called for an increase in Public Official B’s retainer and supplemental payments through 2024. Although the amended agreement does not appear to have been executed, from 2015 through June 2018, FirstEnergy Corp. paid into the Company 1 account pursuant to the terms of the agreement with Public Official B. Invoices from Company 1 were structured to bypass FirstEnergy Corp.’s Level of Signature Authority levels for purposes of internal approval of the payments. Deferred Prosecution Agreement at 34 [Emphasis added].

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<sup>1</sup> United States of America v. FirstEnergy Corp. Case: 1:21-cr-00086-TSB Doc #: 3 Filed 07/22/21 (hereinafter, Deferred Prosecution Agreement or DPA).

{¶ 10} The Commission notes that, in the *ESP IV Case*, a supplemental stipulation was filed on May 28, 2021. *ESP IV Case*, Supplemental Stipulation (May 28, 2015). Also on May 28, 2015, IEU-Ohio filed a letter in the *ESP IV Case* stating that ‘the Industrial Energy Users-Ohio (“IEU-Ohio”) shall not oppose either the settlement package described in the Stipulation or the Commission’s approval of such settlement package.’ These dates are consistent with the facts set forth in the Deferred Prosecution Agreement and with payments made to IEU-Ohio Administration Company and Sustainability Funding Alliance (SFA), which were disclosed as part of the expanded scope of this case. Audit Report, Expanded Scope at 11, 30, 38. These payments were part of \$13,441,982 paid to SFA under the original agreement and the agreement as amended in 2015. Audit Report, Expanded Scope at 9. Moreover, the Commission is aware that records of communications and other documents from the Companies provide additional corroboration that there was a side agreement between the Companies and parties to this proceeding. Audit Report, Expanded Scope at 30.

{¶ 11} The Commission further notes R.C. 4928.145 conditions the obligation to disclose “side agreements” upon the service of “an appropriate discovery request.” The evidentiary record in the *ESP IV Case* indicates that that an appropriate discovery request appears to have been made by the Ohio Consumers’ Counsel.<sup>2</sup> The Companies’ responses dated December 14, 2015, and January 14, 2016, do not disclose any amended agreements.

{¶ 12} The Commission has jurisdiction to investigate potential violations of R.C. 4928.145. R.C. 4928.16 states in relevant part:

(A)(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the

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<sup>2</sup> On our own motion, the Commission takes administrative notice of OMAEG Ex. 24, docketed in the *ESP IV Case* on January 25, 2016.

commission \* \* \* to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15 \* \* \*.

(B) In addition to its authority under division (C) of section 4928.08 of the Revised Code and to any other remedies provided by law, the commission, after reasonable notice and opportunity for hearing in accordance with section 4905.26 of the Revised Code, may do any of the following:

\* \* \*

(2) Order any remedy or forfeiture provided under sections 4905.54 to 4905.60 and 4905.64 of the Revised Code upon a finding under division (A)(2) of this section that the electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15 \* \* \*.

R.C. 4928.54 authorizes the Commission to assess a forfeiture of up to \$10,000 per violation per day for violations of Ohio law governing public utilities.

{¶ 13} Accordingly, the Commission finds that the scope of this proceeding should be expanded to include an investigation into whether the Companies violated R.C. 4928.145 by failing to disclose the amended agreement during the proceedings in the *ESP IV Case*. This action is consistent with our commitment, with respect to the Companies' activities surrounding the passage of H.B. 6, to follow the facts wherever they may lead, in this case as well as in the three additional, targeted investigations opened by the Commission into the Companies conduct.<sup>3</sup>

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<sup>3</sup> *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; *In re the Review of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co., for Compliance with R.C. 4928.17 and Ohio Adm.Code 4901:1-37*, Case No. 17-974-EL-UNC; *In re the Review of the Distribution Modernization Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-2474-EL-RDR.

{¶ 14} As we have noted in another order issued today,<sup>4</sup> these four investigations target activities by the Companies which are subject to our exclusive jurisdiction over rates and utility service. These investigations complement, but do not seek to supplant, the ongoing criminal investigation by the United States Attorney and the civil action by Ohio Attorney General Dave Yost pursuant to Ohio's civil RICO statute. However, it is of utmost importance that our investigations do not interfere with the criminal investigation by the United States Attorney or the action brought by the Ohio Attorney General. Therefore, having put the Companies, and interested parties, on notice that the potential violation of R.C. 4928.145 will be investigated by the Commission, we will stay further action, including discovery, until otherwise ordered by the Commission.

{¶ 15} However, we note that Blue Ridge has recommended that refunds be made to customers as a result of the expanded scope of the audit. Audit Report, Expanded Scope at 5, Table 2, and 28, Table 25. Therefore, we will bifurcate the issues raised in this Entry regarding the potential violation of R.C. 4928.145 from the issues raised in the Audit Report, including the Expanded Scope, so that the remaining issues can be resolved and any dollars due to be refunded may be returned to customers as soon as possible.

{¶ 16} Although we will stay further investigation of this issue, including discovery, until otherwise ordered by the Commission, the Companies are directed to preserve all documents and other records related to the potential violation of R.C. 4928.145, including, but not limited to, all documents and records related to any agreements with SFA or IEU-Ohio Administration Company until the stay has been lifted and the investigation has been completed, including a hearing if necessary.

### III. ORDER

{¶ 17} It is, therefore,

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<sup>4</sup> *In re the 2021 Review of the Delivery Capital Recovery Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 21-1038-EL-RDR.

{¶ 18} ORDERED, That the scope of this proceeding be expanded to include an investigation into a potential violation of R.C. 4928.145 by the Companies. It is, further

{¶ 19} ORDERED, That the investigation into a potential violation of R.C. 4928.145 be bifurcated this issue from the remaining issues in this case. It is, further,

{¶ 20} ORDERED, That all further proceedings regarding a potential violation of R.C. 4928.145, including discovery, be stayed until otherwise ordered by the Commission. It is, further,

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

COMMISSIONERS:

*Approving:*

Jenifer French, Chair  
M. Beth Trombold  
Lawrence K. Friedeman  
Daniel R. Conway  
Dennis P. Deters

GAP/kck



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**Case No(s). 20-1629-EL-RDR**

Summary: Entry expanding the scope of this proceeding to include investigation into a potential violation of R.C. 4928.145 by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company; bifurcating this issue from the remaining issues in this case; and staying all further proceedings regarding this issue, including discovery, until otherwise ordered by the Commission electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio