

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 ON REHEARING

Entered in the Journal on February 9, 2022

I. SUMMARY

{¶ 1} In this Entry on Rehearing, the Commission denies the application for rehearing filed by Ohio Consumers' Counsel.

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. R.C. 4928.145 provides that, 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.

{¶ 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, on December 16, 2020, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) from the submitted proposals to complete the required audit services.

{¶ 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} On December 15, 2021, the Commission noted that there is information in this docket and in the public domain which may demonstrate a potential violation of the Companies' obligation under R.C. 4928.145 to disclose a "side agreement" during the *ESP IV Case*. This information included the Statement of Facts included in a Deferred Prosecution Agreement¹ between FirstEnergy Corp. and the United States Attorney for the Southern District of Ohio. Accordingly, the Commission further expanded the scope of this proceeding 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*.

{¶ 9} However, 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 stayed further action, including discovery, until otherwise ordered by the Commission in order to

¹ 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).

avoid interference with the ongoing criminal investigation by the United State Attorney and the civil action by Ohio Attorney General Dave Yost pursuant to Ohio's civil RICO statute.

{¶ 10} Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

{¶ 11} On January 14, 2021, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. In the application for rehearing, OCC raises one assignment of error, claiming that the Commission erred – in violation of R.C. 4903.082, Ohio Adm.Code 4901:1-16 et seq.², R.C. 4928.145, R.C. 4903.09, due process, and other authority – by indefinitely delaying its and parties' investigations involving revelation of FirstEnergy's unreasonable and unlawful failure to disclose apparent secret side deals in the *ESP IV Case*.

{¶ 12} In support of its assignment of error, OCC argues that the Commission's stay of further proceedings regarding the Companies' potential violation of Ohio law is unreasonable because it is against law and state policy. OCC notes that the Supreme Court of Ohio has ruled that side agreements are relevant to whether a settlement was the product of serious bargaining. OCC argues that customers are paying charges under an electric security plan that may not have been the product of serious bargaining and thus should never have been approved. OCC posits that this requires immediate action by the Commission.

{¶ 13} OCC further argues that the Commission's indefinite delay of investigating the Companies' potential violation of Ohio law is unreasonable because it is against the law governing discovery. OCC notes that R.C. 4903.082 states that all parties and intervenors

² In its Application for Rehearing and in the Memorandum in support, OCC cites repeatedly to an alleged violation of Ohio Adm.Code 4901:1-16 et seq. Chapter 4901:1-16 of the Ohio Administrative Code provides standards for gas pipeline safety in this state. OCC never explains the nature of the alleged violation; thus, this claim will be disregarded by the Commission.

shall be granted ample rights of discovery. Thus, OCC claims that the stay of discovery in this case is antithetical to the law governing discovery.

{¶ 14} Finally, OCC contends that the Commission stay is unreasonable because it lacks record support. OCC argues that, although the Commission stated that we would indefinitely delay investigation into the alleged violation R.C. 4928.145 so as not to interfere with other investigations, the Commission neither cited authority nor explained itself. Thus, OCC claims that the Commission failed to comply with the requirements of R.C. 4903.09 to set forth findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact. Further, OCC argues that because the Commission has exclusive jurisdiction over whether the Companies violated R.C. 4928.145, there is no overlap between the issues in this case and those involved in other investigations.

{¶ 15} The Commission finds that rehearing on OCC's sole assignment of error should be denied. It is well established that the Commission is vested with the broad discretion to manage its dockets to avoid duplication of effort, including the discretion to decide, how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business and eliminate unnecessary duplication of effort. *In re Application of Columbus S. Power Co. and Ohio Power Co.*, Case Nos. 11-346-EL-SSO et al., Opinion and Order (Aug. 8, 2012) at 24 (citing *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379; *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560. With respect to OCC's claim that the stay on discovery violates OCC's ample rights of discovery under R.C. 4903.082, the Commission notes that OCC has already been exercising its ample rights of discovery in this proceeding. FirstEnergy Corp. has provided over 230,000 pages of documents to OCC in response to a subpoena duces tecum issued by the attorney examiner on September 24, 2022 at the request of OCC, and the document production is ongoing. Tr. (Jan. 14, 2022) at 8-9. OCC has characterized this document production as a "mountain of evidence" necessitating that other investigations into the Companies' conduct be held in abeyance, *indefinitely*, while OCC and others "wade" through the documents. *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 (Corporate Separation Case), Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. However, the stay in this proceeding will provide OCC with an ample opportunity to sift through the documents produced by FirstEnergy Corp. to determine if any of the documents are relevant to the alleged violation of R.C. 4928.145.

{¶ 16} Moreover, in order to ensure that neither OCC nor any other intervenor is prejudiced by the stay on discovery, the Commission directed the Companies to preserve all documents and other records related to the potential violation of R.C. 4928.145 until the stay has been lifted and the investigation has been completed, including an evidentiary hearing if necessary. Further, the Commission notes that, once the stay is lifted and discovery may proceed, OCC will have a reasonable time for discovery and to prepare its case before any hearing is held; in the four investigations³ into the Companies' conduct surrounding the passage of H.B. 6, the Commission's attorney examiners have liberally granted extensions in order to resolve discovery disputes, file comments, and allow OCC, and other parties, sufficient time to prepare their cases for hearing.

{¶ 17} We also note that OCC appears to claim that the Commission should act to determine if the stipulation in the *ESP IV Case* should be set aside if the alleged violation of R.C. 4928.145 is proven. However, the Commission order approving the stipulation in the *ESP IV Case* is a final, non-appealable order, and OCC poses no legal theory which would enable that Commission to revisit that order. This does not mean that there are no remedies if FirstEnergy is proven to have violated R.C. 4928.145. As we noted in the Entry, the

³ In addition to the instant case, these four investigations include: *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 (*Political and Charitable Spending Case*); *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 (*DMR Review*) and the *Corporate Separation Case*.

Commission 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 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.

{¶ 18} In support of its assignment of error, OCC also contends that the Commission failed to comply with the requirements of R.C. 4903.09 to set forth findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact. However, OCC's arguments lack merit. In the Entry, the Commission noted the existence of facts in the public domain which indicate that the alleged "side agreement" may be part of the criminal investigation being conducted by the United States Attorney for the Southern District of Ohio. Specifically, the Commission noted that FirstEnergy Corp. had entered into the Deferred Prosecution Agreement with the United States Attorney for the Southern District of Ohio and that this Deferred Prosecution

Agreement includes a Statement of Facts admitted by FirstEnergy Corp. The Commission cited the relevant portion of the Statement of Facts:

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.

* * *

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 16, 34 [Emphasis added].

{¶ 19} The filing of the Deferred Prosecution Agreement and the recitation of the facts surrounding the alleged “side agreement” are clearly sufficient facts, as cited by the Commission in the Entry, for the Commission to base its decision to stay further proceedings regarding the alleged “side agreement” in this case.

{¶ 20} Regarding the reasons for our decision to stay further action on this issue, while we are determined to follow the facts wherever they may lead in our targeted

investigations into FirstEnergy, we will not do so heedless of potential risks; it is of the utmost importance that our actions do not interfere with the criminal investigation by the U.S. Attorney or the civil action brought by the Ohio Attorney General Dave Yost. OCC faults the Commission for our decision to stay further proceedings on this one issue in this proceeding, but OCC presents no legal arguments demonstrating that it is impossible, or even improbable, for the Commission's investigation to interfere with the criminal investigation. OCC claims that because the Commission has exclusive jurisdiction over whether the Companies violated R.C. 4928.145, there is no "overlap" between the issues in this case and those involved in other investigations. We note, on the other hand, that the facts certainly overlap between investigations, and witnesses may overlap between the investigations. Thus, key witnesses to the alleged "side agreement" may be unwilling to testify or may rely upon their Constitutional rights to decline to testify regarding the circumstances surrounding the alleged "side agreement." Moreover, there may be additional facts regarding the alleged "side agreement" which are not presently publicly known; premature disclosure of such facts may inadvertently interfere with the investigation. Nonetheless, even if there is a low risk of interfering in the criminal investigation, the Commission is unwilling to accept that risk. We will err on the side of caution before we run the risk of interference in the ongoing Federal criminal investigation. Accordingly, the Commission finds that rehearing on OCC sole assignment of error should be denied.

{¶ 21} However, as we noted in the Entry, Blue Ridge has recommended that refunds be made to customers as a result of the expanded scope of the audit. Therefore, we have bifurcated those issues raised in the 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. The Commission notes that comments and reply comments to the Audit Report and the Expanded Scope have been filed and that the supplemental

report regarding stadium naming rights has been filed as well. Thus, the Commission directs that the attorney examiners schedule the hearing in this case as soon as practicable.

III. ORDER

{¶ 22} It is, therefore,

{¶ 23} ORDERED, That the application for rehearing filed by OCC be denied. It is, further,

{¶ 24} 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,

{¶ 25} ORDERED, That a copy of this Entry on Rehearing 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/hac

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Summary: Entry denying the application for rehearing filed by Ohio Consumers'
Counsel. electronically filed by Kelli C. King on behalf of The Public Utilities
Commission of Ohio