**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, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. | ) ) ) ) ) | Case No. 17-2474-EL-RDR |

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# INTERLOCUTORY APPEAL, REQUEST FOR THE PUCO LEGAL DIRECTOR TO CERTIFY THE APPEAL TO THE PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW
**BY**
**OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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February 23, 2022

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The PUCO Commissioners should overrule Attorney Examiner Gregory Price's denials of two Consumers' Counsel subpoenas and *allow OCC to prepare and present the case it intends for the public* relating to the FirstEnergy scandal. This is OCC's eleventh Interlocutory Appeal from rulings by Examiner Price that limit OCC's consumer advocacy in FirstEnergy-related investigations. In this case, a key question is whether any of the funds that the FirstEnergy Utilities collected from consumers for its distribution modernization charge were misused for unauthorized purposes such as political activity.

Here, Examiner Price denied OCC's request to subpoena former PUCO auditor Oxford for a discovery deposition. And Examiner Price denied OCC's request for documents the Auditor holds pertaining to the audit. OCC wants to discover Oxford's state work up to its prematurely ended auditing of the PUCO/FirstEnergy distribution modernization charge (that cost two million Ohioans nearly half a billion dollars). This time, Examiner Price denied OCC's subpoena and deposition for reasons that included a "transparen[cy]" issue, where:

> one, at a non-public deposition, all parties may not have a full and fair opportunity to cross-examine the witness; and two, OCC would be under no duty to file the transcript of the deposition in the docket.[1]

*No party to this case, not even FirstEnergy, argued for this standard advanced by Examiner Price that the normal process for a deposition, including the examination of the witness and the handling of transcripts, should preclude its use.* It seems a standard uniquely applied to OCC.

Examiner Price rejected OCC's argument, as the PUCO did in the recent FirstEnergy Advisors case[2] (which the Ohio Supreme Court then overturned in the OCC/NOPEC appeals[3]), that R.C. 4903.082 allows the discovery that OCC seeks. *But R.C. 4903.082 contains no exclusion preventing discovery of the PUCO Staff or a PUCO auditor.* In his ruling, Examiner Price did not address head-on the law's lack of a discovery exemption for the PUCO Staff and auditor. He did conclude that OCC has been provided with "ample discovery" under the law.[4] And he did write, among other things, that OCC: "fails to address whether there are any facts which are otherwise unobtainable from other sources, including discovery produced by the Companies, discovery produced by FirstEnergy Corp. under subpoena, or documents which are publicly available."[5] *No party to this case, not even FirstEnergy, argued for this standard advanced by Examiner*

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[1] Entry at ¶ 31 (February 18, 2022).

[2] *In the Matter of the Application of Suvon, LLC D/B/A FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio,* Case No. 20-103-EL-AGG, Finding and Order at ¶¶ 24-25 (April 22, 2020).

[3] *In re Application of Suvon, LLC D/B/A FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator,* Slip Op. No. 2021-Ohio-3630.

[4] Entry at ¶ 28 (February 18, 2022).

[5] *Id.* at ¶ 31 (February 18, 2022).

*Price that OCC has to show all these things just to use the widespread discovery tool of a deposition (allowed by O.A.C. 4901-1-21).*

Examiner Price wrote that making the PUCO Staff subject to discovery "in these cases would be unduly burdensome."[6] But he did not properly weigh what is "undue" regarding the process in these cases that involve one of the *scandals of the century* in Ohio. These cases for investigating the FirstEnergy utilities, whose holding company (FirstEnergy Corp.) has been charged with a federal crime, have an extreme and singular gravity to them. The Examiner's Entry treats the issues as if they're *ordinary* for the public. They are not. The stakes in these cases are *extraordinary* for the public. Accordingly, the PUCO should have a very high threshold – a threshold not reached here – for what is unduly burdensome in discovery of this state-hired (PUCO) auditor.

Examiner Price justifies his denial of OCC's motions for subpoenas in part by "direct[ing] Staff to produce a witness from Oxford at the evidentiary hearing to be held in this proceeding."[7] But O.A.C. 4901-1-28(E) already allows that "any person making or contributing to the report may be subpoenaed to testify at the hearing…." Oxford earlier filed such a report. Moreover, it is a false equivalency in the Entry to treat cross-examining the auditor at hearing and deposing the auditor (per O.A.C. 4901-1-16 et seq.) as the same thing, they are not the same thing under Ohio's system of justice (which applies to the PUCO). At a deposition, per O.A.C. 4901-1-16(B) et seq., it "is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of

[6] *Id.*

[7] Entry at ¶ 31 (February 18, 2022).

admissible evidence." This Ohio standard is especially what makes depositions a powerful tool for the investigating that is part of case preparation – and it's this case preparation that OCC has been denied in the ruling. Examiner Price has conflated case presentation with case preparation, to the detriment of Ohio consumers.

Finally, PUCO Examiner Price also takes issue with OCC's use of its time to file interlocutory appeals. He writes: "Moreover, the attorney examiner notes that, while OCC appears to have time to file requests for interlocutory appeals for expedited discovery, they do not appear to have time to timely review the thousands of documents that have already been provided to them."[8] Interlocutory appeals are allowed at the PUCO by O.A.C. 4901-1-15 and OCC will take the appeals when truth and justice for Ohioans warrants it.

This appeal should be certified to the Commissioners by the PUCO Legal Director, as allowed by O.A.C. 4901-1-15(B). The PUCO Commissioners should then reverse Examiner Price's ruling per O.A.C. 4901-1-15(E)(1).

The reasons for the PUCO Legal Director to certify this appeal (or waive the certification requirement per O.A.C. 4901-1-38(B)) and for the PUCO Commissioners to reverse the ruling are more fully stated in the following memorandum in support.

[8] Entry at ¶ 36 (February 18, 2022).

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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## I. INTRODUCTION

OCC seeks to depose the PUCO's former Auditor, Oxford. OCC intends to examine, among other things, the Auditor's conclusions and recommendations on whether FirstEnergy used the distribution modernization charges collected from its two million utility consumers for unauthorized purposes, including political spending. The deposition would also delve into how this investigation is impacted by circumstances surrounding what is described, in a text message by FirstEnergy's fired CEO Chuck Jones, as the "burning" of the final DMR audit by former PUCO Chairman Randazzo.

OCC incorporates in this Memorandum in Support its arguments made in the first section of this pleading, preceding this Memorandum. Those arguments also support certification (and waiving certification) and Commissioner reversal of Examiner Price's ruling.

Notably, there is no exemption from discovery for the PUCO Staff, in R.C. 4903.082. Indeed, the law requires that the PUCO's rules "should be reviewed regularly by the commission to aid full and reasonable discovery by all parties." The PUCO's rule exempting its Staff from discovery fails to aid full and reasonable discovery and thus violates the law.

The 1983 statute was enacted as a reform law to give parties in PUCO cases ample discovery in all PUCO proceedings. The PUCO should let the law work for the public.

PUCO Examiner Price's denial of OCC's subpoenas (for documents and a deposition) thwarts OCC's "thorough and adequate preparation…" (per O.A.C. 4901-1-16(A). OCC's case preparation serves the PUCO's interest in making just decisions based on a full record per R.C. 4903.09.

The PUCO Commissioners should reverse the ruling denying OCC's subpoenas and deposition. There should be a proper investigation in this case. And that includes allowing parties to prepare their cases as provided by law and rule.

## II. STANDARD OF REVIEW AND WAIVER OF CERTIFICATION REQUIREMENT

The PUCO will review an Attorney Examiner's ruling if the Legal Director (among others) certifies the appeal.[9] The standard applicable to certifying an appeal is that "the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice … to one or more of the parties, should the commission ultimately reverse the ruling in question."[10] Upon consideration of an appeal, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.[11]

[9] O.A.C. 4901-1-15(B).

[10] *Id*.

[11] O.A.C. 4901-1-15(E).

Note that the PUCO may waive the certification requirements, for good cause. That waiver is allowed by O.A.C. 4901-1-38(B). The PUCO should waive the certification requirement. The good cause for the waiver is the gravity of the issues for the public in the FirstEnergy scandal and the extraordinary circumstances presented for the public by those issues.

It is unfortunate that the PUCO's interlocutory appeal rules, O.A.C. 4901-1-15(A)(1) and (3), favor utilities. Rule 15(A)(1) allows a direct appeal to the Commissioners (without needing certification) when a motion to compel discovery is *granted*. Utilities, having the most case information, more typically are the parties subject to a motion to compel. The PUCO's rule disfavors those (like consumer representatives) who file motions to compel that are denied and do not qualify for a direct appeal to Commissioners. The rule is asymmetrical, generally in favor of utilities. Similarly, Rule 15(A)(3) only allows a direct interlocutory appeal when a motion to quash a subpoena is *denied*. Again, the rule is not symmetrical. The rule does not treat equally those (generally non-utilities) whose subpoenas are quashed, as they are not given a direct right of appeal to Commissioners. *This disparity is another reason for granting a waiver of certification under O.A.C. 4901-1-38(B).*

## III. REQUEST FOR CERTIFICATION

### A. The appeal presents new and novel questions of law and policy and departs from past precedent, warranting certification of the appeal (if the PUCO does not waive certification as OCC proposes).

The appeal presents new and novel questions of law and policy, per O.A.C. 4901-1-15. And the issues depart from past precedent.

Examiner Price wrote that making the PUCO Staff subject to discovery "in these cases would be unduly burdensome."[12] But that finding and others reflect issues of law and state policy in this regulatory crisis, which justify certification (or a waiver of certification).

The Examiner did not properly weigh what is "undue" regarding burdensomeness in the process in these cases that involve one of the scandals of the century in Ohio. These cases for investigating the FirstEnergy utilities, whose holding company (FirstEnergy Corp.) has been charged with a federal crime, have an extreme gravity to them. The Examiner's Entry treats the issues as if they're *ordinary* for the public. They are not. The stakes in these cases are *extraordinary* for the public. This appeal thus presents new and novel questions of law and policy warranting certification.

*Accordingly, the PUCO should have a very high threshold – a threshold not reached here – for what is unduly burdensome in discovery of this state (PUCO) auditor. And, given the gravity and extraordinary nature of the FirstEnergy scandal, the PUCO should have a very low threshold for certifying a state consumer advocate's appeal to the Commissioners regarding denial of discovery.*

In the investigations of FirstEnergy, the PUCO has repeatedly stated that it is "determined to act in a deliberate manner, based upon facts rather than speculation."[13] It is problematic for the PUCO in its need for facts to prevent parties like OCC from discovering the facts. The PUCO needs to allow parties ample opportunities to obtain all

[12] Entry at ¶ 27 (February 18, 2022).

[13] *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 at ¶ 17 (November 4, 2020).

the facts. That is required by R.C. 4903.082. Granting the subpoena motions and this appeal would also help to achieve Chairperson French's objective to provide "more transparency" to lift the 'black cloud' of [the] HB 6 scandal" from over the PUCO.[14]

With this context, the PUCO's state-appointed Commissioners should rule on this appeal.

**1. Attorney Examiner Price's denial of OCC discovery rights is contrary to Ohio law, presenting a new or novel interpretation of law.**

Attorney Examiner Price's denial of OCC's motions raises new and novel questions of law and policy. The Attorney Examiner's ruling presents a novel issue of whether PUCO rules that conflict with Ohio law can be upheld. The PUCO's rules can't be upheld.

Ohio law establishes that "[a]ll parties and intervenors shall be granted ample rights of discovery." Under R.C. 4903.082, the rules of the PUCO should be reviewed regularly by the commission "to aid full and reasonable discovery by all parties." And that law provides that the Rules of Civil Procedure should be used wherever practicable. Under Ohio Civil Rule 26, the scope of discovery is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving issues and whether the burden or expense of discovery outweighs its likely benefit." Ohio Civ. Rule 26(B)(1).

R.C. 4903.082 does not exempt the PUCO Staff, which is a party in this case, from discovery. That's the law. R.C. 4903.082 is a 1983 statute that was enacted as a

[14] J. Pelzer, New PUCO Chair Jenifer French: more transparency needed to lift the 'black cloud' of [the] HB 6 scandal, Cleveland.com (May 18, 2021).

reform law to give parties in PUCO cases greater discovery rights in PUCO proceedings. The PUCO should let the law work for the public.

But instead of allowing OCC to move forward with the ample discovery rights and full and reasonable discovery that it is guaranteed under law, the Attorney Examiner thwarted OCC's discovery by denying our motions for subpoenas and the deposition. The Attorney Examiner relied on rules adopted by the PUCO (O.A.C. 4901-1-016(H); 4901-1-25(D)), that preclude discovery of "commission staff" or "a member of commission staff." Those provisions were read in error by the Attorney Examiner to deny OCC the ample discovery permitted by law.

Clearly, the PUCO's rules conflict with R.C. 4903.082. The PUCO's rules are subordinate to statutes; they are supposed to merely facilitate the policy set forth in the statutes to be administered by the administrative agency.[15] Where the PUCO rules conflict with Ohio law, as they do here, the law prevails, not the rules.[16] The Examiner's ruling thus involves a new and novel interpretation of law or policy in that it allows the PUCO to restrict the discovery guaranteed by law. OCC's request should be certified to the PUCO by the Legal Director (or certification should be waived per O.A.C. 4901-1-38(B).

**B. An immediate determination is needed to prevent undue prejudice.**

Under O.A.C. 4901-1-15(B), an "immediate determination" by the PUCO is needed to prevent undue prejudice.[17] OCC and Ohio consumers would suffer undue

[15] *State ex rel Estate of Sziraki v. Adm'r Bureau of Workers' Compensation,* 137 Ohio St.3d 201 (2013).

[16] *See Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 242 (2004) ("an agency rule can be disturbed if it is, among other things, manifestly contrary to the statute.").

[17] O.A.C. 4901-1-15(B).

prejudice should the PUCO later (but not now) reverse the Attorney Examiner's ruling. Examiner Price's ruling further delays and hinders OCC's case preparation efforts and the search for truth and justice.

Case preparation efforts are needed for the filing of written comments/objections. Attorney Examiner Price's denial of OCC's subpoenas interferes with OCC's discovery rights, case preparation, and case presentation.

Further, Attorney Examiner Price's ruling setting a comment schedule without affording the parties the benefit of crucial discovery to which they are entitled (as well as the opportunity to review and analyze that discovery) will interfere with OCC's case presentation. OCC and consumers will be prejudiced without an immediate determination of these issues.

## IV. APPLICATION FOR REVIEW

### A. Motions for Subpoenas.

In his February 18, 2022 Entry,[18] Examiner Price denied OCC's motions for subpoenas. The subpoenas would have enabled OCC to conduct discovery of Oxford Advisors through a pre-hearing deposition.

As we explained at the outset of this pleading and incorporate here, Examiner Price's ruling was in error for several reasons. First, Mr. Price asserts that the subpoenas were "not in compliance with the rules[,]" citing O.A.C. 4901-1-25.[19] While Ohio law – R.C. 4903.082 – grants ample rights of discovery for all parties and intervenors, the PUCO's discovery

[18] The Entry is attached.

[19] Entry at ¶ 24 (February 18, 2022).

rules – O.A.C. 4901-1-16(I) and 4901-25(d) – unlawfully restricts those rights by making the "commission staff" exempt from discovery.

Second, Mr. Price ruled that OCC had not "set forth good cause to support a waiver of O.A.C. 4901-1-25(D) with respect to either of the subpoenas."[20] Consistent with its rights under Ohio law, OCC filed two subpoenas to allow it to seek discovery from one of the state-appointed auditors in this case, Oxford Advisors. Oxford Advisors is not a member of the PUCO Staff. It was a PUCO-hired auditor who supposedly completed its contract work for the state on or around March 2021.

OCC was pursuing its rights under the Ohio law (R.C. 4903.082 and O.A.C. 4901-1-16 et seq.) to obtain information relevant to the subject matter of this proceeding. Information sought to be obtained from the subpoenas goes to the issue of Oxford's findings related to the use of DMR funds. It also goes to whether undue or improper influence has been exerted in this case related to what FirstEnergy described in a text message as "the burned audit report."

In addition to being contrary to the governing Ohio statutes, Attorney Examiner Price's ruling is mistaken on the rules themselves. He cites to the "plain language"[21] of the rule to justify his decision. But he ignores the rule's plain language. Oxford was an "independent contractor" not an "employee" of the PUCO. They were not a "member of commission staff." O.A.C. 4901-1-25(D) does not apply to them. And, in any event, the rule is unlawful as a violation of R.C. 4903.082.

[20] *Id.* at ¶ 26.

[21] Entry at ¶ 24 (February 18, 2022).

Examiner Price's ruling also ignores the rule's plain language by discussing "regulatory history."[22] That is inappropriate. Rules, like statutes, must be applied consistent with their plain language.[23] Only if a rule is capable of bearing more than one meaning is it appropriate to consider regulatory history. The Ohio Supreme Court has said:

> ambiguity in a statute exists only if *its language* is susceptible of more than one reasonable interpretation. Thus, inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.[24]

O.A.C. 4901-1-25(D) is unambiguous – it applies to members of the PUCO Staff (not contractors). Attorney Examiner Price's reliance on regulatory history is in error and contrary to Ohio Supreme Court precedent.[25]

As demonstrated above, O.A.C. 4901-1-25(D) does not apply to Oxford. But Attorney Examiner Price nonetheless addressed OCC's alternative argument that O.A.C.

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[22] *Id.* at ¶ 24.

[23] R.C. 1.41 ("Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, *and to rules adopted under them*.") (italics added); 1.42. Ohio Admin. Code 4901-1-25(D) was adopted under R.C. 4901.13.

[24] *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013).

[25] Additionally, the "regulatory history" upon which Attorney Examiner relies was a rulemaking proceeding. Entry at para. 24. Although Attorney Examiner Price asserts that OCC is making a "collateral attack" on the PUCO's order in that proceeding, collateral estoppel does not apply. For it to apply, four elements must be present: (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) The issue must have been identical to the issue involved in the prior suit. *See Parklane Hosiery Co.* v. *Shore* (1979), 439 U.S. 322, 326 (1979); *Hicks* v.. *De La Cruz*, 52 Ohio St.2d 71, 74-75 (1977). This audit involving whether the FirstEnergy Utilities improperly used DMR funds does not meet any of these elements based on a rule-making proceeding.

4901-1-25(D) should be waived for good cause if it does apply.[26] Attorney Examiner Price ruled that OCC had not shown good cause.[27] That ruling in in error.

First, Attorney Examiner Price said that "[q]uestions posed by OCC regarding why Oxford had not begun drafting the final report until January would produce no probative evidence regarding whether the Companies properly used DMR funds."[28] Such questions are not, of course, the only reasons that OCC wants to depose Oxford and obtain documents from it. But such questions are in fact probative regarding whether the FirstEnergy Utilities properly used DMR funds.

Oxford's final audit report in a large, complex matter involving hundreds of millions of dollars was due February 25, 2020.[29] Just a week before the due date, the PUCO Staff moved for a short extension of time for filing the Oxford final report – from February 25, 2020 to March 31, 2020.[30] A day after Oxford's final audit was otherwise due, former PUCO Chair Sam Randazzo and other Commissioners surprisingly ruled that there would not be a final audit report.[31] In such a large, complex case, why had Oxford not started the final audit report a month before it was due? Was it told not to? Why? By whom? Had it asked PUCO Staff to request an extension of the filing date for a final audit report? Or was it simply told that PUCO Staff was going to ask for the extension?

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[26] Entry at ¶¶ 26-31.

[27] *Id.* at ¶ 26.

[28] *Id.*

[29] Entry at ¶ 8 (January 24, 2018); Entry, RFP at 1 (December 13, 2017).

[30] Motion for Extension of Time and Memorandum in Support Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio (February 18, 2020).

[31] Entry at ¶ 9 (February 26, 2020).

What had Oxford found? Had it found that DMR funds were used for political purposes? Who had it told? When had they told them?

These questions just scratch the surface. The point is that, in an audit described by Attorney Examiner Price as evaluating if DMR revenues were used appropriately,[32] these questions are germane.

Second, Attorney Examiner Price said that "[m]aking Staff subject to discovery, including depositions, in these cases would be unduly burdensome in light of the number of cases in which the Staff must participate."[33] Rejecting OCC's argument that it is entitled to "ample discovery" in this case (as in all others), Attorney Examiner Price said that "OCC . . . could make that argument in *any case* in which it seeks a deposition of Staff."[34]

Here Attorney Examiner Price erred under Ohio Adm. Code 4901-1-38 by not waiving PUCO rules. As outlined above, this is not just *any* case (and we are not asking to conduct discovery in just any case). It's an extraordinary case. As the PUCO is well aware, it relates to a multi-million dollar bribery scheme – what federal prosecutors have called "the largest bribery scheme ever" in Ohio[35] -- and determining whether Ohioans were charged to fund that scheme through the DMR.[36] That PUCO Staff, generally, is busy is not an excuse to deny waiving O.A.C. 4901-1-25(D) and defaulting to the broad

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[32] *See* Entry at ¶¶ 4, 10, 24, 30 (February 18, 2022).

[33] *Id.* ¶ 27.

[34] *Id.* (italics added).

[35] N. Reimann, *Ohio Speaker of the House Arrested in State's 'Largest Bribery Scheme Ever*,' Forbes.com (July 21, 2020).

[36] Entry at ¶ 10 ("The Commission specified that the audit to be conducted [in this case] should also include an examination of the time period leading up to the passage of H.B. 6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in the ESP IV Case.").

discovery rules in an extraordinary case such as this (particularly when discovery is not even being sought from PUCO Staff).[37] And here, there is no interference with anything the Staff is doing. Oxford's work was completed on or around February of *last year*.

Third, Attorney Examiner Price asserts that OCC has already "been provided with ample discovery in this case."[38] And he writes that when asked during the January 7, 2022 prehearing conference for an update on discovery, "no discovery disputes were raised at that time."[39] Regarding the former, Attorney Examiner Price relies on an entirely different case to "support" his assertion.[40] Regarding the latter, "no discovery disputes were raised at that time" because (as Attorney Examiner Price acknowledged himself earlier in the Entry) at the January 7, 2022 prehearing conference he "deferred ruling on the two motions for subpoena requested to be issued to Oxford by OCC . . . ."[41]

Fourth, Attorney Examiner Price asserts that OCC's reliance on a message from FirstEnergy Corp.'s prior CEO (Chuck Jones) "demonstrates OCC's obvious interest in investigating potential wrongdoing as evidenced by the Deferred Prosecution Agreement, rather than investigating what the Commission actually has jurisdiction over investigating, which is whether the Companies improperly used DMR funds."[42] That

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[37] Attorney Examiner Price's assertion that OCC "fails to address whether there are any facts which are otherwise unobtainable from other sources, including discovery produced by the Companies, discovery produced by FirstEnergy Corp. under subpoena, or document which are publicly available[]" is gratuitous and not a known standard that must be met before a party may conduct a discovery deposition. OCC has filed numerous motions to compel, motions for subpoenas, and interlocutory appeals to obtain information on consumers' behalf. OCC cannot possibly get information regarding Oxford's audit – which was "burned" – except by deposing Oxford and obtaining documents from it. That OCC filed the subpoenas at issue here is demonstration enough that OCC cannot get the information from any other source.

[38] Entry ¶ 28 (February 18, 2022).

[39] *Id.*

[40] *Id.* (citing to the *Corporate Separation Case*).

[41] *Id.* at ¶ 16.

[42] *Id.* at ¶ 30 (February 18, 2022).

message, of course, said that Oxford's final report had been "burned." Why was it burned? What had Oxford found? Why would the former FirstEnergy executive have an interest in an independent audit report that didn't exist? Had it found that DMR funds were improperly used for political purposes? Attorney Examiner Price cannot, and should not, prejudge what information Oxford might reveal. The answers to even these rudimentary questions confirm that obtaining information from Oxford is important to this case involving how DMR funds were used. And as noted above the questioning of Oxford will cover many other areas of inquiry that are germane to the investigation in this case. To paint issues pertaining to the use of DMR funds as outside the PUCO jurisdiction is just plain wrong.

Fifth, Attorney Examiner Price reasons that denying the subpoenas is consistent with the PUCO's stated interest in not interfering with the Federal criminal investigation of the FirstEnergy scheme.[43] "OCC has presented no arguments demonstrating that its efforts will not interfere with the Federal investigation."[44] In addition to showing the need for the subpoenaed discovery under the Civil Rules and the Rules of Evidence, parties in this case (under Attorney Examiner Price's ruling) must show, *in addition*, that the discovery they seek will not "interfere" with the Federal investigation. Nowhere is Attorney Examiner Price, or the PUCO, vested with such authority to add this additional requirement for obtaining discovery.[45] Such efforts will thwart OCC's investigation into

[43] *Id.*

[44] *Id.*

[45] *See Disc. Cellular, Inc. v. PUC*, 112 Ohio St.3d 360, 373 (2007) ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.").

whether the distribution modernization funds were improperly used. It seems that some of the standards in the Entry may be unique to OCC.

Sixth, Attorney Examiner Price asserts that OCC does not need the subpoenaed information because it will have the opportunity to "examine the contents and conclusions of the Daymark final report."[46] Parties' methods for preparing their cases are not so circumscribed by Ohio law and rules for case preparation. OCC's points on this issue and others at the outset of this pleading are incorporated here. Parties are free to put together a case of their own making, using the discovery tools of their choice. Attorney Examiner Prices' ruling would rewrite the PUCO's discovery rules.

Further, Attorney Examiner Price goes on to order that a witness from Oxford appear at the evidentiary hearing in this proceeding.[47] However, this order adds little for consumers in the overall context of PUCO rules. Under O.A.C. 4901-1-28(A), the PUCO's rules allow for "[a]ny person making or contributing to the report may be subpoenaed to testify at the hearing in accordance with rule 4901-1-25 of the Administrative Code ,,."

Also flawed is the Entry's stated rationale of "transparency." Mr. Price wrote: "[t]estimony of a witness from Oxford at a public evidentiary hearing (including, if necessary, the confidentiality protections routinely used in hearings), subject to cross examination from all parties, will be far more transparent than a non-public deposition for two reasons: one, at a non-public deposition, all parties may not have a full and fair opportunity to cross-examine the witness; and two, OCC would be under no duty to file

[46] Entry at ¶ 30 (February 18, 2022).

[47] *Id.* at ¶ 31.

the transcript of the deposition in the docket."[48] This seems to be a new take on the rule for discovery including depositions, now that OCC seeks this deposition. No party to this case, not even FirstEnergy, argued this theory advanced by Examiner Price that the normal process of a deposition, including the handling of examination and transcripts, should preclude its use.

Oxford's "mid-term report may contain reliable, probative evidence regarding the Companies' use of DMR funds."[49] One is left to guess why Oxford's final report, associated documents, and Oxford's deposition testimony would *not* contain reliable, probative evidence when, as Attorney Examiner Price himself acknowledges, its mid-term report might. Oxford's final report, or the lack of a final report and Oxford's deposition testimony may indeed, like the mid-term report, contain reliable, probative evidence regarding the use of DMR funds.[50] OCC is entitled to the information.

Finally, Attorney Examiner Price stated that "[a] manifestly unwarranted attack on an individual Staff member does not constitute good cause for waiver of the rules."[51] *But here, OCC did not engage in an unwarranted attack on a Staff member, nor did it "unfairly malign"[52] the PUCO Staff as Attorney Examiner Price alleges.*

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[48] Entry at ¶ 12 (February 18, 2022).

[49] *Id.*

[50] Attorney Examiner Price asserts that Oxford's testimony at hearing will be superior to deposition testimony because "at a non-public deposition, all parties may not have a full and fair opportunity to cross-examine the witness [and] OCC would be under no duty to file the transcript of the deposition in the docket." Entry at ¶ 31. This prejudices OCC and other parties who may be interested in questioning Oxford at deposition. Depositions are a discovery tool, and questions asked at one are very different than those asked during hearing. Further, as Attorney Examiner Price notes in the Entry, scheduling and discovery matters are well-within attorney examiners' purview. Entry at ¶ 35. Attorney Examiner can simply order that all parties have a full and fair opportunity to cross-examine the Oxford witness and that OCC file the transcript.

[51] Entry at ¶ 29 (February 18, 2022).

[52] *Id.*

Rather OCC was pointing out the *fact* that the PUCO Staff instructed potential auditors that the scope of the corporate separation audit did not include examining whether FirstEnergy consumers were the source of funds for FirstEnergy's HB 6 political and charitable spending. Examiner Price alleges that "there is nothing ***to imply that any corporate separation issues related to FirstEnergy's H.B. 6 related activities were out of bounds."[53] We will let the emails speak for themselves. But note that auditor Daymark's caveat statement at the beginning of the audit report, about what the audit did *not* include, is not welcome news for consumers who should be protected by a full audit including HB 6 spending:

> It should be recognized that during the course of this audit, several other reviews of FirstEnergy were underway. The findings in this audit are based solely on the information and documents produced by FirstEnergy for Daymark via data requests and interviews associated with this audit. *While information or documents produced in response to other audits or investigation may be relevant to evaluating whether FirstEnergy's conduct in a particular situation was a violation of the laws and rules governing corporate separation they were not evaluated as part of this audit.* Daymark Audit at 1

Attorney Examiner Price's ruling on our motions for subpoena should be reversed by the PUCO.

## V. CONCLUSION

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient

[53] *Id.*

policeman." So wrote Louis Brandeis in 1913, a few years before he joined the United States Supreme Court. That speaks to investigating the FirstEnergy scandals.

OCC's interlocutory appeal of Attorney Examiner Price's February 18, 2022 ruling meets the standard for granting interlocutory appeals. OCC's appeal on behalf of millions of Ohio consumers should be certified by the Legal Director to the PUCO Commissioners. The PUCO should reverse the Attorney Examiner's ruling. The Commissioners should allow OCC to proceed with its deposition of Oxford Advisors and with obtaining documents from it in the interest of truth and justice regarding the FirstEnergy scandals.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Interlocutory Appeal, Request for the PUCO Legal Director to Certify the Appeal to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel was provided electronically to the persons listed below this 23rd day of February 2022.

*/s/ Maureen R. Willis*
Maureen R. Willis
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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**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, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.** | **CASE NO. 17-2474-EL-RDR** |

**ENTRY**

Entered in the Journal on February 18, 2022

## I. SUMMARY

**{¶ 1}** In this Entry, the attorney examiner denies the motions for subpoenas duces tecum, directs Staff to produce a witness from Oxford Advisors, LLC, at the hearing to be held in this matter, denies the certification of the interlocutory appeal filed by Ohio Consumers' Counsel, and directs that comments be due 60 days after issuance of this Entry and reply comments will be due 15 days after the filing of initial comments.

## II. HISTORY

**{¶ 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}** 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 4928.143.

**{¶ 4}** On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for an ESP. *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*). Further, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the *ESP IV Case*. On rehearing, the Commission authorized FirstEnergy to implement a distribution modernization rider (Rider DMR). *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶185. Additionally, the Commission ruled that Staff will review the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282. Subsequently, the Commission determined that this review should be conducted with the assistance of a third-party monitor and that the monitor should prepare a mid-term report, to inform the Commission when evaluating any proposed extensions of the DMR, and a final report. On January 24, 2018, the Commission selected Oxford Advisors, LLC, (Oxford) as the third-party monitor. Entry (Jan. 24, 2018) at ¶7.

**{¶ 5}** Numerous parties appealed the Commission's decision in the *ESP IV Case*, challenging Rider DMR and other aspects of the Commission's orders. On June 19, 2019, the Supreme Court of Ohio issued its decision in those appeals, affirming the Commission's order in part, reversing it in part as it relates to Rider DMR, and remanding with instructions to remove Rider DMR from FirstEnergy's ESP. *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 at ¶¶ 14-29 (*Ohio Edison*).

**{¶ 6}** On August 22, 2019, pursuant to the *Ohio Edison* decision, the Commission directed the Companies to immediately file proposed revised tariffs setting Rider DMR to $0.00. The Companies were further directed to issue a refund to customers for monies collected through Rider DMR for services rendered after July 2, 2019, subject to Commission review. Once the refund had been appropriately issued, the Companies were instructed to file proposed, revised tariffs removing Rider DMR from the Companies' ESP. *ESP IV Case*, Order on Remand (Aug. 22, 2019) at ¶¶ 14-16.

**{¶ 7}** The Companies complied with the Commission's directives as instructed in the Order on Remand and filed tariffs removing Rider DMR from their ESP on October 18, 2019.

**{¶ 8}** On February 26, 2020, the Commission issued an Entry in which the Commission stated that the provisions for a final review of Rider DMR were an essential part of the terms and conditions related to Rider DMR in the *ESP IV Case*. *ESP IV Case*, Fifth Entry on Rehearing at ¶282, Eighth Entry on Rehearing at ¶113, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 17-20. Additionally, the Commission cited the Court's objections in *Ohio Edison* to the usefulness of the proposed final review after the Court questioned the lack of an effective remedy resulting from such review. *Ohio Edison* at ¶26. As such, the Commission found that, when the provisions of Rider DMR were eliminated, so too were the provisions requiring a final review of the rider. The Commission then dismissed and closed the case of record. Entry (Feb. 26, 2020) at ¶9. No party filed an application for rehearing regarding the Commission's ruling.

**{¶ 9}** Thereafter, on September 8, 2020, Ohio Consumers' Counsel filed a motion requesting that the Commission reopen this proceeding and initiate an audit of Rider DMR. On December 30, 2020, the Commission determined that, in the interests of both transparency and state policy, good cause existed to initiate an additional review of Rider DMR.

**{¶ 10}** Accordingly, the Commission directed Staff to prepare a request for proposal (RFP) to solicit the services of a third-party auditor to assist Staff with the full review of Rider DMR, as contemplated in the *ESP IV Case*. Due to an insufficient number of submitted proposals, the Commission directed Staff to reissue the RFP for audit services, in accordance with a revised RFP. The Commission specified that the audit to be conducted should also include an examination of the time period leading up to the passage of H.B. 6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in the *ESP IV Case*. *ESP IV Case*, Fifth

Entry on Rehearing (Oct. 12, 2016) at ¶282. All proposals were submitted by May 18, 2021, in accordance with the terms of the RFP. Entry (Jun. 6, 2021) at ¶12.

**{¶ 11}** On June 2, 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. *Id.* at ¶14. In the Entry, the Commission ordered Daymark and the Companies to incorporate the terms and conditions of the RFP into the contract, which set the deadline for the draft audit report as October 15, 2021, and the deadline to file the final audit report as October 29, 2021. *Id.*; Entry (Apr. 7. 2021), Attachment at 3.

**{¶ 12}** On September 24, 2021, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp. The subpoena duces tecum was issued by the attorney examiner as requested by OCC.

**{¶ 13}** On October 14, 2021, Staff filed a motion for an extension of time to file the draft audit report and final audit report, which was granted by Entry on October 22, 2021. In that Entry, the deadlines for Daymark to provide its draft and final audit reports were set for December 2, 2021, and December 16, 2021, respectively.

**{¶ 14}** On October 20, 2021, OCC filed a motion for a subpoena for any drafts of the final report prepared by Oxford in this proceeding. Staff filed a memorandum contra the motion for subpoena on November 4, 2021. OCC filed its reply to the memorandum contra on November 12, 2021. Subsequently, on December 10, 2021, OCC filed a motion for a second subpoena, a subpoena duces tecum for Oxford to attend and provide testimony at a deposition and for waiver of Ohio Adm.Code 4901-1-25(D). Staff filed a memorandum contra the motion on December 27, 2021. OCC filed a reply to the memorandum contra on January 3, 2022.

**{¶ 15}** On December 14, 2021, Staff filed a motion for extension of time to file the final audit report, which was granted by Entry on December 15, 2021. The deadline for Daymark to file its final report was set for January 14, 2022.

**{¶ 16}** On January 7, 2022, a prehearing conference was held in order to address pending motions in this proceeding and for parties to provide an update as to discovery matters. At the prehearing conference, the attorney examiner deferred ruling on the two motions for subpoenas requested to be issued to Oxford by OCC until after the final report has been filed by Daymark.

**{¶ 17}** On January 12, 2022, OCC filed an interlocutory appeal of the "ruling" of the attorney examiner to defer ruling on the two motions for subpoenas filed by OCC.

**{¶ 18}** Subsequently, Daymark filed the final report on January 14, 2022.

## III. DISCUSSION

### *A. The motions for subpoenas for Oxford should be denied.*

**{¶ 19}** In its motion for subpoena filed on October 20, 2021, OCC seeks the production of the final report prepared by Oxford, which was not filed in this proceeding. In support of its motion, OCC speculates that the Oxford final report "could hold" information that pertains to whether the Companies used money collected from the DMR to fund political activities. Further, OCC requests that the Commission, if necessary, waive Ohio Adm.Code 4901-1-25(D). Noting that the rule may be waived "for good cause shown," OCC avers that subpoenas duces tecum are a key investigatory tool that allow a party to obtain information that may be used in evidence. Ohio Adm.Code 4901-1-25; Civ. R. 45.

**{¶ 20}** In its motion in support of the second subpoena, filed on December 10, 2021, OCC contends that the act of signing a subpoena is essentially a ministerial act. Further, OCC argues that, under R.C. 4903.082, parties must be given ample rights to discovery. OCC further claims that there is good cause for waiving Ohio Adm.Code 4901-1-25(D), if

needed, because OCC need to depose Oxford to have ample discovery for case preparation for the hearing and to provide a record on which the Commission can base its opinion.

**{¶ 21}** Staff responds to the initial subpoena that, as demonstrated by an affidavit by Paul Corey from Oxford, an Oxford final report *does not exist*, in draft form or otherwise.

**{¶ 22}** Further, Staff argues that, even if the records did exist, the Commission's procedural rules do not permit a subpoena to compel production of documents by a Commission-selected auditor that is assisting Staff. Ohio Adm.Code 4901-1-25(D). With respect to the second subpoena, Staff states that the underlying rationale remains the same. Oxford was selected to assist Staff. The Entry selecting Oxford provided that "Oxford will execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C, 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16." Entry (Jan. 24, 2018) at ¶10.

**{¶ 23}** With respect to the first subpoena, OCC replies that the Commission, for transparency, should reject Staff's opposition and issue the subpoena. Further, OCC contends that, even if the Commission rules do not permit discovery upon Staff, the rules do not protect Oxford, which is an independent contractor, from discovery. OCC avers that Oxford is an "independent contractor" not "commission staff" and, thus, is not exempt from discovery. Finally, OCC argues that the Commission can waive any provision of Ohio Adm.Code Chapter 4901-1 "for good cause shown." Ohio Adm.Code 4901-1-38. OCC contends that the unique circumstances of this case, which include a Federal criminal investigation and the execution of a deferred prosecution agreement by FirstEnergy Corp., dictate that the Commission waive the rule to permit discovery upon Oxford. Further, OCC accuses Staff of seeking to deter a "real investigation" of FirstEnergy by urging the Commission to deny the motion for subpoena and through communications with potential bidders in the *FirstEnergy Corporate Separation Case*. In support of the second subpoena, OCC expands this argument, noting that a text message from a FirstEnergy chief executive officer, first partially disclosed in the Deferred Prosecution Agreement entered into between the

United States Attorney for the Southern District of Ohio and FirstEnergy Corp., referenced a past Commission chairman "burning the final DMR report."

**{¶ 24}** The attorney examiner finds that both the motion for a subpoena for the draft Oxford final report and the motion for a subpoena duces tecum regarding the mid-term report should be denied. OCC contends that signing a subpoena is essentially a ministerial act; however, even if that were the proper characterization, and it is not, the subpoenas at issue were, on their face, not in compliance with the rules. Ohio Adm. Code 4901-25(D) states:

> A subpoena may require a person, *other than a member of the commission staff*, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule. [Emphasis added].

In addition to the plain language of the rule cited above, the Commission has long established that discovery should not be permitted with respect to auditors such as Oxford. In a prior case, the Commission expressly denied OCC's recommendation that the Commission procedural rules be amended to permit discovery upon auditors hired by or at the discretion of the Commission:

> The fifth request of OCC is to modify the rule to permit discovery upon auditors hired by or at the direction of the Commission. OCC contends that that the rationale for not allowing discovery on Commission staff does not apply to auditors * * * The Commission does not agree with OCC's position that the rationale for not allowing discovery on Commission staff does not apply to auditors. The auditors serve in place of staff and, therefore, consistent treatment is appropriate. OCC's request should be denied.

*In re the Commission's Review of Ohio Adm.Code Chapters 4901-1, 4901-3, and 4901-9*, Case No. 06-685-AU-ORD, Finding and Order (Dec. 6, 2006) at 27. OCC did not seek rehearing of this decision. Therefore, the attorney examiner finds that OCC arguments that Ohio Adm.Code 4901-1-25(D) does not apply to Oxford to be both misplaced and an improper collateral attack on the Commission's final, nonappealable order in the rulemaking. The Commission, in fact, has been clear that the third-party monitor for the DMR was to "assist and work with FirstEnergy and FirstEnergy Corp. to ensure that Rider DMR funds are expended appropriately." *In re Application of Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113. Moreover, in rejecting the Companies' claim that Staff was fully capable of assessing whether DMR funds were used properly, the Commission was clear that the decision to hire a third-party monitor rather than use Staff to review the use of the DMR funds was made in the interests of "balancing the workload of Staff." *Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 12, 17. Oxford was directed to submit quarterly interim updates to Staff, so that Staff would remain informed on the progress of the ongoing review. *Id.* at ¶19. Further, the Commission expressly stated Oxford is bound by the nondisclosure provisions of R.C. 4901.16. Entry (Jan. 24, 2018) at ¶10.

**{¶ 25}** In support of its argument that auditors are not part of Staff for discovery purposes, OCC notes that the Entry selecting Oxford specified that Oxford would serve as an "independent contractor." Entry, (Jan. 24, 2018) at ¶13. However, this provision is routinely included in orders selecting auditors and simply relates to the employment and tax status of Oxford. Oxford was not an "employee" of the Commission for employment and tax purposes. OCC is clearly aware of this fact because OCC has designated its outside experts who testify in Commission proceedings as "independent contractors." *Ohio Edison*, Case No. 14-1297-EL-SSO, Co. Ex. 52 (filed Oct. 15, 2015) and Co. Ex. 58 (filed Oct. 16, 2015). Under OCC's line of reasoning, OCC's own outside experts, who are identified as "independent contractors," would be independent from OCC, including, potentially, when

it comes to protecting communications with such outside experts under attorney/client privilege or attorney work product doctrine. However, OCC's reasoning is flawed and should be rejected.

*B. OCC has failed to set forth good cause for waiver of Ohio Adm.Code 4901-1-25.*

**{¶ 26}** Moreover, the attorney examiner finds that OCC has not set forth good cause to support a waiver of Ohio Adm.Code 4901-1-25(D) with respect to either of the requested subpoenas. With respect to the subpoena for Oxford's draft final report, the facts are clear that no such draft report exists in any form whatsoever. Questions posed by OCC regarding why Oxford had not begun drafting the final report until January would produce no probative evidence regarding whether the Companies properly used DMR funds. On the other hand, Daymark did produce, on January 14, 2022, a final report that appears to fully address whether the Companies properly expended DMR funds.

**{¶ 27}** With respect to the motion for a waiver of Ohio Adm.Code 4901-1-25(D) regarding the mid-term report, the attorney examiner finds that OCC has not set forth good cause to support a waiver of the rule. The rule precluding discovery, including depositions, has long been in place and exists for good reason. Intervenors such as OCC can pick and choose which cases to intervene in and the degree of their participation in that case. For example, in the last six annual transmission rider update cases filed by the Companies, OCC sought intervention in only three of those cases. Staff does not have that discretion. Among many other duties, Staff reviews all rate, tariff and rider filings made by utilities before the Commission and files reports or recommendations in the vast majority of those cases. Making Staff subject to discovery, including depositions, in these cases would be unduly burdensome in light of the number of cases in which the Staff must participate. Rather than set forth good cause that Oxford should be deposed, OCC simply makes the argument that Oxford must be subject to discovery (in this case a deposition) in order for OCC to have "ample discovery," as provided by R.C. 4903.082; but OCC, or any other party, could make that argument in any case in which it seeks a deposition of Staff. More importantly, OCC

fails to address whether there are any facts which are otherwise unobtainable from other sources, including discovery produced by the Companies, discovery produced by FirstEnergy Corp. under subpoena, or documents which are publicly available.

**{¶ 28}** Moreover, the record demonstrates that OCC has been provided with ample discovery in this case. FirstEnergy Corp. has provided over 230,000 pages of documents in response to a subpoena duces tecum requested by OCC. (Tr. (Jan. 7, 2022) at 9-10.) OCC has characterized this document production as a "mountain of evidence" necessitating that the *Corporate Separation Case* be held in abeyance while OCC and others "wade" through the documents. *Corporate Separation Case,* Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. Further, at the prehearing conference on January 7, 2022, the attorney examiners asked the parties for an update regarding discovery, including compliance with the granting of a motion to compel filed by OCC, and no discovery disputes were raised at that time (Tr. (Jan. 7, 2022) at 12-14).

**{¶ 29}** The attorney examiner notes that, in its reply to Staff's memorandum contra, OCC unfairly maligns Staff, claiming that, in the *Corporate Separation Case*, Staff instructed potential bidders for the audit contract that the project does not include the H.B. 6 scandal. However, there is nothing in the email attached to OCC's reply to imply that any corporate separation issues related to FirstEnergy's H.B. 6 related activities were out of bounds in the audit. This individual Staff member was simply responding to questions whether the RFP included "whether FirstEnergy improperly used funds collected in the DMR" and whether the RFP included "whether the source of funds for political and charitable spending by the Companies" in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers. OCC is well aware that whether FirstEnergy improperly used funds collected in the DMR is being addressed in this proceeding and is the subject of the Daymark final audit report. In addition, the question of whether the source of funds for political and charitable spending by the Companies in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers is being thoroughly addressed in *In re 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, (*FirstEnergy Political and Charitable Spending Case*) Entry (May 13, 2021). Moreover, OCC is well aware that its arguments regarding the scope of the audit in the *FirstEnergy Corporate Separation Case* have been considered and rejected by the Commission. OCC raised these same arguments in an application for rehearing filed on December 4, 2020, in that proceeding. The Commission considered, and rejected, those arguments. *FirstEnergy Corporate Separation Case,* Application for Rehearing (Dec. 4, 2020) at 11-14 (*denied by operation of law*). A manifestly unwarranted attack on an individual Staff member does not constitute good cause for a waiver of the rules.

**{¶ 30}** Finally, the attorney examiner notes that OCC also relies heavily upon a message from a past chief executive officer of FirstEnergy Corp., which was disclosed as part of the Deferred Prosecution Agreement between the United States Attorney for the Southern District of Ohio and FirstEnergy Corp. OCC's reliance upon the message demonstrates OCC's obvious interest in investigating potential wrongdoing as evidenced by the Deferred Prosecution Agreement, rather than investigating what the Commission actually has jurisdiction over investigating, which is whether the Companies improperly used DMR funds. However, this is a topic which appears, from the Deferred Prosecution Agreement, to be a subject in the ongoing Federal criminal investigation. The United States Attorney is investigating this issue. The Commission has made it clear that avoiding interference with the ongoing Federal criminal investigation is of the utmost importance. *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, Entry on Rehearing (Dec. 15, 2021) at ¶ 14. In attempting to show good cause for a waiver of the Commission rules, OCC has presented no arguments demonstrating that its efforts will not interfere with the Federal investigation. Moreover, as noted above, Daymark produced a final report on January 14, 2022, that appears to fully address whether the Companies properly expended DMR funds, and OCC will have a full and fair opportunity to examine the contents and conclusions of

the Daymark final report. Accordingly, the attorney examiner finds that OCC has failed to demonstrate good cause for a waiver of Ohio Adm.Code 4901-1-25(D).

**{¶ 31}** Nonetheless, the Commission has stated its commitment with respect to the Companies' activities surrounding the passage of H.B. 6, to follow the facts wherever they may lead. *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, Entry on Rehearing (Dec. 15, 2021) at ¶13. Further, the attorney examiner notes that the Commission reopened this proceeding in the interest of promoting transparency. Entry (Dec. 30, 2020) at ¶22. Oxford has prepared a mid-term report regarding the Companies' use of DMR revenues. Although this mid-term report was prepared to inform the Commission on whether the DMR should be extended and was filed in this docket only by mistake, the mid-term report may contain reliable, probative evidence regarding the Companies' use of DMR funds. The parties should have a full and fair opportunity to cross-examine a witness from Oxford under oath regarding the mid-term report. Therefore, the attorney examiner directs Staff to produce a witness from Oxford at the evidentiary hearing to be held in this proceeding. Testimony of a witness from Oxford at a public evidentiary hearing (including, if necessary, the confidentiality protections routinely used in hearings), subject to cross-examination from all parties, will be far more transparent than a non-public deposition for two reasons: one, at a non-public deposition, all parties may not have a full and fair opportunity to cross-examine the witness; and two, OCC would be under no duty to file the transcript of the deposition in the docket.

### *C. The interlocutory appeal should not be certified to the Commission.*

**{¶ 32}** Further, the attorney examiner finds that OCC's interlocutory appeal, filed on January 12, 2022, should not be certified to the Commission. 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 appeal 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).

**{¶ 33}** 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.

**{¶ 34}** However, the attorney examiner finds the interlocutory appeal should be rejected as improper. The interlocutory appeal was not taken from a "ruling" by the attorney examiner issued under Ohio Adm.Code 4901-1-14. OCC claims that the attorney examiner erred at the January 7, 2022 prehearing conference by deferring ruling on the motions for subpoenas for Oxford. However, the attorney examiner did not rule on the motion at the January 7, 2022 prehearing conference. The attorney examiner determined that a ruling on the motions for subpoena should come after the filing of the final report by Daymark in the event that the Daymark final report resolved the questions OCC sought to pose to Oxford at a deposition. Accordingly, the attorney examiner expressly deferred ruling on the motion to compel. (Tr. (Jan. 7, 2022) at 10-11.) Therefore, the interlocutory appeal is improper because it was not filed in response to a "ruling" by the attorney examiner and should be denied on that basis. *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Opinion and Order (Mar. 31, 2016) at 11; *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶18.

**{¶ 35}** Even upon a finding that the interlocutory appeal was proper, which it is clearly not, the attorney examiner, nonetheless, finds that it fails to meet the requirements of Ohio Adm.Code 4901-1-15(B), as it does not present a new or novel question of interpretation, law, or policy.[1] It is well-established that the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and ruling on discovery issue, 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 interlocutory appeal seeks Commission review of a decision by the attorney examiner to defer ruling on a motion for subpoena, but there is nothing new or novel about deferring ruling on a motion until a more appropriate time. *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶18.

**{¶ 36}** 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 January 7, 2022 prehearing conference. At the January 7, 2022 prehearing conference, the attorney examiner deferred ruling on the motions for subpoenas until after the filing of the Daymark final report, which was due to be filed (and was filed) on January 14, 2022. (Tr. (Jan. 7, 2022) at 10-11.) OCC literally filed its interlocutory appeal on January 12, 2022, which was two days before the audit report was

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1 OCC provides no argument that the interlocutory appeal is taken from a ruling that departs from past precedent.

due to be filed and when the attorney examiner told them that the decision on the subpoena would be ripe for decision. Only a little over a month later, this Entry is now filed. There was no prejudice or undue delay, and, in any event, the motions for subpoenas have been denied in this Entry. Moreover, the attorney examiner notes that, while OCC appears to have time to file requests for interlocutory appeals for expedited discovery, they do not appear to have time to timely review the thousands of documents that have already been provided to them. In the *FirstEnergy Corporate Separation Case*, OCC sought an extension of time to prepare for hearing, which was granted by the attorney examiners. *FirstEnergy Corporate Separation Case,* Tr. (Jan. 4, 2022) at 23-26). Unsatisfied with the additional time to prepare, OCC asks that the *FirstEnergy Corporate Separation Case* be held in abeyance while OCC sifts through a "mountain of evidence" obtained from FirstEnergy Corp. pursuant to a subpoena. *FirstEnergy Corporate Separation Case,* Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. OCC cannot now convincingly claim that the brief delay caused by the deferred ruling for subpoenas is unduly delaying its hearing preparation while it seeks delays in other proceedings in order to review the "mountain of evidence" it has obtained from FirstEnergy Corp. Accordingly, the attorney examiner finds that the interlocutory appeal should not be certified to the Commission.

### *D. A comment period should be established for review of the final report filed by Daymark.*

**{¶ 37}** At the prehearing conference on January 7, 2022, the attorney examiners advised the parties that a comment period would be set following the filing of the final report, which was due January 14, 2022, and that parties should expect an initial comment period of 30 days and a reply comment period of 15 days (Tr. (Jan. 7, 2022) at 11-12). However, the attorney examiner is mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. in response to the broad subpoena issued by the attorney examiner at the request of OCC. Therefore, the attorney examiner will provide an extended opportunity for OCC, and other parties, to review these documents prior to the

filing of initial comments to the Daymark final report. Accordingly, initial comments will be due 60 days after issuance of this Entry and reply comments will be due 15 days after the filing of initial comments. The attorney examiners will entertain reasonable requests for extension of the comment period if OCC, or any other party, provides meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

## IV. ORDER

**{¶ 38}** It is, therefore,

**{¶ 39}** ORDERED, That OCC's motions for subpoenas filed on October 20, 2021, and December 10, 2021, be denied. It is, further,

**{¶ 40}** ORDERED, That OCC's request for waiver of Ohio Adm.Code 4901-1-25 be denied. It is, further,

**{¶ 41}** ORDERED, That, in the interest of transparency, Staff produce a witness from Oxford at the evidentiary hearing to be held in this proceeding. It is, further,

**{¶ 42}** ORDERED, That OCC's interlocutory appeal filed on January 12, 2022, be denied. It is, further,

**{¶ 43}** ORDERED, That parties abide by the comment period established in Paragraph 36. It is, further,

**{¶ 44}** 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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**in**

**Case No(s). 17-2474-EL-RDR**

Summary: Attorney Examiner Entry ordering that OCC's motions for subpoenas filed on October 20, 2021, and December 10, 2021, be denied; that OCC's request for waiver of Ohio Adm.Code 4901-1-25 be denied; that, in the interest of transparency, Staff produce a witness from Oxford at the evidentiary hearing to be held in this proceeding; that OCC's interlocutory appeal filed on January 12, 2022, be denied; and, that parties abide by the comment period established in Paragraph 36 electronically filed by Heather A. Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio

**This foregoing document was electronically filed with the Public Utilities**

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**in**

**Case No(s). 17-2474-EL-RDR**

Summary: Request Interlocutory Appeal, Request for the PUCO Legal Director to Certify the Appeal to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers' Counsel electronically filed by Ms. Alana M. Noward on behalf of Willis, Maureen R.