

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of the	:	
Distribution Modernization Rider of	:	Case No. 17-2474-EL-RDR
Ohio Edison Company, The Cleveland	:	
Electric Illuminating Company, and	:	
The Toledo Edison Company.	:	

In the Matter of the Review of The	:	
Ohio Edison Company, The Cleveland	:	Case No. 17-974-EL-UNC
Electric Illuminating Company, and	:	
The Toledo Edison Company's	:	
Compliance with R.C. 4928.17 and the	:	
Ohio Adm. Code Chapter 4901:1-37.	:	

MEMORANDUM CONTRA INTERLOCUTORY APPEAL

On February 23, 2022, the Office of the Ohio Consumers' Counsel (OCC) filed an Interlocutory Appeal asking the Public Utilities Commission of Ohio (Commission) to overrule the Attorney Examiner's denials of two OCC subpoenas. Specifically, OCC's request to subpoena former PUCO auditor Oxford for a discovery deposition and OCC's request for documents the Auditor holds pertaining to the audit were denied.

The Staff of the Commission (Staff) submits that there are two primary reasons the Attorney Examiner's ruling was lawful and should be upheld. First, the Commission's rules permit interlocutory appeals from rulings by an attorney examiner in limited circumstances. Those circumstances are not present here. Second, the rule of law excluding Commission Staff from discovery is clear. The Auditor is an extension of Staff, and thus, not subject to discovery. Furthermore, it was ordered that Staff produce a

representative of the auditor referenced in the subpoena for cross examination during hearing, so OCC, other parties and intervenors will all have an opportunity to question the representative regarding his or her findings. The reasons for Staff's opposition to OCC's Interlocutory Appeal are further addressed herein.

Respectfully submitted,

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**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

MEMORANDUM IN SUPPORT

I. LAW AND ARGUMENT

A. **The Commission's rules permit interlocutory appeals from rulings by an attorney examiner in limited circumstances – this is not one.**

The Commission's rules permit interlocutory appeals from rulings by an attorney examiner in limited circumstances. Those circumstances are not present here. OCC's request to certify the interlocutory appeal should be denied.

Rule 4901-1-15(B) provides:

Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds 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 or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

Ohio Admin. Code §4901-1-15(B).

Under this rule, an interlocutory appeal may not be certified to the Commission unless one of two conditions are met: (1) the appeal presents a new or novel question of interpretation, law, or policy, or (2) the ruling represents a departure from past precedent. Neither condition is satisfied by OCC's request.

The Attorney Examiner's ruling was based on a rule that has been in place for many years, Ohio Adm. Code 4901-25(D), and has been consistent with prior applications of that rule. In fact, as the Attorney Examiner pointed out, the Commission in a prior case expressly denied OCC's recommendation that the Commission amend its procedural rules to permit discovery upon auditors hired by or at the discretion of the Commission. The Commission stated:

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. The Commission was very clear that "auditors serve in place of staff" and should be treated accordingly. Notably, OCC did not seek rehearing of this decision.

Furthermore, to the extent OCC's interlocutory appeal seeks an appeal of the attorney examiner's finding that good cause was not shown to waive the longstanding provisions of Ohio Adm. Code 4901-1-25(D), the record is clear that this ruling does not present a new or novel question of interpretation, law, or policy, or a departure from past precedent.

Evidence is regularly reviewed, balanced, and weighed against a standard of review, including "good cause" in the context of a request to waive rules. Thus, a ruling

on this particular waiver request is clearly not a novel question of interpretation, law or policy. The presence of a different set of facts across cases does not change the legal standard by which those facts are evaluated. Additionally, OCC presents no evidence that denying its waiver request is a departure from past precedent.

The Attorney Examiner's ruling reflects the plain language of the rule and is consistent with Commission precedent.¹ There is nothing novel about the ruling nor does it represent a departure from past precedent. Therefore, the criteria for certifying an interlocutory appeal are not satisfied. OCC, other parties and intervenors, will have the opportunity to cross examine Staff and its auditors in this proceeding, which is consistent with the longstanding precedent in Commission proceedings.

B. The rule of law excluding Commission Staff from discovery is clear.

OCC continues to refuse to acknowledge the plain reading and meaning of the Commission's rules, which are clear and unambiguous. OCC further misapprehends the Commission' authority to abrogate those rules.

The Commission's rules do not permit a subpoena either to compel appearance at a deposition, or the production of documents at such a deposition, by a Commission-selected auditor. Ohio Adm.Code 4901-1-25(D) provides that "[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

¹ OCC argues that the Attorney Examiner should have waived the rule exempting Staff from discovery. OCC, however, has not shown good cause to waive that rule. Again, the rule is clear and has long been applied to auditors selected by the Commission. The Entry provides a myriad of reasons why a waiver of this rule should not be granted here.

within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code.”

Ohio Adm.Code 4901-1-25(D) (emphasis added). The Commission Staff is explicitly exempted from this rule, and the auditor was operating as an extension of Staff.

Moreover, Ohio Admin.Code 4901-1-16(G) similarly explicitly excepts Staff from the discovery provisions.

The Commission has consistently adhered to these rules, and OCC neither has nor can offer any precedent to the contrary. This is well-established law, and the language of the Commission rules is clear. OCC has failed to present “a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent” as required by Ohio Admin.Code 4901-1-15(B).

OCC’s reliance on R.C. 4903.082 is unavailing, in two respects. First, while that section grants “ample rights of discovery” to “[a]ll parties and intervenors,” nowhere in Title 49 of the Ohio Revised Code did the General Assembly define who is considered to be a “party” to a Commission proceeding. The Commission’s rules, however, do define who may be a party. Ohio Admin.Code 4901-1-10 defines who are considered to be parties to a Commission proceeding, and specifically excludes its Staff from the definition for purposes of discovery.

Second, asserting R.C. 4903.082's provision that “the law requires that the PUCO’s rules ‘should be reviewed regularly by the commission to aid full and reasonable discovery,’” OCC Interlocutory Appeal at 1, belies the flaw in its argument. The Commission’s rules have been reviewed, not only by the Commission, but by the Joint Committee on Agency Rule Review (JCARR), which approved the exclusion of

Commission Staff from the discovery rules. Indeed, that exclusion from the “1983 statute” was reviewed and reauthorized as recently as March 20, 2020.

C. *Suvon* is neither applicable nor authoritative here, and OCC’s reliance is misplaced.

OCC argues that the Attorney Examiner erroneously rejected OCC’s argument to subpoena former PUCO auditor Oxford for a discovery deposition, and OCC’s request for documents the Auditor holds pertaining to the audit.² In a perplexing move, OCC cites to the Ohio Supreme Court’s decision in *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 *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* (*Suvon*) to support its arguments. But the *Suvon* decision is neither on point nor instructive here. The Court’s primary finding in the *Suvon* case was that the Commission’s decision to certify Suvon lacked evidentiary support in the record (the Court did not opine on discovery issues, or conclude that *Suvon* should not be certified.)

First, although the Ohio Supreme Court did recognize that “intervening parties in proceedings before PUCO also have a statutory right to discovery under R.C. 4903.082,” *Suvon* dealt with a Competitive Retail Electric Supplier (CRES) certification issue, not an independent auditor, or an intervenor’s ability to conduct discovery on Staff. Furthermore, and perhaps most significant, the Ohio Supreme Court never made a

² OCC Interlocutory Appeal at 1-2.

substantive ruling in *Suvon* regarding discovery rights. Instead, and what OCC omits, the Ohio Supreme Court instructed the Commission, on remand, to “rule on the merits of the discovery motions before issuing a decision on the certification application.”³ In the *Suvon* proceeding, the Commission made the determination to certify Suvon as a CRES, and ruled that Motions to Compel were moot in light of that decision. The Ohio Supreme Court recognized that CRES certification proceedings operate under a statutory deadline.⁴ However, the Court determined that the Commission would need to balance the statutory right to discovery and the constraints imposed by the statutory time frame for ruling on the certification application.⁵ In other words, the Court wanted the Commission to decide whether discovery was necessary; not simply decided that discovery was unnecessary because it had already made a decision (regarding the certification of Suvon). Attempting to use the *Suvon* decision as precedent for the points it is trying to make through its interlocutory appeal is disjointed at best. *Suvon* is not applicable here as the Ohio Supreme Court made no substantive ruling on discovery rights, and the Court most certainly did not make any substantive ruling on an intervenor’s ability to conduct discovery on Staff (as that was not at issue in the *Suvon* proceeding).

II. CONCLUSION

For the reasons explained above, OCC’s Interlocutory Appeal should be denied. The Commission’s rules permit interlocutory appeals from rulings by an attorney examiner in

³ Id. at 16.

⁴ Id.

⁵ Id.

limited circumstances. Those circumstances are not present here. Second, the rule of law excluding Commission Staff from discovery is clear.

Respectfully submitted,

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**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Memorandum Contra Interlocutory Appeal**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 28th day of February, 2022.

/s/ Thomas G. Lindgren

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17-974-EL-UNC

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Summary: Memorandum Contra Interlocutory Appeal electronically filed by Mrs.
Kimberly M. Naeder on behalf of PUCO