

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 March 8, 2022

{¶ 1} In this Entry, the attorney examiner certifies for Commission review the interlocutory appeal filed by Ohio Consumers' Counsel on February 23, 2022.

{¶ 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 R.C. 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 (OCC) 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. 2, 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 and, in the alternative, a motion for waiver of Ohio Adm.Code 4901-1-25(D). Staff filed a memorandum contra the motion for subpoena on November 4, 2021. Staff attached an affidavit from Paul Corey of Oxford attesting that a final report does not exist in draft form or otherwise. 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.

{¶ 19} By Entry issued February 18, 2022, the attorney examiner denied the motions for subpoenas duces tecum, directed Staff to produce a witness from Oxford at the hearing to be held in this matter, and extended the comment period, while noting that further reasonable requests for extension of the comment period would be entertained if OCC, or any other party, provided meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

{¶ 20} On February 23, 2022, OCC filed an interlocutory appeal requesting certification of the denial of the motions for subpoena in the February 18, 2022 Entry.

{¶ 21} 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).

{¶ 22} 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.

{¶ 23} In its interlocutory appeal, OCC asserts that it meets the requirements in Ohio Adm.Code 4901-1-15(B). OCC claims that the denial of its motions raise new and novel question of law and policy. Specifically, it notes that Ohio Civil Rule 26 states that discovery “is proportional to the needs of the case,” and R.C. 4903.082 requires the Commission rules to be reviewed regularly “to aid full and reasonable discovery by all parties.” OCC argues that R.C. 4903.082 does not exempt Staff from discovery, thus Ohio Adm.Code 4901-1-16(H) and 4901-1-25(D), which preclude discovery upon Staff, conflict with and are subordinate to the Revised Code. Additionally, OCC contends that an immediate determination is necessary to prevent undue prejudice, asserting that the ruling delays and hinders its case preparation efforts. OCC specifically argues that this discovery is necessary for its efforts to file written comments, and the comment deadlines have now been set.

{¶ 24} Furthermore, OCC argues that the Commission recently rejected a similar argument from OCC, and that decision was overturned by the Ohio Supreme Court. *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 (Oct. 14, 2021) (*Suvon*). OCC also asserts that Ohio Adm.Code 4901-1-38(B) allows the Commission to waive the requirements to certify a case for good cause. It argues that this is an extraordinary case given the circumstances surrounding it, and good cause exists to certify the appeal. As an aside, OCC also argues that the existing interlocutory appeal rules unfairly favor utilities, which it contends is another reason to certify its appeal to the Commission.

{¶ 25} On February 28, 2022, Staff filed a memorandum contra to OCC’s interlocutory appeal and request for certification of the denial of the motions for subpoena. In its memorandum contra, Staff argues that the ruling in the February 18, 2022 Entry reflects that plain language of Ohio Adm.Code 4901-1-25(D) and is consistent with Commission

precedent, citing *In re the Commission's review of Ohio Adm.Code Chapters 4901-1, 4901-3 and 4901-9*, Case Number 06-685-AU-ORD, Finding and Order (Dec. 6, 2006) at 27. Staff claims that there is nothing novel about the ruling nor does it represent a departure from past precedent. Staff contends that OCC's reliance upon R.C. 4903.82 is unavailing because, while the statute grants "ample rights of discovery" to all "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. On the other hand, Ohio Adm.Code 4901-1-10 defines who are considered to be parties to a Commission proceeding and specifically excludes Staff from the definition of "party" for purposes of discovery. Additionally, Staff notes that R.C. 4903.082 requires that the rules be reviewed regularly, and the Commission as well as the Joint Committee on Agency Rule Review have reviewed the rules as required.

{¶ 26} Staff also argues that the *Suvon* case cited by OCC is inapplicable to the current interlocutory appeal. Specifically, Staff explains that the Court did not opine on the outcome of the pending discovery issues. According to Staff, the Court found that intervening parties have a right to discovery under R.C. 4903.082, but the case involved a Competitive Retail Electric Supplier certification issue and did not involve discovery on Staff or an independent auditor. Moreover, Staff explains that the Court instructed the Commission to rule on discovery motions before issuing a decision on the application, but the Court did not issue a substantive ruling on the discovery issues themselves.

{¶ 27} The attorney examiner finds that the interlocutory appeal should be certified to the Commission. The attorney examiner finds that the appeal presents a new or novel question of law or policy. R.C. 4903.082 states, in part, that "[a]ll parties and intervenors shall be granted ample rights of discovery. The present rules of the public utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. ***" OCC contends that Ohio Adm.Code 4901-1-16(H) and 4901-1-25(D), which preclude discovery upon Staff are in conflict with R.C. 4903.082, which does not exempt Staff from discovery.

{¶ 28} The attorney examiner notes that the Commission procedural rules are currently under review. In this review, OCC recommended that Staff should be subject to depositions, but OCC did not claim that the Commission's rules precluding discovery of Staff are in conflict with R.C. 4903.82. *In re the Review of Ohio Adm.Code Chapter 4901-1 Rules Regarding Practice and Procedure Before the Commission*, Case No. 18-275-AU-ORD, Comments, Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (Jan. 13, 2020) at 11. Moreover, in the previous review of Ohio Adm. Code Chapter 4901-1, OCC did not raise the claim that the Commission's rules precluding discovery of Staff are in conflict with R.C. 4903.82. *In re the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure, et al.*, Case No. 11-776-AU-ORD, Joint Comments (Apr. 1, 2011) at 11. Likewise, in the 2006 rule review cited by the attorney examiner in the February 18, 2022 Entry, the attorney examiner noted that the Commission explicitly rejected OCC's recommendation that third-party auditors employed by the Commission be subject to discovery (Entry, February 18, 2022 at ¶ 24). In that rule review, OCC did not claim that the Commission's rules precluding discovery of Staff are in conflict with R.C. 4903.82. *In re Review of Chapters 4901-1, et al.*, Case No. 06-685-AU-ORD, Comments, Ohio Consumers' Counsel (Jun. 26, 2006) at 19-21. In fact, there is no indication that OCC has ever previously claimed that the Commission's rules conflict with R.C. 4903.082. Given that there is no indication that OCC or any other stakeholder has raised this issue before, OCC's claim is a new or novel interpretation of law.

{¶ 29} OCC is less persuasive in its claim that an immediate determination is needed to prevent undue prejudice. OCC reasons that the ruling delays and hinders OCC's case preparation efforts. OCC continues to pursue a final report prepared by Oxford, but the record is clear that no such report exists, in draft form or otherwise. OCC notes that the February 18, 2022 Entry also established a comment period without affording parties the benefit of crucial discovery, which will interfere with its case presentation. The attorney examiner notes that it is unusual for any party in a Commission proceeding to claim that depositions are necessary before comments are filed. However, the attorney examiner finds

that an immediate ruling from the Commission regarding the interlocutory appeal would permit the filing of comments without further undue delays, irrespective of whether OCC prevails in its interlocutory appeal or the rulings in the February 18, 2022 Entry are affirmed. Accordingly, the interlocutory appeal shall be certified to the Commission for review.

{¶ 30} It is, therefore,

{¶ 31} ORDERED, That OCC's interlocutory appeal be certified to the Commission for review. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Jacky Werman St. John

By: Jacky Werman St. John
Attorney Examiner

JRJ/mef

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Summary: Attorney Examiner Entry ordering that Ohio Consumers' Counsel's interlocutory appeal be certified to the Commission for review electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio