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 9, 2022

I. SUMMARY

{¶ 1} The Commission affirms the February 18, 2022 Entry, in its entirety, and dismisses the interlocutory appeal filed by Ohio Consumers' Counsel on February 23, 2022.

II. PROCEDURAL 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} On June 14, 2019, Oxford filed its mid-term report.[1]

{¶ 6} 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. Specifically, the Court held that Rider DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of Rider DMR revenues were not sufficient to protect ratepayers. *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)*, reconsideration denied, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 458.

{¶ 7} 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

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[1] The mid-term report was prepared to inform the Commission on whether Rider DMR should be extended and was filed in this docket inadvertently; rather, the mid-term report was meant to be filed in Case No. 19-361-EL-RDR. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 113.

$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.

{¶ 8} 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.

{¶ 9} 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.

{¶ 10} 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.

{¶ 11} Accordingly, by Entry issued December 30, 2020, the Commission directed Staff to prepare a request for proposal (RFP) to solicit the services of a third-party monitor 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.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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 was filed by Daymark.

{¶ 18} Nonetheless, on January 12, 2022, and only two days prior to the filing deadline for Daymark's final audit report, OCC filed an interlocutory appeal of the "ruling" of the attorney examiner to defer ruling on the two motions for subpoenas filed by OCC.

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

{¶ 20} By Entry issued February 18, 2022, the attorney examiner denied the motions for subpoenas duces tecum, directed Staff to produce a witness from Oxford Advisors, LLC, 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.

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

{¶ 22} On February 28, 2022, Staff filed a memorandum contra OCC's interlocutory appeal and request for certification of the denial of the motions for subpoena.

{¶ 23} By Entry issued March 8, 2022, the interlocutory appeal was certified to the Commission, pursuant to Ohio Adm.Code 4901-1-15(B).

{¶ 24} Ohio Adm.Code 4901-1-15(E)(1) provides that, upon consideration of an interlocutory appeal, the Commission may, in its discretion either: (1) affirm, reverse, or modify the ruling; or (2) dismiss the appeal for a variety of stated reasons, including, but not limited to, whether the issues presented are now moot or the party taking the appeal has failed to show prejudice as a result of the ruling in question.

III. Discussion

{¶ 25} In its interlocutory appeal, OCC argues that the attorney examiner erred by denying OCC's motions for subpoenas, as it alleges the subpoenas would have enabled OCC to conduct discovery of Oxford through a pre-hearing deposition. OCC first contends that Ohio Adm.Code 4906-1-16(I) and 4901-1-25(D) unlawfully restrict the "ample rights of discovery" for all parties and intervenors provided in R.C. 4903.082 by making Staff exempt from discovery. Specific to its efforts in this case, OCC notes that it was pursuing information regarding the findings of Oxford as they relate to the use of Rider DMR funds and whether undue or improper influence had been exerted in this case regarding Oxford's final audit report. In addition to claiming that the Commission's discovery rules run afoul of the statutory language allowing for ample discovery, OCC further claims that the attorney examiner's reading of the plain language of the rule was also mistaken, noting that Oxford is not an employee of the Commission, but rather an independent contractor. Thus, considering the rule language specifically refers to "a member of commission staff," OCC claims that Ohio Adm.Code 4901-1-25 does not apply to Oxford. As there is no ambiguity in the rule itself, OCC also argues that the reliance on "regulatory history" was also misplaced, as regulatory history is only appropriate to consider in the event a rule is capable of bearing more than one meaning. *Dunbar v. State*, 136 Ohio St.3d 181, 186 (2013).

{¶ 26} OCC takes issue with the attorney examiner's statement 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." OCC disagrees, stating that questions regarding the events leading up to the Commission's decision that a final audit report would not be required are certainly germane to this proceeding. Further, in response to the argument that OCC could potentially make an argument that it is entitled to "ample discovery" in any Commission proceeding in which it seeks a deposition of Staff, OCC argues that this case, given its extraordinary circumstances, warrants a waiver of the Commission rules to allow for a deposition of Oxford. Moreover, OCC claims that the policy for refraining from deposing Staff members, i.e., Staff's workload, is not applicable in this case, as Oxford purportedly completed its work in this case on or around February 2021. OCC also claims that the Entry unfairly holds that OCC must show that the discovery they seek will not interfere with the ongoing Federal investigation, in addition to the requirements for showing the need for subpoenaed discovery pursuant to the Civil Rules and Rules of Evidence; however, OCC claims that, as a creature of statute, the Commission, and its agents, do not have the authority to impose such a requirement. Additionally, OCC claims the attorney examiner was mistaken to assert 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, noting that the Commission's discovery rules allow each party to construct a "case of their own making," using the varying methods of discovery of their own choice. Contrary to the February 18, 2022 Entry, OCC claims that the order for a witness from Oxford to appear at the evidentiary hearing adds little value for consumers, as Ohio Adm.Code 4901-1-28(A) allows for any person making or contributing to the report may be subpoenaed to testify at the hearing in accordance with Ohio Adm.Code 4901-1-25. Moreover, OCC argues that "[o]ne is left to guess why Oxford's final report, associated documents, and Oxford's deposition testimony would not contain reliable, probative evidence" if the mid-term report might, as alleged in the February 18, 2022 Entry. Further, by alleging that "Oxford's testimony at hearing will be superior to deposition testimony," OCC claims the February 18, 2022 Entry prejudices OCC and other parties who may be interested in questioning Oxford at deposition, further noting that questioning at depositions is very different from that during a hearing.

{¶ 27} Staff responds by arguing that the Entry was lawful and should be upheld, namely contending that, as an extension of Staff, Oxford is not subject to discovery. Furthermore, Staff reiterates that, as directed in the February 18, 2022 Entry, Staff is required to produce a witness from Oxford to be available for questioning during the evidentiary hearing, consistent with the longstanding precedent in Commission proceedings. Staff claims OCC refuses to acknowledge the plain reading and meaning of the Commission's rules, which are clear and unambiguous, as well as misapprehends the Commission's authority to abrogate those rules. In fact, Staff contends the limited case law OCC does appear to cite to in its interlocutory appeal is completely unrelated and misplaced. *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). Staff requests that OCC's interlocutory appeal be denied, as 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 an auditor selected by the Commission.

{¶ 28} As a preliminary issue, while OCC claims the prohibition of using a deposition in this manner would prejudice it and other parties, it provides no basis for why this would be the case, especially given the directive for Staff to produce a witness from Oxford during the evidentiary hearing to address questions regarding its mid-term report. We also agree that any prejudice is even more difficult to ascertain, given that it is unusual for any party in a Commission proceeding to claim that depositions are necessary before comments are filed. Entry (Feb. 18, 2022) at ¶ 26. As such, pursuant to Ohio Adm.Code 4901-1-15(E)(1), we could very well dismiss this appeal as OCC has failed to demonstrate how it will be prejudiced by the rulings in question. We have concluded in numerous proceedings that parties are not prejudiced by an inability to depose staff members, since recommendations are presented in reports, which are then available to all parties, including any underlying workpapers. Additionally, Staff witnesses, including a witness from Oxford, will be available for cross-examination during the course of the evidentiary hearing. See *In re the Application of The Cincinnati Gas & Elec. Co.*, Case No. 91-940-EL-AIR, Entry (Nov.

18, 1991); *In re the Investigation into the Disconnect Practices of Sheldon Gas Co.*, Case No. 84-305-GA-COI, Entry (Apr. 10, 1984). When raising a claim of prejudice as to discovery, the moving party, in this case, OCC, bears the "burden of demonstrating * * * that it has been or will be prejudiced by the error." *In re the Application of Champaign Wind, LLC*, 146 Ohio St.3d 489, 2016-Ohio-1513, 58 N.E.3d 1142, citing *In re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.3d 1126, ¶ 24, quoting *A.K. Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 88, 765 N.E.2d 862 (2002). OCC has failed to establish how it has been prejudiced in its interlocutory appeal. Given the commitment to produce a witness from Oxford to be available for cross-examination during the hearing regarding the mid-term report, we also find that, to some extent, OCC's interlocutory appeal could also be considered moot. Despite these fallacies in OCC's interlocutory appeal, we find it, nonetheless, necessary to respond to the substance of its arguments and affirm the February 18, 2022 Entry in its entirety.

{¶ 29} R.C. 4903.082 does provide that ["a]ll parties and intervenors shall be granted ample rights of discovery" and that the Commission's rules "should be reviewed regularly * * *to aid full and reasonable discovery by all parties." Ohio Adm. Code 4901-1-25(D) states, in pertinent part: "[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." [Emphasis added].

{¶ 30} The Supreme Court of Ohio has held that the Commission is "granted very broad discretion in the conduct of its hearings." *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62, 68, 442 N.E.2d 1288 (1982). Further, R.C. 4901.13 authorizes this Commission to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. Generally, rules promulgated by an administrative agency have the force and effect of law unless they are unreasonable or are in conflict with related statutes enacted by the General Assembly. *Ohio Academy of Nursing Homes, Inc. v.*

Barry, 56 Ohio St.3d at 127, 564 N.E.2d 686. We do not agree with OCC that the Commission's discovery rules contradict the statutory language. Discovery generally as provided by the Rules of Civil Procedure in court proceedings is not available in administrative proceedings and "[t]he extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency." *LTV Steel Co. v. Industrial Com'n*, 140 Ohio App.3d 680, 748 N.E.2d 1176 (10th Dist. 2000) citing *Bell v. State Med. Bd. of Ohio*, Lucas App. No. L–85–441, unreported, 1986 WL 6698 (June 13, 1986). Ohio Adm.Code 4901-1-25 and 4901-1-16 are not in conflict with R.C. 4903.082, which provides for "ample discovery" in proceedings, but not unfettered discovery opportunities. Indeed, the plain language of the more specific statute dealing with depositions before the Commission, R.C. 4903.06, is permissive and indicates that the Commission "may cause" the depositions of witnesses to be taken during an investigation, and the Commission's rules outline the procedures for doing so. R.C. 4903.06 merely confers upon the Commission the authority to cause depositions to be taken; it does not, however, command the Commission to require depositions of any particular witnesses or dictate the manner in which they are to be taken. See., e.g., *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 47 Ohio St.2d 244, 253, 1 O.O.3d 141, 146, 351 N.E.2d 442, 448 (1976) (where the Supreme Court found that, while "R.C. 4123.09 vests the Industrial Commission with authority to allow the taking of depositions," it "does not require the commission to do so."). Moreover, R.C. 4903.082 demonstrates that the legislature has granted broad discretion to this Commission to implement its own rules to ensure the parties are provided with the opportunity for *full and reasonable* discovery, bolstered by the general policy in Ohio that an administrative agency has broad discretion to fashion its own discovery rules. In fact, R.C. 119.09, which generally governs adjudication hearings before other state agencies, does not provide for prehearing discovery depositions by a party to an adjudication hearing; instead, R.C. 119.09 pertains to securing the attendance of witnesses and the production of records and documents for the purpose of conducting an adjudication hearing. *Ohio State Bd. Of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145, 555 N.E.2d 630 (1990). We, therefore, conclude that the Commission's discovery rules do not run afoul of R.C. 4903.082.

{¶ 31} In addition to the plain language of the rule cited above, and as noted in the February 18, 2022 Entry, the Commission has long established that discovery should not be permitted with respect to Staff, including auditors such as Oxford. The Commission has 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. *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. As emphasized in the February 18, 2022 Entry, the Commission has been very clear that the third-party monitor for Rider 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. The Cleveland Elec. Illum. Co., and The Toledo 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 Rider DMR funds were used properly, the Commission specifically noted that the decision to hire a third-party monitor rather than use Staff to review the use of the Rider DMR funds was made in the interests of "balancing the workload of Staff." *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 12, 17. Further, 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. As aptly observed by Staff, OCC conveniently omits to reconcile the fact that 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.

{¶ 32} Thus, Oxford was afforded the same investigatory authority possessed by Staff and was held to the same applicable nondisclosure provisions during its audit. These directives are consistent with other proceedings that utilize an auditor or consultant to assist Staff. In fact, when an auditor or consultant is selected to assist Staff in any Commission proceeding, it is not uncommon for Staff to adopt the resulting audit report or the

recommendations stated therein and present those findings during the evidentiary hearing, marking and admitting the audit report as a Staff exhibit, as part of its case-in-chief. See, e.g., *In re the Application of Duke Energy Ohio, Inc. to Adjust Rider AU for 2018 Grid Modernization Costs*, Case No. 19-664-GA-RDR, Finding and Order (Feb. 10, 2021) at ¶ 17; *In re the 2016 and 2017 Review of the Distribution Investment Rider Contained in the Tariffs of Ohio Power Co.*, Case Nos. 17-38-EL-RDR and 18-230-EL-RDR, Opinion and Order (June 17, 2020) at ¶¶ 8-9; *In re the Vectren Energy Delivery of Ohio, Inc.'s Capital Expenditure Program Rider*, Case No. 21-620-GA-RDR, Finding and Order (Aug. 25, 2021) at ¶ 16; *In re the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case No. 07-589-GA-AIR, et al., Opinion and Order (May 28, 2008) at 3. We are unaware of any instance in which OCC, or any other party, has objected to the designation of an audit report produced by a Commission-selected auditor as a Staff exhibit or claimed that Staff is not the appropriate party to move the report into evidence. This is simply because auditors are treated as an extension of Staff.[2] Clearly, treating them otherwise would not be in the public interest and invokes policy reasons for disallowing such conduct, including the ability of Staff to efficiently and effectively conduct its reviews. OCC fails to provide any reasoning, let alone a rational basis, for its novel interpretation of, and structural change to, the Commission's well-established discovery rules. Now, having established that Ohio Adm.Code 4901-1-25 is both sound and applicable to Oxford, we will address whether the February 18, 2022 Entry unreasonably denied a waiver of the rule, as requested by OCC.

{¶ 33} We agree that OCC has not set forth good cause to support a waiver of Ohio Adm.Code 4901-1-25(D). 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.

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2 Though an auditor may not be an employee of the Commission in the traditional sense, an auditor will certainly be considered a member of Staff for the purposes of providing either findings and recommendations on Staff's behalf or evidence in support of its review. In fact, by adopting OCC's argument, auditors would be subject to discovery requests from public utilities during the course of their review and investigation of those utilities.

Again, OCC provides no valid or relevant case precedent in support of its request for a waiver.[3] Rather, OCC simply states that, given the circumstances of this proceeding, we should provide them with the requested waiver.

{¶ 34} Ironically, OCC contends that the attorney examiner has prejudged what information a deposition of Oxford may reveal. As noted in the February 18, 2022 Entry, these assertions are based on nothing more than unsubstantiated speculation, at best, and fall well short of establishing good cause for a waiver of our discovery rules. We find it necessary again to provide an overview of the purpose of these proceedings for the benefit of OCC. This proceeding is addressing whether FirstEnergy improperly used funds collected in the DMR, which is the subject of the Daymark final audit report. The question of whether the source of funds for political and charitable spending by the Companies in support of H.B. 6 was included, directly or indirectly, 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, Entry (May 13, 2021). Moreover, OCC is well aware that its arguments regarding the scope of the audit in *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.'s Compliance with R.C. 4928.17 and Ohio Adm.Code Chapter 4901:1-37*, Case No. 17-974-EL-UNC (*FirstEnergy Corporate Separation Case)* have been considered and rejected by the Commission. Specifically, OCC raised these same arguments in its application for rehearing filed on December 4, 2020, in that proceeding; and the Commission denied that rehearing request and, thus, rejected those arguments by

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[3] For instance, we agree with Staff that OCC's reference to *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) in support of its arguments regarding R.C. 4903.082 is misplaced. While the Court did cite to this statute in its decision to remand the matter back to the Commission, it did so by noting that the Commission would need to balance this statutory right of discovery with the specific constraints imposed by the statutory timeframe to rule on a competitive retail electric service provider certification application. The Court did not issue substantive rulings on the disputed discovery requests. Also, unlike this proceeding, *Suvon* did not involve discovery upon Staff or a Commission-selected auditor.

operation of law 30 days later. *FirstEnergy Corporate Separation Case*, Application for Rehearing (Dec. 4, 2020) at 11-14 (denied by operation of law).

{¶ 35} As a matter of highest importance, we reiterate our interest in not interfering with the Federal criminal investigation. The investigation in the instant proceeding, as well as the three other investigations currently pending before us, target activities by the Companies which are subject to our exclusive jurisdiction over rates and utility service. These investigations complement, but do not seek to supplant, the ongoing criminal investigation by the United States Attorney for the Southern District for Ohio and the civil action by Ohio Attorney General Dave Yost pursuant to Ohio's civil RICO statute. However, it is of utmost concern to us that our investigations do not interfere with that criminal investigation by the U.S. Attorney or the action brought by the Ohio Attorney General. *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). Moreover, we confirm that this interest applies equally to all parties involved in this case, despite OCC's fears that it alone is "thwarted" by this necessitated effort to stay within the scope of this proceeding and the Commission's jurisdiction. Contrary to the arguments raised in the interlocutory appeal, the fact that these actions are still ongoing weighs in favor of maintaining our well-established discovery process, especially at this stage of the proceeding, rather than fundamentally changing it, as OCC requests. Historically, when the Commission has found good cause to grant waivers of its procedural rules, pursuant to Ohio Adm.Code 4901-1-38, it has been for requests related to ministerial components of our process, i.e., certain service requirements, requirements pertaining to the filing of protected or confidential documents, or permitting responsive memoranda. See, e.g., *In re the Proper Procedures and Process for the Commission's Operations and Proceedings During the Declared State of Emergency and Related Matters*, Case No. 20-591-AU-UNC, Entry (Apr. 8, 2020); *In re the Certification of Northeast Ohio Public Energy Council as a Government Aggregator*, Case No. 00-2317-EL-GAG, Entry (July 17, 2013); *In re the Commission Review of the Capacity Charges of Ohio Power Co. and Columbus S. Power Co.*, Case No. 10-2929-EL-UNC, Entry (Mar. 7, 2012). OCC

has not demonstrated why the Commission should now deviate from its historical application of this rule by essentially eliminating it.

{¶ 36} Moreover, the record demonstrates that OCC has been provided with ample discovery in this case. As noted in the February 18, 2022 Entry, 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 implies that the attorney examiner improperly relied upon "an entirely different case," but OCC did, in fact, make the statements at issue, and there is no reason to believe that OCC was making a material misrepresentation to the Commission at this time. The Commission confirms that, during the January 7, 2022, prehearing conference *in this proceeding*, no discovery disputes (beyond the obvious deferred motions for subpoenas filed by OCC) were brought to the attention of the attorney examiners. Entry (Feb. 18, 2022) at ¶28, citing (Tr. (Jan. 7, 2022) at 12-14). Further, we affirm the attorney examiner's ruling that OCC cannot demonstrate good cause because OCC did not address whether there are any facts which are not obtainable from other sources, including discovery produced by the Companies, the documents produced by FirstEnergy Corp., or documents which are publicly available.

{¶ 37} Nevertheless, the lack of any resulting prejudice invalidates OCC's arguments and strips away the ability to establish good cause for the requested waiver of Ohio Adm.Code 4901-1-25(D).[4] See *In re the Procurement of Standard Service Offer Generation as Part of the Fourth Electric Security Plan for Customers of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 16-776-EL-UNC, Entry on Rehearing (Sept. 9, 2020) (where the Commission denied a waiver of Ohio Adm.Code 4901-1-02(D)(4), noting, among other things, that the parties failed to demonstrate how they were prejudiced by the

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[4] Regardless, even if we had chosen to grant the requested waiver of Ohio Adm.Code 4901-1-25, OCC failed to also request a waiver of Ohio Adm.Code 4901-1-21 in its original motion for subpoenas or in its interlocutory appeal. Ohio Adm.Code 4901-1-21 governs the use of depositions in Commission proceedings and, likewise, prohibits their use on a member of Staff. Ohio Adm.Code 4901-1-21(A). As that rule has not been invoked in the pleadings, we will not discuss it here, but quickly note that the discussion above would apply, as well.

decision). Pursuant to the February 18, 2022 Entry, Staff is required to produce a witness from Oxford at the hearing to be subject to cross-examination regarding its mid-term report. Although this mid-term report was prepared to inform the Commission on whether the DMR should be extended, it may contain reliable, probative evidence regarding the Companies' use of Rider DMR funds. All parties will be afforded a full and fair opportunity to cross-examine a witness from Oxford under oath regarding the mid-term report. This will, undoubtedly, promote transparency in this proceeding and assist the Commission in its commitment to follow the facts wherever they may lead. Entry (Feb. 18, 2022) at ¶ 31; Entry (Dec. 30, 2020) at ¶22; *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.

{¶ 38} The Commission notes that, in its interlocutory appeal, OCC alleges a number of errors by the attorney examiner. Upon review, we find that none of these alleged errors have merit. Given that the February 18, 2022 Entry extended the comment period in this proceeding and allowed that reasonable requests for further extensions would only be entertained if a party were to produce meaningful, quantified assessments on the progress of reviewing discovery, we suggest parties maintain their focus on reviewing the approximately 230,000 pages of documents provided by the Companies and FirstEnergy Corp. through discovery, rather than attack the Commission's longstanding discovery practices. (Tr. (Jan. 7, 2022) at 9-10).

IV. ORDER

{¶ 39} It is, therefore,

{¶ 40} ORDERED, That the February 18, 2022 Entry be affirmed, in its entirety. It is, further,

{¶ 41} ORDERED, That OCC's interlocutory appeal be dismissed, in accordance with this Entry. It is, further,

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

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

MJA/mef

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

Summary: Entry affirming the February 18, 2022 Entry, in its entirety, and dismissing the interlocutory appeal filed by Ohio Consumers’ Counsel on February 23, 2022 electronically filed by Ms. Mary E. Fischer on behalf of Public Utilities Commission of Ohio