

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF 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

Entered in the Journal on April 6, 2022

I. SUMMARY

{¶ 1} The Commission denies the interlocutory appeal filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

II. PROCEDURAL HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy Utilities 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. 4905.06 states, in relevant part, that the Commission has general supervision over all public utilities within its jurisdiction as defined in R.C. 4905.05, and may examine such public utilities and keep informed as to their general condition, capitalization, and franchises, and as to the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, the safety and security of the public and their employees, and their compliance with all laws, orders of the Commission, franchises, and charter requirements.

{¶ 4} R.C. 4905.05 states, in relevant part, that the jurisdiction, supervision, powers, and duties of the Commission extend to every public utility, the plant or property of which lies wholly within this state and when the property of a public utility lies partly within and

partly without this state to that part of such plant or property which lies within this state; to the persons or companies owning, leasing, or operating such public utilities; and to the records and accounts of the business thereof done within this state.

{¶ 5} The Commission opened this proceeding on September 15, 2020, to review the political and charitable spending by the Companies in support of Am. Sub. H.B.6 and the subsequent referendum effort. On that same date, the attorney examiner directed the Companies to show cause, by September 30, 2020, demonstrating that the costs of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state. Further, the attorney examiner directed interested parties to file comments regarding the Companies' response by October 29, 2020, and to file reply comments by November 13, 2020.

{¶ 6} The Companies timely filed their response to the show cause order on September 30, 2020. As part of the response, the Companies included an affidavit of Santino L. Fanelli.

{¶ 7} In a memorandum filed on July 23, 2021, the Companies represented that the Deferred Prosecution Agreement (DPA) entered into between the Companies' parent corporation, FirstEnergy Corp., and the United States Attorney's Office for the Southern District of Ohio may require that the Companies supplement their response to the September 15, 2020 show cause order. Further, the Companies represented that the DPA requires that the Companies supplement certain portions of their discovery responses in this proceeding.

{¶ 8} On June 29, 2021, OCC filed a motion to compel requesting various documents. Notably, one request, RPD-05-001, sought all documents reflecting (i) communications from the Federal Energy Regulatory Commission's (FERC) Division of Audits and Accounting relating to its audit of FirstEnergy Corp. and its subsidiaries; (ii)

communications from FirstEnergy to FERC's Division of Audits and Accounting relating to this investigation.¹

{¶ 9} The Companies filed a memorandum contra OCC's motion to compel on July 9, 2021.

{¶ 10} By Entry issued August 3, 2021, the attorney examiner scheduled a prehearing conference in this proceeding to address a variety of matters, including, but not limited to, the status of supplementing the original response to the show cause order. Further, the Entry indicated that a new schedule would be established for the filing of comments and reply comments to the Companies' response to the show cause order.

{¶ 11} On August 6, 2021, the Companies filed a motion for leave to file a supplemental response to the September 15, 2020 show cause order. No memoranda contra the Companies' motion were subsequently filed.

{¶ 12} In order to allow additional time to resolve numerous outstanding discovery disputes and other procedural issues, the attorney examiner extended the deadline for filing initial comments and reply comments to the Companies' response to the show cause order on several occasions, both sua sponte and at the request of various parties. See, e.g., Entry (Oct. 20, 2020) at ¶ 10; Entry (Apr. 22, 2021) at ¶¶ 6, 8, 12; Entry (May 13, 2021) at ¶¶ 23, 24, 28; Entry (July 20, 2021) at ¶¶ 15, 17; Entry (July 29, 2021) at ¶¶ 14, 16; Entry (Aug. 3, 2021) at ¶ 17.

{¶ 13} A prehearing conference was held on August 31, 2021, at which the Companies' unopposed motion for leave to supplement its response to the Commission's show cause order was granted, among other matters. Among those issues discussed was

¹ The audit was initiated to evaluate FirstEnergy Corp.'s and its subsidiaries' compliance with: (1) cross-subsidization restrictions on affiliate transactions under 18 C.F.R. Part 35; (2) service company accounting, recordkeeping, and FERC Form No. 60 reporting requirements under 18 C.F.R. Parts 366, 367, and 369; (3) accounting and reporting requirements prescribed for public utilities pertaining to transactions with affiliated companies under 18 C.F.R. Parts 101 and 141; and (4) preservation of records requirements for holding companies and service companies under 18 C.F.R. Part 368.

OCC's motion to compel filed on June 29, 2021, which the attorney examiner denied, noting that the Commission would allow FERC to proceed with its audit in a confidential manner and that the attorney examiners would revisit the issue if, and when, the public audit report was released. Further, in order to provide parties time to adhere to the directives provided during the prehearing conference, the attorney examiner instructed that the initial and reply comment period would be established by subsequent entry. (Tr. (Aug. 31, 2021) at 9, 18, 54).

{¶ 14} By Entry issued October 28, 2021, the attorney examiner established a comment period regarding the Companies' response to the show cause order, as supplemented on August 6, 2021, with initial and reply comments to be filed by November 29, 2021, and December 14, 2021, respectively.

{¶ 15} Initial comments regarding the Companies' show cause order were timely filed by Citizens' Utility Board of Ohio, OCC, and the Ohio Manufacturers' Association Energy Group (OMAEG) on November 29, 2021.² Reply comments were timely filed by OCC, Ohio Hospital Association, FirstEnergy Utilities, and OMAEG.³ The comments generally supported an update of the Companies to ensure that political and charitable contributions are not recovered in rates.

{¶ 16} On January 13, 2022, OCC filed a motion for an in-camera review to resolve the Companies' claim of privilege against responding to OCC's discovery and a motion to require the Companies to file notice if they disclose any records they claim to be privileged.

{¶ 17} On February 7, 2022, OCC filed correspondence in which it requested that the attorney examiners revisit the ruling on the motion to compel filed by OCC on June 29, 2021, requesting FirstEnergy disclose all documents given to FERC as part of its recent audit of FirstEnergy Corp. and its subsidiaries. In support of its request, OCC stated that the

² Ohio Energy Group, the Ohio Hospital Association, Natural Resources Defense Council, and Ohio Partners for Affordable Energy filed correspondence indicating they would not be filing initial comments.

³ Ohio Energy Group filed correspondence indicating it would not be filing reply comments.

FERC audit report was recently publicly filed on February 4, 2022, arguing that the confidentiality of the audit materials was no longer an issue.

{¶ 18} On February 10, 2022, a prehearing conference was held. At that conference, the attorney examiner granted OCC's motion for an in-camera review of the Companies' documents. Additionally, the parties were invited to file memoranda discussing whether the documents produced to the FERC are still protected now that the FERC audit has been released. The attorney examiners informed parties that a second prehearing conference would be scheduled during which they would provide their rulings.

{¶ 19} On February 18, 2022, FirstEnergy Utilities, OCC, and OMAEG timely filed responsive memoranda regarding the discovery of documents produced to FERC.

{¶ 20} By Entry issued March 9, 2022, the Commission directed Staff to issue the attached request for proposal (RFP) to acquire auditing services to assist the Commission with its review of the political and charitable spending of the Companies. The Entry further noted that the auditor's investigation shall determine whether the Companies' show cause demonstration is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state.

{¶ 21} On March 11, 2022, a prehearing conference was held to discuss the *in camera* review and the pending motion regarding production of documents used in the FERC audit. At the prehearing conference, the attorney examiners provided rulings regarding their findings from the *in camera* review, as well as granted OCC's narrowed motion to compel⁴ and directed the FirstEnergy Utilities to produce all documents and communications provided to FERC during the course of its audit within 30 days.

⁴ During the prehearing conference, counsel for OCC acknowledged that it was narrowing the scope of its motion to compel to only require the FirstEnergy Utilities to produce documents reflecting communications from FirstEnergy to FERC's Division of Audits and Accounting relating to this audit. OCC also confirmed that it was only interested in documents relating to the operations in Ohio.

{¶ 22} On March 16, 2022, the Companies filed an interlocutory appeal of the attorney examiner's reconsideration and granting of OCC's motion to compel during the March 11, 2022 prehearing conference, specifically with respect to RPD-5-001.⁵

{¶ 23} On March 21, 2022, OCC filed a memorandum contra the Companies' interlocutory appeal.

III. DISCUSSION

A. *Summary of the Arguments*

{¶ 24} In support of their interlocutory appeal, the Companies first assert that the attorney examiners failed to address whether OCC had carried its burden to demonstrate that the requested FERC audit documents concerning the Companies are relevant to this proceeding, the scope of which is limited to whether the costs of any political or charitable spending in support of Am. Sub. H.B. 6 were included in any rates or charges paid by Ohio consumers. Additionally, the Companies argue that FERC's audit concerns FirstEnergy Corp.'s and its subsidiaries' compliance with FERC rules, not the Companies' compliance with Ohio law or Commission regulations, and covers over a dozen other FirstEnergy-related entities that are not regulated by this Commission and encompasses a period from January 1, 2015 to September 30, 2021, which is broader than the time period at issue in this case. According to the FirstEnergy Utilities, only a portion of FERC's comprehensive audit concerns issues of any relevance to this case. Moreover, where there is overlap between the raw data relevant to this proceeding and the data that was provided to FERC, the FirstEnergy Utilities claim that data exists independent of FERC's audit, and the Companies have either produced it in response to the other requests from OCC or have offered to provide it in response to the discovery requests at issue.

⁵ While the attorney examiner also granted the motion to compel as to INT-6-003, the FirstEnergy Utilities do not appear to be contesting that portion of the ruling. In INT-6-003, OCC also requested: (1) the employees that have met with the FERC staff either in person or via virtual meetings; (2) the employees interviewed by FERC staff; and (3) the employees that have communicated with FERC staff.

{¶ 25} More importantly, allege the Companies, is the fact that the FERC materials are protected from disclosure by federal law and the publication of the final audit report does not change that. According to the FirstEnergy Utilities, federal law broadly protects information exchanged with FERC during an audit. Specifically, section 301 of the Federal Power Act provides, “No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts.” 16 U.S.C. § 825(b); see also 42 U.S.C. § 16452(d); 18 C.F.R. § 3c.2(a).⁶ Additionally, the Companies note that, in its letter to FirstEnergy Corp. opening the audit, FERC explicitly stated “[d]ocuments and information Commission staff obtains during [an] audit, as well as all working papers developed, will be placed in nonpublic files.” The Companies argue that, in order for FERC to carry out its audit duties with efficiency, companies must be able to provide their business information freely with an expectation of confidentiality and without fear of that information later being disclosed, which is bolstered by FERC’s own pronouncements about its audit process that note information provided by audited entities to FERC staff will be done so on a non-public basis. See *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, Order No. 675, at ¶ 43 (Feb. 17, 2006); *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at ¶ 15 (May 15, 2008).

{¶ 26} The FirstEnergy Utilities argue that the federal interest in the confidentiality of the audit materials would be severely undermined by permitting disclosure of confidential audit communications just because a party did not seek them directly from FERC. Moreover, the Companies contend that the issuance of the final audit report does not eliminate the nonpublic nature of the audit communications under federal law or pertinent regulations, further arguing that neither OCC nor OMAEG cited to any authority in any jurisdiction finding that FERC audit materials are no longer worthy of protection

⁶ These statutes and regulation prohibit any FERC employee, absent direction from FERC or a court of competent jurisdiction, from divulging any fact or information which may come to his or her knowledge during the course of examination of books or other accounts.

following the publication of an audit report. The Companies assert that FERC has clearly delineated the specific procedural moments when certain aspects of an audit are made public. See Procs. for Disposition of Contested Audit Matters, Docket No. RM06-2-000, 114 FERC ¶ 61,178, 2006 WL 368433, Order No. 675, at ¶ 38 (Feb. 17, 2006).

{¶ 27} Moreover, in response to the attorney examiner's ruling, the Companies note that R.C. 4901.16 is not applicable to the FERC audit process, and the interpretation of R.C. 4901.16 in no way informs the interpretation of FERC's governing statutes and regulations; in fact, allege the Companies, R.C. 4901.16 and the relevant FERC statutes, regulations, and governing policies are substantively different, given that the latter do not expressly contemplate that information obtained during an audit will be disclosed when Staff or an auditor submits a "report to the [] commission" or "when called on to testify." As such, the Companies contend that the applicable federal statutes and rules provide for no such exception. See *Reliant Energy Power Generation, Inc. v. FERC*, 520 F. Supp. 2d 194, 199, 206 (D.D.C. 2007); *Wholesale Competition in Regions with Organized Elec. Markets*, 125 FERC ¶ 61,071, 2008 WL 4686146, Order No. 719, at ¶ 465 (Oct. 17, 2008). The FirstEnergy Utilities further allege that cases dealing with requests for records from outside parties to FERC pursuant to the Freedom of Information Act also demonstrate the confidential nature of such information. See *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 333 (D.D.C. 2015); *Williston Basin Interstate Pipeline Co. v. FERC*, No. CIV. A. 88-0592-LFO, 1989 WL 44655, at *1 (D.D.C. Apr. 17, 1989). In fact, the Companies assert that the attorney examiners' grant of OCC's motion to compel here would give OCC discovery rights far exceeding those provided in FERC's own proceedings. Subsequent to filing of memoranda on February 18, 2022, OCC moved to intervene in the ongoing FERC audit, seeking "all the rights belonging to a party." See FERC Docket No. FA19-1-000, #20220224-5140 (Feb. 24, 2022). As such, the FirstEnergy Utilities maintain that FERC will soon decide what, if any, rights OCC has with respect to the confidential audit, deeming the attorney examiner's ruling premature, at best.

{¶ 28} Although the Companies do not contest that the findings phase of FERC's audit is complete, they claim FERC's audit of FirstEnergy Corp. and its subsidiaries

continues in the compliance phase, and so, it is incorrect to deem FERC's audit "completed." As noted earlier, the Companies continue to assert that there is nothing about the publication of the final audit report that eliminates the non-public nature of the audit communications under federal law or regulation. The FirstEnergy Utilities maintain that the same paradox raised by the attorney examiner during the August 31, 2021 prehearing conference still exists today in that FERC is still unable to disclose this information itself. (Transcript (Aug. 31, 2021) at 18). In addition to the ongoing audit proceedings, the Companies also note that FERC's related investigation of FirstEnergy Corp.'s lobbying and governmental affairs activities concerning H.B. 6 must be considered. In its initial engagement letters, FERC staff directed FirstEnergy Corp. to preserve and maintain all documents and information related to those issues as they have been developed as part of the audit conducted by FERC's Division of Audits and Accounting. Moreover, the Companies claim that FERC has previously made clear that it believes it has an important interest in ensuring the integrity of investigations that follow from FERC audits. See *Procs. for Disposition of Contested Audit Matters*, Docket No. RM06-2-000, 114 FERC ¶ 61,178, Order No. 675, at ¶ 44 (Feb. 17, 2006).

{¶ 29} Finally, the Companies note that the Commission has now ordered an audit in this case to "determine whether the show cause demonstration submitted by [the Companies] is sufficient to ensure that the cost of any political or charitable spending in support of Am. Sub. H.B. 6, or the subsequent referendum effort, were not included, directly or indirectly, in any rates or charges paid by ratepayers in this state." Further, the RFP attached to the Entry indicates that the auditor's comprehensive review will broadly cover matters related to the Companies' political and charitable spending and the costs booked to a number of relevant FERC Accounts. Entry (Mar. 9, 2022) at ¶¶ 1, 20. Given this further review by the Commission, the Companies claim any potential intrusion into FERC's confidential processes should be even more disfavored. Thus, the Companies request that the Commission reverse the ruling granting the motion to compel.

{¶ 30} In its memorandum contra the Companies' interlocutory appeal, OCC initially argues that the Companies' appeal does not qualify for immediate review under Ohio Adm.Code 4901-1-15(A), as that rule allows a party that is adversely affected by a ruling granting a motion to compel discovery to seek an immediate interlocutory appeal. According to OCC, the FirstEnergy Utilities have not suffered any harm, as the harm they claim from the ruling is "violating the important federal interest in the confidentiality of audit materials," which is a potential harm to FERC and not the Companies themselves. Along that same line, OCC argues that the appeal should be dismissed as the FirstEnergy Utilities lack standing, pursuant to Ohio Adm.Code 4901-1-15(E)(2), to raise the issue of confidentiality. In support of its argument, OCC asserts that, because the statutes upon which the FirstEnergy Utilities rely for continued protection of the information only apply to FERC employees, the Companies lack standing to raise a claim of confidentiality under statutes that apply only to FERC staff.

{¶ 31} Assuming the Commission agrees that an immediate appeal is inappropriate, OCC also argues that the FirstEnergy Utilities failed to claim 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, pursuant to Ohio Adm.Code 4901-1-15(B).⁷ OCC claims that it is common practice and, thus, not new or novel, for parties to file discovery requests with the utility seeking communications that a utility had with Staff or a Staff auditor. Moreover, OCC asserts that an attorney examiner requiring the production of discovery in response to a motion to compel raises no new or novel questions, and certainly does not represent a departure from past precedent.

{¶ 32} Similar to its arguments pertaining to standing, OCC also claims that the Commission should otherwise dismiss the appeal because the FirstEnergy Utilities have failed to show prejudice as a result of the ruling, pursuant to Ohio Adm.Code 4901-1-

⁷ OCC notes that the FirstEnergy Utilities failed to even make the argument that their appeal qualified for certification under Ohio Adm.Code 4901-1-15(B).

15(E)(2), noting that the Companies cannot demonstrate harm given that the audit has been completed. In response to the Companies' claims of prejudicial effect, OCC notes that the audit in this proceeding and the FERC investigation are completely separate matters and OCC does not seek any documents from that investigation. As a second point, OCC argues that the fact that FERC completed an audit covering similar issues raised for the Commission's consideration does not deprive the Commission of its jurisdiction nor OCC of its discovery rights. While the Companies claim production of the documents will undermine FERC's guarantees for confidentiality, OCC responds by observing that the audit is completed and there is no ongoing audit process with which the production of documents could interfere.⁸

{¶ 33} Finally, OCC opines that that attorney examiner's ruling requiring the production of information provided to FERC during the course of its audit was lawful under R.C. 4903.082 and Ohio Adm.Code 4901-1-16(B). The Commission's discovery rules, according to OCC, are intended to facilitate full and reasonable discovery, consistent with the statutory discovery rights parties are afforded under R.C. 4903.082. As such, OCC requests that the Commission deny the Companies' appeal, which represents obstructive and delaying tactics to thwart OCC's ample discovery rights provided by statute. Further, Ohio Adm.Code 4901-1-16(B) provides that any party to a Commission proceeding may obtain discovery in any matter, not privileged, which is relevant to the subject matter of the proceeding. The rule also provides that 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 admissible evidence. As to relevance, OCC asserts the FERC audit includes the period related to H.B. 6 activities (January 1, 2017 through December 31, 2019), and covered various information relevant to this proceeding, including the discovery that FirstEnergy Service Company improperly recorded \$10.9 million of lobbying costs in utility operating expense accounts; the identification of \$20.9 million in

⁸ OCC notes that FirstEnergy has accepted FERC's findings from the audit and will not be pursuing either of the two options for contesting FERC audit findings.

payments to entities associated with the former Commission chairman; the identification of \$28.98 million in payments to 16 entities that were improperly classified or misallocated to certain FirstEnergy regulated utilities; and the discovery that internal lobbyists were incorrectly recording their labor costs. Moreover, now that the audit has concluded, OCC argues that the attorney examiner was correct to determine there was no privilege associated with the documents. According to OCC, FirstEnergy Utilities have failed to cite to any authority to support their position of keeping documents FirstEnergy Corp. and its subsidiaries gave to FERC from the public now that the audit has been concluded.

B. *Commission Conclusion*

{¶ 34} 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 one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A), i.e., the granting of a motion to compel. Therefore, the interlocutory appeal is properly before the Commission.⁹

{¶ 35} Ohio Adm.Code 4901-1-15(E) 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 party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question.

⁹ While OCC argues that this issue requires to be certified to the Commission, pursuant to Ohio Adm.Code 4901-1-15(B), we note that the subject ruling granted a motion to compel over the objections of FirstEnergy Utilities and requires them to produce documentation responsive to the motion to compel. OCC produces no case precedent or otherwise persuasive authority to support its contention that the FirstEnergy Utilities have not been adversely affected by the ruling.

{¶ 36} Ohio Adm.Code 4901-1-16 provides any party to a Commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. 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 admissible evidence. Therefore, in determining whether or not to grant a motion to compel discovery, the Commission, or the attorney examiner, must determine that the information sought to be discovered is neither privileged nor irrelevant.

{¶ 37} The Companies' entire basis for arguing against relevancy is grounded in three conclusory sentences in its memorandum contra the motion to compel. See Memorandum Contra OCC Motion to Compel (July 9, 2021) at 6. We believe that the narrowed discovery request is relevant and appears reasonably calculated to lead to the discovery of admissible evidence in this proceeding, as claimed by OCC. Moreover, we note that the FERC audit arises from the same facts and circumstances and addresses several of the same issues that will be the subject of the Commission's audit in this case, as discussed further in the recently issued RFP. Specifically, the auditor selected by the Commission will be required, among other things, to review costs booked to relevant FERC accounts during the period from January 1, 2017 through December 31, 2019. Entry (Mar. 9, 2022) at ¶¶ 1, 14. Accordingly, the Companies' arguments regarding discoverability are rejected.

{¶ 38} As noted by the attorney examiner during the prehearing conference, "[w]hile the Companies admit that the federal statutes and regulations expressly apply to FERC, the Companies also attempt to argue that they reflect and implement important federal rules and policy that implicitly extends to state regulators like this Commission; however, the Companies have produced no persuasive case precedent to substantiate these claims." (Tr. (Mar. 11, 2022) at 53). We continue to find a lack of persuasive authority supporting the arguments of the Companies related to the federal statutes and regulations prohibiting the disclosure of information by FERC employees that would warrant reconsideration of the attorney examiner's ruling. (See Tr. (Mar. 11, 2022) at 53-54) (where

the attorney examiner noted the inapplicability of cases cited by the Companies regarding the Freedom of Information Act).

{¶ 39} In fact, in all of the applicable pleadings, the FirstEnergy Utilities' only attempt to cite to a case dealing with a disputed discovery order pertaining to information that allegedly infringed upon a federal regulatory body's confidential processes was a decision from the Supreme Court of Texas. See *Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (1993). In that case, the Supreme Court of Texas, after recognizing that a similar regulation for the United States Food and Drug Administration (FDA) spoke to only agency disclosures, held that the regulation did not preempt the trial court's order to produce the identities of reporters who provided adverse reaction reports to the FDA, but added "[t]he FDA regulations clearly embody a vital public interest in confidential voluntary reporting that is eviscerated as equally by a manufacturer's compelled disclosure as by the FDA's disclosure."¹⁰ The Court stressed that "the congressional objective of fostering post-approval reporting of possible adverse reactions for all FDA-approved drugs [was] severely compromised by the trial court's order of wholesale disclosure of reporters identities." And the Court noted that Eli Lilly, the FDA, and the general public all have a strong interest "in maintaining the free flow of information derived from adverse reaction reports." Given the trial court "ordered full disclosure . . . without a showing of particularized relevance and need," the Court vacated the discovery order. *Id.* at 160.

{¶ 40} However, we do not find this case to be persuasive or controlling to contest an order compelling information submitted during an audit conducted by FERC. Not only does *Eli Lilly* deal with an entirely separate regulatory agency and subject matter, there is no comparable voluntary disclosure process at risk of being jeopardized in this case. The FirstEnergy Utilities were obligated to provide FERC with any and all information requested during the course of its audit, as FERC maintains the ability to inspect all records

¹⁰ Although submission of a report to the manufacturer is voluntary by the health care provider, the manufacturer must submit any such reports it receives to the FDA. 21 U.S.C. § 355(k)(1).

of entities falling within its jurisdiction. Further, unlike the FDA in *Eli Lilly*, which again is not binding upon this Commission, FERC did not file a statement of interest in response to the motion to compel in this case. Finally, even if we were to find *Eli Lilly* to be persuasive, any “compelling public interest consideration manifested” by the FERC regulations was upheld by allowing FERC to complete its audit without undue interference from the discovery process in this proceeding.

{¶ 41} Moreover, it appears that the Texas Public Utility Commission did not find the holdings in *Eli Lilly* to be controlling regarding documentation provided to FERC through the audit process when this exact issue was raised before it. See *In re Petition of Entergy Gulf States, Inc. for Certification of an Independent Organization for the Entergy Settlement Area in Texas*, Texas Pub. Util. Comm., Docket No. 28818 (*EGSI Case*), Order No. 10 (Apr. 21, 2004). In that case, the Texas Industrial Energy Consumers served upon Entergy Gulf States, Inc. (EGSI) a discovery request to describe in detail all compliance audits of activities conducted by FERC or other regulatory agencies during the last 24 months, as well as summarize the results of such audits and “provide all available documentation concerning the audits.” EGSI objected, citing the fact that the request would require it to produce information or documents related to ongoing FERC audits or non-public matters and would be inconsistent with the non-public nature both of any documents and information related to the audits and matters. In response to the subsequent motion to compel, EGSI continued to assert the objection on the basis of the federal provision and argued that, since documents and information obtained by FERC staff during the audits was placed in non-public files, non-public meant exempt from disclosure even under a protective order. EGSI also claimed that when it provided data responses to FERC, it did so under federal provisions which govern confidential treatment of materials submitted, noting that FERC is the primary arbiter of documents it receives from regulated utilities and that parties should have requested documents from FERC so that FERC can decide the issue. The Texas Public Utility Commission did not agree and found that the federal provisions cited by EGSI were not applicable to the case and ordered that EGSI *immediately* produce all documents responsive

to the discovery request, noting that the protective order in place would afford a sufficient level of confidential treatment and protections to any documents disclosed. *Id.* at 3-4. As such, we find the attorney examiner's ruling to be consistent with that of another public utility commission when faced with a comparable discovery dispute.

{¶ 42} We also agree that the attorney examiner's ruling strikes the necessary balance between the discovery rights of OCC, and other parties to this proceeding, with that of the interest to allow FERC to engage and complete its audit function in a confidential manner. The FERC Division of Audits and Accounting has expressly indicated that the audit has been completed and FirstEnergy Corp. has admitted it is not contesting any of the findings of the audit through the two options available pursuant to FERC's regulations. (Tr. (Mar. 11, 2022) at 41-42). Further, we agree that the audit subject to the discovery request is separate and apart from the pending investigation of FirstEnergy Corp.'s lobbying and governmental affairs activities. Additionally, in response to arguments proffered by the Companies, at no time did the attorney examiner indicate that FERC was bound by R.C. 4901.16. Instead, the attorney examiner simply noted that the FERC statutes and regulation cited by the Companies operated in a similar fashion to the Commission's own statutory preclusion against employees prematurely divulging information during the course of an ongoing investigation. The provision of information to FERC as non-public during the course of an audit is strikingly similar to the routine procedural practice here at the Commission where entities can provide Staff information on a non-public basis during an investigation.

{¶ 43} Under these circumstances, and pursuant to the Commission's broad discovery rules, OCC is entitled to discovery of this information, as the information at issue is relevant to the subject matter of the proceeding, the information sought appears reasonably calculated to lead to the discovery of admissible evidence, and the Companies have not proven that that the information is either privileged or irrelevant. Further, similar to the *EGSI Case*, we agree that the protective agreements entered into between parties serve as an appropriate mechanism to protect any confidential information that may be produced.

(Tr. (Mar. 11, 2022) at 55-56). The Commission accordingly finds that the attorney examiner did not err in granting OCC's motion to compel with regard to the documents provided to FERC during the course of the audit.

{¶ 44} However, we do acknowledge that the attorney examiner, when granting the motion to compel, did not specify the applicable timeframe for responsive information. We believe, in this limited aspect of the ruling, clarification is required to be consistent with the Commission's Entry issued in this case on March 9, 2022, as well as earlier rulings in this case. (Tr. (Mar. 25, 2021) at 10). Specifically, while the FERC audit covered the period from January 1, 2015 through September 30, 2021, we will note the motion to compel will be granted for information falling within the period from January 1, 2017 through December 31, 2019. The ruling will be affirmed in all other respects. The Companies will be required to produce the responsive materials within 30 days of the March 11, 2022 prehearing conference, unless otherwise ordered.

IV. ORDER

{¶ 45} It is, therefore,

{¶ 46} ORDERED, That the interlocutory appeal filed by the FirstEnergy Utilities be denied. It is, further,

{¶ 47} ORDERED, That the attorney examiner's ruling be clarified to only apply to information and documents falling within the period from January 1, 2017 through December 31, 2019, consistent with Paragraph 44. It is, further,

{¶ 48} 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 P. Deters

MJA/hac

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Case No(s). 20-1502-EL-UNC

Summary: Entry denying the interlocutory appeal filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company electronically filed by Heather A. Chilcote on behalf of Public Utilities Commission of Ohio