

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 13, 2022

{¶ 1} In this Entry, the attorney examiner sets a briefing schedule and schedules a prehearing conference to take place at 10:00 a.m. on April 20, 2022, at the Commission offices.

{¶ 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. 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 represent that the Deferred Prosecution Agreement (DFA) 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 represent that the DFA requires that the Companies supplement certain of their discovery responses in this proceeding.

{¶ 8} On June 29, 2021, Ohio Consumers' Counsel (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. Further, in order to provide parties time to adhere to the directives provided during the prehearing conference, the attorney

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.

examiner instructed that the initial and reply comment period would be established by subsequent entry. (Tr. (Aug. 31, 2021) at 9, 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. Further, the attorney examiner deferred ruling on OCC's October 27, 2021 motion until after responsive memoranda contra and comments regarding the Companies' show cause order had been received. Entry (Oct. 28, 2021) at ¶ 20.

{¶ 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. Reply comments were timely filed by OCC, Ohio Hospital Association, FirstEnergy Ohio, and OMAEG. 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 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 FERC are still protected now that the FERC audit has been released. The attorney examiners informed the parties that a second prehearing conference would be scheduled during which they would provide their rulings.

{¶ 19} On February 18, 2022, FirstEnergy, 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 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^[WN1] 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 compel² and directed FirstEnergy to produce all documents and communications provided to FERC during the course of its audit within 30 days, adding that any necessary adjustments to the timing of production could be determined at a later date.

{¶ 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.

² During the prehearing conference, counsel for OCC acknowledged that it was narrowing the scope of its motion to compel to only require FirstEnergy 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.

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

{¶ 24} On April 6, 2022, the Commission issued an Entry denying the Companies' interlocutory appeal. The Commission also clarified that the motion to compel is granted as to the period from January 1, 2017 through December 31, 2019. Furthermore, the Commission ordered that the Companies will be required to produce the responsive materials within 30 days of the March 11, 2022 prehearing conference, unless otherwise ordered.

{¶ 25} On April 6, 2022, the Companies contacted the attorney examiners and parties via email to request an extended production deadline, allowing the Companies to produce responsive documents on a rolling basis.

{¶ 26} In response, the attorney examiners instructed the parties to work amongst themselves to determine a reasonable timeframe to propose to the attorney examiners by the following day, consistent with the purpose stated in Ohio Adm.Code 4901-1-16(A). However, by email correspondence received April 7, 2022, the parties indicated that they were unable to come to an agreement. Specifically, OCC and the Northwest Ohio Aggregation Coalition raised concerns with allowing any extension of the deadline and OMAEG, while not opposing production on a rolling basis, requested clarification as to when production would begin. The Companies did, however, represent to the attorney examiners that eight other parties³ had indicated they did not object to production of responsive documents on a rolling basis.

{¶ 27} On April 11, 2022, a prehearing conference was held. During the conference, the attorney examiner emphasized that the timing for production of documents does not

³ According to the Companies, Industrial Energy Users-Ohio, Environmental Law and Policy Center, Interstate Gas Supply, Inc., Natural Resources Defense Council, Ohio Partners for Affordable Energy, Ohio Hospital Association, Ohio Energy Group and Ohio Environmental Council did not object to production on a rolling basis.

typically require the intervention of the attorney examiners. Rather, the attorney examiner explained that parties routinely work amongst themselves to mutually agree on production deadlines. At the conference, the attorney examiner ordered a break in the conference, during which time the parties were to continue discussing the production deadline. After an extended break, the parties stated that they were unable to come to an agreement but would be willing to continue negotiations. At that time, the attorney examiner ordered the parties to continue discussions and inform the attorney examiners by 12:00 p.m. on April 12, 2022, if they are able to agree on a production deadline. The attorney examiner stated that if the parties are unable to come to an agreement by that time, memoranda on the issue would be due April 15, 2022, and replies would be due by 12:00 p.m. on April 19, 2022. Furthermore, another prehearing conference would be scheduled for April 20, 2022, at which time the attorney examiner would make a ruling on the production deadline.

{¶ 28} Shortly before 12:00 p.m. on April 12, 2022, OCC contacted the attorney examiners and other parties by email to request that the attorney examiner allow discussions to continue until 5:30 p.m. OCC noted that the parties were continuing to work towards a resolution. The attorney examiner responded, via email, that the parties will be afforded the opportunity to continue discussion on the issue as requested. Shortly before 5:30 p.m., OCC contacted the attorney examiners and other parties by email to state that they were unable to reach a resolution regarding the production deadline.

{¶ 29} At this time, the attorney examiner finds it appropriate to set a briefing schedule. Parties seeking to be heard on this issue should file memoranda by April 15, 2022, and any replies are due by 12:00 p.m. on April 19, 2022.

{¶ 30} A prehearing conference shall be held at 10:00 a.m. on April 20, 2022, at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-C, Columbus, Ohio 43215. The parties should register at the lobby desk and then proceed to the 11th floor to participate in the hearing. A court reporter will transcribe this prehearing conference.

{¶ 31} It is, therefore,

{¶ 32} ORDERED, That parties adhere to the briefing schedule set forth in Paragraph 29. It is, further,

{¶ 33} ORDERED, That a prehearing conference be scheduled in accordance with Paragraph 30. It is, further,

{¶ 34} 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

NJW/kck

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

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

Summary: Attorney Examiner Entry ordering that parties adhere to the briefing schedule set forth in Paragraph 29 and ordering that a prehearing conference be scheduled for April 20, 2022 at 10:00 a.m. in accordance with Paragraph 30. electronically filed by Kelli C. King on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio