BEFORE
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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S SUPPLEMENTAL MEMORANDUM CONCERNING THE TIMING OF THE PRODUCTION OF DOCUMENTS PRODUCED TO THE FEDERAL ENERGY REGULATORY COMMISSION

I. INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") respectfully submit this Memorandum in accordance with the Attorney Examiners' April 13 Entry[1] directing the parties to file additional briefing laying out a reasonable time frame for the production of FERC materials as compelled by the Attorney Examiners' March 11 Ruling,[2] and modified by the Commission's April 6 Entry.[3] Since the March 11 Ruling, the Companies have been diligently working to assemble a production of documents in compliance with the Commission's directive. "[T]here's no question that these documents are going to be produced."[4] Rather, this dispute "comes down to a matter of timing and logistics for the production of *thousands* of documents to occur,"[5] particularly given the

[1] Case No. 20-1502-EL-UNC, Entry (Apr. 13, 2022) ("April 13 Entry").

[2] Case No. 20-1502-EL-UNC, Hr'g Tr. (Mar. 11, 2022), at 57:1-59:25 ("March 11 Ruling").

[3] Case No. 20-1502-EL-UNC, Entry (Apr. 6, 2022) ("April 6 Entry").

[4] Case No. 20-1502-EL-UNC, Hr'g Tr. (Apr. 11, 2022), at 8:18-19.

[5] *Id.* at 8:21-23 (emphasis added).

Companies' need to redact information unrelated to the Companies, which largely concerns affiliated utilities regulated by other states' commissions.

The logistics of providing a production of the compelled FERC materials concerning the Companies have proved challenging. This is why the Companies emailed the Attorney Examiners and counsel for all parties on April 6 seeking an extension of the production deadline as contemplated during the March 11 prehearing conference.[6] Specifically, the Companies asked permission to begin rolling productions of documents 30 days from the date of any order denying the Companies' interlocutory appeal, where all productions would be completed within 120 days of the date of any such order. When the Commission denied the Companies' interlocutory appeal and limited the responsive time period, the Companies further reduced their requested extension. And at the Attorney Examiners' request, the Companies immediately contacted the parties to discuss a solution. Except for the Office of the Ohio Consumer's Counsel ("OCC"), whose position is supported by Northwest Ohio Aggregation Coalition, no party objected to rolling productions in principle.[7]

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[6] While the Companies are pleased to file a written motion requesting a continuance whenever necessary, they believed they had already orally requested the ability to revisit the production deadline at the March 11, 2022 prehearing conference, and understood the Attorney Examiners' March 11 ruling to support follow-up via email to the Examiners and all parties. Under O.A.C. 4901-1-12(A) and O.A.C. 4901-1-13(D), parties are permitted to request a continuance orally at a prehearing conference. The Companies believed they made such a motion during the March 11 prehearing conference. Case No. 20-1502-EL-UNC, Hr'g Tr. (Apr. 11, 2022), at 57:25-28:5 ("MR. DORINGO: . . . And in terms of timing, I would say given the length of the audit that continued for, you know, some years, and the breath of the audit and OCC's request, we would request 30 days *at least* to make a production, *subject to any motions of interlocutory appeal*.") (emphasis added). Because the Attorney Examiners acknowledged the Companies' request, the Companies viewed their email seeking an extension as taking the logical next step. *See id.* at 59:15-23 ("ATTORNEY EXAMINER ADDISON: . . . I do believe the 30-day time frame is appropriate to allow the FirstEnergy utilities to file an interlocutory appeal, if they so choose. *And if that would happen, we will of course take that under advisement, and to the extent that we need to adjust the timing of any production, or if the Commission would later reverse our decision here today, we can certainly – that will certainly be addressed at a later time*.") (emphasis added). *See also* Case No. 20-1502-EL-UNC, Hr'g Tr. (Apr. 11, 2022), at 6:15-19 (noting the Companies were directed "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 the production could be determined at a . . . later date*") (emphasis added).

[7] Case No. 20-1502-EL-UNC, Entry (Apr. 13, 2022), at ¶ 26. The Companies also note that Citizens Utility Board of Ohio deferred to OCC, but does not necessarily object to rolling production, and the Ohio

Since April 6, OCC has taken lead on negotiating with the Companies. Yet, despite the Companies' best efforts, the parties have been unable to reach a common understanding of how long the review, redaction, organization, and production of these documents will take. Notwithstanding the inability to negotiate a resolution, the Companies have endeavored to produce documents as expeditiously as possible. Indeed, the Companies have already identified a small subset of responsive documents that require no redactions, and produced those documents to the parties. And any extension does not prejudice OCC or any other party.

For these reasons and those further explained below, the Companies request that the Attorney Examiners permit them to produce the compelled FERC documents on a rolling basis where all productions will be completed by June 17, 2022.[8] Further, the Companies will reasonably prioritize for the next production responsive documents related to "Accounting for Lobbying Expenses, Donations, and Costs that Lacked Proper Supporting Documentation" and "Service Company Billing Procedures."[9]

II. ARGUMENT

A. The Companies Have Been Working Diligently To Comply With The Commission's Orders.

Under O.A.C. 4901-1-17(G), "an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown." There is good cause here to grant the Companies' request for an extension. Since the March 11 prehearing conference, and while their interlocutory appeal was pending, the Companies began

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Manufacturer's Association Energy Group does not necessarily object to a rolling production within a reasonable time frame but asked for further clarification on timing. Other intervenors either communicated they did not object, or did not provide a response.

[8] The June 17, 2022 proposed production completion deadline represents a further reduction from the Companies' April 7, 2022 request for 90 days from the Commission's April 6, 2022 Entry.

[9] Final FERC Audit report, pgs. 46-53, 58-60.

gathering documents responsive to the Attorney Examiners' March 11 Ruling, and later the Commission's April 6 Entry. That is, documents provided by FirstEnergy entities related to Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company between January 1, 2017 and December 31, 2019.[10]

Unfortunately, documents satisfying those criteria are not stored in a central repository from which they can be immediately reproduced. As such, right after the March 11 prehearing conference, the Companies began working with counsel and their document review vendor to collect and load documents to their review platform. At that point, the universe of responsive materials totaled more than 8,700 documents. Once available for review, counsel began running searches to understand the universe of potentially relevant documents, which revealed several hurdles to completing productions by April 11, or prior to June 17.

First, the universe of documents that fall within the Commission's responsive criteria number at least 3,300 documents based on document date properties. These documents will require document-by-document review. Because the April 6 Entry affirms that the Companies must provide documents that "relate to" Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, production of just those documents that explicitly name the Companies is insufficient. This places a high burden on the Companies to identify documents that "relate to" the Companies for production. Moreover, counsel needs to conduct quality control reviews over many of the thousands of documents that fall outside the date range to ensure the review population is not under-inclusive. Thus, as the Companies have

[10] Case No. 20-1502-EL-UNC, Hr'g Tr. (Apr. 11, 2022), at 59:5-59:14 ("MR. DORINGO: Just to be clear, when you say it includes production of documents from FirstEnergy entities, I understand that to mean all entities that were under -- that were party to that audit, *but so the limitation then is only those documents which concern the Ohio Companies*? ATTORNEY EXAMINER ADDISON: *Of course.* And I think we did make that designation earlier during the conference, but thank you for making that clarification, Mr. Doringo.") (emphasis added); Case No. 20-1502-EL-UNC, Entry (Apr. 6, 2022), at ¶ 44. (affirming the Attorney Examiners' ruling in this respect).

explained, providing the parties with all relevant documents requires additional time to complete this review.

Second, the Companies' need to redact information unrelated to the Companies entails a time-intensive process. To OCC's credit, at the March 11, 2022 prehearing conference, OCC recognized the need for redactions.[11] While redactions of short non-excel documents can be completed at a quicker pace, redactions of excels take much longer and can typically only be completed at a rate of 1 to 5 documents per hour, depending on the size of the document. Here, most of the documents respond to FERC data requests that sought information related to the Companies, as well as other entities outside the PUCO's jurisdiction, including FirstEnergy entities operating in other states. And within this population, there are many excel documents requiring redaction. It takes time to ensure that any redactions are not over- or under-inclusive.

Third, even if the Companies had overcome the hurdles described above and completed their review of the documents prior to the Commission's April 6 Entry denying their interlocutory appeal, the Companies would have needed more time beyond April 11. This is because the Commission's April 6 Entry altered the scope of any production contemplated by the Attorney Examiners' March 11 Ruling. Specifically, the Companies would have had to re-review any previously prepared production and eliminate or redact many documents outside the relevant date range. This step would have had to be completed before any production could be made.

In sum, demands for immediate production fundamentally misunderstand the lead-time and logistics needed to make a production of this magnitude that accurately captures the information the Companies were directed to produce—no more, no less. The Companies will continue to work

[11] *See* Case No. 20-1502-EL-UNC, Hr'g Tr. (Mar. 11, 2022), at 37:18-21 ("MS. WILLIS: . . . to the extent that documents would include more than Ohio information, we would accept the redactions on those documents.").

earnestly to provide the thousands of documents over the next two months, but they require that additional time to do so in a thoughtful and responsible manner consistent with the Commission's April 6, 2022 Entry.[12]

B. The Parties Are Not Prejudiced By The Companies' Proposed Rolling Production Schedule.

The routine discovery extension the Companies seek also does not prejudice the parties. Notably, a production completion date of June 17 does not interfere with the procedural schedule in this proceeding. An audit report is not due in this proceeding until December. A mid-June production therefore provides the parties with ample time to review documents and complies with Commission rules.[13]

Indeed, in a separate investigation before this Commission, OCC, OMAEG, and NOPEC requested that the Commission allow them to request documents up until the scheduled hearing date.[14] Accordingly, the parties' receipt of the documents at issue nearly six months before the issuance of the audit report in this proceeding will not cause them any prejudice. And any argument against rolling productions based on the timing of FirstEnergy Corp.'s securities productions misunderstands the nature of those ongoing productions, which are necessarily timed based on productions to the plaintiffs in those cases.[15] Consistent with Commission precedent, the

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[12] Indeed, the Companies have no interest in delaying the production of these materials and will provide them on a rolling basis, with the potential and hope to complete the production in advance of the proposed June 17, 2022 deadline.

[13] O.A.C. 4901-1-17(A) ("Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.").

[14] Case No. 17-974, Motion for Indefinite Continuance (Mar. 14, 2022), Mem. at 13.

[15] As counsel for FirstEnergy Corp. has explained, OCC will continue to receive documents FirstEnergy Corp. produces to the plaintiffs in *In re FirstEnergy Crop. Securities Litigation*, Case No. 2:20-cv-03785 (S.D. Ohio). *See, e.g.*, Case No. 17-0974-EL-UNC, Hr'g Tr., at 13:10-20 (Jan. 4, 2022). It is incorrect for OCC to describe the rolling nature of these productions as intentional delays or attribute those alleged delays to the Companies, *as discovery in the securities litigation is ongoing*.

Attorney Examiners should grant the Companies' reasonable extension of the procedural schedule as there is no prejudice to OCC or other parties.[16]

III. CONCLUSION

The only remaining question concerning the production of FERC materials is one of timing—specifically, whether the Companies will be afforded a reasonable extension of time to June 17 to review, organize, redact, and produce the remaining documents, with the aforementioned commitment to prioritize certain categories of materials. The Companies respectfully ask the Attorney Examiners to allow them that time.

[16] *See In the Matter of the Petition of Joseph W. Gardner & Numerous Other Subscribers of the Lake Milton Exch. of Sprint/united Tel. Co. of Ohio, Complainants*, No. 97-37-TP-PEX, 1997 WL 34879401, at *1 (F.E.D.A.P.J.P. Mar. 21, 1997); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to Be Charged & Collected for Gas Serv. in the City of Parma Heights, Ohio. in the Matter of the Application of Columbia Gas of Ohio, Inc., for an Increase in the Rates to Be Charged & Collected for Gas Serv. in the Municipalities of Avon, Avon Lake, Bay Vill., Berea, Middleburg Heights, N. Royalton, Olmstead Falls, Strongsville & Westlake, Ohio.*, No. 83-233-GA-AIR, 1983 WL 887965, at *1 (F.E.D.A.P.J.P. Dec. 7, 1983).

Dated: April 15, 2022

Respectfully submitted,

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I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on April 15, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Shalini B. Goyal
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Summary: Memorandum Concerning the Timing of the Production of Documents Produced to FERC electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company