

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF OHIO  
EDISON COMPANY, THE CLEVELAND  
ELECTRIC ILLUMINATING COMPANY,  
AND THE TOLEDO EDISON COMPANY'S  
COMPLIANCE WITH R.C. 4928.17 AND  
OHIO ADM.CODE CHAPTER 4901:1-37.

CASE NO. 17-974-EL-UNC

## ENTRY

Entered in the Journal on June 16, 2022

### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies certification of the joint interlocutory appeal of the April 7, 2022 Entry, and denies, in part, grants, in part, and defers, in part, the motions to quash.

### II. DISCUSSION

{¶ 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} To assist the Commission with the review of FirstEnergy's compliance with the corporate separation rules set forth in Ohio Adm.Code Chapter 4901:1-37, the Commission directed Staff, on May 17, 2017, to issue a request for proposal (RFP) for audit services. On July 5, 2017, the Commission issued an Entry selecting Sage Management Consultants, LLC (Sage) to conduct the requested audit services, in accordance with the terms set forth in the RFP. Pursuant to the terms of the RFP, a draft audit report was to be submitted by February 28, 2018, with the final audit report due on March 14, 2018. The deadline for the draft audit report and final audit report was extended to April 30, 2018, and May 14, 2018, respectively. Sage filed the final audit report on May 14, 2018.

{¶ 4} Comments regarding the Sage audit report were timely filed by Interstate Gas Supply, Inc. (IGS), Ohio Consumers' Counsel (OCC), Northeast Ohio Public Energy Council (NOPEC), the Companies, and Retail Energy Supply Association (RESA). Reply comments were filed by NOPEC, FirstEnergy Solutions Corp. (FES), OCC, and the Companies. Joint reply comments were filed by RESA and IGS.

{¶ 5} In their comments, the Companies noted that, on March 20, 2018, FES filed a voluntary petition in the United States Bankruptcy Court for relief pursuant to Chapter 11 of Title 11 of the United States Code. Further proceedings in this case were deferred until the resolution of FES' bankruptcy proceeding.

{¶ 6} On March 20, 2020, the Companies filed a notice in this proceeding. The Companies represented that FES had emerged from bankruptcy as Energy Harbor Corp. (Energy Harbor) and that Energy Harbor is no longer an affiliate of the Companies' parent, FirstEnergy Corp.

{¶ 7} On April 29, 2020, the attorney examiner established a supplemental comment period regarding the audit report filed in this proceeding. Supplemental comments were timely filed by Vistra Energy Corp., NOPEC, IGS, OCC, RESA, and the Companies. Supplemental reply comments were timely filed by OCC, NOPEC, IGS, RESA, and the Companies.

{¶ 8} On September 8, 2020, the OCC filed motions in this proceeding for an investigation and management audit of FirstEnergy, its corporate governance, and its activities regarding Am. Sub. H.B. 6, to hire an independent auditor, to reopen the distribution modernization rider audit case, and to require FirstEnergy to show that it did not improperly use money collected from consumers or violate any utility regulatory laws, rules, or orders in its activities regarding Am. Sub. H.B. 6. The Companies filed a memorandum contra OCC's motions on September 23, 2020. OCC filed a reply on September 30, 2020.

{¶ 9} On September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of Am. Sub. H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC.

{¶ 10} On October 29, 2020, FirstEnergy Corp., the corporate parent of the Companies, filed a Form 8-K with the United States Securities and Exchange Commission reporting the termination of certain officers and appointment of new interim chief executive officers. The Form 8-K further stated that, during the course of FirstEnergy Corp.'s internal investigation related to ongoing government investigations, the Independent Review Committee of the Board of Directors determined that each of the terminated executives violated certain FirstEnergy Corp. policies and its code of conduct.

{¶ 11} In light of these disclosures, on November 4, 2020, the Commission issued an Entry directing, in the instant case, Staff to issue an RFP to acquire audit services to assist the Commission with the review of FirstEnergy's compliance with the corporate separation provisions of R.C. 4928.17 and with the Companies' Commission-approved corporate separation plans for the period between November 1, 2016, and October 31, 2020.

{¶ 12} On January 27, 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. In the Entry, the Commission also set the deadline for the completion of the audit report as June 21, 2021. Motions to extend the filing date of the audit report were subsequently filed and granted.

{¶ 13} On September 13, 2021, Daymark filed the final audit report with the Commission.

{¶ 14} On September 17, 2021, the attorney examiner set a comment period and procedural schedule for this proceeding, which was extended by Entry dated October 12, 2021.

{¶ 15} A prehearing conference was held on January 4, 2022. During that conference, numerous rulings were issued, including an extension of the procedural schedule and the evidentiary hearing. The Companies' testimony deadline was set for February 14, 2022, the intervenors' testimony deadline was set for February 28, 2022, and the evidentiary hearing was rescheduled for March 14, 2022. (Tr. (Jan. 4, 2022) at 25-26.)

{¶ 16} OCC and NOPEC filed a document on January 10, 2022, which was intended to be an interlocutory appeal of certain rulings made at the January 4, 2022 prehearing conference. The document file was corrupted and most of the document is illegible.

{¶ 17} On January 13, 2022, the attorney examiner ruled that the filing deadline provided by Ohio Adm.Code 4901-1-15 for interlocutory appeals of rulings made at the January 4, 2022 prehearing conference would be extended to January 14, 2022, which would give OCC and NOPEC an opportunity to timely file the interlocutory appeal.

{¶ 18} On January 14, 2022, an interlocutory appeal, request for certification, and application for review was filed by OCC and NOPEC regarding two rulings at the January 4, 2022 prehearing conference: the attorney examiner's ruling extending the procedural schedule in this case; and the attorney examiner's statement that a ruling on the request by OCC and NOPEC for a supplemental audit would be deferred until after the evidentiary hearing to be held in this case.

{¶ 19} On February 10, 2022, the attorney examiner issued an Entry denying OCC and NOPEC's January 14, 2022 interlocutory appeal. In the same Entry, the procedural schedule was extended, and the evidentiary hearing was rescheduled to commence on May 9, 2022. The attorney examiner also stated that reasonable requests for further extension of

the procedural schedule will be entertained if a party provides meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

*A. Interlocutory Appeal*

{¶ 20} On March 14, 2022, OCC, OMAEG, and NOPEC jointly filed a motion for an indefinite continuance of the hearing and a motion to enlarge the time period for discovery. The motions were filed on an expedited basis.

{¶ 21} On March 21, 2022, FirstEnergy filed a memorandum contra the March 14, 2022 motions, arguing that the discovery deadline should not be extended, and the hearing date should not be continued.

{¶ 22} On April 7, 2022, the attorney examiner issued an Entry denying the motion to reopen the discovery period and continuing the hearing until August 22, 2022. The parties were also directed to file a discovery status report each month until the hearing.

{¶ 23} On April 12, 2022, OCC, OMAEG, and NOPEC filed a joint interlocutory appeal of the April 7, 2022 Entry denying the motion to reopen discovery. The parties state that they are pursuing an interlocutory appeal, pursuant to the standards of Ohio Adm.Code 4901-1-15(B). The appealing parties first argue that the attorney examiner's ruling presents a new or novel question of interpretation, law, or policy, and a departure from past precedent. The parties assert that the attorney examiner's rationale for denying the motion to extend the discovery deadline was inapplicable to Ohio Adm.Code 4901-1-17(G), which requires only a showing of "good cause." The appealing parties state that the attorney examiner's rationale was instead based on OCC's or the parties' failure to raise the discovery extension request at the first opportunity and failure to identify a specific line of inquiry or specific type of documents that would be beneficial for discovery. The parties also state that the attorney examiner cited cases where hearings were continued while the discovery deadline was not extended, but they note that those rulings involved modest time gaps between discovery and hearing, while this proceeding would involve a gap of nine

months. As an additional argument, the appealing parties assert that the decision is built upon the earlier rulings of an attorney examiner who has withdrawn from the case. Alternatively, the parties argue that the requirements in Ohio Adm.Code 4901-1-38(B) should be waived because of the circumstances surrounding the case. The parties add that an immediate determination is needed to prevent undue prejudice because their ample discovery rights under R.C. 4903.082 and Ohio Adm.Code 4901-1-16 would be infringed, and the complete evaluation of the corporate separation issues would be denied.

{¶ 24} On April 18, 2022, the Companies filed a memorandum contra the interlocutory appeal. In the filing, the Companies argue that rulings on the procedural schedule, including the April 7, 2022 ruling, do not meet the requirements for interlocutory appeal pursuant to Ohio Adm.Code 4901-1-15(B) because there is broad discretion for those rulings. The Companies note that implementing procedural rules is a routine matter for the attorney examiners, which does not form the basis for certifying an interlocutory appeal. Noting that “good cause” is grounded in the procedural contours and circumstances of each proceeding, the Companies argue that the attorney examiner did not create a new or novel rule that justifies certification of an interlocutory appeal. The Companies also argue that the parties seeking interlocutory appeal failed to show good cause to extend the discovery deadline. The Companies argue that the cases cited by the attorney examiner are in line with the ruling that denied extending the discovery period because, in one of those cases, discovery was not extended when OCC filed a motion for extension eight days after the discovery deadline. The Companies also point to a case in which the Commission refused to extend a discovery deadline for failure to show a particularized need. *See In re GTE N. Inc.*, Case No. 87-1307-TP-AIR, Entry (June 9, 1988) at 1. The Companies also assert that the movants are not unduly prejudiced by the April 7, 2022 ruling because they already have a significant amount of discovery, and they are able to continue gathering information through the deposition process. The Companies add that there is no basis to waive the requirements in Ohio Adm.Code 4901-1-38(B), as waivers of the procedural rules are

typically related to ministerial issues. *See Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 17-2474-EL-UNC, Entry (Mar. 9, 2022).

{¶ 25} 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 parties acknowledge that they are pursuing an interlocutory appeal pursuant to the standards of Ohio Adm.Code 4901-1-15(B) rather than in paragraph (A) of the rule. Ohio Adm.Code 4901-1-15(B) provides that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling that represents a departure from past precedent and an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission should ultimately reverse the ruling in question. Although both requirements must be met, the appealing parties have failed to satisfy either provision.

{¶ 26} Initially, the attorney examiner finds that the interlocutory appeal is not taken from a ruling that represents a departure from past precedent. The appealing parties assert that the attorney examiner utilized new criteria to deny the discovery extension instead of Ohio Adm.Code 4901-1-17(G), which requires only a showing of “good cause.” However, the supposed new criteria discussed by the attorney examiner were part of the attorney examiner’s analysis as to whether the moving parties had demonstrated good cause for the extension. Failure to raise the issue at earlier opportunities and failure to identify the information sought, in this instance, played a role in finding that the parties had not demonstrated good cause. The Entry clearly states “[f]or these reasons, the attorney examiner does not find good cause to extend the discovery deadline.” Entry (Apr. 7, 2022) at ¶ 27. Furthermore, the appealing parties discussed the cases the attorney examiner cited in which discovery was not extended even though the hearing was continued. The parties

merely noted that those cases did not involve as much time in between the discovery deadline and the hearing date as in this proceeding, which hardly equates to a departure from past precedent. As pointed out by the Companies, one of those cases involved a decision to not extend the discovery deadline due to the moving party's failure to request the extension until after the deadline, which is similar to this proceeding. Additionally, the appealing parties' argument that the decision is built upon the earlier rulings of an attorney examiner who has withdrawn from the case is not well taken. To be clear, the April 7, 2022 Entry denying the motion to reopen the discovery period was issued by an attorney examiner still assigned to this case, and that is the Entry from which the parties filed an interlocutory appeal. The fact that another attorney examiner was previously assigned to the case and issued other discovery-related entries does not elevate the April 7, 2022 Entry to a new or novel question of interpretation, law, or policy. Additionally, the Commission is vested with broad discretion to manage its dockets. *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982). Likewise, the decision to deny a continuance of a hearing or to set a specific deadline for discovery requests rests in the Commission's discretion. *City of Akron v. Pub. Util. Comm.*, 5 Ohio St.2d 237, 241, 215 N.E.2d 366 (1966). The entries setting the discovery deadline in question certainly fall within this discretion and provided ample reasoning for maintaining that deadline. For these reasons, the interlocutory appeal was not taken from a ruling that represents a departure from past precedent.

{¶ 27} Additionally, the attorney examiner finds that the appealing parties have failed to demonstrate that an immediate determination from the Commission is needed to prevent the likelihood of undue prejudice resulting from the April 7, 2022 Entry. The parties merely argue, without support, that an immediate ruling is necessary because their discovery rights would be infringed, and they would not be able to have a complete evaluation of the corporate separation issues. The parties have not identified a specific need for additional documents, any specific topic, or any deficiencies in document production.



In fact, the appealing parties recently stated in their June 13, 2022 Discovery Status Update that “[t]here is a massive amount of new information produced by FirstEnergy since November 2021.” Nor should the requirements in Ohio Adm.Code 4901-1-38(B) be waived because of the circumstances surrounding the case, as the appealing parties suggest. For the reasons stated above, certification of the interlocutory appeal is hereby denied.

{¶ 28} Moreover, pursuant to the April 7, 2022 Entry, the attorney examiner directed the Companies to work in conjunction with the joint movants to file a status report on the discovery process in this docket on various dates preceding the scheduled hearing, the purpose of which was to ascertain “meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.” Entry (Apr. 7, 2022) at ¶ 30. The first deadline for the first of these reports was May 9, 2022. The Companies timely filed a status update, OCC and NOPEC jointly filed a separate update on May 10, 2022, and OMAEG filed an update on May 11, 2022. The second deadline for the filing of these reports was June 13, 2022. On that date, OCC, NOPEC, and OMAEG jointly filed an update, and the Companies filed an update. Although OCC, NOPEC, and OMAEG’s joint June 13, 2022 update does quantify the number of pages that have been produced, the filing does not state the number of pages that have been reviewed or the number of pages that still require review. Notably, while the attorney examiner stressed that this case must move forward, the ongoing discovery production and review was one of the underlying reasons for continuing the hearing to August. These reports should inform the attorney examiner as to whether the parties are adequately prepared for that scheduled hearing. As such, OCC, NOPEC, and OMAEG are directed to amend their reports by June 22, 2022, to specifically indicate the number of pages of documents that have been produced through discovery; how many pages of documents for which they have completed a review; and how many pages of documents still require review. Joint movants should also adhere to these directives in the subsequent discovery report due on July 11, 2022.

**B. *Yeboah-Amankwah and Lisowski Subpoenas***

**1. YEBOAH-AMANKWAH SUBPOENA**

{¶ 29} Also on February 7, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.’s former Chief Ethics Officer, Ebony Yeboah-Amankwah, to testify in a deposition and to produce a number of designated documents in advance of the deposition. The subpoena was signed by the attorney examiner.

{¶ 30} On March 7, 2022, counsel for Ms. Yeboah-Amankwah moved to quash the subpoena pursuant to Ohio Adm.Code 4901-1-25 as unreasonable and oppressive. Counsel emphasizes that Ms. Yeboah-Amankwah is not a party to the case, and the requested documents are not in her custody or control. Specifically, the documents OCC seeks are the property of FirstEnergy rather than the property of Ms. Yeboah-Amankwah, as she returned to the company all FirstEnergy documents in her personal possession at the time of her separation, on November 8, 2020. As further evidence that the subpoena is unreasonable, counsel notes that OCC requested certain documents relating to the Daymark audit, but Ms. Yeboah-Amankwah separated from FirstEnergy Corp. before the Daymark audit began. Counsel points out that OCC never subpoenaed the Companies or related entities for the corporate separation records, which it could have done during the discovery period. Counsel also argues that it would be unduly burdensome to require Ms. Yeboah-Amankwah to attend a deposition without the ability to review applicable documents in advance. Furthermore, counsel argues that the subpoena seeks irrelevant information and sensitive privilege issues may arise during the deposition. Counsel adds that discovery is closed, so the subpoena is untimely.

{¶ 31} OCC filed a memorandum contra to the motion to quash on March 22, 2022. OCC asserts that the information through this subpoena is relevant and reasonably calculated to lead to the discovery of admissible evidence. OCC notes that during the Daymark audit, the Chief Ethics Officer and other positions relating to compliance monitoring were vacant, which OCC believes limited Daymark’s ability to assess

compliance tracking. OCC notes that Ms. Yeboah-Amankwah served as Vice President, Corporate Secretary, and Chief Ethics Officer at FirstEnergy Corp. from July 2017 until November 2020, which was most of the four-year audit period. OCC believes that the Chief Ethics Officer has the ultimate responsibility for corporate separation compliance. OCC states that it would face undue hardship without her testimony, and the documents cannot necessarily be obtained from other sources. OCC also argues that the subpoena is not unreasonable or oppressive. OCC states that Ms. Yeboah-Amankwah can state under oath that she does not recall answers to questions or that she does not have documents in her custody or control, but the whole subpoena should not be quashed on those grounds. OCC also contends that the subpoena is not untimely, as Ohio Adm.Code 4901-1-25 contemplates a subpoena that compels testimony and requires the production of documents. OCC also notes that the subpoena was signed by an attorney examiner.

{¶ 32} Counsel for Ms. Yeboah-Amankwah filed a reply on March 29, 2022. In the reply, counsel argues that the subpoena is misdirected and redundant because OCC and FirstEnergy have already agreed to depositions of individuals with direct access to relevant information. Counsel argues that OCC should not be allowed to simultaneously seek the same discovery from Ms. Yeboah-Amankwah that it is seeking from numerous other individuals, and OCC could renew its request after deposing other individuals if it has reason to believe that Ms. Yeboah-Amankwah has additional information. Counsel adds that the requested documents should be requested from FirstEnergy and not from a third party, and FirstEnergy is best positioned to provide answers to questions than Ms. Yeboah-Amankwah. Counsel also reiterates that the information sought is outside the scope of the case, and document discovery is already closed.

## **2. LISOWSKI SUBPOENA**

{¶ 33} On February 22, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.'s Vice President, Controller & Chief Accounting Officer, Jason Lisowski,

to testify in a deposition and to produce a number of designated documents in advance of the deposition. The subpoena was signed by the attorney examiner.

{¶ 34} FirstEnergy Corp. moved to quash the subpoena for Mr. Lisowski on March 10, 2022. In the motion, FirstEnergy Corp. states that there is not a substantial need for the discovery, especially because the subpoena is a burden for Mr. Lisowski, who has no special knowledge of corporate separation matters, and the nonparty FirstEnergy Corp. Explaining that Mr. Lisowski is responsible for financial reporting, FirstEnergy Corp. states that he has no responsibility for the implementation of a corporate separation plan. FirstEnergy Corp. adds that OCC is already in possession of many of the categories of documents sought. FirstEnergy Corp. explains that a party seeking discovery on a non-party must make a showing of “substantial need” for the information. *See Lambda Research v. Jacobs*, 170 Ohio App. 3d 750, 2007-Ohio-309, 869 N.E.2d 39, ¶¶ 17-18 (1st Dist.). In its second argument, FirstEnergy Corp. asserts that the request for documents is untimely, as document discovery ended months ago. Finally, FirstEnergy Corp. argues that the documents are irrelevant to the corporate separation matters in this proceeding.

{¶ 35} OCC filed a memorandum contra to the motion to quash on March 25, 2022. OCC asserts that the information it seeks is relevant and reasonably calculated to lead to the discovery of admissible evidence. Noting that a motion to compel Federal Energy Regulatory Commission (FERC) audit documents was recently granted in Case No. 20-1502-EL-UNC, OCC states that the FERC documents requested in this subpoena are related to the same FERC audit. OCC also argues that there is a substantial need for the deposition and requested documents, although a substantial need is not required. OCC states that, per R.C. 4928.18(B), FirstEnergy Corp. is required to produce documents that show it complied with the corporate separation requirements, so the request for these records is not unduly burdensome. OCC also asserts that Mr. Lisowski is familiar with the FERC audit and provided FirstEnergy Corp.’s response to the audit, which is relevant because FirstEnergy Corp. focuses on FERC corporate separation requirements. OCC states that the documents cannot be obtained from other sources, and it would face undue hardship if deprived of the

documents. OCC argues that the subpoena is not untimely, emphasizing that depositions may continue despite the discovery cutoff.

{¶ 36} A reply was filed on April 1, 2022. In it, FirstEnergy Corp. reemphasizes that Mr. Lisowski is not responsible for compliance with Ohio corporate separation rules, and compliance with FERC regulations is different. FirstEnergy Corp. states that Mr. Lisowski is the wrong deponent and other deponents are more knowledgeable about compliance with R.C. 4928.17 and Ohio Adm.Code 4901:1-37. FirstEnergy Corp. also asserts that the request for documents is untimely and allowing OCC to request the numerous categories of documents in the subpoena would render the discovery deadline meaningless. FirstEnergy Corp. adds that OCC cannot show a substantial need for the irrelevant documents.

### 3. CONCLUSION

{¶ 37} Ohio Adm.Code 4901-1-25 governs the issuance of subpoenas in Commission proceedings. The language of this rule indicates that any person, not merely a party, may be subject to a subpoena. The requested deponents are such persons within the meaning of the rule. Therefore, the argument that a requested deponent is not a party to this case has no weight in considering the validity of the request for a subpoena. If the subpoenas appear reasonably calculated to lead to the discovery of admissible evidence, then they may proceed, limited only by the provisions of Ohio Adm.Code 4901-1-16, relating to scope of discovery, and Ohio Adm.Code 4901-1-24, relating to privileged information, trade secrets, and similar matters in which the elicitation of the evidence is outweighed by the harm likely to result from its disclosure. “Subpoenas in and of themselves are not discovery tools; subpoenas can be used as aids to discovery by requiring the physical presence of someone or something at some place so as to enable a party to conduct discovery.” *In re the Application of Lake White Water Works to Increase its Rates and Charges*, Case No. 80-744-WW-AIR, Entry (Sept. 10, 1981). Finally, an attorney examiner may quash a subpoena if it is unreasonable or oppressive, pursuant to 4901-1-25(C).

{¶ 38} The attorney examiner finds that these motions to quash as to the Yeboah-Amankwah and Lisowski depositions should be denied, and the depositions may proceed. In making this determination, the attorney examiner declines to opine on relevancy at this time, as relevancy concerns can be addressed at the hearing. Rather, the attorney examiner finds that the depositions may result in information reasonably calculated to lead to the discovery of admissible evidence, pursuant to Ohio Adm.Code 4901-1-16(B). As to the concerns raised regarding memory issues and lack of knowledge, if deponents do not know or remember answers to certain questions, they may answer as such.

{¶ 39} As to the document requests associated with these subpoenas, we note that many of the documents requested are duplicative. Additionally, the parties have already been instructed that documents produced in one of the FirstEnergy investigation cases can be utilized in other FirstEnergy investigation cases so as to avoid duplicative discovery requests. *See* Case Nos. 17-974-EL-UNC, 20-1629-EL-RDR, Tr. (Sept. 14, 2021) at 45-46. To the extent that rulings have already been issued on document production requests in this proceeding or any of the other three FirstEnergy investigation cases currently pending before the Commission,<sup>1</sup> the attorney examiner will not revisit or reopen those discussions at this time, and the prior rulings stand as to this proceeding, unless otherwise ordered by the Commission. If requested documents have already been produced or are subject to ongoing production, those documents need not be produced again for these depositions, as requiring duplicate production would be unreasonable. An extraordinary number of documents have already been produced, and the Companies noted in their June 13, 2022 Discovery Status Report that over 470,000 pages of documents have been produced at that time, and parties will be permitted to ask questions related to those documents during both depositions. Furthermore, it is important to note that deponents are not required to produce documents that they do not have. As to the document requests dealing with the position description of the deponent and the organization chart, those documents should be

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<sup>1</sup> Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, and 17-2474-EL-RDR.

produced as requested. However, the discovery deadline has passed, and discovery is now closed. Although Ohio Adm.Code 4901-1-25(D) contemplates document production associated with a deposition, this rule cannot be used to circumvent a discovery deadline. See *In re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, Case No. 10-693-EL-CSS, Entry (Mar. 30, 2011) at 3-4. The document requests in these subpoenas, if allowed, would serve to essentially extend the discovery deadline. Thus, the attorney examiner finds the remaining subpoena document requests to be overly burdensome at this stage of the proceeding and grants the motion to quash as to all additional documents requested in the subpoenas.

**C. *Mattiuz and Pannell Subpoenas***

{¶ 40} On April 15, 2022, OCC filed a notice to take a deposition of Olenger Pannell and request for production of documents. No memorandum contra was filed in response to this notice.

{¶ 41} On April 13, 2022, OCC filed a notice to take a deposition of Robert Mattiuz and request for production of documents. On May 9, 2022, the Companies filed a motion for partial protective order pursuant to Ohio Adm.Code 4901-1-24. The Companies emphasize that they do not object to the deposition of Mr. Mattiuz but do object to the document requests as untimely and otherwise improper. OCC filed a memo contra to the Companies' motion for a protective order on May 24, 2022, and a reply was filed on May 31, 2022. The Companies filed a letter on June 1, 2022, stating that a resolution has been reached regarding the document requests, and the Companies withdrew the motion.

{¶ 42} The attorney examiners have been informed that the depositions were conducted on June 7, 2022, and June 8, 2022.

**D. *Fernandez and FirstEnergy Corp. Subpoenas***

**1. FERNANDEZ SUBPOENA**

{¶ 43} On February 7, 2022, OCC filed a motion for a subpoena duces tecum for FirstEnergy Corp.’s Vice President and Chief Ethics and Compliance Officer, Antonio Fernandez, to testify in a deposition in this proceeding and to produce a number of designated documents in advance of the deposition. The subpoena was signed by the attorney examiner.

{¶ 44} FirstEnergy Corp. moved to quash the subpoena for Mr. Fernandez on February 28, 2022. In its motion, FirstEnergy Corp. argues that OCC must demonstrate a “substantial need,” and there is no substantial need for the deposition, as the subpoena is directed at the wrong person. Specifically, FirstEnergy Corp. states that Mr. Fernandez does not serve as the Companies’ compliance officer for corporate separation matters. FirstEnergy Corp. emphasizes that Mr. Fernandez does not have personal knowledge or possession of documents related to the Companies’ corporate separation plan. FirstEnergy Corp. states that other individuals are responsible for corporate separation matters, those individuals have been identified to OCC, and OCC refuses to withdraw its subpoena for Mr. Fernandez. Additionally, FirstEnergy Corp. argues that the discovery deadline has passed, and the broad document requests are an attempt to thwart the discovery deadline. In support of its argument, it cites a Commission decision quashing a subpoena that went beyond the scope of discovery and would essentially be conducting discovery after the discovery deadline. *In re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, Case No 10-693-EL-CSS, Entry (Mar. 30, 2011) at 2-4. FirstEnergy Corp. asserts that OCC’s rationale for requesting the documents due to the Audit Report findings falls flat, as the Audit Report was filed on September 13, 2021, and the discovery deadline was November 24, 2021. Finally, FirstEnergy Corp. argues that the document requests are not relevant to the proceeding, nor reasonably calculated to lead to the discovery of admissible evidence.



{¶ 45} OCC filed a memorandum contra to the motion to quash on March 15, 2022. According to OCC, the document requests are relevant and reasonably calculated to lead to admissible evidence. OCC explains that Daymark found that the Companies' corporate separation compliance plan leans heavily on compliance with FERC requirements, so FERC-related documents are highly relevant to this case. OCC notes that the attorney examiner recently ruled that OCC is entitled to documents and communications provided to FERC staff, in Case No. 20-1502-EL-UNC, so its more limited request for this deposition should be granted as well. OCC reasons that the documents cannot be obtained from other sources, and OCC has a substantial need for the documents. Next, OCC states that it agrees to stay the deposition of Mr. Fernandez pending the deposition of two other FirstEnergy Corp. employees, Mr. Pannell and Mr. Mattiuz, so OCC requests that the Commission defer ruling on the subpoena for Mr. Fernandez's deposition. However, OCC clarifies that the motion to quash as to the documents should be denied. Additionally, OCC contends that depositions can be conducted after a discovery deadline, and Ohio Adm.Code 4901-1-25(D) allows for a subpoena for a deposition and to produce other documents within the scope of discovery. OCC adds that although the Commission has granted motions to quash production of documents in prior cases, the FirstEnergy proceedings are unique and should be treated differently.

{¶ 46} FirstEnergy Corp. then filed a reply on March 22, 2022. The reply brief reemphasizes that Mr. Fernandez does not have the information OCC seeks, and an appropriate deponent will be provided for cross-examination. FirstEnergy Corp. notes that since filing its motion to quash, OCC filed a subpoena directed to a FirstEnergy designee, seeking identical documents. Next, FirstEnergy Corp. argues that the document requests are inappropriate as a way to circumvent the discovery deadline, which has already passed. Next, FirstEnergy Corp. argues that OCC did not show a substantial need for the document requests. It argues that OCC could have requested these documents through timely discovery requests. FirstEnergy Corp. notes that OCC's FERC document requests are not even limited to documents involving the Companies or corporate separation, and OCC

already has the Companies' corporate separation audit responses. FirstEnergy Corp. concludes that, even as a non-party, it has produced approximately 300,000 pages of documents to OCC, and OCC did not issue any discovery requests since February 2021. For those reasons, FirstEnergy Corp. asserts that OCC does not show a substantial need for the requested documents.

## 2. FIRSTENERGY CORP. SUBPOENA

{¶ 47} On March 10, 2022, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp. to choose one or more of its employees to testify on its behalf at a deposition and to produce a number of designated documents in advance of the deposition. The subpoena was signed by the attorney examiner.

{¶ 48} FirstEnergy Corp. moved to quash the subpoena on April 6, 2022. FirstEnergy Corp. asserts that OCC improperly directed the subpoena to FirstEnergy Corp. rather than the Companies. FirstEnergy Corp. states that a party seeking discovery on a non-party must make a showing of "substantial need" for the information, and OCC cannot show a substantial need for the information. FirstEnergy Corp. notes that OCC fails to specify topics for the deposition, which is required by Ohio Adm.Code 4901-1-21(F). FirstEnergy Corp. also adds that OCC fails to tailor its subpoena to legitimate corporate separation issues and instead indicates that this proceeding should include an investigation of activities involving Am. Sub. H.B. 6 and FERC-related discovery. In its second argument, FirstEnergy Corp. states that the subpoena request for documents is procedurally improper because document discovery ended months ago. FirstEnergy Corp. notes that a party cannot circumvent discovery deadlines by requesting documents through the deposition process.

{¶ 49} On April 21, 2022, OCC filed a memorandum contra the motion to quash. OCC asserts that it does not need to show a substantial need for the information in the subpoena. OCC states that Ohio Adm.Code 4901-1-25 governs subpoena requests for the Commission and does not reference the requirement to demonstrate a substantial need.

OCC further argues that it does have a substantial need for the information, and the requests are relevant to the proceeding. OCC states that the topics it identified for the deposition were identified as corporate separation policies, practices, and procedures, and the requested documents cannot be obtained from other sources. Additionally, OCC states that the subpoena does not violate the discovery schedule, as the attorney examiner exempted depositions from the discovery cutoff.

{¶ 50} On April 28, FirstEnergy Corp. filed a reply. FirstEnergy Corp. argues that while depositions may proceed after the discovery deadline, document discovery is closed. FirstEnergy Corp. references the April 7, 2022 Entry where the attorney examiner declined to extend the discovery deadline. FirstEnergy Corp. also reiterates that OCC has not shown a substantial need for the documents and states that most of the requested documents will be produced in Case No. 20-1502-EL-UNC. FirstEnergy Corp. also states that the document requests are overbroad.

### 3. CONCLUSION

{¶ 51} At this time, the attorney examiner finds it appropriate to defer ruling on both the Fernandez and general FirstEnergy Corp. depositions. OCC requested that the Fernandez deposition be stayed pending the results of other depositions, and for the same reasons, the general FirstEnergy Corp. deposition should also be stayed. The Mattiuz and Pannell depositions have now been conducted, and the Yeboah-Amankwah and Lisowski depositions may now proceed. Within 15 days from the issuance of this Entry, OCC should file notice in the docket regarding whether it still seeks to depose Mr. Fernandez and the general FirstEnergy Corp. representative, and whether rulings on the motions to quash are still necessary or if the attorney examiner should consider those subpoenas withdrawn.

### III. ORDER

{¶ 52} It is, therefore,

{¶ 53} ORDERED, That certification of the April 12, 2022 interlocutory appeal be denied. It is, further,

{¶ 54} ORDERED, That OCC, NOPEC, and OMAEG file discovery status updates, as specifically directed in Paragraph 28. It is, further,

{¶ 55} ORDERED, That the motions to quash are denied, in part, granted, in part, and held in abeyance, in part, as detailed above. It is, further,

{¶ 56} ORDERED, That OCC file notice in the docket within 15 days, as directed in Paragraph 51. It is, further,

{¶ 57} 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

MLW/mef

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**Case No(s). 17-0974-EL-UNC**

Summary: Attorney Examiner Entry denying certification of the joint interlocutory appeal of the April 7, 2022 Entry, and denying, in part, granting, in part, and deferring, in part, the motions to quash electronically filed by Ms. Mary E. Fischer on behalf of Jacky Werman St. John, Attorney Examiner, Public Utilities Commission of Ohio