

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of Ohio )  
Edison Company, The Cleveland Electric )  
Illuminating Company, and The Toledo ) Case No. 17-0974-EL-UNC  
Edison Company's Compliance with )  
R.C. 4928.17 and Ohio Adm. Code )  
Chapter 4901:1-37. )**

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA  
INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE  
PUCO COMMISSIONERS, AND APPLICATION FOR REVIEW  
BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP,  
INTERSTATE GAS SUPPLY, INC., AND  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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**I. INTRODUCTION**

Last December, the Commission stated it is of the “utmost importance that [the Commission’s] investigations do not interfere with the criminal investigation by the United States Attorney.”<sup>1</sup> Consistent with that directive, on July 21, during a deposition in this case, the Attorney Examiners issued a ruling that parties may not inquire into non-public information related to the Deferred Prosecution Agreement between the Companies’<sup>2</sup> parent FirstEnergy Corp. and the U.S. Attorney’s Office for the Southern District of Ohio that may interfere with the federal investigation.<sup>3</sup> The Office of the Ohio Consumers’ Counsel (“OCC”), the Ohio Manufacturers’ Association Energy Group, the Northeast Ohio Public Energy Council, and Interstate Gas Supply

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<sup>1</sup> Case No. 20-1629-EL-RDR, Entry, at ¶ 14 (Dec. 15, 2021).

<sup>2</sup> “Companies” refers collectively to the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.

<sup>3</sup> Case No. 17-974-EL-UNC, Yeboah-Amankwah Dep. Tr., at 188:2-189:15, 192:7-15 (July 21, 2022), relevant excerpts attached as Exhibit A.

Inc. (collectively, the “Intervenors”) now seek to overturn the Attorney Examiners’ ruling so that they may “explore the underlying facts involving key players in the DOJ investigation.”<sup>4</sup>

The Intervenors’ Interlocutory Appeal, Request for Certification, and Application for Review should be denied. First, the appeal is procedurally improper because—contrary to Rule 4901-1-15(B)’s plain language—it was not taken from (i) a written procedural ruling or (ii) an oral ruling during a public hearing or prehearing conference. Second, regardless of the procedural flaw, the Intervenors’ Application for Review should be rejected because the Attorney Examiners’ July 21 ruling properly respects the bounds of discovery that the Commission has already crafted. These boundaries allow for ample discovery so intervenors can explore issues relevant to each investigation, while ensuring no interference with federal investigations.

## **II. ARGUMENT**

The Intervenors base their motion on Rule 4901-1-15(B), O.A.C., which permits a party to take an interlocutory appeal “from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference.” But before the Commission may consider an appeal under that rule, the appeal must be certified by the Attorney Examiners.<sup>5</sup> And certification is proper only when the applicant establishes (i) “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 and” (ii) “an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of

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<sup>4</sup> Case No. 17-974-EL-UNC, Interlocutory Appeal, Request for Certification to the PUCO Commissioners, and Application for Review by Office of the Ohio Consumers’ Counsel, Ohio Manufacturers’ Association Energy Group, Interstate Gas Supply, Inc., and Northeast Ohio Public Energy Council, at 15 (July 26, 2022) (“Interlocutory Appeal”).

<sup>5</sup> O.A.C. 4901-1-15(B).

the parties, should the commission ultimately reverse the ruling in question.”<sup>6</sup> Here, the Attorney Examiners need not reach whether the requirements for certification have been met because the Intervenor’s request fails to clear the first hurdle of Rule 4901-1-15(B). The Intervenor seeks to attack an oral ruling issued by the Attorney Examiners *during a deposition*. But there is simply nothing in the rule that permits an interlocutory appeal in these circumstances. The Attorney Examiners’ ruling was not one “issued under rule 4901-1-14 of the Administrative Code,” which governs procedural rulings “*in writing*.” Nor was it an “oral ruling issued during a *public hearing* or *prehearing conference*.” Because, as a threshold matter, the Intervenor has no right to an interlocutory appeal from an oral ruling at a deposition, the Request for Certification and Application for Review must be rejected.<sup>7</sup>

Should the Commission nevertheless allow an interlocutory appeal, the Intervenor’s requests should be rejected because the Attorney Examiners’ ruling is consistent with the Commission’s December 15, 2021 Entry in Case No. 20-1629-EL-RDR. That Entry explained that the Commission has opened four investigations that “target activities by the Companies which are subject to our exclusive jurisdiction over rates and utility service.”<sup>8</sup> These investigations “complement, but do not seek to supplant, the ongoing criminal investigation by the United States Attorney.”<sup>9</sup> And the Commission has recognized that it is of the “utmost importance that [the

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<sup>6</sup> See *In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, Entry at ¶ 8 (Oct. 21, 2008) (“[T]o certify an interlocutory appeal to the Commission, both requirements need to be met.”).

<sup>7</sup> In light of the Intervenor’s procedural failings, resolution of this dispute does not require consideration of the “new or novel” or “undue prejudice” requirements.

<sup>8</sup> Case No. 20-1629-EL-RDR, Entry, at ¶¶ 13-14 (Dec. 15, 2021) (discussing Case Nos. 20-1502-EL-UNC, 20-1629-EL-RDR, 17-974-EL-UNC, 17-2474-EL-RDR.)

<sup>9</sup> *Id.* at ¶ 14.

Commission’s] investigations do not interfere with the criminal investigation.”<sup>10</sup> The Commission has thus charted a deliberate course in the cases before it, ensuring that the work being done in the Commission investigations does not risk interference with the DOJ’s investigation. The Attorney Examiners’ July 21 ruling is in line with that approach.

Throughout the Commission’s four distinct cases, the Companies have responded to hundreds of discovery and audit requests and produced thousands of pages of documents. In particular, and as the Intervenors concede, discovery into any impact on customer rates arising from FirstEnergy Corp.’s spending in support of House Bill 6 has proceeded “virtually unimpeded.”<sup>11</sup> And in this case, the Companies, among other things, long ago produced relevant audit materials and responded to scores of written discovery requests. In short, discovery has been comprehensive in this matter and in the three other cases.

But the Commission has carefully—and in no uncertain terms—carved out certain matters from discovery for the time being. Indeed, in the December 15, 2021 Entry in Case No. 20-1629-EL-RDR, the Commission stayed any further discovery into certain issues that remain subject to investigation by the DOJ, including “any agreements with SFA or IEU-Ohio Administration Company.”<sup>12</sup> The Attorney Examiners have likewise ensured throughout this investigation that discovery here does not risk interference with the ongoing criminal matter. When, for example, OCC sought to probe “to what extent . . . payments [to] Generation Now . . . were the basis for the code of conduct violation” and termination of certain FirstEnergy Corp. executives,<sup>13</sup> the Attorney

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<sup>10</sup> *Id.*

<sup>11</sup> Interlocutory Appeal, at 4, 8.

<sup>12</sup> Case No. 20-1629-EL-RDR, Entry, at ¶ 16 (Dec. 15, 2021).

<sup>13</sup> Case No. 17-974-EL-UNC, Hr’g Tr., at 10:9-11:5 (June 30, 2021).

Examiners ruled that the Intervenor parties should “not try to duplicate the criminal investigation engaged in by the . . . U.S. Attorney’s Office.”<sup>14</sup> The Attorney Examiner explained:

When you say you want to rely upon that or you want to investigate those same issues, we become perilously close to making a mistake and disclosing something publicly or requiring the Company to disclose something publicly that could taint the evidence in that case and that is the worst case scenario that we are facing in this matter. So let’s try to stick within the bounds of the investigations that the Commission has begun and we will go from there.<sup>15</sup>

Despite the care the Commission has taken to permit investigations that allow ample exploration of issues but do not interfere with the Department of Justice’s investigation, the Intervenor continue to seek permission to “explore the underlying facts involving key players in the DOJ investigation,”<sup>16</sup> treading straight into the “worst case scenario” the Commission seeks to avoid. These efforts to delve into matters subject to the U.S. Attorney’s criminal investigation should again be rejected.<sup>17</sup>

Notwithstanding the need to avoid interfering in the federal investigation, the Intervenor have been afforded extraordinarily broad discovery rights. They acknowledge that inquiries into cost allocations and rate impact have went forth “unimpeded.”<sup>18</sup> They have already taken two other depositions of Company witnesses on an array of corporate separation topics. At bottom, there are numerous areas that remain open for discovery. Therefore, the Commission should uphold the Attorney Examiners’ July 21 ruling, which properly prohibited lines of questioning that, according to the DOJ itself, present a tangible risk of material interference with the ongoing

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<sup>14</sup> Case No. 17-974-EL-UNC, Hr’g Tr., at 13:18-22 (June 30, 2021).

<sup>15</sup> *Id.* at 13:22-14:6.

<sup>16</sup> Interlocutory Appeal, at 15.

<sup>17</sup> *See, e.g.*, Exhibit A, Yeboah-Amankwah Tr., at 39:12-14 (“Q. Ma’am, have you been notified by anyone from the Department of Justice that you are under investigation?”).

<sup>18</sup> Interlocutory Appeal, at 4, 8.

criminal investigation.<sup>19</sup> As the U.S. Attorney’s office recently explained, “information will become public in due course.”<sup>20</sup>

### III. CONCLUSION

For all these reasons, the Intervenor’s Request for Certification and Application for Review should be rejected.

Dated: August 1, 2022

Respectfully submitted,

/s/ Ryan A. Doringo

Michael R. Gladman (0059797)  
Shalini B. Goyal (0096743)  
Margaret M. Dengler (0097819)  
Jones Day  
325 John H. McConnell Blvd  
Suite 600  
Columbus, Ohio 43215  
Tel: (614) 469-3939  
Fax: (614) 461-4198  
mrgladman@jonesday.com  
sgoyal@jonesday.com  
mdengler@jonesday.com

Ryan A. Doringo (0091144)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
Tel: (216) 586-3939  
Fax: (216) 579-0212  
radoringo@jonesday.com

*On behalf of the Companies*

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<sup>19</sup> Exhibit A, Yeboah-Amankwah Tr., at 185:14-21.

<sup>20</sup> Ohio Capital Journal, “Regulators block deposition of FirstEnergy’s former ethics chief,” Jake Zuckerman (July 29, 2022), available at <https://ohiocapitaljournal.com/2022/07/29/regulators-block-deposition-of-firstenergys-former-ethics-chief-watchdog-doj-clash/>.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on August 1, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Ryan A. Doringo*  
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*Attorney for the Companies*

# EXHIBIT A



BEFORE THE PUBLIC UTILITIES  
COMMISSION OF OHIO

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

CASE NO. 17-974-EL-UNC

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DEPOSITION OF  
EBONY YEBOAH-AMANKWAH

July 21, 2022

10:08 a.m.

Taken at:

Embassy Parkway Suites  
4040 Embassy Parkway  
Fairlawn, Ohio

Kurt M. Spencer, Notary Public

1 APPEARANCES:

2  
3 On behalf of the Deponent:

4 Skadden Arps Slate Meagher & Flom LLP, by

5 MARCIE LAPE, ESQ.

6 PATRICK FITZGERALD, ESQ.

7 BRIAN O'CONNER, ESQ.

8 155 North Wacker Drive

9 Suite 2700

10 Chicago, Illinois 60606

11 (312) 407-0954

12 marcella.lape@skadden.com

13  
14 On behalf of Ohio Consumers' Counsel:

15 JOHN FINNIGAN, ESQ.

16 MAUREEN R. WILLIS, ESQ.

17 LARRY SAUER, ESQ.

18 MIKE HALL, ESQ.

19 65 East State Street

20 Seventh Floor

21 Columbus, Ohio 43215-3420

22 (614) 466-8574

23 john.finnigan@occ.ohio.gov

24 maureen.willis@occ.ohio.gov

1  
2 On behalf of Ohio Edison Company:

3 Jones Day, by

4 RYAN A. DORINGO, ESQ.

5 MICHAEL R. GLADMAN, ESQ.

6 North Point

7 901 Lakeside Avenue

8 Cleveland, Ohio 44114

9 (216) 586-7273

10 radoringo@jonesday.com

11  
12 On behalf of FirstEnergy Corp:

13 Jones Day, by

14 ADAM J. HOLLINGSWORTH, ESQ.

15 MICHAEL KOSLEN, ESQ.

16 North Point

17 901 Lakeside Ave,

18 Cleveland, Ohio 44114

19 (216) 586-7112

20 ahollingsworth@jonesday.com

On behalf of Ohio Attorney General:

THOMAS LINDGREN, ESQ.

WERNER MARGARD, ESQ.

RHIANNON PLANT, ESQ.

CHRISTINA SHAFFER, ESQ.

DONALD LEMING, ESQ.

TOM SHEPHERD, ESQ.

30 East Broad Street

Twenty-fifth Floor

Columbus, Ohio 43215

(614) 644-8768

thomas.lindgren@ohioattorneygeneral.gov

On behalf of Ohio Manufacturers'

Association Energy Group:

Carpenter Lipps & Leland LLP, by

KIMBERLY W. BOJKO, ESQ.

JONATHAN WYGONSKI, ESQ.

280 North High Street

Suite 1300

Columbus, Ohio 43215

(614) 365-4124

bojko@carpenterlipps.com

1  
2 On behalf of Northeast Ohio

3 Public Energy Council:

4 Bricker & Eckler, LLP, by

5 DANE STINSON, ESQ.

6 100 South Third Street

7 Columbus, Ohio 43215

8 (614) 227-2300

9 dstinson@bricker.com

10  
11 On behalf of Interstate Gas Supply:

12 JOSEPH OLIKER, ESQ.

13 EVAN BETTERTON, ESQ.

14 6100 Emerald Parkway

15 Dublin, Ohio 43016

16 (614) 659-5069

17 joe.oliker@igs.com

18  
19 On behalf of Ohio Environmental Council:

20 Clean Energy Attorney,

21 KARIN NORDSTROM, ESQ.

22 1145 Chesapeake Avenue

23 Suite I

24 Columbus, Ohio 43212-3449

On behalf of Industrial Energy Users, IEU-Ohio:

Wallace Mcnees & Nurick, LLC, by

MATTHEW R. PRITCHARD, ESQ.

21 East State Street

Suite 1700

Columbus, Ohio 43215

(614) 719-2853

mpritchard@mcneeslaw.com

On behalf of Ohio Energy Group

Boehm, Kurtz & Lowry, by

JODY KYLER COHN, ESQ.

36 East Seventh Street

Suite 1510

Cincinnati, Ohio 45202

(513) 421-2255

On behalf of Citizens Utility Board, Ohio

Hubay|Dougherty, by

Trent Dougherty

PO Box 12460

Columbus, Ohio 43212

trent@HubayDougherty.com

1 pull that up.

2 MR. GLADMAN: I'm sorry. Can you  
3 repeat that. It wasn't quite clear.

4 MS. LAPE: Yes. It is in the  
5 December 15, 2021 Order, Case No. 20-1629 in  
6 paragraph 14, where the Commission states that  
7 it is of the utmost importance that our  
8 investigations do not interfere with the  
9 criminal investigation by the United States  
10 Attorney or the action brought by the Ohio  
11 Attorney General.

12 Q. Ma'am, have you been notified by  
13 anyone from the Department of Justice that you  
14 are under investigation?

15 MS. LAPE: Objection. Do not  
16 answer that question.

17 Q. Ma'am, I want to ask you about the  
18 circumstances under which your employment ended  
19 with FirstEnergy. Who notified you that your  
20 employment was ending?

21 MS. LAPE: Objection.

22 THE WITNESS: Can I answer the  
23 question?

24 MS. LAPE: Yes.

25 A. My counsel.

1 about, and that you had allowed us to ask about  
2 in the confidential session of the deposition.

3 So if the Plaintiffs in the  
4 securities litigation are allowed to take a  
5 two-day deposition of FirstEnergy Corp about  
6 these same topics, why can't OCC take a same  
7 deposition about the same topics? It would be  
8 patently unfair to customers to be prevented  
9 from obtaining the same type of information  
10 that the Plaintiffs in the federal securities  
11 litigation were allowed to get.

12 AE ADDISON: Thank you.  
13 Mr. Hollingsworth, do you want the last word?

14 MR. HOLLINGSWORTH: I would just  
15 say that nobody is trying to prevent the  
16 consumers from getting access to this  
17 information and to these witnesses. It's just  
18 a matter of timing, and the US Attorney's  
19 office has represented to us that the timing of  
20 these questions would materially impact their  
21 investigation.

22 And so, for the reasons set out in  
23 the December 2001 ruling by the Commission,  
24 where it says it is of utmost importance that  
25 our investigations do not interfere with the



1 interfere with the investigation.

2 AE ADDISON: Thank you. I do  
3 believe a balance can be struck, in terms of  
4 what questions may be permitted to be asked in  
5 confidential session, certainly, we agree that  
6 any non-public information that relates to the  
7 deferred prosecution agreement that may  
8 interfere with the federal investigations,  
9 should not be permitted, and we will not permit  
10 such questions to be asked.

11 It continues to be the Commission's  
12 interest, I believe, that we cited that before,  
13 to not interfere with the ongoing criminal  
14 investigation by the United States Attorney for  
15 the Southern District of Ohio, or the civil  
16 action by the Ohio Attorney General, Dave Yost,  
17 specific to Ohio's civil RICO statute. That  
18 continues to be the case today, however, I feel  
19 as if our ruling just now is not inconsistent  
20 with our prior rulings earlier today in the  
21 public transcript.

22 And further, in taking up various  
23 parties' arguments, as to whether those  
24 arguments entertained by the Attorney  
25 Examiners, at the beginning of this

1 confidential session, should be moved into the  
2 public session, we certainly agree that that  
3 does provide a level of transparency, and  
4 provides parties that may not have had access  
5 to the confidential session, a larger, better  
6 picture view, as to what types of questions  
7 were actually permissible in this proceeding.

8 And so we should, we are going to  
9 be directing both, as soon as the Attorney  
10 Examiners entered the confidential, in which I  
11 believe we were at the very beginning, if not,  
12 very close to the beginning, as soon as we  
13 entered into the confidential session, as well  
14 as our ruling discussed right now, should be  
15 moved into the public transcript.

16 Are there any questions?

17 MR. HOLLINGSWORTH: Not from us,  
18 Your Honor.

19 MR. DORINGO: Your Honor, I don't  
20 have any more questions on this topic. I am  
21 going to be a major downer. I do have one  
22 small issue that I want to raise, but not on  
23 this topic.

24 AE ADDISON: Well, let's hear if  
25 anyone has any issues with this topic, and,

1 then, we will move on to Mr. Doringo.

2 MR. FINNIGAN: Your Honor, I just  
3 wanted to clarify whether this will constitute  
4 your ruling, as you've just described it, or  
5 will there be any written ruling that comes out  
6 and memorializes what you've just said here?

7 AE ADDISON: Oh, no, Mr. Finnigan.  
8 This will be all that the parties get.

9 MR. FINNIGAN: Okay. Thank you.

10 MS. WILLIS: Your Honor, if I may.  
11 As you said, you believe your ruling is  
12 consistent with this morning's ruling, does  
13 that mean this morning's ruling stands?

14 AE ADDISON: Absolutely. I did not  
15 provide any sort of ruling that contradicts  
16 what we stated earlier. I believe they can  
17 be -- they are both still good rulings for  
18 purposes of this deposition.

19 MS. BOJKO: Your Honor, I have a  
20 question.

21 AE ADDISON: Certainly.

22 MS. BOJKO: Thank you. You said  
23 non-public information cannot be disclosed. We  
24 are asking questions, it's my understanding, in  
25 a confidential session, so all of the

1 confidential session would not be considered  
2 non-public. So my understanding of your ruling  
3 is that these questions that we are asking, can  
4 be asked, and that there would be no limits on  
5 background information, or things that happened  
6 prior to House Bill 6 with regard to Corporate  
7 Separation issues and payments to entities; is  
8 that correct?

9 AE ADDISON: And I'm sorry,  
10 Ms. Bojko. Could you go back just maybe a  
11 step; my audio fell bad here just for a moment.

12 MS. BOJKO: Sure. My question was,  
13 you made a statement that no non-public  
14 information can be discussed or questioned.  
15 And it's my understanding that the next session  
16 we are setting forth is purely a confidential  
17 session, so nothing in the confidential session  
18 will be disclosed publically, until either a  
19 party requests that it be disclosed, or Your  
20 Honors state it will be disclosed publically,  
21 similar to our discussion here.

22 So is it fair to assume from both  
23 your ruling this morning and the ruling this  
24 afternoon, that we are able to ask questions  
25 about history and background leading up to the

1 Corporate Separation allocation questions, as  
2 well as events and items that happened  
3 Corporate Separation related before HB 6, we  
4 can ask all those questions, because none of  
5 them will be directly in the public record,  
6 when we ask them, right?

7 AE ADDISON: Ms. Bojko, my ruling  
8 is simply that we are not going to permit  
9 questions related to the non-public  
10 information, regarding the deferred prosecution  
11 agreement that could potentially interfere with  
12 the federal investigations. I think that  
13 we've, Mr. Hollingsworth made it very clear,  
14 based on the representation from the DOJ that  
15 that is taking it one step too far.

16 And while my earlier ruling stands,  
17 we will go ahead and pump the brakes, as it  
18 comes to that particular area of questioning.  
19 So anything that is not seeking that, that's  
20 where my ruling is limited.

21 MR. HOLLINGSWORTH: And thank you,  
22 Your Honor. I think that that helps to  
23 clarify. But just to be clear. So the subject  
24 of the deferred prosecution agreement relates  
25 to the payments related to House Bill 6, and,

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