

In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 17-2474-EL-RDR
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In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 20-1629-EL-RDR
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As the Attorney Examiners indicated in their scheduling orders, these proceedings are ready for resolution.<sup>1</sup> Allowing them to go forward on a reasonable schedule benefits customers, the Commission, and other stakeholders. By contrast, the continuances sought by the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Manufacturers' Association Energy Group ("OMAEG") (together, "Movants"), which are of indefinite duration, would continue to deny Ohio customers any relief, frustrating the core purpose of these proceedings.<sup>2</sup>

Initially, a lengthy delay—almost certainly measured in years—is unnecessary. Movants suggest that resolution of these cases should be postponed until after the conclusion of the criminal

<sup>1</sup> Case No. 17-974-EL-UNC, Entry (Feb. 26, 2024) (“Entry Setting Corporate Separation Procedural Schedule”) at ¶ 4; Case Nos. 17-2474-EL-RDR and 20-1629-EL-RDR (Consol.), Entry (Feb. 26, 2024) at ¶ 4 (“Entry Setting Rider Proceedings Procedural Schedule”).

<sup>2</sup> See 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 and Ohio Manufacturers' Association Energy Group (Mar. 4, 2024) ("Corporate Separation Schedule Appeal"); Case Nos. 17-2474-EL-RDR and 20-1629-EL-RDR (Consol.), Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers' Counsel and Ohio Manufacturers' Association Energy Group (Mar. 4, 2024) ("Rider Proceedings Schedule Appeal").

cases pending against Samuel Randazzo, Charles Jones, or Michael Dowling, but evidence from those individuals is not needed to ensure a full and transparent resolution of the specific issues here. Indeed, the extensive discovery that has already occurred means the parties have had the critical evidence for these matters in their possession for years.<sup>3</sup> Furthermore, Movants suggest a delay is necessary to facilitate review of FirstEnergy Corp.’s production of materials from a separate federal shareholder suit, which FirstEnergy Corp. paused pursuant to the stay order.<sup>4</sup> But FirstEnergy Corp. produced the lion’s share of the documents on March 11, 2024, and has committed to producing the balance by March 28. A reasonable extension of the schedule is thus all that is necessary to enable Movants to identify any new and relevant materials produced.

For these reasons, The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Ohio Utilities” or “Companies”) respectfully request that the Attorney Examiners deny certification. The Companies do not object, however, to a modest extension of the current deadlines to accommodate Movants’ review of incoming discovery and other preparation. The Companies therefore propose a six-week extension. A six-week extension benefits customers and other stakeholders by bringing these matters to resolution in a reasonable timeframe that fairly balances the need for any additional work with the need for finality and relief. Additionally, while the Ohio Utilities will support the Attorney Examiners and Commission in whatever decision they make, it is critical that the schedule set here not impact other matters pending before the Commission which are necessary to the Ohio Utilities’ ability to provide customers with safe, reliable, and adequate electric service moving forward.

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<sup>3</sup> See, e.g., Case Nos. 17-974-EL-UNC et al., Entry (Aug. 24, 2022) (“Stay Order”) at ¶ 75.

<sup>4</sup> E.g., *id.* at ¶¶ 11, 90.

## I. BACKGROUND<sup>5</sup>

The Commission established the Corporate Separation and Distribution Modernization Rider (“Rider DMR”) proceedings in 2017, and the Delivery Capital Recovery Rider (“Rider DCR”) proceeding in 2020 (Rider DMR and Rider DCR, collectively “Rider Proceedings”). To date, the Ohio Utilities and FirstEnergy Corp. have produced hundreds of thousands of pages of documents and responded to multiple hundreds of interrogatories and requests for admission. In addition, final audit reports have been issued—and parties have submitted extensive comments on those reports—in all three proceedings. In each case, prior to the initial stay, there was little left to do before proceeding to hearing or resolution. All outstanding discovery had been answered. The primary exceptions were:

- FirstEnergy Corp.’s ongoing production of documents from a parallel federal shareholder suit;<sup>6</sup>
- Supplementing discovery as needed, particularly related to the FERC audit;
- Discovery on the agreement in the Rider DCR proceeding;<sup>7</sup> and
- Pending requests to subpoena former FirstEnergy Corp. executives in the Corporate Separation proceeding;<sup>8</sup> OCC did not issue subpoenas to the former executives in the Rider Proceedings.

In August 2022, the U.S. Attorney for the Southern District of Ohio requested that the Commission stay the proceedings because “continued discovery ... may directly interfere with or impede the United States’ ongoing investigation.”<sup>9</sup> The Commission granted a six-month stay shortly

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<sup>5</sup> The factual backgrounds of these matters have been repeated at length. We emphasize several points relevant to the current dispute.

<sup>6</sup> Stay Order at ¶ 11.

<sup>7</sup> Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021) at ¶¶ 1, 14.

<sup>8</sup> Case No. 17-974-EL-UNC, Motion for a Subpoena for Former FirstEnergy Corp. President and CEO Charles Jones to Appear at Deposition by Office of the Ohio Consumers’ Counsel (Aug. 4, 2022); *id.*, Motion for a Subpoena for Former FirstEnergy Corp. Senior Vice President of External Affairs Michael Dowling to Appear at Deposition by Office of the Ohio Consumers’ Counsel (Aug. 4, 2022).

<sup>9</sup> Case Nos. 17-974-EL-UNC, et al., Request of the United States Attorney, Southern District of Ohio, to Stay all Discovery in these Proceedings (Aug. 15, 2022) at 2.

thereafter,<sup>10</sup> and extended it twice.<sup>11</sup> With the stay, as Movants acknowledge, “[t]he PUCO ruled that [the securities litigation] production should cease....”<sup>12</sup> But the Commission noted that the delay “would provide OCC with ample opportunity to finish its review of” the “mountain of evidence” “already produced by FirstEnergy Corp.”<sup>13</sup> The Attorney Examiners also did not issue the subpoena in light of the stay.

Eighteen months later, on February 21, 2024, because the U.S. Attorney had not requested an additional extension, the Commission lifted the stay and directed the Attorney Examiners to issue procedural schedules.<sup>14</sup> The Attorney Examiners then did so on February 26, as follows:

<b>Event</b>	<b>No. 17-924<sup>15</sup></b>	<b>Nos. 17-2474, 20-1629<sup>16</sup></b>
Discovery Deadline (except deposition notices)	November 24, 2021 <sup>17</sup>	April 19, 2024
Procedural/Pre-Hearing Conference	April 25, 2024	
Company Testimony	June 26, 2024	May 10, 2024
Intervenor Testimony	July 2, 2024	May 17, 2024
Procedural/Pre-Hearing Conference	July 9, 2024	May 21, 2024
Evidentiary Hearing	July 22, 2024	June 3, 2024

Around the same time that the Commission lifted the stay, an Ohio grand jury issued indictments related to H.B.6.<sup>18</sup> In announcing the indictments, Attorney General Yost “extended [his] thanks to the new leadership of FirstEnergy, which has cooperated fulsomely in [the Attorney

<sup>10</sup> See Stay Order.

<sup>11</sup> Case Nos. 17-974-EL-UNC et al., Entry (Mar. 8, 2023); Case Nos. 17-974-EL-UNC et al., Entry (Aug. 23, 2023).

<sup>12</sup> Rider Proceedings Schedule Appeal at 12-13.

<sup>13</sup> Stay Order at ¶ 75.

<sup>14</sup> Case Nos. 17-974-EL-UNC et al., Entry (Feb. 21, 2024) (“Entry Lifting Stay”) at ¶ 2, 16-18 .

<sup>15</sup> Entry Setting Corporate Separation Procedural Schedule at ¶ 4.

<sup>16</sup> Entry Setting Rider Proceedings Procedural Schedule at ¶ 4.

<sup>17</sup> The discovery deadline in the Corporate Separation Docket expired in November 2021. Case No. 17-924-EL-UNC, Entry (Oct. 12, 2021) at ¶ 24. The Attorney Examiners did not extend it.

<sup>18</sup> Ohio Attorney General, Former PUCO Chairman, Former FirstEnergy Executives Indicted on Public Corruption Charges (Feb. 12, 2024), <https://www.ohioattorneygeneral.gov/Media/News-Releases/February-2024/Former-PUCO-Chairman-Former-FirstEnergy-Executives>.

General’s] investigation.”<sup>19</sup> The Attorney General added that FirstEnergy is “led by a new board and new executives. They have undertaken an expansive internal reform effort and used outside resources to validate its efficacy.”<sup>20</sup>

Then, on February 29, the Office of the Ohio Attorney General filed a letter with the Commission explaining the Ohio Revised Code’s grant of “transactional immunity to anyone who testifies or produces documents in any hearing before the PUCO.”<sup>21</sup> Although the Attorney General’s Office stated it did “not believe that the PUCO should stay its investigations in their entirety,” it asked “that the PUCO refrain from enforcing any subpoena requiring Samuel Randazzo, Charles Jones, or Michael Dowling to produce documents or testify in any PUCO hearing while criminal proceedings are pending.”<sup>22</sup> In response, the Attorney Examiner granted the Attorney General’s request and denied OCC’s motions for subpoenas for Charles Jones and Michael Dowling in the Corporate Separation Proceeding.<sup>23</sup>

Movants filed their Interlocutory Appeal shortly thereafter, requesting that the Attorney Examiners vacate the schedules related to all three of the Rider DMR, Rider DCR, and Corporate Separation matters.

## **II. ARGUMENT**

The Attorney Examiners should deny Movants’ certification request. An indefinite continuance of these proceedings, and the unbounded discovery proposed by Movants during that time, is unnecessary and prejudicial to customers and other stakeholders. Neither of Movants’ two

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<sup>19</sup> WBNS 10TV, Ohio AG Yost Announces New Indictments in HB 6 Scandal (Feb. 12, 2024), <https://www.youtube.com/watch?v=sM8fyu-VAtw> at 6:35 – 7:00.

<sup>20</sup> *Id.*

<sup>21</sup> Case Nos. 17-974-EL-UNC et al., Correspondence Received from Carol Hamilton O’Brian, Deputy Attorney General for Law Enforcement (Feb. 29, 2024) at 1.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> Case Nos. 17-974-EL-UNC et al., Entry (Mar. 1, 2024).

grounds for their Interlocutory Appeal to extend the procedural schedules justifies their request, and the effect will be to perpetuate uncertainty, delay customers’ relief, and deprive all parties of finality. An Interlocutory Appeal also is not an appropriate vehicle to seek an extension of the procedural schedule. The Companies alternatively propose that the Attorney Examiners extend the current schedules by six-weeks, as indicated below.

Event	No. 17-924		Nos. 17-2474, 20-1629	
	As Set	With Extension	As Set	With Extension
Discovery Deadline (except dep. notices)	November 24, 2021	November 24, 2021	April 19, 2024	May 31, 2024
Procedural/Pre-Hearing Conference	April 25, 2024	June 6, 2024		
Company Testimony	June 26, 2024	August 7, 2024	May 10, 2024	June 21, 2024
Intervenor Testimony	July 2, 2024	August 13, 2024	May 17, 2024	June 28, 2024
Procedural/Pre-Hearing Conference	July 9, 2024	August 20, 2024	May 21, 2024	July 2, 2024
Evidentiary Hearing	July 22, 2024	September 3, 2024	June 3, 2024	July 15, 2024

This extension balances the interests of all stakeholders, for the reasons explained herein.

**A. These Matters Can Proceed to Resolution Without Testimony or Documents from Randazzo, Jones, or Dowling.**

The Attorney Examiners’ prohibition on “subpoenas requiring Samuel Randazzo, Charles Jones, or Michael Dowling to produce documents or testify in any Commission proceeding ... during the pendency of the ongoing criminal proceedings”<sup>24</sup> does not justify an indefinite postponement. Put simply, such testimony or documents are unnecessary. The questions relevant to these proceedings have been thoroughly vetted in numerous audit reports, the parties’ voluminous comments, and through the ““mountain of evidence”” that the parties have had in their possession for years.<sup>25</sup>

Additionally, the criminal proceedings will likely take years to resolve, and there is no guarantee that Randazzo, Jones, or Dowling will *ever* participate in these proceedings, even following

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<sup>24</sup> *Id.* at ¶ 7.

<sup>25</sup> *See* Stay Order at ¶ 75.

final resolution of their criminal cases. Federal and state prosecutors are investigating the full reach of H.B.6 with the full support and cooperation of “the new leadership of FirstEnergy.”<sup>26</sup> To the extent anyone were one day to reveal new, probative information, the Commission can use its statutory authority to address those issues. After all, the Commission has made clear that its guiding principle in these proceedings is to “follow the facts wherever they lead.”<sup>27</sup>

***Rider Proceedings.*** There are no material issues of fact outstanding in the Rider Proceedings. When the Commission entered the stay, there was no outstanding discovery, no pending subpoenas, and the proceedings were ready to proceed to disposition. Indeed, Movants *never* sought testimony from Randazzo, Jones, or Dowling in either of the Rider Proceedings.

The Attorney Examiners should not credit Movants’ allegation of wrongdoing concerning the Oxford audit in the Rider DMR Proceeding.<sup>28</sup> Far from the claim of a physical “burning” of evidence,<sup>29</sup> Commission Staff have made clear, through a sworn affidavit, that the reason OCC has never seen a final audit report from Oxford Advisors is because it “does not exist, in draft form or otherwise.”<sup>30</sup> However, there *is* now a final independent audit report. After the Commission granted OCC’s motion to reopen the matter, in January 2020,<sup>31</sup> Daymark Energy Advisors, Inc., issued its report,<sup>32</sup> and the parties extensively commented on it. As a result, the Rider DMR proceeding is ready to be decided.

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<sup>26</sup> WBNS 10TV, Ohio AG Yost Announces New Indictments in HB 6 Scandal (Feb. 12, 2024), <https://www.youtube.com/watch?v=sM8fyu-VAtw> at 6:35 – 6:44.

<sup>27</sup> *E.g.*, Case Nos. 17-974-EL-UNC et al., Entry on Rehearing (Oct. 18, 2023) at ¶ 2 .

<sup>28</sup> Rider Proceedings Schedule Appeal at 6.

<sup>29</sup> *Id.*

<sup>30</sup> Case No. 17-2474-EL-RDR, Memorandum Contra to the Motion for Subpoena for Audit Report and Related Documents (Nov. 4, 2021) at 1.

<sup>31</sup> *Id.*, Entry (Dec. 30, 2020).

<sup>32</sup> *Id.*, Rider DMR Audit Report (Jan. 14, 2022)

The Attorney Examiners also should not accept Movants’ assertion that they require “discovery from former Chair Randazzo and others ... to develop a complete record on” the side agreement issue in the Rider DCR case.<sup>33</sup> All of the key facts surrounding the agreement—when it was entered, the amounts paid, and whether it should have been reported—are knowable *now*. OCC has already served discovery on the Ohio Utilities concerning the agreement. There is simply no need for documents or testimony from Randazzo, Jones, or Dowling, which may never be available.

***Corporate Separation Proceeding.*** Movants assert that they need evidence from Randazzo, Jones, and Dowling in the Corporate Separation Proceeding,<sup>34</sup> but regardless of whether they could or would testify regarding issues germane to the Ohio Utilities’ compliance with corporate separation rules, the matter should not be postponed indefinitely. Prior to the stay, the parties were on the cusp of a hearing. Over its nearly seven-year span, beginning two years before H.B.6 passed, the Commission has overseen two comprehensive independent audits, and the parties have submitted many rounds of comments on the corresponding audit reports. A review of the audit reports shows that the core issues do not depend on any evidence that Randazzo, Jones, or Dowling might theoretically provide. The Commission can and should proceed in resolving the issues already raised.

**B. Forthcoming Document Productions do not Support an Indefinite Delay.**

FirstEnergy Corp.’s forthcoming document production also does not support Movants’ request, and any burden on OCC or OMAEG can be addressed by the Companies’ proposed six-week extension. This is true for three reasons.

*First*, the Ohio Utilities and FirstEnergy Corp. long ago completed their productions of discovery—amounting to hundreds of thousands of pages of materials—relating to the topics of the proceedings. It is true that FirstEnergy Corp. will produce roughly 720,000 pages of materials from

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<sup>33</sup> Rider Proceedings Schedule Appeal at 5.

<sup>34</sup> Corporate Separation Schedule Appeal at 5.



the securities litigation,<sup>35</sup> but to be clear, these materials are only being produced because OCC requested them in a subpoena that offered no limitation on the relevance to this proceeding of the materials sought.<sup>36</sup> Given their differing topics, FirstEnergy Corp.’s further production of securities litigation materials is unlikely to yield any new and relevant materials. Notably, FirstEnergy Corp. was required to pause its productions in response to OCC’s subpoena request during the stay,<sup>37</sup> and is producing documents promptly now that the stay has lifted.

*Second*, the Attorney Examiners have already rejected OCC’s request to delay hearings to receive additional information. During the January 4, 2022 hearing in the Corporate Separation Proceeding, FirstEnergy Corp.’s counsel warned that because “discovery[,] in large part[,] in the securities case has not really begun, [OCC] will be getting documents until this matter probably either resolves or that matter resolves because discovery in the securities case is just really beginning....”<sup>38</sup> In the same hearing, the Attorney Examiners rejected OCC’s request for a supplemental audit, observing: “[T]his case has been open for nearly five years. We’ve had two audit reports filed in this case. ... We’ve had three separate comment periods. Hundreds of pages of comments have been filed by the parties. ... *The time has come to hold the hearing in this proceeding.*”<sup>39</sup>

*Third*, the Ohio Utilities understand that FirstEnergy Corp.’s production is substantially complete and should be finished by the end of March. An extension of six weeks is the appropriate

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<sup>35</sup> See Corporate Separation Schedule Appeal at 2; Rider Proceeding Schedule Appeal at 2. Movants claim that FirstEnergy Corp. “withheld” these materials, but as discussed above and as Movants themselves later admit, FirstEnergy Corp. was directed by the Commission not to produce further materials during the pendency of the stay.

<sup>36</sup> See Case Nos. 17-974-EL-UNC, et al., Motion for Subpoena Duces Tecum for FirstEnergy Corp. to Produce all Discovery Documents that FirstEnergy Corp. was Ordered to Provide by the U.S. Chief District Judge in a Shareholder Lawsuit by Office of the Ohio Consumers’ Counsel (Sept. 24, 2021).

<sup>37</sup> *E.g.*, Stay Order at ¶¶ 11, 90.

<sup>38</sup> Case No. 17-974-EL-UNC, Prehearing Conference (Jan. 4, 2022) Tr. at 13:11-15.

<sup>39</sup> *Id.* at 24:1-11 (emphasis added).

remedy to accommodate the review of these materials, as well as to accommodate any other discovery the Movants receive or preparation they seek to conduct.

**C. An Indefinite Delay Would Harm Customers, the Parties, and Other Stakeholders.**

Movants' request also fails to account for the harm that vacating the hearing dates and delaying them for years would impose on Ohio customers, the parties, and other stakeholders. These proceedings have been pending since as early as 2017. While Ohio customers have been awaiting resolution, the parties and Commission have committed enormous resources and effort to exchanging discovery, litigating disputes, and preparing these proceedings for resolution. The time to finally resolve them is now. The longer the delay, the greater the risk that the affected customers will not be the customers receiving relief. Striking the hearing dates from the calendar and waiting for complex criminal cases and subsequent appeals to end—while allowing for unfettered discovery in the meantime—is the wrong approach. But, however the Attorney Examiners and Commission decide to proceed, they should ensure that any delay in these proceedings does not affect the Ohio Utilities' ability to move forward with other matters that are needed to serve customers with safe, reliable, and affordable energy.

**D. Movants' Request for an Interlocutory Appeal is Procedurally Improper.**

Finally, although the Attorney Examiners should refuse certification on the merits, in the alternative, certification should be denied because the request fails to meet the requirements under the Commission's rules of practice and procedure.

To certify an Interlocutory Appeal, under Ohio Administrative Code § 4901-1-15(B), the Attorney Examiners must find that (1) “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 (2) “an immediate determination by the commission is needed to prevent the likelihood of undue prejudice

or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.”<sup>40</sup> Neither condition is met.

First, the Attorney Examiners’ setting of procedural schedules does not present any new or novel question of interpretation, law, or policy, nor does it depart from precedent. Attorney Examiners have express authority to make procedural rulings,<sup>41</sup> and in this instance, the Commission itself lifted the stay and instructed the Attorney Examiners to set the schedules in question.<sup>42</sup> The Attorney Examiners complied with the Commission’s instruction.

That the Attorney General’s letter followed the scheduling Entries does not change this analysis. The Attorney General’s office expressly stated it was not seeking to stay these matters; rather, it asked that the Attorney Examiners refrain from enforcing subpoenas against Randazzo, Jones, and Dowling. The Attorney Examiners acted on the Attorney General’s request. None of this implicates a new or novel interpretation of law, policy, or precedent. Indeed, as confirmed by the progression of these matters to date, the Attorney Examiners and Commission routinely balance the parties’ requests for additional discovery against customers’ and other stakeholders’ interests in resolution.<sup>43</sup> The first prong of the interlocutory appeal test is not met.

Second, there is no threat of “undue prejudice” to Movants. As discussed fully herein, there has been broad discovery in these matters, including hundreds of thousands of pages produced, hundreds of pieces of written discovery answered, and multiple final audit reports accompanied by dozens of party and intervenor comments. By contrast, the affected individuals are not central to the

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<sup>40</sup> See, e.g., *In the Matter of the Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 23-23-EL-SSO et al., Entry (Sept. 18, 2023) at ¶ 13.

<sup>41</sup> Ohio Admin. Code §§ 4901-1-14; 4901-1-26(A)(1)(b), 4901-1-27(A).

<sup>42</sup> See Entry Lifting Stay.

<sup>43</sup> See Case No. 17-974-EL-UNC, Prehearing Conference (Jan. 4, 2022) Tr. at 24:1-11; Case No. 20-1629-EL-RDR, Entry (Dec. 15, 2021) at ¶ 15.

issues in these proceedings. And, if relevant information were to come out, the Commission would be able to address it then. Because Movants will have every opportunity to present their cases, they will not be prejudiced.

### **III. CONCLUSION**

The two Rider Proceedings and Corporate Separation Proceeding are ready for disposition. Movants' request for an indefinite continuance is unnecessary and would serve only to harm customers and other stakeholders. A six-week extension of current deadlines is a reasonable accommodation. The Attorney Examiners also should ensure that any delay in these proceedings does not affect the Companies' ability to move forward with their regular and important work in service of customers.

Respectfully submitted,

*/s/ Nicole Allen*

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*\*Practice Pending Admission (Expires January  
23, 2025)*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing submission on behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on March 11, 2024. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

*/s/ Nicole Allen*

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