THE PUBLIC UTILITIES COMMISSION OF OHIO

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**

ENTRY

Entered in the Journal on February 18, 2022

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies the motions for subpoenas duces tecum, directs Staff to produce a witness from Oxford Advisors, LLC, at the hearing to be held in this matter, denies the certification of the interlocutory appeal filed by Ohio Consumers' Counsel, and directs that comments be due 60 days after issuance of this Entry and reply comments will be due 15 days after the filing of initial comments.

II. HISTORY

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities, as defined by R.C. 4928.01(A)(6), and public utilities, as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with 4928.143.

{¶ 4} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for an ESP. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143,*

Revised Code, in the Form of an Elec. Security Plan, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) (*ESP IV Case*). Further, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the *ESP IV Case*. On rehearing, the Commission authorized FirstEnergy to implement a distribution modernization rider (Rider DMR). *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶185. Additionally, the Commission ruled that Staff will review the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282. Subsequently, the Commission determined that this review should be conducted with the assistance of a third-party monitor and that the monitor should prepare a mid-term report, to inform the Commission when evaluating any proposed extensions of the DMR, and a final report. On January 24, 2018, the Commission selected Oxford Advisors, LLC, (Oxford) as the third-party monitor. Entry (Jan. 24, 2018) at ¶7.

{¶ 5} Numerous parties appealed the Commission's decision in the *ESP IV Case*, challenging Rider DMR and other aspects of the Commission's orders. On June 19, 2019, the Supreme Court of Ohio issued its decision in those appeals, affirming the Commission's order in part, reversing it in part as it relates to Rider DMR, and remanding with instructions to remove Rider DMR from FirstEnergy's ESP. *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 at ¶¶ 14-29 (*Ohio Edison)*.

{¶ 6} On August 22, 2019, pursuant to the *Ohio Edison* decision, the Commission directed the Companies to immediately file proposed revised tariffs setting Rider DMR to $0.00. The Companies were further directed to issue a refund to customers for monies collected through Rider DMR for services rendered after July 2, 2019, subject to Commission review. Once the refund had been appropriately issued, the Companies were instructed to file proposed, revised tariffs removing Rider DMR from the Companies' ESP. *ESP IV Case*, Order on Remand (Aug. 22, 2019) at ¶¶ 14-16.

{¶ 7} The Companies complied with the Commission's directives as instructed in the Order on Remand and filed tariffs removing Rider DMR from their ESP on October 18, 2019.

{¶ 8} On February 26, 2020, the Commission issued an Entry in which the Commission stated that the provisions for a final review of Rider DMR were an essential part of the terms and conditions related to Rider DMR in the *ESP IV Case*. *ESP IV Case*, Fifth Entry on Rehearing at ¶282, Eighth Entry on Rehearing at ¶113, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 17-20. Additionally, the Commission cited the Court's objections in *Ohio Edison* to the usefulness of the proposed final review after the Court questioned the lack of an effective remedy resulting from such review. *Ohio Edison* at ¶26. As such, the Commission found that, when the provisions of Rider DMR were eliminated, so too were the provisions requiring a final review of the rider. The Commission then dismissed and closed the case of record. Entry (Feb. 26, 2020) at ¶9. No party filed an application for rehearing regarding the Commission's ruling.

{¶ 9} Thereafter, on September 8, 2020, Ohio Consumers' Counsel filed a motion requesting that the Commission reopen this proceeding and initiate an audit of Rider DMR. On December 30, 2020, the Commission determined that, in the interests of both transparency and state policy, good cause existed to initiate an additional review of Rider DMR.

{¶ 10} Accordingly, the Commission directed Staff to prepare a request for proposal (RFP) to solicit the services of a third-party auditor to assist Staff with the full review of Rider DMR, as contemplated in the *ESP IV Case*. Due to an insufficient number of submitted proposals, the Commission directed Staff to reissue the RFP for audit services, in accordance with a revised RFP. The Commission specified that the audit to be conducted should also include an examination of the time period leading up to the passage of H.B. 6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in the *ESP IV Case*. *ESP IV Case*, Fifth

Entry on Rehearing (Oct. 12, 2016) at ¶282. All proposals were submitted by May 18, 2021, in accordance with the terms of the RFP. Entry (Jun. 6, 2021) at ¶12.

{¶ 11} On June 2, 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. *Id.* at ¶14. In the Entry, the Commission ordered Daymark and the Companies to incorporate the terms and conditions of the RFP into the contract, which set the deadline for the draft audit report as October 15, 2021, and the deadline to file the final audit report as October 29, 2021. *Id.*; Entry (Apr. 7. 2021), Attachment at 3.

{¶ 12} On September 24, 2021, OCC filed a motion for subpoena duces tecum for FirstEnergy Corp. The subpoena duces tecum was issued by the attorney examiner as requested by OCC.

{¶ 13} On October 14, 2021, Staff filed a motion for an extension of time to file the draft audit report and final audit report, which was granted by Entry on October 22, 2021. In that Entry, the deadlines for Daymark to provide its draft and final audit reports were set for December 2, 2021, and December 16, 2021, respectively.

{¶ 14} On October 20, 2021, OCC filed a motion for a subpoena for any drafts of the final report prepared by Oxford in this proceeding. Staff filed a memorandum contra the motion for subpoena on November 4, 2021. OCC filed its reply to the memorandum contra on November 12, 2021. Subsequently, on December 10, 2021, OCC filed a motion for a second subpoena, a subpoena duces tecum for Oxford to attend and provide testimony at a deposition and for waiver of Ohio Adm.Code 4901-1-25(D). Staff filed a memorandum contra the motion on December 27, 2021. OCC filed a reply to the memorandum contra on January 3, 2022.

{¶ 15} On December 14, 2021, Staff filed a motion for extension of time to file the final audit report, which was granted by Entry on December 15, 2021. The deadline for Daymark to file its final report was set for January 14, 2022.

{¶ 16} On January 7, 2022, a prehearing conference was held in order to address pending motions in this proceeding and for parties to provide an update as to discovery matters. At the prehearing conference, the attorney examiner deferred ruling on the two motions for subpoenas requested to be issued to Oxford by OCC until after the final report has been filed by Daymark.

{¶ 17} On January 12, 2022, OCC filed an interlocutory appeal of the "ruling" of the attorney examiner to defer ruling on the two motions for subpoenas filed by OCC.

{¶ 18} Subsequently, Daymark filed the final report on January 14, 2022.

III. DISCUSSION

A. The motions for subpoenas for Oxford should be denied.

{¶ 19} In its motion for subpoena filed on October 20, 2021, OCC seeks the production of the final report prepared by Oxford, which was not filed in this proceeding. In support of its motion, OCC speculates that the Oxford final report "could hold" information that pertains to whether the Companies used money collected from the DMR to fund political activities. Further, OCC requests that the Commission, if necessary, waive Ohio Adm.Code 4901-1-25(D). Noting that the rule may be waived "for good cause shown," OCC avers that subpoenas duces tecum are a key investigatory tool that allow a party to obtain information that may be used in evidence. Ohio Adm.Code 4901-1-25; Civ. R. 45.

{¶ 20} In its motion in support of the second subpoena, filed on December 10, 2021, OCC contends that the act of signing a subpoena is essentially a ministerial act. Further, OCC argues that, under R.C. 4903.082, parties must be given ample rights to discovery. OCC further claims that there is good cause for waiving Ohio Adm.Code 4901-1-25(D), if

needed, because OCC need to depose Oxford to have ample discovery for case preparation for the hearing and to provide a record on which the Commission can base its opinion.

{¶ 21} Staff responds to the initial subpoena that, as demonstrated by an affidavit by Paul Corey from Oxford, an Oxford final report *does not exist*, in draft form or otherwise.

{¶ 22} Further, Staff argues that, even if the records did exist, the Commission's procedural rules do not permit a subpoena to compel production of documents by a Commission-selected auditor that is assisting Staff. Ohio Adm.Code 4901-1-25(D). With respect to the second subpoena, Staff states that the underlying rationale remains the same. Oxford was selected to assist Staff. The Entry selecting Oxford provided that "Oxford will execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C, 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16." Entry (Jan. 24, 2018) at ¶10.

{¶ 23} With respect to the first subpoena, OCC replies that the Commission, for transparency, should reject Staff's opposition and issue the subpoena. Further, OCC contends that, even if the Commission rules do not permit discovery upon Staff, the rules do not protect Oxford, which is an independent contractor, from discovery. OCC avers that Oxford is an "independent contractor" not "commission staff" and, thus, is not exempt from discovery. Finally, OCC argues that the Commission can waive any provision of Ohio Adm.Code Chapter 4901-1 "for good cause shown." Ohio Adm.Code 4901-1-38. OCC contends that the unique circumstances of this case, which include a Federal criminal investigation and the execution of a deferred prosecution agreement by FirstEnergy Corp., dictate that the Commission waive the rule to permit discovery upon Oxford. Further, OCC accuses Staff of seeking to deter a "real investigation" of FirstEnergy by urging the Commission to deny the motion for subpoena and through communications with potential bidders in the *FirstEnergy Corporate Separation Case*. In support of the second subpoena, OCC expands this argument, noting that a text message from a FirstEnergy chief executive officer, first partially disclosed in the Deferred Prosecution Agreement entered into between the

United States Attorney for the Southern District of Ohio and FirstEnergy Corp., referenced a past Commission chairman "burning the final DMR report."

{¶ 24} The attorney examiner finds that both the motion for a subpoena for the draft Oxford final report and the motion for a subpoena duces tecum regarding the mid-term report should be denied. OCC contends that signing a subpoena is essentially a ministerial act; however, even if that were the proper characterization, and it is not, the subpoenas at issue were, on their face, not in compliance with the rules. Ohio Adm. Code 4901-25(D) states:

> A subpoena may require a person, *other than a member of the commission staff*, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code. Such a subpoena is subject to the provisions of rule 4901-1-24 of the Administrative Code as well as paragraph (C) of this rule. [Emphasis added].

In addition to the plain language of the rule cited above, the Commission has long established that discovery should not be permitted with respect to auditors such as Oxford. In a prior case, the Commission expressly denied OCC's recommendation that the Commission procedural rules be amended to permit discovery upon auditors hired by or at the discretion of the Commission:

> The fifth request of OCC is to modify the rule to permit discovery upon auditors hired by or at the direction of the Commission. OCC contends that that the rationale for not allowing discovery on Commission staff does not apply to auditors * * * The Commission does not agree with OCC's position that the rationale for not allowing discovery on Commission staff does not apply to auditors. The auditors serve in place of staff and, therefore, consistent treatment is appropriate. OCC's request should be denied.

In re the Commission's Review of Ohio Adm.Code Chapters 4901-1, 4901-3, and 4901-9, Case No. 06-685-AU-ORD, Finding and Order (Dec. 6, 2006) at 27. OCC did not seek rehearing of this decision. Therefore, the attorney examiner finds that OCC arguments that Ohio Adm.Code 4901-1-25(D) does not apply to Oxford to be both misplaced and an improper collateral attack on the Commission's final, nonappealable order in the rulemaking. The Commission, in fact, has been clear that the third-party monitor for the DMR was to "assist and work with FirstEnergy and FirstEnergy Corp. to ensure that Rider DMR funds are expended appropriately." *In re Application of Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113. Moreover, in rejecting the Companies' claim that Staff was fully capable of assessing whether DMR funds were used properly, the Commission was clear that the decision to hire a third-party monitor rather than use Staff to review the use of the DMR funds was made in the interests of "balancing the workload of Staff." *Ohio Edison Co.*, Case No. 14-1297-EL-SSO, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 12, 17. Oxford was directed to submit quarterly interim updates to Staff, so that Staff would remain informed on the progress of the ongoing review. *Id.* at ¶19. Further, the Commission expressly stated Oxford is bound by the nondisclosure provisions of R.C. 4901.16. Entry (Jan. 24, 2018) at ¶10.

{¶ 25} In support of its argument that auditors are not part of Staff for discovery purposes, OCC notes that the Entry selecting Oxford specified that Oxford would serve as an "independent contractor." Entry, (Jan. 24, 2018) at ¶13. However, this provision is routinely included in orders selecting auditors and simply relates to the employment and tax status of Oxford. Oxford was not an "employee" of the Commission for employment and tax purposes. OCC is clearly aware of this fact because OCC has designated its outside experts who testify in Commission proceedings as "independent contractors." *Ohio Edison*, Case No. 14-1297-EL-SSO, Co. Ex. 52 (filed Oct. 15, 2015) and Co. Ex. 58 (filed Oct. 16, 2015). Under OCC's line of reasoning, OCC's own outside experts, who are identified as "independent contractors," would be independent from OCC, including, potentially, when

it comes to protecting communications with such outside experts under attorney/client privilege or attorney work product doctrine. However, OCC's reasoning is flawed and should be rejected.

B. OCC has failed to set forth good cause for waiver of Ohio Adm.Code 4901-1-25.

{¶ 26} Moreover, the attorney examiner finds that OCC has not set forth good cause to support a waiver of Ohio Adm.Code 4901-1-25(D) with respect to either of the requested subpoenas. With respect to the subpoena for Oxford's draft final report, the facts are clear that no such draft report exists in any form whatsoever. Questions posed by OCC regarding why Oxford had not begun drafting the final report until January would produce no probative evidence regarding whether the Companies properly used DMR funds. On the other hand, Daymark did produce, on January 14, 2022, a final report that appears to fully address whether the Companies properly expended DMR funds.

{¶ 27} With respect to the motion for a waiver of Ohio Adm.Code 4901-1-25(D) regarding the mid-term report, the attorney examiner finds that OCC has not set forth good cause to support a waiver of the rule. The rule precluding discovery, including depositions, has long been in place and exists for good reason. Intervenors such as OCC can pick and choose which cases to intervene in and the degree of their participation in that case. For example, in the last six annual transmission rider update cases filed by the Companies, OCC sought intervention in only three of those cases. Staff does not have that discretion. Among many other duties, Staff reviews all rate, tariff and rider filings made by utilities before the Commission and files reports or recommendations in the vast majority of those cases. Making Staff subject to discovery, including depositions, in these cases would be unduly burdensome in light of the number of cases in which the Staff must participate. Rather than set forth good cause that Oxford should be deposed, OCC simply makes the argument that Oxford must be subject to discovery (in this case a deposition) in order for OCC to have "ample discovery," as provided by R.C. 4903.082; but OCC, or any other party, could make that argument in any case in which it seeks a deposition of Staff. More importantly, OCC

fails to address whether there are any facts which are otherwise unobtainable from other sources, including discovery produced by the Companies, discovery produced by FirstEnergy Corp. under subpoena, or documents which are publicly available.

{¶ 28} Moreover, the record demonstrates that OCC has been provided with ample discovery in this case. FirstEnergy Corp. has provided over 230,000 pages of documents in response to a subpoena duces tecum requested by OCC. (Tr. (Jan. 7, 2022) at 9-10.) OCC has characterized this document production as a "mountain of evidence" necessitating that the *Corporate Separation Case* be held in abeyance while OCC and others "wade" through the documents. *Corporate Separation Case,* Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. Further, at the prehearing conference on January 7, 2022, the attorney examiners asked the parties for an update regarding discovery, including compliance with the granting of a motion to compel filed by OCC, and no discovery disputes were raised at that time (Tr. (Jan. 7, 2022) at 12-14).

{¶ 29} The attorney examiner notes that, in its reply to Staff's memorandum contra, OCC unfairly maligns Staff, claiming that, in the *Corporate Separation Case*, Staff instructed potential bidders for the audit contract that the project does not include the H.B. 6 scandal. However, there is nothing in the email attached to OCC's reply to imply that any corporate separation issues related to FirstEnergy's H.B. 6 related activities were out of bounds in the audit. This individual Staff member was simply responding to questions whether the RFP included "whether FirstEnergy improperly used funds collected in the DMR" and whether the RFP included "whether the source of funds for political and charitable spending by the Companies" in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers. OCC is well aware that whether FirstEnergy improperly used funds collected in the DMR is being addressed in this proceeding and is the subject of the Daymark final audit report. In addition, the question of whether the source of funds for political and charitable spending by the Companies in support of H.B. 6 was recovered in rates and charges paid by Ohio ratepayers is being thoroughly addressed in *In re 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, (*FirstEnergy Political and Charitable Spending Case*) Entry (May 13, 2021). Moreover, OCC is well aware that its arguments regarding the scope of the audit in the *FirstEnergy Corporate Separation Case* have been considered and rejected by the Commission. OCC raised these same arguments in an application for rehearing filed on December 4, 2020, in that proceeding. The Commission considered, and rejected, those arguments. *FirstEnergy Corporate Separation Case,* Application for Rehearing (Dec. 4, 2020) at 11-14 (*denied by operation of law*). A manifestly unwarranted attack on an individual Staff member does not constitute good cause for a waiver of the rules.

{¶ 30} Finally, the attorney examiner notes that OCC also relies heavily upon a message from a past chief executive officer of FirstEnergy Corp., which was disclosed as part of the Deferred Prosecution Agreement between the United States Attorney for the Southern District of Ohio and FirstEnergy Corp. OCC's reliance upon the message demonstrates OCC's obvious interest in investigating potential wrongdoing as evidenced by the Deferred Prosecution Agreement, rather than investigating what the Commission actually has jurisdiction over investigating, which is whether the Companies improperly used DMR funds. However, this is a topic which appears, from the Deferred Prosecution Agreement, to be a subject in the ongoing Federal criminal investigation. The United States Attorney is investigating this issue. The Commission has made it clear that avoiding interference with the ongoing Federal criminal investigation is of the utmost importance. *In re the 2021 Review of the Delivery Capital Recovery Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 21-1038-EL-RDR, Entry on Rehearing (Dec. 15, 2021) at ¶ 14. In attempting to show good cause for a waiver of the Commission rules, OCC has presented no arguments demonstrating that its efforts will not interfere with the Federal investigation. Moreover, as noted above, Daymark produced a final report on January 14, 2022, that appears to fully address whether the Companies properly expended DMR funds, and OCC will have a full and fair opportunity to examine the contents and conclusions of

the Daymark final report. Accordingly, the attorney examiner finds that OCC has failed to demonstrate good cause for a waiver of Ohio Adm.Code 4901-1-25(D).

{¶ 31} Nonetheless, the Commission has stated its commitment with respect to the Companies' activities surrounding the passage of H.B. 6, to follow the facts wherever they may lead. *In re the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.,* Case No. 20-1629-EL-RDR, Entry on Rehearing (Dec. 15, 2021) at ¶13. Further, the attorney examiner notes that the Commission reopened this proceeding in the interest of promoting transparency. Entry (Dec. 30, 2020) at ¶22. Oxford has prepared a mid-term report regarding the Companies' use of DMR revenues. Although this mid-term report was prepared to inform the Commission on whether the DMR should be extended and was filed in this docket only by mistake, the mid-term report may contain reliable, probative evidence regarding the Companies' use of DMR funds. The parties should have a full and fair opportunity to cross-examine a witness from Oxford under oath regarding the mid-term report. Therefore, the attorney examiner directs Staff to produce a witness from Oxford at the evidentiary hearing to be held in this proceeding. Testimony of a witness from Oxford at a public evidentiary hearing (including, if necessary, the confidentiality protections routinely used in hearings), subject to cross-examination from all parties, will be far more transparent than a non-public deposition for two reasons: one, at a non-public deposition, all parties may not have a full and fair opportunity to cross-examine the witness; and two, OCC would be under no duty to file the transcript of the deposition in the docket.

C. The interlocutory appeal should not be certified to the Commission.

{¶ 32} Further, the attorney examiner finds that OCC's interlocutory appeal, filed on January 12, 2022, should not be certified to the Commission. 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 "ruling" which is the subject of the interlocutory appeal is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

{¶ 33} Ohio Adm.Code 4901-1-15(B) specifies 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 law or policy or is taken from a ruling which represents a departure from past precedent and that 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. In order to certify an interlocutory appeal to the Commission, both requirements need to be met.

{¶ 34} However, the attorney examiner finds the interlocutory appeal should be rejected as improper. The interlocutory appeal was not taken from a "ruling" by the attorney examiner issued under Ohio Adm.Code 4901-1-14. OCC claims that the attorney examiner erred at the January 7, 2022 prehearing conference by deferring ruling on the motions for subpoenas for Oxford. However, the attorney examiner did not rule on the motion at the January 7, 2022 prehearing conference. The attorney examiner determined that a ruling on the motions for subpoena should come after the filing of the final report by Daymark in the event that the Daymark final report resolved the questions OCC sought to pose to Oxford at a deposition. Accordingly, the attorney examiner expressly deferred ruling on the motion to compel. (Tr. (Jan. 7, 2022) at 10-11.) Therefore, the interlocutory appeal is improper because it was not filed in response to a "ruling" by the attorney examiner and should be denied on that basis. *In re Ohio Power Co.,* Case No. 16-1852-EL-SSO, et al., Opinion and Order (Mar. 31, 2016) at 11; *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶18.

{¶ 35} Even upon a finding that the interlocutory appeal was proper, which it is clearly not, the attorney examiner, nonetheless, finds that it fails to meet the requirements of Ohio Adm.Code 4901-1-15(B), as it does not present a new or novel question of interpretation, law, or policy.[1] It is well-established that the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and ruling on discovery issue, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g.*, *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. The interlocutory appeal seeks Commission review of a decision by the attorney examiner to defer ruling on a motion for subpoena, but there is nothing new or novel about deferring ruling on a motion until a more appropriate time. *FirstEnergy Political and Charitable Spending Case*, Entry (May 13, 2021) at ¶18.

{¶ 36} Further, the attorney examiner finds that OCC has not demonstrated that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the January 7, 2022 prehearing conference. At the January 7, 2022 prehearing conference, the attorney examiner deferred ruling on the motions for subpoenas until after the filing of the Daymark final report, which was due to be filed (and was filed) on January 14, 2022. (Tr. (Jan. 7, 2022) at 10-11.) OCC literally filed its interlocutory appeal on January 12, 2022, which was two days before the audit report was

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1 OCC provides no argument that the interlocutory appeal is taken from a ruling that departs from past precedent.

due to be filed and when the attorney examiner told them that the decision on the subpoena would be ripe for decision. Only a little over a month later, this Entry is now filed. There was no prejudice or undue delay, and, in any event, the motions for subpoenas have been denied in this Entry. Moreover, the attorney examiner notes that, while OCC appears to have time to file requests for interlocutory appeals for expedited discovery, they do not appear to have time to timely review the thousands of documents that have already been provided to them. In the *FirstEnergy Corporate Separation Case*, OCC sought an extension of time to prepare for hearing, which was granted by the attorney examiners. *FirstEnergy Corporate Separation Case,* Tr. (Jan. 4, 2022) at 23-26). Unsatisfied with the additional time to prepare, OCC asks that the *FirstEnergy Corporate Separation Case* be held in abeyance while OCC sifts through a "mountain of evidence" obtained from FirstEnergy Corp. pursuant to a subpoena. *FirstEnergy Corporate Separation Case,* Interlocutory Appeal, Request for Certification and Application for Review (Jan. 14, 2022) at 13-14. OCC cannot now convincingly claim that the brief delay caused by the deferred ruling for subpoenas is unduly delaying its hearing preparation while it seeks delays in other proceedings in order to review the "mountain of evidence" it has obtained from FirstEnergy Corp. Accordingly, the attorney examiner finds that the interlocutory appeal should not be certified to the Commission.

D. A comment period should be established for review of the final report filed by Daymark.

{¶ 37} At the prehearing conference on January 7, 2022, the attorney examiners advised the parties that a comment period would be set following the filing of the final report, which was due January 14, 2022, and that parties should expect an initial comment period of 30 days and a reply comment period of 15 days (Tr. (Jan. 7, 2022) at 11-12). However, the attorney examiner is mindful of the substantial production of over 230,000 pages of documents by FirstEnergy Corp. in response to the broad subpoena issued by the attorney examiner at the request of OCC. Therefore, the attorney examiner will provide an extended opportunity for OCC, and other parties, to review these documents prior to the

filing of initial comments to the Daymark final report. Accordingly, initial comments will be due 60 days after issuance of this Entry and reply comments will be due 15 days after the filing of initial comments. The attorney examiners will entertain reasonable requests for extension of the comment period if OCC, or any other party, provides meaningful, quantified assessments on the progress of reviewing discovery in this proceeding.

IV. ORDER

{¶ 38} It is, therefore,

{¶ 39} ORDERED, That OCC's motions for subpoenas filed on October 20, 2021, and December 10, 2021, be denied. It is, further,

{¶ 40} ORDERED, That OCC's request for waiver of Ohio Adm.Code 4901-1-25 be denied. It is, further,

{¶ 41} ORDERED, That, in the interest of transparency, Staff produce a witness from Oxford at the evidentiary hearing to be held in this proceeding. It is, further,

{¶ 42} ORDERED, That OCC's interlocutory appeal filed on January 12, 2022, be denied. It is, further,

{¶ 43} ORDERED, That parties abide by the comment period established in Paragraph 36. It is, further,

{¶ 44} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Gregory A. Price

By: Gregory A. Price
Attorney Examiner

MJA/hac

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Case No(s). 17-2474-EL-RDR

Summary: Attorney Examiner Entry ordering that OCC's motions for subpoenas filed on October 20, 2021, and December 10, 2021, be denied; that OCC's request for waiver of Ohio Adm.Code 4901-1-25 be denied; that, in the interest of transparency, Staff produce a witness from Oxford at the evidentiary hearing to be held in this proceeding; that OCC's interlocutory appeal filed on January 12, 2022, be denied; and, that parties abide by the comment period established in Paragraph 36 electronically filed by Heather A. Chilcote on behalf of Gregory A. Price, Attorney Examiner, Public Utilities Commission of Ohio