

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of)
National Aeronautics and Space)
Administration at Glenn Research)
Center to establish a Reasonable)
Arrangement with the Cleveland)
Electric Illuminating Company and)
First Energy Corporation for Electrical)
Service)

Case No. 09-91-EL-AEC

PUCO

**CONSOLIDATED MOTION OF CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND FIRSTENERGY CORPORATION TO STAY DISCOVERY AND
BRIEF IN OPPOSITION TO OHIO CONSUMER COUNSEL'S MOTION TO
SHORTEN THE DISCOVERY RESPONSE TIME**

I. INTRODUCTION

Even though no reasonable arrangement has been submitted to the Commission in this case, the Ohio Consumer Counsel ("OCC") has moved to intervene and has sought an order expediting discovery. Cleveland Electric Illuminating Company ("CEI") and FirstEnergy Corporation (collectively the "Companies") do not oppose OCC's Motion to Intervene. Discovery in this case, however, should be stayed until such time as the Companies' pending Motion to Dismiss has been resolved and a reasonable arrangement between the Companies and the Applicant, National Aeronautics and Space Administration at Glenn Research Center ("NASA Glenn"), has been negotiated and filed with the Commission for its consideration. Until such time, it would be unproductive and imprudent for the parties to initiate discovery.

Nor has OCC demonstrated any basis for shortening the response time for discovery. OCC merely contends that discovery should be expedited to allow adequate time to investigate the terms of any reasonable arrangement with NASA Glenn, even though OCC readily concedes that there is no such arrangement at present. If and when a reasonable arrangement is established,

the normal discovery rules will provide ample opportunity for the parties to conduct discovery. This is especially true here given the fact that a hearing date has not been established in this case.

Accordingly, as explained more fully below, the Companies request an order from the Commission (1) staying any discovery in this matter until the Companies' pending Motion to Dismiss has been resolved and a reasonable arrangement has been submitted to the Commission for its review, and (2) denying OCC's Motion to Shorten the Discovery Response Time.

II. BACKGROUND

On February 6, 2009, NASA Glenn filed an application in this matter requesting to establish a reasonable arrangement with the Companies. NASA Glenn's filing also constituted a complaint seeking an order varying the terms of a contract between NASA Glenn and CEI that terminated on December 31, 2008, and an order compelling CEI and FirstEnergy to negotiate with NASA Glenn to establish a new reasonable arrangement. NASA Glenn concedes in the Application, as it must, that no such arrangement exists at present. Importantly, the Application does not specify any terms of the proposed arrangement that NASA Glenn is seeking in this matter.

On February 24, 2009, the Companies filed an Answer in response to the Complaint. Contemporaneously, the Companies filed a Motion to Dismiss the Application on numerous procedural and substantive grounds. In addition to other grounds, the Motion to Dismiss argues that NASA Glenn has not satisfied the requirements of R.C. § 4905.31 for obtaining such an arrangement because that statute envisions that a mercantile customer will establish a reasonable arrangement with a utility *before* submitting the arrangement to the Commission for approval. Absent such an agreement, a mercantile customer, must, at a minimum, file an application setting forth the terms of a proposed arrangement, and the Commission must afford the affected utility

an opportunity to comment and/or object to the proposal before any action is taken. Neither of these requirements has been met.

On March 3, 2009, the OCC filed a Motion to Intervene and Motion to Shorten Discovery Response Time. On March 4, 2009, OCC served its First Set of Interrogatories and Requests for Production of Documents upon NASA Glenn. Two days later, on March 6, 2009, OCC served its First Set of Interrogatories and Requests for Production of Documents upon the CEI. Despite the absence of a reasonable arrangement for anyone to consider, OCC contends that expedited discovery will provide “adequate time to investigate the specific facts that NASA has made in its Application.” Motion to Intervene at 5. Absent from the motion is any explanation as to why the normal discovery rules should be altered in this case.

III. ARGUMENT

A. Discovery Should Be Stayed Until The Motion to Dismiss Is Resolved And A Reasonable Arrangement Is Submitted To The Commission.

The application filed by NASA Glenn requests an unlawful extension of an expired contract and an order directing the Companies to negotiate a reasonable arrangement. NASA Glenn’s application does not request Commission approval of any actual rate or service. There is currently no application for *approval* of a reasonable arrangement before the Commission at this time. Any discovery requested by OCC, or other interested parties, will invariably go to a *potential* reasonable arrangement that may or may not ever be presented to the Commission. The parties should not be forced to expend valuable resources providing information on an agreement that currently does not exist.

CEI has expressed its willingness to enter into negotiations with NASA Glenn for a new arrangement. CEI’s Motion to Dismiss at 9. If and when negotiations begin, CEI and NASA Glenn should be afforded the opportunity to conduct these discussions without undue

interference - in the form of untimely and intrusive discovery requests. Accordingly, until such time as negotiations have been concluded and there is an actual reasonable arrangement that has been submitted to the Commission for review, all discovery in this matter should be stayed.

B. OCC Has Failed To Demonstrate Any Basis For Expediting Discovery.

The Commission rules clearly spell out the discovery process.¹ Parties are allowed twenty days to respond to interrogatories and requests for production of documents.² Only for “good cause shown” will the Commission shorten the discovery period.³ Yet, OCC has failed to show any good cause why the discovery period must be shortened. Without some tangible justification, OCC’s motion to shorten the discovery response period must be denied.

Furthermore, rather than supporting OCC’s request for expedited discovery, the decisions cited by OCC in support of its motion actually demonstrate that expedited discovery is not warranted. In each of the cases cited by OCC, the Commission shortened the discovery response period based upon a determination that an expedited process was necessary so that the parties could comply with an abbreviated hearing schedule. *See, e.g., In Re: Ohio Edison Company*, Case No. 03-2144-EL-ATA, (October 28, 2003) (stating that “[d]ue to the abbreviated period for the start of the hearing response time for discovery should be shortened * * *.”) Here, OCC requests expedited discovery even though no party has requested that this matter be decided on an expedited basis, and no hearing date has been established by the Commission. Clearly, expedited discovery is not warranted under such circumstances.

¹ OAC 4901-1-16 to 4901-1-24.

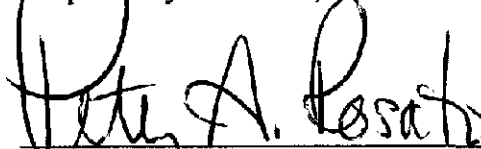
² OAC 4901-1-19 and 4901-1-20.

³ OAC 4901-1-17.

IV. CONCLUSION

While the Companies do not oppose OCC's intervention in this proceeding, all discovery should be stayed at this time. No discovery should be allowed until the Commission has resolved the Companies' pending Motion to Dismiss and a reasonable arrangement has been negotiated and submitted to the Commission for review. Any discovery prior to these events is unwarranted and would unduly burden the parties. If and when discovery become appropriate, the normal response times should apply. OCC has provided no justification and no good cause for deviating from the Commission's well-established rules.

Respectfully submitted,



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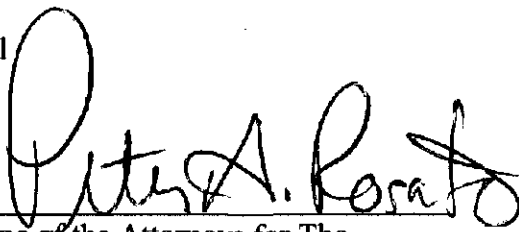
ATTORNEYS FOR THE CLEVELAND
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FIRSTENERGY CORPORATION

CERTIFICATE OF SERVICE

A copy of the forgoing was served via regular U.S. Mail upon the following this 2nd day
of March, 2009:

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