

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider.**

**Case No. 10-176-EL-ATA**

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**MOTION FOR CONTINUANCE BY OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY  
(EXPEDITED RULING REQUESTED)**

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Pursuant to Rule 4901-1-13(A) and other applicable authority, Applicants Ohio Edison Company("OE"), The Cleveland Electric Illuminating Company ("CEI") and The Toledo Edison Company ("TE") (collectively the "Companies") respectfully request a continuance of the deadline for submission of pre-filed testimony and the commencement of the hearing. Specifically, the Companies request that the Commission extend the deadline for submission of pre-filed testimony to January 7, 2011 and continue commencement of the hearing until January 27, 2011. The reasons for this Motion are set forth in the accompanying Memorandum. Pursuant to Rule 4901-1-12(C), the Companies request an expedited ruling on this Motion.

Further, as also set forth in the attached Memorandum and in light of the filing of this Motion, the Motion to Supplement Testimony and Request for Expedited Ruling filed by the Office of the Ohio Consumers' Counsel ("OCC") on November 9, 2010 should be denied.

Dated: November 12, 2010

Respectfully submitted,

/s/ James W. Burk

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**MEMORANDUM IN SUPPORT OF MOTION FOR CONTINUANCE AND  
MEMORANDUM CONTRA MOTION TO SUPPLEMENT TESTIMONY AND  
REQUEST FOR EXPEDITED RULING BY THE OFFICE OF  
THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On April 15, 2010, the Commission held that it lacked jurisdiction over claims that the Companies made “promises” regarding all-electric rates that allegedly were “outside of the express terms of [their] tariffs.” *See* Second Entry on Reh’g dated Apr. 15, 2010, ¶ 9. By virtue of that decision, allegations that the Companies promised “permanent” all-electric rates were outside the scope of this case. Both the Companies and the Office of the Ohio Consumers’ Counsel (“OCC”) sought rehearing of that decision. *See* OCC’s App. for Reh’g dated May 17, 2010; Companies’ App. for Reh’g dated May. 14, 2010. On June 9, 2010, the Commission granted rehearing to further consider the parties’ arguments. *See* Fourth Entry on Reh’g dated June 9, 2010, ¶ 9.

On November 10, 2010—less than three weeks before the scheduled hearing in this case and three business days before pre-filed testimony was due—the Commission issued its Fifth Entry on Rehearing (“Fifth Entry”). In it, the Commission clarified that “claims that customers were to receive rates that are in violation of Commission-approved tariffs or which were not authorized by the Commission are issues that the Commission is empowered to decide.” Fifth Entry, ¶ 13. Moreover, the Commission held that parties may conduct discovery and introduce

evidence at hearing regarding those claims. Fifth Entry, ¶ 13; *see* Entry dated Nov. 8, 2010, ¶ 8 (granting motion to compel discovery of information and documents related to Companies’ historical marketing of all-electric rates).

Allegations regarding “promises” of “permanent” all-electric rates now are squarely within the scope of this case. As set forth below, however, the current hearing schedule does not allow adequate time to take discovery and prepare testimony on these new issues. Specifically, under the existing schedule, pre-filed testimony is due on November 15, 2010—just three business days after the issuance of the Fifth Entry—and the hearing is scheduled to begin on November 29, 2010. *See* Entry dated Oct. 8, 2010, ¶ 6. Given the recent introduction of these allegations into this case, the parties need more time to prepare. Therefore, the Companies respectfully request that the Commission extend the deadline for submission of pre-filed testimony to January 7, 2011 and continue commencement of the hearing until January 27, 2011.<sup>1</sup>

The Commission also should reject OCC’s proposed change to the procedural schedule. Specifically, as set forth in their Motion to Supplement Testimony, OCC proposes, in essence, that the Commission bifurcate the hearing and schedule a second proceeding in December to address information OCC learns through discovery. OCC also proposes to allow intervenors—but not the Companies—to file a second round of testimony prior to this additional proceeding.

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<sup>1</sup> In response to an inquiry by counsel for the Companies, Ohio Partners for Affordable Energy, the Ohio Manufacturers’ Association, the Ohio Hospital Association, Industrial Energy Users-Ohio, Constellation New Energy, Inc. and Movants for Intervention Steigerwald, et al. have indicated that they do not oppose the granting of this Motion. The Office of the Ohio Consumers’ Counsel has filed its own motion to revise the procedural schedule.

Given that the Fifth Entry was issued less than three weeks before the scheduled hearing, there is insufficient time for full briefing of this Motion under the usual timeline provided in Rule 4901-1-12(B). Pursuant to Rule 4901-1-12(C), the Companies therefore request an expedited ruling on this Motion. All of the parties to this proceeding, including The Office of the Ohio Consumers’ Counsel, Ohio Partners for Affordable Energy, the Ohio Manufacturers’ Association, the Ohio Hospital Association, Industrial Energy Users-Ohio, Constellation New Energy, Inc. and Movants for Intervention Steigerwald, et al. have indicated that they do not object to an expedited ruling.

As described below, the Commission should reject the OCC's proposal and approve the Companies' Motion for Continuance.

## **II. ARGUMENT**

### **A. The Companies' Motion For Continuance Should Be Granted.**

- 1. Because the Fifth Entry on Rehearing only two days ago introduced additional issues regarding the Companies' past marketing practices into this case, there is good cause for extension of the deadline for submission of pre-filed testimony and for continuance of the commencement of the hearing.**

The Fifth Entry has dramatically expanded the scope of issues in this proceeding, and the parties need more time to investigate those issues and prepare related testimony. *See* Rule 4901-1-13(A) (permitting continuances and extensions of time "for good cause shown"). Over the past several months, dozens of customers have sent letters expressing concern regarding the future of all-electric rates, and many of them apparently allege that they were "promised" or otherwise entitled to permanently discounted rates. *See, e.g.,* Letter from Donna and John Miscik docketed Apr. 16, 2010. OCC already has issued discovery requests relating to those allegations, and it apparently intends to introduce evidence regarding the Companies' alleged past marketing practices at hearing. *See* OCC's Memo. in Support of Mot. to Compel dated June 30, 2010, p. 2. Several customers, either individually or as a group, also have sought intervention to present similar allegations. *See* Motion to Intervene dated June 2, 2010.<sup>2</sup>

As a result of the Fifth Entry, all of these allegations are now before the Commission. The Commission may hear testimony – potentially extensive -- on these issues. These allegations are potentially broad in scope, both in terms of the variety of individual

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<sup>2</sup> The Companies oppose the requested intervention of Sue Steigerwald, "Citizens for Keeping the All-Electric Promise," Joan Heginbotham and Bob Schmitt Homes, Inc. *See* Companies' Memo. Contra. Mot. to Intervene dated June 17, 2010.

"representations, " marketing materials and programs and by the length of the period possibly addressed (approximately 40 years for CEI and TE and over 20 years for OE). .

The Companies (and other parties) must be allowed time to test these factual allegations and prepare responsive testimony. Specifically, the Companies should have an “ample right of discovery” to, among other things, depose customers who claim that they were promised permanently discounted rates and to request and review documents allegedly supporting those assertions. *See* R.C. 4903.082 (“All parties and intervenors ***shall*** be granted ample rights of discovery.”) (emphasis added). Moreover, the Companies should be allowed time to prepare testimony rebutting those claims. OCC and others apparently will cite this evidence as reason to impose significant costs on the Companies. (Fifth Entry on Rehearing at 4; Memorandum in Support of Motion to Establish a Procedural Schedule by the Office of the Ohio Consumers’ Counsel at 3; Memorandum in Support of Motion to Compel Discovery Responses at 12-14.) The Companies should be allowed a fair opportunity to prepare and present a response.

Under the current case schedule, however, the Companies do not have this fair opportunity. In fact, even if they served targeted discovery regarding those allegations today—two days after the Fifth Entry was issued—responses would not be due until after the currently scheduled hearing had started. And given that pre-filed testimony is due in three days, the Companies do not remotely have enough time to prepare testimony addressing the (as yet unspecified) allegations. Given this, the Companies respectfully request that the Commission extend the deadline for submitting pre-filed testimony to January 7, 2011 and continue commencement of the hearing to January 27, 2011. This additional time will allow the Companies (and other parties) a fair opportunity to take discovery and prepare testimony regarding these newly-introduced issues, as well as to discuss settlement. Because there is “good

cause” for this request, the Companies’ Motion for Continuance should be granted. *See* Rule 4901-1-13(A).

**2. The due process rights of the Companies will be violated if the deadline for submission of pre-filed testimony is not extended and if the commencement of the hearing is not continued.**

The Companies due process rights are at risk of being violated unless the Commission grants the relief requested here. The Due Process Clause of the United States and Ohio Constitutions are violated if an entity shows that “(1) [it] had a life, liberty, or property interest protected by the Due Process Clause; (2) [it] was deprived of this protected interest; and (3) the state did not afford [it] adequate procedural rights prior to depriving him of the property interest.” *Waeschle v. Dragovic*, 576 F.3d 539, 544 (6th Cir. 2009); *see Ohio v. Hochhausler* (1996), 76 Ohio St. 3d 455, 459 (“[The Ohio Constitution] demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest.”)

Should the Commission fail to grant the relief requested here and subsequently impair the property interests of the Companies, the Companies easily will meet the first two prongs of this test. The Companies undoubtedly have a constitutional property interest in this proceeding and in their right to recover “just and reasonable rates,” as provided by state statute. *See Herrada v. City of Detroit*, 275 F.3d 553, 556 (6th Cir. 2001) (“[Plaintiff] clearly has a property interest in her money.”); *Monongahela Power Co. v. Schriber*, 322 F. Supp. 2d 902, 918 (S.D. Ohio 2004) (“[T]o preserve the integrity of the Due Process Clause of the Fourteenth Amendment, state-prescribed rates must allow a utility to recover its costs with a reasonable rate of return on the value of the property being used by the state to provide a public service.”); *Ridenour v. Wilkinson*, 2007 Ohio 5965, ¶ 37 (10th App. Dist.) (“[P]laintiffs are entitled to due process with respect to any deprivation of their money.”); *see also* R.C. 4909.15(A).

Further, unless the Commission extends the deadline for filing testimony and continues the hearing, the Companies will not have constitutionally adequate procedural protections. The “core components of due process” are “notice and the right to a hearing.” *See Lane Hollow Coal Co. v. Director, Office of Workers’ Compensation Programs*, 137 F.3d 799, 808 (4th Cir. 1998); *see also Ohio v. Mateo* (1991), 57 Ohio St. 3d 50, 52. To be constitutionally sufficient, the “notice” must be provided in a way that allows the parties “to prepare their arguments and make their objections.” *See Bachowski v. Salamone*, 139 Wis. 2d 397, 412 (Wis. 1987); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (explaining that due process requires that parties are afforded “an opportunity to present their objections”); *Mellon v. Travelers Ins. Co.*, 267 Pa. Super. 191, 197 (Pa. Super. Ct. 1979) (explaining that purpose of constitutional notice is to allow parties to “marshal their evidence and prepare their arguments”). Notice thus is constitutionally inadequate where it deprives a party of the “opportunity to gather evidence or prepare legal arguments” in advance of a proceeding, including through discovery. *See Sales v. Agric. Labor Relations Bd.*, 39 Cal. 3d 209, (Cal. 1985); *see also In re App. of Duke Energy Ohio, Inc. for an Increase in Elec. Rates, et al.*, Nos. 08-709-EL-AIR, *et al.*, Op. and Order dated July 8, 2009, ¶ 14 (noting that due process includes “an opportunity for discovery [and] hearing”).

Here, the first time the Commission ruled that this proceeding will encompass allegations regarding the Companies’ past marketing practices was in the Fifth Entry, which was issued on November 10, 2010—19 days before the hearing in this case, and three business days before pre-filed testimony is due. This is no small addition. The Companies’ currently serve thousands of electric heating customers, any of whom may allege that they were “promised” permanently discounted rates (and in fact, dozens of customers already have alleged this). Moreover, the all-



electric rates at issue date back many years—in some cases to the 1970s—and investigation of the issues recently introduced by the Fifth Entry thus will require significant time and resources.

By giving notice that these allegations are at issue a mere three business days before testimony is due, the Commission has not given the Companies a constitutionally adequate time to “gather evidence or prepare legal arguments” regarding them. This is especially true in light of the Commission’s April 15, 2010 Second Entry on Rehearing, which expressly indicated that those allegations would *not* be heard in this case. The Companies have no opportunity to conduct discovery regarding customers’ allegations of past “promises”—responses to discovery propounded the day after the Fifth Entry was issued would not be due until after the currently-scheduled hearing as begun. And the Companies certainly cannot prepare testimony rebutting those allegations when they cannot learn the basis of them. As it stands, the Commission’s notice with respect to those allegations is constitutionally inadequate, and consequently the Companies’ due process right may be violated if the hearing proceeds as scheduled. To avoid this problem, the Commission should give the parties more time to prepare their cases and should grant the relief requested here.

**B. No Party Will Be Prejudiced By The Extension Of The Testimony Deadline Or Continuance Of The Hearing.**

No party will be prejudiced by the relief requested in this Motion. In fact, commencement of the hearing in January 2011 will have no effect on the rates charged to all-electric customers. Those customers already are receiving a bill credit pursuant to the Companies’ respective Residential Generation Credit Riders (“Riders RGC”), and the Commission has indicated that, regardless of the outcome of this proceeding, these credits will remain in place “at a minimum . . . through the next winter heating season” (*i.e.*, through May 2011). *See* Second Entry on Reh’g dated Apr. 15, 2010, ¶ 7. Moreover, because all-electric

credits will not be applied during the summer months (*i.e.*, June through August), the Commission and parties have several months to resolve the issues in this proceeding. *See id.* There is more than enough time available to complete discovery and prepare for hearing.

Although no prejudice will result from the relief requested here, severe prejudice will result if the Companies' request is denied. As demonstrated above, the Companies (and other parties) need time to take discovery of customers' allegations and prepare responsive testimony. Without that additional time, the Companies will be severely prejudiced in cross-examining OCC's and others' witnesses, in presenting an affirmative case, and in developing arguments for post-hearing briefs. To avoid that prejudice, this Motion should be granted.

**C. OCC's Motion To Supplement Testimony Should Be Denied.**

As described above, the Commission should adopt the procedural schedule proposed by the Companies. Relatedly, the Commission also should deny OCC's Motion to Supplement Testimony, in that if the Companies' Motion is granted OCC will receive the relief sought in its Motion. Specifically, OCC proposes a bifurcation of this hearing, with one proceeding addressing rate-related issues and a second proceeding, to be held weeks later, to address information gained in response to OCC's discovery requests." *See Memo.*, p. 2. OCC also proposes that it and "all intervenors" be allowed to file supplemental testimony in advance of this second proceeding. (*Id.* at 3.)

There is a better way to address OCC's concerns—the Commission should grant the Companies' Motion for Continuance. The Companies' proposed schedule affords adequate time for all parties—not just OCC—to investigate and prepare testimony regarding customers' allegations and allows all relevant issues to be heard in a single proceeding. Because the Companies' proposal is simpler and fairer for all parties, the Commission should grant the Companies' Motion for Continuance and deny OCC's Motion to Supplement Testimony.

### III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission, on an expedited basis, grant the Companies' Motion for Continuance, extend the deadline for submission of pre-filed testimony to January 7, 2011, and continue commencement of the hearing until January 27, 2011. The Companies also respectfully request that the Commission deny OCC's Motion to Supplement Testimony.

DATED: November 12, 2010

Respectfully submitted,

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AND THE TOLEDO EDISON COMPANY

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Continuance by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (Expedited Ruling Requested) and Memorandum in Support and Memorandum Contra Motion to Supplement Testimony and Request for Expedited Ruling By The Office of the Ohio Consumers' Counsel were delivered to the following persons by first class mail, postage prepaid, this 12th day of November, 2010:

/s/ James W. Burk

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