BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	)))))))	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA INTERVENORS' JOINT MOTION TO MODIFY DISCOVERY TIME LIMITS AND AMEND THE PROCEDURAL SCHEDULE

I. INTRODUCTION

In their Joint Motion to Modify Discovery Time Limits and Amend the Procedural Schedule (the "Joint Motion"), various intervenors (the "Joint Intervenors") seek to alter the procedural schedule for this proceeding, which has already been determined by the Attorney Examiner in her Entry dated August 29, 2014. The arguments put forth by the Joint Intervenors, however, are groundless. The current procedural schedule is clearly reasonable and consistent with Commission precedent, and the Joint Intervenors have done nothing to show otherwise. Contrary to the Joint Intervenors' assertions, the current procedural schedule allows ample time for several rounds of discovery and for settlement discussions. It also provides a reasonable opportunity for a decision on the electric security plan ("ESP") application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") to be issued within the statutorily mandated 275-day timeframe. Further, keeping the current date for the commencement of the hearing in this proceeding better enables the Companies to know the Commission's decision regarding the proposed Economic Stability

Program related to their participation in the PJM Base Residual Auction scheduled to commence on May 11, 2015. As demonstrated below, the Joint Motion is thus meritless and the Attorney Examiner should deny it accordingly and retain the previously approved discovery response time and procedural schedule.

II. BACKGROUND

On August 4, 2014, the Companies filed their Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan (the "Application"). In an Entry dated August 29, 2014 ("Entry"), the Attorney Examiner set forth the following procedural schedule:

- October 1, 2014: Deadline to intervene.
- December 1, 2014: Discovery cutoff except for deposition notices.
- December 5, 2014: Intervenor testimony due.
- December 19, 2014: Staff testimony due.
- January 9, 2014: Prehearing conference.
- January 20, 2014: Commencement of hearing.

Entry at 3-4. The Entry did not alter the default discovery response time of twenty days for interrogatories, document requests, or requests for admission. *See* Rules 4901-1-19(A), 4901-1-20(C), and 4901-1-22(B), O.A.C.

The adopted discovery cutoff date is 118 days or nearly four months after the Companies filed their Application.[1] The due date for intervenor testimony is 122 days after the Application was filed and the hearing begins 170 days after the filing of the Application. Pursuant to the

[1] The time period from initial filing to Commission Order in the Companies' ESP III proceeding was approximately 3 months.

Application, the procedural schedule approved by the Attorney Examiner provides a reasonable opportunity for the Commission to render a decision on the Companies' Application no later than April 8, 2015, such that the Companies will know the Commission's decision with adequate time to prepare for and participate in the May 2015 PJM Base Residual Auction. *See* Application at 22.

In contrast, the Joint Intervenors seek to have the discovery response time expedited to ten days. Joint Motion at 9.[2] The Joint Intervenors further seek to have the due date for intervenor testimony amended to December 22, 2014, the due date for Staff testimony changed to January 9, 2015, the prehearing conference date switched to January 23, 2015, and the commencement date for the hearing amended to February 10, 2015. Joint Motion at 9-10. As shown below, however, the Joint Intervenors fail to provide any rational justification for expediting the discovery response time or amending the previously approved procedural schedule.

III. ARGUMENT

A. There Is No Need to Expedite Discovery In The Instant Proceeding.

Given the length of the approved procedural schedule, the Joint Intervenors cannot point to any basis for deviating from the default discovery response time set forth in O.A.C. 4901-1-19(A). They contend that a shortened discovery "response time is necessary to ensure that the parties have sufficient time to investigate the numerous issues raised by the Application within the time period designated for discovery." Joint Motion at 8. And further: "a shortened response time will permit parties to thoroughly investigate these issues, review the Companies' responses, and seek additional information where necessary." *Id.* This argument falls flat.

[2] All citations from the Joint Motion are to the Memorandum in Support.

In their motion, the Joint Intervenors conspicuously ignore a recent ruling in Ohio Power Company's current ESP proceeding, Case No. 13-2385-EL-SSO. In that proceeding, various intervenors sought to have the discovery response time expedited to ten days. *See* Case No. 13-2385-EL-SSO, Entry at 1 (Feb. 6, 2014). That proceeding had an approved procedural schedule with very similar timeframes and overall length to the approved schedule in this proceeding, and indeed, the Companies patterned the procedural schedule proposed in their Application after the schedule adopted by the Attorney Examiner in Case No. 13-2385-EL-SSO. *See* Case No. 13-2385-EL-SSO, Entry at 1-2 (Jan. 24, 2014). In that case, as here, various intervenors similarly argued that a shortened response time would "allow the parties…to conduct a full investigation of the important issues involved in [the] proceedings before the filing of testimony" and would further "better prepare the parties to engage in meaningful settlement discussions." Case No. 13-2385-EL-SSO, Entry at 1-2 (Feb. 6, 2014).

The Attorney Examiner rejected these arguments out of hand:

> The attorney examiner finds that the procedural schedule established in the January 24, 2014 Entry affords ample time in which Joint Movants may conduct discovery in advance of the evidentiary hearing date and the deadline for filing intervenor testimony….Contrary to Joint Movants' assertions, expedited discovery is not necessary to enable intervenors to prepare their testimony or to engage in meaningful settlement discussions, as the current procedural schedule already provides intervenors a fair opportunity to fully investigate the issues raised in AEP Ohio's application and supporting testimony. In short, Joint Movants have failed to show good cause for their request for expedited discovery in these proceedings.

Id. at 2-3.

So too, here. The Companies have not sought expedited treatment of their Application by the Commission and the current procedural schedule reflects this fact as it provides ample time for any intervenors in this proceeding to conduct discovery. The discovery cutoff date of December 1, 2014 is 118 days after the Companies filed their Application – in the AEP case it

was 133 days (including the Christmas and New Year's holidays). The current procedural schedule thus provides ample time to conduct several rounds of discovery under the standard twenty-day response rules. *See* Rules 4901-1-19(A), 4901-1-20(C), and 4901-1-22(B), O.A.C. Indeed, given this fact, the Joint Intervenors' claim that the discovery response time needs to be shortened in order to permit them to "review the Companies' responses, and seek additional information where necessary" cannot be taken seriously. Joint Motion at 8. Clearly, under the present procedural schedule the Joint Intervenors have ample time to do just that. Here, as in Case No. 13-2385-EL-SSO, "the current procedural schedule already provides intervenors a fair opportunity to fully investigate the issues raised in [the Companies'] application and supporting testimony." Case No. 13-2385-EL-SSO, Entry at 3 (Feb. 6, 2014). Moreover, given the large number of parties that have intervened in this proceeding, and the voluminous amount of discovery likely at issue, shortening the discovery response time to ten days would prove unduly burdensome to the Companies.

As authority, the Joint Intervenors seek to rely on a recent ruling in the ESP proceeding of Duke Energy Ohio, Inc. ("Duke"), Case No. 14-841-EL-SSO, in which the Attorney Examiner shortened the discovery response time to ten days. That ruling is inapposite to the instant matter. In Case No. 14-841-EL-SSO, Duke filed its ESP application on May 29, 2014 and the hearing date was set for September 8, 2014, 102 days after the filing of Duke's application. Case No. 14-841-EL-SSO, Entry at 1-2 (June 6, 2014). In contrast, in the instant proceeding there is 170 days from the filing of the Companies' Application to the commencement date of the hearing. This is in excess of an additional two month differential between the procedural schedule in Duke's proceeding and that adopted here. Given such an expanded timeframe, the Joint Intervenors' reliance on the Entry in Duke's ESP proceeding is misplaced. Here, as in Ohio Power

Company's ESP proceeding, the Joint Intervenors "have failed to show good cause for their request for expedited discovery in these proceedings." Case No. 13-2385-EL-SSO, Entry at 2 (Feb. 6, 2014).

B. There Is No Need To Amend The Procedural Schedule In The Instant Proceeding.

1. The current due date for intervenor testimony does not create a hardship for the Joint Intervenors.

In their motion, the Joint Intervenors argue that keeping the discovery cutoff date at December 1, 2014, and the due date for intervenor testimony at December 5, 2014, "creates a specific hardship for intervenors" ostensibly because the testimony due date occurs "only four days" after the discovery cutoff date. Joint Motion at 8. This putative claim, however, would only carry any weight if the current procedural schedule did not already allow ample time for discovery. As noted above, however, the current procedural schedule provides all intervenors in the instant proceeding the opportunity to conduct several rounds of discovery prior to the current due date for intervenor testimony. Indeed, in Case No. 13-2385-EL-SSO, intervenor testimony was due four days after the discovery cutoff date, just as it is here under the current procedural schedule. *See* Case No. 13-2385-EL-SSO, Entry at 1 (Jan. 24, 2014). In that case, the discovery cutoff date was May 2, 2014 and intevenor testimony was due on May 6, 2014. *See id*. There is thus no need to extend this due date as the Joint Intervenors have proposed and the current due date by no means imposes any sort of "specific hardship." Further, discovery responses received after the intervenor testimony filing date is still valuable for purposes of depositions and use at hearings. Thus, Joint Intervenors suggestion that the discovery cut-off date is in effect November 14, 2014 under the approved procedural schedule is simply wrong.

2. The Joint Intervenors have ample time to access protected materials once they execute a protective agreement.

The Joint Intervenors also argue that an extension of the current procedural schedule is necessary because the "Companies redacted crucial portions of their ESP application." Joint Motion at 11. This argument fails to get off the ground. The Companies did file a very limited portion of their Application under seal and sought protection for the same because those portions of the Application contained highly competitively sensitive confidential information (the "Protected Materials"). Nonetheless, the Protected Materials only comprised a small portion of the Companies' Application.

Further, the Companies have readily provided a protective agreement to those intervenors who have requested one in order that any intervenor may have access to the Protected Materials once the protection thereof is assured. Indeed, the Companies have already entered into protective agreements with several intervenors who have, in turn, acquired access to the Protected Materials. The Companies are ready and willing to work with any of the Joint Intervenors to do the same. Further, given that the discovery cutoff date is 118 days after the Companies filed their Application and the hearing does not commence until 170 days after the Companies filed their Application, the Joint Intervenors have more than ample time to review the Protected Materials filed with the Companies' Application on August 4, 2014. Any contention otherwise is baseless.

3. The current procedural schedule provides ample time for settlement discussions.

In their motion, the Joint Intervenors claim that amending the procedural schedule "will also provide increased opportunity for more meaningful settlement discussions should they occur." Joint Motion at 11. This contention, however, is unfounded given the 170-day timeframe from the filing of the Companies' Application to the commencement date of the

hearing. The current procedural schedule thus provides approximately six months within which the Companies, Staff and any intervenors can engage in settlement discussions prior to hearing. This is clearly a more than sufficient time period in which to pursue settlement discussions; no further amplification is necessary. The Joint Intervenors' claim otherwise is thus meritless.

4. Extending the date for the commencement of the hearing will run up against the 275-day statutory deadline and undermine the Companies' ability to participate in the May 2015 PJM Base Residual Auction.

Pursuant to Section 4928.143(C)(1) of the Ohio Revised Code, the Commission must render a decision in an electric distribution utility's ESP application within 275 days of the filing of that application. *See* R.C. 4928.143(C)(1). Here, the time period from the filing of the Companies' Application on August 4, 2014 to the current commencement of the hearing date on January 20, 2015 is 170 days. The current procedural schedule thus leaves sufficient time for a hearing that could last several days, post-hearing briefing that could take several weeks, and for the Commission to reach a reasoned decision based on the evidence before it. Extending the procedural schedule any further could lead to the current proceeding conflicting with the 275-day statutory window.

Further, as indicated in their Application, the Companies have requested that the Commission render a decision no later than April 8, 2015 in order for the Companies to be able to meaningfully participate in the PJM Base Residual Auction scheduled for May 2015. *See* Application at 22. Extending the procedural schedule from its currently approved dates could well place the Companies' ability to participate in the PJM Base Residual Auction in jeopardy. Thus, for the aforementioned reasons the current procedural schedule should remain in place.

IV. CONCLUSION

For the foregoing reasons, the Attorney Examiner should deny the Joint Motion and maintain the current procedural schedule and discovery response period.

Date: September 22, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on September 22, 2014.

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Summary: Memorandum Contra Intervenors' Joint Motion to Modify Discovery Time Limits and Amend the Procedural Schedule electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company