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 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**

REPLY OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S JOINT MEMORANDUM CONTRA MOTION TO AMEND THE PROCEDURAL SCHEDULE

I. INTRODUCTION

On November 5, 2014, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies"), filed their Motion to Amend the Procedural Schedule (the "Motion to Amend"). In their Motion, the Companies sought to change the date of the prehearing conference, from January 9, 2015 to January 16, 2015, and the commencement date of the hearing, from January 20, 2015 to January 28, 2015. As demonstrated in their Motion, the Companies have good cause for this request. As currently scheduled, there are only 29 days from the due date for intervenor testimony to the commencement date of the hearing.

Given that there are over fifty intervenors in this proceeding, and the upcoming Christmas and New Year's holidays, there is simply not enough time to review intervenor testimony and schedule and take depositions prior to the hearing under the current procedural schedule. Indeed, no intervenors were willing to commit to depositions over the holidays. The Companies' proposed schedule also still enables the Commission to issue a decision prior to the

PJM Base Residual Auction ("BRA") scheduled for May 2015. Further, as demonstrated below, the Companies' proposal does not prejudice any party to this proceeding and best balances the interests of the Commission, Staff, the Companies and the Intervenors.

In their Joint Motion to Strike, Joint Memoranda Contra, and Joint Motion for a Prehearing Conference (the "Joint Memorandum Contra"), the Northeast Ohio Public Energy Council ("NOPEC"), and the Office of the Ohio Consumers' Counsel ("OCC") (collectively, the "Joint Intervenors") make a number of misrepresentations regarding the Companies' Motion to Amend. For example, the Joint Intervenors falsely claim that the "intent" of the Motion to Amend is to "prejudice" the Joint Intervenors and that the Motion to Amend is some sort of apparent ruse by the Companies to obfuscate the discovery process. Joint Motion at 5; 6. As demonstrated below, these untoward claims are meritless.

At the same time, the Joint Intervenors seek to game the schedule by ignoring the potential number of intervenor witnesses (and thus the time needed for their depositions) or the legitimate concerns for assuring that there is adequate time between the Commission's decision here and the May 2015 PJM BRA. Simply put, the Joint Intervenors' suggestion that the discovery cutoff date be extended by a week and the due date for intervenor testimony be extended by eight days does nothing more than recreate the problem which the Companies seek to resolve in their Motion to Amend; their suggestion would truncate the time between intervenor testimony and the hearing. The Joint Intervenors also conveniently ignore the fact that the due date for intervenor testimony has already been extended once, by 17 days, in this proceeding. Thus, as demonstrated below, the Attorney Examiner should grant the Companies' requested amendment to the procedural schedule and reject the proposal by the Joint Intervenors.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

The procedural schedule originally approved for this proceeding was as follows:

- Discovery cutoff: December 1, 2014
- Due date for intervenor testimony: December 5, 2014
- Due date for Staff testimony: December 19, 2014
- Prehearing conference: January 9, 2015
- Hearing commencement date: January 20, 2015

See Case No. 14-1297-EL-SSO, Entry at 2 (Aug. 29, 2014). This schedule provided 46 days from the due date for intervenor testimony to the commencement of the hearing. Further, by setting the commencement date of the hearing for January 20, 2015, this schedule afforded the Commission sufficient time within which to render a decision on the Companies' Application prior to the May 2015 PJM BRA.

On September 5, 2014, several intervenors moved to alter the schedule and shorten the time for discovery of their witnesses. *See* Case No. 14-1297-EL-SSO, Joint Motion to Modify Discovery Time Limits and Amend the Procedural Schedule (Sept. 5, 2014). In an Entry dated October 6, 2014, the Attorney Examiner changed the due date for intervenor testimony to December 22, 2014, an extension of seventeen days. Thus, pursuant to the October 6 Entry, the current procedural schedule for this proceeding is as follows:

- Discovery cutoff: December 1, 2014
- Due date for intervenor testimony: December 22, 2014
- Due date for Staff testimony: January 9, 2014
- Prehearing conference: January 9, 2015[1]
- Hearing commencement date: January 20, 2015

[1] As the Companies indicated in the Motion, scheduling the due date for Staff testimony and the prehearing conference on the same day means that it will not be possible for any party to this proceeding, Staff, the Companies, or the intervenors, as well as the Attorney Examiners, to review Staff's testimony prior to the prehearing conference. *See* Mot. at 2-3. The Companies' Motion to Amend resolves this issue as well.

See id. at 5. In light of the extension granted to the intervenors regarding the due date for their testimony, the current schedule, on paper, provides only 29 days between the filing of intervenor testimony and the commencement date for the hearing. Given the holidays, the current schedule realistically only provides less than 10 business days, in which to review testimony from, as well as schedule and take depositions from intervenor witnesses—a very difficult task because there are in excess of fifty intervenors in the instant proceeding. *See* Case No. 14-1297-EL-SSO, Docket. The current schedule also sets the due date for Staff testimony and the date for the prehearing conference on the same day, January 9, 2015.

III. ARGUMENT

A. The Companies' Proposed Amendment To The Procedural Schedule Is Reasonable And Properly Balances The Interests Of All Parties To This Proceeding, Including Those Of Staff And The Commission.

Given that there are over fifty intervenors to this proceeding, combined with the upcoming holidays, the current procedural schedule is unduly burdensome. As noted, it provides less than 10 business days in which the Companies will need to review intervenor and Staff testimony, schedule and take possibly dozens of depositions prior to the hearing. As such, the Companies' proposal in their Motion to Amend makes sense. The Companies merely seek a one week continuance of the prehearing conference and the hearing, moving those dates to January 16, 2015 and January 28, 2015, respectively.

Moving these dates back by approximately one week has numerous advantages. First, it enables all interested parties and the Commission to review Staff testimony prior to the prehearing conference. Second, in providing more time from the due date for intervenor testimony to the commencement date of the hearing, it affords the Companies sufficient time to review intervenor testimony, and schedule and take depositions of intervenor witnesses, notwithstanding the holidays. Third, it provides the Commission adequate time to issue a

decision sufficiently in advance of the PJM BRA. Fourth, the Companies' proposal does not prejudice any party while fairly balancing the interests of the Commission, Staff, the Companies and the intervenors. As such, the Companies' modest proposal should be approved without delay.

Further, the Commission decisions cited by the Companies in their Motion to Amend strongly favor the Companies here. Each of these decisions stands for the proposition that moving a hearing date is permissible in order to afford a party sufficient time to prepare for that hearing. *See generally, In the Matter of Columbus Southern Power Company*, Case No. 09-872-EL-UNC, 2010 Ohio PUC LEXIS 1296 (Dec. 3, 2010); *In the Matter of the Application of Ohio Edison Company*, Case No. 10-176-EL-ATA, 2010 Ohio PUC LEXIS 1211 (Nov, 12, 2010); *In the Matter of the Application of Commerce Energy, Inc. d/b/a Just Energy*, Case No. 02-1828-GA-CRS, 2010 Ohio PUC LEXIS 1025 (Oct. 7, 2010); *In the Matter of the Application of Duke Energy Ohio*, Case No. 10-1268-EL-RDR, 2010 Ohio PUC LEXIS 991 (Sept. 29, 2010).

B. The Joint Intervenors' Proposal Only Works To Their Benefit And To The Detriment of Others.

In contrast, the proposal contained in the Joint Intervenors' Joint Memorandum Contra benefits no one but the intervenors in this case. It does nothing more than reinstate the problem the Companies seek to address in their Motion to Amend while providing the Joint Intervenors with a second, and wholly unwarranted, extension of the due date for intervenor testimony. Complicating matters, the Joint Intervenors' Joint Memorandum is littered with falsehoods and misrepresentations (as well as being devoid of any authority whatsoever), to wit:

- **"Despite [the Companies] continuing failure to comply with the Joint Movants' discovery requests, FirstEnergy has not proposed extending the Discovery Cutoff Date or the Intervenor Testimony Due Date." Joint Motion at 5.**

Not true. The Companies have appropriately complied with all of the Joint Intervenors' discovery requests. As shown in the Companies' Memorandum Contra NOPEC and OCC's Joint Motion to Compel, the Joint Intervenors seek to have the Commission order the Companies to provide the Joint Intervenors with essentially unfettered access to highly competitively sensitive information (the "Proprietary Data") belonging to FirstEnergy Solutions Corp. ("FES"). *See* Companies' Memo. Contra Joint Motion to Compel at 1-2. In truth, the problem lies with the Joint Intervenors who have consistently refused to enter into a reasonable protective agreement with the Companies that both: (a) safeguards the Proprietary Data; and (b) provides full access to the Proprietary Data and allows for full participation in this proceeding by any intervenor. *Id.* at 4-6. Indeed, numerous intervenors have already entered into a form of such a protective agreement with the Companies and have had full access to the Proprietary Data for a period of months.

As further demonstrated by the Companies in their Memorandum Contra the Joint Intervenors' Joint Motion to Compel, the Companies have gone to great lengths in their repeated attempts to reach an accommodation with both NOPEC and OCC, but to no avail. OCC has consistently refused to provide a reason as to why it will not enter into the Companies' proposed protective agreement (even after the Companies added several provisions requested by OCC). *See id.* at 7-10; 20-21. NOPEC has consistently refused to acknowledge that its customer status as related to FES understandably would give considerable pause about providing NOPEC with full access to the Proprietary Data in the absence of a suitable protective agreement. *See id.* at 6-7; 10-12; 17-20. NOPEC has further misled the Commission regarding its very close

relationship with its affiliate NOPEC, Inc., a registered CRES provider and direct competitor of FES. *See id.* at 6-7; 17-20. Thus, the Joint Intervenors have only themselves to blame regarding their alleged inability to conduct discovery.

Moreover, the Joint Intervenors conveniently ignore two pertinent facts: (1) the Joint Intervenors' proposal to move the discovery cutoff date back one week and the due date for intervenor testimony back to December 30, 2014, the day before New Year's Eve, simply reinstates the problem the Companies seek to solve with their Motion to Amend; and (2) the Joint Intervenors, as well as every other intervenor to this proceeding, have already received a 17 day extension of the due date for intervenor testimony.[2] Setting a due date for intervenor testimony of December 30, 2014 leaves very little time until the commencement date of the hearing. Again, this time frame will be further reduced by the holidays. The Companies thus would once again be left with too little time to review intervenor testimony as well as schedule and take numerous depositions of witnesses sponsored by whichever of the over fifty intervenors offers testimony. Further, the Joint Intervenors also ignore the need for the Commission to issue a decision by April 8 in time to plan for the PJM BRA in May 2015. In a nutshell, the Joint Intervenors' proposal serves no one's interests but their own, while undermining the interests of others.

[2] The intervenors, under the current schedule, have 140 days, or nearly five months (August 4 through December 22), to conduct discovery and prepare testimony without any further extensions.

- **"Considering FirstEnergy's admission that it will not conduct depositions until after January 5, 2015, extending the Discovery Cutoff Date to December 8, 2014 and the Intervenor Testimony Due Date to December 30, 2014, will have absolutely no effect on FirstEnergy's ability to conduct depositions after January 5, 2015." Joint Motion at 6.**

Not true. The Companies have never "admitted" that they will not conduct depositions until after January 5, 2015. To the contrary, it was certain intervenors who were unwilling to commit to make their witnesses available for deposition through the holiday period. The Companies' Motion to Amend simply recognizes the fact that it will be very difficult to conduct depositions during the holiday period – far from any sort of "admission" to say the least. Further, as noted, the Companies need time to review testimony from possibly over fifty intervenors. This matter presents the Companies with a potentially unprecedented amount of intervenor testimony to which they must respond. Thus, even if no depositions take place between the holidays, the Companies will be able to use that time to review the intervenor testimony, determine which witnesses they need to depose and conduct depositions. This time will allow the deposition process, which will still be quite compressed, to proceed expeditiously. Moving the discovery cutoff date and the due date for intervenor testimony, as the Joint Intervenors propose, will unduly burden the Companies.

- **"It is apparent that FirstEnergy's intent in refusing to agree to an extension of the Discovery Cutoff Date and the Intervenor Testimony Due Date is to prejudice Joint Movants' (and perhaps other parties') preparation for hearing, particularly considering its refusal to comply with their discovery requests." Joint Motion at 6.**

Not true. The Companies have done nothing to prejudice the Joint Intervenors or, for that matter, any other party to this proceeding. Indeed, in light of the Companies' modest procedural proposal, this claim is simply preposterous. What is "apparent," however, is that the Joint Intervenors' proposal is wholly self-serving and ignores the undue burden it places on both the Companies (to review testimony, and schedule and conduct depositions) and the Commission (to

issue an Opinion and Order prior to preparation for the May 2015 PJM BRA). Further, as noted, any difficulties the Joint Intervenors are experiencing with the discovery process are decidedly self-wrought. On this score, the Joint Intervenors have no one to blame but themselves.

- **"Apparently, considering the significant length of time between the Prehearing Conference Date and the Hearing Commencement Date, FirstEnergy may intend to use the time for purposes of settlement. That amount of time is excessive." Joint Motion at 6.**

Not true. The length of time between the Companies' proposed date of the prehearing conference and the commencement date of the hearing, 12 days, is hardly "excessive." In their Motion to Amend, the Companies simply seek to move the prehearing conference date back one week because the due date for Staff testimony and the date of the prehearing conference are currently scheduled for *the same day*. The Companies are not trying to carve out "excessive" time for settlement or anything else. Rather, the Companies' proposal simply attempts to balance fairly the interests of all parties to this proceeding, including Staff and the Commission. On the other hand, Joint Intervenors provide no reason why the Staff's testimony due date or the Prehearing Conference should be moved – other than Joint Intervenors want it. Clearly, moving the date of the prehearing conference back by one week so that all parties and the Commission have a chance to review Staff's testimony prior to the prehearing conference makes imminent sense.

C. There Is No Need To Schedule A Prehearing Conference On This Matter.

The Joint Intervenors have also requested that the Attorney Examiner schedule a prehearing conference to address this matter. *See* Joint Motion at 7. Given the modest nature of the Companies' proposal, there is no need to burden the Commission, or other parties to this proceeding, with a prehearing conference on this matter. The Joint Intervenors miss the mark here as well.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the Companies' Motion to Amend the Procedural Schedule and deny the procedural proposal set forth in the Joint Intervenors' Memorandum Contra.

Date: November 21, 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 November 21, 2014.

/s/ David A. Kutik
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Summary: Reply of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to The Office of The Ohio Consumers' Counsel and Northeast Ohio Public Energy Council's Joint Memorandum Contra Motion to Amend the Procedural Schedule electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company