

**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	)	Case No. 14-1297-EL-SSO
Authority to Provide for a Standard Service	)	
Offer Pursuant to R.C. 4928.143 in the Form of	)	
an Electric Security Plan.	)	

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**REPLY OF BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS,  
CONSTELLATION NEWENERGY INC.,  
ELECTRIC POWER SUPPLY ASSOCIATION,  
ENVIRONMENTAL DEFENSE FUND,  
ENVIRONMENTAL LAW AND POLICY CENTER,  
EXELON GENERATION COMPANY LLC,  
INTERSTATE GAS SUPPLY, INC.,  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL,  
OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS DBA POWER4SCHOOLS,  
OHIO CONSUMERS' COUNSEL, OHIO ENVIRONMENTAL COUNCIL,  
OHIO HOSPITAL ASSOCIATION,  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP,  
OHIO SCHOOL BOARDS ASSOCIATION,  
OHIO SCHOOLS COUNCIL,  
PJM POWER PROVIDERS GROUP,  
RETAIL ENERGY SUPPLY ASSOCIATION  
AND  
SIERRA CLUB  
IN SUPPORT OF JOINT MOTIONS TO REOPEN THE HEARING RECORD AND TO  
ESTABLISH A PROCEDURAL SCHEDULE**

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**I. INTRODUCTION**

On December 2, 2015, the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, "FirstEnergy") filed a Memorandum Contra the December 1, 2015 Motion by Buckeye Association of School Administrators, Constellation NewEnergy Inc., the Electric Power Supply Association, Exelon Generation Company LLC, Interstate Gas Supply, Inc., Northeast Ohio Public Energy Council, Ohio

Association of School Business Officials, Ohio Consumers' Counsel, Ohio Hospital Association, Ohio Manufacturers' Association Energy Group, Ohio School Boards Association, Ohio Schools Council, PJM Power Providers Group, Retail Energy Supply Association, and Sierra Club (collectively, "Joint Movants"). The Joint Movants represent a wide array of residential and commercial customers, power providers, marketers, and organizations that will be impacted by the outcome of this proceeding and that impact could be felt for the next eight years.

The Joint Movants requested that the Public Utilities Commission of Ohio ("Commission") reopen the record in this proceeding and set a procedural schedule allowing adequate discovery and hearing in response to a new Third Supplemental Stipulation filed on December 1, 2015.<sup>1</sup>

The Commission should grant that Motion so that it has before it adequate information upon which to base its decision in this precedential case where billions of dollars could be charged to FirstEnergy customers. Joint Movants have shown good cause for granting their Motion, which proposes a reasonable procedural schedule which will not unduly delay the PUCO's consideration of this matter.

## **II. ARGUMENT**

The Third Supplemental Stipulation is 21 pages long, including 11 full pages of substantive provisions that contain wholly new or greatly expanded subject areas such as renewable energy, grid modernization, energy efficiency and carbon reduction planning, and potential alterations to FirstEnergy's base distribution rates. Even the extensions of previously contemplated Electric Security Plan ("ESP") provisions such as the Delivery Capital Recovery

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<sup>1</sup> The Environmental Law & Policy Center, Ohio Environmental Council, and Environmental Defense Fund ("Environmental Intervenors") filed a separate motion to set a procedural schedule on December 2, 2015. The Environmental Intervenors join the Joint Movants in opposing the schedule proposed by FirstEnergy, but reserve the right to file a separate reply in the event that FirstEnergy files an additional memorandum contra the Environmental Intervenors' Motion that raises independent issues.

(“DCR”) rider raise new questions regarding the basis for determining whether such an extension is appropriate.<sup>2</sup> The Stipulation would extend the ESP by another five years, setting a wide variety of such rates for customers (including riders and non-bypassable charges) through May 31, 2024.

FirstEnergy argues that the Commission should reject Joint Movants’ proposed schedule for consideration of these weighty issues and instead adopt a truncated schedule that deprives the parties of any ability to conduct written discovery, gives intervenors just over a week to prepare opposing testimony, and provides for a hearing to be held in just two weeks. Memorandum Contra Joint Motion to Reopen the Hearing Record and to Establish a Procedural Schedule (Dec. 2, 2015) at 9. FirstEnergy’s proposed schedule is patently inadequate for consideration of an Electric Security Plan that could cost customers billions of dollars over the next eight years and have wide-ranging impacts on the electricity market in Ohio and the larger region. FirstEnergy’s sudden desire would unreasonably constrict the presentation of evidence – evidence that the Commission needs in order to determine whether the new Stipulation is reasonable, is in the public interest, and complies with Ohio law.

**A. An Extension of the Schedule Consistent with Joint Movants’ Proposal Is Necessary and Consistent With Commission Precedent, Including Prior Decisions in This Case.**

FirstEnergy claims that the Third Supplemental Stipulation contains little new material necessitating additional discovery and only provides for future Commission proceedings on any new issues. Memorandum Contra at 5-6. Yet the Stipulation itself touts items such as “ground-breaking efforts” to implement grid modernization as well as provisions to promote “carbon

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<sup>2</sup> The Third Supplemental Stipulation provides in Section V.K. that Rider DCR as well as Rider RRS will continue even if the ESP is terminated under the fourth-year review required under R.C. 4928.143(E).

reduction . . . [and] renewed support for energy efficiency and renewable resources in Ohio.”

Third Supplemental Stipulation at 3. Moreover, FirstEnergy cannot dispute that the Stipulation, if approved by the Commission, would lock in certain decisions for the next eight years such as: the profits (return on equity) customers must pay for grid modernization efforts; the guaranteed shared savings customers must pay for energy-efficiency programs, at more than double the levels in the past; the collections from customers for lost distribution revenues; customer-funded low-income programs that are not competitively bid; and significant, automatic increases in the amounts customers could be charged to fund distribution investment under Rider DCR over the next eight years. *Id.* at 10, 11-12, 13, 17. Either these new provisions are meaningful, in which case a schedule permitting written discovery and deliberately prepared testimony regarding their merits is warranted, or they are mere window dressing that can be dealt with in the single one-day deposition proposed by FirstEnergy because they have no real substance. FirstEnergy cannot have it both ways.

The Commission need look no further than the docket in this case for precedent for extending the schedule and allowing sufficient time for discovery and preparation of intervenor testimony regarding these issues. When FirstEnergy filed its three prior stipulations, in each case the Commission permitted additional written discovery and intervenor testimony on a reasonable timeline. *See* Entry (Jan. 14, 2015); Entry (Feb. 4, 2015); Entry (July 2, 2015). The same treatment is appropriate here. Simply because FirstEnergy failed to file the latest stipulation before the hearing does not mean that the Commission should consider that stipulation without adequate evidence and analysis regarding its consequences for Ohio ratepayers.

FirstEnergy’s suggestion that a single day of deposition and less than two weeks to prepare intervenor testimony will suffice to provide such evidence fails to account for the

significant new provisions contained in the Third Supplemental Stipulation. In particular, analysis of issues such as the potential cost to customers of an eight-year PPA, an increase in distribution funding (through Rider DCR) or the basis for the customer-funded profits (in the form of returns on equity or shared savings) guaranteed by the stipulation require factual information that the parties can obtain only through written discovery and document requests, not through ad hoc testimony by one witness who may not have any detailed knowledge of those matters. Likewise, intervenors must have the ability to obtain and analyze such discovery if they are to provide testimony that will adequately assist the Commission in determining whether the Stipulation is in the public interest and complies with Ohio law. This is especially true because Joint Movants were not privy to the closed-door settlement discussions between FirstEnergy and Commission Staff that produced the Third Supplemental Stipulation's framework.

FirstEnergy's reliance on cases where the Commission purportedly did not establish a period for written discovery regarding a newly filed stipulation is misplaced at best. Memorandum Contra at 4-5. The first case cited by FirstEnergy involved an *unopposed* stipulation in which there were no parties who would serve written discovery requests, and all testimony filed was in support of the stipulation. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-3549-EL-SSO *et al.*, Opinion and Order (Nov. 22, 2011) at 5. Case No. 11-4393-EL-RDR, meanwhile, involved reopening of the docket solely to address procedural questions regarding the Commission's review of proposed energy efficiency programs and an associated cost recovery mechanism, not any factual issue that would necessitate written discovery from a party. *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and*

*for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry at 1-2 (Mar. 21, 2012). With respect to *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, FirstEnergy's citation to the September 16, 2011 Entry from that case stops two pages too short. See Memorandum Contra at 4. Pages 5 and 6 of that Entry provide a timeline for additional written discovery in the proceeding. See also Case No. 11-346-EL-SSO, Entry (Sept. 23, 2011) at 3 (clarifying that response time for additional discovery requests is five days). In Case No. 14-158-EL-ATA, similarly, the sole party opposing the stipulation did in fact request the production of a number of relevant documents in conjunction with notices of deposition. *In the Matter of the Application of Ohio Power Company for Approval of an Advanced Meter Opt-Out Service Tariff*, Case No. 14-158-EL-ATA, Notice to Take Depositions and Requests for Production of Documents by the Office of the Ohio Consumers' Counsel (Apr. 24, 2015). Finally, the reference to a lack of discovery after submission of additional analysis by Commission Staff in *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 10-388-EL-SSO, Entry on Rehearing at 9 (May 13, 2010), is simply irrelevant since that case involved Staff analysis of an existing stipulation, rather than a new stipulation with new substantive provisions.

**B. The Great Need for a Full and Complete Evidentiary Record Must Override FirstEnergy's Belated Alarm About Delays in the Case Schedule.**

FirstEnergy's asserted concern about expediting this proceeding is belied by the fact that the Third Supplemental Stipulation was not filed until December 1, 2015. Even the settlement

discussions amongst the full set of parties to the case that resulted in this Stipulation did not begin until after November 18, 2015. Those confidential settlement discussions certainly do not provide a substitute for formal discovery (including written discovery)<sup>3</sup> that can be used as evidence for the Commission's consideration. Indeed, it is virtually certain that FirstEnergy will claim that any information discussed or provided during the settlement negotiations cannot be used in the evidentiary hearing to follow.

Moreover, most of the prior delays in this case have resulted from FirstEnergy's own filing of previous stipulations that necessitated extensions of the discovery and hearing schedule. *See* Entry (Jan. 14, 2015) (extending schedule after filing of December 22, 2014 Stipulation); Entry (Feb. 4, 2015) (further extending schedule at request of Commission Staff to allow adequate analysis of Stipulation); Entry (May 29, 2015) (delaying hearing to allow analysis of May 28, 2015 Supplemental Stipulation); Entry (July 2, 2015) (extending schedule in light of filing of the Supplemental Stipulation and June 4, 2015 Second Supplemental Stipulations). It is FirstEnergy that has driven the schedule to the point it is at now, yet FirstEnergy asks that intervening parties suffer the consequences by being deprived of any chance at written discovery or anything beyond a minimal opportunity to prepare testimony in opposition to the Third Supplemental Stipulation.

Meanwhile, FirstEnergy has failed to explain why the Standard Service Offer ("SSO") auction preparations outlined in its Memorandum Contra cannot proceed at least in large part while the ESP application is pending. No party conducted any cross-examination of FirstEnergy

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<sup>3</sup> FirstEnergy asks that there be no written discovery. Instead it proposes to allow Witness Mikkelsen to be deposed. Constricting intervenors to a certain form of discovery is inconsistent with PUCO rules and law. *See* R.C. 4903.082; Ohio Adm. Code 4901:1-16. It also encourages gamesmanship at the deposition in order to exhaust the brief time allotted for intervenors to seek answers to a host of questions regarding factually complex and vitally important issues.

Witness Miller regarding the proposed auction structure, Tr. III at 697-698, and that issue appears to be completely uncontested in this case. In this context, it is unclear why FirstEnergy would think that moving ahead with the SSO auction process now in preparation for approval of its ESP is unwise. And under Joint Movants' proposed schedule, the Commission could well decide these cases before FirstEnergy's proposed auction date of April 4, 2016. Moreover, FirstEnergy does not explain why that April 4 date is inviolable; notably, Ohio Power Company did not hold the first two auctions for its SSO starting on June 1, 2015 until April 28 and May 12 of that year. *In the Matter of the Procurement of Standard Service Offer Generation for the Customers of Ohio Power Company*, Case No. 15-792-EL-UNC, Finding and Order (May 13, 2015) at 1-2; Finding and Order (Apr. 29, 2015) at 1-2. At worst, the Commission may certainly provide guidance to FirstEnergy as to how to conduct its SSO auctions if this case has not been decided by the expiration of the current ESP, as in the Opinion and Order in Duke's most recent ESP case. *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO *et al.*, Opinion and Order (Apr. 2, 2015) at 51 ("If a subsequent SSO is not authorized by the Commission by April 1, 2018, Duke shall procure, through the CBP process, 100 tranches of a full-requirements product for a term that is not less than quarterly or more than annually to be deliverable on June 1, 2018, until a subsequent SSO is authorized."). This issue is not a sufficient reason to prevent intervening parties from eliciting an adequate factual record regarding the Third Supplemental Stipulation so that the Commission is able to fully assess its merits.



### III. CONCLUSION

The Commission is now faced with a Third Supplemental Stipulation filed with little notice to many parties, after discovery and the hearing in this case have concluded. The Stipulation presents substantial new provisions regarding an ESP that already has potentially immense impacts on FirstEnergy customers. Approving this settlement package without sufficient time for opposing parties to develop an adequate record regarding its merits would be unreasonable and unnecessary. It would deprive the Commission of adequate information upon which to base its decision in this precedential case where billions of dollars are at stake. Accordingly, the Commission should reject FirstEnergy's proposed schedule and instead grant the reasonable schedule requested by either the Joint Movants or the Environmental Intervenors.

Date: December 3, 2015

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio e-filing system will electronically serve notice of the filing of the public version of this document on the parties referenced in the service list of the docket card who have electronically subscribed to this case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served upon the persons below via electronic mail on December 3, 2015.

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Summary: Reply Reply in Support of Joint Motions to Reopen the Hearing Record and to Establish a Procedural Schedule electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center and Ohio Environmental Council and Environmental Defense Fund and Buckeye Association of School Administrators and Constellation NewEnergy, Inc. and Electric Power Supply Association and Exelon Generation Company LLC and Interstate Gas Supply, Inc. and Northeast Ohio Public Energy Council and Ohio Association of School Business Officials and Ohio Consumers' Counsel and Ohio Hospital Association and Ohio Manufacturers' Association Energy Group and Ohio School Boards Association and Ohio Schools Council and PJM Power Providers Group and Retail Energy Supply Association and Sierra Club