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**

JOINT INTERLOCUTORY APPEAL AND JOINT REQUEST FOR CERTIFICATION OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Rule 4901-1-15, Ohio Administrative Code, the PJM Power Providers Group ("P3") and the Electric Power Supply Association ("EPSA") jointly seek an interlocutory appeal to the procedural ruling issued in this case on June 3, 2016, by the attorney examiners and jointly seek certification thereof. The June 3rd Entry terminated a previously granted stay of discovery, and ruled that a hearing should be held on rehearing, established the scope of the hearing and established a procedural schedule. The Public Utilities Commission of Ohio ("Commission") itself, however, has not first made the determinations required by Ohio Revised Code Section 4903.10 in order for further hearings to take place on rehearing, nor has it found that it has the necessary jurisdiction to consider the only issue identified in the attorney examiners' Entry as the sole issue for further hearing on rehearing – the new Retail Rate Stability Rider ("Rider RRS") proposal. The attorney examiners are not empowered to find that further hearing should be held on rehearing or to determine the scope.

As parties who are adversely affected by the attorney examiners' Entry, P3[1] and EPSA[2] file this joint interlocutory appeal and joint request for certification, asking for an immediate Commission determination to prevent undue prejudice or expense. As explained more fully in the attached memorandum in support of the joint interlocutory appeal and joint request for certification, the Entry is unreasonable and unlawful. As a result, the Commission should vacate the attorney examiners' determination that a hearing shall be held on the new Rider RRS proposal and vacate the Entry's procedural schedule.

Respectfully submitted,

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[1] P3 is a non-profit organization whose members are energy providers in the PJM Interconnection LLC ("PJM") region, conduct business in the PJM balancing authority area, and are signatories to various PJM agreements. Altogether, P3 members own over 84,000 megawatts ("MWs") of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region, representing 13 states and the District of Columbia. This joint interlocutory appeal and joint request for certification do not necessarily reflect the specific views of any particular member of P3 with respect to any argument or issue, but collectively present P3's positions.

[2] EPSA is a national trade association representing leading competitive power suppliers, including generators and marketers. Competitive suppliers, which collectively account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers. This joint interlocutory appeal and joint request for certification do not necessarily reflect the specific views of any particular member of EPSA with respect to any argument or issue, but collectively present EPSA's positions.

MEMORANDUM IN SUPPORT OF JOINT INTERLOCUTORY APPEAL AND JOINT REQUEST FOR CERTIFICATION OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

I. INTRODUCTION

The attorney examiners' June 3rd Entry in this case should be reversed for two reasons. First, the attorney examiners cannot assert jurisdiction over FirstEnergy's new Rider RRS proposal until the Commission rules on whether FirstEnergy's failure to include its new proposal in its application for rehearing prevents the Commission from hearing the proposal on rehearing. Second, only the Commission (and not the attorney examiners) can grant rehearing and set the scope of rehearing, including the evidence to be taken on the new Rider RRS proposal. The attorney examiners, however, ordered that a hearing on the new Rider RRS proposal take place and set a procedural schedule. Those actions were taken without the requisite authority of a preceding Commission order, are contrary to the Commission's governing rehearing statute, and present a new or novel question of interpretation, law, or policy, all of which require immediate Commission determination to prevent undue prejudice or expense. As a result, the P3/EPSA interlocutory appeal should be certified to the Commission and the Commission should vacate the Entry as to the Rider RRS procedural schedule.

II. STANDARD OF REVIEW

Ohio Administrative Code Rule ("Rule") 4901-1-15(B) allows an adversely affected party to take an interlocutory appeal to the Commission of procedural rulings or rulings issued during a hearing or prehearing conference. An interlocutory appeal in this instance must first be certified to the Commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. Rule 4901-1-15(B). The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds:

(a) The appeal presents a new or novel question of interpretation, law, or policy; or

(b) The appeal is taken from a ruling which represents a departure from past precedent and an immediate Commission determination is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question.

III. RELEVANT BACKGROUND

A. The June 3, 2016 attorney examiners' Entry ordered rehearing on the new Rider RRS proposal without a preceding Commission Entry.

By way of background, the Commission reopened discovery by Entry on Rehearing issued on May 11, 2016, after the Commission granted all applications for rehearing solely for "further consideration of matters specified in the applications for rehearing." P3/EPSA filed a motion to stay discovery given the significant jurisdictional rulings that the Commission had not yet made. The attorney examiners stayed discovery pending filing of memoranda contra to P3/EPSA's motion for a stay.

On Friday, June 3, 2016, the attorney examiners issued the Entry lifting the stay. The attorney examiners not only lifted the stay, but at paragraph 15 of the Entry determined that a hearing should be held on the new Rider RRS proposal and that the scope of the hearing would be limited to only the "provisions of, and alternatives to" the new Rider RRS proposal. The Entry clearly indicates that the attorney examiners (and not the Commission) decided to hold an evidentiary hearing as the Entry states at paragraph 16 that "in light of the decision to hold an evidentiary hearing regarding the provisions of the Modified RRS proposal contained in FirstEnergy's application for rehearing, the stay of discovery is hereby terminated in order to provide parties the ability to conduct discovery in anticipation of the forthcoming hearing."

The attorney examiners then set a procedural schedule that required intervenors to file testimony by June 22 (16 days from Monday, June 6) and a discovery cutoff by July 1 with a

hearing to be held Monday, July 11 (immediately after the week of the Fourth of July). The attorney examiners did so with no guidance or governing order from the Commission granting rehearing on the new Rider RRS proposal or setting the scope of rehearing.

In accordance with Rule 4901-1-15(C), a complete copy of the attorney examiners' June 3, 2016 Entry is attached hereto.

IV. ARGUMENT

A. The attorney examiners do not have the authority to order a hearing on the new Rider RRS proposal until the Commission determines it has jurisdiction on rehearing over the proposal.

The attorney examiners not only lifted the stay on discovery through the Entry but ordered that a hearing be held on the new Rider RRS proposal. The attorney examiners did so even though the Commission has not ruled on whether it has jurisdiction on rehearing over the proposal. The question of law presented is whether the attorney examiners can act on the new Rider RRS proposal even though the Commission has not resolved whether it has jurisdiction to hear the proposal at this stage. The answer to that question is no as the attorney examiners do not have the authority to decide a jurisdictional issue for the Commission on rehearing. In usurping the Commission's authority and taking jurisdiction over the new Rider RRS proposal, the attorney examiners have taken an action contrary to well-established Ohio law and Commission precedent.

The jurisdictional argument is a significant argument in this proceeding. Multiple cases have established that an argument must be raised in an assignment of error or ground for rehearing in an application for rehearing in order to be heard, and this requirement is a

jurisdictional prerequisite for consideration thereof on rehearing.[3] FirstEnergy did not include its new Rider RRS proposal in its application for rehearing even though Ohio Revised Code Section ("R.C.") 4903.10 requires all assignments of error to be listed in the application for rehearing. As argued in P3/EPSA's memorandum contra filed on May 12, 2016, that is a fatal error that robs this Commission of jurisdiction to hear the new Rider RRS proposal in this proceeding. Without FirstEnergy's new Rider RRS proposal being raised in the application for rehearing, the necessary jurisdiction on rehearing is lacking and the Commission cannot hear evidence on rehearing regarding it. As a result, it was unreasonable and unlawful for the attorney examiners to conclude that a hearing should be held regarding the new Rider RRS proposal.

The Commission has the authority to rule on the jurisdictional issue, not the attorney examiners. A hearing on the new Rider RRS proposal, therefore, cannot be held unless the Commission first determines that the argument for the new Rider RRS proposal was raised as an assignment of error in the application for rehearing (which it was not) and the Commission has jurisdiction (which it does not).

B. Only the Commission (and not the attorney examiners) can grant rehearing and set the scope of rehearing and the evidence to be collected.

There are direct statutory obligations with which the Commission must adhere in considering an application for rehearing. In pertinent part, R.C. 4903.10 states:

> Where such application for rehearing has been filed, the **commission** may grant and hold such rehearing on the matter specified in such application, if in **its judgment** sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have

[3] *Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, 136 Ohio St. 3d 333, 338, 2013-Ohio-3705 ("failure to set forth specifically those arguments on rehearing as required by R.C. 4903.10 deprives this court of jurisdiction over Columbia's first proposition of law"). *See, also, Office of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 247, 1994-Ohio-469 ("[S]etting forth specific grounds for rehearing is a jurisdictional prerequisite for review"); and *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 374-375, 2007-Ohio-53 ("[w]e have held that when an appellant's grounds for rehearing fail to specifically allege in what respect the PUCO's order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met.").

> entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the **commission** grants such rehearing, it **shall** specify in the notice of such granting the purpose for which it is granted. The **commission shall** also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. (Emphasis added.)

The plain language of R.C. 4903.10 requires the *Commission* (not its attorney examiners) to *first* conclude:

- Sufficient reason for rehearing exists;
- The purpose for which it is granting rehearing;
- If additional evidence will be taken at an additional hearing, the scope of the additional evidence; and
- The designated additional evidence could not have been offered during the original hearing, with reasonable diligence.

The Commission has not made any of those conclusions. In its Entry on Rehearing issued on May 11, 2016, the Commission granted all applications for rehearing only for "further consideration of matters specified in the applications for rehearing." This action simply gave the Commission additional time – the Commission did not address the actual arguments or find that any of them substantively warranted further hearing.

The plain language of paragraph 15 of the attorney examiners' June 3rd Entry shows that they usurped the Commission's statutory obligations by concluding:

- Sufficient reason for rehearing exists ("[u]pon consideration of the arguments raised in the applications for rehearing and the memoranda contra the applications for rehearing, a hearing should be held[.]");
- Deciding the purpose for granting rehearing ("a hearing should be held regarding the provisions of the Modified RRS Proposal"); and
- Deciding the scope of the additional evidence that will be taken at an additional hearing ("The scope of the hearing will be limited to

> the provisions of, and alternatives to, the Modified RRS Proposal. No further testimony will be allowed regarding other assignments of error raised by parties.").

The attorney examiners attempt to step into the Commission's role is not only contrary to the express language of the statute, but also contrary to Commission precedent.[4] Simply put, nothing authorizes the attorney examiners to make these initial determinations for the Commission.[5] As a result, the attorney examiners' actions in deciding to hold a hearing on the new Rider RRS proposal and to mandate the scope of evidence to be collected presents a new or novel question of interpretation, law, or policy as to the authority of attorney examiners in relation to R.C. 4903.10. As no such authority exists, the Commission should ensure that the express language of R.C. 4903.10 is followed and vacate the attorney examiners' actions.

C. An immediate Commission determination is needed to prevent undue prejudice and expense to the parties.

An immediate Commission determination is needed to prevent undue prejudice and expense to the parties. The Entry was issued late on a Friday (June 3) and essentially gave parties two weeks to engage witnesses and file testimony. Discovery cuts off on July 1 (the Friday before the Fourth of July holiday weekend) with the hearing to commence on Monday, July 11, immediately after a popular vacation week. Immediate certification of this interlocutory appeal by the attorney examiners is necessary to avoid parties incurring the expense of paying witnesses, preparing testimony and going to trial when it is very likely that the Commission may

[4] *See, e.g., Doc Goodrich & Sons, Inc. v. Public Utilities Comm.*, 52 Ohio St. 2d 70, 7 Ohio Op. 3d 148, 372 N.E.2d 354, 1978 Ohio LEXIS 495 (1978) (the Commission found sufficient reason for rehearing existed, the Commission decided the purpose and the Commission established the process by requiring additional briefs on certain specified issues) and *Mosley v. The Dayton Power and Light Company*, Case No. 11-1494-EL-CSS, Entry on Rehearing (August 21, 2013) (the Commission itself found sufficient reason for rehearing existed, the Commission ruled what would be addressed on rehearing and the Commission directed that the hearing be reopened.

[5] In construing a statute, words cannot be added or deleted. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶49 (April 21, 2016), citing *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶32.

rule in a manner that differs from the attorney examiners. The parties should not have to bear the expense of a rushed and forced trial without a Commission order in compliance with R.C. 4903.10 as well as a ruling on whether the Commission believes it can assert jurisdiction of a proposal that was not included in FirstEnergy's application for rehearing.

V. CONCLUSION

For all of the foregoing reasons, the Commission should vacate the procedural schedule set forth in the June 3 Entry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 8th day of June 2016 upon all persons/entities listed below:

s/ Michael J. Settineri
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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

ENTRY

Entered in the Journal on June 3, 2016

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner issues a procedural schedule that sets an additional hearing in this matter to begin on July 11, 2016.

II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (ESP IV).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in this proceeding, approving FirstEnergy's application and the stipulations filed in this proceeding with several modifications (Opinion and Order).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association (EPSA), the Retail Energy Supply Association (RESA), Dynegy Inc. (Dynegy), Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation. 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On April 29, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: Sierra Club; Dynegy; the PJM Power Providers Group and EPSA (jointly, P3/EPSA); and RESA.

{¶ 9} Thereafter, on May 2, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (CMSD); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials, d/b/a Power4Schools (collectively, Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (jointly, OCC/NOAC).

{¶ 10} In its application for rehearing, and as a recommended resolution to three of its proffered assignments of error, FirstEnergy proposed a modified calculation (Modified RRS Proposal) for its retail rate stability rider (RRS) as approved in the ESP IV Opinion and Order, in order to reflect the FERC Order. Additionally, FirstEnergy recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

{¶ 11} By Entry on Rehearing issued May 11, 2016, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSA, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC, for further consideration of the matters specified in the applications for rehearing. In that Entry, the Commission also found that given "the number and complexity of the assignments of error raised in the applications for rehearing, as well as the potential for further evidentiary hearings in this matter, * * * it is appropriate to grant rehearing at this time. This will allow parties to begin discovery in anticipation of potential further hearings." Entry on Rehearing (May 11, 2016) at 3.

{¶ 12} On May 19, 2016, P3/EPSA filed a joint motion for a stay of discovery and a joint motion for an expedited ruling, arguing that a stay would allow the parties to avoid unnecessary expenses and time conducting and responding to discovery until such time that the Commission resolves the pending issues on rehearing and objections to the Commission's jurisdiction to consider FirstEnergy's Modified RRS Proposal.

{¶ 13} On May 20, 2016, the attorney examiner granted P3/EPSA's motion to stay discovery, on a limited basis, in order to allow parties to file memoranda in response to the motion to stay. Additionally, the attorney examiner noted that the stay of discovery may be extended or terminated once the attorney examiners had the opportunity to review memoranda in response to the motion to stay.

{¶ 14} On May 26, 2016, FirstEnergy filed its motion contra P3/EPSA's motion to stay discovery, stating no party to the proceeding was prejudiced by the Commission's

decision to inform parties to engage in additional discovery. Contrarily, FirstEnergy argues that denying parties the opportunity to engage in discovery at this point will prejudice parties if an additional hearing is required by the Commission. In fact, FirstEnergy indicated that it had already received discovery requests from another intervenor. FirstEnergy further argues that P3/ESPA raised no sufficient grounds to stay discovery, as the Commission sufficiently specified the scope of any additional proceeding, as required by R.C. 4903.10. Moreover, FirstEnergy states that an additional hearing to consider the Modified RRS Proposal is well within the Commission's jurisdiction, noting that the Ohio Supreme has previously found that the Commission may grant rehearing, take additional evidence, and consider proposed modifications to the plan originally approved. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 304, 2006-Ohio-5789). Finally, FirstEnergy contends that if further clarification is needed as to the scope of any additional proceeding, the Commission may provide such clarification in a future order.

{¶ 15} Upon consideration of the arguments raised in the applications for rehearing and the memoranda contra the applications for rehearing, a hearing should be held regarding the provisions of the Modified RRS Proposal. The scope of the hearing will be limited to the provisions of, and alternatives to, the Modified RRS Proposal. No further testimony will be allowed regarding other assignments of error raised by parties.

{¶ 16} In addition, in light of the decision to hold an evidentiary hearing regarding the provisions of the Modified RRS proposal contained in FirstEnergy's application for rehearing, the stay of discovery is hereby terminated in order to provide parties the ability to conduct discovery in anticipation of the forthcoming hearing.

{¶ 17} Further, in order to provide the parties sufficient time and opportunity to present evidence related to the Modified RRS Proposal, the attorney examiner finds the following procedural schedule is reasonable and should be established for this proceeding:

(a) Testimony on behalf of intervenors should be filed by June 22, 2016.

(b) Discovery requests regarding the Modified RRS Proposal, except for notices of deposition, should be served by July 1, 2016.

(c) The evidentiary hearing shall commence on July 11, 2016, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, Hearing Room 11-A, Columbus, Ohio.

{¶ 18} Further, the attorney examiner finds that the response time for discovery should continue to be seven days for all discovery served in this proceeding. Discovery requests and replies shall be served by hand delivery, e-mail or facsimile (unless otherwise agreed by the parties). An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming (unless otherwise agreed by the parties). To the extent that a party has difficulty responding to a particular discovery request within the seven-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution.

III. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the stay of discovery previously granted in this proceeding be terminated, in accordance with Paragraph 16. It is, further,

{¶ 21} ORDERED, That the procedural schedule set forth in Paragraph 17 be observed by the parties. It is, further,

{¶ 22} ORDERED, That the discovery timeline set forth in Paragraph 18 be observed by the parties. It is, further,

{¶ 23} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison
By: Megan J. Addison
Attorney Examiner

GAP/sc

Summary: Attorney Examiner Entry setting a procedural schedule and terminating the stay of discovery imposed in the May 20, 2016 Attorney Examiner Entry. - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio

Summary: Request -- Joint Interlocutory Appeal and Joint Request for Certification electronically filed by Mr. Michael J. Settineri on behalf of PJM Power Providers Group and Electric Power Supply Association