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

MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A PROTECTIVE ORDER
(EXPEDITED RULING REQUESTED)

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies"), pursuant to Rule 4901-1-24(A)(1), O.A.C., hereby move for a protective order to prevent the unnecessary and duplicative deposition of Company witness Eileen M. Mikkelsen. In their Notice to Take Deposition and Request for Production of Documents, Environmental Defense Fund, Environmental Law and Policy Center, The Office of the Ohio Consumer's Counsel, Ohio Environmental Council, The Ohio Manufacturers' Association Energy Group, PJM Power Providers Group, and Sierra Club (collectively, the "Joint Intervenors") seek to depose Company witness Mikkelsen for a second time on July 8, 2016 – the last business day before the hearing regarding the Companies' proposed modifications to Rider RRS ("Modified Rider RRS") is set to commence. In their Notice, filed at the close of business on Friday, July 1, 2016, the Joint Intervenors allege that a second deposition of Ms. Mikkelsen is supposedly necessary because of the contents of the testimony of witness Joseph M. Buckley (the "Buckley Testimony") of the Staff of the Public

Utilities Commission of Ohio ("Staff") and related confidential responses by the Companies to two Staff Data Requests.

As demonstrated in the attached Memorandum in Support, on June 29, 2016, the Joint Intervenors deposed Ms. Mikkelsen in excess of eight hours over a broad range of topics related to the Companies' proposal regarding Modified Rider RRS. Further, the alleged need to depose Ms. Mikkelsen for a second time relates to an alternative proposal to Modified Rider RRS set forth in the Buckley Testimony, and the Companies' responses to certain Staff Data requests, which have nothing to do with Ms. Mikkelsen's rehearing testimony or Modified Rider RRS. The Joint Intervenors will have the full opportunity to cross-examine Staff witness Buckley (and other Staff witnesses) at the hearing. Allowing the Joint Intervenors to depose Ms. Mikkelsen a second time on this issue thus is, at best, premature, and at worst, harassment and an abuse of the discovery process. Moreover, noticing the deposition for July 8, 2016, the last business day prior to the commencement of hearing, will unduly interfere with the Companies' ability to prepare for the upcoming hearing. The Commission thus should issue a protective order prohibiting a second deposition of Company witness Mikkelsen.

Pursuant to Rule 4901-1-12(C), O.A.C., an expedited ruling is necessary as the hearing in this matter is scheduled to commence next week.

Date: July 5, 2016

Respectfully submitted,

/s/ David A. Kutik

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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

MEMORANDUM IN SUPPORT OF THE MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A PROTECTIVE ORDER

I. INTRODUCTION

Pursuant to Rule 4901-1-24(A)(1), O.A.C., the Commission should grant a protective order to prevent the Joint Intervenors from deposing Company witness Mikkelsen for a second time on rehearing. It is no understatement to say that Company witness Mikkelsen has had to sit through more hours of depositions in this case than any witness in any other case before the Commission. Ms. Mikkelsen already has been deposed by the Joint Intervenors for over eight hours – the Joint Intervenors are seeking, at best, a second bite at the apple. Ms. Mikkelsen has previously been deposed five times for a total of five days. Yet, incredibly, the Joint Intervenors want to depose her again.

Further, the stated topics that the Joint Intervenors propose as grounds for a second deposition bear no relation to Ms. Mikklesen's rehearing testimony or Modified Rider RRS. The Joint Intervenors seek to engage in nothing more than a "fishing expedition," apparently attempting to discern the Companies' potential testimony in the Staff's proposal. Thus, the Joint Intervenors seek to depose Ms. Mikkelsen on potential rebuttal testimony, the need for which

will not be known until after the Staff's witnesses testify. The notice is accordingly improperly premature.

Moreover, noticing Ms. Mikkelsen's deposition for July 8, 2016, the last business day prior to the commencement of the hearing, unduly impedes the Companies' ability to prepare for hearing.

II. RELEVANT FACTS

In its Opinion and Order in this proceeding, dated March 31, 2016 (the "March 31 Order"), the Commission approved the Companies' Fourth Electric Security Plan and related Stipulations, including Rider RRS. The Companies sought rehearing on certain aspects of the March 31 Order, including the lack of cost recovery for outages greater than 90 days in the case of certain generating assets associated with Rider RRS, and the requirement that the Companies bear certain capacity performance penalties should such penalties arise. *See* Case No. 14-1297-EL-SSO, Companies' Mem. in Support of App. for Rehearing, p. 12 (May 2, 2016). As a result, to preserve the benefits of, and improve upon, the original rider RRS, the Companies proposed certain modifications to Rider RRS in their Application for Rehearing, which was filed on May 2, 2016. Also, on May 2, 2016, the Companies filed Ms. Mikkelsen's rehearing testimony to support and explain the minor and beneficial modifications to Rider RRS proposed by the Companies.

As described in Ms. Mikkelsen's rehearing testimony, the proposed modifications to Rider RRS are modest and would continue to provide the Companies' customers with a beneficial hedge against anticipated higher and volatile future market prices:

> The only changes to the Rider RRS calculation are: 1) actual costs will be replaced with the costs which are already evidence of record and relied upon by the Commission in this case; 2) actual generation output will be replaced with the generation output which is already evidence of record and relied upon by the Commission in this case; and 3) actual capacity (MWs)

> cleared in the PJM capacity market will be replaced with the capacity (MWs) projected to clear, which is already evidence of record and relied upon by the Commission in this case. As before, these capacity MWs will be applied to actual base residual auction ("BRA") pricing. Proxy revenues for ancillary services and environmental attributes will be based on information in the record and relied upon by the Commission. As modified, Rider RRS will provide a more reliable hedge against increasing market prices by using the Companies' assumed costs of the Plants as a proxy for costs associated with fuel-diverse baseload generation assets.

Rehearing Testimony of Eileen M. Mikkelsen, p. 5 (May 2, 2016).

On June 3, 2016, the Attorney Examiner issued an Entry setting a procedural schedule establishing: (a) June 22, 2016, as the due date for intervenor testimony; (b) July 1, 2016, as the cutoff date for written discovery; and (c) July 11, 2016, as the commencement date for the hearing. Case No. 14-1297-EL-SSO, Entry, pp. 4-5 (June 3, 2016) (the "June 3 Entry"). Notably, the June 3 Entry limited the scope of the upcoming hearing to issues related to Modified Rider RRS. *See id*., p. 4.

On June 22, 2016, the Joint Intervenors filed their first Notice to Take Deposition and Requests for Production of Documents. *See* Case No. 14-1297-EL-SSO, Notice to Take Deposition and Requests for Production of Documents, p. 1 (June 22, 2016). Originally noticed for June 30, 2016, by mutual agreement of the parties, the date was changed to June 29, 2016. On June 29, 2016, the Companies duly produced Ms. Mikkelsen to the Joint Intervenors for deposition. Ms. Mikkelsen subsequently was deposed by the Joint Intervenors for over eight hours. The Joint Intervenors were free to question Ms. Mikkelsen on any aspect of her rehearing testimony and Modified Rider RRS.

Late in the day on June 29, 2016, Staff filed testimony regarding Modified RRS. In the Buckley Testimony, Staff set forth an alternative proposal entirely unrelated to Modified Rider RRS, calling for the creation of a new rider -- the Distribution Modernization Rider -- instead of

Modified Rider RRS. *See generally*, Buckley Testimony. The apparent purpose of the new rider is to collect revenue to enhance the investment grade rating of the Companies' parent corporation. *See id*., pp. 3-4. On page 6 of his testimony, Mr. Buckley references the Companies' confidential response to Staff Data Request 35. The subject of the response to this request was the adverse impact that a downgrade in investment rating might have on the Companies and their parent corporation.

On July 1, 2016, the Companies served the confidential responses to Staff Data Requests 34 and 35 on those parties that had executed a protective agreement with the Companies.[1] Later that day, at the close of business, the Joint Intervenors filed their Notice of Deposition, seeking to depose Ms. Mikkelsen for a second time regarding, among other things, Staff's alternative proposal to Modified Rider RRS and the Companies' confidential responses to Staff Data Requests 34 and 35. In pertinent part, the Joint Intervenors' Notice of Deposition states:

> The deposition will be taken of the aforementioned deponent on relevant topics within the scope of these proceedings, *including but not limited to*, the following:
>
> - *Alternatives to the Modified Rider RRS proposal*, including Staff's alternative proposal for a new Distribution Modernization Rider (as described in the Rehearing Testimony of Staff Witness Choueiki, Turkenton, and Buckley);
>
> - The Companies' responses to PUCO Data Request Nos. 34 and 35.

Joint Intervenors' Notice of Dep., pp. 1-2 (emphasis added) (attached hereto as Ex. A.). The Joint Intervenors noticed the deposition for July 8, 2016, the last business day prior to the commencement of the hearing.

[1] These responses were originally served on Staff on June 28, 2016, but not on other parties, under the Companies' belief that the documents were being produced under a joint interest privilege. Once Staff disclosed some of the responses in testimony, the Companies provided them to the other parties.

III. ARGUMENT

A. A Protective Order Is Authorized Under Ohio Law.

Rule 4901-1-24, O.A.C., in pertinent part provides:

> (A) Upon motion of any party or person from whom discovery is sought, the commission, the legal director, the deputy legal director, or an attorney examiner may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that: (1) Discovery not be had.

Rule 4901-1-24, O.A.C.

The language of Rule 4901-1-24 tracks, essentially verbatim, Rule 26(C) of the Ohio Rules of Civil Procedure., which in pertinent part provides:

> Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had.

Ohio R.Civ.P. 26(C).

Ohio allows protective orders to be issued to prevent oppressive and unduly burdensome discovery practices. *See, e.g.*, *Dehlendorf v. City of Gahanna*, 2015-Ohio-3680; 2015 Ohio App. LEXIS 3577 at *22-25 (Ohio Ct. App., Franklin Cty., Sept. 10, 2015) (affirming trial court's issuance of a protective order to prevent a second deposition because "it was not necessary…as such matters could be brought up at trial."); *Beale v. O'Neill*, 1988 Ohio App. LEXIS 1927 at *3-6 (Ohio Ct. App., Franklin Cty., May 17, 1988) (affirming trial court's issuance of a protective order preventing a deposition until pending motion for summary judgment was resolved); *Greene v. Greene*, 1979 Ohio App. LEXIS 11942 at *4 (Ohio Ct. App., Cuyahoga Cty., Jan. 11, 1979) ("A litigant need not comply with oppressive discovery demands.").

Further, protective orders may be issued (or motions to compel may be denied) to prevent "fishing expeditions" that amount to an abuse of the discovery process. *See, e.g., Bland v.*

Graves, 85 Ohio App. 3d 644, 659 (Ohio Ct. App., Summit Cty. 1993) (""The court may permissibly limit discovery so as to prevent mere 'fishing expeditions' in an effort to locate incriminating evidence. Plaintiffs have not demonstrated even indirectly what essential and beneficial information they expected to learn from [the discovery sought]."); *Miller v. Pennitech Indus. Tools*, 1995 Ohio App. LEXIS 1622 at *22-23 (Ohio Ct. App., Medina Cty., April 19, 1995) (affirming trial court's limiting of discovery and denying motion to compel to prevent a "fishing expedition"); *Bishop v. Jones Motor Co.*, 1992 Ohio App. LEXIS 2407 at *6 (Ohio Ct. App., Wayne Cty., May 13, 1992) ("A trial court does not have to permit a 'fishing expedition' for incriminating documents under the guise of open discovery."); *Walsh v. Elevator Enterprises*, 1985 Ohio App. LEXIS 6284 at *3-5 (Ohio Ct. App., Franklin Cty., April 2, 1985) (affirming trial court's issuance of protective order that prevented a deposition because "appellant appeared to be on a fishing expedition in seeking to take [the] deposition"); *State, Ex rel. Bd. of Educ. v. Johnston*, 1978 Ohio App. LEXIS 10708, *14 (Ohio Ct. App., Franklin Cty., June 22, 1978) (affirming Ohio Industrial Commission's decision to deny relator's "request . . . to take . . . depositions which appeared to be only a fishing expedition to attempt to gain evidence to support [a] motion to vacate.").

B. There Is No Basis For Deposing Ms. Mikkelsen A Second Time.

In line with the authority cited above, there are five reasons why the Commission should issue a protective order preventing a second deposition of Ms. Mikkelsen on rehearing. First, Ms. Mikkelsen already has been deposed on her rehearing testimony for over eight hours by the Joint Intervenors[2] and the Joint Intervenors are merely seeking a second bite at the apple.

[2] Notably, at the conclusion of their respective examinations of Ms. Mikkelsen, each counsel noted that he or she had no further questions.

Second, Staff's proposal, as articulated in the Buckley Testimony, has nothing to do with Ms. Mikkelsen's rehearing testimony or Modified Rider RRS. At best, the Joint Intervenors seek to take discovery on the Companies' possible testimony in response to the Staff's proposal – testimony which should be submitted on rebuttal. Third, the fact that the Joint Intervenors were not served until after Ms. Mikkelsen's June 29 deposition is an insufficient reason to require another deposition. Otherwise, Ms. Mikkelsen potentially is subject to deposition until the first day of hearing. . The need for such testimony will not be known until after Staff's witnesses testify. Fourth, the notice, as written, is unlimited and thus, would subject Ms. Mikkelsen to repetitive and unnecessary additional deposition questioning which should have been undertaken previously. Fifth, noticing Ms. Mikklesen's deposition for July 8, 2016, the last business day before hearing, unduly interferes with the Companies' preparation for the upcoming hearing. Therefore, the Commission should issue a protective order to prevent a second deposition of Ms. Mikkelsen. A more specific recitations of the reasons for this Motion follows.

First, on June 29, 2016, the Joint Intervenors already have deposed Ms. Mikkelsen on her rehearing testimony for more than eight hours. The Companies produced Ms. Mikkelsen for deposition at their corporate office in Akron, Ohio at 9:00 a.m. with the deposition concluding at 5:30 p.m. Both public and confidential sessions were held, generating a transcript some 228 pages long. During the deposition, the Joint Intervenors were free to ask Ms. Mikkelsen any questions that they might have had regarding Ms. Mikkelsen's rehearing testimony and Modified Rider RRS. The Companies also have responded to more than 100 written discovery requests related to Ms. Mikkelsen's rehearing testimony and Modified Rider RRS. Thus, the Joint Intervenors have been afforded a more than fulsome opportunity to conduct discovery regarding

the Companies' proposed minor modifications to Rider RRS. Permitting Ms. Mikkelsen to be deposed yet again unjustifiably permits the Joint Intervenors a second bite at the apple.

Second, the Joint Intervenors' alleged reason for seeking to depose Ms. Mikkelsen a second time has no relation to any aspect of Modified Rider RRS or Ms. Mikkelsen's rehearing testimony. The Joint Intervenors claim a supposed need to question Ms. Mikkelsen regarding Staff's alternative proposal (and, apparently, any other alternative proposals, regardless if any exist) and the Companies' confidential responses to Staff Data Requests 34 and 35. Quite simply, however, Ms. Mikkelsen currently has little, if anything, substantive to contribute on these topics as they are not even tangentially connected to her rehearing testimony. Ms. Mikkelsen's rehearing testimony focuses solely on the Companies' proposed modifications to Rider RSS and the attendant benefits to customers. Further, to the extent that the Companies could offer any responsive testimony, such testimony would be offered on rebuttal. Indeed, as of this writing, the Companies have not yet determined what response, if any, they might have to Staff's proposal and thus no decision has been made on whether Companies may offer rebuttal testimony. Such a decision likely would be made only after the Staff's witnesses testify. Thus, seeking discovery from the Companies on Staff's proposal is premature at best.

Moreover, Ms. Mikkelsen's testimony is not necessary to understand Staff's proposal. The Joint Intervenors will have the full opportunity to cross-examine Mr. Buckley, as well as Staff's other witnesses, at the hearing scheduled to commence on July 11, 2016. Simply because the Rules do not permit the Joint Intervenors to depose Staff witnesses does not mean that the Joint Intervenors may then depose Ms. Mikklesen instead.[3] This is particularly the case here,

[3] *See* Rule 4901-1-16(I), O.A.C. ("Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to the commission staff.").

where the ostensible topics of the noticed deposition bear no relation to Ms. Mikkelsen's rehearing testimony or Modified Rider RRS.

Third, the Joint Intervenors apparently contend that the Companies' confidential discovery requests were not served on them either contemporaneously with, or prior to, Ms. Mikkelsen's June 29 deposition. *See*, Joint Intervenors' Notice of Dep., p. 2, n. 1. The intervenors to this proceeding, including the Joint Intervenors, have served thousands of discovery requests on the Companies to which the Companies dutifully have responded. The fact that the Companies continue to respond to discovery after Ms. Mikkelsen's June 29 deposition is not a basis to seek additional deposition time now. Having noticed a deposition before the close of written discovery, the Joint Intervenors undertook the risk that discovery responses would be served after Ms. Mikkelsen's rehearing deposition.

Fourth, the Joint Intervenors are engaged in little more than a repetitious "fishing expedition." Indeed, the Joint Intervenors' Notice of Deposition is unlimited. The Joint Intervenors seek to depose Ms. Mikkelsen over a range of topics, "*including but not limited to . . . [a]lternatives to the Modified Rider RRS proposal*, including Staff's alternative proposal for a new Distribution Modernization Rider." Joint Intervenors' Notice of Dep., pp. 1-2 (emphasis added). The Joint Intervenors, who already have deposed Ms. Mikkelsen for over eight hours, seek to depose her a second time -- "from day to day, except for holidays and weekends, until examination by all Intervenors is completed" -- regarding topics that have nothing to do with her rehearing testimony or Modified Rider RRS. Further, all of this ostensibly is justified simply because the Joint Intervenors failed to request the Companies' confidential responses to Staff Data Requests 35 and 36 in a timely fashion. The Commission thus should issue a protective order accordingly.

Fifth, the Joint Intervenors noticed Ms. Mikkelsen's second deposition for Friday, July 8, 2016. As noted, July 8, 2016, is the last business day prior to the commencement of the hearing on July 11, 2016. Permitting the Joint Intervenors to depose Ms. Mikkelsen yet again on this date will unduly interfere with the Companies' witness and hearing preparation. Given that the Companies have already produced Ms. Mikkelsen for over eight hours of deposition, and further given that the topics proposed for a second deposition bear no relation to Ms. Mikkelsen's rehearing testimony or Modified Rider RRS, the added burden to the Companies of producing Ms. Mikkelsen for deposition on July 8, 2016, simply cannot be justified.

As noted, all of this is without good reason. The Joint Intervenors failed to seek timely production of the Companies' responses to Staff's data requests. Further, at best, the deposition appears to be an attempt get an improperly premature preview regarding the Companies' still as of yet unformulated position on the Staff's testimony. The Companies' position, if any, needs to be presented through rebuttal testimony, the necessity of which cannot be known to the Companies until the Staff's witnesses testify.

Hence, for these reasons and following the authority cited above, the Commission should issue a protective order to prevent Ms. Mikkelsen from being unnecessarily and unjustifiably deposed again. *See, e.g.*, *Dehlendorf* at *22-25; *Beale* at *3-6; *Greene* at *4; *Bland* at 659; *Miller* at *22-23; *Bishop* at *6; *Walsh* at *3-5; *State, Ex rel. Bd. of Educ.* at *14.

Lastly, because the hearing is set to commence next week, pursuant to Rule 4901-1-12(C), an expedited ruling on the Companies' Motion for Protective Order is necessary.

IV. CONCLUSION

For the foregoing reasons, the Companies request that the Commission grant a protective order to prohibit the deposition of Company witness Eileen M. Mikkelsen noticed for July 8, 2016.

Date: July 5, 2016

Respectfully submitted,

/s/ David A. Kutik

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ATTORNEYS FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I certify that this Motion for Protective Order was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 5th day of July, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ David A. Kutik
One of the Attorneys for the Companies

Summary: Motion for Protective Order electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company