

## 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

### THIRD ENTRY ON REHEARING

Entered in the Journal on July 6, 2016

#### I. SUMMARY

{¶ 1} In this Third Entry on Rehearing, the Commission finds that the applications for interlocutory appeals filed in this proceeding on June 8, 2016 should be denied. Additionally, the Commission finds the applications for rehearing filed by Northwest Ohio Aggregation Coalition and the Ohio Consumers' Counsel on May 31, 2016 and June 10, 2016 should be denied. Similarly, the Commission finds that the application for rehearing filed by Ohio Manufacturers' Association Energy Group on June 24, 2016 should be denied, as the assignments of error contained therein have been sufficiently addressed in this proceeding. Further, the Commission finds that the motion to stay the procedural schedule as established in the June 3, 2016 Entry be denied.

#### II. DISCUSSION

##### A. *Procedural History*

{¶ 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} On April 29, 2016 and May 2, 2016, several parties filed applications for rehearing of the Opinion and Order. By Entry issued May 2, 2016, the attorney examiner directed all memoranda contra to be filed by May 12, 2016.

{¶ 8} On May 11, 2016, the Commission issued an Entry on Rehearing (First Entry on Rehearing). In the First Entry on Rehearing, the Commission granted the numerous applications for rehearing filed in this proceeding on April 29, 2016 and

May 2, 2016, for further consideration of the arguments raised in the applications for rehearing.

{¶ 9} By Finding and Order issued May 25, 2016, the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the Opinion and Order, did not appear to be unjust and unreasonable, and therefore, was approved for rates effective June 1, 2016.

{¶ 10} On May 31, 2016, Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC) filed an application for rehearing regarding the Commission's May 25, 2016 Finding and Order. Thereafter, on June 24, 2016, RESA and the Ohio Manufacturers' Association Energy Group (OMAEG) also filed applications for rehearing regarding the Commission's May 25, 2016 Finding and Order. The Commission issued an Entry on Rehearing on June 29, 2016 (Second Entry on Rehearing), in which it granted OCC/NOAC and RESA's applications for rehearing for further consideration of the matters raised in the applications for rehearing. FirstEnergy filed memoranda contra RESA and OMAEG's applications for rehearing on July 5, 2016.

{¶ 11} OCC/NOAC filed its third application for rehearing in this proceeding on June 10, 2016, presenting three assignments of error regarding the First Entry on Rehearing.

{¶ 12} On June 3, 2016, the attorney examiner issued an Entry establishing a procedural schedule for an additional hearing in this matter. Further, the attorney examiner lifted the temporary stay of discovery in order to allow parties to conduct discovery in preparation of the additional evidentiary hearing to discuss the Modified RRS Proposal.

{¶ 13} On June 8, 2016, PJM Power Providers, Inc. and Electric Power Supply Association (collectively, P3/EPSA), and OCC/NOAC and OMAEG filed requests for certification and applications for review of interlocutory appeals of the June 3, 2016 Entry.

{¶ 14} On June 10, 2016, IEU-Ohio filed a memorandum contra Joint Appellants' request for certification and application for review of an interlocutory appeal. Thereafter, on June 13, 2016, FirstEnergy filed memoranda contra P3/EPSA and Joint Appellants' requests for certification and applications for review of interlocutory appeals.

{¶ 15} By Entry issued June 30, 2016, the attorney examiner granted P3/EPSA and Joint Appellants' requests for certification, certifying their applications for interlocutory appeals for the Commission's review.

## ***B. Interlocutory Appeals***

### **1. APPLICABLE LAW**

{¶ 16} Pursuant to Ohio Adm.Code 4901-1-15(E), upon consideration of an interlocutory appeal, the Commission may, in its discretion either: (1) affirm, reverse, or modify the ruling; or (2) dismiss the appeal, if the Commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question, or the issues presented should be deferred and raised at some later point in the proceeding.

### **2. JOINT APPELLANTS' INTERLOCUTORY APPEAL FILED ON JUNE 8, 2016**

{¶ 17} Joint Appellants request that the Commission vacate the attorney examiner's June 3, 2016 Entry, setting an evidentiary hearing regarding the provisions of FirstEnergy's Modified RRS Proposal. Joint Appellants contend that the Entry

allowed the Companies to modify their ESP “without first withdrawing and terminating the plan in compliance with the statutory process prescribed under R.C. 4928.143(C).” Joint Appellants contend that the June 3, 2016 Entry provided FirstEnergy with the option to propose a revised plan, which is not authorized under the applicable statute, and differs significantly from past decisions. *In re Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 856 N.E.2d 213, 2006-Ohio-5789 (*CG&E Case*). Initially, Joint Appellants argue that, although the *CG&E Case* was very similar procedurally to this proceeding, this case varies from the *CG&E Case* in five important respects: (1) the Commission failed to specify the scope of rehearing to the Modified RRS Proposal or determine that the Modified RRS Proposal was properly raised as an assignment of error; (2) the scope of FirstEnergy’s proposed changes “fundamentally alter the nature” of the approved ESP, far exceeding the changes proposed in the *CG&E Case*; (3) the Commission did not reopen the record in *CG&E Case* upon determining that the alternative proposal was merely an assignment of error, whereas the Modified RRS Proposal is a new proposal which effectively rejects the Commission’s approved ESP; (4) this proceeding is subject to a different statutory scheme than the one applicable for the *CG&E Case*; and (5) the changes proposed in the *CG&E Case* were driven by the Commission’s proposed changes, whereas the Modified RRS Proposal is driven by the FERC Order.

{¶ 18} Further, Joint Appellants allege that the June 3, 2016 Entry failed to specifically state the grounds on which FirstEnergy believed the Opinion and Order to be unlawful or unreasonable. Joint Appellants further note that FirstEnergy’s argument that the Opinion and Order did not reflect the FERC Order cannot be considered reasonable, given the fact that the FERC Order was issued after the Opinion and Order. Joint Appellants also contend that the June 3, 2016 Entry departs from past precedent because it would allow the Commission to consider evidence that could have been offered during the original hearing, in direct violation of R.C. 4903.10(B). Joint

Appellants argue that FirstEnergy had the opportunity to raise the Modified RRS Proposal during the 18-month process, especially since many of the intervening parties raised objections to the fact that the original PPA proposal would need to be reviewed and approved by FERC. As FirstEnergy elected not to offer its Modified RRS Proposal during that time, Joint Appellants believe the Companies should not be given an additional opportunity to do so now in violation of R.C. 4903.10(B). Finally, Joint Appellants claim that the June 3, 2016 Entry departs from past precedent as it is essentially an entry on rehearing, which, according to R.C. 4903.10, can only be issued by the Commission, as well as lacks any explicit reasoning for the decision to establish a procedural schedule or hold a hearing with respect to the Modified RRS Proposal.

{¶ 19} Moreover, Joint Appellants argue that allowing for the hearing to take place will establish harmful precedent for Ohio consumers, effectively providing utility companies to amend their ESP applications through the rehearing process by proposing changes unrelated to an error committed by the Commission, allowing evidence which could have been offered during the original hearing, allowing an attorney examiner to issue an entry on rehearing, and allow a decision that is not supported by reason or explanation to stand.

{¶ 20} In its memorandum contra Joint Appellants' application for review of an interlocutory appeal, IEU-Ohio argues that because the Commission approved the ESP in its Opinion and Order and FirstEnergy has not withdrawn its application, there is no lawful basis for the Commission to order the utility to file tariffs to continue its most recent SSO, pursuant to R.C. 4928.143(C)(2)(b). IEU-Ohio also notes that customers have already engaged to enter into new contracts for service with FirstEnergy or competitive retail electric service (CRES) providers in reliance on the Opinion and Order and these customers, as well as the remaining customer base in FirstEnergy's service territory, will no longer be able to enjoy the numerous benefits resulting from the Opinion and Order.

{¶ 21} In its memorandum contra Joint Appellants' application for an interlocutory appeal, FirstEnergy asserts that the June 3, 2016 Entry was merely setting a procedural schedule in order to conduct further evidentiary hearings that the Commission alluded to in its First Entry on Rehearing. Additionally, FirstEnergy notes that agreeing with the position of the Joint Appellants would effectively eliminate the electric utilities' rehearing and appeal process, as provided in R.C. Chapter 4903, thereby forcing them to either choose to accept the Commission's modifications to a proposed ESP or withdraw their application pursuant to R.C. 4928.143(C)(2). The Companies also contend Joint Appellants' attempt to distinguish this proceeding from the *CG&E Case* does not warrant vacating the Entry, noting that receiving evidence on rehearing in order to comply with R.C. 4903.09 is authorized by R.C. 4903.10 and was acknowledged by the Supreme Court of Ohio in the *CG&E Case*. *CG&E Case* at 304. Moreover, FirstEnergy states this issue is moot, as the First Entry on Rehearing already made the decision to reopen the record. Additionally, the Companies claim that the scope of rehearing was adequately identified, as no other application for rehearing granted in the First Entry on Rehearing requested additional evidentiary hearings.

{¶ 22} The Companies assert the June 3, 2016 Entry was simply establishing a procedural schedule after the Commission had issued its First Entry on Rehearing. Setting such procedural schedules, FirstEnergy alleges, is a very routine practice of attorney examiners. Further, FirstEnergy states that it had no lawful basis to introduce evidence to support the Modified RRS Proposal until after the Commission had issued the First Entry on Rehearing.

### 3. P3/EPSC INTERLOCUTORY APPEAL FILED ON JUNE 8, 2016

{¶ 23} In their memorandum in support, P3/EPSC assert that the June 3, 2016 Entry should be reversed for two reasons. P3/EPSC first argue that the attorney examiner cannot assert jurisdiction over the Modified RRS Proposal until the

Commission rules on whether FirstEnergy's failure to include its new proposal in its application for rehearing, as required by R.C. 4903.10, prevents the Commission from hearing the proposal on rehearing. As a result, P3/EP SA argue that a hearing cannot be held unless the Commission first determines that the argument for the Modified RRS Proposal was raised in an assignment of error in the application for rehearing and the Commission has jurisdiction. Second, P3/EP SA contend that only the Commission, can grant rehearing and set the scope of rehearing, including the evidence to be taken on the Modified RRS Proposal. P3/EP SA argue, however, that the attorney examiner, nonetheless, ordered that a hearing on the Modified RRS Proposal take place and set a procedural schedule without the requisite authority of a preceding Commission order, which is contrary to R.C. 4903.10 and past precedent. Specifically, P3/EP SA argue that R.C. 4903.10 requires the Commission, rather than an attorney examiner, to conclude the following before a hearing may be held: sufficient reason for rehearing exists; the purpose for which rehearing is being granted; the scope of additional evidence to be taken at hearing, if any; and that the designated evidence could not have been offered during the original hearing, with reasonable diligence. As no authority to issue the June 3, 2016 Entry existed, P3/EP SA recommend that it should be vacated in its entirety to ensure compliance with R.C. 4903.10.

{¶ 24} In its memorandum contra P3/EP SA's application for an interlocutory appeal, FirstEnergy argues that the attorney examiner was not required to delay all proceedings until after the Commission had considered the jurisdictional arguments, further noting that the Commission granted rehearing in order to allow for additional evidence to be gathered regarding the Modified RRS Proposal. Upon granting rehearing, FirstEnergy asserts the decision to establish a procedural schedule was well within the attorney examiner's authority. The Companies further acknowledge that the Commission will still have the ability to consider Joint Appellants' jurisdictional arguments, but that should not halt all other matters pertaining to this proceeding. The



Companies allege that the June 3, 2016 Entry was merely implementing the Commission's First Entry on Rehearing and setting a procedural schedule in order to take additional evidence in regard to the Modified RRS Proposal.

#### 4. COMMISSION DECISION ON INTERLOCUTORY APPEALS

{¶ 25} The Commission finds that the attorney examiner's rulings in the June 3, 2016 Entry should be affirmed in all respects, including, but not limited to, the ruling setting this matter for hearing and the ruling establishing the scope of the hearing. We do not agree with P3/EP SA's claims that setting the hearing and establishing the scope of the hearing are beyond the attorney examiners' authority. We note that R.C. 4901.18 specifically authorizes the Commissioners to appoint attorney examiners and we have set forth the authority and duties of the attorney examiners in Ohio Adm.Code 4901-1-27. Further, we note that attorney examiners frequently determine whether a matter should be set for hearing in cases such as complaint cases filed under R.C. 4905.26. No party is prejudiced by the fact that the attorney examiner established the hearing date and established the scope of the evidence to be taken because every party had the ability to seek an interlocutory appeal pursuant to Ohio Adm.Code 4901-1-15, as the Joint Appellants and P3/EP SA have done here.

{¶ 26} Further, we disagree with P3/EP SA's and Joint Appellants' jurisdictional claims that a hearing cannot be held unless the Commission first determines that the Modified RRS Proposal was raised in an assignment of error in the application for rehearing and, thus, that we have jurisdiction to consider the alternate proposal. The Commission has already granted rehearing in this matter for further consideration of the matters specified in the applications for rehearing and, in that Entry on Rehearing, the Commission noted the potential of subsequent hearings in order to take additional evidence. Entry on Rehearing at 3. We do not agree with P3/EP SA that, prior to setting the matter for hearing, the Commission was required to address either P3/EP SA's or

Joint Appellants' jurisdictional claims, raised in their memoranda contra FirstEnergy's application for rehearing, or that any additional findings were necessary.

{¶ 27} Nonetheless, although the Commission was not required to address the jurisdictional claims prior to exercising our discretion to hold a hearing, we have reviewed the Joint Appellants' and P3/EPSC's jurisdictional arguments and find them to be baseless. FirstEnergy's application for rehearing consisted of three parts: the application for rehearing setting forth the assignments of error, a memorandum in support, detailing arguments in support of the assignments of error as well as providing the details of the Modified RRS Proposal, and rehearing testimony in support of the Modified RRS Proposal. FirstEnergy also proposed that the Commission hold a hearing to take additional evidence on the Modified RRS Proposal. The Commission finds that this complied with the requirements of R.C. 4903.10, which requires that the application for rehearing be in writing and that the application for rehearing set forth specifically the ground or grounds on which the applicant considers the Commission order to be unreasonable or unlawful. The sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the Commission order is unreasonable and unlawful, and the memorandum in support provided the details regarding the Modified RRS Proposal. Further, we note that our determination in this case is consistent with the Court's decision in the *CG&E Case* rejecting OCC's claim that the utility failed to follow the formal requirements of R.C. 4903.10 because the utility included its alternative proposal allegedly without setting forth the specific grounds challenging the reasonableness or lawfulness of the Commission's order. *CG&E Case* at ¶14.

{¶ 28} Moreover, the Commission finds that arguments to distinguish this case from the *CG&E Case* are not persuasive. In the *CG&E Case*, after the Commission modified and approved a stipulation in the proceeding, the utility made an alternative proposal as part of its application for rehearing. The Commission adopted that

alternative proposal on rehearing. On appeal, the Supreme Court of Ohio held that “the commission did not fail to adhere to any required procedural protections. The commission treated CG & E’s alternative proposal as an assignment of error on rehearing and not as a new or separate proposal.” *CG&E Case* at ¶ 15. In this proceeding, the Commission modified and approved a stipulation filed in the proceeding. FirstEnergy made an alternative proposal as part of its application for rehearing and requests that the Commission adopt the alternative proposal on rehearing. There is no substantive difference between the *CG&E Case* and this proceeding. Accordingly, we find that the Modified RRS Proposal is properly before the Commission on rehearing.

{¶ 29} We also reject Joint Appellants’ claims that the *CG&E Case* was different than this proceeding because the Commission did not reopen the proceeding to take additional evidence in the *CG&E Case*. We note that R.C. 4903.10 specifically contemplates that the Commission may reopen the record to take additional evidence when it states that “the commission shall also specify the scope of the additional evidence, if any, that will be taken.” In addition, the Court expressly recognized in the *CG&E Case* that the Commission “has discretion under [R.C. 4903.10] to decide whether a subsequent hearing is necessary to take additional evidence.” *CG&E Case* at ¶15. Likewise, we are not persuaded that this case should be distinguished from the *CG&E Case* by the scope of the changes proposed by the utility in the alternative proposal. In the *CG&E Case*, the Court noted that “[u]nder R.C. 4903.10(B), if the commission determines upon rehearing that its ‘original order or any part thereof is *in any respect* unjust of unwarranted, *or should be changed*,’ [the Commission] can abrogate or modify the order.” *Id.* (emphasis added).

{¶ 30} Moreover, we are not persuaded by Joint Appellants’ efforts to distinguish this proceeding from the *CG&E Case* because this proceeding is subject to a different statutory scheme than the one applicable for the *CG&E Case* and because the changes

proposed in the *CG&E Case* were driven by the Commission's proposed changes, whereas the Modified RRS Proposal is driven by the FERC Order. Neither the statutory scheme of the underlying application nor the underlying reasons for the proposed alternative are relevant. The relevant issue is whether the Companies have properly raised the Modified RRS Proposal pursuant to R.C. 4903.10, and the Commission has decided that question in the affirmative. Further, we find that no party is prejudiced by our consideration of the Modified RRS Proposal because each party will have a full and fair opportunity to cross examine the Companies' witnesses and to present any relevant evidence in opposition to the Modified RRS Proposal, or to propose an alternative, at hearing.

{¶ 31} Accordingly, for the reasons set forth above, the Commission finds that the interlocutory appeal should be denied and that the attorney examiner's rulings in the June 3, 2016 Entry should be affirmed.

{¶ 32} As a final matter, P3/EPSC filed a motion to stay the procedural schedule on June 14, 2016, pending the outcome of its interlocutory appeal. As its interlocutory appeal has been denied, this issue is now moot, and, therefore, we find that P3/EPSC's motion to stay the procedural schedule should be denied.

### **C. *Applications for Rehearing***

#### **1. APPLICABLE LAW**

{¶ 33} 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.

## 2. OCC/NOAC APPLICATION FOR REHEARING FILED ON MAY 31, 2016

{¶ 34} On May 31, 2016, OCC/NOAC filed an application for rehearing regarding the Commission's May 25, 2016 Finding and Order, asserting three assignments of error for the Commission's consideration. In its application for rehearing, OCC/NOAC argue that the Commission unreasonably found the tariff rates filed by FirstEnergy to be consistent with its Opinion and Order, as the tariffs failed to implement Rider RRS as approved by the Commission. OCC/NOAC state that FirstEnergy was obligated to withdraw its pending application in this case and file a new application, due to the fact that the Companies effectively rejected the Commission's modifications to the proposed ESP by including the Modified RRS Proposal in its application for rehearing. As the projected hedge resulting from Rider RRS was premised upon FirstEnergy executing a power purchase agreement (PPA) with an affiliate, OCC/NOAC argue FirstEnergy has fundamentally changed the operation of Rider RRS and that, by approving the tariffs filed pursuant to the Opinion and Order, the Commission erred in finding such tariffs to be consistent with the Opinion and Order. Moreover, OCC/NOAC contend that Rider RRS provided many of the alleged benefits of the ESP, and without it, the ESP can no longer be approved as a package. Additionally, OCC/NOAC contend the Commission erred by unlawfully approving the tariff rates for the ESP, as Rider RRS does not satisfy the requirements of R.C. 4928.143(B)(2)(d), and therefore, the Commission lacked authority to approve it. Finally, OCC/NOAC argue that the Commission erred in approving tariff rates to implement an ESP, noting that FirstEnergy's tariff filing disregards certain modifications the Commission approved in the Opinion and Order. According to OCC/NOAC, the tariff filing was inconsistent with the actual ESP authorized by the Commission, and failed to follow the process set forth in R.C. 4928.141(B).

{¶ 35} On June 9, 2016, Industrial Energy Users-Ohio (IEU-Ohio) filed a memoranda contra OCC/NOAC's application for rehearing. IEU-Ohio argues that

OCC/NOAC's arguments are without merit, as the tariff filing was consistent with the Opinion and Order and that OCC/NOAC requests an inappropriate remedy as its application for rehearing is merely limited to the approval of compliance tariffs. Additionally, IEU-Ohio contends that no party will suffer any harm from the May 15, 2016 Finding and Order, emphasizing that the rates are currently set at zero; however, IEU-Ohio notes that customers who have engaged to enter into new contracts for service with FirstEnergy or competitive retail electric service (CRES) providers in reliance on the Opinion and Order will suffer "irreparable hardship." Accordingly, IEU-Ohio requests the Commission deny the application for rehearing.

{¶ 36} Thereafter, on June 10, 2016, Ohio Energy Group (OEG) and FirstEnergy filed memoranda contra OCC/NOAC's application for rehearing. OEG states that OCC/NOAC's argument has already been considered and rejected in this proceeding, noting that Staff and the Commission have already conclusively found that the Companies' tariff filing was consistent with the Opinion and Order. FirstEnergy agrees that OCC/NOAC's allegations are without merit and that this Commission has already held "the Companies have an approved ESP, subject to rehearing, irrespective of FERC's action rescinding the waiver of FirstEnergy Solution's affiliate power sales restrictions." May 25, 2016 Finding and Order at 4. FirstEnergy contrarily argues that the Companies were under no obligation to enter into the PPA proposed under the ESP. Opinion and Order at 87. Additionally, the Companies argue that the prohibitions on recovery associated with capacity performance penalties and plant outage costs through Rider RRS would not change the tariff sheets as filed on May 13, 2016. For all of these reasons, FirstEnergy requests that the Commission deny OCC/NOAC's application for rehearing.

{¶ 37} In their first assignment of error, OCC/NOAC claim that the Commission unreasonably found the tariff rates filed by FirstEnergy to be consistent with its Opinion and Order, as the tariffs failed to implement Rider RRS as approved by the

Commission. We disagree. As noted by Staff, the tariff sheets filed by FirstEnergy are consistent with the ESP as modified and approved by the Commission in the Opinion and Order issued in this case. Moreover, all of the terms, conditions and other provisions (including the provisions for review of Rider RRS), regarding Rider RRS which are contained in the application and the stipulations as modified by the Commission, continue to apply. OCC/NOAC point to no language in the tariff or any other evidence to support their claim that the tariff is intended to implement Rider RRS as proposed to be modified by the Companies on rehearing. We note that, in the tariff pages for Rider RRS, there are no rates or charges to be recovered from, or credited to ratepayers, because, as noted by OCC/NOAC, FERC's recent action with respect to the affiliate waivers may make it more difficult to execute the proposed PPA with FirstEnergy's affiliate. However, the fact that it may be *more difficult* to execute the proposed PPA does not mean it would be *impossible* following review of the proposed PPA by FERC. Under R.C. 4928.143, the Companies have an approved ESP, including Rider RRS, irrespective of FERC's action. The Companies are simply unable to include credits or charges in Rider RRS at this time, pending FERC review of the proposed PPA. Likewise, the ESP approved by the Commission is in effect irrespective of any issues raised on rehearing regarding Rider RRS by either the Companies or by intervenors. The Opinion and Order is effective unless and until abrogated or modified by the Commission on rehearing. R.C. 4903.15. Further, OCC/NOAC's allegations that customers will be harmed by the approval of the tariffs for Rider RRS are misplaced. There are no rates or charges in the approved tariff for Rider RRS and rates charges cannot be included in Rider RRS without a further order by the Commission. In fact, by leaving the values blank rather than including a rate set at zero, the Companies have made it abundantly clear that further action by the Commission is necessary before rates or charges can be implemented. Accordingly, rehearing on this assignment of error should be denied.

{¶ 38} OCC/NOAC argue in their second assignment of error that the Commission erred in approving tariff rates for an ESP containing Rider RRS that did not satisfy the requirements of R.C. 4928.143(B)(2)(d). The Commission notes, initially, that OCC/NOAC's premise, that the Commission approved "tariff rates" is simply wrong; there are no rates or charges in the tariff pages for Rider RRS. Further, the Commission finds that the delay in implementing Rider RRS, as approved by the Commission, due to FERC's action regarding the affiliate waiver, has no effect upon our statutory authority to approve Rider RRS under 4928.143(B)(2)(d). The record is clear that, if and when implemented, Rider RRS meets the requirements of 4928.143(B)(2)(d), as we determined in the Opinion and Order.

{¶ 39} With respect to OCC/NOAC's third assignment of error, the Commission finds that rehearing on this assignment of error should be denied. We have already addressed and rejected OCC/NOAC's claims that the tariffs approved by the Commission are intended to implement the Modified RRS Proposal rather than Rider RRS as approved by the Commission in the Opinion and Order. Further, we find no basis for OCC/NOAC's claim that FirstEnergy was obligated to withdraw and terminate its application instead of filing an application for rehearing. In an analogous situation, the Supreme Court of Ohio found no error where the electric utility filed tariffs implementing an ESP and also filed for rehearing and appealed a Commission decision modifying and approving an ESP without either withdrawing or formally accepting the modified ESP. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655, 2011-Ohio-1788 at ¶¶ 45-47. OCC/NOAC make no effort to distinguish this precedent.

{¶ 40} Therefore, the Commission finds that rehearing on the May 31, 2016 applications for rehearing should be denied.



### 3. APPLICATION FOR REHEARING FILED ON JUNE 10, 2016

{¶ 41} OCC/NOAC filed its third application for rehearing on June 10, 2016, presenting three assignments of error regarding the First Entry on Rehearing. In its memorandum in support, OCC/NOAC argue the Commission unreasonably and unlawfully granted FirstEnergy's application for rehearing, which allowed FirstEnergy to fundamentally change its Commission-modified and approved ESP through the rehearing process, violating R.C. 4928.141 and 4928.143(C). OCC/NOAC further note that once the Commission's approved ESP was preempted by the FERC Order, FirstEnergy was left with withdrawing its application as its only option to move forward. Second, OCC/NOAC argue that the Commission unreasonably and unlawfully granted FirstEnergy's application for rehearing, without specifying the scope of rehearing and without limiting the evidence on rehearing to that which could not have been offered upon the original hearing, violating R.C. 4903.10. OCC/NOAC assert that the proffered testimony of FirstEnergy witness Mikkelsen could have been presented at the original hearings, as many of the intervenors had raised the possibility of FERC withdrawing the affiliate waiver as a potential outcome. Finally, OCC/NOAC assert that the Commission unreasonably granted FirstEnergy's application for rehearing without first considering the other intervening parties' memoranda contra, thereby denying intervening parties a reasonable opportunity to be heard before the Commission issued the First Entry on Rehearing.

{¶ 42} On June 20, 2016, FirstEnergy and IEU-Ohio filed memoranda contra OCC/NOAC's third application for rehearing. IEU-Ohio initially argues that the Commission lacks the authority to issue an order directing FirstEnergy to continue its most recent SSO, as FirstEnergy has not withdrawn its application and the Commission has not rejected the application. IEU-Ohio also raises its concerns regarding various customers' reliance on the Opinion and Order and their ability to fully enjoy the potential benefits provided by the approved ESP IV.

{¶ 43} FirstEnergy contends that the Companies' right to seek rehearing of the Opinion and Order, and the Commission's authority to grant rehearing for matters it deems necessary, are expressly provided for in statute. Moreover, the Companies disagree with OCC/NOAC's characterization of the Modified RRS Proposal as "fundamentally changing" the ESP IV; rather, FirstEnergy asserts the proposal contains modest changes to the calculation of Rider RRS in order to ensure customers continue to realize the expected benefits of the rate stabilization mechanism. Additionally, FirstEnergy states that the only effect the FERC Order had on the ESP IV was that it prompted the development of the Modified RRS Proposal for the Commission's consideration. FirstEnergy further argues that the First Entry on Rehearing did not violate R.C. 4903.10, as alleged by OCC/NOAC, noting that the Modified RRS Proposal relies on data included in the record and already relied upon in the Opinion and Order. Additionally, the Companies contend that the Commission's modifications to the calculation of Rider RRS in its Opinion and Order, as well as the FERC Order, could not have been reasonably foreseen to occur at the time of the original hearing. FirstEnergy argues further that utilities are not required, nor expected, to present every conceivable alternative during an ESP proceeding. Finally, the Companies argue that the Commission did not act unreasonably in granting rehearing before considering the memoranda contra the Companies' application for rehearing. Instead, FirstEnergy asserts that parties were provided notice of both the application for rehearing and the Commission's rehearing, which is the only process requirement found in the statute. In fact, FirstEnergy states that OCC/NOAC cannot show that they were prejudiced when they are being afforded an additional opportunity for discovery and an evidentiary hearing, while also noting that Commission precedent supports the Commission's decision to grant rehearing before memoranda contra have been reviewed. *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984).

{¶ 44} The Commission finds that OCC/NOAC's first assignment of error merely repeats arguments raised by OCC/NOAC in their May 31, 2016 application for rehearing. Accordingly, due to the reasons set forth in Paragraphs 37-39 above, rehearing on this assignment should be denied.

{¶ 45} With respect to OCC/NOAC's second assignment of error, the Commission notes that the attorney examiner established the scope the hearing in the June 3, 2016 Entry and that we specifically affirmed that ruling above in Paragraph 25. Therefore, rehearing on this assignment of error should be denied. With respect to the exclusion of evidence on rehearing which could have been offered upon the original hearing, the attorney examiners will address any objections to evidence on that basis at the evidentiary hearing.

{¶ 46} Finally, rehearing on OCC/NOAC third assignment of error should be denied. OCC/NOAC contend that the Commission should not have granted rehearing without first considering other intervening parties' memoranda contra. However, the Commission merely granted rehearing for further consideration of the matters specified in the applications for rehearing. Since FirstEnergy had requested an additional hearing on its Modified RRS Proposal as part of its application for rehearing, the Commission granted rehearing prior to the filing of memorandum contra in order to provide parties as much time as possible for discovery regarding the Modified RRS Proposal. Nonetheless, we will thoroughly consider all arguments raised in the memoranda contra in the ultimate disposition of the applications of rehearing.

{¶ 47} Accordingly, the Commission finds that OCC/NOAC's application for rehearing, filed on June 10, 2016, should be denied.

**4. APPLICATION FOR REHEARING FILED ON JUNE 24, 2016**

{¶ 48} OMAEG filed an application for rehearing on June 24, 2016, in which it asserts the Commission's May 25, 2016 Finding and Order was unjust and unreasonable. Specifically, OMAEG raises two assignments of error, claiming that the Companies' proposed Rider RRS tariff rates were inconsistent with the Opinion and Order and that the Commission should have directed the Companies to refile the tariffs to reflect a \$0.00 per kWh rate for Rider RRS. The Companies filed a memorandum contra OMAEG's application for rehearing on July 5, 2016, reiterating that their tariffs were, in fact, consistent with the Opinion and Order.

{¶ 49} The Commission finds that both assignments of error raised by OMAEG merely repeat arguments raised by OCC/NOAC in their May 31, 2016 application for rehearing. Accordingly, due to the reasons set forth in Paragraphs 37-38 above, rehearing on these assignments should be denied.

**III. ORDER**

{¶ 50} It is, therefore,

{¶ 51} ORDERED, That OCC/NOAC's applications for rehearing filed on May 31, 2016 and June 10, 2016 be denied. It is, further,

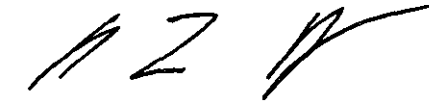
{¶ 52} ORDERED, That OMAEG's application for rehearing filed on June 24, 2016 be denied. It is, further,

{¶ 53} ORDERED, That P3/EPISA and Joint Appellants' applications for interlocutory appeals be denied. It is, further,

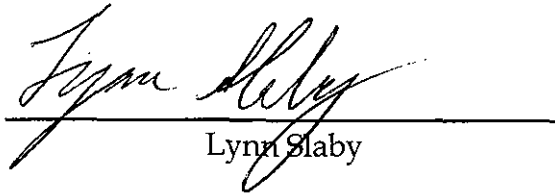
{¶ 54} ORDERED, That P3/EPISA's motion to stay the procedural schedule be denied. It is, further,

{¶ 55} ORDERED, That a copy of this Third Entry on Rehearing be served upon all parties of record.

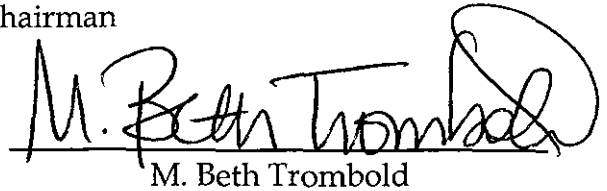
THE PUBLIC UTILITIES COMMISSION OF OHIO



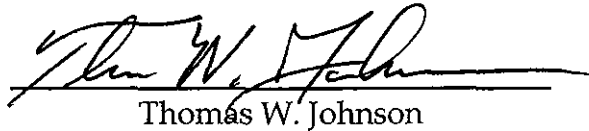
Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold



Thomas W. Johnson

MJA/sc

Entered in the Journal  
**JUL 06 2016**



Barcy F. McNeal  
Secretary