**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| 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 R.C. 4928.143 in the Form of an Electric Security Plan. | ) ) ) ) ) ) ) | Case No. 14-1297-EL-SSO |

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# MEMORANDUM CONTRA TO MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A PROTECTIVE ORDER BY ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, THE NORTHWEST OHIO AGGREGATION COALITION, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENVIRONMENTAL COUNCIL, THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, PJM POWER PROVIDERS GROUP, AND THE SIERRA CLUB

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**MEMORANDUM CONTRA MOTION OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY FOR A PROTECTIVE ORDER**
**BY**
**ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, THE NORTHWEST OHIO AGGREGATION COALITION, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO ENVIRONMENTAL COUNCIL, THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP, PJM POWER PROVIDERS GROUP, AND THE SIERRA CLUB**

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## I. INTRODUCTION

In the interests of fundamental fairness and promoting a full and comprehensive record in this proceeding, the Joint Intervenors[1] file this Memorandum Contra FirstEnergy's[2] Motion for Protective Order (filed on July 5, 2016). The Commission should deny that Motion and permit a second limited deposition of Ms. Mikkelsen on July 8, 2016, on new matters revealed only after Ms. Mikkelsen's first deposition was completed.

[1] Environmental Defense Fund, Environmental Law and Policy Center, The Northwest Ohio Aggregation Coalition, the Office of the Ohio Consumers' Counsel, Ohio Environmental Council, the Ohio Manufacturers' Association Energy Group , PJM Power Providers Group, and the Sierra Club (collectively, the "Joint Intervenors").

[2] Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company will be referred to as FirstEnergy, the Companies, or the Utilities.

## II. BACKGROUND

On June 22, 2016, the Joint Intervenors filed a Notice to Take a Deposition and Request for Production of Documents with respect to FirstEnergy Witness Ms. Mikkelsen. On June 28, 2016, the Companies served responses to Staff Discovery Requests #34 and #35 on Staff but not on the Joint Intervenors, despite an obligation under Commission rules to do so. *See* O.A.C. 4901-1-18 (requiring discovery responses to "be served upon all parties").

On June 29, 2016,[3] the Joint Intervenors deposed Ms. Mikkelsen. At the end of the day, Staff Witnesses Joseph Buckley, Tamara Turkenton, and Hisham Choueiki filed rehearing testimony. This testimony offered a new proposal as an alternative to the Utilities' Modified RRS. Staff's entirely new proposal was based on – and quoted verbatim – the discovery responses that Ms. Mikkelsen drafted and the Utilities served on Staff (but not Joint Intervenors) on June 28, 2016.

Unaware of these discovery responses, which listed FirstEnergy Witness Mikkelsen as the responsible person, and unaware of Staff's new proposal that was based on the responses, the Joint Intervenors did not question Ms. Mikkelsen on these topics. Once alerted to the Staff testimony and the existence of the Utilities' discovery responses, Joint Intervenors quickly issued a second notice to depose Ms. Mikkelsen. The second deposition of Ms. Mikkelsen is specifically focused on FirstEnergy's late-served discovery responses and their relationship to the associated new plan proposed by Staff in testimony filed on June 29, 2016. *See* Deposition Notice at 2 (filed July 1, 2016).

[3] The Joint Intervenors had originally noticed Ms. Mikkelsen to be deposed on June 30, 2016, which had it gone forward, would have been after the Staff's filed testimony.

In a motion for protective order (the "Motion") filed at the close of business on July 5, 2016, the Utilities now ask that the Commission prohibit the Joint Intervenors from further deposing Ms. Mikkelsen. They argue that allowing the deposition will unduly burden them.

The PUCO should deny the Utilities' Motion. The Joint Intervenors are entitled to such additional but limited discovery. The Utilities have not met their burden of showing the deposition would be "oppressive or unduly burdensome" on them. The deposition should go forward this Friday, July 8, 2016, as noticed.

## III. LAW AND ARGUMENT

The goal of the discovery rules is to "encourage prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in [PUCO] proceedings."[4] That is exactly what the Joint Intervenors seek through their second limited deposition of Ms. Mikkelsen. The Utilities' Motion is an unwarranted attempt to prevent the Joint Intervenors from thoroughly and adequately preparing their cases for hearing. It should be denied.

As parties to this proceeding, the Joint Intervenors "may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding [as long as] the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[5] Such discovery "may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or

[4] Ohio Adm. Code Rule 4901-1-16(A).

[5] Ohio Adm. Code Rule 4901-1-16(B).

other property, *depositions*, and requests for admission."[6] Notably, "[t]he frequency of using these discovery methods is not limited"[7] unless the "party or person from whom discovery is sought" shows that a protective order is "necessary to protect [such] party or person from annoyance, embarrassment, oppression, or undue burden or expense."[8]

The Utilities have not met that burden here. In their attempt to meet this burden, FirstEnergy lists five reasons why they believe the PUCO should grant their Motion: (1) Ms. Mikkelsen has already been deposed; (2) Staff's testimony is not relevant to Ms. Mikkelsen; (3) service of the Utilities' discovery responses (which Ms. Mikkelsen is responsible for) on Joint Intervenors after June 29, 2016 is insufficient grounds for a second deposition; (4) Ms. Mikkelsen will be subject to "repetitive and additional deposition questioning" that should have been done at the initial deposition; and (5) a deposition on July 8, 2016, will "unduly interfere" with the Companies' preparation for the hearing. As explained below, these arguments are without merit.

### A. The Joint Intervenors are entitled to a second limited deposition because the Utilities have not met their burden that such deposition will be unduly burdensome.

As described above, a party seeking a protective order must show that it is "necessary to protect [such] party or person from annoyance, embarrassment, oppression, or undue burden or expense."[9] The Ohio Administrative Code does not limit the number of depositions that can be made of a particular person or party. Nor is it an established PUCO practice to limit depositions of witnesses to one time. The mere fact that Ms. Mikkelsen has already been deposed is an insufficient justification to warrant granting a

[6] Id. (emphasis added).

[7] Id.

[8] Ohio Admin. Code Rule 4901-1-24.

[9] Ohio Admin. Code Rule 4901-1-24.

protective order, especially where the second deposition covers new topics that could not have been part of the first deposition.

The Companies cite three cases to support their argument that deposing Ms. Mikkelsen a second time is an "oppressive and unduly burdensome discovery practice[]."[10] Each of these cases are inapplicable to the circumstances in this case.

First, *Dehlendorf v. City of Gahanna*,[11] held that a "second deposition of [a witness] was not necessary to discuss alleged discrepancies between [the witness's] testimony and [another witness's] affidavit, as such matters could be brought up at trial."[12] Key to this holding, the trial court found that the appellant "had already questioned" the witness on the relevant information and thus could not show good cause to depose the witness a second time.

Here, by contrast, the Joint Intervenors have not had an opportunity to question Ms. Mikkelsen on FirstEnergy's response to Staff discovery requests #34 and #35 or her knowledge of or input to Staff's newly proposed plan. The discovery responses and Staff's new proposal were not known to the Joint Intervenors until after Ms. Mikkelsen's deposition was concluded.[13] Notably, although those discovery responses were served on Staff prior to Ms. Mikkelsen's deposition, they were not provided to Joint Intervenors until July 1, 2016 – and then only after Joint Intervenors specifically requested copies of the discovery responses. Ms. Mikkelsen, the sponsoring witness for these discovery

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[10] See *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*, at 5 (July 5, 2016) (hereinafter the "Motion").

[11] 2015-Ohio-3680; 2015 Ohio App. LEXIS 3577 (Ohio Ct. App., Franklin Cty., Sept. 10, 2015).

[12] Id. at *23.

[13] Indeed, the Rehearing Testimony of Joseph P. Buckley was not filed until 5:22 pm on June 29, 2016.

responses, is the only witness offered by the Utilities at this time. Additional deposition questions will be directed to the substance of the discovery responses – not to discrepancies between testimony as in *Dehlendorf*.

Second, *Beale v. O'Neill*[14] is clearly inapplicable. There, the court suspended discovery pending resolution of a motion for summary judgment.[15] Here, there is no pending motion for summary judgment that warrants suspending or preventing further discovery.

Third, *Greene v. Greene*[16] is also inapposite. In that case, the court held that "[a] litigant need not comply with oppressive discovery demand." However, what was oppressive in that case – i.e., "[r]equiring the appellee to furnish the identical information [it had already produced] by producing additional documents and by answering fifty-eight multiple part interrogatories" – is not present here. The Joint Intervenors seek to ask Ms. Mikkelsen questions that they did not have the opportunity to ask at the first deposition because of new information that came to light after the first deposition concluded. There is no repetition here. Instead, there is good cause for deposing Ms. Mikkelsen on limited matters not inquired into in her first deposition.

### B. FirstEnergy's late-served discovery responses are relevant to the Staff's testimony and will assist the PUCO in having a complete record.

The Utilities admit that Staff's new proposal will be at issue at the upcoming hearing.[17] Therefore, FirstEnergy's late-served discovery responses – which are quoted verbatim in Staff's testimony – are clearly relevant. Because Staff Witness Buckley

[14] 1988 Ohio App. LEXIS 1927 (Ohio Ct. App., Franklin Cty., May 17, 1988).

[15] Id. at *3.

[16] 1979 Ohio App. LEXIS 11942 (Ohio Ct. App., Cuyahoga Cty., Jan. 11, 1979).

[17] See, e.g., Motion at 8.

relies on Ms. Mikkelsen's discovery responses, deposition testimony on such responses is "[r]easonably calculated to lead to the discovery of admissible evidence." The Joint Intervenors are entitled to probe Ms. Mikkelsen on her responses.

The Joint Intervenors also should be able to explore with Ms. Mikkelsen "alternatives to the Modified RRS proposal."[18] At the initial deposition Ms. Mikkelsen testified that she was "not aware of any alternatives" to the Modified RRS proposal put forth in her testimony.[19] Now she most certainly is. The Joint Intervenors have a right to probe Ms. Mikkelsen on the extent to which FirstEnergy may have had input to the Staff's new proposal. Such questioning will not be duplicative of the first deposition and will be narrowly tailored to the topics outlined in the Joint Intervenors' deposition notice.[20]

Finally, an additional but limited deposition of Ms. Mikkelsen will allow for the development of a complete record for the PUCO and enable a more efficient hearing. In this case where hundreds of millions of dollars may be charged to customers, it is essential to have a complete record. Allowing the limited deposition of Ms. Mikkelsen to go forward will assist the PUCO in deciding these important issues.

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[18] Notice to Take Deposition and Requests for Production of Documents by 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 The Sierra Club at 2 (June 22, 2016).

[19] Deposition of Eileen M. Mikkelsen at 172:16-21 (June 29, 2016).

[20] Notice to Take Deposition and Requests for Production of Documents by 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 The Sierra Club at 2 (requesting testimony on "[a]lternatives to the Modified Rider RRS proposal, including Staff's new proposal for a new Distribution Modernization Rider (as described in the Rehearing Testimony of Staff Witness Choueiki, Turkenton, and Buckley).") (July 1, 2016).

### C. The Utilities are at fault for the late production of the discovery responses – they should be held accountable, not Joint Intervenors.

The Utilities claim that the Joint Intervenors' notice of deposition is "justified simply because the Joint Intervenors failed to request the FirstEnergy's confidential responses to Staff Data Requests 35 and 36 [sic] in a timely fashion."[21] This argument is both legally and factually wrong.

First, Joint Intervenors, including OCC, did request such data requests and the Utilities' response to the data requests. For instance, OCC requested "a copy of all formal and informal requests . . . made by the Commission, the PUCO Staff and the PUCO's Attorneys General in this Proceeding to the Company and the response to those requests provided by the Company."[22] Moreover, these same requests included instructions that "[r]esponses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available."[23] Any suggestion that the Joint Intervenors "failed to request"[24] the responses or "failed to seek timely production"[25] of them is simply incorrect.

Second, even if the Joint Intervenors had not requested such documents (they did), the Utilities were required to provide them to Joint Intervenors under the PUCO's rules. Specifically, under Ohio Admin. Code 4901-1-19(A), a party must serve a copy of answers to discovery on all parties. This means that FirstEnergy was required to timely serve Joint Intervenors copies of its responses to Staff Data Requests #35 and #36.

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[21] Motion at 9.

[22] See e.g., The Office of the Ohio Consumers' Counsel's Interrogatories and Requests for Production of Documents Propounded Upon FirstEnergy, First Set RPD-1 at 22 (Aug. 20, 2014).

[23] See, e.g., id at Instruction 9. This is in accordance with O.A.C. 4901-1-16(D)(5).

[24] Motion at 9.

[25] Motion at 10.

Because FirstEnergy failed to comply with this requirement, Joint Intervenors did not become aware of those discovery responses until after Ms. Mikkelsen's deposition.

FirstEnergy tries to justify its failure to timely serve the discovery responses by claiming that it believed "that the documents were being produced under a joint interest privilege." This excuse is misguided and lacks any basis in fact.

A "joint interest" privilege requires a showing that parties have interests that are identical.[26] Clearly that is not the case here, because the Commission Staff cannot have identical interests to the Companies. As the PUCO Staff has testified in prior cases:

> [The Staff] represents the entire state of Ohio. We represent the lowest of the low income, the highest of the high income, every single company that exists in Ohio, no matter how big, how small, the utilities. Staff is the neutral arbitrator of the state of Ohio and we look out for the short-term and long-term benefits for all of the energy needs of Ohio.[27]

A neutral arbitrator with the interests of everyone in mind could not plausibly have a joint interest privilege with the Utilities. Consequently, FirstEnergy's "joint privilege" argument is without merit.

Moreover, if it had concluded that its responses were somehow privileged, FirstEnergy was under an obligation to advise Joint Intervenors that it had provided responses to the Staff, but was not providing those responses to Joint Intervenors, based

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[26] *See, e.g., Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010); *Square D Co. v. E.I Elecs., Inc.*, 264 F.R.D. 385, 391(N.D. 111. 2009) (rejecting joint defense privilege claim because entity "has not demonstrated that its interest is identical to [other entity's] interest); *Net2Phone, Inc. v. eBay, Inc*., 2008 U.S. Dist.LEXIS 50451, *23 (D.N.J. June 26, 2008); *In re Diet Drugs Product Liability Litig.*, No, MDL 1203, 2001 U.S. Dist. LEXIS 5494 at 15 (E.D. Pa. April 19, 2001) ("the subject matter [of communications] must be a of a legal nature — something more than mere concurrent legal interest or concerns — and there may not exist any divergence in the interests") (emphasis added); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.").

[27] *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs,* Hearing Transcript Volume I at 246:13-23 (March 10, 2016).

on privilege. FirstEnergy did not do this. The PUCO should recognize this argument for what it is -- an attempt to evade discovery that is reasonably calculated to lead to the discovery of admissible evidence.

### D. The noticed deposition is necessary based upon new information – it is not a "fishing expedition" that will subject Ms. Mikkelsen to "repetitive" questioning.

The Companies also erroneously argue that the Joint Intervenors' Notice for a second deposition of Ms. Mikkelsen is a "fishing expedition" that amounts to an "abuse of the discovery process."[28] In support of this argument, the Companies variously cite to cases holding that certain discovery requests were impermissible "fishing expeditions" because the information sought was not shown to be "essential and beneficial information,"[29] "necessary or relevant,"[30] or is "overly broad discovery."[31] FirstEnergy's reliance on these cases is misplaced. Far from being a "fishing expedition," the noticed deposition will focus on a narrow set of issues that only came to light after Ms. Mikkelsen's prior deposition was concluded.

The Utilities admit that Staff's new proposal will be at issue at the upcoming hearing.[32] Therefore, FirstEnergy's responses to discovery requests #34 and #35 – one of which is quoted verbatim in Staff's testimony – are clearly relevant. Staff Witness Buckley relies on Ms. Mikkelsen's discovery responses, making discovery (through

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[28] Motion at 5.

[29] *Bland v. Graves*, 620 N.E.2d 920 (Ohio App. 9th Dist. 1993).

[30] *Bishop v. Jones Motor Co., Inc.*, 2690, 1992 WL 103756, at *3 (Ohio App. 9th Dist. May 13, 1992).

[31] *Insulation Unlimited, Inc. v. Two J's Properties, Ltd*., 705 N.E.2d 754, 757 (Ohio Com. Pleas 1997). The Companies also cite to *Walsh v. Elevator Enterprises, Inc.*, 84AP-721, 1985 WL 10229, at *2 (Ohio App. 10th Dist. Apr. 2, 1985). One fact the court relied on for denying additional discovery in this case was that the "newly discovered evidence" was actually not "new." That is distinguishable from this case where the Companies and Staff have produced new evidence after Company Witness Mikkelsen's initial deposition

[32] See, e.g., Motion at 8.

deposition testimony) "[r]easonably calculated to lead to the discovery of admissible evidence." The Joint Intervenors are entitled to an opportunity to probe Ms. Mikkelsen on her responses. Such questioning will not be duplicative of the first deposition and will be narrowly tailored to the topics outlined in the Joint Intervenors' deposition notice. The noticed deposition is not a fishing expedition because it will elicit relevant, necessary, and beneficial information well within the bounds of discovery and integrally related to one of the alternatives under review in this proceeding.

### E. A July 8, 2016, deposition does not interfere with the Utilities' ability to prepare for hearing. Indeed, the timing is entirely of the Utilities' own doing.

The Utilities argue that they are burdened by having to produce Ms. Mikkelsen for a deposition on July 8, "the last business day prior to the commencement of the hearing."[33] This argument should carry no weight. The PUCO has set a procedural schedule in this case that allows for depositions to be taken as late as July 8, 2016. Additionally, if FirstEnergy had produced the discovery responses on June 28, 2016, when they served them on Staff (i.e., when they were obligated to), then the Joint Intervenors could have conducted just one deposition of Ms. Mikkelsen. The Utilities should not be permitted to unfairly benefit from their dilatory discovery responses. The PUCO should deny the motion for a protective order.

[33] Motion at 10.

## IV. CONCLUSION

The Joint Intervenors are entitled to depose Ms. Mikkelsen unless the Utilities can show that doing so would be "oppressive or unduly burdensome." The Utilities have not met this burden. The PUCO should deny the Motion and allow the Joint Intervenors to depose Ms. Mikkelsen on July 8, 2016, on the narrow issues as noticed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra to Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for a Protective Order was served via electronic service upon the parties this 7th day of July 2016.

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Summary: Memorandum Memorandum Contra to Motion of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for a Protective Order by Environment Defense Fund, Environmental Law and Policy Center, the Northwest Ohio Aggregation Coalition, the Office of the Ohio Consumers' Counsel, Ohio Environmental Counsel, the Ohio Manufacturers' Association Energy Group, PJM Power Providers Group and the Sierra Club electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.