BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company.	))))))	**Case No. 20-1502-EL-UNC**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The U.S. Attorney's Office asked the Commission to stay these proceedings for six months.[1] In response, the Commission ordered a temporary stay, to avoid "inadvertently thwarting or obstructing the efforts of the DOJ."[2] Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") submit that staying these proceedings to avoid a conflict with the U.S. Attorney's efforts was the prudent course, and file this memorandum contra in support of the Commission's Entry.

The Office of the Ohio Consumers' Counsel ("OCC") now challenges the Commission's decision under R.C. 4903.10 and O.A.C. 4901-1-35.[3] However, OCC has failed to show that the Entry is in any way unreasonable or unlawful.[4] The Commission considered the procedural history

[1] U.S. Attorney's August 15, 2022 Letter.

[2] Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, Entry (August 24, 2022) (the "Entry") at ¶ 86.

[3] Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, OCC's Application for Rehearing and Memorandum in Support, (Sept. 23, 2022) ("AFR", "AFR, Mem." or "Application for Rehearing").

[4] *See* R.C. 4903.10.

of these cases and weighed the issues at stake in accordance with the law in an exhaustive analysis that OCC ignores.

Further, OCC has already raised, and the Commission has already rejected, most of OCC's arguments in past decisions. There is no basis for the Commission to consider those arguments again, and the Commission should decline to do so. Similarly, the Commission should not consider OCC's arguments that are unrelated to the decision to stay these proceedings.

Therefore, and as discussed further below, the Companies respectfully request that OCC's Application for Rehearing be denied.

II. ARGUMENT

A. OCC Fails To Set Forth Grounds For Finding The Entry Either Unlawful Or Unreasonable.

In ordering a six-month stay of these proceedings, the Commission explained, in a thorough and well-reasoned decision, that balancing the facts with the law, "the considerable overlap of the parties' discovery and issues between the Commission's four proceedings and the DOJ's investigation" "weigh[ed] most heavily" in favor of granting the stay.[5] The Entry specifically addressed each factor the Commission considered, including any alleged prejudice to intervenors and the public's interest in resolving these proceedings.[6] Indeed, the Commission's balancing analysis was supported by an extensive discussion of Sixth Circuit precedent (in the absence of

[5] Entry at ¶ 85.

[6] *See id.* at ¶ 71(noting that the Commission should consider the "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest"—as well as the Fifth Amendment rights of those implicated by the DOJ's federal criminal investigations); *id.* at ¶¶ 72-84.

on-point state and Commission authority) applicable to a court's determination to stay a civil action while a criminal action is pending.[7]

OCC does not attempt to address the Commission's factor-by-factor analysis or the conclusions reached by the Commission in its application of those factors. Nor does OCC claim that the Commission's weighing of those factors was somehow improper. Instead, OCC's Application for Rehearing argues the stay itself violates intervenors' due process and discovery rights, and in doing so, is unreasonable.[8] These arguments do not specifically allege how the Entry is unreasonable or unlawful, as required by R.C. 4903.10.[9] In fact, the Commission found that the stay may aid the parties' discovery efforts by, for example, giving OCC and others time to "wade" through the "mountain of evidence" already produced and by "ultimately reduc[ing] or eliminat[ing] the need for discovery."[10]

It is no violation of due process for the Commission to temporarily stay these proceedings. The Commission assured the parties that "these proceedings [will] move forward and provide answers," just "not at the expense of ensuring effective criminal prosecution and justice."[11] Further, the Commission has afforded OCC and others ample process. The Commission has granted several requests to enlarge discovery periods[12] and "OCC has already been exercising its ample rights of discovery"[13] in this proceeding and others.

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[7] Entry at ¶¶ 70-71.

[8] OCC AFR, Mem. at 3-7.

[9] *See Disc. Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 59, 112 Ohio St. 3d 360, 374, 859 N.E.2d 957, 971 ("We 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.").

[10] Entry at ¶¶ 75, 77.

[11] *Id.* at ¶ 86.

[12] *Id.* at ¶ 79.

[13] Case No. 20-1629-EL-RDR, Entry at ¶ 15 (Feb. 9, 2022).

In addition, the Commission has ample reason to believe a temporary stay is necessary to avoid interfering with the U.S. Attorney's efforts. In its Entry, the Commission found that OCC and others "are unable, or unwilling, to move forward without the opportunity to inquire about non-public information related to the DPA that may interfere with the DOJ's federal investigation," leaving the Commission with "no other remedy" than a temporary stay.[14]

OCC's arguments against the stay also contradict *its own* position in the Corporate Separation Audit, Case No. 17-974-EL-UNC, where OCC requested an *indefinite* continuance to enable it to review all the documents produced by FirstEnergy Corp.[15] OCC has likewise argued, in Comments in Case No. 20-1502-EL-UNC, that to protect consumers "the PUCO should reserve final judgment [in the proceeding] until *all* its audits are completed, the FERC audit is completed, the SEC investigation is completed, . . . *and any other sources of information are considered (such as any related further federal criminal investigations and shareholder lawsuits)*."[16]

Because OCC has not attempted to demonstrate, let alone demonstrated, that the Entry is unlawful or unreasonable, the Commission should reject OCC's Application for Rehearing.

B. OCC's Application For Rehearing Is Improper.

Beyond failing to show that the Entry is either unlawful or unreasonable, OCC's Application for Rehearing is, in many instances, unrelated to any determination made by the Commission in the Entry. Rather than addressing the Commission's thorough reasoning for

[14] Entry at ¶ 86.

[15] Case No. 17-974-EL-UNC, OCC, NOPEC, and OMAEG Motion for an Indefinite Continuance (Mar. 14, 2022).

[16] OCC Comments, Case No. 20-1502-EL-UNC, at 21 (Nov. 29, 2022) (emphasis added).

granting the stay, OCC's Application for Rehearing relitigates matters addressed and rejected by the Commission[17] or advances new requests while the stay is in effect.[18]

Many of the supposed "errors" OCC points to are not properly before the Commission; OCC's Application For Rehearing is based on arguments that were rejected in prior filings.[19] It is improper for a party to "reiterate[] arguments that were considered and rejected by the Commission."[20] For these reasons, OCC's assignments of error "fail[] to provide any facts or arguments that would give the Commission just cause to reconsider its decision."[21] The Commission should reject OCC's arguments accordingly.

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[17] *Compare* OCC AFR, Mem. at 10-12 ("The PUCO's stay order should not prevent the PUCO from granting the Motion for Supplemental Audit filed on November 5, 2021 by OCC and the Northeast Ohio Public Energy Council.") *with* Case No. 17-974-EL-UNC, Prehearing Conference Tr. at 24:12-23 (Jan. 4, 2022), *and* Case No. 17-974-EL-UNC, Entry at ¶¶ 25-29 (Feb. 10, 2022); *compare* OCC AFR, Mem. at 15-17 ("The PUCO should have allowed discovery to be re-opened in Case No. 17-974-EL-UNC after the stay is lifted.") *with* Case No. 17-974-EL-UNC, Entry ¶¶ 20-28 (Jun. 16, 2022); *compare* OCC AFR, Mem. at 21-24 ("The PUCO should have expanded the PUCO investigations to expressly include a management and performance audit examining the relationship between FirstEnergy and former PUCO chair Sam Randazzo.") *with* Case No. 20-1629-EL-RDR, Entry at ¶¶ 15-21 (Feb. 9, 2022); *compare* OCC AFR, Mem. at 25-28 ("The PUCO should have ordered FirstEnergy to release its internal reports on the H.B. 6 scandal after the stay is lifted.") *with* Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, Entry Denying the Motions filed by the OCC and NOAC on July 7, 2022, and August 10, 2022 at ¶ 81 (Aug. 24, 2022).

[18] OCC AFR, Mem. at 17-18 ("The PUCO's Order should have allowed for *in camera* review of documents produced by FirstEnergy Corp. and the FirstEnergy Utilities under protective agreements."); *id.* at 19-20 ("The PUCO should have provided for the lifting of the stay in Case No. 20-1629-EL-RDR at the same time the stay for the U.S. Attorney is lifted.").

[19] *See supra*, at n.17.

[20] *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at *6 (Nov. 29, 2011). *See also In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at *15-16 (May 4, 2011) (rejecting an application for rehearing that "raised nothing new"); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 WL 2288069, Entry on Rehearing, at *5-7 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, Entry on Rehearing, at *9-10 (Nov. 1, 2011) (denying application for rehearing because applicant "raised nothing new on rehearing that was not thoroughly considered" in the Commission order at issue).

[21] *Wiley*, 2011 Ohio PUC LEXIS 1276, at *6.

Moreover, OCC's Application for Rehearing inappropriately raises several new issues nowhere implicated in—let alone determined by—the Entry. OCC's calls for an *in camera* review or to lift the stay in Case No. 20-1629-EL-RDR are new arguments unrelated to this stay and are therefore not properly raised in an application for rehearing.[22] R.C. 4903.10 provides that a "party . . . may apply for a rehearing in respect to any matters *determined in the proceeding*." And it is improper to raise entirely new arguments for the first time in an application for rehearing because those arguments are not properly before the Commission.[23] Thus, OCC's calls for the Commission to address on rehearing new arguments unrelated to the stay ordered by the Entry must be rejected.

III. CONCLUSION

As the Commission has explained: "The interest of justice requires continued application of the practice to freeze civil proceedings when criminal prosecution involving the same facts is warming up or under way so as to avoid improper interference with ongoing criminal proceedings."[24] Accordingly, and for all the reasons discussed herein and in the Entry, the Commission should reject OCC's Application for Rehearing.

[22] OCC AFR, Mem. at 17-20.

[23] *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Second Entry on Rehearing at ¶ 23 (Oct. 23, 2019) ("[Complainant] attempts to alter its initial grounds for complaint by asserting this new argument at the rehearing stage of the proceeding. For this reason alone, rehearing should be denied."); *In the Matter of the Application of Killen Generating Station for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-891-EL-REN, Entry on Rehearing at ¶ 15 (May 26, 2010) ("[T]he Commission finds no merit to OCC and OEC's argument . . . , which was improperly raised for the first time on rehearing."); *In the Matter of the Commissions Review of Chapter 4901:1-35 of the Ohio Admin. Code.*, No. 18-1188-EL-ORD, 2020 WL 4819379, at *6 (F.E.D.A.P.J.P. July 29, 2020) (same).

[24] Entry at ¶ 86 (citations omitted).

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Respectfully submitted,

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on October 3, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Shalini B. Goyal
Attorney for the Companies

Summary: Memorandum Contra the Application for Rehearing by OCC electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company