

**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)	Case No. 14-1297-EL-SSO
for a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of an Electric Security)	
Plan)	

**MOTION FOR PROTECTIVE ORDER
OF
OHIO EDISON COMPANY
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
THE TOLEDO EDISON COMPANY**

Pursuant to O.A.C. 4901-1-24(A), Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”) move for a protective order (the “Motion”) prohibiting the depositions of the Company witnesses who filed rebuttal testimony in this proceeding. The Commission’s rules do not permit discovery once a hearing has begun and Commission precedent does not authorize these unnecessary depositions.

A Memorandum in Support of this Motion is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ N. Trevor Alexander

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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Continuing on with a seemingly never-ending request for unlimited discovery, the intervenors in this case have noticed or otherwise requested depositions of the Companies' rebuttal witnesses. On October 20, 2015, Sierra Club noticed the depositions of and requested documents from Messrs. Moul and Rose and Ms. Mikkelsen. Also on October 20, 2015, P3/ESPA informally requested the deposition of Mr. Lisowski. These attempts at further discovery should be stopped. Discovery is over.

The Commission's rules do not allow unlimited discovery at any time until the end of a hearing. Instead, the Commission rules properly place restrictions on discovery in order to ensure the orderly administration of cases. The Commission's rules do not permit the notice of depositions once a hearing has begun. O.A.C. 4901-1-17(A) provides a reasonable limit on when discovery should take place, i.e., "discovery must be completed prior to the commencement of the hearing." Because there have been 31 hearing days already, not including several local hearings, the intervenors do not have any right to conduct additional depositions or to additional documents at this point.

Moreover, Commission precedent does not authorize intervenors to conduct depositions of rebuttal witnesses. Accordingly, a protective order is necessary to preclude any further discovery and allow the parties to move forward with the rebuttal phase of the hearing.

I. The Commission's Rules Do Not Authorize Depositions After The Hearing Starts.

O.A.C. 4901-1-17(A) is the Commission's rule governing the timing of discovery. It states:

“(A) Except as provided in paragraph (E) of this rule, discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.”

This language is clear. Unless otherwise ordered, once the hearing begins there is no further opportunity for discovery. Depositions and accompanying document requests are discovery,¹ which is further evidenced by the Commission rule requiring subpoenas to be issued prior to the start of hearing.² These deposition notices were issued on October 20, 2015, well after the hearing commenced. There has been no entry in this proceeding authorizing additional discovery once the hearing commenced. Accordingly, the intervenors have no right to notice the depositions of rebuttal witnesses and the Motion should be granted.

II. Precedent Does Not Support Depositions Of Rebuttal Witnesses.

There is no Commission precedent where a rebuttal witness has been ordered to be deposed in similar circumstances. This issue was recently addressed in the DP&L ESP II proceeding, Case No. 12-426-EL-SSO. In that case, DP&L *voluntarily agreed* to make a

¹ O.A.C. 4901-1-16(B)(“Discovery may be obtained through interrogatories, **requests for the production of documents** and things or permission to enter upon land or other property, **depositions**, and requests for admission.”)(emphasis added).

² O.A.C. 4901-1-25(E)(“Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than ten days prior to the commencement of the hearing or, if expedited treatment is requested, no later than five days prior to the commencement of the hearing.”)

rebuttal witness available for a deposition limited to two hours.³ Several intervenors requested the right to conduct depositions of DP&L's rebuttal witnesses for as long as was required. The intervenors argued that they had issued discovery requests which arguably addressed rebuttal testimony, needed to conduct depositions to learn more about DP&L's position, and would be able to conduct the hearing more efficiently if they were able to conduct unlimited depositions of DP&L's witnesses.⁴

The Attorney Examiner rejected the intervenors' position and granted DP&L's oral motion for protective order. In making his decision, he pointed out that there had been no time limits on the initial deposition of DP&L's witness,⁵ the scope of the initial depositions was not limited,⁶ the intervenors had issued over 400 interrogatories,⁷ and the intervenors would have the ability to cross examine the witnesses about their rebuttal testimony at hearing.⁸ The Attorney Examiner then pointed out that general Commission practice does not permit depositions of rebuttal witnesses. "I agree that general Commission practice has been rebuttal witnesses are not another opportunity for discovery."⁹ In light of each of these factors, DP&L's motion for protective order was granted.¹⁰

Each of those criteria are met in this proceeding. The intervenors have already issued over 3700 discovery requests and they have spent over 25 days of depositions and 20 days of hearing examining the Companies' witnesses. Each of the rebuttal witnesses has been previously deposed and cross-examined at length. Several of the witnesses were cross-examined in this

³ Case No. 12-426-EL-SSO, March 27, 2013, Tr. Vol. VIII, pp. 2066. The relevant portion of this transcript is attached hereto as Exhibit A.

⁴ *Id.*, pp. 2064-72.

⁵ *Id.*, p. 2067.

⁶ *Id.*

⁷ *Id.*, p. 2068.

⁸ *Id.*, pp. 2074-76.

⁹ *Id.*, p. 2070.

¹⁰ *Id.*, p. 2074.

hearing over multiple days.¹¹ Those witnesses will also be available for cross examination in this hearing next week. There is no procedural or fairness reason to vary from the Commission precedent prohibiting depositions of rebuttal witnesses at this late date.

Intervenors may attempt to differentiate the DP&L decision by pointing out that DP&L stipulated to the 2 hour depositions of their rebuttal witnesses and the Companies are not offering that same stipulation. This argument fails because DP&L was not required to permit those depositions, and did so voluntarily.¹² The Companies are not willing to make that same agreement because this hearing is in a different procedural posture than the DP&L hearing. The entire DP&L ESP hearing was completed in only 12 hearing days. This case has been pending since August of 2014, has had 31 hearing days thus far, and has 4 more hearing days scheduled for next week. There must be a reasonable limit to the extensive proceedings which have taken place thus far, and therefore the Companies are not willing to stipulate to more unlimited depositions.

Finally, the intervenors will not be prejudiced in any manner by not being able to conduct these additional depositions. They have had extensive access to these witnesses already. More importantly, all of the rebuttal testimony expressly addresses issues raised in intervenor testimony. As the intervenors are, by definition, already very familiar with those issues they will not be prejudiced if the Motion is granted.

III. Attempts to Resolve Dispute

Pursuant to O.A.C. 4901-1-24(B), this dispute was discussed on the record with the Attorney Examiners during the hearing on October 19, 2015. As that discussion showed, the

¹¹ Company witness Mikkelsen was examined over three days. Company witnesses Moul, Lisowski, and Rose were examined over two days.

¹² *Id.*, p. 2069 (“We did agree to let Ms. Seger-Lawson go for two hours which, frankly, we don’t believe OCC was entitled to in any event, but we agreed to that as a courtesy.”)

parties have a fundamental disagreement as to whether any depositions are appropriate and that discussion did not resolve the parties dispute. The Companies also spoke to Sierra Club via telephone on October 21, 2015 and were unable to resolve this dispute.

IV. Conclusion

The Commission's rules do not permit discovery once the hearing has commenced, and recent Ohio precedent supports the Companies' position. Therefore, the Companies respectfully request that the Motion be granted.

Respectfully submitted,

/s/ N. Trevor Alexander

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 21st day of October, 2015. The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

Association of Independent Colleges and Universities of Ohio, Buckeye Association Of School Administrators, Buckeye Wind LLC, Citizens Coalition, City Of Akron, City Of Cleveland, Constellation NewEnergy Inc., Council Of Smaller Enterprises, Direct Energy Services LLC, Duke Energy Ohio Inc., Dynegy Inc., Energy Professionals of Ohio, EnerNOC Inc., Environmental Law & Policy Center, Exelon Generation Company, LLC, Hardin Wind LLC, IBEW Local 245, IGS Energy, Industrial Energy Users Of Ohio, Kroger Co., Mid-Atlantic Renewable Energy Coalition, Monitoring Analytics LLC, MSC, Nextera Energy Resources, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Nucor Steel Marion, Inc., Ohio Advanced Energy Economy, Ohio Association Of School Business, Ohio Consumers Counsel, Ohio Energy Group, Inc., Ohio Environmental Counsel, Ohio Hospital Association, Ohio Manufacturers' Association, Ohio Power Company, Ohio Partners For Affordable Energy, Ohio School Boards Association, Ohio Schools Council, PJM Power Providers Group, Power4Schools, Retail Energy Supply Association, Sierra Club, The Cleveland Municipal School District, The Electric Power Supply Association, Wal-Mart Stores East, LP, and Sam's East, Inc.

/s/ N. Trevor Alexander

An Attorney for the Companies

2063

1 Wednesday Afternoon Session,
2 March 27, 2013.

3 - - -

4 EXAMINER PRICE: Let's go on the record.
5 Ms. Yost.

6 MS. YOST: Thank you, your Honor. OCC
7 served a notice of deposition upon Dayton Power &
8 Light, and I have a copy for the Bench if I could
9 provide that.

10 EXAMINER PRICE: Please.

11 MS. YOST: Your Honors, OCC filed a
12 notice to take depositions and requests for
13 production of documents served upon the company and
14 filed in the docket on January 3rd, 2013, and in
15 that notice pursuant to Commission Rule
16 4901-1-2-1(B), as in boy, OCC indicated that they
17 would like to take the deposition of all persons who
18 will be called by Dayton Power & Light Company to
19 present testimony including direct, rebuttal,
20 surrebuttal, and any other form of testimony filed or
21 to be filed in this proceeding.

22 In addition to that, OCC served discovery
23 responses upon the company. May I approach, your
24 Honor?

25 EXAMINER PRICE: You may.

2064

1 MS. YOST: Your Honors, OCC served its
2 30th set on March 1st, 2013, and in that set OCC
3 interrogatory No. 493, which is found on page 6,
4 requested that pursuant to the Commission Rule
5 4901-1-16(C), as in cat, that the company identify
6 each expert witness that they expect to testify.

7 The responses indicated in regards to
8 rebuttal, that last sentence of the response
9 indicates: Mr. Chambers or Mr. Malinak may file
10 rebuttal testimony relating to their initial prefiled
11 testimony, but DP&L has not yet determined whether
12 such rebuttal testimony will be filed.

13 OCC has not received a supplement in
14 regards to the responses to our interrogatory that we
15 just discussed. In addition to that, the OCC points
16 out the Commission's rules, specifically the general
17 rules on discovery, 4901-1-16(B), as in boy, indicate
18 that the frequency of using these discovery methods
19 is not limited, unless Commission orders otherwise,
20 under Rule 4901-1-24 of the Administrative Code.

21 As the Bench knows, Rule 24 is the rule
22 regarding motions for protection.

23 Pursuant to OCC's notice, the companies
24 never requested nor received a motion to protect the
25 types of discovery that OCC was requesting from it.

2065

1 In addition to that rule, rule 16(C), as
2 in cat, indicates that a party may, through
3 interrogatories, require any other party to identify
4 each expert witness expected to testify at the
5 hearing and to state the subject matter on which the
6 expert is expected to testify.

7 As we just indicated, OCC has done that
8 and has also indicated the company's response.

9 Rule 16(C) says that, thereafter, any
10 party may discover from the expert or other party
11 facts or data known, or opinions held, by the expert
12 which are relevant to the stated subject matter.

13 And, your Honor, the Commission's rules
14 do not limit the taking of depositions. The
15 Commission's rules do not limit the taking of
16 depositions only in regard to the filing of direct
17 testimony.

18 OCC's notice is in accordance with the
19 Commission's rules. There's been no motion for
20 protection sought or received and, I don't want to
21 misstate, but I believe late last week or earlier
22 this week was when we were first notified that
23 Ms. Seger-Lawson would be testifying, we received her
24 testimony yesterday, and in accordance with
25 Commission's rules, and I will also point out not

2066

1 only the Commission's rules, but the Revised Code
2 permits ample discovery for the parties.

3 And in accordance with the rules, OCC's
4 notice, I think it's only fair that OCC get to take
5 the deposition of Ms. Seger-Lawson.

6 The company has indicated that they are
7 willing to let us depose Ms. Seger-Lawson but has
8 imposed a two-hour limitation which, you know, per
9 the Commission rules depositions are not limited
10 unless otherwise established by a hearing examiner.

11 In addition to that, it's kind of
12 premature, but OCC would request that we be permitted
13 to take the depositions of Mr. Jackson and
14 Mr. Malinak. We, of course, would review the
15 testimony but, in accordance with OCC's notice and
16 Commission's rules, we would be entitled to take that
17 deposition before they were permitted to testify.

18 EXAMINER PRICE: Just to sum up, are you
19 making a motion to compel?

20 MS. YOST: It's hard to say, your Honor,
21 because to the extent that we don't feel it would be
22 necessary to take a deposition, we would not want to
23 do that. But I have no reason to think that we would
24 not want to take their depositions.

25 To the extent they just rehash their

2067

1 direct testimony, that would not be proper rebuttal
2 and we would move to strike that. So I'm not
3 anticipating that it will just be a rehashing of
4 their direct testimony, but, again, that's just an
5 anticipation that I have.

6 But in regards to the testimony of Dona
7 Seger-Lawson, excuse me, not the testimony, but the
8 deposition, in essence I just want a determination
9 from the Commission that the deposition would not be
10 limited to two hours, as the company has so
11 indicated.

12 EXAMINER PRICE: When you first had your
13 deposition of Ms. Seger-Lawson, was there any time
14 limit imposed on the deposition?

15 MS. YOST: No, your Honor. I think you
16 made that very clear that depositions were not going
17 to be limited.

18 EXAMINER PRICE: And when you made --
19 when you had your first deposition of
20 Ms. Seger-Lawson, beyond the privileged issues the
21 Bench is aware about, you had the opportunity to ask
22 her any questions you wanted to ask her.

23 MS. YOST: To some extent, yes, your
24 Honor.

25 EXAMINER PRICE: Okay. A qualified

2068

1 answer is fine.

2 Okay, Mr. Sharkey -- and just to be
3 clear, I guess for the record, we are at 30 sets of
4 written discovery, interrogatories, 493 plus?

5 MS. YOST: Possibly plus.

6 EXAMINER PRICE: And requests for
7 production of documents, 120, plus?

8 MS. YOST: Possibly plus.

9 EXAMINER PRICE: Is there a 31st set
10 that I am not aware of?

11 MS. YOST: I'm thinking there is.

12 EXAMINER PRICE: There may be a
13 31st set?

14 MS. YOST: There may be.

15 EXAMINER PRICE: Mr. Sharkey.

16 MR. SHARKEY: I'll start by saying I
17 don't remember if there's a 31st set or not, we're
18 at least toward the end with this set, your Honor.

19 Yes, your Honor, several responses.
20 First of all, it's my understanding that ordinarily
21 rebuttal witnesses aren't subject to discovery. And
22 in particular, as you've correctly noted,
23 Ms. Seger-Lawson has already been subject to a
24 deposition. OCC had the opportunity to depose her
25 for as long as it wished.

2069

1 In addition, Mr. Jackson and Mr. Malinak
2 who we are expecting to serve rebuttal testimony from
3 still today, towards the end of the day,
4 Mr. Jackson's already been deposed for three days,
5 your Honor, and Mr. Malinak was deposed for a day,
6 and they had as long as they wanted with him. It was
7 without limitation.

8 So we would submit that there's been
9 ample opportunity to conduct discovery, and in
10 addition, your Honor, all three of those persons will
11 be called live as witnesses here so there will be no
12 limitation when they arrive here as to the scope and
13 number of questions that could be asked of them.

14 EXAMINER PRICE: Let's not jump to that
15 conclusion.

16 MR. SHARKEY: Well, okay. But as you
17 know, your Honors, the questioning, the scope of the
18 questioning that you have allowed has been fairly
19 broad and you've certainly allowed attorneys to ask
20 questions, as many as they've had. I haven't seen
21 you place any limits on the amount of time or number
22 of questions on hardly -- hardly any attorney, so
23 there's no prejudice through a denial.

24 We did agree to let Ms. Seger-Lawson go
25 for two hours which, frankly, we don't believe OCC

2070

1 was entitled to in any event, but we agreed to that
2 as a courtesy. But in light of the tightness of time
3 as to Mr. Jackson and Mr. Malinak when their
4 testimony will be served and, you know, the
5 anticipation of getting them on next week, we did not
6 agree to allow them to be deposed.

7 EXAMINER PRICE: Are you making a motion
8 for protective order?

9 MR. SHARKEY: Yes, your Honor, I'll make
10 an oral motion for protective order so the motion is
11 live and in front of you.

12 EXAMINER PRICE: Okay. Are you aware of
13 any -- I agree that general Commission practice has
14 been rebuttal witnesses are not another opportunity
15 for discovery. Are you aware of any Commission
16 precedence or rulings along those lines?

17 MR. SHARKEY: Your Honor, I am not aware
18 one way or the other as I stand here what
19 Commission's rulings are, so no.

20 EXAMINER PRICE: Ms. Yost, are you aware
21 of any precedence on this issue?

22 MS. YOST: Your Honor, I'm aware that
23 I've been able to depose rebuttal witnesses in the
24 past and that's why I didn't think there would be
25 much of an issue.

2071

1 Precedent right on point other than the
2 rules? We didn't find any. We did look. Either
3 way.

4 EXAMINER PRICE: When did you depose
5 rebuttal witnesses?

6 MS. YOST: Mr. Hamrock AEP.

7 EXAMINER PRICE: AEP, all right.
8 Generous attorney examiners.

9 MR. SHARKEY: May I inquire, your Honor,
10 as to whether that was agreed to by AEP or ordered by
11 the attorney examiners?

12 EXAMINER PRICE: You can inquire. I
13 don't know off the top of my head.

14 Is this something AEP agreed to or was
15 this something the examiners ordered?

16 MS. YOST: Your Honor, I can't speak to
17 that. I can't recall.

18 EXAMINER PRICE: Okay. Fair enough.

19 Anything else you wish to consider before
20 we rule on this?

21 MR. OLIKER: Your Honor, can I have a
22 moment, please?

23 EXAMINER PRICE: Yes, Mr. Oliker.

24 MR. OLIKER: I'm sorry to trouble you
25 with this, but as you know from Mr. Jackson, he has

2072

1 done some, what may be viewed as unusual calculations
2 by some parties that have been very difficult to
3 follow.

4 I believe that, for the sake of
5 administrative economy and for not keeping everyone
6 in this room too long, it may be more helpful for us
7 to be able to explore some of his calculations in the
8 event that is what his testimony would contain in a
9 deposition so that we can save everybody the time and
10 effort in this room as we go forward with this
11 hearing.

12 EXAMINER PRICE: That's a good point.

13 Mr. Alexander?

14 MR. ALEXANDER: Your Honor, I agree with
15 OCC and with IEU.

16 One additional point with regard to the
17 two-hour limitation proposed by DP&L, there is a
18 pending motion to strike, I understand there's going
19 to be argument on that tomorrow, but for tonight's
20 purposes we may spend time talking about an issue
21 that isn't ultimately in the testimony. So this
22 two-hour limitation is really very, very tight.

23 I know there's at least three parties who
24 plan to have questions for Ms. Seger-Lawson,
25 particularly when there's some testimony that's in

2073

1 doubt that we still need to ask questions about
2 tonight in the event our motion to strike is denied
3 tomorrow.

4 MS. YOST: Your Honor, if I may add.

5 EXAMINER PRICE: Yes.

6 MS. YOST: I agree with Mr. Olier that
7 to the extent that we are permitted to do a
8 deposition of the witnesses, it will expedite the
9 amount of cross-examination that we have before the
10 Bench.

11 In addition to that, I will just point
12 out the only piece of rebuttal testimony we have in
13 front of us is that of Witness Seger-Lawson and there
14 was some question about what questions we could have
15 asked them during the deposition, but as the company
16 has pointed out, the staff presented a new piece of
17 testimony in regard to the storm rider, I believe
18 they moved to strike it, said they only had a week to
19 take a look at it.

20 They have since addressed it in their
21 rebuttal testimony and so this is kind of a new area
22 for OCC to take a position, I'm sure we're probably
23 in support of the staff but, nonetheless, we would
24 like to talk to Ms. Seger-Lawson about her position.
25 So it is a new area that was not in the application.

2074

1 EXAMINER PRICE: But that's not fair to
2 the company because staff introduced a new topic to
3 say the company's burden is now greater because some
4 other party, well within their rights I may point
5 out, has proposed a new provision. I think that's
6 pushing the envelope a little bit.

7 Okay. At this time, we're going to grant
8 Dayton's motion for protective order.

9 MR. SHARKEY: Thank you, your Honor.

10 EXAMINER PRICE: We are going to find
11 that additional depositions beyond the two hours that
12 you've already agreed to for Ms. Seger-Lawson would
13 impose an undue burden upon the company. You
14 certainly cannot say in this proceeding the parties
15 have not had ample discovery, we're at 30 sets of
16 interrogatories just from one party, 30 sets of
17 written discovery just from one party, and over 400
18 interrogatories.

19 The whole point of discovery is to
20 prevent gamesmanship at trial and trial by surprise,
21 but in Commission proceedings all of the testimony is
22 prefilled. You have Ms. Seger-Lawson's testimony at
23 this point, if the company -- actually I'm going to
24 take the "if" away.

25 What date did you say you would have

2075

1 Jackson and --

2 MR. FARUKI: It will be either tonight or
3 tomorrow, your Honor. I'm hoping for tonight. Maybe
4 tomorrow morning.

5 EXAMINER PRICE: It will be filed by
6 tomorrow.

7 MR. FARUKI: Yes.

8 EXAMINER PRICE: Close of business.

9 MR. FARUKI: Yes, sir.

10 EXAMINER PRICE: So the parties will have
11 at least Friday, Saturday, Sunday, and Monday to
12 review that prefiled testimony.

13 MR. FARUKI: Correct, your Honor.

14 EXAMINER PRICE: And that's pretty much
15 time to prepare for hearing. I certainly understand
16 and accept that depositions make the hearing go a
17 little bit more quickly, but if you need additional
18 time to cross-examine these witnesses, you'll have
19 time to cross-examine the witness.

20 There shouldn't be anything in the
21 rebuttal testimony that's beyond the facts that
22 were -- the issues that were raised in the intervenor
23 testimony or in staff's testimony so all these topics
24 have been thoroughly covered.

25 To the extent that there's something

2076

1 beyond, then we'll rule appropriately. Okay.

2 MR. SHARKEY: Thank you, your Honor.

3 MS. YOST: Just for clarification.

4 EXAMINER PRICE: Yes.

5 MS. YOST: So the motion for protection
6 is in regard to limiting the deposition of
7 Ms. Seger-Lawson to two hours and at this time the
8 motion for protection is in regards to any deposition
9 for Chambers and Malinak?

10 EXAMINER PRICE: Jackson and Malinak,
11 Chambers is not being re-called.

12 MR. FARUKI: That's correct, your Honor.

13 MR. SHARKEY: That's correct.

14 MS. YOST: Thank you, your Honor.

15 EXAMINER PRICE: Thank you.

16 EXAMINER MCKENNEY: Is OCC ready to call
17 its witness?

18 MS. YOST: Yes, your Honor. At this time
19 OCC calls Ms. Beth Hixon to the stand and request
20 that her testimony be marked as OCC Exhibit 23.

21 EXAMINER MCKENNEY: Ms. Hixon, please
22 raise your right hand.

23 (Witness sworn.)

24 EXAMINER MCKENNEY: Thank you, you may be
25 seated. Please state your name and address for the

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Case No(s). 14-1297-EL-SSO

Summary: Motion for Protective Order Regarding Depositions electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Cleveland Illuminating Company and The Toledo Edison Company