BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	**)** **)** **)** **)** **)** **)**	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE JOINT MOTION FOR A STAY OF DISCOVERY AND FOR AN EXPEDITED RULING FILED BY THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

There are no grounds to stay discovery in this proceeding. The Commission's Entry on Rehearing issued May 11, 2016 ("Entry") properly granted rehearing and gave parties an opportunity to commence discovery regarding the proposed modifications to how Rider RRS is calculated (the "Proposal"), which were set out in the Application for Rehearing filed on May 2, 2016 by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies"). No party is prejudiced by the Commission's decision to allow additional discovery. In contrast, the Companies and their customers are prejudiced by delaying the full benefits of Stipulated ESP IV. The Commission should lift the temporary stay and allow discovery to continue.

I. THERE ARE NO GROUNDS TO STAY DISCOVERY.

The PJM Power Providers Group and the Electric Power Supply Association ("Movants") seek to obstruct this matter and stay discovery from going forward. Movants trot out the four part test to stay an order. But, as shown below, they fail to satisfy any of the factors of that test. The rehearing here is well supported by the Companies' application and is within the Commission's jurisdiction to consider. No one is prejudiced by having discovery go forward,

much less irreparably harmed. A stay will obstruct the rights of parties to participate in this case and will be contrary to the public interest in obtaining an expeditious resolution of the remaining issues in this matter.

A. Those Seeking the Continuation of a Stay Will Not Prevail on "the Merits."

What constitutes "the merits" is left unclear in the instant Motion. It appears that Movants raise two arguments: (1) the Commission's Entry did not specify the purpose and scope of rehearing as required by R.C. 4903.10; and (2) the Commission lacks jurisdiction to grant rehearing and consider the Proposal. As demonstrated below, neither argument supports staying discovery.

1. The Commission's Entry specifies the purpose and scope of rehearing as required by R.C. 4903.10.

R.C. 4903.10 directs that, upon granting rehearing, the Commission "shall specify in the notice of such granting the purpose for which it is granted" and also "specify the scope of the additional evidence, if any, that will be taken."[1] Here, the Entry stated that rehearing has been granted because the Proposal creates "the potential for further evidentiary hearings." The Entry also "allow[ed] parties to begin discovery in anticipation of potential further hearings."[2] The Entry explains that in their Application for Rehearing, and as a recommended solution to three of their proffered assignments of error, the Companies (1) proposed a "modified calculation for [their] retail rate stability rider (Rider RRS) as approved" in the Commission's March 31, 2016 Opinion and Order (the "Order"); (2) recommended an expedited procedural schedule for the Commission to consider the proposed modifications; and (3) filed rehearing testimony

[1] P3/EPSA Motion, pp. 2, 4, 6.

[2] Entry, p. 3.

supporting the proposed modifications.[3] The discovery authorized necessarily is limited to the Proposal given that no other rehearing application granted by the Commission could, by any stretch of the imagination, result in further evidentiary hearings. And granting rehearing to take evidence on the Proposal prior to deciding other parties' grounds for rehearing is sensible given that the Proposal will moot many of those grounds for rehearing.[4] Movants' erroneous reading of the purpose and scope language in R.C. 4903.10 is not a basis for staying discovery on the Proposal.

2. The Commission does not lack jurisdiction to consider the Proposal.

Movants also incorrectly claim that the Commission lacks jurisdiction to consider the Proposal because it is not included as an assignment of error in the Companies' Application for Rehearing. To the contrary, the Commission had jurisdiction to grant rehearing based on the Companies' grounds for rehearing stated in their Application for Rehearing and then, on rehearing, to consider the Proposal. R.C. 4903.10 requires a rehearing application to "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." That is what the Companies' Application for Rehearing did. The Companies' sixth, seventh, and eighth grounds for rehearing provide specific bases upon which the Commission erred in how it modified and approved Rider RRS as originally proposed:

> 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.

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[3] Entry, pp. 2-3.

[4] *See*, *generally*, Companies' Memorandum Contra Intervenor Applications for Rehearing filed May 12, 2016.

7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.

8. The Order is unreasonable because it does not reflect the ruling by the Federal Energy Regulatory Commission Order issued on April 27, 2016 in Docket Number EL 16-34-000.

Through these grounds for rehearing, the Companies point out that rehearing is necessary because, among other things, the Order imposed risks on the Companies that they did not have in the original Rider RRS proposal. These grounds for rehearing satisfy R.C. 4903.10.

Movants' misreading of R.C. 4903.10 would require the Companies to state as one of their grounds for rehearing that the Commission somehow failed to approve the *modified* Rider RRS proposal. Instead, as grounds for rehearing, the Companies properly stated three separate reasons why the Commission erred in how it modified and approved the *original* Rider RRS. The Commission correctly observed that the modified Rider RRS proposal is the Companies' recommended solution to three of their proffered assignments of error. It does not matter that the Companies did not lay out the specifics of the Proposal in the Application for Rehearing (as opposed to its Memorandum in Support that was incorporated into the Application for Rehearing). Rather, the issue is whether the Companies stated valid grounds for rehearing. Once the Commission finds grounds for rehearing, the Commission has broad discretion. As the Ohio Supreme Court explained, "[f]ollowing a rehearing, the Commission need only be *of the opinion* that the original order should be changed for it to modify the same."[5] Here, the

[5] *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 15, 460 N.E.2d 1108 (1984) (emphasis in original).

Commission is well within its authority to determine *in its opinion* that the Order be changed to include the modified Rider RRS proposal.

A case relied on by Movants illustrates this basic point. In *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 304, 2006-Ohio-5789 ("*CG&E*"), CG&E applied for rehearing of a Commission order approving, with modifications, a stipulated rate stabilization plan. CG&E objected to the modifications and asked the Commission to either approve the plan without modification or to accept a revised plan. The Commission merged the two rehearing steps in its Entry on Rehearing: it first granted rehearing because "its 'original order or any part thereof is in any respect unjust or unwarranted, or should be changed'" and then "merely modified its opinion and order just as it might do based on any other party's arguments on rehearing."[6] The Ohio Supreme Court noted that the Commission could have granted rehearing, taken additional evidence, and then considered CG&E's revisions to its plan. Nevertheless, the Commission approved CG&E's plan revisions without allowing for additional discovery or conducting an evidentiary hearing.[7] The Ohio Supreme Court did not find fault with the Commission's decision to grant rehearing and consider CG&E's plan revisions; instead, the Court found fault with the Commission's lack of record evidence to support the plan revisions.[8] Thus, Movants' very authority teaches that the Commission should have done in that case what it has done here – grant rehearing and provide for a process to ensure that the record is complete prior to issuing a decision on the proposed modifications.

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[6] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d at 304.

[7] *Id. See also* CG&E Entry on Rehearing, pp. 9-14.

[8] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d at 304, 307-09.

Indeed, Movants' jurisdictional argument lacks any supporting legal authority. No case cited by Movants has held that an application for rehearing must state not only the proffered assignment of error but also any recommended solution. The case on which Movants mostly rely, *CG&E*, did not distinguish between an application for rehearing and its supporting memorandum. Rather, *CG&E* addressed whether an alternative utility proposal can be addressed at the application for rehearing stage, instead of through a new application, and ruled that considering an alternative utility proposal at the application for rehearing stage is indeed appropriate.[9] In fact, only one case cited by Movants – *In Re Settlement Agreement in Case No. 07-564-WW-AIR and the Standards for Waterworks Companies and Sewage Disposal System Companies*, Case No. 08-1125-WW-UNC, 2009 Ohio PUC LEXIS 854 (Oct. 14, 2009) ("*Aqua Ohio*") – notes any distinction between an application for rehearing and its supporting memorandum. And in *Aqua Ohio*, the distinction was noteworthy only because the application for rehearing utterly failed to state *any* grounds for rehearing but instead merely directed the reader to the supporting memorandum to find the errors.[10] In contrast, the Companies' Application for Rehearing proffered three assignments of error relating to the disposition of Rider RRS, and as the Commission observed, the supporting memorandum described a proposed solution to those assignments of error.

Other cases relied on by Movants also are easily distinguishable and do not support their claim that the Commission lacks jurisdiction to review the Proposal. Three cases – *Office of Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St. 3d 244, 247, 1994-Ohio-53, *Discount*

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[9] *Id.* at 304-05.

[10] *Aqua Ohio* at *8-9.

Cellular, Inc. v. Pub. Util. Comm., 112 Ohio State. 3d 360, 374, 2007-Ohio-53, and *Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.*, 136 Ohio St.3d 333, 2013-Ohio-3705[11] – merely stand for the proposition that an application for rehearing must set forth specific grounds for rehearing in order for the Ohio Supreme Court to consider those grounds on appeal. In each of these cases, the appellant attempted to assert in its appeal to the Ohio Supreme Court a new claim that was conspicuously absent from its application for rehearing. These cases are irrelevant for at least two reasons. First, the Ohio Supreme Court's jurisdiction is not at issue here. Second, the Companies' Application for Rehearing satisfied R.C. 4903.10 by setting forth eight specific grounds for rehearing.

The other case cited by Movants fails for similar reasons. In *In Re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, 2005 Ohio PUC LEXIS 704, the applicant's memorandum in support included a fourteen-page introduction.[12] The Commission did not distinguish between the applicants' application for rehearing and its memorandum in support, stating that "IEU-Ohio's application for rehearing also contained a 14-page introduction, which included many statements contrary to the Commission's decision in this proceeding."[13] Although these arguments appeared in IEU-Ohio's memorandum in support,

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[11] P3/EPSA Motion, p. 7 and fn. 8.

[12] *See In Re Columbus Southern Power Company and Ohio Power Company*, 2005 Ohio PUC LEXIS 704, at *30; *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Industrial Energy Users-Ohio's Application for Rehearing, pp. 4-18 (Feb. 25, 2005).

[13] *In Re Columbus Southern Power Company and Ohio Power Company*, 2005 Ohio PUC LEXIS 704, at *30.

the Commission considered and denied them.[14] Because the Companies' Application for Rehearing plainly enumerated eight specific assignments of error, this Commission decision is not applicable or instructive here.

B. No Party Will Suffer Irreparable Injury If Discovery on the Proposal Continues.

Movants argue that they somehow will be harmed by permitting discovery because, they say, such discovery could be time consuming and expensive. This argument is a red herring. Indeed, this argument can be made with respect to any rehearing. Simply put, if Movants no longer see value in participating in this proceeding – which would be sensible given that the Proposal does not include the purchase power agreement component that Movants found objectionable – they are free to withdraw or not participate in discovery at all. The fact that Movants want to stop all other parties from taking discovery on the Proposal is indefensible.

C. A Stay Will Harm Other Parties Interested In Discovering Facts Relating To The Companies' Proposal.

The Companies already have received discovery requests from another intervenor. Movants should not be able to deny all other parties willing to participate in the rehearing process – including the Companies – the opportunity to participate in discovery regarding the Proposal or intervenors' positions on the Proposal. Of course, if the Commission believes additional specificity is necessary regarding the scope of evidence to be considered on rehearing, it certainly can provide that specificity in a future order.

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[14] *Id.* at *30-31.

D. A Stay On Discovery Does Not Serve The Public Interest.

Movants weakly claim that allowing discovery will confuse the public. This claim is nonsense. The Commission's discovery processes are well-known to (and well-used by) the parties to this matter. Moving this case forward to a resolution serves the public interest to finalize all terms and conditions of ESP IV. What does not serve the public interest is intervenors raising meritless objections as roadblocks intended to deny the Companies' customers all the benefits of the Stipulated ESP IV.

II. CONCLUSION

For the reasons state above, the Commission should lift the temporary stay and allow discovery in this matter to continue.

Respectfully Submitted,

/s/ James W. Burk

James W. Burk (0043808)
Counsel of Record
Carrie M. Dunn (0076952)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Telephone: (330) 384-5861
Fax: (330) 384-8375
burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
Telephone: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

James F. Lang (0059668)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street

Cleveland, OH 44114
Telephone: (216) 622-8200
Fax: (216) 241-0816
jlang@calfee.com
talexander@calfee.com

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

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26th day of May, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

ss/ James F. Lang
One of Attorneys for the Companies

Summary: Memorandum Contra P3/EPSA Motion for Stay of Discovery electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company