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 APPLICATION FOR REHEARING OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER SUPPLY ASSOCIATION

I. INTRODUCTION

The Joint Application for Rehearing of the Commission's July 6, 2016 Third Entry on Rehearing ("Third Entry") filed by the PJM Power Providers Group and the Electric Power Supply Association (hereinafter, "P3/EPSA") fails to state valid grounds for rehearing. In the Third Entry, the Commission denied P3/EPSA's application for interlocutory appeal filed June 8, 2016, and affirmed the attorney examiner's June 3, 2016 Entry setting a hearing regarding the provisions of, or alternatives to, the Proposal.[1] In denying P3/EPSA's application for interlocutory appeal, the Commission substantively considered, addressed, and rejected the exact same arguments P3/EPSA reiterate here. The Commission should again deny P3/EPSA's Joint Application for Rehearing because: 1) there is nothing new for the Commission to consider, so there is no basis for rehearing; and 2) P3/EPSA's recycled arguments have not become any more persuasive with the passage of time.

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[1] Third Entry, ¶¶ 12, 27-32.

II. ARGUMENT

A. The Commission Did Not Err in Determining that the Companies' Application for Rehearing Consisted of the Application for Rehearing, the Memorandum in Support, and Rehearing Testimony in Support of the Proposal.

P3/EPSA argue in their first assignment of error that the Commission erred when it "looked beyond the Companies' Application for Rehearing" by considering the substantive arguments in "the Companies' Memorandum of Support or testimony."[2] P3/EPSA essentially allege that the Companies' omission of an explicit reference to "Modified Rider RRS" in the body of their Application for Rehearing divests the Commission of jurisdictional authority to consider the Proposal.[3] P3/EPSA have advanced the same jurisdictional arguments on three prior occasions in as many months: 1) Joint Memorandum Contra the Companies' Application for Rehearing filed on May 12, 2016;[4] 2) Joint Motion for a Stay of Discovery filed on May 19, 2016;[5] and 3) Joint Interlocutory Appeal filed on June 8, 2016.[6] These rehashed jurisdictional arguments are as meritless now as they were before. As the Commission has previously found, the Commission should again find that P3/EPSA's jurisdictional arguments are "baseless."[7]

Contrary to P3/EPSA's claim, the Commission possessed the authority to grant rehearing based on the Companies' grounds for rehearing stated in their Application for Rehearing. The Commission then, on rehearing, could consider the Proposal because the Proposal relates to the

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[2] P3/EPSA Joint Application for Rehearing ("P3/EPSA AFR"), p. 5.

[3] *Id*. at 5-6.

[4] P3/EPSA Memo Contra Companies' Application for Rehearing, pp. 4-6.

[5] P3/EPSA Joint Motion for Stay of Discovery, pp. 6-8.

[6] P3/EPSA Joint Interlocutory Appeal, pp. 5-6.

[7] Third Entry, ¶ 27.

grounds set forth in the Companies' Application for Rehearing. 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 exactly what the Companies' Application did. The Companies' sixth, seventh, and eighth grounds for rehearing provided specific bases upon which the Commission erred in how it modified and approved Rider RRS as originally proposed, to wit:

> 6. The Order is unreasonable because it requires the Companies to bear the burden for any capacity performance penalties.
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> 7. The Order is unreasonable because the Commission prohibited cost recovery for Plant outages greater than 90 days.
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> 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 16-34-000.

Through these grounds for rehearing, the Companies underscored that rehearing was necessary because, among other things, the Commission's March 31, 2016 Opinion and Order ("March 31 Order") imposed risks on the Companies that they did not have in the original Rider RRS proposal. These grounds for rehearing plainly satisfy the requirements of R.C. 4903.10.

P3/EPSA's 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 modifications to Rider RRS set out in the Proposal which were never before the Commission (nor could they have been). Instead, as grounds for rehearing, the Companies properly stated three separate reasons why the Commission erred in how it modified and approved Rider RRS that was part of the Third Supplemental Stipulation and why the Commission should thus grant rehearing. It does not matter that the Companies did not articulate the specifics of the Proposal in the body of the Application for Rehearing (as opposed to the Memorandum in Support that was incorporated

into the Application for Rehearing). Rather, the issue is whether the Companies stated valid grounds for rehearing, which they did.

Once the Commission finds grounds for rehearing, the Commission has broad discretion to craft a solution on rehearing. 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."[8] Once the Commission determined that there were reasons to revisit the March 31 Order, the Commission was well within its authority to determine that the March 31 Order might be changed to include the modifications to Rider RRS described in the Proposal. There is no legal requirement that solutions to be considered on rehearing to address errors or issues raised by an initial Commission order be included in the assignments of error to justify rehearing.

In their latest attempt to repackage their jurisdictional argument, P3/EPSA contend that the Commission's Third Entry "contravenes its ruling in Case No. 11-776-AU-ORD."[9] In that rulemaking proceeding, the Commission approved changes to Rule 4901-1-35 to specify that an "application for rehearing must set forth, in numbered or lettered paragraphs, the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful."[10] P3/EPSA grossly overstate the import of Case No. 11-776-AU-ORD. In that case, the Commission adopted two minor changes to Rule 4901-1-35: 1) the phrase "in numbered or lettered paragraphs" was inserted into the rule; and 2) division (E), which prohibited delivery of

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

[9] P3/EPSA AFR, p. 7.

[10] *See* O.A.C. 4901-1-35.

applications for rehearing via facsimile transmission, was removed.[11] Incredibly, P3/EPSA devote almost an entire page and half of their Application for Rehearing to discussing how the inclusion in Rule 4901-1-35(A) of a new formatting requirement – numbered or lettered paragraphs – somehow compels the Commission to reverse its ruling in the Third Entry. P3/EPSA's argument is entirely without merit. The Companies' Application for Rehearing fully complied with Rule 4901-1-35(A) by including eight assignments of error in eight numbered paragraphs. Case No. 11-776-AU-ORD adds no precedential value to the contested issues before the Commission.

P3/EPSA also claim, again, that "Case No. 11-776-AU-ORD is not the first time the Commission has made this determination," citing *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, *8-9 (October 14, 2009) (hereinafter, "*Aqua Ohio*").[12] In prior briefing, the Companies addressed and easily distinguished *Aqua Ohio* from this case.[13] In *Aqua Ohio*, the application for rehearing failed to state *any* grounds for rehearing, but instead merely directed the reader to the supporting memorandum to find the assignments of error.[14] Here, in stark contrast, the Companies'

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[11] *In the Matter of the Commission's Review of Chapters 4901-1, Rules of Practice and Procedure; 4901-3, Commission Meetings; 4901-9, Complaint Proceedings; and 4901:1-1, Utility Tariffs and Underground Protection, of the Ohio Administrative Code*, Case No. 11-776-AU-ORD, Findings and Order, p. 46/48 of Attachment A.

[12] PS/EPSA AFR, pp. 7-8 n.21.

[13] *See* Companies' Memo Contra P3/EPSA Joint Motion for Stay of Discovery, p. 6 (May 26, 2016). P3/EPSA also generally referenced the *Aqua Ohio* decision in its Application for Rehearing filed May 12, 2016, but did not see sufficient value in the *Aqua Ohio* decision to include it in its Application for Interlocutory Appeal filed June 8, 2016.

[14] *Aqua Ohio*, pp. *8-9.

Application for Rehearing proffered three assignments of error relating to the disposition of Rider RRS, any one of which was sufficient for the Commission to grant rehearing under R.C. 4903.10.

The Commission should once again reject P3/EPSA's argument that the Commission lacked jurisdiction to consider the Proposal. P3/EPSA do not advance any new legal theories or arguments for the Commission to consider, so there is no basis for rehearing on this issue. Consequently, the Commission should deny rehearing of P3/EPSA's first assignment of error.

B. The Commission Did Not Err When It Determined that Assignments of Error Nos. 6-8 in the Companies' Application for Rehearing Provided Sufficient Detail on Which Grounds the Companies Claimed that the Commission's March 31 Order Was Unreasonable or Unlawful.

In its second assignment of error, P3/EPSA argue that the Commission unlawfully permitted the Companies "to bootstrap Modified Rider RRS onto assignments of error lacking any discernible nexus to the Companies' proposal."[15] Specifically, P3/EPSA contend that the Proposal is not an explanation of any of those assignments of error (*i.e.*, assignments of error 6, 7 and 8), and, as such, cannot be considered by the Commission on rehearing.[16] P3/EPSA again fail to understand the rehearing process here.

Apparently, P3/EPSA believe that a party cannot explain in its memorandum in support to its application for rehearing any potential solution to the errors in a Commission order. As the Commission found in the Third Entry on Rehearing, the Companies properly asserted three assignments of error related to Rider RRS, and explained in their memorandum in support that

[15] P3/EPSA AFR, p. 9.

[16] P3/EPSA AFR, pp. 8-9.

the errors rendered the March 31 Order unreasonable.[17] Among other things, the March 31 Order shifted certain risks onto the Companies without any corresponding benefit.[18] However, as explained in the memorandum in support, the stability benefits to the Companies' customers of Rider RRS were too important to be abandoned along with all the benefits of Stipulated ESP IV. Thus, the Companies proposed that the Commission consider on rehearing modifications to how Rider RRS charges and credits are calculated so that the Companies' customers could continue to receive equivalent benefits and address the additional risks imposed by the Commission's modifications to Stipulated Rider RRS.[19] Although details regarding the Proposal could have been provided later during the rehearing process, the Companies included a detailed discussion of the Proposal in their memorandum in support, together with testimony provided by Eileen Mikkelsen, so that the Commission could proceed to review it without delay.[20]

Simply put, there is an obvious "discernible nexus" between the Proposal and assignments of error 6-8. As noted, the assignments pointed out ***why*** Rider RRS, as approved, should be changed. The Proposal is one way ***how*** Rider RRS should be changed; the Proposal is an obvious solution to the errors spelled out in these assignments. Indeed, the Proposal also is an obvious solution to the assignments of error set out in P3/EPSA's Application for Rehearing filed on April 29, 2016, which the Commission granted on May 11, 2016.[21] Thus, the

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[17] *See* Third Entry, ¶ 27; Companies' AFR, pp. 12-14.

[18] *Id.*, p. 13.

[19] *Id.*, pp. 14-16.

[20] *See id.*, p. 21-22.

[21] Entry on Rehearing, p. 3. *See* P3/EPSA Application for Rehearing, pp. 8, 19-26 (arguing that Rider RRS is unreasonable because of its reliance on a PPA that passes revenues to FirstEnergy Solutions, Corp.).

Commission was well within its authority to grant rehearing of multiple applications for rehearing challenging the Commission-approved Rider RRS and then set rehearing to consider the Companies' Proposal as a way to deal with the issues raised in the applications. For this reason, the Commission should deny rehearing of P3/EPSA's second assignment of error.

C. The Commission Did Not Act Unreasonably In Finding It has Jurisdiction to Hear the Companies' Proposal.

P3/EPSA's third assignment of error is simply a restatement of its first assignment; namely, that the Commission lacks jurisdiction to consider the Proposal because the Companies' assignments of error 6-8 did not claim that the March 31 Order failed to adopt the Proposal.[22] Of course, there was no way that the Companies could claim that the failure to adopt the Proposal was error. The Commission could not have adopted the Proposal in its March 31 Order because the Proposal did not exist until May 2, 2016. Thus, the Companies' Application for Rehearing filed May 2, 2016 could not have contested the Commission's failure to adopt the Proposal. Nevertheless, in conformance with R.C. 4903.10, the Companies identified errors in the March 31 Order, which would provide the reasons for a rehearing. The Companies did not violate R.C. 4903.10 when they proposed a reasonable solution to the errors for the Commission to consider on rehearing. The Commission did not err in finding that (1) the Companies properly raised reasons for rehearing and put forward the Proposal to consider on rehearing; and (2) no party is prejudiced by the Commission's consideration of the Proposal.[23]

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[22] P3/EPSA AFR, p. 10.

[23] Third Entry, ¶ 30.

P3/EPSA mostly re-cite and re-discuss the cases from prior briefing. For example, for the fourth time,[24] P3/EPSA cite *Discount Cellular, Inc. v. Pub. Util. Comm.*,[25] which merely stands 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. To reiterate, the *Discount Cellular* case is irrelevant for at least two reasons: 1) the Ohio Supreme Court's jurisdiction is not at issue here; and 2) the Companies' Application for Rehearing satisfied R.C. 4903.10 by setting forth specific grounds for rehearing.

P3/EPSA spend considerable time arguing with the Commission about its interpretation of the *CG&E Case*[26] and its applicability to the instant case.[27] P3/EPSA essentially claim that the *CG&E Case* "has no bearing on the question of the Commission's jurisdiction in this case" because CG&E's application for rehearing specifically described the alternative proposal while the Companies' Application did not.[28] P3/EPSA assert that this is the "crucial distinction that makes the *CG&E Case* entirely inapplicable."[29] P3/EPSA deem this factual distinction "crucial" because their entire legal theory is based upon the false premise that the Companies were required (pursuant to R.C. 4903.10) to make explicit reference to the Proposal in the body of their Application for Rehearing. But the Commission has repeatedly rejected this interpretation of R.C. 4903.10. Contrary to P3/EPSA's assertion, this factual distinction is entirely immaterial

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[24] *See* P3/EPSA Memo Contra Companies' Application for Rehearing, p. 4; P3/EPSA Joint Interlocutory Appeal, p. 6, n. 3; P3/EPSA Joint Motion for Stay of Discovery, p. 7; P3/EPSA AFR, p. 10.

[25] 112 Ohio St.3d 360, 374 (2007).

[26] *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 (2006).

[27] Third Entry, ¶¶ 28-30.

[28] P3/EPSA AFR, pp. 12-13.

[29] P3/EPSA AFR, p. 13.

to the instant case. The Commission's discussion of the *CG&E Case* in the Third Entry is directly on point,[30] and P3/EPSA raise no new arguments justifying rehearing.

P3/EPSA's Application for Rehearing includes one new case citation that has not appeared in its previous briefs – *Specialized Transport, Inc. v. Pub. Util. Comm.*, 170 Ohio St. 539, 540 (1960). That case does not advance P3/EPSA's position. P3/EPSA cite *Specialized Transport* to assert that the Ohio Supreme Court requires strict adherence to the requirements of R.C. 4903.10.[31] P3/EPSA fail to mention, however, that *Specialized Transport* involved the older (now obsolete) version of R.C. 4903.10, which required every applicant for rehearing to notify all parties in the proceeding and to "make affidavit thereof in said application."[32] The appellant in *Specialized Transport* failed to submit an affidavit within 30 days of the appealed order. Consequently, the Court dismissed the appeal for failure to satisfy a "jurisdictional prerequisite" that the Court deemed "fatal to the appellant's right of appeal."[33] The *Specialized Transport* decision is distinguishable because: (1) it interpreted a different version of R.C. 4903.10; and (2) the appellant in *Specialized Transport* conceded that it failed to satisfy this jurisdictional prerequisite. Here, the Companies fully complied with R.C. 4903.10 by filing eight assignments of error (in numbered paragraphs).

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[30] Third Entry, ¶¶ 28-30.

[31] P3/EPSA AFR, p. 10.

[32] *Specialized Transport*, 170 Ohio St. at 540. The current version of R.C. 4903.10 does not require filing an affidavit for proof of service. Instead, every applicant must "give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission." R.C. 4903.10(B).

[33] *Id*. at 541.

As with P3/EPSA's first two assignments of error, the third assignment of error offers essentially nothing new for the Commission to consider; it provides no basis for rehearing. Thus, it also should be denied by the Commission.

III. CONCLUSION

P3/EPSA have failed to show that the Third Entry was unreasonable or unlawful. Therefore, for the reasons stated above, the Commission should deny P3/EPSA's Application for Rehearing.

Respectfully Submitted,

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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 15th day of August, 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.

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

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