

FILE

IN THE SUPREME COURT OF OHIO

16-1325

In the Matter of the Application of Ohio  
Edison Company, The Cleveland Electric  
Illuminating, 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. )  
)  
) Supreme Court Case No. 16-  
)  
)  
)  
) Appeal from the Public Utilities  
) Commission of Ohio  
)  
) Case No. 14-1297-EL SSO

NOTICE OF APPEAL  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL  
AND  
NORTHWEST OHIO AGGREGATION COALITION (AND ITS INDIVIDUAL  
COMMUNITIES)

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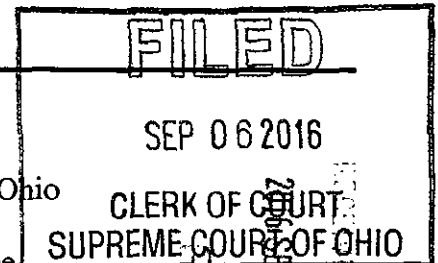
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## **NOTICE OF APPEAL**

Appellants, the Office of the Ohio Consumers' Counsel ("OCC") and the Northwest Ohio Aggregation Coalition ("NOAC") and NOAC Communities, consistent with R.C. 4903.11 and 4903.13, and S.Ct.Prac.R. 3.11(D)(2), 5.05, and 10.02<sup>1</sup> respectively and respectfully give notice to this Court and to the Public Utilities Commission of Ohio ("Appellee" or "PUCO") of this appeal from several PUCO decisions issued in Case No. 14-1297-EL-SSO. The decisions being appealed are the PUCO's Finding and Order entered in its Journal on May 25, 2016, its Entry entered in its Journal on June 3, 2016, and its Third Entry on Rehearing entered in its Journal on July 6, 2016.

The decisions under appeal implement the PUCO's March 31, 2016 Opinion and Order where the PUCO approved FirstEnergy's<sup>2</sup> electric security plan, and authorized a so-called stability charge under which customers would subsidize power plants owned by FirstEnergy's affiliate (FirstEnergy Solutions). The PUCO's March 31, 2016 Opinion and Order is now under review at the PUCO. In this regard, a limited rehearing was granted and an evidentiary hearing was held to consider new proposals that would replace the stability provision approved in the PUCO's March 31, 2016 Opinion and Order. There has been no ruling to date establishing new rates for customers.

Nonetheless, in the decisions under appeal, the PUCO permitted FirstEnergy to implement rates, effective June 1, 2016, consistent with its March 31, 2016 Opinion and Order. In approving the standard service offer rates, the PUCO approved a tariff that is intended to collect from customers the so-called stability charge. The stability charge, though as yet assigned

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<sup>1</sup> Under S.Ct.Prac.R. 10.02(A)(2), the decisions being appealed are attached.

<sup>2</sup> FirstEnergy refers to Ohio Edison Company, The Cleveland Electric Illuminating, and The Toledo Edison Company collectively.

no value, will enable FirstEnergy to charge customers above market-based rates for electric generation. The PUCO's decisions approving tariffs that implement FirstEnergy's electric security plan rates, with a "placeholder" for a stability charge, violate the law and this Court's recent decisions that protected customers, and the market pricing that serves customers, by overturning stability charges for both DP&L<sup>3</sup> and AEP Ohio.<sup>4</sup>

As established under R.C. Chapter 4911, Appellant, the Office of Consumers' Counsel, is the statutory representative of the residential customers of Ohio Edison Company, The Cleveland Electric Illuminating, and The Toledo Edison Company ("FirstEnergy" or "Companies"). Appellant was a party of record in the above-referenced PUCO case. Appellant Northwest Ohio Aggregation Coalition (NOAC) is a coalition of opt out aggregators for electric service and the individual NOAC Communities are aggregators for electric services and are members of NOAC.

As background, on August 4, 2014, FirstEnergy filed an Electric Security Plan, under R.C. 4928.141, to provide a standard service offer from the period of June 1, 2016, through May 31, 2019. On March 31, 2016, the PUCO issued its Opinion and Order, approving and modifying FirstEnergy's Application and Stipulations filed in this proceeding. In the PUCO's Order it approved, inter alia, the so-called stability charge under which customers of FirstEnergy would subsidize FirstEnergy's affiliate-owned power plants.

On April 27, 2016, the Federal Energy Regulatory Commission ("FERC") issued an Order that affected FirstEnergy's plans to have customers subsidize its affiliate-owned power

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<sup>3</sup> *In re Application of Dayton Power & Light Co.*, Slip Opinion No. 2016-Ohio-3490 (Jun. 20, 2016)).

<sup>4</sup> *In re Application of Columbus S. Power Co.*, Slip. Opinion No. 2016-Ohio-1608 (Apr. 21, 2016).

plants. FERC granted a complaint and rescinded the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation (FirstEnergy's affiliate, the owner of its power plants). FERC's ruling meant that Ohio customers were protected from paying an above-market subsidy to FirstEnergy to support uneconomic generation owned by the FirstEnergy's unregulated affiliate pending FERC review and approval. It also meant that the PUCO's March 31, 2016 Order approving the so-called stability charge (related to a power purchase agreement) could not be implemented without FirstEnergy getting FERC approval of it.

On April 29, 2016 and May 2, 2016, FirstEnergy and other intervenors filed applications for rehearing of the PUCO's Opinion and Order. FirstEnergy's filing proposed an alternative ("modified rider RRS") to its so-called stability charge that was intended to address FERC's ruling. FirstEnergy indicated that any new proceeding at FERC would likely require a "much more lengthy time period to come to a conclusion."<sup>5</sup>

On May 11, 2016, the PUCO issued an Entry on Rehearing ("First Entry on Rehearing") in which it granted the numerous Applications for Rehearing filed on April 29, 2016, and May 2, 2016. The applications were granted on the basis that "sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."

On May 13, 2016, FirstEnergy filed tariffs that it alleged were consistent with the PUCO's March 31, 2016 filing. Included in the tariffs was the so-called stability charge, with no value assigned to it. On May 25, 2016, the PUCO issued a Finding and Order in which it found that FirstEnergy's proposed tariff filing was consistent with the March 31, 2016 Opinion and

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<sup>5</sup> FirstEnergy Application for Rehearing at 14 (May 2, 2016).

Order. (Attachment A). It gave FirstEnergy approval to collect rates from customers starting June 1, 2016.

On May 31, 2016, the Appellants timely filed a Joint Application for Rehearing regarding the PUCO's May 25, 2016 Finding and Order, in accordance with R.C. 4903.10. On June 24, 2016, the Ohio Manufacturers' Association Energy Group ("OMAEG") and the Retail Energy Supply Association also filed applications for rehearing regarding the PUCO's May 25, 2016 Finding and Order. The PUCO issued an Entry on Rehearing dated June 29, 2016, ("Second Entry on Rehearing"), to further consider the matters specified in the numerous parties' applications for rehearing, including Appellants' Application for Rehearing. The applications were granted on the basis that "sufficient reasons have been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing."

On June 3, 2016, the attorney examiner issued an Entry establishing a limited procedural schedule for an additional hearing in this matter. (Attachment B). The scope of the hearing was limited to FirstEnergy's proposed modifications to its so-called stability charge. On June 8, 2016, the Appellants and OMAEG timely filed a Joint Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review regarding the Attorney Examiner's June 3, 2016 Entry.

Appellants' May 31, 2016, Joint Application for Rehearing and Appellants' Joint Interlocutory Appeal were both denied by a Third Entry on Rehearing entered in the PUCO's Journal on July 6, 2016 ("Third Entry on Rehearing"). (Attachment C).

Appellants file this Notice of Appeal complaining and alleging that Appellee's May 25, 2016 Finding and Order, June 3, 2016 Entry, and July 6, 2016 Third Entry on Rehearing are

unlawful and unreasonable, and the Appellee erred as a matter of law, in the following respects.

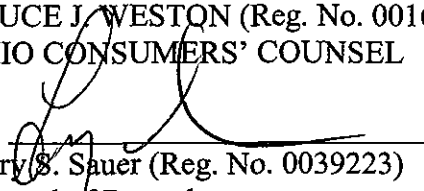
These issues were raised in Appellants' Application for Rehearing and/or Interlocutory Appeal:

1. The PUCO erred by approving FirstEnergy's Tariff to implement an electric security plan that contained a so-called stability charge for a power purchase agreement ("Retail Rate Stability Rider") that does not satisfy the criteria for a stability charge under R.C. 4928.143(B)(2)(d).
2. The PUCO erred when it permitted FirstEnergy to charge customers standard offer rates that were not established in compliance with R.C. 4928.142 or 4928.143. An intervening Federal Energy Regulatory Commission Order made it impossible for FirstEnergy to file rates in compliance with the PUCO's March 31, 2016 Order. The PUCO had no authority to approve new standard offer rates without complying with the procedures in R.C. 4928.141 et seq. , meaning that FirstEnergy would have had to file a new application for a standard offer .
3. The PUCO erred in granting FirstEnergy's Application for Rehearing by failing to comply with R.C. 4903.09, which requires the PUCO to set forth the specific reasons supporting its decisions.

**WHEREFORE**, Appellants respectfully submit that the PUCO's May 25, 2016 Finding and Order, June 3, 2016 Entry, and July 6, 2016 Third Entry on Rehearing are unreasonable and unlawful, and should be reversed, vacated, or modified with instructions to the PUCO to correct the errors complained of herein.

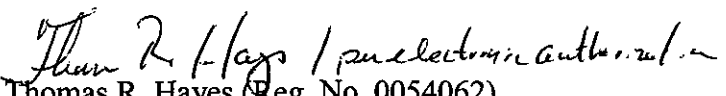
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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal by the Office of the Ohio Consumers' Counsel was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the Office of the Chairman in Columbus and upon all parties of record by electronic transmission this 6<sup>th</sup> day of September 2016.

  
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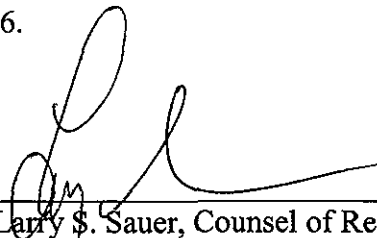
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**CERTIFICATE OF FILING**

I hereby certify that a Notice of Appeal of the Office of the Ohio Consumers' Counsel was filed with the docketing division of the Public Utilities Commission of Ohio as required by Ohio Adm. Code 4901-1-02(A) and 4901-1-36.



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**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**

**IN THE MATTER OF THE REVISED TARIFFS FOR  
RIDER GEN OF OHIO EDISON COMPANY, THE  
CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON  
COMPANY.**

**CASE NO. 16-541-EL-RDR**

**FINDING AND ORDER**

Entered in the Journal on May 25, 2016

**I. SUMMARY**

{¶ 1} In this Finding and Order, the Commission approves the proposed tariffs filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company on May 13, 2016, to become effective June 1, 2016, subject to Staff's recommendations.

**II. DISCUSSION**

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm

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16-541-EL-RDR

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supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, in Case No. 14-1297-EL-SSO, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143.

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in Case No. 14-1297-EL-SSO, approving FirstEnergy's application and the stipulations filed in this proceeding with several modifications (Opinion and Order). The Commission directed FirstEnergy to file tariffs consistent with the Opinion and Order by May 1, 2016. Opinion and Order at 99.

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association, the Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation. 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} On April 29, 2016, in Case No. 14-1297-EL-SSO, FirstEnergy filed a motion for an extension of time to file its tariffs in order to fully consider the FERC Order and its impact on the Companies' tariffs to be filed pursuant to the Opinion and Order.

{¶ 8} By Entry issued April 29, 2016, in Case No. 14-1297-EL-SSO, the attorney examiner granted FirstEnergy's request, noting that the new filing deadline would be established by a subsequent entry. Thereafter, by Entry issued May 10, 2016, the attorney examiner directed the Companies to file their proposed tariffs, consistent with the Opinion

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and Order, by May 13, 2016, and noted that such tariffs would be effective June 1, 2016, subject to Commission review and final approval.

{¶ 9} On May 13, 2016, in Case Nos. 14-1297-EL-SSO and 16-541-EL-RDR, the Companies filed proposed tariffs consistent with the Opinion and Order.

{¶ 10} Thereafter, on May 20, 2016, in Case Nos. 14-1297-EL-SSO and 16-541-EL-RDR, Staff filed its review and recommendations regarding the Companies' proposed tariff filing.

{¶ 11} In its review and recommendations, Staff asserts that the proposed tariff filing includes tariff schedules modified to comply with the Opinion and Order, including modifications to the Electric Service Regulations, Electric Generation Supplier Coordination Tariffs, and several Riders. Additionally, Staff notes that the filing includes proposed retail generation rates (Rider GEN), that reflect the SSO auction rates approved by the Commission on April 14, 2016, and April 27, 2016. Staff further notes that Rider GEN includes the new Percentage of Income Payment Plan (PIPP) generation rate that reflects the PIPP auction rates approved by the Commission on May 4, 2016.

{¶ 12} Staff asserts that it has reviewed the proposed tariffs and finds that the tariffs filed on May 13, 2016, appear to be in compliance with the Opinion and Order. Additionally, Staff notes that the proposed Rider GEN rates for PIPP and non-PIPP customers were also filed in Case No. 16-541-EL-RDR. Staff recommends that, for the remaining term of the ESP, the Commission should require the Companies to file the PIPP and non-PIPP generation rates for Commission review no later than 30 days following the date of the last auction, and that final Rider GEN tariffs reflecting the updated PIPP and non-PIPP generation rates shall be approved effective June 1 of each year, contingent upon the Commission's review. In conclusion, Staff recommends that the proposed tariffs filed on May 13, 2016, be approved and become effective on June 1, 2016.

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16-541-EL-RDR

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{¶ 13} The Commission has reviewed the Companies' May 13, 2016 proposed tariff filing and Staff's review and recommendations. Further, the Commission notes that the Companies have an approved ESP, subject to rehearing, irrespective of FERC's action rescinding the waiver of FirstEnergy Solutions' affiliate power sales restrictions. Moreover, the Companies have not included any proposed charges or credits in their retail rate stability rider (RRS). The Commission finds that, in accordance with Staff's recommendations, the Companies' proposed tariff filing is consistent with the Opinion and Order, does not appear to be unjust and unreasonable, and should be approved for rates effective June 1, 2016. Additionally, in accordance with Staff's recommendations, the Companies shall, for the remaining term of the ESP, file the PIPP and non-PIPP generation rates for Commission review no later than 30 days following the date of the last auction, and the final Rider GEN tariffs reflecting the updated PIPP and non-PIPP generation rates shall be approved effective June 1 of each year, contingent upon the Commission's review.

### III. ORDER

{¶ 14} It is, therefore,

{¶ 15} ORDERED, That Staff's review and recommendations be adopted and the Companies' proposed tariff filing be approved. It is, further,

{¶ 16} ORDERED, That a copy of this Finding and Order be served upon all parties of record.

**Commissioners Voting:** Asim Z. Haque, Chairman; Lynn Slaby; M. Beth Trombold; Thomas W. Johnson.

MWC/sc

**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**

**ENTRY**

**Entered in the Journal on June 3, 2016**

**I. SUMMARY**

**{¶ 1} In this Entry, the attorney examiner issues a procedural schedule that sets an additional hearing in this matter to begin on July 11, 2016.**

**II. DISCUSSION**

**{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.**

**{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.**

**{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (ESP IV).**



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{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in this proceeding, approving FirstEnergy's application and the stipulations filed in this proceeding with several modifications (Opinion and Order).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association (EPSA), the Retail Energy Supply Association (RESA), Dynegy Inc. (Dynegy), Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation. 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On April 29, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: Sierra Club; Dynegy; the PJM Power Providers Group and EPSA (jointly, P3/EPSA); and RESA.

{¶ 9} Thereafter, on May 2, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (CMSD); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials, d/b/a Power4Schools (collectively, Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (jointly, OCC/NOAC).

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{¶ 10} In its application for rehearing, and as a recommended resolution to three of its proffered assignments of error, FirstEnergy proposed a modified calculation (Modified RRS Proposal) for its retail rate stability rider (RRS) as approved in the ESP IV Opinion and Order, in order to reflect the FERC Order. Additionally, FirstEnergy recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

{¶ 11} By Entry on Rehearing issued May 11, 2016, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSCo, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC, for further consideration of the matters specified in the applications for rehearing. In that Entry, the Commission also found that given "the number and complexity of the assignments of error raised in the applications for rehearing, as well as the potential for further evidentiary hearings in this matter, \* \* \* it is appropriate to grant rehearing at this time. This will allow parties to begin discovery in anticipation of potential further hearings." Entry on Rehearing (May 11, 2016) at 3.

{¶ 12} On May 19, 2016, P3/EPSCo filed a joint motion for a stay of discovery and a joint motion for an expedited ruling, arguing that a stay would allow the parties to avoid unnecessary expenses and time conducting and responding to discovery until such time that the Commission resolves the pending issues on rehearing and objections to the Commission's jurisdiction to consider FirstEnergy's Modified RRS Proposal.

{¶ 13} On May 20, 2016, the attorney examiner granted P3/EPSCo's motion to stay discovery, on a limited basis, in order to allow parties to file memoranda in response to the motion to stay. Additionally, the attorney examiner noted that the stay of discovery may be extended or terminated once the attorney examiners had the opportunity to review memoranda in response to the motion to stay.

{¶ 14} On May 26, 2016, FirstEnergy filed its motion contra P3/EPSCo's motion to stay discovery, stating no party to the proceeding was prejudiced by the Commission's

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decision to inform parties to engage in additional discovery. Contrarily, FirstEnergy argues that denying parties the opportunity to engage in discovery at this point will prejudice parties if an additional hearing is required by the Commission. In fact, FirstEnergy indicated that it had already received discovery requests from another intervenor. FirstEnergy further argues that P3/ESPA raised no sufficient grounds to stay discovery, as the Commission sufficiently specified the scope of any additional proceeding, as required by R.C. 4903.10. Moreover, FirstEnergy states that an additional hearing to consider the Modified RRS Proposal is well within the Commission's jurisdiction, noting that the Ohio Supreme has previously found that the Commission may grant rehearing, take additional evidence, and consider proposed modifications to the plan originally approved. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 304, 2006-Ohio-5789). Finally, FirstEnergy contends that if further clarification is needed as to the scope of any additional proceeding, the Commission may provide such clarification in a future order.

{¶ 15} Upon consideration of the arguments raised in the applications for rehearing and the memoranda contra the applications for rehearing, a hearing should be held regarding the provisions of the Modified RRS Proposal. The scope of the hearing will be limited to the provisions of, and alternatives to, the Modified RRS Proposal. No further testimony will be allowed regarding other assignments of error raised by parties.

{¶ 16} In addition, in light of the decision to hold an evidentiary hearing regarding the provisions of the Modified RRS proposal contained in FirstEnergy's application for rehearing, the stay of discovery is hereby terminated in order to provide parties the ability to conduct discovery in anticipation of the forthcoming hearing.

{¶ 17} Further, in order to provide the parties sufficient time and opportunity to present evidence related to the Modified RRS Proposal, the attorney examiner finds the following procedural schedule is reasonable and should be established for this proceeding:

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- (a) Testimony on behalf of intervenors should be filed by June 22, 2016.
- (b) Discovery requests regarding the Modified RRS Proposal, except for notices of deposition, should be served by July 1, 2016.
- (c) The evidentiary hearing shall commence on July 11, 2016, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, Hearing Room 11-A, Columbus, Ohio.

{¶ 18} Further, the attorney examiner finds that the response time for discovery should continue to be seven days for all discovery served in this proceeding. Discovery requests and replies shall be served by hand delivery, e-mail or facsimile (unless otherwise agreed by the parties). An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming (unless otherwise agreed by the parties). To the extent that a party has difficulty responding to a particular discovery request within the seven-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution.

### III. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the stay of discovery previously granted in this proceeding be terminated, in accordance with Paragraph 16. It is, further,

{¶ 21} ORDERED, That the procedural schedule set forth in Paragraph 17 be observed by the parties. It is, further,

{¶ 22} ORDERED, That the discovery timeline set forth in Paragraph 18 be observed by the parties. It is, further,

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{¶ 23} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison

By: Megan J. Addison  
Attorney Examiner

GAP/sc

**This foregoing document was electronically filed with the Public Utilities**

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**in**

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

**Summary: Attorney Examiner Entry setting a procedural schedule and terminating the stay of discovery imposed in the May 20, 2016 Attorney Examiner Entry. - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio**

**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**

**THIRD ENTRY ON REHEARING**

Entered in the Journal on July 6, 2016

**I. SUMMARY**

{¶ 1} In this Third Entry on Rehearing, the Commission finds that the applications for interlocutory appeals filed in this proceeding on June 8, 2016 should be denied. Additionally, the Commission finds the applications for rehearing filed by Northwest Ohio Aggregation Coalition and the Ohio Consumers' Counsel on May 31, 2016 and June 10, 2016 should be denied. Similarly, the Commission finds that the application for rehearing filed by Ohio Manufacturers' Association Energy Group on June 24, 2016 should be denied, as the assignments of error contained therein have been sufficiently addressed in this proceeding. Further, the Commission finds that the motion to stay the procedural schedule as established in the June 3, 2016 Entry be denied.

**II. DISCUSSION**

**A. *Procedural History***

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

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{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (ESP IV).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in this proceeding, approving FirstEnergy's application and the stipulations filed in this proceeding with several modifications (Opinion and Order).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association (EPSA), the Retail Energy Supply Association (RESA), Dynegy Inc. (Dynegy), Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation. 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} On April 29, 2016 and May 2, 2016, several parties filed applications for rehearing of the Opinion and Order. By Entry issued May 2, 2016, the attorney examiner directed all memoranda contra to be filed by May 12, 2016.

{¶ 8} On May 11, 2016, the Commission issued an Entry on Rehearing (First Entry on Rehearing). In the First Entry on Rehearing, the Commission granted the numerous applications for rehearing filed in this proceeding on April 29, 2016 and



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May 2, 2016, for further consideration of the arguments raised in the applications for rehearing.

{¶ 9} By Finding and Order issued May 25, 2016, the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the Opinion and Order, did not appear to be unjust and unreasonable, and therefore, was approved for rates effective June 1, 2016.

{¶ 10} On May 31, 2016, Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC) filed an application for rehearing regarding the Commission's May 25, 2016 Finding and Order. Thereafter, on June 24, 2016, RESA and the Ohio Manufacturers' Association Energy Group (OMAEG) also filed applications for rehearing regarding the Commission's May 25, 2016 Finding and Order. The Commission issued an Entry on Rehearing on June 29, 2016 (Second Entry on Rehearing), in which it granted OCC/NOAC and RESA's applications for rehearing for further consideration of the matters raised in the applications for rehearing. FirstEnergy filed memoranda contra RESA and OMAEG's applications for rehearing on July 5, 2016.

{¶ 11} OCC/NOAC filed its third application for rehearing in this proceeding on June 10, 2016, presenting three assignments of error regarding the First Entry on Rehearing.

{¶ 12} On June 3, 2016, the attorney examiner issued an Entry establishing a procedural schedule for an additional hearing in this matter. Further, the attorney examiner lifted the temporary stay of discovery in order to allow parties to conduct discovery in preparation of the additional evidentiary hearing to discuss the Modified RRS Proposal.

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{¶ 13} On June 8, 2016, PJM Power Providers, Inc. and Electric Power Supply Association (collectively, P3/EP SA), and OCC/NOAC and OMAEG filed requests for certification and applications for review of interlocutory appeals of the June 3, 2016 Entry.

{¶ 14} On June 10, 2016, IEU-Ohio filed a memorandum contra Joint Appellants' request for certification and application for review of an interlocutory appeal. Thereafter, on June 13, 2016, FirstEnergy filed memoranda contra P3/EP SA and Joint Appellants' requests for certification and applications for review of interlocutory appeals.

{¶ 15} By Entry issued June 30, 2016, the attorney examiner granted P3/EP SA and Joint Appellants' requests for certification, certifying their applications for interlocutory appeals for the Commission's review.

**B. Interlocutory Appeals**

**1. APPLICABLE LAW**

{¶ 16} Pursuant to Ohio Adm.Code 4901-1-15(E), upon consideration of an interlocutory appeal, the Commission may, in its discretion either: (1) affirm, reverse, or modify the ruling; or (2) dismiss the appeal, if the Commission is of the opinion that the issues presented are moot, the party taking the appeal lacks the requisite standing to raise the issues presented or has failed to show prejudice as a result of the ruling in question, or the issues presented should be deferred and raised at some later point in the proceeding.

**2. JOINT APPELLANTS' INTERLOCUTORY APPEAL FILED ON JUNE 8, 2016**

{¶ 17} Joint Appellants request that the Commission vacate the attorney examiner's June 3, 2016 Entry, setting an evidentiary hearing regarding the provisions of FirstEnergy's Modified RRS Proposal. Joint Appellants contend that the Entry

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allowed the Companies to modify their ESP "without first withdrawing and terminating the plan in compliance with the statutory process prescribed under R.C. 4928.143(C)." Joint Appellants contend that the June 3, 2016 Entry provided FirstEnergy with the option to propose a revised plan, which is not authorized under the applicable statute, and differs significantly from past decisions. *In re Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 856 N.E.2d 213, 2006-Ohio-5789 (CG&E Case). Initially, Joint Appellants argue that, although the CG&E Case was very similar procedurally to this proceeding, this case varies from the CG&E Case in five important respects: (1) the Commission failed to specify the scope of rehearing to the Modified RRS Proposal or determine that the Modified RRS Proposal was properly raised as an assignment of error; (2) the scope of FirstEnergy's proposed changes "fundamentally alter the nature" of the approved ESP, far exceeding the changes proposed in the CG&E Case; (3) the Commission did not reopen the record in CG&E Case upon determining that the alternative proposal was merely an assignment of error, whereas the Modified RRS Proposal is a new proposal which effectively rejects the Commission's approved ESP; (4) this proceeding is subject to a different statutory scheme than the one applicable for the CG&E Case; and (5) the changes proposed in the CG&E Case were driven by the Commission's proposed changes, whereas the Modified RRS Proposal is driven by the FERC Order.

(¶ 18) Further, Joint Appellants allege that the June 3, 2016 Entry failed to specifically state the grounds on which FirstEnergy believed the Opinion and Order to be unlawful or unreasonable. Joint Appellants further note that FirstEnergy's argument that the Opinion and Order did not reflect the FERC Order cannot be considered reasonable, given the fact that the FERC Order was issued after the Opinion and Order. Joint Appellants also contend that the June 3, 2016 Entry departs from past precedent because it would allow the Commission to consider evidence that could have been offered during the original hearing, in direct violation of R.C. 4903.10(B). Joint

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Appellants argue that FirstEnergy had the opportunity to raise the Modified RRS Proposal during the 18-month process, especially since many of the intervening parties raised objections to the fact that the original PPA proposal would need to be reviewed and approved by FERC. As FirstEnergy elected not to offer its Modified RRS Proposal during that time, Joint Appellants believe the Companies should not be given an additional opportunity to do so now in violation of R.C. 4903.10(B). Finally, Joint Appellants claim that the June 3, 2016 Entry departs from past precedent as it is essentially an entry on rehearing, which, according to R.C. 4903.10, can only be issued by the Commission, as well as lacks any explicit reasoning for the decision to establish a procedural schedule or hold a hearing with respect to the Modified RRS Proposal.

{¶ 19} Moreover, Joint Appellants argue that allowing for the hearing to take place will establish harmful precedent for Ohio consumers, effectively providing utility companies to amend their ESP applications through the rehearing process by proposing changes unrelated to an error committed by the Commission, allowing evidence which could have been offered during the original hearing, allowing an attorney examiner to issue an entry on rehearing, and allow a decision that is not supported by reason or explanation to stand.

{¶ 20} In its memorandum contra Joint Appellants' application for review of an interlocutory appeal, IEU-Ohio argues that because the Commission approved the ESP in its Opinion and Order and FirstEnergy has not withdrawn its application, there is no lawful basis for the Commission to order the utility to file tariffs to continue its most recent SSO, pursuant to R.C. 4928.143(C)(2)(b). IEU-Ohio also notes that customers have already engaged to enter into new contracts for service with FirstEnergy or competitive retail electric service (CRES) providers in reliance on the Opinion and Order and these customers, as well as the remaining customer base in FirstEnergy's service territory, will no longer be able to enjoy the numerous benefits resulting from the Opinion and Order.

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{¶ 21} In its memorandum contra Joint Appellants' application for an interlocutory appeal, FirstEnergy asserts that the June 3, 2016 Entry was merely setting a procedural schedule in order to conduct further evidentiary hearings that the Commission alluded to in its First Entry on Rehearing. Additionally, FirstEnergy notes that agreeing with the position of the Joint Appellants would effectively eliminate the electric utilities' rehearing and appeal process, as provided in R.C. Chapter 4903, thereby forcing them to either choose to accept the Commission's modifications to a proposed ESP or withdraw their application pursuant to R.C. 4928.143(C)(2). The Companies also contend Joint Appellants' attempt to distinguish this proceeding from the *CG&E Case* does not warrant vacating the Entry, noting that receiving evidence on rehearing in order to comply with R.C. 4903.09 is authorized by R.C. 4903.10 and was acknowledged by the Supreme Court of Ohio in the *CG&E Case*. *CG&E Case* at 304. Moreover, FirstEnergy states this issue is moot, as the First Entry on Rehearing already made the decision to reopen the record. Additionally, the Companies claim that the scope of rehearing was adequately identified, as no other application for rehearing granted in the First Entry on Rehearing requested additional evidentiary hearings.

{¶ 22} The Companies assert the June 3, 2016 Entry was simply establishing a procedural schedule after the Commission had issued its First Entry on Rehearing. Setting such procedural schedules, FirstEnergy alleges, is a very routine practice of attorney examiners. Further, FirstEnergy states that it had no lawful basis to introduce evidence to support the Modified RRS Proposal until after the Commission had issued the First Entry on Rehearing.

### **3. P3/EPSCA INTERLOCUTORY APPEAL FILED ON JUNE 8, 2016**

{¶ 23} In their memorandum in support, P3/EPSCA assert that the June 3, 2016 Entry should be reversed for two reasons. P3/EPSCA first argue that the attorney examiner cannot assert jurisdiction over the Modified RRS Proposal until the

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Commission rules on whether FirstEnergy's failure to include its new proposal in its application for rehearing, as required by R.C. 4903.10, prevents the Commission from hearing the proposal on rehearing. As a result, P3/EPSC argue that a hearing cannot be held unless the Commission first determines that the argument for the Modified RRS Proposal was raised in an assignment of error in the application for rehearing and the Commission has jurisdiction. Second, P3/EPSC contend that only the Commission, can grant rehearing and set the scope of rehearing, including the evidence to be taken on the Modified RRS Proposal. P3/EPSC argue, however, that the attorney examiner, nonetheless, ordered that a hearing on the Modified RRS Proposal take place and set a procedural schedule without the requisite authority of a preceding Commission order, which is contrary to R.C. 4903.10 and past precedent. Specifically, P3/EPSC argue that R.C. 4903.10 requires the Commission, rather than an attorney examiner, to conclude the following before a hearing may be held: sufficient reason for rehearing exists; the purpose for which rehearing is being granted; the scope of additional evidence to be taken at hearing, if any; and that the designated evidence could not have been offered during the original hearing, with reasonable diligence. As no authority to issue the June 3, 2016 Entry existed, P3/EPSC recommend that it should be vacated in its entirety to ensure compliance with R.C. 4903.10.

{¶ 24} In its memorandum contra P3/EPSC's application for an interlocutory appeal, FirstEnergy argues that the attorney examiner was not required to delay all proceedings until after the Commission had considered the jurisdictional arguments, further noting that the Commission granted rehearing in order to allow for additional evidence to be gathered regarding the Modified RRS Proposal. Upon granting rehearing, FirstEnergy asserts the decision to establish a procedural schedule was well within the attorney examiner's authority. The Companies further acknowledge that the Commission will still have the ability to consider Joint Appellants' jurisdictional arguments, but that should not halt all other matters pertaining to this proceeding. The

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Companies allege that the June 3, 2016 Entry was merely implementing the Commission's First Entry on Rehearing and setting a procedural schedule in order to take additional evidence in regard to the Modified RRS Proposal.

#### **4. COMMISSION DECISION ON INTERLOCUTORY APPEALS**

{¶ 25} The Commission finds that the attorney examiner's rulings in the June 3, 2016 Entry should be affirmed in all respects, including, but not limited to, the ruling setting this matter for hearing and the ruling establishing the scope of the hearing. We do not agree with P3/EPSA's claims that setting the hearing and establishing the scope of the hearing are beyond the attorney examiners' authority. We note that R.C. 4901.18 specifically authorizes the Commissioners to appoint attorney examiners and we have set forth the authority and duties of the attorney examiners in Ohio Adm.Code 4901-1-27. Further, we note that attorney examiners frequently determine whether a matter should be set for hearing in cases such as complaint cases filed under R.C. 4905.26. No party is prejudiced by the fact that the attorney examiner established the hearing date and established the scope of the evidence to be taken because every party had the ability to seek an interlocutory appeal pursuant to Ohio Adm.Code 4901-1-15, as the Joint Appellants and P3/EPSA have done here.

{¶ 26} Further, we disagree with P3/EPSA's and Joint Appellants' jurisdictional claims that a hearing cannot be held unless the Commission first determines that the Modified RRS Proposal was raised in an assignment of error in the application for rehearing and, thus, that we have jurisdiction to consider the alternate proposal. The Commission has already granted rehearing in this matter for further consideration of the matters specified in the applications for rehearing and, in that Entry on Rehearing, the Commission noted the potential of subsequent hearings in order to take additional evidence. Entry on Rehearing at 3. We do not agree with P3/EPSA that, prior to setting the matter for hearing, the Commission was required to address either P3/EPSA's or

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Joint Appellants' jurisdictional claims, raised in their memoranda contra FirstEnergy's application for rehearing, or that any additional findings were necessary.

{¶ 27} Nonetheless, although the Commission was not required to address the jurisdictional claims prior to exercising our discretion to hold a hearing, we have reviewed the Joint Appellants' and P3/EPSC's jurisdictional arguments and find them to be baseless. FirstEnergy's application for rehearing consisted of three parts: the application for rehearing setting forth the assignments of error, a memorandum in support, detailing arguments in support of the assignments of error as well as providing the details of the Modified RRS Proposal, and rehearing testimony in support of the Modified RRS Proposal. FirstEnergy also proposed that the Commission hold a hearing to take additional evidence on the Modified RRS Proposal. The Commission finds that this complied with the requirements of R.C. 4903.10, which requires that the application for rehearing be in writing and that the application for rehearing set forth specifically the ground or grounds on which the applicant considers the Commission order to be unreasonable or unlawful. The sixth, seventh, and eighth assignments of error provided sufficient detail on which grounds the Companies claim that the Commission order is unreasonable and unlawful, and the memorandum in support provided the details regarding the Modified RRS Proposal. Further, we note that our determination in this case is consistent with the Court's decision in the *CG&E Case* rejecting OCC's claim that the utility failed to follow the formal requirements of R.C. 4903.10 because the utility included its alternative proposal allegedly without setting forth the specific grounds challenging the reasonableness or lawfulness of the Commission's order. *CG&E Case* at ¶14.

{¶ 28} Moreover, the Commission finds that arguments to distinguish this case from the *CG&E Case* are not persuasive. In the *CG&E Case*, after the Commission modified and approved a stipulation in the proceeding, the utility made an alternative proposal as part of its application for rehearing. The Commission adopted that



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alternative proposal on rehearing. On appeal, the Supreme Court of Ohio held that “the commission did not fail to adhere to any required procedural protections. The commission treated CG & E’s alternative proposal as an assignment of error on rehearing and not as a new or separate proposal.” *CG&E Case* at ¶ 15. In this proceeding, the Commission modified and approved a stipulation filed in the proceeding. FirstEnergy made an alternative proposal as part of its application for rehearing and requests that the Commission adopt the alternative proposal on rehearing. There is no substantive difference between the *CG&E Case* and this proceeding. Accordingly, we find that the Modified RRS Proposal is properly before the Commission on rehearing.

{¶ 29} We also reject Joint Appellants’ claims that the *CG&E Case* was different than this proceeding because the Commission did not reopen the proceeding to take additional evidence in the *CG&E Case*. We note that R.C. 4903.10 specifically contemplates that the Commission may reopen the record to take additional evidence when it states that “the commission shall also specify the scope of the additional evidence, if any, that will be taken.” In addition, the Court expressly recognized in the *CG&E Case* that the Commission “has discretion under [R.C. 4903.10] to decide whether a subsequent hearing is necessary to take additional evidence.” *CG&E Case* at ¶15. Likewise, we are not persuaded that this case should be distinguished from the *CG&E Case* by the scope of the changes proposed by the utility in the alternative proposal. In the *CG&E Case*, the Court noted that “[u]nder R.C. 4903.10(B), if the commission determines upon rehearing that its ‘original order or any part thereof is in any respect unjust of unwarranted, or should be changed,’ [the Commission] can abrogate or modify the order.” *Id.* (emphasis added).

{¶ 30} Moreover, we are not persuaded by Joint Appellants’ efforts to distinguish this proceeding from the *CG&E Case* because this proceeding is subject to a different statutory scheme than the one applicable for the *CG&E Case* and because the changes

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proposed in the *CG&E Case* were driven by the Commission's proposed changes, whereas the Modified RRS Proposal is driven by the FERC Order. Neither the statutory scheme of the underlying application nor the underlying reasons for the proposed alternative are relevant. The relevant issue is whether the Companies have properly raised the Modified RRS Proposal pursuant to R.C. 4903.10, and the Commission has decided that question in the affirmative. Further, we find that no party is prejudiced by our consideration of the Modified RRS Proposal because each party will have a full and fair opportunity to cross examine the Companies' witnesses and to present any relevant evidence in opposition to the Modified RRS Proposal, or to propose an alternative, at hearing.

{¶ 31} Accordingly, for the reasons set forth above, the Commission finds that the interlocutory appeal should be denied and that the attorney examiner's rulings in the June 3, 2016 Entry should be affirmed.

{¶ 32} As a final matter, P3/EPSC filed a motion to stay the procedural schedule on June 14, 2016, pending the outcome of its interlocutory appeal. As its interlocutory appeal has been denied, this issue is now moot, and, therefore, we find that P3/EPSC's motion to stay the procedural schedule should be denied.

### **C. *Applications for Rehearing***

#### **1. APPLICABLE LAW**

{¶ 33} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

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**2. OCC/NOAC APPLICATION FOR REHEARING FILED ON MAY 31, 2016**

{¶ 34} On May 31, 2016, OCC/NOAC filed an application for rehearing regarding the Commission's May 25, 2016 Finding and Order, asserting three assignments of error for the Commission's consideration. In its application for rehearing, OCC/NOAC argue that the Commission unreasonably found the tariff rates filed by FirstEnergy to be consistent with its Opinion and Order, as the tariffs failed to implement Rider RRS as approved by the Commission. OCC/NOAC state that FirstEnergy was obligated to withdraw its pending application in this case and file a new application, due to the fact that the Companies effectively rejected the Commission's modifications to the proposed ESP by including the Modified RRS Proposal in its application for rehearing. As the projected hedge resulting from Rider RRS was premised upon FirstEnergy executing a power purchase agreement (PPA) with an affiliate, OCC/NOAC argue FirstEnergy has fundamentally changed the operation of Rider RRS and that, by approving the tariffs filed pursuant to the Opinion and Order, the Commission erred in finding such tariffs to be consistent with the Opinion and Order. Moreover, OCC/NOAC contend that Rider RRS provided many of the alleged benefits of the ESP, and without it, the ESP can no longer be approved as a package. Additionally, OCC/NOAC contend the Commission erred by unlawfully approving the tariff rates for the ESP, as Rider RRS does not satisfy the requirements of R.C. 4928.143(B)(2)(d), and therefore, the Commission lacked authority to approve it. Finally, OCC/NOAC argue that the Commission erred in approving tariff rates to implement an ESP, noting that FirstEnergy's tariff filing disregards certain modifications the Commission approved in the Opinion and Order. According to OCC/NOAC, the tariff filing was inconsistent with the actual ESP authorized by the Commission, and failed to follow the process set forth in R.C. 4928.141(B).

{¶ 35} On June 9, 2016, Industrial Energy Users-Ohio (IEU-Ohio) filed a memoranda contra OCC/NOAC's application for rehearing. IEU-Ohio argues that

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OCC/NOAC's arguments are without merit, as the tariff filing was consistent with the Opinion and Order and that OCC/NOAC requests an inappropriate remedy as its application for rehearing is merely limited to the approval of compliance tariffs. Additionally, IEU-Ohio contends that no party will suffer any harm from the May 15, 2016 Finding and Order, emphasizing that the rates are currently set at zero; however, IEU-Ohio notes that customers who have engaged to enter into new contracts for service with FirstEnergy or competitive retail electric service (CRES) providers in reliance on the Opinion and Order will suffer "irreparable hardship." Accordingly, IEU-Ohio requests the Commission deny the application for rehearing.

{¶ 36} Thereafter, on June 10, 2016, Ohio Energy Group (OEG) and FirstEnergy filed memoranda contra OCC/NOAC's application for rehearing. OEG states that OCC/NOAC's argument has already been considered and rejected in this proceeding, noting that Staff and the Commission have already conclusively found that the Companies' tariff filing was consistent with the Opinion and Order. FirstEnergy agrees that OCC/NOAC's allegations are without merit and that this Commission has already held "the Companies have an approved ESP, subject to rehearing, irrespective of FERC's action rescinding the waiver of FirstEnergy Solution's affiliate power sales restrictions." May 25, 2016 Finding and Order at 4. FirstEnergy contrarily argues that the Companies were under no obligation to enter into the PPA proposed under the ESP. Opinion and Order at 87. Additionally, the Companies argue that the prohibitions on recovery associated with capacity performance penalties and plant outage costs through Rider RRS would not change the tariff sheets as filed on May 13, 2016. For all of these reasons, FirstEnergy requests that the Commission deny OCC/NOAC's application for rehearing.

{¶ 37} In their first assignment of error, OCC/NOAC claim that the Commission unreasonably found the tariff rates filed by FirstEnergy to be consistent with its Opinion and Order, as the tariffs failed to implement Rider RRS as approved by the

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Commission. We disagree. As noted by Staff, the tariff sheets filed by FirstEnergy are consistent with the ESP as modified and approved by the Commission in the Opinion and Order issued in this case. Moreover, all of the terms, conditions and other provisions (including the provisions for review of Rider RRS), regarding Rider RRS which are contained in the application and the stipulations as modified by the Commission, continue to apply. OCC/NOAC point to no language in the tariff or any other evidence to support their claim that the tariff is intended to implement Rider RRS as proposed to be modified by the Companies on rehearing. We note that, in the tariff pages for Rider RRS, there are no rates or charges to be recovered from, or credited to ratepayers, because, as noted by OCC/NOAC, FERC's recent action with respect to the affiliate waivers may make it more difficult to execute the proposed PPA with FirstEnergy's affiliate. However, the fact that it may be *more difficult* to execute the proposed PPA does not mean it would be *impossible* following review of the proposed PPA by FERC. Under R.C. 4928.143, the Companies have an approved ESP, including Rider RRS, irrespective of FERC's action. The Companies are simply unable to include credits or charges in Rider RRS at this time, pending FERC review of the proposed PPA. Likewise, the ESP approved by the Commission is in effect irrespective of any issues raised on rehearing regarding Rider RRS by either the Companies or by intervenors. The Opinion and Order is effective unless and until abrogated or modified by the Commission on rehearing. R.C. 4903.15. Further, OCC/NOAC's allegations that customers will be harmed by the approval of the tariffs for Rider RRS are misplaced. There are no rates or charges in the approved tariff for Rider RRS and rates charges cannot be included in Rider RRS without a further order by the Commission. In fact, by leaving the values blank rather than including a rate set at zero, the Companies have made it abundantly clear that further action by the Commission is necessary before rates or charges can be implemented. Accordingly, rehearing on this assignment of error should be denied.

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{¶ 38} OCC/NOAC argue in their second assignment of error that the Commission erred in approving tariff rates for an ESP containing Rider RRS that did not satisfy the requirements of R.C. 4928.143(B)(2)(d). The Commission notes, initially, that OCC/NOAC's premise, that the Commission approved "tariff rates" is simply wrong; there are no rates or charges in the tariff pages for Rider RRS. Further, the Commission finds that the delay in implementing Rider RRS, as approved by the Commission, due to FERC's action regarding the affiliate waiver, has no effect upon our statutory authority to approve Rider RRS under 4928.143(B)(2)(d). The record is clear that, if and when implemented, Rider RRS meets the requirements of 4928.143(B)(2)(d), as we determined in the Opinion and Order.

{¶ 39} With respect to OCC/NOAC's third assignment of error, the Commission finds that rehearing on this assignment of error should be denied. We have already addressed and rejected OCC/NOAC's claims that the tariffs approved by the Commission are intended to implement the Modified RRS Proposal rather than Rider RRS as approved by the Commission in the Opinion and Order. Further, we find no basis for OCC/NOAC's claim that FirstEnergy was obligated to withdraw and terminate its application instead of filing an application for rehearing. In an analogous situation, the Supreme Court of Ohio found no error where the electric utility filed tariffs implementing an ESP and also filed for rehearing and appealed a Commission decision modifying and approving an ESP without either withdrawing or formally accepting the modified ESP. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655, 2011-Ohio-1788 at ¶¶ 45-47. OCC/NOAC make no effort to distinguish this precedent.

{¶ 40} Therefore, the Commission finds that rehearing on the May 31, 2016 applications for rehearing should be denied.

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**3. APPLICATION FOR REHEARING FILED ON JUNE 10, 2016**

{¶ 41} OCC/NOAC filed its third application for rehearing on June 10, 2016, presenting three assignments of error regarding the First Entry on Rehearing. In its memorandum in support, OCC/NOAC argue the Commission unreasonably and unlawfully granted FirstEnergy's application for rehearing, which allowed FirstEnergy to fundamentally change its Commission-modified and approved ESP through the rehearing process, violating R.C. 4928.141 and 4928.143(C). OCC/NOAC further note that once the Commission's approved ESP was preempted by the FERC Order, FirstEnergy was left with withdrawing its application as its only option to move forward. Second, OCC/NOAC argue that the Commission unreasonably and unlawfully granted FirstEnergy's application for rehearing, without specifying the scope of rehearing and without limiting the evidence on rehearing to that which could not have been offered upon the original hearing, violating R.C. 4903.10. OCC/NOAC assert that the proffered testimony of FirstEnergy witness Mikkelsen could have been presented at the original hearings, as many of the intervenors had raised the possibility of FERC withdrawing the affiliate waiver as a potential outcome. Finally, OCC/NOAC assert that the Commission unreasonably granted FirstEnergy's application for rehearing without first considering the other intervening parties' memoranda contra, thereby denying intervening parties a reasonable opportunity to be heard before the Commission issued the First Entry on Rehearing.

{¶ 42} On June 20, 2016, FirstEnergy and IEU-Ohio filed memoranda contra OCC/NOAC's third application for rehearing. IEU-Ohio initially argues that the Commission lacks the authority to issue an order directing FirstEnergy to continue its most recent SSO, as FirstEnergy has not withdrawn its application and the Commission has not rejected the application. IEU-Ohio also raises its concerns regarding various customers' reliance on the Opinion and Order and their ability to fully enjoy the potential benefits provided by the approved ESP IV.

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{¶ 43} FirstEnergy contends that the Companies' right to seek rehearing of the Opinion and Order, and the Commission's authority to grant rehearing for matters it deems necessary, are expressly provided for in statute. Moreover, the Companies disagree with OCC/NOAC's characterization of the Modified RRS Proposal as "fundamentally changing" the ESP IV; rather, FirstEnergy asserts the proposal contains modest changes to the calculation of Rider RRS in order to ensure customers continue to realize the expected benefits of the rate stabilization mechanism. Additionally, FirstEnergy states that the only effect the FERC Order had on the ESP IV was that it prompted the development of the Modified RRS Proposal for the Commission's consideration. FirstEnergy further argues that the First Entry on Rehearing did not violate R.C. 4903.10, as alleged by OCC/NOAC, noting that the Modified RRS Proposal relies on data included in the record and already relied upon in the Opinion and Order. Additionally, the Companies contend that the Commission's modifications to the calculation of Rider RRS in its Opinion and Order, as well as the FERC Order, could not have been reasonably foreseen to occur at the time of the original hearing. FirstEnergy argues further that utilities are not required, nor expected, to present every conceivable alternative during an ESP proceeding. Finally, the Companies argue that the Commission did not act unreasonably in granting rehearing before considering the memoranda contra the Companies' application for rehearing. Instead, FirstEnergy asserts that parties were provided notice of both the application for rehearing and the Commission's rehearing, which is the only process requirement found in the statute. In fact, FirstEnergy states that OCC/NOAC cannot show that they were prejudiced when they are being afforded an additional opportunity for discovery and an evidentiary hearing, while also noting that Commission precedent supports the Commission's decision to grant rehearing before memoranda contra have been reviewed. *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 460 N.E.2d 1108 (1984).



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{¶ 44} The Commission finds that OCC/NOAC's first assignment of error merely repeats arguments raised by OCC/NOAC in their May 31, 2016 application for rehearing. Accordingly, due to the reasons set forth in Paragraphs 37-39 above, rehearing on this assignment should be denied.

{¶ 45} With respect to OCC/NOAC's second assignment of error, the Commission notes that the attorney examiner established the scope the hearing in the June 3, 2016 Entry and that we specifically affirmed that ruling above in Paragraph 25. Therefore, rehearing on this assignment of error should be denied. With respect to the exclusion of evidence on rehearing which could have been offered upon the original hearing, the attorney examiners will address any objections to evidence on that basis at the evidentiary hearing.

{¶ 46} Finally, rehearing on OCC/NOAC third assignment of error should be denied. OCC/NOAC contend that the Commission should not have granted rehearing without first considering other intervening parties' memoranda contra. However, the Commission merely granted rehearing for further consideration of the matters specified in the applications for rehearing. Since FirstEnergy had requested an additional hearing on its Modified RRS Proposal as part of its application for rehearing, the Commission granted rehearing prior to the filing of memorandum contra in order to provide parties as much time as possible for discovery regarding the Modified RRS Proposal. Nonetheless, we will thoroughly consider all arguments raised in the memoranda contra in the ultimate disposition of the applications of rehearing.

{¶ 47} Accordingly, the Commission finds that OCC/NOAC's application for rehearing, filed on June 10, 2016, should be denied.

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**4. APPLICATION FOR REHEARING FILED ON JUNE 24, 2016**

{¶ 48} OMAEG filed an application for rehearing on June 24, 2016, in which it asserts the Commission's May 25, 2016 Finding and Order was unjust and unreasonable. Specifically, OMAEG raises two assignments of error, claiming that the Companies' proposed Rider RRS tariff rates were inconsistent with the Opinion and Order and that the Commission should have directed the Companies to refile the tariffs to reflect a \$0.00 per kWh rate for Rider RRS. The Companies filed a memorandum contra OMAEG's application for rehearing on July 5, 2016, reiterating that their tariffs were, in fact, consistent with the Opinion and Order.

{¶ 49} The Commission finds that both assignments of error raised by OMAEG merely repeat arguments raised by OCC/NOAC in their May 31, 2016 application for rehearing. Accordingly, due to the reasons set forth in Paragraphs 37-38 above, rehearing on these assignments should be denied.

**III. ORDER**

{¶ 50} It is, therefore,

{¶ 51} ORDERED, That OCC/NOAC's applications for rehearing filed on May 31, 2016 and June 10, 2016 be denied. It is, further,

{¶ 52} ORDERED, That OMAEG's application for rehearing filed on June 24, 2016 be denied. It is, further,

{¶ 53} ORDERED, That P3/EPISA and Joint Appellants' applications for interlocutory appeals be denied. It is, further,

{¶ 54} ORDERED, That P3/EPISA's motion to stay the procedural schedule be denied. It is, further,

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[¶ 55] ORDERED, That a copy of this Third Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Asim Z. Haque, Chairman

  
Lynn Slaby

  
M. Beth Trombold

  
Thomas W. Johnson

MJA/sc

Entered in the Journal  
JUL 06 2016

  
Barcy F. McNeal

Barcy F. McNeal  
Secretary