

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA
OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY'S
MOTION TO STRIKE PORTIONS OF THE MEMORANDUM CONTRA OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

On October 12, 2016, the Public Utilities Commission of Ohio (Commission) issued its Fifth Entry on Rehearing (EOR), rejecting the Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's (the Companies) proposed modifications to the Retail Rate Stability Rider (Rider RRS) and instead adopting Staff's proposed Distribution Modernization Rider (Rider DMR) with some modifications (Fifth EOR).¹ Additionally, the Commission addressed several issues raised by intervening parties on rehearing and related to the Companies' Stipulated ESP IV.²

The Ohio Manufacturers' Association Energy Group (OMAEG) and other intervening parties submitted applications for rehearing of the Fifth EOR on November 14, 2016. The

¹ Fifth Entry on Rehearing at 1 (October 12, 2016) (October 12 EOR).

² Id.

Companies also filed an application for rehearing of the Commission's Fifth EOR.³ In response, OMAEG filed a memorandum contra to the Companies' application for rehearing (Memorandum Contra).⁴

Subsequently, the Companies' filed a motion to strike OMAEG's Memorandum Contra, alleging that OMAEG's argument regarding the Companies' right to withdraw its ESP is improper and prejudicial.⁵ The Companies, however, fail to explain how OMAEG's response to the Commission's decision to provide the Companies with an unfettered right to withdraw its ESP, contained in its Fifth EOR,⁶ is untimely or inappropriate to include in its pleading. Accordingly, OMAEG requests the Commission deny the Companies' motion to strike.

II. ARGUMENT

A. OMAEG's argument specific to the Companies' right to withdraw is properly included in its Memorandum Contra.

The portion of OMAEG's Memorandum Contra that the Companies seek to strike was appropriately and properly included in OMAEG's Memorandum Contra as it relates to the Companies' application for rehearing. As such, it should not be stricken.

The Companies' application for rehearing includes a number of alleged Commission errors contained in the Fifth Entry on Rehearing regarding the various provisions of the

³ Companies Application for Rehearing (November 14, 2016).

⁴ Memorandum Contra Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Application for Rehearing on Behalf of the Ohio Manufacturers' Association Energy Group (November 25, 2016) (Memorandum Contra).

⁵ Motion of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company to Strike Portions of the Memorandum Contra of the Ohio Manufacturers' Association Energy Group at 2 (December 2, 2016) (Motion to Strike).

⁶ Fifth EOR at 150.

Stipulated ESP IV.⁷ These alleged errors and requests by the Companies, if granted by the Commission, will significantly alter the Stipulation that was agreed to by the signatory parties and authorized by the Commission. This will, in turn, undoubtedly impact the ESP v. MRO test,⁸ as well as the three-part settlement test,⁹ specific to whether the provisions in the stipulation, as a package, benefit ratepayers and are in the public interest. These tests were critical to the Commission's determination to authorize the Stipulated ESP IV. Whether the Companies have an unfettered right to withdraw its ESP is directly related to the collective assignments of error listed by the Companies in their application for rehearing as each assignment of error has the potential to significantly alter the Stipulated ESP IV, which will in turn effect when the Companies file tariffs and whether the Companies ultimately choose to withdraw its ESP. Each time the Companies submit a new request for consideration by the Commission, as they do in their application for rehearing, it is imperative that the Commission also consider whether it is appropriate to allow the Companies to withdraw its ESP after collecting costs from ratepayers pursuant to their filed tariffs. The impact of the Commission's decision to allow the Companies to file tariffs, collect costs from ratepayers, and then the Companies' subsequent decision to withdraw the ESP at some point in the future, will evolve each time the Commission makes some alteration and/or modification to the Stipulated ESP IV.

⁷ Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Rehearing of Fifth Entry on Rehearing at 1-5 (November 14, 2016).

⁸ Section 4928.143(C)(1), Revised Code, requires that the Commission determine, before approving an ESP, that the ESP is more favorable in the aggregate as compared to the expected results under a Market Rate Offer (MRO); see also *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, Opinion and Order at 48 (September 4, 2013).

⁹ The Commission has adopted the following three prong test to evaluate whether a stipulation is reasonable and warrants acceptance: (1) whether the stipulation is the product of serious bargaining among capable, knowledgeable parties; (2) whether the stipulation, as package, benefits ratepayers and is in the public interest; (3) whether the stipulation violates any important regulatory principles or practices. See, e.g., *In the Matter of the Application of the 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, Opinion and Order at 39 (March 31, 2016).

Therefore, it is appropriate that each time the Companies file an application for rehearing, which includes requests to modify the approved Stipulated ESP IV, the Commission also consider whether the Companies should continue to be provided the opportunity to withdraw its ESP after filing tariffs and collecting costs from customers.

OMAEG's Memorandum Contra properly addresses that very issue, after properly arguing its disagreement with the Companies' individual assignments of error regarding specific provisions of the ESP. The complexity of this case, both substantively and procedurally, requires that the Commission consider all of the information and arguments collectively and not in a vacuum in order to reach the best decision for all parties involved. Accordingly, the Commission should deny the Companies' motion to strike.

B. The Companies are not prejudiced by OMAEG's argument that the Commission erred in providing the Companies an unfettered right to withdraw its ESP.

The Companies also assert that they are prejudiced by the portion of OMAEG's Memorandum Contra at issue as they have no opportunity to respond to the argument. This is wholly inaccurate. In fact, the Companies devote more than two pages of their Memorandum Contra the Intervenors' applications for rehearing of the Fifth Entry on Rehearing to the issue of their right to withdraw the ESP and include this argument as its own section in their memorandum contra.¹⁰ The Companies specifically address the Commission's decision to allow them to withdraw their ESP even after they file tariffs, citing to the Fifth Entry on Rehearing.¹¹ Further, they make numerous arguments as to why the Commission's decision

¹⁰ Memorandum of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company Contra the Intervenors' Applications for Rehearing of Fifth Entry on Rehearing at 47-49 (November 25, 2016).

¹¹ Id. at 47-48.

was appropriate and proper.¹² Therefore, the Companies' assertion that they will be prejudiced by OMAEG's argument regarding this issue as they will not have an opportunity to respond is not inaccurate given they have already responded to such arguments.

C. Rule 4901-1-35, Ohio Administrative Code, does not preclude OMAEG from filing a pleading that references and supports a particular argument of another party to further its own arguments.

Subsection (B) of Rule 4901-1-35, Ohio Administrative Code, states that "[a]ny party may file a memorandum contra within ten days after the filing of an application for rehearing."¹³ While the Companies assert that nothing in this subsection permits parties to file memoranda in support of another application,¹⁴ there is also nothing in this rule that *prohibits* a filing in support, or a filing that supports in part and disagrees in part with an application for rehearing.¹⁵ Further, the Companies' arguments ignore the fact that while OMAEG referenced supportive assertions made by the Ohio Consumers' Counsel in its application for rehearing to further its arguments contra the Companies, OMAEG clearly opposes the Companies' application for rehearing, as exemplified by the 29 pages of arguments disagreeing with the Companies.¹⁶ Based on the plain reading of Rule 4901-1-35, Ohio Administrative Code, the motion to strike should be denied.

¹² Id. at 47-49.

¹³ Rule 4901-1-35, Ohio Administrative Code.

¹⁴ Motion to Strike at 2.

¹⁵ *In Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case Nos. 03-93-EL-ATA, Entry (January 2, 2007), the Attorney Examiner denied a motion to strike a memorandum in support of another party's motion noting that the Commission's Rule 4901-1-12 did not prohibit such a filing. Rule 4901-1-35 is similarly worded, also not prohibiting a memorandum in support.

¹⁶ Memorandum Contra Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company's Application for Rehearing on Behalf of the Ohio Manufacturers' Association Energy Group (November 23, 2016).

D. Alternatively, OMAEG requests leave to file a memorandum in support of OCC's Application for Rehearing.

Nonetheless, to the extent necessary and in the alternative, OMAEG moves the Commission for leave to file a memorandum in support of the Office of the Ohio Consumers' Counsel's (OCC) Application for Rehearing where it argued that the Commission erred in extending the Companies right to withdraw its ESP.¹⁷ To the extent OMAEG's argument is deemed to be additional support of its application for rehearing, which it is not as argued above, the Commission should grant OMAEG's alternative motion for leave to file a memorandum in support of another party's rehearing position. As recognized by the Companies, the Commission has allowed parties to file such memorandum in support: "[t]o the extent that a party believes that it is necessary to inform the Commission of its support for another party's rehearing position, the appropriate motion for leave to file a memorandum in support should be submitted for the Commission's consideration."¹⁸

Consistent with the Commission's prior directives, OMAEG seeks leave to inform the Commission of its support for OCC's rehearing position in addition to the arguments raised above. Therefore, to the extent necessary, OMAEG requests that the Commission grant OMAEG's motion in the alternative and construe its previous arguments set forth in Section II.H of its Memorandum Contra as a memorandum in support of OCC's Application for Rehearing.

¹⁷ Application for Rehearing by the Office of the Ohio Consumers' Counsel at 41-43 (November 14, 2016).

¹⁸ *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing at 3 (October 17, 2007).

III. CONCLUSION

Based on the aforementioned arguments, OMAEG respectfully requests that the Commission deny the Companies' Motion to Strike portions of its Memorandum Contra to the Companies' application for rehearing. Specifically, Ohio rules do not preclude OMAEG from referencing other parties' comments in furtherance of its own arguments and the Companies are in no way prejudiced by the argument. Further, OMAEG's assertions are directly related to the 43 pages of allegations made by the Companies in its application for rehearing. In the alternative, OMAEG respectfully requests that the Commission grant its motion for leave and construe Section II.H of its Memorandum Contra as a memorandum in support of OCC's application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on December 12, 2016.

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