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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Application of Direct Energy Services, LLC, Direct Energy Business, LLC, Dominion Energy Solutions, Inc., Interstate Gas Supply, Inc., and SouthStar Energy Services, LLC for a Waiver of a Provision of Rule 4901-29-06(E)(1) of the Ohio Administrative Code.	:	Case No. 17-2358-GA-WVR

APPLICANTS' REPLY
TO
OCC MEMORANDUM CONTRA JOINT MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

By their motion of January 17, 2018, Direct Energy Services, LLC, Direct Energy Business, LLC, Dominion Energy Solutions, Inc., Interstate Gas Supply, Inc., and SouthStar Energy Services, LLC (collectively, "Applicants") sought a protective order from the discovery served upon them on December 29, 2017 by the Office of the Ohio Consumers' Counsel ("OCC"). In support of their motion, Applicants argued that, because the Commission has not yet determined the procedural course their application for waiver will take, discovery is premature at this juncture. The basis for the motion is summarized below.

As explained in the supporting memorandum accompanying the motion, Rule 4901:1-29-02(C), OAC, which governs applications for a waiver of a competitive retail natural gas service ("CRNGS") rule, states only that "(t)he commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown," and does not specify the process the Commission must follow in acting

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upon a waiver request.[1] Thus, the Commission has discretion to establish the procedure to be followed in considering a waiver application. The Commission's options include acting upon the application without seeking input from interested parties,[2] deciding the case based on the application and matters raised in motions for leave to intervene and/or unsolicited comments filed in the docket,[3] issuing a formal call for comments from interested parties,[4] or, in those rare instances where the Commission deems that there are factual issues that must be resolved to determine if good cause exists for granting the waiver, scheduling an evidentiary hearing.[5] Applicants pointed out that, if the Commission elects to decide this case based on the information now before it and does not set the matter for hearing, responding to discovery would, by definition, impose an unnecessary burden and expense upon Applicants because the purpose of discovery is to permit parties to develop evidence for hearing.[6] Thus, Applicants' sought protection pursuant to Rule 4909-1-24(A), OAC, which provides that the Commission "may issue any order that is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," and specifically requested that the

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[1] Applicants' Memorandum in Support, 1-2.

[2] *See, e.g., In the Matter of the Application of The Northeast Ohio Public Energy Council for a Waiver of Ohio Admin.Code 4901:1- 21-17(F),* Case No. 16-2177-EL-WVR (Entry Dated November 9, 2016); *In the Matter of the Application of Swickard Gas Company for Waiver of the Requirement of Rule 4901:1-18-02(B)(3) of the Ohio Administrative Code,* Case No. 13-1452-GA-WVR (Finding and Order dated July 31, 2013).

[3] *See, e.g., In the Matter of the Application of Columbia Gas of Ohio, Inc. for a Waiver of Ohio Administrative Code Section 4901:1-13-11(B),* Case No. 16-653-GA-WVR (Entry dated July 20, 2016); *In the Matter of the Application of Duke Energy Ohio, Inc. for a Waiver,* Case No. 16-1017-EL-WVR (Entry dated June 13, 2016).

[4] *See, e.g., In the Matter of the Application of Ohio Power Company for a Waiver,* Case No. 16-1773-EL-WVR (Entry dated December 14, 2016).

[5] *In the Matter of the Application of Dayton Power and Light Company for Approval of its Energy Efficiency and Peak Demand Reduction Program Portfolio for 20018-2020,* Case Nos. 17-1398-EL-POR and 17-1399-EL-WVR (Entry dated September 29, 2017).

[6] *See* Applicants' Memorandum in Support, 3, citing Rule 4901-1-16(A)-(B), OAC.

Commission issue an order providing that Applicants are not required to respond to OCC's first set of discovery dated December 29, 2017 until such time as the Commission orders otherwise.

On February 1, 2017, OCC filed a memorandum contra Applicants' motion for a protective order in which OCC asserts that granting the motion would be contrary to Commission precedent and would deny discovery that is necessary for OCC to evaluate the effect of the waiver application on consumers. OCC also contends that the Commission should deny the motion because Applicants have failed to show that they have exhausted all reasonable means of resolving any differences with OCC regarding the discovery. Applicants hereby file their reply to OCC's memorandum contra pursuant to Rule 4901-1-12(B)(2), OAC. For those reasons set forth herein, these OCC arguments should be rejected by the Commission.

II. DISCUSSION

A. THE RIGHT TO DISCOVERY IN COMMISSION PROCEEDINGS IS NOT ABSOLUTE, AND THE COMMISSION HAS DISCRETION TO DETERMINE WHETHER AND WHEN DISCOVERY SHOULD BE AVAILABLE ON A CASE-BY-CASE BASIS.

It is well-settled that the Commission has broad discretion to manage its dockets, including the discretion to determine how to best manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.[7] This discretion extends to managing the use of discovery in Commission proceedings. Thus, although OCC emphasizes that R.C. 4903.082 provides that "(a)ll parties and intervenors shall be granted ample rights of discovery" in Commission proceedings and that the Supreme Court of Ohio has held

[7] *See Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982); *see also In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR (Opinion and Order dated March 31, 2016, at 10).

that parties in Commission cases have broad rights to discovery,[8] the right to discovery is not absolute, and the Commission has the authority to determine whether and when discovery should be available in a Commission proceeding. Indeed, in Case No. 07-532-GA-MER,[9] commonly referred to as the Duke Merger Case, the Commission, on its own motion, ordered that discovery be stayed pending a Commission determination as to the scope and nature of its review in that proceeding.[10] OCC subsequently argued in that case that the stay on discovery should be lifted, but the Commission rejected this argument, finding that "(s)ince, in this case, we have not yet determined whether a hearing will be held, we find it is not appropriate to lift the stay on discovery."[11]

The finding in the Duke Merger Case reinforces Applicants' point that discovery is intended to permit parties to develop evidence in preparation for hearing,[12] as does the language of the Commission's rule establishing the time period for discovery. As OCC points out, Rule 4901-1-17(A), O.A.C., provides that "(d)iscovery may begin immediately after a proceeding is commenced,"[13] but this is followed by the statement that "discovery must be completed prior to the commencement of the hearing," which certainly suggests that discovery is generally available only in proceedings in which a hearing is involved.

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[8] *See* OCC Memorandum Contra, 4, citing *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300 (2006).

[9] *See In the Matter of the Application of Cinergy Corp., on Behalf of the Cincinnati Gas & Electric Company, and Deer Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, Case No. 05-732-GA-MER.

[10] *See* Case No. 07-532-GA-MER (Entry Dated June 14, 2005, at 3).

[11] *See* Case No. 07-532-GA-MER (Entry on Rehearing Dated 7, 2005, at 2).

[12] *See* Applicants' Memorandum in Support, 3.

[13] OCC Memorandum Contra, 4.

This proposition that the right of discovery is not absolute is also buttressed by the Commission's order in Case No. 06-685-AU-ORD, a rulemaking proceeding that addressed the Commission's procedural rules set forth in Chapter 4901-1, OAC.[14] In that case, OCC proposed adding a definition of "proceeding" to Rule 4901-01, OAC, that would encompass "any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold or rule upon."[15] In rejecting this proposal, the Commission found as follows:

> The Commission agrees that the proposed definition is overly broad and unnecessary. If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. The Commission does not believe that such rights exist. In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases.[16]

Thus, contrary to OCC's contention, the Commission's discretion to manage its dockets unquestionably includes the authority to determine whether and when discovery should be made available in a Commission proceeding.

B. THE RULINGS CITED BY OCC AS AUTHORITY FOR DENYING APPLICANTS' MOTION FOR A PROTECTIVE ORDER DO NOT HAVE THE PRECEDENTIAL VALUE OCC ASCRIBES TO THEM.

OCC relies on an entry in a Columbia Gas of Ohio, Inc. ("Columbia") case involving an application for approval to implement a capital expenditure program for the proposition that the Commission has previously rejected arguments for staying discovery similar to those made by

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[14] *See In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD.

[15] Case No. 06-684-AU-ORD (Finding and Order dated December 6, 2006, at 3).

[16] *Id.*

the Applicants in this case.[17] Although Applicants acknowledge that Columbia advanced several of the same arguments that Applicants have made here in support of its motion to stay discovery until the Commission determined the nature and scope of the proceeding on the application in that case, Applicants do not agree that this entry is, in any way, controlling for the purposes of this proceeding.

First, unlike the Commission findings in the Duke Merger Case and the Case No. 06-685-AU-ORD rulemaking proceeding cited above to show that the Commission has recognized that the right to discovery is not absolute, the entry in the Columbia case was an attorney examiner's entry. Because Columbia did not pursue an interlocutory appeal from the entry notwithstanding that it was inconsistent with Commission precedent, the Commission itself was not called upon to consider Columbia's arguments. Thus, it is rather misleading for OCC to suggest that that the "PUCO rejected" these arguments and that the "PUCO agreed with OCC."[18]

Second, as a review of the entry will quickly show, the attorney examiner did not address, let alone analyze, any of Columbia's arguments. Rather, the attorney examiner simply recited the provision of R.C. 4903.082 requiring the Commission to provide ample rights of discovery and the portion of Rule 4901-1-17(A), O.A.C, specifying that discovery may begin immediately upon the commencement of a proceeding, before finding that discovery "will aid the parties in the preparation of their comments and reply comments in these cases and, ultimately, better inform the Commission's review of the application."[19] Thus, the most that can be fairly said is that the attorney examiner's entry implicitly rejected Columbia's arguments, although even that

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[17] *See* OCC Memorandum Contra, 4-6, citing *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval to Implement a Capital Expenditure Program*, Case No. 11-5351-GA-UNC (Entry dated January 27, 2012).

[18] *Id.*, 5-6.

[19] *See* Case No. 11-5351-GA-UNC (Entry dated January 27, 2012, ¶ 8).

is something of a stretch in that, in this same entry, the attorney examiner issued a call for comments on the application, thereby establishing the scope and nature of the proceeding before finding that discovery should proceed. And, although OCC claims that the fact that Columbia had already responded to discovery before filing its motion to stay additional discovery played no role in the decision, it is certainly not accurate to say that "the PUCO did not limit its decision to those cases where the party seeking a protective order had previously responded to discovery."[20] Again, this was not a Commission decision, and, more importantly, the attorney examiner's entry does nothing to undermine the proposition that right to discovery is not absolute and that the Commission has discretion to determine whether and when discovery rights should be made available on a case-by-case basis.

Finally, as noted above, the entry in the Columbia case included a call for comments on the application, and the attorney examiner based her denial of the motion to stay discovery on her finding that discovery would "aid the parties in the preparation of their comments and reply comments." In this case, there has been no call for comments, and as Applicants have previously suggested, in view of the fact that the application for waiver has been pending since mid-November and has drawn no interest from anyone other than OCC, it is unlikely that a call for comments would be productive. Moreover, OCC has now had multiple opportunities to set out its position on the waiver request,[21] so it is not necessary to give OCC yet another bite at the apple by entertaining comments from OCC. Further, as reiterated *infra*, the first branch of the application for waiver merely asks the Commission if the adopted version of Rule 4901:1-29-06(E)(1), OAC, was consistent with the Commission's actual intent. If the answer to that

[20] OCC Memorandum Contra, 6, n. 21.

[21] *See* OCC Motion to Intervene dated December 1, 2017, OCC Reply to Applicants' Response to OCC Motion to Intervene dated December 21, 2017, and OCC Motion to Deny Application dated January 19, 2018.

question is no, good cause exists for granting the requested waiver. This is a question that only the Commission can answer, and discovery will do nothing to illuminate this issue or to inform the Commission's answer. The Commission has the discretion to determine whether and when discovery is appropriate on a case-by-case basis, and if there is no call for comments and no hearing, discovery serves no purpose.

The second decision cited by OCC is an entry in Case No. 13-2420-EL-UNC, which involved an application by The Dayton Power and Light Company ("DP&L") for authority to transfer or sell its generating assets.[22] Although OCC mentions this case in a footnote, OCC apparently offers it as a second instance in which there was a denial of a motion seeking a stay of discovery based on the argument that discovery should only be permitted if the Commission determined that a hearing would be held. Like the ruling in the Columbia case, this was also an attorney examiner's ruling, not a Commission ruling. More importantly, DP&L was seeking a waiver of the Commission rule governing applications of this type which specifically required that a hearing be held. Under these circumstances, the attorney examiner's finding that the "this case should proceed as if it were going to hearing"[23] was completely understandable. Where a hearing is mandated by rule, discovery rights cannot be held hostage by a motion seeking a waiver of the hearing requirement. However, as Applicants have previously explained, there is no requirement in the Commission's waiver rule that a hearing be held on a waiver request, or, for that matter, that the Commission call for comments on a waiver request. Thus, the Commission has the option of ruling on the waiver request based on the information contained in the application for waiver without seeking input from any other parties, either through comments

[22] *See* OCC Memorandum Contra, 6, n. 21, citing *In the Matter of the Application of The Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC.

[23] Case No. 13-2420-EL-UNC (Entry dated May 30, 2014, ¶9).

or through an evidentiary hearing. Thus, the entry in the DP&L case, which also included a call for comments, does nothing to undercut Applicants' argument that they should be protected from discovery until the Commission determines the procedural course their application for waiver will take.

OCC concludes this section of its memorandum contra with the statement that Applicants "cannot determine unilaterally what does constitute a proceeding where they are obligated to respond to discovery" and goes on to state "(a)nd they cannot decide unilaterally when discovery would be appropriate in a proceeding."[24] However, applicants have made no such unilateral determinations here. Indeed, the purpose of the motion for a protective order is to present these issues to the Commission, the entity that has authority to decide, on a case-by-case basis, whether and when discovery should be permitted.

C. DISCOVERY WILL NOT INFORM THE COMMISSION'S DECISION AS TO WHETHER RULE 4901:1-29-06(E)(1), OAC, WAS ADOPTED IN ERROR AND IS INCONSISTENT WITH THE COMMISSION'S ACTUAL INTENT.

As Applicants have explained in their earlier filings in this docket, their application for waiver contains two branches. In the first branch, Applicant's cite a number of factors that strongly indicate that the adopted version of Rule 4901:1-29-06(E)(1), OAC, is not consistent with the Commission's intent, which, in turn, would mean that the rule was adopted in error. OCC has made no attempt to counter this thesis or to explain away these factors. Instead, in its January 19, 2018 motion to deny the application, OCC contends that it makes no difference if the rule was mistakenly approved, arguing that Applicants are precluded from raising this issue at this juncture because their waiver request represents a late-filed application from the Commission's finding and order in Case No. 12-925-GA-ORD, the rulemaking proceeding in

[24] OCC Memorandum Contra, 6.

which the rule would adopted, and/or an impermissible collateral attack on that finding and order.[25] For reasons set forth in Applicants' February 5, 2018 memorandum contra the OCC motion, these arguments are without merit, and Applicants again assert that, if the Commission finds that the third-party verification provision of the rule is inconsistent with its actual intent, good cause exists under Rule 4901:1-29-02(C), OAC, for granting the requested waiver. However, the point, for purposes at hand, is that there is no discovery that would provide any assistance to the Commission in answering the question posed by the first branch of the application for waiver.[26] Indeed, as a review of the interrogatories and requests for production contained in OCC's first set of discovery will show,[27] nothing in OCC's first set of discovery has anything to do with this question. Further, OCC has already staked out its position that it is irrelevant if the rule was adopted in error. Thus, there is no discovery that would assist OCC or, for that matter, any other party, in preparing comments on this issue even if the Commission were to call for comments on this question. In short, if the Commission finds that adopted version of the rule is inconsistent with its actual intent – a question only the Commission can answer – this would end the matter, and the second branch of the application will not be reached.

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[25] In the memorandum contra the motion for a protective order, OCC adds a new wrinkle, claiming that there is no need to speculate as to the Commission's intent "because an examination of intent is necessary only if the rule is ambiguous," citing R.C. 1.49, and asserting "that the language of the rule at issue in this case is not ambiguous." *See* OCC Memorandum Contra, 3, n. 7. In the first place, R.C. 1.49 has no application in this setting. This statute sets out the factors a court may consider for purposes of interpreting legislative intent if the language of a statute is ambiguous. Second, even if this statute applied, the Applicants in this case are not asking the Commission to interpret one of its rules. Rather, Applicants are asking the Commission if the adopted version of a rule is consistent with its *own* intent, which is a completely different question. Third, there is no question that the adopted version of Rule 4901:1-29-06(E)(1), OAC, is ambiguous. This rule is grammatically awkward, contains a misplaced conditional clause that creates an incomplete sentence, and, read literally, would require suppliers to record the sales portion of the call, but not the portion containing the required representations an customer acknowledgments, notwithstanding that the finding and order in Case No. 12-925-GA-ORD clearly contemplated that the supplier would record the *entire* call.

[27] *See* Applicants' Joint Motions for a Protective Order, Attachment A.

On the other hand, if – and only if – the Commission determines that the adopted version of the rule is consistent with its intent, the second branch of the application for waiver will come into play. In the second branch of their application, Applicants contend that, even if the Commission finds that the adopted version of the rule is consistent with the Commission's intent, good cause still exists for granting the requested waiver. In support of this assertion, Applicants cited, *inter alia*, the added cost of engaging a third-party verifier, the customer inconvenience resulting from the TPV process, the increased likelihood that an enrollment will not be completed despite the stated desire of the prospective customer to enter into a contract with the supplier, and the additional problem different enrollment protocols create for suppliers that provide both gas and electric service.[28] As noted in Applicants' memorandum contra OCC's motion to deny the application, the Commission can decide whether these considerations constitute good cause for granting the waiver based on the information now before it.[29] However, if the Commission doubts the veracity of these allegations and determines that an evidentiary hearing is required on these issues, Applicants agree that discovery would be appropriate.[30] But, what the Commission should not do is subject Applicants to the burden of responding to discovery relating to the allegations in the second branch of the application before it rules on the first branch of the application or before it establishes the procedural course for this proceeding. If the Commission finds that no hearing is required, discovery serves no purpose.

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[28] *See* Joint Application, 11-14.

[29] *See* Applicants' Memorandum Contra, 27.

[30] In so stating, Applicants wish to make clear that, contrary to OCC's statement *(see* OCC Memorandum Contra, 4), Applicants did not "admit that OCC's discovery requests are within the scope of discovery contemplated by the PUCO's rules." What Applicants actually said was that, "(a)lthough many of OCC's interrogatories and requests for production of documents are objectionable on a variety of grounds, Applicants acknowledge that those that seek to elicit information relating to these allegations are within the scope of discovery contemplated by Rule 4901-1-16, (OAC.)" Applicants' Memorandum in Support, 5.

Nor should the Commission defer ruling on the first branch of the application for waiver and allow the case to proceed with the intention of addressing both branches of the application after the smoke clears. This approach would subject Applicants to a burden and expense that would prove unnecessary if the Commission ultimately finds that the adopted version of the rule was approved in error.

D. OCC'S ARGUMENT THAT APPLICANTS' EFFORTS TO RESOLVE THEIR DISCOVERY DISPUTE WITH OCC WERE INADEQUATE IS TOTALLY LACKING IN MERIT.

Rule 4909-1-24, OAC sets out the requirements for motions for protective orders. Paragraph (B) of this rule provides that:

> No motion for a protective order shall be filed under paragraph (A) of this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery.

Although OCC contends that Applicants have failed to comply with this requirement, the rationale OCC offers to support the proposition that Applicants' efforts to resolve this issue were inadequate is unavailing. OCC begins by noting that it never received any emails from any of the individual Applicants indicating that there was an issue with its first set of discovery requests, and that the only discussion concerning the issue came in the form of a telephone call from counsel for one of the Applicants on January 17, 2017, the day before the discovery responses were due.[31] However, there is no deadline for filing a motion for a protective order. Moreover, Applicants could have responded to the discovery by objecting on the grounds that it was premature and sat back to await an OCC motion to compel. Thus, filing the motion for a protective order actually accelerated the process. Further, we do not know what to make of

[31] *See* OCC Memorandum Contra, 9.

OCC's comment that it never received emails from any of the individual Applicants. Like the application itself, the motion for a protective order was a joint motion filed by all the Applicants, and undersigned counsel for Dominion Energy Solutions, Inc., who initiated the January 17, 2018 call,[32] opened the discussion by advising counsel for OCC that he was calling on behalf of all the Applicants. Is OCC suggesting that Applicants did not exhaust all other reasonable means of resolving the dispute because each of the four Applicants did not contact OCC individually? If so, this argument should be given the short shrift it deserves.

OCC next faults Applicants for failing to offer alternatives to the request made during the January 17, 2018 call that OCC agree that Applicants should not be required to respond to discovery until the Commission determines the procedural course for the case.[33] The one alternative that OCC specifically mentions is that Applicants could have requested an extension of the response time for discovery. However, that is precisely what Applicants proposed by asking OCC to agree that Applicants should not be required to respond to discovery at this juncture. On the other hand, if OCC's reference to an extension of the response time means an extension to some fixed date, this would have done nothing to resolve the underlying issue because there is no way of knowing when, or if, the Commission will issue a procedural entry in the case. As to the suggestion that Applicants should have offered some other resolution or compromise, Applicants are still waiting to hear what OCC has in mind. If there is another way to avoid the burden and expense of responding to discovery that may ultimately serve no purpose, Applicants are all ears.

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[32] *See* Applicants' Joint Motion for a Protective Order, Attachment B.

[33] *See* OCC Memorandum in Support, 9.

Finally, OCC points to the fact that Applicants "discussed the issue of discovery just once with OCC – in a very brief conversation" as grounds for the Commission to deny the motion for a protective order because, according to OCC, this was effort inadequate.[34] It appears that OCC believes that Applicants, to satisfy the requirement that they exhaust all reasonable means to resolve the issue, should have contacted OCC on multiple occasions, notwithstanding that counsel for OCC made it clear during the January 17, 2018 call that OCC was not receptive to Applicants' proposal. The term "exhaust all reasonable means" as used in Rule 4909-1-24(B), OAC, does not mean Applicants were required to beat their heads against the wall by continuing to beg OCC to reconsider its position after counsel for OCC squarely indicated that OCC was not amenable to delaying the discovery responses until the Commission determined the procedural course the case should take. This argument is a makeweight and should be rejected by the Commission out of hand.

III. CONCLUSION

Although R.C. 4903.082 provides that "(a)ll parties and intervenors shall be granted ample rights of discovery," this does not mean that the right to discovery is absolute. As discussed above, the Commission, in the Duke Merger Case, stayed discovery *sua sponte* because it had not yet determined the scope and nature of its review and that proceeding, and subsequently denied an OCC motion to lift the stay because it had not yet determined if a hearing would be held in the matter, thereby recognizing that discovery serves no purpose unless a hearing is held. Moreover, in the Case No. 06-685-AU-ORD rulemaking, the Commission rejected OCC's proposed definition of "proceeding" because "it would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate." Plainly,

[34] *Id.*

the Commission has the discretion to determine whether and when discovery will be permitted on a case-by-case basis.

The Commission has the obligation under Rule 4909-1-24(A), OAC, to protect a party from discovery that would impose an undue burden or expense. Requiring a party to respond to discovery before it is known if the discovery will serve any purpose, by definition, would subject the party to a burden and expense that may prove unnecessary. Accordingly, the Commission should not require Applicants to respond to OCC's first set of discovery until the Commission determines the procedural course the application for waiver will take.

WHEREFORE, Applicants respectfully request that their motion for a protective order be granted and that the Commission issue an order providing that Applicants are not required to respond to OCC's first set of discovery dated December 29, 2017 until such time as the Commission orders otherwise.

Respectfully submitted,

/s/ Scott Dismukes

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Certificate of Service

I hereby certify that a copy of the foregoing was served by electronic mail on the following parties this 8th day of February 2018.

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