BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Distribution Modernization Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	**)** **)** **)** **)** **)**	**Case No. 17-2474-EL-RDR**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE MOTION TO COMPEL OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Scott J. Casto (0085756)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 761-7835
Fax: (330) 384-3875
scasto@firstenergycorp.com

David A. Kutik (0006418)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company

TABLE OF CONTENTS

I. INTRODUCTION

By its instant motion, the Office of the Ohio Consumers' Counsel's ("OCC") improperly attempts to inject itself into a monitoring process ordered by the Commission; OCC also erroneously demands to receive "post haste" information to which it is not entitled now or any time in the foreseeable future. Accordingly, OCC's motion to compel discovery from Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the "Companies") at this point in this proceeding should be denied.

Apparently, it matters not to OCC that there is no procedural schedule – much less a scheduled hearing – in this matter. (Similarly, OCC overlooks that it is not yet even a party to this case.) But without a filed report or an established process going forward towards a hearing or a schedule for comments, there can be no discovery here. Otherwise, discovery would be limitless. Simply put, where, as all agree, the standard for proper discovery is a reasonable likelihood to lead to the discovery of admissible evidence, there has to be something (e.g., a hearing, a report) to establish the limits of relevance. In this case, once a report is submitted, conclusions and recommendations are known and some process is set for the review of those things, the Companies and any party permitted to participate in that review can address discovery through the lens of the report -- but only if permitted by the Commission.

Further, granting OCC's motion would have serious adverse consequences for future similar reviews. As the Commission's admonition to the Companies to produce all of the requested materials indicates, the Commission understands that its ability to conduct investigations is most effective when information flows freely from the Companies to the Staff or its authorized agent. Should the Companies (and future similarly situated companies) now be required to provide to OCC (or any other potential party) everything that was provided to Staff or its agent, then the

Companies will naturally be more limited and circumspect in responding to requests. Of course, this does not need to happen. Given that there is no need or precedent to support OCC's premature and immediate discovery demands, OCC's motion to compel should be denied.

II. RELEVANT FACTS

The Commission opened this docket as a follow up to a process ordered in its Eighth Entry on Rehearing in the Companies' most recent Electric Security Plan ("ESP IV").[1] The ESP created a distribution modernization rider ("Rider DMR"), the purpose of which is to "provide a needed incentive to the Companies to focus innovation and resources on grid modernization."[2] Further, as the Commission observed, "Rider DMR will address a demonstrated need for credit support for the Companies in order to ensure that the Companies have access to capital markets in order to make investments in their distribution system."[3] In response to, among other things, assertions that Rider DMR could be used to provide the Companies' affiliate an improper subsidy,[4] the Commission ordered Staff to review the Companies' use of Rider DMR revenues.[5]

Subsequently, in order to undertake the review process that was envisioned in the Eighth Entry on Rehearing in the ESP IV Case,[6] the Commission opened this docket and directed Staff to issue a request for proposal for a third-party monitor to assist Staff in its review.[7] Notably, the

---

[1] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of an Electric Security Plan ("ESP IV Case"),* Case No. 14-1297-EL-CSS.
[2] *Id.*, Fifth Entry on Rehearing, p. 88 (October 12, 2016).
[3] *Id.*, pp. 87-88.
[4] *Id.*, pp. 124-126. These charges were – and are (*see* OCC Motion, p. 1) – baseless. The record in the *ESP IV Case* showed that there was no way for funds to go directly from the Companies to their unregulated affiliate, FirstEnergy Solutions Corp. ("FES"). *ESP IV Case* Rehearing Tr. Vol. I, p. 226 (Mikkelsen Cross). *See also id*., pp 208; 227. Further, the Companies stated time and again that they intended to use Rider DMR revenues for distribution expenses and obligations. *Id.*, Tr. Vol. X, p. 1607 (Mikkelsen Rebuttal Cross). This evidence was unrebutted. Still further, FES has filed for bankruptcy protection. *In re FirstEnergy Solutions Corp., et al*., Case No. 18-50757 (N.D. Ohio Bankr.). In fact, FES's bankruptcy filing on March 31, 2018 is an obvious rebuttal to any claims of a secret flow of Rider DMR dollars to support FES's generation assets.
[5] *ESP IV Case*, Fifth Entry on Rehearing, pp. 127-128.
[6] *See ESP IV Case*, Eighth Entry on Rehearing, pp. 49-50 (August 16, 2017).
[7] Case No. 17-2474-EL-RDR, Entry at ¶5 (December 13, 2017).

Commission stated that the Commission "shall select and *solely direct the work of the monitor*."[8] Moreover, the Commission provided that: (1) the monitor would execute its duties "pursuant to the Commission's statutory authority to investigate and acquire records, contracts reports and other documentation"; and (2) the monitor would be subject to the Commission's statutory duty under Ohio Revised Code Section 4901.16."[9] Importantly for purposes of the instant motion, the Commission ordered, "Any conclusions, results, or recommendations formulated by Oxford may be examined by any participant to this proceeding."[10]

Oxford Advisors LLC ("Oxford") was selected to be the Rider DMR monitor and the Companies have been and are working closely with Oxford and Staff as they undertake their review of Rider DMR.

OCC moved to intervene in this case on March 14, 2018. On March 22, 2018, OCC served the Companies with discovery comprised of a set of requests for production of documents ("RPDs"). The RPDs seek: (1) all requests made to the Companies by the Commission, Staff, Oxford and " the PUCO's Attorneys General"; (2) all documents provided to the Commission, Staff, Oxford and " the PUCO's Attorneys General"; (3) all discovery received by other parties in the proceeding; (4) all communications related to the proceeding between the Companies, the Commission, Staff, Oxford and " the PUCO's Attorneys General"; (5) any draft reports received by the Companies from the Commission, Staff, Oxford or " the PUCO's Attorneys General"; and (6) any communications in the proceeding between the Companies and the Commission, Staff, Oxford or " the PUCO's Attorneys General" relating to any draft reports.

[8] *Id.*, ¶8.
[9] *Id.*, ¶10.
[10] *Id.*, ¶9.

The Companies responded with objections to the RPDs on April 11, 2018. Notwithstanding its claim now to need responses to its RPDs "post haste," OCC took until June 21, 2018 to file its Motion to Compel.

III. ARGUMENT

A. OCC Is Not Entitled To Discovery Now.

OCC has utterly failed to show why it needs discovery now. No hearings have been set. No procedural schedule has been established. No reports have been filed by Oxford or Staff (and none have been provided to the Companies).

The Commission's rules and precedent require that, for discovery to proceed, there must be contemplated either a hearing or some other process (like submission of comments). In short, discovery is proper only when it would be necessary to prepare for some type of hearing or filing.

The Commission has determined that discovery is not necessarily proper in every matter before the Commission. In *In re Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, the Commission addressed comments related to the Commission's procedural rules contained in Chapter 4901-1. OCC requested that the Commission add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon."[11] OCC argued:

> By defining a "proceeding" the Commission would ensure that all parties will be permitted to participate fully in all matters before the Commission. Full participation would include, at a minimum, the rights to intervene, to conduct discovery, to examine and challenge evidence that is made a part of the record, and to submit evidence into the record. OCC contends that as currently written, the

[11] *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶7 (December 6, 2006).

> Commission's rules fail to extend these procedural due process rights to proceedings other than those in which a hearing is held.[12]

The Commission rejected OCC's recommendation and found that the proposed definition was "overly broad and unnecessary." The Commission stated:

> 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*. The request is denied.[13]

In another matter, the Commission held that:

> the Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process *normally reserved for cases where a hearing is required."*[14]

The Commission's rules contemplate discovery will normally precede – and will be necessary to prepare for – a hearing. Rule 4901-1-17 provides that discovery "can commence immediately after a proceeding is commenced." Rule 4901-1-17(A) specifically contemplates that a hearing will be held ("discovery must be completed prior to the commencement of the hearing").

Similarly, Rule 4901-1-16(B) contemplates hearings. This rule defines the proper scope of discovery: i.e., among other things, that the request is reasonably likely to lead to the discovery of admissible evidence. Thus, there are at least two limiting principles to the standard for proper discovery. First, the rule requires that a hearing will occur. If there is no hearing, there will be no evidence, and thus, nothing to lead to the discovery of admissible evidence. The second limiting

[12] *Id.*
[13] *Id.*, ¶ 9 (emphasis added).
[14] *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing, ¶ 8 (October 28, 2003) (denying OCC and CLEC's application for rehearing claiming that it has full discovery rights in a proceeding).

factor in the rule is that the discovery request has some relationship to relevant issues, i.e., "it will lead to … admissible evidence." Any discovery is premature until there is a demonstrated need or plan for a hearing. Moreover, although Rule 4901-1-16(H) does permit an entity to conduct discovery even though a motion to intervene has not been granted, because the Commission has not yet determined whether a hearing will be held, the Commission may still deny the motion to compel.[15]

OCC's authorities do not support any right to discovery *now*. To be sure, Ohio Revised Code Section 4903.082 states "all parties and intervenors shall be granted ample rights of discovery…." But the Commission previously denied a motion to compel because Section 4903.082 "did not require the Commission to allow for discovery"[16] in every proceeding.

OCC does not even bother to account for material distinctions in the very authorities that it quotes.[17] In those cases, the Commission orders refer to the need for discovery *to prepare for a hearing*.

OCC's citations to complaint cases are not apposite.[18] In complaint cases, because there was going to be a hearing, discovery and evidence were clearly contemplated and proper.

Likewise, OCC's comparison of *In the Matter of the Audit of Transportation Migration Rider – Part B of the East Ohio Gas Company ("East Ohio Transp. Migration Rider Audit")*, Case

[15] *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 in Control of The Cincinnati Gas & Electric Company, Case No. 05-732- et al*, Entry on Rehearing, ¶¶13-14 (December 7, 2005) (noting Rule 4901-1-16(H), but finding that because the Commission has "not yet determined whether a hearing will be held…it is not appropriate to lift the stay on discovery.")

[16] *In re the Matter of the Application of The East Ohio Gas Company dba Dominion Eats Ohio and Columbia Gas of Ohio Inc. for Adjustment of Their Interim Emergency and Temporary Percentage of Income Payment Plan Riders*, Case No. 05-1421-GA-PIP, Entry on Rehearing, ¶8 (March 7, 2006). *See also In re Cincinnati Gas & Electric Co.*, Case Nos. 05-732-EL-MER, 05-733-EL-AAM and 05-974-GA-AAM, Entry on Rehearing, ¶ 11 (February 6, 2006).

[17] *See* OCC Memorandum in Support, p. 3, nn. 12 & 13, citing *In the Matter of the Investigation into the Perry Nuclear Power Plant*, Case No. 85-521-EL-COI, Entry, p. 23 (Mar. 17, 1987) (referring to the need to prepare thoroughly for and to not delay hearings or trials).

[18] OCC Memorandum in Support, p. 4.

No. 17-219-GA-EXR to this case is misplaced. In that case, the Commission had already initiated a procedure – namely, a comment period – when it initiated the annual audit.[19] Indeed, the Attorney Examiner, in granting OCC's motion to compel there, cited to the pending comment period as rationale for permitting discovery.[20] OCC badly mischaracterizes two other cases[21] when it implies that, although there was no procedural schedule or hearing established, discovery was allowed to proceed. In fact, in both cases, the procedural schedule was established in the same entry that overruled motions resisting discovery.[22]

Noticeably absent from OCC's moving papers is any persuasive discussion demonstrating why OCC needs to see *now* each and every single data request sent by Oxford and the Companies' responses thereto. Curiously, OCC cites the Commission's January 14, 2018 Entry that defined the role that OCC could play in this docket, i.e., "Any conclusions, results, or recommendations formulated by Oxford may be examined by any participant to this proceeding."[23] OCC contends that this gives them a current right to discovery.[24] However, given that there are, to the Companies' knowledge, no reports (and thus no any conclusions, results or recommendations) from Oxford, OCC's reliance on this language is puzzling. This fact alone shows that OCC is not entitled to any discovery at this time.

OCC gives the game away when it claims that it needs "draft reports" in order to "assess the justness and reasonableness of the Auditor's [sic] conclusions in its mid or final report" and to

[19] *East Ohio Transp. Migration Rider Audit*, Case No. 17-219-GA-EXR, Entry, ¶15 (April 19, 2017).
[20] *Id.*, at Entry, ¶13 (September 28, 2017).
[21] *See* OCC Memorandum in Support, p. 7, n. 25, citing *In re the Application of Columbia Gas Company of Ohio, Inc.*, Case No. 11-5321-GA-UNC, Entry, p. 8 (January 27, 2012) and *In re the Application of Dayton Power and Light Co.*, Case No. 13-2420-EL-UNC, Entry, p. 9 (May 30, 2014).
[22] *In re the Application of Columbia Gas Company of Ohio, Inc.,* Case No. 11-5321-GA-UNC, Entry, p. 2 (January 27, 2012); *In re the Application of Dayton Power and Light Co.,* Case No. 13-2420-EL-UNC, Entry, p. 2 (May 30, 2014).
[23] OCC Memorandum in Support, pp. 7-8, citing Entry at ¶13
[24] *Id.*, pp.7-8.

"inform [OCC] as to whether the audit process is truly an independent process, as the PUCO intended."[25] This fails to carry the day for at least two reasons. First, and most obviously, there are, to the Companies' knowledge, no draft reports. (Nor have any "final" reports been filed.) Thus, there are no draft reports to discover at this time. Second, OCC's assertions are purely conclusory -- and nonsensical to boot. OCC never says how seeing a draft report can help OCC assess the propriety of Oxford's conclusions. Further, OCC provides no clue about how seeing a draft report can inform anyone of the "independence" of the process. Indeed, the latter assertion by OCC does nothing but impugn the integrity of Oxford and Staff with no basis whatsoever. OCC's motion should be rejected on that ground alone. In any event, there is no reason why OCC needs such information now, rather than after a report is, in fact, filed by Oxford or Staff. Certainly, after at least three opportunities to do so (i.e., two emails to the Companies' counsel and its memorandum in support of the instant motion), OCC has failed to provide a legitimate reason why it needs discovery any time before a report is filed by Oxford.

The Commission's discovery rules recognize the Commission's broad discretion to determine how it will conduct its business. Without any statutes, rules or precedents that require the Commission to hold a hearing, much less allow discovery, the Commission has a free hand to fashion process that serves the interests of all concerned. Indeed, the Commission may construct a process that allows a wide-ranging Staff review (with fulsome information provided by the Companies) followed by a limited process for review of filed reports, without any discovery by any intervenor. The Commission selected a procedural tool which in its discretion allows the free flow of information on an ongoing and real-time basis. The Commission should preserve its

[25] *Id.*, p. 9.

flexibility to develop the best process based on the facts and circumstances of each docket, and reject OCC's attempt to convert every matter into a full-blown adjudication.

B. Because, Among Other Reasons, They are Untimely, OCC's Requests Are Not Relevant, and are Overbroad And Unduly Burdensome.

OCC baldly asserts that the Companies have failed to carry their burden with regards to relevancy.[26] OCC overlooks the fact that OCC's role in this matter will be to review and comment on any conclusions, results or recommendations by Oxford. Thus, the scope of Oxford's report will necessarily determine the proper scope of discovery. Here, all of OCC's RPDs are currently irrelevant because Oxford has rendered no conclusions, results or recommendations.

Further, without a report to define the proper scope of discovery, OCC's RPDs are overbroad. In this matter, the Companies have been ordered to provide and produce, without objection, all information requested by Staff and Oxford. While that collaboration is ongoing, any distraction from that effort is a burden the Commission should not permit.

OCC contends that discovery requesting the Companies' responses to other parties' discovery is propounded and provided all of the time in cases before the Commission.[27] But this Staff review is not like most other cases before the Commission: here, there is no report, no procedural schedule and no hearing. In other cases, discovery provided to parties is limited by the relevant issues in those cases to be tried at hearing or to be subjected to commentary. Thus, by asking for discovery responses made to other parties in those cases, such omnibus requests are also limited by the limits of the underlying discovery. Here, there is nothing that can define relevant discovery. Until that time, any discovery would be, by definition, overbroad.

[26] *Id*., p. 10.
[27] OCC Memorandum in Support, p. __.

C. Ohio Revised Code Section 4901.16 Prohibits The Disclosure Of Information Until, At Least, A Final Report Is Filed.

Section 4901.16 plays a vital role in assuring that the Commission can do its work while appropriately preventing a utility's confidential information from being publicly disclosed. The Commission has previously recognized the importance and role of Section 4901.16 in protecting business information shared with Staff as part of an investigatory process. In *In the Matter of the Investigation of The Cincinnati Gas & Electric Company Relative to Its Compliance with the Natural Gas Pipeline Safety Standards and Related Matters,* Case No. 00-681-GA-GPS, the Commission held that an investigative report shared with Staff by a utility was protected under Section 4901.16.[28] In so holding, the Commission explained that the protections set forth in Section 4901.16 were necessary to foster the continued sharing of information by utilities to Staff.[29]

The same policies apply with force here. The balance of trust and candor fostered by Section 4901.16 would be set askew if OCC were permitted to take advantage of the opportunity for efficient procurement of information by Staff that that statute allows by simply seeking discovery of everything that the Companies provided without giving the Companies the opportunity to protect confidential information. Such disclosure would unquestionably have the chilling effect of discouraging utilities from freely and openly sharing information with Staff for fear that their confidential business information (regardless of relevance) would be discoverable. If OCC is permitted to have broad discovery rights (indeed without a hearing even being contemplated or a report filed), the Companies and all public utilities under the Commission's jurisdiction would be forced to make objections and interpret document requests more narrowly. Otherwise, the

[28] *In the Matter of the Investigation of the Cincinnati Gas & Electric Company Relative to Its Compliance With the Natural Gas Pipeline Safety Standards and Related Matters,* Case No. 00-681-GA-GPS, Entry, p. 5 (July 28, 2004).
[29] *Id.*

Companies would be at risk of forfeiting their rights, endangering their proprietary information and potentially violating other laws and regulations.

The Commission should not encourage such a misuse of the discovery rules by OCC that could jeopardize Staff's ability to obtain information from public utilities in order to fulfill its duty. For this reason, the Commission should deny OCC's Motion.

IV. CONCLUSION

For the foregoing reasons, OCC is not currently entitled to any discovery in this docket.

Respectfully submitted,

/s/ *Scott J. Casto*
Scott J. Casto (0085756)
Counsel of Record
FirstEnergy Service Company
76 S. Main St.
Akron, Ohio 44308
Tel: (330) 761-7835
Fax: (330) 384-3875
scasto@firstenergycorp.com

David A. Kutik (0006418)
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Tel: (216) 586-3939
Fax: (216) 579-0212
dakutik@jonesday.com

On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 6th day of July 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record. Courtesy email copies have also been sent to:

Zachary Woltz & Kevin Moore
Ohio Consumers' Counsel
Zachary.woltz@occ.ohio.gov
Kevin.moore@occ.ohio.gov

Michael Kurtz
Ohio Energy Group
mkurtz@BKLlawfirm.com

/s/ *Scott J. Casto*
Attorney for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

Summary: Memorandum Contra electronically filed by Mr. Scott J Casto on behalf of The Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company