

**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) Case No. 17-2474-EL-RDR
Illuminating Company, and The Toledo)
Edison Company)

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo) Case No. 19-361-EL-RDR
Edison Company for an Extension of)
Their Distribution Modernization Rider)

MOTION TO STAY PROCEEDINGS AND DISCOVERY

Pursuant to Ohio Adm. Code 4901-1-12, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”) respectfully move the Commission for a temporary stay of the above-captioned proceedings, including a stay of all discovery, pending disposition by the Ohio Supreme Court (“Supreme Court”) of the Companies’ Motion for Reconsideration of the Supreme Court’s June 19, 2019 Opinion in Case Nos. 2017-1664 and 2017-1444 (“ESP IV Appeal”). The ESP IV Appeal involves, among other things, the lawfulness of the Companies’ Distribution Modernization Rider (“Rider DMR”).

While the Companies’ Motion for Reconsideration raises ample grounds for the Supreme Court to uphold Rider DMR, staying the above-captioned proceedings, including all discovery, ensures the Commission and parties do not expend valuable time and resources on issues that could be eliminated or significantly altered by the Supreme Court’s decision on reconsideration. A stay will promote administrative economy, conserve the resources of the Commission and parties,

avoid undue expense and prevent unnecessary discovery disputes requiring Commission intervention. Furthermore, issuing a temporary stay will not prejudice or cause harm to anyone. Instead, granting a temporary stay of these proceedings, including discovery, will collectively benefit the public and all interested stakeholders.

The Companies further request that, as soon as the Supreme Court renders a decision on the pending Motion for Reconsideration, the Attorney Examiner schedule a status conference to discuss how to proceed in light of the Supreme Court's decision.

Respectfully Submitted,

/s/ James F. Lang

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**MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND
DISCOVERY**

I. INTRODUCTION

The above-captioned proceedings involve (1) the Companies' request for an extension of Rider DMR and (2) Staff's selection of a third-party monitor to prepare a mid-term report if the Companies requested an extension of Rider DMR. On June 19, 2019, the Ohio Supreme Court issued an Opinion in the ESP IV Appeal, finding Rider DMR is unlawful. On July 1, 2019, the Companies filed with the Supreme Court a Motion for Reconsideration of its June 19, 2019 decision. While the Companies' Motion for Reconsideration raises ample grounds for the Supreme Court to uphold Rider DMR, staying the above-captioned proceedings, including all discovery, ensures the Commission and parties do not expend valuable resources on issues that may be eliminated or significantly altered by the Supreme Court's decision on reconsideration. A temporary stay until the Supreme Court rules on the pending Motion for Reconsideration presents the most sensible, beneficial, and efficient path forward. No party will be prejudiced or harmed by a temporary stay.

A stay of discovery will also avoid the need for the parties and the Commission to address potentially unnecessary discovery disputes and expend significant time and resources. The Rider DMR extension proceeding and the mid-term report implicate the Companies' highly confidential and proprietary business information, including material, non-public information under federal securities law.

Therefore, in the interests of promoting administrative efficiency, the Commission should grant a temporary stay of both proceedings, including all pending discovery, until the Supreme Court rules on the Motion for Reconsideration. The Companies further request that, at that time, the Attorney Examiner hold a status conference to discuss how to move forward consistent with the Supreme Court's directives.

II. FACTUAL BACKGROUND

On February 1, 2019, the Companies filed their application for an extension of Rider DMR in Case No. 19-361-EL-RDR (the "DMR Extension Proceeding"). In its Eighth Entry on Rehearing in ESP IV,¹ the Commission directed Staff to issue an RFP for a third-party monitor. Staff issued the RFP and selected the third-party monitor in Case No. 17-2474-EL-RDR ("Monitor Selection Proceeding"). In the Eighth Entry on Rehearing, the Commission further directed that if the Companies initiated the DMR Extension Proceeding, the third-party monitor would prepare a mid-term report to file in the DMR Extension Proceeding:

This RFP should include quarterly interim updates on the use of Rider DMR to Staff, *a mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR, within 60 days after the filing of an application for extension*, and a final report in a separate docket established for the review of Rider DMR, to be filed 90 days after the termination of Rider DMR or its extension.²

¹ Case No. 14-1297-EL-SSO.

² ESP IV, Eighth Entry on Rehearing, ¶ 113 (Aug. 16, 2017) (emphasis added).

On June 14, 2019, the mid-term report was filed in the Monitor Selection Proceeding, rather than the DMR Extension Proceeding. Because the mid-term report's sole purpose is to inform the DMR Extension Proceeding, the DMR Extension Proceeding and mid-term report are inextricably linked.

On June 19, 2019, the Ohio Supreme Court reversed the Commission's finding that Rider DMR is lawful and ordered that the case be remanded to the Commission with instructions to remove Rider DMR from ESP IV. On July 1, 2019, the Companies filed a Motion for Reconsideration of the June 19, 2019 Opinion as it pertained to Rider DMR. As of the date of this filing, the Motion for Reconsideration remains pending with the Supreme Court.

III. LEGAL STANDARD

The Commission is vested with broad discretion to manage its dockets, including the discretion to decide how it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.³ When ruling on motions to stay a Commission proceeding, including discovery, where another tribunal is concurrently considering an issue dispositive of the Commission proceeding, the Commission has considered the benefits of granting a stay, as well as the potential harm or prejudice to other parties if the stay is granted or denied.⁴ The circumstances here strongly support a temporary stay.

³ See, e.g., *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379, 384 N.E.2d 264 (1978); *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560, 433 N.E.2d 212 (1982).

⁴ See, e.g., *In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan, et al.*, Case No. 02-3310-EL-ETP, *et al.*, 2003 Ohio PUC LEXIS 55, Entry, ¶ 9 (Feb. 20, 2003); *In the Matter of the Complaint of Thomas & Derrell Wilkes v. Ohio Edison Company*, Case No. 09-682-EL-CSS, 2009 Ohio PUC LEXIS 1189, Entry, ¶ 2-4 (Dec. 16, 2009).

IV. ARGUMENT

A. A Temporary Stay Will Promote Administrative Efficiencies, Conserve the Resources of the Commission and the Parties, and Avoid Unnecessary Expense.

By granting a temporary stay until the Supreme Court either denies the Motion for Reconsideration or issues its decision following reconsideration, the Commission will promote administrative economy by avoiding unnecessary expenditure of resources. This will benefit not only the parties, but also the Commission. A temporary stay will ensure the Commission, in its review of the Companies' request to extend Rider DMR, does not expend valuable time and resources on issues that may be eliminated or significantly altered by the Supreme Court's decision on reconsideration. At this stage, the prudent path forward for review of the DMR Extension Proceeding, including the mid-term report, is to wait for the Supreme Court to rule on the pending Motion for Reconsideration. This is consistent with well-established Commission precedent staying proceedings (including staying pending discovery) where another adjudicative forum is concurrently considering unresolved, dispositive issues.⁵

Like the DMR Extension Proceeding, the Monitor Selection Proceeding must also be stayed. While the Monitor Selection Proceeding's purpose was only to select the third-party

⁵ See, e.g., *In the Matter of the Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan, et al.*, Case No. 02-3310-EL-ETP, *et al.*, 2003 Ohio PUC LEXIS 55, Entry, ¶ 9 (Feb. 20, 2003) (staying Commission proceeding, including discovery, "until more clarity is achieved regarding matters pending at FERC and elsewhere"); *In the Matter of the Application of Ameritech Communications, Inc. d/b/a Ameritech Communications of Ohio, Inc. for Authority to Provide Competitive Telecommunications Services in the State of Ohio, et al.*, Case No. 96-327-CT-ACE, *et al.*, 1998 Ohio PUC LEXIS 192, Entry, ¶¶ 5, 13 (Feb. 27, 1998) (granting motion to stay proceedings, including discovery, while an unresolved, dispositive issue remained pending before a civil court); *In the Matter of the Complaint of Thomas & Derrell Wilkes v. Ohio Edison Company*, Case No. 09-682-EL-CSS, 2009 Ohio PUC LEXIS 1189, Entry, ¶ 2-4 (Dec. 16, 2009) (granting motion to stay of discovery proceedings where an unresolved, dispositive issue remained pending before a civil court); *In the Matter of the Application of Ohio Edison Company for Authority to Amend Its Residential Tariff Nos. 10 and 12*, Case No. 90-718-EL-ATA, 1990 Ohio PUC LEXIS 645, Entry, ¶¶ 1, 6, 8 (June 1, 1990) (granting stay of proceeding pending Commission decision on an application for rehearing in a different case); *In the Matter of the Complaint of Chet Simons dba Starlink v. ALLTEL Ohio Inc. and Western Reserve Telephone Company*, Case No. 96-1405-TP-CSS, Entry, ¶¶ 1, 3 (Mar. 4, 1997) (granting stay of proceeding, including stay of pending discovery, until resolution of separate but related complaint case before the Commission).

monitor, interested parties have treated the Monitor Selection Proceeding as a *de facto* second proceeding concerning Rider DMR and the contents of the mid-term report.⁶ Indeed, the mid-term report was filed in the Monitor Selection Proceeding, rather than the DMR Extension Proceeding. Yet the mid-term report's purpose is solely to inform the Commission's decision whether to extend Rider DMR. It has no other legal significance; the Commission and the Supreme Court have recognized that Rider DMR funds already collected (prior to the pending Motion for Reconsideration) are non-refundable.⁷ To that end, the Commission's Eighth Entry on Rehearing in ESP IV made the preparation and filing of the mid-term report contingent on the Companies' filing of an application for an extension of Rider DMR.⁸ Had the Companies declined to seek an extension of Rider DMR, there would be no need to prepare (or docket in which to file) the mid-term report. Therefore, staying the Monitor Selection Proceeding as well is necessary to promote administrative efficiency and conserve the resources of the Commission and the parties.

Without a stay, there will be discovery disputes that necessitate Commission intervention. The mid-term report contains highly confidential and proprietary information, including information qualifying as material non-public information under federal securities laws.⁹

⁶ For example, on July 9, 2019, intervenor Industrial Energy Users-Ohio served two separate, but identical sets of discovery on the Companies – one set for each proceeding.

⁷ See *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-2401, ¶ 23.

⁸ ESP IV, Eighth Entry on Rehearing, ¶ 113 (“This RFP should include . . . a mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR, within 60 days after the filing of an application for extension . . .”). The Attorney Examiner has also recognized that the third-party monitor's filing of the mid-term report is contingent upon the filing of a request to extend Rider DMR. See *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, Entry (Nov. 1, 2018), ¶ 15. Note that the termination of Rider DMR triggers a completely separate audit that is not at issue in these proceedings. The report at issue here is the “mid-term report to be docketed in any proceeding in which the Companies seek an extension of Rider DMR, within 60 days after the filing of an extension.” The other report the third-party monitor is to file, which is *not* at issue here, is a “final report in a separate docket established for the review of Rider DMR, to be filed 90 days after the termination of Rider DMR or its extension.” See ESP IV, Eighth Entry on Rehearing, ¶ 113.

⁹ See Companies' Motion for Protective Order (June 14, 2019) and Affidavit of Mark Ketchaver In Support (June 17, 2019).

Intervenors have issued, and will likely continue to issue, discovery on a variety of Rider DMR-related issues, including the contents of the mid-term report. By temporarily staying the proceedings and discovery, including pending discovery, the Commission will avoid having to adjudicate discovery disputes that may be unnecessary depending on the Supreme Court's decision on the pending Motion for Reconsideration.

B. A Temporary Stay Will Not Harm or Prejudice Any Party.

A temporary stay of these proceedings, including staying all discovery, will not result in harm or prejudice to any party. The Companies are only seeking a temporary stay – i.e., until the Supreme Court denies the pending Motion for Reconsideration or issues its decision following reconsideration. If the Supreme Court grants the Motion for Reconsideration and upholds the Commission's order authorizing Rider DMR, the Companies expect the stay to be lifted so that these proceedings may move forward. Further, given that no procedural schedule has been set in the DMR Extension Proceeding, a temporary stay will not impact any existing deadlines. Neither will a temporary stay impair the parties' ability to conduct discovery once the stay is lifted.

V. CONCLUSION

For the foregoing reasons, the Companies respectfully request a temporary stay of the above-captioned proceedings, including temporarily staying all pending and future discovery, until the Supreme Court renders a decision on the Companies' pending Motion for Reconsideration. The Companies further request that, as soon as the Supreme Court renders its decision, the Attorney Examiner schedule a status conference where the parties can discuss how to proceed in light of the Supreme Court's decision.

Respectfully Submitted,

/s/ James F. Lang

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion to Stay Proceedings and Discovery and Memorandum in Support was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 29th day of July, 2019. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Mark T. Keaney

One of the Attorneys for Ohio Edison
Company and The Cleveland Electric
Illuminating Company

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Case No(s). 17-2474-EL-RDR, 19-0361-EL-RDR

Summary: Motion to Stay Proceedings and Discovery electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company