

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Review of Ohio</b>	)	
<b>Edison Company, The Cleveland Electric</b>	)	
<b>Illuminating Company, and The Toledo</b>	)	<b>Case No. 17-0974-EL-UNC</b>
<b>Edison Company's Compliance with</b>	)	
<b>R.C. 4928.17 and Ohio Adm. Code</b>	)	
<b>Chapter 4901:1-37.</b>	)	

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**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY'S  
MEMORANDUM CONTRA THE APPLICATION FOR REHEARING BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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**I. INTRODUCTION**

On February 23, as the federal criminal trial of two individuals charged in connection with House Bill 6 neared its end, the U.S. Attorney's Office asked the Commission to extend the stay of these proceedings for six more months.<sup>1</sup> And citing the U.S. Attorney's concern that "continued discovery in the Commission's four investigations may directly interfere with or impede the United States' ongoing investigation into corruption relating to Am. Sub. H.B. 6," the Commission extended the stay and found that the interference concerns cited in its comprehensive August 24, 2022 Entry "remain largely at issue."<sup>2</sup> Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the "Companies") respectfully submit that extending the stay of these proceedings to avoid a conflict with the U.S. Attorney's efforts remains the prudent course, and file this memorandum contra in support of the Commission's Entry.

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<sup>1</sup> U.S. Attorney's February 23, 2023 Letter.

<sup>2</sup> *Id.* at ¶ 6; *see also* Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, Entry (August 24, 2023) (the "August 24 Entry").

Just as it did in response to the Commission’s original decision to stay these cases, the Office of the Ohio Consumers’ Counsel (“OCC”) now challenges the Entry under R.C. 4903.10 and O.A.C. 4901-1-35, claiming the Commission “violated . . . due process rights guaranteed by the Ohio and U.S. Constitution” and “unreasonably imposed a very broad stay . . . , which was broader than needed to avoid interference with the criminal investigations.”<sup>3</sup> But OCC again fails to show that the Entry is in any way unreasonable or unlawful.<sup>4</sup> The Commission issued the stay pursuant to an exhaustive legal analysis that OCC has never challenged. That same analysis supports extending the stay. The stay did not violate the due process rights of OCC or any other party, all of whom have had (and will, after the stay, continue to have) a more than ample opportunity to litigate their case. And none of the developments in matters brought by other government or private actors to which OCC points alters the Commission’s analysis.

Further, several of OCC’s supposed “errors” have already been rejected by the Commission, are far afield from the decision to extend the stay, and are not properly before the Commission. OCC has, for the most part, repeated the arguments raised in its Application for Rehearing in response to the Commission’s August 24 Entry.<sup>5</sup> But as these arguments have been rejected by the Commission by operation of law under Ohio R.C. 4903.10 and, in many instances, a prior Commission order, there are no grounds for OCC to assert them again now. OCC’s Application for Rehearing also improperly raises several new issues for the first time in this

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<sup>3</sup> Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, OCC’s Application for Rehearing and Memorandum in Support (April 7, 2023) (“AFR”, “AFR, Mem.” or “Application for Rehearing”), at 1.

<sup>4</sup> See R.C. 4903.10.

<sup>5</sup> See Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, OCC’s Application for Rehearing and Memorandum in Support (September 23, 2022).

proceeding even though R.C. 4903.10 allows only for “rehearing in respect to any matters *determined in the proceeding.*”<sup>6</sup>

Therefore, and as discussed further below, the Companies respectfully request that OCC’s Application for Rehearing be denied.

## II. ARGUMENT

### A. OCC Fails To Set Forth Grounds For Finding The Entry Either Unlawful Or Unreasonable.

In extending the stay of these proceedings for six months, the Commission has not acted unlawfully or unreasonably. The Commission is afforded extensive discretion to manage its own proceedings, and in particular, the timing of those proceedings.<sup>7</sup> It exercised that authority here to grant the U.S. Attorney’s request to extend the stay for a limited period of time and for reasons it thoroughly analyzed in its August 24 Entry. In that Entry, the Commission considered the procedural history of these cases and weighed the issues at stake in accordance with the law in an exhaustive analysis.<sup>8</sup> The factors in that analysis—which took any prejudice to intervenors and the public’s interest into account—balanced in favor of issuing a stay.<sup>9</sup> And the Commission again found in its March 8 Entry that the concerns regarding interference with the U.S. Attorney’s ongoing investigation “remain largely at issue.”<sup>10</sup>

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<sup>6</sup> R.C. 4903.10 (allowing an application for rehearing only after an order has been made and requiring the application to set forth the grounds on which the applicant considers the order to be unreasonable or unlawful).

<sup>7</sup> *Weiss v. Pub. Util. Comm.*, 2000-Ohio-5, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (finding Commission has broad discretion to manage its docket); *see also Toledo Coal. for Safe Energy v. Pub. Utilities Comm’n of Ohio*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982).

<sup>8</sup> *See* Case 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, Entry (August 24, 2022), at ¶¶ 70-71 (noting that the Commission should consider the “(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest”—as well as the Fifth Amendment rights of those implicated by the DOJ’s federal criminal investigations); *id.* at ¶¶ 72-84.

<sup>9</sup> August 24 Entry, at ¶ 85.

<sup>10</sup> Entry, at ¶ 5-6.

Here, OCC has not attempted to address—let alone shown any error in—the Commission’s factor-by-factor analysis or the conclusions the Commission reached in its application of those factors. Nor does OCC dispute the Commission’s broad discretion to manage its cases. Instead, OCC primarily (1) raises the already-rejected contention that the stay violates its due process rights,<sup>11</sup> and (2) argues that recent events have altered the rationale for a continued stay of these cases.<sup>12</sup> Neither argument holds water.

**First**, it is no due process violation for the Commission to extend the stay here. To be sure, parties to Commission proceedings are afforded broad discovery rights. Those rights, however, have never been denied to OCC. OCC has acknowledged receiving “mountains” of documents and discovery responses from these proceedings.<sup>13</sup> And the Commission has granted several requests to extend comment and/or discovery periods in each of the four House Bill 6-related proceedings at the request of OCC.<sup>14</sup> The Commission has made clear that “these proceedings [will] move forward and provide answers,” just “not at the expense of ensuring effective criminal prosecution and justice.”<sup>15</sup> OCC’s due process arguments are without merit.

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<sup>11</sup> OCC also contends that the Commission erred by “not allowing parties the full response time under PUCO[] rules.” AFR Mem., at 3-5. But the U.S. Attorney requested a stay under 28 U.S.C. § 517. The U.S. Attorney is not a party to the case and did not file any motion. The motion deadlines under O.A.C. 4901-1-12 do not apply. Further, the Commission has inherent discretion to manage its proceedings. *See supra* fn. 7. And, in any event, OCC has taken advantage of the Application for Rehearing process to assert its arguments.

<sup>12</sup> Case No. 20-1629-EL-RDR, AFR Mem., at 15-17; Case No. 20-1502-EL-RDR, AFR Mem., at 18-20; Case No. 17-2474-EL-RDR, AFR Mem., at 15-17; Case No. 17-974-EL-UNC, AFR Mem., at 15-17.

<sup>13</sup> Case No. 17-0974-EL-UNC, Entry (Feb. 10, 2022), at ¶¶ 22, 30.

<sup>14</sup> OCC’s arguments against the stay also contradict its own position in the Corporate Separation Audit, Case No. 17-974-EL-UNC, where OCC requested an indefinite continuance to enable it to review all the documents produced by FirstEnergy Corp. Case No. 17-974-EL-UNC, OCC, NOPEC, and OMAEG Motion for an Indefinite Continuance (Mar. 14, 2022). OCC has likewise argued, in Comments in Case No. 20-1502-EL-UNC, that to protect consumers “the PUCO should reserve final judgment [in the proceeding] until all its audits are completed, the FERC audit is completed, the SEC investigation is completed, . . . and any other sources of information are considered (such as any related further federal criminal investigations and shareholder lawsuits).” OCC Comments, Case No. 20-1502-EL-UNC, at 21 (Nov. 29, 2022) (emphasis added).

<sup>15</sup> August 24 Entry, at ¶ 86.

*Second*, recent events do not change the Commission’s well-supported rationale for an extended stay of these proceedings. OCC contends that the convictions of two individuals charged in connection with House Bill 6, the lifting of the stay in the Ohio Attorney General matter, and FirstEnergy Corp.’s recent resolution with FERC’s Office of Enforcement signal there is no remaining risk of interference with the U.S. Attorney’s ongoing investigation.<sup>16</sup> The U.S. Attorney himself, however, plainly disagrees. The February 23 Letter, filed when the federal criminal trial was drawing to a close, states in no uncertain terms that “continued discovery in the PUCO Proceedings may directly interfere with or impede the United States’ ongoing investigation.”<sup>17</sup> Simply put, the U.S. Attorney is pursuing its investigations and it is the U.S. Attorney’s Office that is best situated to gauge whether other proceedings related to House Bill 6 run the risk of interference with its ongoing criminal investigation. The U.S. Attorney’s Office made that determination for these proceedings and, referencing its “ongoing investigation,” asked that the Commission prevent interference with *that* work.<sup>18</sup>

Moreover, the Commission has already determined there is a risk that parties “are unable, or unwilling, to move forward without seeking non-public information related to the DPA that may interfere with the DOJ’s federal investigation.”<sup>19</sup> This is what led the Commission to conclude last August that it had “no other remedy” than a temporary stay.<sup>20</sup> There is no reason to depart from that decision or to believe the risk of encroachment upon the government’s ongoing investigations has subsided.

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<sup>16</sup> See Case No. 20-1629-EL-RDR, AFR Mem., at 14-17; Case No. 20-1502-EL-RDR, AFR Mem., at 18-20; Case No. 17-2474-EL-RDR, AFR Mem., at 14-17; Case No. 17-974-EL-UNC, AFR Mem., at 14-17. OCC also claims that the recent sale of Energy Harbor weighs in favor of lifting the stay. However, Energy Harbor is not now and has never been a party to these proceedings, and OCC offers no reasonable explanation as to why Energy Harbor’s sale has any relevance.

<sup>17</sup> U.S. Attorney’s February 23, 2023 Letter.

<sup>18</sup> U.S. Attorney’s February 23, 2023 Letter.

<sup>19</sup> August 24 Entry, at ¶ 86.

<sup>20</sup> August 24 Entry, at ¶ 86.

Because OCC has not demonstrated that the Entry is unlawful or unreasonable, the Commission should reject OCC's Application for Rehearing.

**B. OCC's Application For Rehearing Is Improper.**

Beyond failing to show that the Entry is either unlawful or unreasonable, OCC's Application for Rehearing is, in many ways, unrelated to any determination made by the Commission in its Entry. Rather, OCC attempts to relitigate decided matters<sup>21</sup> or advances new demands that have nothing to do with the Commission's decision to extend the stay.

*First*, several of the supposed "errors" OCC points to are not properly before the Commission because they have already been considered and rejected by the Commission or the Attorney Examiners.<sup>22</sup> Indeed, OCC has repeated many of the same purported errors it raised in its Application for Rehearing in response to the Commission's August 24 Entry granting the initial

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<sup>21</sup> Compare Case No. 17-974-EL-UNC, AFR, Mem. at 18-19 ("The PUCO's stay order should not have prevented the PUCO from granting the Motion for Supplemental Audit filed on November 5, 2021 by OCC and the Northeast Ohio Public Energy Council.") with Case No. 17-974-EL-UNC, Prehearing Conference Tr. at 24:12-23 (Jan. 4, 2022), and Case No. 17-974-EL-UNC, Entry at ¶¶ 25-29 (Feb. 10, 2022); compare Case No. 17-974-EL-UNC, AFR, Mem. at 21-22 ("The PUCO should have allowed discovery to be re-opened in Case No. 17-974-EL-UNC after the stay is lifted.") with Case No. 17-974-EL-UNC, Entry ¶¶ 20-28 (Jun. 16, 2022); compare Case No. 20-1629-EL-RDR, AFR Mem., at 9-13; Case No. 20-1502-EL-RDR, AFR Mem., at 19-12; Case No. 17-2474-EL-RDR, AFR Mem., at 9-12; Case No. 17-974-EL-UNC, AFR Mem., at 9-12 ("The PUCO should have expanded the PUCO investigations to expressly include a management and performance audit examining the relationship between FirstEnergy and former PUCO chair Sam Randazzo.") with Case No. 20-1629-EL-RDR, Entry at ¶¶ 15-21 (Feb. 9, 2022); compare Case No. 20-1629-EL-RDR, AFR Mem., at 13-15; Case No. 20-1502-EL-RDR, AFR Mem., at 13-14; Case No. 17-2474-EL-RDR, AFR Mem., at 13-14; Case No. 17-974-EL-UNC, AFR Mem., at 13-14 ("The PUCO should have ordered FirstEnergy to release its internal reports on the H.B. 6 scandal after the stay is lifted.") with Case Nos. 20-1629-EL-RDR, 20-1502-EL-UNC, 17-2474-EL-RDR, 17-974-EL-UNC, Entry Denying the Motions filed by the OCC and NOAC on July 7, 2022, and August 10, 2022 at ¶ 81 (Aug. 24, 2022).

<sup>22</sup> See *supra* fn. 21; see also *Wiley v. Duke Energy Ohio, Inc.*, Case No. 10-2463-GE-CSS, 2011 Ohio PUC LEXIS 1276, Entry on Rehearing, at \*6 (Nov. 29, 2011); *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, 2011 Ohio PUC LEXIS 543, Entry on Rehearing, at \*15-16 (May 4, 2011) (rejecting an application for rehearing that "raised nothing new"); *City of Reynoldsburg v. Columbus Southern Power Co.*, Case No. 08-846-EL-CSS, 2011 WL 2288069, Entry on Rehearing, at \*5-7 (June 1, 2011) (holding that no grounds for rehearing existed where no new arguments had been raised); *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Approval of a General Exemption of Certain Natural Gas Commodity Sales Services or Ancillary Services*, No. 08-1344-GA-EXM, 2011 Ohio PUC LEXIS 1184, Entry on Rehearing, at \*9-10 (Nov. 1, 2011) (denying application for rehearing because applicant "raised nothing new on rehearing that was not thoroughly considered" in the Commission order at issue).

stay. These arguments were denied by operation of law under R.C. 4903.10, and there are no grounds for OCC to attempt to revisit them here. And, in any event, many have been rejected by separate Commission order.<sup>23</sup> OCC's assignments of error thus "fail[] to provide any facts or arguments that would give the Commission just cause to reconsider its decision"<sup>24</sup> and should be rejected.

**Second**, OCC's Application for Rehearing impermissibly raises several new issues beyond the scope of the Entry.<sup>25</sup> R.C. 4903.10 provides that a "party . . . may apply for a rehearing in respect to any matters *determined in the proceeding*." Accordingly, it is improper to raise entirely new arguments for the first time in an application for rehearing.<sup>26</sup> The Commission should reject any attempt to address new arguments unrelated to the extended stay.

### III. CONCLUSION

The Commission has properly exercised its authority to grant the U.S. Attorney's request, and OCC has not demonstrated that the Commission's decision was in any way unlawful or unreasonable. Accordingly, and for all the reasons discussed above and in the Entry, the Commission should deny OCC's Application for Rehearing.

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<sup>23</sup> See *supra* fn. 21.

<sup>24</sup> Wiley, 2011 Ohio PUC LEXIS 1276, at \*6.

<sup>25</sup> Case No. 20-1629-EL-RDR, AFR Mem., at 6-7, 19; Case No. 20-1502-EL-UNC, AFR Mem., at 5-7, 15-17, 19; Case No. 17-2474-EL-RDR, AFR Mem., at 6; Case No. 17-974-EL-UNC, AFR Mem., at 6-7.

<sup>26</sup> Case No. 20-1629-EL-RDR, AFR Mem., at 6-7, 19; Case No. 20-1502-EL-UNC, AFR Mem., at 5-7, 15-17, 19; Case No. 17-2474-EL-RDR, AFR Mem., at 6; Case No. 17-974-EL-UNC, AFR Mem., at 6-7.

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Respectfully submitted,

/s/ Ryan A. Doringo

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Michael R. Gladman (0059797)  
Shalini B. Goyal (0096743)  
Margaret M. Dengler (0097819)  
Jones Day  
325 John H. McConnell Blvd  
Suite 600  
Columbus, Ohio 43215  
Tel: (614) 469-3939  
Fax: (614) 461-4198  
mrgladman@jonesday.com  
mdengler@jonesday.com

Ryan A. Doringo (0091144)  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
Tel: (216) 586-3939  
Fax: (216) 579-0212  
radoringo@jonesday.com

*On behalf of the Companies*



**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on April 17, 2023. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Shalini B. Goyal  
*Attorney for the Companies*

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Toledo Edison Company.