

FILE

BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Ohio ) Case No. 08-935-EL-SSO  
Edison Company, The Cleveland Electric )  
Illuminating Company and The Toledo )  
Edison Company for Authority to )  
Establish a Standard Service Offer )  
Pursuant to R.C. 4928.143 in the Form of )  
an Electric Security Plan. )

THE FIRSTENERGY COMPANIES' MEMORANDUM CONTRA  
THE JOINT INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO  
FULL COMMISSION, AND APPLICATION FOR REVIEW

INTRODUCTION

Pursuant to Rule 4901-1-15(D), Ohio Administrative Code ("O.A.C."), the FirstEnergy Companies file their Memorandum Contra the Joint Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review filed September 15, 2008, by the self-styled Joint Appellants.

ARGUMENT

A. The Joint Appellant's Have Not Articulated Grounds to Certify an Appeal.

Rule 4901-1-15(B), O.A.C., sets forth the standards that must be met before an interlocutory appeal is certified:

.... The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that: the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

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Thus, in addition to “the likelihood of undue prejudice,” the Joint Appellants must also show either (1) that “the appeal presents a new or novel question of interpretation, law, or policy” or (2) that the appeal “is taken from a ruling which represents a departure from past precedent.” *Id.* Without this showing, the “attorney examiner . . . shall not certify [the] appeal.” *Id.*

This showing has not been made by the Joint Appellants. Indeed, the need for this showing has not even been acknowledged. They state, “The standard applicable to certifying this appeal is that ‘[a]n immediate determination by the commission is necessary to prevent the likelihood of undue prejudice.’” (Jt. Appellants’ Memo., p. 2.) Thus, they disregard altogether the need to show either a departure from past precedent or a new or novel question of interpretation, law, or policy. Having failed to make *any* showing on these necessary points, the rules require that the appeal “shall not [be] certifi[ed].” Rule 4901-1-15(B).

At all events, no new or novel question of law is presented here, nor has there been a departure from past precedent. The scheduling of public hearings is a matter for the discretion of the Commission—particularly where, as here, no statute provides for such hearings—and the Joint Appellants have not articulated any legal theory for why the schedule must be extended. Moreover, the Joint Appellants have not demonstrated undue prejudice. They have not shown, and it is not self-evident, why two weeks (or more in most cases) should not be enough time for customers “to learn of the hearings, prepare for testifying and adjust their schedules,” especially, with respect to the last point, given that seven of the nine hearings occur in the evening. (Jt. Appellants’ Memo., p. 2.)

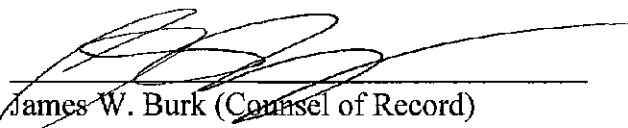
No public hearings are required in this case by statute; the Commission scheduled nine. The Joint Appellants have no cause for complaint.

**B.      However the Commission Responds to the Joint Appeal, It Should Not Delay the Hearing Scheduled in this Case.**

As discussed, the Joint Appeal articulates no legal ground for action. As set out, however, in their response to a recent, similar filing made by the Citizens' Coalition, the Companies will accept whatever the Commission determines, within its broad discretion, regarding the number and time of hearings and the content and manner of public notices with this caveat: However the Commission resolves this appeal, it should not do so in a manner that would delay the resolution of this case. The various requests made in the Joint Appeal show little regard for the statutory deadlines governing this case and the burdens imposed, in particular the burden on the Commission, in complying with them. Whatever the Commission does, it should not delay the schedule for evidentiary hearing currently set for October 16.

September 22, 2008

Respectfully submitted,



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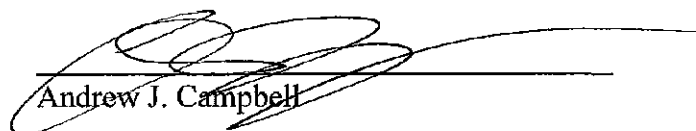
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Joint Interlocutory Appeal, Request for Certification to Full Commission, and Application for Review of the Joint Appellants was electronically delivered to the following persons, this 22nd day of September, 2008:



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