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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The attorney examiner finds:

(1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company (FirstEnergy) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.

(2) On July 31, 2008, FirstEnergy filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. This application is for an electric security plan in accordance with Section 4928.143, Revised Code. Contemporaneously, in Case No. 08-936-EL-SSO, FirstEnergy filed a separate application for a market rate offer in accordance with Section 4928.142, Revised Code.

(3) By entry dated August 5, 2008, the attorney examiner scheduled a technical conference on FirstEnergy's application and set the evidentiary hearing for October 2, 2008. Further, on August 25, 2008, Ohio Consumers' Counsel (OCC), Northwest Aggregation Coalition (NWAC), and the Ohio Environmental Council (OEC) jointly filed a motion for a continuance of the hearing date; the attorney examiner granted the request by entry dated September 5, 2008, continuing the hearing until October 16, 2008.

(4) Moreover, on September 9, 2008, the attorney examiner scheduled nine local public hearings in this proceeding, commencing on September 24, 2008. Subsequently, on September 15, 2008, OCC, the City of Cleveland, The Sierra

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Club, Natural Resource Defense Council, Citizens for Fair Utility Rates, Neighborhood Environmental Coalition, Cleveland Housing Network, The Empowerment Center for Greater Cleveland, Ohio Schools Council, the Ohio Farm Bureau Federation, and Ohio Partners for Affordable Energy (collectively, Joint Appellants) filed a joint interlocutory appeal, request for certification, and application for review regarding the schedule for local public hearings. On September 22, 2008, FirstEnergy filed a memorandum contra the joint interlocutory appeal.

(5) Joint Appellants argue that they will be prejudiced if the local public hearings are scheduled without sufficient advance notice to the public regarding the dates, times, and locations of the local public hearings. Joint Appellants believe that 30 days is the minimum notice necessary.

In its memorandum contra, FirstEnergy argues that the Joint Appellants have not articulated grounds to certify an interlocutory appeal. FirstEnergy argues that the joint interlocutory appeal should not be certified to the Commission for review because Joint Appellants have not demonstrated that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent as required by Rule 4901-1-15, Ohio Administrative Code (O.A.C.). FirstEnergy notes that the Joint Appellants do not even acknowledge the existence of this requirement for certification of an interlocutory appeal. Moreover, FirstEnergy argues that Joint Appellants have not demonstrated undue prejudice because they have not shown why two weeks is not enough time for customers to prepare for the local public hearings. Finally, FirstEnergy argues that, irrespective of how the Commission addresses the joint interlocutory appeal, it should not delay the evidentiary hearing scheduled for October 16, 2008, in this case.

(6) Rule 4901-1-15, O.A.C., sets forth the substantive standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule *or* unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. The ruling

which is the subject of the joint interlocutory appeal is not one of the four specific rulings enumerated in paragraph (A) of Rule 4901-1-15, O.A.C. Therefore, the joint interlocutory appeal should only be certified to the Commission if it meets the requirements of paragraph (B) of Rule 4901-1-15, O.A.C.

(7) Paragraph (B) of Rule 4901-1-15, O.A.C., specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent *and* that 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. In order to certify an interlocutory appeal to the Commission, *both* requirements need to be met. In this case, neither provision was satisfied.

(8) With respect to the first provision, whether the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent, the joint interlocutory appeal is defective on its face because the Joint Appellants did not present any arguments that the joint interlocutory appeal presented a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent.

Nonetheless, the attorney examiner finds that the joint appeal does not present a new or novel question of law or policy. Although this proceeding is one of the first cases under the statutory framework established by Am. Sub. Senate Bill 221, the Commission and its attorney examiners have had years of experience scheduling local public hearings in cases affecting rates; therefore, the appeal does not present a new or novel question of law or policy. *In re Columbus Southern Power Company and Ohio Power Company,* Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2.

Further, the attorney examiner finds that the joint interlocutory appeal is not taken from a ruling which represents a departure from past precedent. The case at issue is similar to cases involving applications for an increase in rates filed pursuant to

Section 4909.18, Revised Code. It has not been Commission practice in rate cases, where local public hearings are required by statute, to provide 30 days notice. Section 4903.083, Revised Code, which governs local public hearings for rate cases, only requires that notice of local public hearings be published "once each week for two consecutive weeks," and Commission practice has adhered to that statutory requirement. *See In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company,* Case No. 07-551-EL-AIR, Entry (February 2, 2008) (local public hearings scheduled with 20 days notice); *In re Ohio American Water Company,* Case No. 07-1112-WS-AIR, Entry (July 27, 2008) (local public hearings scheduled with 13 days notice); *In re Duke Energy Ohio, Inc.,* Case No. 07-589-GA-AIR, Entry (February 1, 2008) (local public hearings scheduled with 20 days notice). Clearly, the notice provided in this case is consistent with Commission precedent.

(9) Moreover, the joint interlocutory appeal did not establish that an immediate determination by the Commission was needed to prevent the likelihood of undue prejudice or expense to one or more of the parties. On August 25, 2008, prior to the scheduling of the local public hearings, OCC, NWAC, Ohio Partners for Affordable Energy, and OEC filed a joint motion requesting that local public hearings be scheduled in this proceeding. In the joint motion, the parties recommended that: (1) the Commission schedule at least six local public hearings; (2) the local public hearings be conducted after 5:00 p.m.; (3) the local public hearings be held prior to the evidentiary hearing in this proceeding; and (4) public notice should be published at least 30 days notice prior to the local public hearings. However, in their filing, the parties did not address the statutory requirement contained in Section 4928.143(C)(1), Revised Code, that the Commission issue an order regarding an application for an electric security plan within 150 days after the filing date of the application or explain how the recommendations for local public hearings could be satisfied consistent with this statutory timeframe.

Subsequently, the attorney examiner issued the entry scheduling the local public hearings. In the entry, the attorney examiner scheduled nine local public hearings rather than the recommended six hearings, scheduled seven of the nine local

public hearings in the evening, and scheduled all of the local public hearings prior to the commencement of the evidentiary hearing on October 16, 2008. However, due to the time constraints imposed by the statutory requirement that the Commission issue an order regarding FirstEnergy's application within 150 days after the filing of the application, the entry scheduling the local public hearings was issued 15 days prior to the first local public hearing rather than the recommended 30 days.

The attorney examiner finds that the notice provided for in the entry setting local public hearings is not prejudicial to the Joint Appellants. There is no basis in law or Commission practice for the 30 days notice argued for by the Joint Appellants. Section 4928.143, Revised Code, which governs applications for electric security plans, contains no requirement for notice for local public hearings (or even a requirement to hold local public hearings). However, Section 4928.143(C)(1), Revised Code, does require that the Commission issue a decision on the application for an electric security plan within 150 days of the filing of the application, and the local public hearings were scheduled with the maximum public notice which still allows the Commission to meet that 150-day statutory timeframe. The application in this proceeding was filed on July 31, 2008; therefore, a decision by the Commission is due no later than December 28, 2008. The scheduled hearing date of October 16, 2008, provides the minimum time necessary for the completion of the evidentiary hearing, the filing of post-hearing briefs by the parties, and consideration by the Commission prior to December 28, 2008. It was not feasible both to provide 30 days notice prior to the local public hearings and to hold the local public hearings prior to the evidentiary hearing, as argued for by the Joint Appellants, and to comply with the 150-day statutory timeframe.

Accordingly, because the joint interlocutory appeal did not present a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and because an immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, the attorney examiner finds that the joint interlocutory appeal should not be certified to the Commission for review.

It is, therefore,

ORDERED, That the request for certification to the Commission of the joint interlocutory appeal be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Gregory A. Price
Attorney Examiner

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Reneé J. Jenkins
Secretary