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April 5, 2010

Via Facsimile and Federal Express

Ms. Renee J. Jenkins
Director, Administration Department
Secretary to the Commission
Docketing Division
The Public Utilities Commission of Ohio
180 Broad Street
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Dear Ms. Jenkins:

Re: ***Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Memorandum Contra Office of Consumers' Counsel Joint Interlocutory Appeal***
Case No. 10-388-EL-SSO

Enclosed for filing, please find the original and twenty-two (22) copies of the *Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Memorandum Contra Office of Consumers' Counsel Joint Interlocutory Appeal* regarding the above-referenced case. Please file the enclosed *Memorandum Contra,* time-stamping the two extras and returning them to the undersigned in the enclosed envelope.

Thank you for your assistance in this matter. Please contact me if you have any questions concerning this matter.

Very truly yours,

James W. Burk

JWB/jhp
Enclosures
cc: Parties of Record

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 R.C. § 4928.143 in the Form of an Electric Security Plan	**Case No. 10-388-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY MEMORANDUM CONTRA OFFICE OF CONSUMER COUNSEL ET AL. JOINT INTERLOCUTORY APPEAL

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (hereinafter collectively referred to as the "Companies"), pursuant to O.A.C. 4901-1-15(D), submit this Memorandum Contra Office of Consumers' Counsel et al. Joint Interlocutory Appeal et al., in this matter.

I. Introduction

On March 23, 2010, the Companies filed an Application for an Electric Security Plan ("ESP"). This Application included a Stipulation and Recommendation ("Stipulation"). The signatories to the Stipulation included, in addition to the Companies, the PUCO Staff and fourteen other Signatory Parties, as well as two non-opposing parties. These parties represent a diverse range of interests and recognized that the Stipulation provided a broad set of customer benefits; most notably, conducting a competitive bidding process to take advantage of historically low energy prices.

Recognizing the benefit of a prompt decision on the Stipulation by the Commission, the Entry issued on March 24, 2010 ("Entry") set a procedural schedule that would permit a Commission decision by May 5, 2010. The procedural schedule was not set in a vacuum. The Entry also established a timeframe for expedited responses to discovery and motions. Parties were also encouraged to serve pleadings by electronic mail to expedite communications between parties. Discovery requests and replies were ordered to be served by email, facsimile, or hand delivery. The Entry also set the Technical Conference for April 5, 2010 and ordered that local public hearings be held.

These numerous steps to expedite and help educate interested parties are not prejudicial to any party. Indeed, many of the primary components contained in the new ESP are the same as or similar to components: (a) in the ESP under which the Companies are currently operating; or (b) the Companies' proposed MRO, which was recently, fully litigated. Thus, the procedural schedule established by the Entry at issue provides a reasonable foundation for the review of the issues posed in this case and for the issuance of a Commission Order by May 5, 2010.

II. The Process And Issues Are Not New To The Commission And The Parties.

In the Companies' current ESP (the "2009 ESP"), a Stipulation was filed on February 19, 2009 and a Supplemental Stipulation on February 26, 2009 (together referred to as the "2009 Stipulation"). Hearings on the 2009 Stipulation were held on February 26, 2009 and March 11, 2009. The Commission issued an Order adopting a portion of the 2009 Stipulation on March 4, 2009 and another Order adopting the entire 2009 Stipulation on March 25, 2009. The OCC, in its interlocutory appeal, discusses in detail the timeline and events that should occur when there was no Stipulation. This does not apply in the current situation where a Stipulation signed by a

large number of parties has been filed. The current situation is more akin to the process that was successfully followed for the review and approval of the Companies' 2009 ESP. The process in that case serves as precedent for the appropriate procedures that should be followed in this proceeding.

This approach is reasonable given the similarity in the issues presented in the new ESP and those that were presented in the 2009 ESP and the Companies most recent MRO Application. The entire record from the Companies' MRO Application has been requested to be incorporated into this proceeding. Most of the issues presented by the instant ESP Application are not new issues. They are either currently in effect as part of the 2009 ESP or were proposed in the Companies' MRO Application. The listing of similar issues includes: (1) the competitive bidding process and structure; (2) no minimum stay provision; (3) recovery of competitive bid results through existing Rider GEN; (4) no minimum default service rider; (4) similar process for the acquisition of RECs to meet R.C. 4928.64 benchmarks; (5) the seasonality factors from the MRO are adopted; (6) the generation uncollectible rider remains in place and avoidable by shopping customers; (7) no increase in base distribution rates; (8) a new distribution rider is implemented to replace the existing distribution rider; (9) a provision related to significantly excessive earnings test ("SEET"); (10) a rider to recover non-market based transmission/RTO charges was proposed in the MRO; (11) many riders approved in the 2009 ESP remain in effect; (12) the Companies continue to be able to recover lost distribution revenues related to approved energy efficiency programs; (13) provisions for continuing administrators for energy efficiency programs that were a part of the 2009 ESP; (14) funding of the Community Connections program for low income energy efficiency and weatherization; (15) funding for the fuel fund through OPAE; (16) economic development funding; (17) recovery of new and incremental

taxes; and (18) continuation of the time differentiated pricing determined in a separate Commission proceeding. The major new provisions are limited to: (1) giving a generation discount to PIPP customers; (2) a different structure for the distribution rider that is more favorable for customers; (3) the Companies' agreement to absorb tens of millions of dollars of costs associated with the transfer to the PJM RTO and the conclusion of that proceeding; (4) resolution of certain aspects of the Smart Grid proceeding; (5) support for the expansion of the Cleveland Clinic; (5) a provision addressing the recently announced merger; and (6) the calculation of the demonstration that the new ESP is quantitatively more favorable than an MRO using the same analysis and format as that accepted by the Commission in the current ESP.

The vast majority of the parties participating in this proceeding were also participants in the process that led to the 2009 ESP and/or the most recent MRO Application. For the most part, these parties participated fully in discussions, meetings, and conferences that eventually culminated in the Stipulation in the new ESP. The parties had significant exposure to the provisions that were also reviewed in previous proceedings. The need for additional inquiry and analysis by non-signatory parties should be, therefore, far less than if all of the provisions of the new ESP were being presented for the first time. Given the familiarity with the provisions of the new ESP generally, the limited new issues, as well as the opportunity for discovery that the Entry allows in this proceeding –on an expedited basis – the procedural schedule established by the Entry is reasonable. The joint interlocutory appeal filed by the OCC et al. should not be certified to the full Commission, and should be denied.

III. OCC Joint Interlocutory Appeal Does Not Meet the Standard for Certification

OCC is not seeking an immediate interlocutory appeal to the Commission. Nothing alleged in their joint interlocutory appeal would meet any of the requirements set forth in O.A.C. 4901-1-15(A).

Under O.A.C. 4901-1-15(B), an interlocutory appeal may *only* be certified if 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. The OCC joint interlocutory appeal does not meet the standard necessary for certification, and therefore should be denied.

OCC generally does not present its arguments in terms of the standards that must be met under O.A.C. 4901-1-15(B). In fact, OCC provides little support for its position that an interlocutory appeal should be certified under the mandatory standards set forth in the Commission's rules. Due to this lack of support, the joint interlocutory appeal must not be certified. Rather than articulating a basis upon which an interlocutory appeal may be certified, OCC provides argument about three substantive areas: (1) discovery; (2) notice of the public hearing; and (3) alleged denial of an opportunity to respond to the Companies' Motion for Waiver. The joint interlocutory appeal makes one passing reference that the circumstances present novel issues related to scheduling and procedural rights of the parties. Joint Interlocutory Appeal, p. 6. But the issuance of a procedural schedule different than that preferred by OCC is hardly a novel issue. This issue has been dealt with time and again by the Commission from the Companies' RSP case filed in 2003 up through the present. In any event, the Companies will address each of OCC's substantive areas of discussion below.

A. Discovery Rights in this Proceeding Meet Statutory Guideline.

OCC's joint interlocutory appeal is written as though OCC has been denied discovery in this proceeding. This is not the case. OCC has already submitted two lengthy sets of interrogatories and requests for production and has noticed one deposition of the Companies' witness. No responses to OCC discovery requests are overdue. The first responses to OCC's discovery are not due until April 5, 2010.

OCC also expressed concern that a protective agreement was not yet signed at the time the joint interlocutory appeal was filed. While true, it is important to note that at that time no discovery was yet due and no documents that had been previously filed with the Application were filed a confidential basis. A protective agreement with OCC was signed on and transmitted to OCC on April 2, 2010, before any discovery in this proceeding was due.[1] Simply put, though the joint interlocutory appeal is written as though discovery responses to OCC have been wrongfully denied or delayed, this is not the case. There is no discovery-related reason to support an interlocutory appeal.

The Entry and timeline associated therewith are reasonable and similar to the process followed with the Commission approval of the Companies' 2009 ESP. Additionally, as discussed above, many of the provisions included in the new ESP are the same or similar to the provisions of the 2009 ESP and/or provisions set forth in the Companies' most recent, and fully litigated, MRO Application, which certainly lends itself to far less discovery needed. Also, as to any new provisions, extensive discussions have been held and information provided to all the parties in the Companies' most recent MRO Application proceeding prior to filing the Stipulation, which equally included parties that became Signatory Parties and those that did not.

[1] The Companies' review of the OCC proposed protective agreement was prolonged (such as it was) because OCC provided only a pdf version of the document.

So while ample rights of discovery are provided for in the Revised Code, whatever discovery right that parties may have must be determined in the context of each case. In this proceeding, OCC has already submitted two rounds of interrogatories and request for production, and also a notice to take the deposition of the Companies' sole witness; in addition to information they had been previously provided.[2] The Companies are in compliance with the timeline set forth in the Entry. In the context of this case, ample rights of discovery have been provided.

B. The Notice of the Public Hearing

OCC expresses a concern that the notice of the public hearing will not be issued before the intervention date established in the Entry, and therefore persons that may be interested in intervening will unaware of the proceeding. Notwithstanding the language of the Commission's rule, this view is misguided for several reasons. First, the filing of the Companies' new ESP Application and Stipulation, together with all the attachments thereto, was a public filing. None of the information was filed under seal. Second, a number of newspaper articles were released both online and in print, as early as the same day of the filing of the Application. These are some of the same papers in which legal notice would have been printed. Third, the view that persons must see the legal notice in the paper before being aware of an intervention opportunity isn't consistent with experience. Multiple parties have intervened in the new ESP proceeding that were not parties in the Companies' MRO proceeding. Finally, contrary to the suggestion in the joint interlocutory appeal, the SSO statute, R.C. 4928.141(B), does not require that the notice of a public hearing include an announcement that persons may seek intervention. *Joint Interlocutory Appeal*, p. 10. In fact, all that the statute requires is a notice of the public hearing;

[2] While OCC complains about the short time for discovery, its first discovery request was not received until the close of business on Friday March 26, 2010, three business days after the filing of the Application on March 23, 2010 of which OCC was served a copy and was aware in advance of the signing date of the Stipulation. The second set of discovery was served at close of business on Good Friday, April 2, 2010.

no information about a person seeking intervention is mentioned. OCC's concern in this regard does not form a reasonable basis upon which the joint interlocutory appeal may be certified.

C. The Commission has not Ruled on the Companies' Motion for Waiver

The Companies filed, contemporaneously with the filing of the Application here, a Motion for Waiver of certain Commission rules. In its interlocutory appeal, OCC complains that the Commission ruled on the Motion for Waiver before any parties had a chance to respond. To the contrary, the Commission has not yet ruled on the Companies' Motion for Waiver – it is not even mentioned in the March 24th Entry. In fact, it is scheduled for consideration on the Commission's April 7th Agenda. Indeed, on March 26, 2010, OCC et al. filed a Memorandum Contra the Motion for Waiver. The OCC's assertion that no good cause exists for the waiver of select rule requirements is based upon inaccurate premises and exalts purely form over substance. In one instance, OCC complains the ESP Application did not contain a newspaper notice. But the Entry stated that notice language, which provided by the Commission, would be supplied once locations for public hearings were established. No one would have benefited from the Companies' including a notice with their Application that was known to be incomplete. In another instance, OCC complains about the lack of three years of financial projections, that the information is needed to perform the SEET. But the SEET, when completed years in the future, would not rely on three year old projections in any event. Another error is that OCC claimed that the current Rider GCR -- the generation cost reconciliation rider – is avoidable, and the new ESP would make it non-avoidable. This is wrong. In fact, just the opposite is true. The new ESP makes the Rider GCR avoidable for shopping customers, subject to a limited exception.[3]

[3] Rider GCR would only become non-avoidable if the balance reaches 5% of the generation expense or if, in the Companies' judgment, the default of a winning bidder would cause the balance to exceed the 5% threshold.

OCC also objects to a waiver of O.A.C. 4901:1-35-03(C)(9). Of this rule's 25 parts and subparts, only a handful even arguably apply to the Companies' ESP. Further, many of the provisions listed by OCC are discussed in detail in the Application.

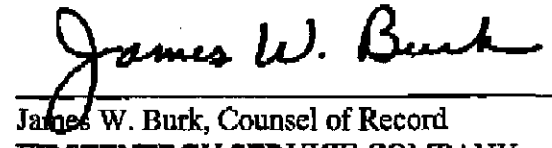
As is becoming a theme, OCC complains before there is any basis for complaint. In this instance, OCC's dissatisfaction with the Commission seems to center around the date established for intervention of additional parties into the ESP proceeding[4] – citing to O.A.C. 4901-1-12(C) for support. *Joint Interlocutory Appeal*, pp. 2-3. The basis for establishing the intervention date stems neither from the Motion for Waiver nor O.A.C. 4901-1-12(C), but from the more specific SSO rules, namely O.A.C. 4901:1-35-06(B). This SSO rule provides authority to the Attorney Examiner to establish an intervention date other than the default date set forth in the rule. In the Entry, the Attorney Examiner was exercising the authority granted by this rule. O.A.C. 4901-1-12(C) was not violated; it doesn't apply in this situation. OCC allegations in this regard are without merit and the joint interlocutory appeal should not be certified.

[4] The ESP Application filed by the Companies included a provision that relieved parties from filing a Motion for Intervention if the party had been granted intervention in the Companies' MRO case, Case No. 09-906-EL-SSO, and the Attorney Examiner granted this request in the Entry at paragraph 5.

IV. Conclusion

For all of the foregoing reasons, OCC et al. failed to provide the Attorney Examiner with a basis under O.A.C. 4901-1-15(B) that would permit them to certify this interlocutory appeal, and therefore the joint interlocutory appeal may not be certified. The Companies request that the Attorney Examiner deny the OCC et al. request for certification.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the foregoing Memorandum Contra Joint Interlocutory Appeal has been served upon all of the parties of record in Case No. 10-388-EL-SSO by electronic mail this 5th day of April, 2010.

James W. Burk
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