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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) Case No. 10-176-EL-ATA
Edison Company for Approval of a New)
Rider and Revision of an Existing Rider.)

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JOINT INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO FULL COMMISSION,
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
SUE STEIGERWALD
CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE
JOAN HEGINBOTHAM
BOB SCHMITT HOMES

The Joint Appellants¹ hereby submit this Interlocutory Appeal² to the Public Utilities Commission of Ohio ("PUCO" or "Commission") and respectfully request the certification of this appeal to the full Commission for review of the attorney examiner's Entry regarding required pre-filed testimony from all witnesses, including non-expert witnesses.³ Review and reversal of the ruling that all testimony must be pre-filed will result in an outcome that will conform to the Commission's rules and practice that only require pre-filing testimony for expert witnesses.⁴

¹ Office of the Ohio Consumers' Counsel ("OCC"), Sue Steigerwald, Citizens For Keeping The All-Electric Promise ("CKAP"), Joan Heginbotham, and Bob Schmitt Homes, Inc. (the last four parties collectively, "CKAP Parties").

² The appeal is filed pursuant to Ohio Adm. Code 4901-1-15.

³ Entry at 2, ¶(5) (November 23, 2010) ("all direct testimony . . . , whether expert or non-expert, should be pre-filed").

⁴ Ohio Adm. Code 4901-1-29 ("Expert testimony").

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The request for a departure from the Commission's rules and practice was made by counsel for Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy" or the "Company") at the prehearing conference on November 18, 2010. Since the prehearing was not a "transcribed prehearing conference," FirstEnergy's request should have been submitted in writing.⁵ This lack of proper procedure for FirstEnergy's procedural request further complicates the departure from the Commission's rules and practice that requires the pre-filing of only expert testimony since Joint Applicants were not provided the normal opportunity to argue against FirstEnergy's request.

This Interlocutory Appeal should be certified⁶ for an immediate determination by the Commission as a new or novel question or a departure from past precedent and to prevent undue prejudice to Ohio consumers and the Joint Appellants. Upon review,⁷ the Commission should reverse or modify the Attorney Examiner's Entry dated November 23, 2010 regarding a requirement that non-expert testimony be pre-filed. The reasons for this Interlocutory Appeal, including the Request for Certification and the Application for Review, are explained in the attached Memorandum in Support.

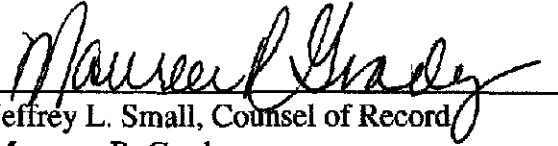
⁵ Ohio Adm. Code 4901-1-12(A).

⁶ Ohio Adm. Code 4901-1-15(B).

⁷ Ohio Adm. Code 4901-1-15(C).

Respectfully Submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

A Motion to Intervene was submitted by the CKAP Parties on June 2, 2010. The OCC supported the motion, and FirstEnergy opposed the motion. FirstEnergy's opposition was in part based upon the fact that Ms. Steigerwald and Ms. Heginbotham are individual customers of FirstEnergy.⁸ Without ruling on that motion, the Commission waited until October 8, 2010 to set a schedule for local public hearings. That Entry was revised on October 14, 2010. The October 14, 2010 Entry stated that the Commission was "particularly interested in receiving more information at the public hearings about . . . [1][utility] Commitments . . . [2] Electric vs. Natural Gas . . . [home heating] difference in cost [and] [3] Rate Shock"⁹

On November 17, 2010, after two local public hearings had already been held, the motion to intervene submitted by the CKAP Parties was granted. A prehearing conference was held on November 18, 2010, which was not transcribed. FirstEnergy counsel repeated the Company's discomfort with the presence of individual customers as

⁸ FirstEnergy Memorandum Contra Motion to Intervene by CKAP Parties at 1 (June 17, 2010).

⁹ Entry at 4-5, ¶(7) (October 14, 2010).

parties and requested that the testimony of non-expert witnesses be required to be submitted in writing (i.e. in advance of the hearing in Columbus). A short discussion ensued in which the OCC stated that it did not agree to such a departure from the Commission rule and practice regarding pre-filing non-expert witness testimony.

On November 23, 2010, the Attorney Examiner issued an Entry that, in part, required non-expert witnesses to submit their testimony in advance of the hearing in Columbus and in writing.¹⁰ The November 23, 2010 Entry characterized the ruling as an effort to “clarify” an earlier Entry dated November 12, 2010 on the subject of pre-filed, direct testimony.¹¹ Since the usual Commission practice requires only pre-filed testimony from expert witnesses, the November 23, 2010 Entry clearly responded to FirstEnergy’s request at the November 18, 2010 prehearing conference.

The Entry dated November 23, 2010 (a copy of which is attached) is the subject of this appeal.

II. CERTIFICATION OF INTERLOCUTORY APPEAL

The full Commission will review the Attorney Examiner’s ruling if the Attorney Examiner (or other appropriate PUCO personnel) certifies the Appeal. The standard applicable to certifying this appeal is either that “[t]he 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....”¹² The determination

¹⁰ Ohio Adm. Code 4901-1-12(A).

¹¹ Entry at 2, ¶(5) (November 23, 2010).

¹² Ohio Adm. Code 4901-1-15(B).

that non-expert testimony must be pre-filed is both a departure from the Commission's rules and practice as well as a matter that must be dealt with immediately since it involves the manner in which testimony must be presented at the final hearing.

Bowing to FirstEnergy's efforts to hinder the ability of Joint Applicants to present their cases is a "new or novel" policy under the first portion of the certification standard in Ohio Adm. Code 4901-1-15(B). The requirement regarding pre-filed, written testimony in the Commission rules applies only to "expert testimony to be offered in commission proceedings. . . ."¹³ Adding limitations on non-expert testimony that is not contained in the Commission rules is not consistent with the pronouncement in October that the non-expert testimony is invited under the circumstances of this case.¹⁴

The Entry on November 23, 2010 is also a departure from past precedent. For example, the OCC called three customer witnesses to the stand and conducted live, direct testimony in the Commission's proceedings on the subject of FirstEnergy's line extension policies.¹⁵ Live, non-expert testimony was also presented in a complaint against FirstEnergy's handling of market support generation under the Company's electric transition plan stipulation.¹⁶ Joint Applicants are unable to locate a proceeding that involved FirstEnergy where live cross-examination of witnesses was conducted and where non-expert witnesses were required to pre-file written testimony. FirstEnergy

¹³ Ohio Adm. Code 4901-1-29(A).

¹⁴ Entry at 4-5, ¶(7) (October 14, 2010).

¹⁵ See *In re Commission Investigation of Line Extension Policies*, Case Nos. 01-2708-EL-COI, *et al.*, OCC Post-Hearing Merit Brief at 7-8 (referring to live testimonies of three customer witnesses at Tr. Vol. I, pages 9-98) (June 26, 2002).

¹⁶ *In re Cleveland MSG Complaint Against FirstEnergy*, Case No. 01-174-EL-CSS, Initial Post-Hearing Brief of the City of Cleveland and WPS Energy at 41 (referring to live testimony by I. Henderson at Tr. Vol. I, pages 26-28) (April 27, 2001).

certainly has the resources and experience to deal with the cross-examination of non-expert witnesses. Pre-filed, non-expert testimony was not required in previous cases that involved FirstEnergy.

The Entry dated November 23, 2010 presents an additional “new or novel” approach towards limiting legal argument and expediting a ruling on an oral request that justifies certification under Ohio Adm. Code 4901-1-15(B). The methods sanctioned in the Commission’s rules when a party seeks a change in procedure are the filing of a written motion or making an oral motion at a public hearing or a “transcribed prehearing conference....”¹⁷ FirstEnergy proposed the required pre-filing of non-expert witness testimony at a prehearing that was not transcribed even though the PUCO’s rule required the filing of a written motion. FirstEnergy did not file a motion and support such motion, but was able to obtain a favorable ruling by bringing the matter up at a prehearing conference that did not permit opposing parties to file written responses. Even the Commission’s rules regarding expedited rulings on motions¹⁸ would have afforded Joint Applicants a greater opportunity to argue their positions than the unprecedented step of granting a party’s request by characterizing it as an effort to “clarify” a previous entry.¹⁹ The full Commission should determine whether to permit a short-cut to the procedures set out in the PUCO’s rules (including a short-cut to even expedited rulings).

This above explains that a “new or novel question of interpretation, law, or policy” exists under Ohio Adm. Code 4901-1-15(B) regarding the Entry dated November

¹⁷ Ohio Adm. Code 4901-1-12(A).

¹⁸ Ohio Adm. Code 4901-1-12(C).

¹⁹ Entry at 2, ¶(5) (November 23, 2010).

23, 2010. This interlocutory appeal is also taken from a ruling that is “a departure from past precedent[s].”²⁰ Ohio Adm. Code 4901-1-15(B) only requires that one of these standards be met (in addition to prejudice which is explained below). However, both standards (a “new or novel question” and “a departure from past precedent”) are met here.

There is undue prejudice to Joint Applicants and the Ohio public (a basis for certification under Ohio Adm. Code 4901-1-15(B)) where a barrier is erected to the presentation of evidence by non-expert witnesses. The CKAP Parties were left in limbo for over five months while their Motion to Intervene was pending. That period included the dates when the first two local public hearings were scheduled, dates on which persons such as Ms. Steigerwald and Ms. Heginbotham could have testified if not for the confusion over their status in this proceeding. Their status as parties having been decided on November 17, 2010, non-expert witnesses for the CKAP Parties were expected to appear as party witnesses at the hearing in Columbus rather than at the remaining local public hearings.

But the November 23, 2010 Entry -- issued on the final date for the local public hearings -- took the unprecedented step of requiring non-expert witnesses to pre-file written testimony in a FirstEnergy case. The Entry added a requirement that would not have existed if witnesses for the CKAP Parties had appeared at the local public hearings. This added requirement forces a level of formality and demands upon a witnesses' time that discourages non-expert witnesses from appearing. As described above, this added burden could not have been anticipated from the Commission's rules or practice, and

²⁰ Ohio Adm. Code 4901-1-15(B).

could not have been discussed with witnesses earlier in these proceedings. Indeed, pre-filed, non-expert testimony was not required concerning the original filing of testimony that was scheduled for November 15, 2010. The connection between requiring pre-filed, non-expert testimony and the continuance granted to FirstEnergy on November 12, 2010 is unexplained by the November 23, 2010 Entry. “Undue prejudice” exists under these circumstances.²¹

Given that the Entry dated November 23, 2010 places an additional burden on parties seeking to present non-expert witnesses, an “immediate determination” is needed to lift this burden well before the due date for such testimony in order to prevent undue prejudice that can be avoided in the event the Commission ultimately reverses the ruling in question. Thus, that element for certification under Ohio Adm. Code 4901-1-15(B) is also met.²²

III. APPLICATION FOR REVIEW

Joint Appellants’ Application for Review meets the terms of Ohio Adm. Code 4901-1-15(C), because the application meets the timing requirement set out in the Commission’s rules²³ and the application “set[s] forth the basis of the appeal and citations of any authorities relied upon.” The PUCO should reverse or modify the Entry dated November 23, 2010, pursuant to Ohio Adm. Code 4901-1-15(E).

Joint Appellants will be prejudiced if an additional burden is placed on non-expert witness testimony presented at the hearing in Columbus. The Commission should rule

²¹ Id.

²² Id.

²³ Ohio Adm. Code 4901-1-15(C) provides “five days after the ruling is issued,” and Ohio Adm. Code 4901-1-7(A) provides a due date on Monday if the fifth day falls on a Sunday.

that the pre-filing of non-expert testimony is not required and that non-expert testimony need not be reduced to writing, in accordance with Ohio Adm. Code 4901-1-29.

FirstEnergy's request was inappropriately made at a prehearing conference that was not transcribed, and thus this pleading is the only means by which Joint Applicants can make written arguments against FirstEnergy's desired change in Commission procedure. Consistent with Ohio Adm. Code 4901-1-15(E)(1), the Commission should modify or reverse the Entry dated November 23, 2010, and permit non-expert testimony to be presented without the additional requirement that it be pre-filed.

IV. CONCLUSION

For the reasons set forth above, this Appeal should be certified to the full Commission, and it should reverse or modify the Attorney Examiner's ruling by conforming the procedure in this case with the Commission's rules and practice. Fact witnesses should not be disadvantaged as the result of FirstEnergy's inappropriate request at a pre-hearing conference that was not transcribed and was therefore not subject to public scrutiny.

The Commission should hear non-expert testimony without the requirement that it be pre-filed, consistent with the PUCO's long-standing rule. This matter should be decided in favor of normal practice as well as in the interest of a transparent state regulatory process for the setting of electric rates in Northern Ohio and the PUCO's desire to acquire all facts before making its decision.

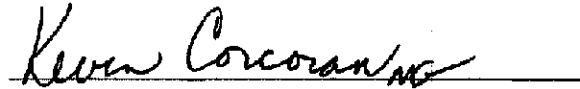
Respectfully Submitted,

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ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (FirstEnergy or the Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On February 12, 2010, FirstEnergy filed an application in this proceeding to revise its current tariffs in order to provide rate relief to certain all-electric customers.
- (3) On March 3, 2010, the Commission issued its Finding and Order in this proceeding, approving FirstEnergy's application as modified by the Commission and providing interim rate relief for all-electric residential customers. On March 8, 2010, the Ohio Consumers' Counsel (OCC) filed an application for rehearing. On April 6, 2010, the Commission granted rehearing for the purpose of further consideration of the matters specified in the application for rehearing. Subsequently, on April 15, 2010, the Commission denied rehearing in its Second Entry on Rehearing (April 15 Entry) in this proceeding. On April 2, 2010, FirstEnergy also filed an application for rehearing regarding the Commission's March 3, 2010, Finding and Order. The Commission granted rehearing on April 28, 2010, in the Third Entry on Rehearing in this proceeding.

On May 14, 2010, FirstEnergy filed an application for rehearing regarding the April 15 Entry. Further, on May 17, 2010, Industrial Energy Users-Ohio (IEU-Ohio) and OCC each filed applications for rehearing regarding the April 15 Entry. In the Fourth Entry on Rehearing in this

proceeding, issued on June 9, 2010, the Commission granted these applications for rehearing for further consideration of the matters specified in the applications for rehearing. On November 10, 2010, in the Fifth Entry on Rehearing in this proceeding, the Commission granted, in part, and denied, in part, the applications for rehearing filed by FirstEnergy and OCC, and denied the application for rehearing filed by IEU-Ohio.

- (4) By entry issued on October 8, 2010, this case was set for an evidentiary hearing on November 29, 2010. The October 8, 2010, entry, *inter alia*, set November 1, 2010, as the deadline for filing motions to intervene and scheduled a prehearing conference in this matter for November 18, 2010. By entry issued November 12, 2010, the attorney examiner directed that the evidentiary hearing should commence as scheduled on November 29, 2010, but then be continued until January 27, 2011.
- (5) The November 12, 2010, entry also established January 7, 2011, as the deadline for the submission testimony by the Companies and intervenors. The attorney examiner will clarify that all direct testimony offered by the Companies and intervenors in this matter, whether expert or non-expert, should be pre-filed.
- (6) Pursuant to discussions with the parties during the prehearing conference on November 18, 2010, the attorney examiner finds that the response time for discovery should be shortened to ten days and that discovery requests and replies should be served by electronic message (e-mail).
- (7) The attorney examiner also finds that an additional prehearing conference in this matter should be scheduled for January 18, 2011, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-D, Columbus, Ohio 43215.
- (8) On October 15, 2010, and November 2, 2010, Constellation NewEnergy, Inc. (Constellation) and Ohio Partners for Affordable Energy (OPAE), respectively, filed motions to intervene. No party filed a memorandum contra either motion to intervene. Although OPAE filed its motion one

day after the November 1, 2010, deadline, the attorney examiner finds that OPAB should be granted leave to file its motion to intervene one day late. The attorney examiner further finds that the motions to intervene filed by Constellation and OPAB are reasonable and should be granted. Constellation also filed a motion for admission *pro hac vice* on behalf of Cynthia Forner Brady, while OPAB filed a motion for admission *pro hac vice* on behalf of David C. Rinebolt. The attorney examiner finds that the motions for admission *pro hac vice* should be granted.

It is, therefore,

ORDERED, That the parties adhere to the processes and procedures set forth in findings (5) and (6). It is, further,

ORDERED, That a prehearing conference be held on January 18, 2011, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-D, Columbus, Ohio 43215. It is, further,

ORDERED, That the motions to intervene and the motions for admission *pro hac vice* filed by Constellation and OPAB be granted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Henry H. Phillips-Gary
Attorney Examiner

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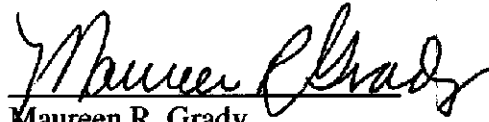
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Renee J. Jenkins
Secretary

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Interlocutory Appeal was served by regular U.S. Mail, prepaid, to the counsel identified below (provided electronically to the Attorney Examiners) this 29th day of November 2010.



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