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December 29, 2010

Reneé J. Jenkins
Director of Administration
Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street, 13th Floor
Columbus, Ohio 43215

Re: Case No. 10-176-EL-ATA

Dear Ms. Jenkins:

On December 27, 2010, I filed a Motion for Certification of Interlocutory Appeal and Application for Review of Interlocutory Appeal ("Motion") on behalf of The Cleveland Electric Illuminating Company, Ohio Edison Company and The Toledo Edison Company. A copy of the Attorney Examiner's December 22, 2010 Entry was inadvertently omitted and not attached to the Motion, as was required by Rule 4901-1-15(C). That Entry is attached to this correspondence and is to be incorporated as an exhibit to the Motion.

Thank you for your attention to this matter.

Very truly yours,

Grant Garber

Grant W. Garber

Enclosure

cc: Counsel of Record (w/encl.)

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

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.

(4) Further, by entry issued on October 8, 2010, this case was set for an evidentiary hearing on November 29, 2010. The evidentiary hearing in this matter commenced as scheduled on November 29, 2010, and was then continued until January 27, 2011. Pursuant to entries issued on October 8, 2010, October 14, 2010, and November 5, 2010, six local public hearings were scheduled and held in this matter.

(5) By entry issued on November 17, 2010 (November 17 Entry), Sue Steigerwald, Citizens for Keeping the All-Electric Promise (CKAP), Joan Heginbotham, and Bob Schmitt Homes, Inc. (Bob Schmitt Homes) were granted intervention in this proceeding.

(6) By entry issued on November 23, 2010 (November 23 Entry), the attorney examiner, *inter alia*, directed all direct testimony offered by the Companies and intervenors, whether expert or non-expert, should be pre-filed.

(7) On November 29, 2010, Sue Steigerwald, CKAP, Joan Heginbotham, and Bob Schmitt Homes (collectively, CKAP Parties) and OCC (collectively, Joint Movants) filed a joint interlocutory appeal, request for certification to full Commission, and application for review of the November 23 Entry. FirstEnergy filed a memorandum contra on December 6, 2010.

(8) On December 17, 2010, FirstEnergy filed an application for rehearing of the November 17 Entry granting intervention to the CKAP Parties.

(9) Rule 4901-1-15, Ohio Administrative Code (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 by the attorney examiner pursuant to paragraph (B) of the rule. 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 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.

(10) The November 23 Entry, ordering the pre-filing of all direct testimony offered by the Companies and intervenors, whether expert or non-expert, does not fall within the four enumerated rulings specified by Rule 4901-1-15(A), O.A.C, from which interlocutory appeals may be taken without certification by the attorney examiner. Therefore, an interlocutory appeal of the November 23 Entry may only be taken if the attorney examiner certifies the appeal pursuant to Rule 4901-1-15(B), O.A.C.

(11) Joint Movants contend that the requirement that non-expert testimony be pre-filed is a departure from the Commission's rules and practice, as well as the Commission's past precedent, and is also a matter that must be dealt with immediately since it involves the manner in which testimony must be presented during the evidentiary hearing; therefore, the requirements for certification of an appeal under Rule 4901-1-15(B), O.A.C., are satisfied. Joint Movants argue that the requirement regarding pre-filed, written testimony imposed by Rule 4901-1-29(A), O.A.C., applies only to expert testimony and add that placing limitations on non-expert testimony that is not contained in the Commission's rules is inconsistent with the statements contained in the entries scheduling the local public hearings inviting public comments during the hearings on several issues. Joint Movants further allege that they were unable to locate a proceeding involving FirstEnergy where live cross-examination of witnesses was conducted and where non-expert witnesses were required to pre-file written testimony. Joint Movants point out that live, direct testimony has been conducted in two other cases involving FirstEnergy.

In addition, Joint Movants assert that the November 23 Entry presents an additional "new or novel" question of law or policy since the November 23 Entry changed the procedural schedule previously established in this proceeding by ruling on an oral request made at a prehearing that was not transcribed. Joint Movants assert that the Commission's rules require that a party either file a written motion or make an oral motion at a transcribed prehearing conference.

Joint Movants also argue that the November 23 Entry unduly prejudices them by creating a barrier to the presentation of evidence by non-expert witnesses. Joint Movants contend that several potential witnesses, such as Ms. Stiegerwald and Ms. Heginbotham, did not testify at the first two local public hearings due to their status as parties in this proceeding, and then, after the motion to intervene filed by the CKAP parties was granted in the November 17 Entry, the CKAP parties expected that any non-expert witnesses for the CKAP parties would appear at the evidentiary hearing

rather than at the remaining local public hearings. Joint Movants argue that the November 23 Entry, issued on the final date for the local public hearings, added a requirement that would not have existed if witnesses for the CKAP parties had appeared at the local public hearings and forces a level of formality and demands upon a witnesses' time that discourages non-expert witnesses from appearing. As a result, Joint Movants maintain that an immediate determination is needed in order to prevent undue prejudice that can be avoided in the event the Commission ultimately reverses the ruling in question.

(12) FirstEnergy responds that the attorney examiner reasonably determined that non-expert testimony should be pre-filed because pre-filing non-expert testimony will allow for the efficient administration of the evidentiary hearing and for an equitable ordering of witnesses. FirstEnergy also argues that requiring pre-filed non-expert testimony is essential for protecting FirstEnergy's procedural rights, as pre-filing the testimony will allow FirstEnergy to prepare focused discovery, take depositions and prepare cross-examination and, if necessary, rebuttal testimony.

FirstEnergy additionally contends that the proposed interlocutory appeal should not be certified because the November 23 Entry is not a departure from past precedent and does not present a new or novel question of interpretation, law, or policy. FirstEnergy notes that, contrary to Joint Movants' claims, the Commission has required pre-filed non-expert testimony in multiple cases involving FirstEnergy. In addition, FirstEnergy points out that pre-filed non-expert testimony has been regularly required in complex cases involving multiple parties and/or multiple fact witnesses. FirstEnergy also argues that the cases cited by Joint Movants are distinguishable, as those cases involve only a small number of witnesses, with limited and discrete testimony, and no concern that parties to the proceeding would be able to submit unvetted, live direct testimony.

FirstEnergy maintains that the requirement that all witnesses submit pre-filed testimony is not a new or novel question of

interpretation, law, or policy. While acknowledging that Rule 4901-1-15(B), O.A.C., requires pre-filing of expert testimony, FirstEnergy notes that the Commission's rules are silent regarding the filing of non-expert testimony. FirstEnergy suggests that, contrary to Joint Movants' claims, no practice or rule entitles non-experts to present live direct testimony. FirstEnergy argues that Rule 4901-1-27(B), O.A.C., allows attorney examiners to fashion case-specific procedures based on case-specific considerations in order to avoid unnecessary delay and assure that the hearing proceeds in an orderly and expeditious manner.

Finally, FirstEnergy argues that Joint Movants fail to show undue prejudice from the November 23 Entry, as Joint Movants remain free to present at the hearing the testimony and documents they deem necessary for prosecution of their case.

(13) The attorney examiner finds that Joint Movants' joint interlocutory appeal, request for certification to full Commission, and application for review of the November 23 Entry should be denied. In making this determination, the attorney examiner notes that joint movants inaccurately assert that the requirement that non-expert testimony be pre-filed is a departure from the Commission's rules and practice. A review of filings before the Commission reveals that pre-filing of non-expert testimony has been required on a variety of occasions, including cases involving FirstEnergy. See, e.g., *Worthington Industries, et al., v. The Toledo Edison Co.*, Case No. 08-67-EL-CSS, Entry (May 29, 2008); *S.G. Foods, Inc., et al. v. The Cleveland Electric Illuminating Co., et al.*, Case No. 04-28-EL-CSS, Entry (September 28, 2007); *Cutter Exploration, Inc. v. The East Ohio Gas Co.*, Case No. 09-1982-GA-CSS, Entry (November 19, 2010); and *In the Matter of the Request of Wyandot Land Development LLC for an Administrative Hearing*, Case No. 06-1390-TR-CVF, Entry (September 30, 2009). These cases indicate that, pursuant to the authority granted to the presiding hearing officer under Rule 4901-1-27, O.A.C., pre-filing non-expert direct testimony has been required when necessary, in the judgment of the presiding hearing officer, to assure an orderly and expeditious proceeding.

The attorney examiner also finds that the November 23 Entry does not prejudice Joint Movants, as the entry does not restrict the ability of Joint Movants to present their case and that it is common practice in Commission proceedings for procedural rulings to be issued following informal discussions held during prehearing conferences.

(14) However, in order to facilitate public testimony in this proceeding, the attorney examiner finds that pre-filing of direct testimony by FirstEnergy and intervenors should no longer be required. Instead, FirstEnergy and intervenors are directed to file a list of witnesses, both expert and non-expert, by December 30, 2010. In addition, the attorney examiner finds that the deadline for the submission of direct expert testimony by FirstEnergy and intervenors should be changed to January 10, 2011.

(15) The attorney examiner finds that FirstEnergy's application for rehearing should have been filed as an interlocutory appeal within five days of the November 17 Entry. Thus FirstEnergy's December 17, 2010 filing is not timely. FirstEnergy cannot avoid the requirements of Rule 4901-1-15, O.A.C.., by calling its filing an application for rehearing rather than an interlocutory appeal. *See, In re Cincinnati Gas & Electric Company*, Case No. 05-59-EL-AIR, Entry (November 3, 2005) at 2. Therefore, the attorney examiner finds that FirstEnergy's application for rehearing should be denied.

It is, therefore,

ORDERED, That Joint Movants' joint interlocutory appeal, request for certification to full Commission, and application for review of the November 23 Entry be denied, in accordance with finding (13). It is, further,

ORDERED, That the parties comply with the revised requirements and deadlines established in finding (14). It is, further,

ORDERED, That FirstEnergy's application for rehearing be denied, in accordance with finding (15). It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Henry H. Phillips-Gary

By: Henry H. Phillips-Gary
Attorney Examiner

JRP/sc

Entered in the Journal

DEC 22 2010

Reneé J. Jenkins

Reneé J. Jenkins
Secretary