

FILE

**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 MEMORANDUM CONTRA FIRSTENERGY'S MOTION FOR
CERTIFICATION OF INTERLOCUTORY APPEAL
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
SUE STEIGERWALD
CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE
JOAN HEGINBOTHAM
BOB SCHMITT HOMES**

I. BACKGROUND

This pleading ("Memo Contra") is jointly submitted¹ in opposition to the Motion for Certification of Interlocutory Appeal and Application for Review of Interlocutory Appeal ("FirstEnergy's Appeal") that was filed on December 27, 2010 with the Public Utilities Commission of Ohio ("PUCO" or "Commission") by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy" or the "Company"). FirstEnergy's Appeal seeks reversal of the Entry dated December 22, 2010 ("December Entry") that stated that "pre-filing of direct [non-expert] testimony . . . should no longer be required" "in order to facilitate

¹ This Memo Contra is submitted by the 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").

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public testimony in this proceeding.”² The December Entry restored the procedure stated in the Commission’s rules that requires only expert (i.e. not non-expert) testimony to be pre-filed in PUCO proceedings.³

A Motion to Intervene was submitted by the CKAP Parties on June 2, 2010. 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.⁴ On October 8, 2010, without ruling on that motion, the Commission 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”⁵

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 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.

² Entry at 6, ¶(14) (December 22, 2010). “Non-expert” has been added to the quote, which reflects the apparent intent of the remainder of paragraph (14) that requires “the submission of direct *expert* testimony . . . [by] January 10, 2011.” *Id.*

³ Ohio Adm. Code 4901-1-29 (“Expert testimony”).

⁴ FirstEnergy Memorandum Contra Motion to Intervene by CKAP Parties at 1 (June 17, 2010).

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

On November 23, 2010, the Attorney Examiner issued an Entry (“November Entry”) that, in part, required non-expert witnesses to submit their testimony in advance of the hearing in Columbus and in writing.⁶ The November Entry characterized the ruling as an effort to “clarify” an earlier Entry dated November 12, 2010 on the subject of pre-filed, direct testimony.⁷ The OCC and the CKAP Parties filed a joint interlocutory appeal (“Joint Appeal”) on November 29, 2010. Among other matters, the Joint Motion argued:

The Entry [dated November 23, 2010] added a requirement [for pre-filing non-expert testimony] 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 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, 2010.⁸

FirstEnergy opposed the Joint Motion on December 6, 2010. The Company’s pleading affirmed that FirstEnergy sought the requirement that non-expert testimony be pre-filed.⁹

⁶ Ohio Adm. Code 4901-1-12(A).

⁷ Entry at 2, ¶(5) (November 23, 2010).

⁸ Joint Motion at 5-6 (November 29, 2010).

⁹ FirstEnergy Memorandum Contra Joint Interlocutory Appeal at 4 (December 6, 2010).

II. ARGUMENT

A. The December Entry is Consistent with Commission Practice and the Ruling Was Explained.

1. The December Entry is Consistent with the Commission's Rules and Practice.

The December Entry is consistent with Commission rule and practice. The requirement regarding pre-filed, written testimony in the Commission rules applies only to “expert testimony to be offered in commission proceedings. . . .”¹⁰ Adding a limitation on non-expert testimony that is not contained in the Commission rules is also inconsistent with the pronouncement in October that the non-expert testimony is invited under the circumstances of this case.¹¹

FirstEnergy's Appeal repeats its arguments from its opposition to the Joint Appeal. The Company mistakenly cites cases for the proposition that they represent “overwhelming past precedent,”¹² but the cases cited are *exceptions* from Ohio Adm. Code 4901-1-29(A) that is the Commission's *rule* regarding the pre-filing of testimony. FirstEnergy's exceptions are also not a good fit to the circumstances of this proceeding.

The exceptions cited by FirstEnergy are limited to a case before the Power Siting Board (i.e. a “BGN” case) and three complaint cases (“CSS” cases).¹³ Those cases were not more “complex”¹⁴ than the cases cited by the OCC and the CKAP Parties in the Joint Appeal. That Joint Appeal cited a complaint case in which non-expert testimony was

¹⁰ Ohio Adm. Code 4901-1-29(A).

¹¹ Entry at 4-5, ¶(7) (October 14, 2010).

¹² FirstEnergy Appeal at 2 (December 27, 2010).

¹³ Id. at 3-4.

¹⁴ Id. at 4.

taken that was not pre-filed, consistent with the Commission's rule that applies absent special circumstances.¹⁵

The instant proceeding was initiated by FirstEnergy to alter rates for its all-electric customers, and the Commission stated that it seeks information regarding the Company's marketing practices to help inform the PUCO's decision.¹⁶ This proceeding is therefore more akin to the Commission's inquiry into electric utility line extension cases where the Commission's rule was observed and three customer witnesses were called to the stand for live, direct testimony at the hearing in Columbus.¹⁷ The December Entry is consistent with more than the Commission's rule; it is consistent with practice before the Commission.

2. The Ruling Was Explained.

FirstEnergy repeats the explanation for the current treatment of non-expert testimony in several places, and yet states that the outcome in the December Entry is unexplained.¹⁸ The December Entry states that non-expert testimony need not be pre-filed "in order to facilitate public testimony in this proceeding."¹⁹ The Joint Motion,

¹⁵ Joint Appeal at 3, footnote 16, citing *In re Cleveland MSG Complaint Against FirstEnergy*, Case No. 01-174-EL-CSS (referring to live, direct testimony by Cleveland Witness I. Henderson at Tr. Vol. I, pages 26-28) (November 29, 2010).

¹⁶ FirstEnergy complaint regarding discovery in this case makes it seem that an investigation into the Company's marketing practices only includes the investigation of customer representatives. FirstEnergy's Appeal at 7. The Company has not cooperated with efforts to investigate its marketing practices. See, e.g., OCC's Motion to Compel Discovery (December 23, 2010). The OCC has provided over five thousand pages of documents to FirstEnergy in discovery, while the Company steadfastly refuses to provide a few addresses that would permit the OCC to subpoena the Company's former employees who have been identified as having information regarding FirstEnergy's marketing practices. *Id.*

¹⁷ See Joint Appeal at 3, footnote 15, citing *In re Commission Investigation of Line Extension Policies*, Case Nos. 01-2708-EL-COI, *et al.* (referring to live testimonies of three customer witnesses at Tr. Vol. I, pages 9-98) (November 29, 2010).

¹⁸ See, e.g., FirstEnergy's Appeal at 8 (December 27, 2010).

¹⁹ December Entry at 6, ¶(14).

which is partially quoted in the introduction to this pleading, argued that departure from the practice stated in the Commission's rules regarding who must pre-file testimony "discourages non-expert witnesses from appearing."²⁰ The OCC and CKAP Parties also argued that the November Entry was inconsistent with the "pronouncement in October that the non-expert testimony is invited under the circumstances of this case."²¹ These arguments, summarized in the December Entry,²² are the basis for the reversal of the ruling in November that non-expert testimony had to be pre-filed.

FirstEnergy seizes upon a bit of imprecise language in the December Entry as part of its argument. The OCC and the CKAP Parties argued that the Commission invited "non-expert testimony,"²³ which is summarized in the December Entry as an argument regarding "public comments."²⁴ The determination to which FirstEnergy objects -- that non-expert testimony need not be pre-filed -- was made (as stated in the December Entry) "in order to facilitate public testimony in this proceeding."²⁵ FirstEnergy argues that "there is no further 'public testimony' to 'facilitate' in this case."²⁶ Potential non-expert witnesses such as Sue Steigerwald and Joan Heginbotham are both members of the public and might also be non-expert party witnesses. However, the terminology used in the December Entry might have been clearer if it had referred to the Commission's

²⁰ Joint Appeal at 5 (November 29, 2010).

²¹ Joint Appeal at 3, citing Entry at 4-5, ¶(7) (October 14, 2010).

²² December Entry at 3, ¶(11).

²³ Joint Appeal at 5 (November 29, 2010).

²⁴ December Entry at 3, ¶(11).

²⁵ December Entry at 6, ¶(14).

²⁶ FirstEnergy's Appeal at 8 (December 27, 2010).

encouragement of “non-expert testimony” rather than the facilitation of “public testimony.”

Ironically, it is the ruling in the November Entry -- that non-expert testimony would have to be pre-filed -- that was unexplained. The November Entry did not examine the arguments of parties submitted by way of a written motion and responsive pleadings, or examine arguments made in an oral motion at a public hearing or at a “transcribed prehearing conference”²⁷ These are the prescribed forms stated in the Commission’s rules for parties to propose that procedures be altered in a proceeding – not the use of an untranscribed prehearing conference. The November Entry simply stated that non-expert testimony would be pre-filed as a matter of “clarif[ication],”²⁸ which did not explain the departure from the Commission’s procedures as set forth in the Ohio Administrative Code. The ruling in the November Entry stemmed from a FirstEnergy proposal at an untranscribed prehearing conference,²⁹ and it is that entry that is unexplained.

The Joint Appeal was submitted to argue the position taken by the OCC and CKAP, and the December Entry now provides an explanation for the procedure that will be followed regarding pre-filed testimony.

²⁷ Ohio Adm. Code 4901-1-12(A).

²⁸ November Entry at 2, ¶(5).

²⁹ Care should be taken to not turn untranscribed pre-hearing conferences into a new litigation battlefield. The Commission’s rules do not support such a result, and they do not give warning that rulings will be made based upon unrecorded motions and without the opportunity to fully develop and present arguments.

B. FirstEnergy's Motion Fails to Meet the Requirements for Certification.

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...."³⁰ As stated in the foregoing arguments, the determination that non-expert testimony need not be pre-filed is neither a new or novel question of interpretation, law, or policy nor a departure from the Commission's practice. Live, direct testimony by non-experts is a matter that is neither uncommon for the Commission nor to FirstEnergy.

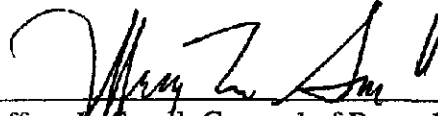
III. CONCLUSION

For the reasons set forth above, FirstEnergy's Appeal should not be certified to the full Commission. The ruling in the December Entry that requires only the pre-filing of expert testimony should not be reversed or modified.

³⁰ Ohio Adm. Code 4901-1-15(B).

Respectfully Submitted,

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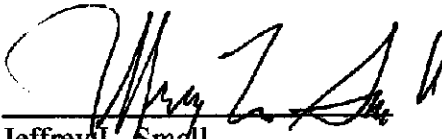
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Memorandum Contra was served by regular U.S. Mail, prepaid, to the counsel identified below (provided electronically to the Attorney Examiners) this 3rd day of January, 2011.



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