

**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)	Case No. 11-411-EL-ACP
Of a Force Majeure Determination for a)	
Portion of the 2010 Solar Energy)	
Resources Benchmark Requirement)	
Pursuant to Section 4928.64(C)(4) of the)	
Ohio Revised Code and Section 4901:1-)	
40-06 of the Ohio Administrative Code)	

**INTERLOCUTORY APPEAL
REQUEST FOR CERTIFICATION TO THE COMMISSION
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
THE OHIO ENVIRONMENTAL COUNCIL, AND
THE ENVIRONMENTAL LAW AND POLICY CENTER**

The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Environmental Council ("OEC") and the Environmental Law and Policy Center ("ELPC," collectively, "OCEA"),¹ on behalf of certain customers, including the residential customers of the Ohio Edison Company, the Cleveland Electric Illuminating Company (collectively "FirstEnergy" or "Companies"), hereby submits this Interlocutory Appeal ("Appeal") to the Public Utilities Commission of Ohio ("PUCO" or "Commission"). This case involves the Application of FirstEnergy for a *force majeure* determination so that it can be excused from meeting the statutory benchmarks for solar energy from sources within

¹ Pursuant to Ohio Adm. Code 4901-1-15.

Ohio in 2010.² This case, in which FirstEnergy seeks a second consecutive waiver of its solar energy requirements, presents the Commission with one of the most important questions under S.B. 221 since the law into effect in 2008. The undersigned members of OCEA respectfully request the certification³ of this Appeal to the Commission for modification of the Attorney Examiner's March 2, 2011 *Entry* ("Entry")⁴ that establishes the procedural schedule in this case.

OCEA appreciates that the Attorney Examiner is executing the Ohio Administrative Code rule⁵ which requires the Commission to set a procedural schedule to process any *force majeure* request. But the proposed schedule will not allow the parties to conduct even one set of discovery and will not allow for a meaningful review of FirstEnergy's request. Therefore, as set forth in the attached Memorandum in Support, the procedural schedule presented in the *Entry* presents a new or novel question of interpretation and policy which would prejudice the development of fully informed advocacy on behalf of those customers and interests represented by undersigned members of OCEA on the Companies' Application. Accordingly, this Appeal should be certified for an immediate determination by the Commission to prevent undue prejudice⁶ to the approximately 1.9 million residential customers of FirstEnergy, as represented by OCC, and other customers and interests, as represented by ELPC and OEC.

² R.C. 4928.64 (B)(2)

³ See Ohio Adm. Code 4901-1-15(B).

⁴ As required by Ohio Adm. Code 4901-1-15(C), a copy of the *Entry* is attached.

⁵ Ohio Adm. Code 4901:1-40-06(A) states that: "The process and timeframes for such a [*force majeure*] determination shall be set by entry of the commission, the legal director, deputy legal director, or attorney examiner."

⁶ See Ohio Adm. Code 4901-1-15(B).

Upon review, the Commission should: (1) modify⁷ the *Entry* and extend the deadline for filing comments on the Companies' Application from March 23, 2011, to April 4, 2011, and extend the reply comment deadline from April 4, 2011, to April 11, 2011; (2) shorten the discovery response time from twenty days to seven days; and (3) require service of discovery by email. This proposal will allow additional time for intervening parties to receive, review and incorporate results from discovery conducted in this case. This schedule will allow time for the Commission to review all comments and reply comments, and render a decision within the ninety days as required by the rule.⁸

The reasons for this Appeal, including the request for certification, are more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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⁷ Ohio Adm. Code 4901-1-15(E)(1).

⁸ Ohio Adm. Code 4901:1-40-06(A) states that "A decision on a request for a force majeure determination will be rendered within ninety days of an electric utility or electric services company filing a request for such determination."

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

FirstEnergy has applied to receive a *force majeure* determination so that it can be excused from meeting the statutory benchmarks for solar energy from sources within Ohio in 2010. This is the second consecutive year in which FirstEnergy has sought a *force majeure* waiver of its solar energy benchmark.⁹ FirstEnergy's Application could affect its customers, including residential customers, by causing further delay of solar power development and the benefits solar power would provide under Senate Bill 221 ("S.B. 221"). The Application was filed on January 24, 2011. By its own Rule, the Commission is required to issue a ruling within ninety days of the filing.¹⁰ OCC is the state agency that, pursuant to Ohio law, represents the residential customers of utility

⁹ See *In the matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Force Majeure Determination for a portion of the 2009 Solar Energy Resources Benchmark*, Case No. 09-1922-EL-EEC (December 7, 2009).

¹⁰ Ohio Adm. Code 4901:1-40-06(A)

companies such as FirstEnergy. OCC has a pending motion to intervene, filed on February 8, 2011. The OEC is a non-profit, charitable organization comprised of a network of over 100 affiliated member groups whose mission is to secure a healthier environment for all Ohioans. The OEC has a pending motion to intervene, filed on January 31, 2011. ELPC is a non-profit environmental advocacy organization whose mission is to improve the Midwest's environmental quality and economic development and has members in Ohio. ELPC also has a pending motion to intervene, filed on February 17, 2011.

By *Entry* dated March 2, 2011, the Attorney Examiner established a procedural schedule for this proceeding that may not allow the parties to complete even one set of discovery. OCEA appreciates that the proposed procedural schedule allows for initial and reply comments from all parties. Even with the 90-day time line for the case, residential customers should nonetheless be provided sufficient time to prepare for the filing of the comments. Significantly, that preparation is based upon the discovery process under the PUCO's rules, which in this case includes both OCC's discovery that is pending in this case and further discovery.

As discussed herein, the scheduled due dates for comments and replies, in combination with the lack of expedited time lines for discovery responses, will unduly prejudice OCC and the residential customers it represents by not allowing sufficient time for case preparation in advance of the filing of comments. OEC and ELPC will be similarly prejudiced because they are unable to issue discovery requests or review responses to OCC's discovery. Therefore, the undue prejudice created by the current procedural schedule qualifies for an interlocutory review.

II. OCEA’S INTERLOCUTORY APPEAL SHOULD BE CERTIFIED FOR THE COMMISSION TO CONSIDER MODIFYING THE CURRENT PROCEDURAL SCHEDULE.

The Commission will review an Attorney Examiner’s ruling if the Attorney Examiner (or other PUCO personnel) certifies the Appeal. The standard applicable to certifying an appeal is that “the appeal ... is taken from a ruling which represents a new or novel question of interpretation, law, or policy [...] and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”¹¹

A. An Immediate Determination is Needed to Prevent Undue Prejudice.

OCEA’s Appeal should be certified to the Commission. First, an “immediate determination” by the Commission is needed to prevent undue prejudice to OCEA and FirstEnergy’s customers, including residential customers. The undue prejudice will result from the denial of adequate discovery under the current time line, which will not be rectifiable if the Commission later determines when it resolves this case that the procedural schedule provided too little preparation time.

In support of the need for an immediate determination, it should be recognized that Ohio law and rule provide for parties to have adequate case preparation in advance of opportunities to advocate to the Commission. R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” The undersigned members of OCEA filed motions to intervene, which are pending before the Commission,¹² and thus

¹¹ Ohio Adm. Code 4901-1-15(B).

¹² The OCC filed a Motion to Intervene on February 8, 2011.

are parties according to Ohio Adm. Code 4901-1-16(H).¹³ Additionally, R.C. 4903.082 directs the Commission to ensure that parties are allowed “full and reasonable discovery” under its rules.

The *Entry*, in establishing an imminent comment deadline of March 23, 2011, does not provide OCEA with the “ample rights of discovery” or the “full and reasonable discovery” as required by a law. Indeed, the Supreme Court of Ohio reversed a decision of the PUCO where OCC’s motion to compel answers to discovery was denied.¹⁴. Therefore, OCEA and the FirstEnergy customers OCEA represents will be unduly prejudiced by being unable to adequately use discovery for the filing of comments.

In addition, the Commission has adopted Ohio Adm. Code 4901-1-16(A) that provides:

The purpose of rules 4901-1-16 to 4901-1-24 of the Administrative Code is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.

This rule, with its focus on thorough preparation, directly supports OCEA’s request for certification. The requirement in Senate Bill 221 to obtain solar energy generation, from which the Companies are requesting a *force majeure* waiver, is intended to benefit Ohioans. But this is the second consecutive year that the Companies have requested a *force majeure* determination. Given the serious nature of this repeat request, OCC sent discovery in order to, as the rule above states, “facilitate thorough and adequate preparation for participation” in this proceeding. And OCC expects to have follow-up

¹³ Ohio Adm. Code 4901-1-16(H) states: “For purposes of rules 4901-1-16 to 4901-1-24 of the Administrative Code, the term “party” includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.”

¹⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 2005-Ohio-5789, 856 N.E.2d 213, at ¶86.

discovery, along with the possibility that some discovery may require time for dispute resolution by the parties. OCC, in its advocacy for residential customers, and the other undersigned members of OCEA, must have sufficient time to conduct discovery and employ the discovery answers received in the preparation of its comments. OEC and ELPC should also deserve the opportunity to review responses to OCC's discovery and to issue their own discovery requests.

The modification to the procedural schedule proposed by OCEA will prevent the likelihood (or the virtual certainty) of undue prejudice that would result from the current procedural schedule. Therefore, the OCEA respectfully requests that the Appeal be certified to the full Commission for review.

B. The Ruling Presents a New or Novel Question of Interpretation, Law, or Policy.

The *Entry* presents a new or novel question of interpretation, law or policy. A review of the previous cases in which *force majeure* requests were made reveals that, although the timelines from each application filing to a decision varied significantly, in all cases parties were provided sufficient time to file comments on the applications.¹⁵ In one case, the PUCO Staff sent out and received data requests prior to comments submitted and the Commission's decision.¹⁶ Just as the Staff used data requests to

¹⁵ The exception is *In the Matter of the Application of Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark*, Case No. 10-428-EL-ACP. In that case, no party intervened and no comments were filed.

¹⁶ *In the Matter of the Application of Columbus Southern Power Company for Amendment of the 2009 Solar Energy Resource Benchmark, Pursuant to Section 4928.64(C)(4), Ohio Revised Code*, Case No. 09-987-EL-EEC, et al. Although no procedural schedule was issued in this case, the AEP Companies answered PUCO staff-issued data requests on 12/7/09, comments were filed by several parties on 12/15/09 and the Commission issued a Finding and Order on 1/7/10).

develop their position, OCC, OEC and ELPC request the use of discovery to develop theirs.

This is the first time that a procedural schedule has been issued in a *force majeure* waiver docket¹⁷ Unlike the circumstances that existed in the previous or pending cases, this schedule may impair the ability of parties to adequately prepare comments in this case. Therefore, the Appeal should be certified for review.

OCEA appreciates that a procedural schedule, as required by the rule, is being incorporated into these cases. But the procedural schedule should accommodate adequate case preparation. Thus, the procedural schedule, while a requirement in the case, should not limit any party's ability to fully participate in the proceeding.

Furthermore, past precedent does not show strict adherence to the ninety-day timeline. Of the cases filed after the applicable rule was in effect¹⁸, only two had PUCO decisions issued in ninety days.¹⁹ The other four cases were only recently settled after an extended period of time or are still pending.²⁰ Thus, OCEA is recommending that, if

¹⁷ This section assumes that the current procedural schedule in this case was designed to assist with adherence to the ninety-day completion requirement.

¹⁸ Rule 4901:1-40-06(A) became effective on December 10, 2009.

¹⁹ See *In the Matter of the Application of The Dayton Power and Light Company for a Force Majeure Determination with Regard to DP&L's 2009 Ohio Solar Energy Resource Benchmark*, Case No. 09-1989-EL-ACP (Application filed on 12/23/2009 – Finding and Order issued on 3/17/2009); and *In the Matter of the Application of Retail Electric Supply Association for an Amendment to the 2009 Solar Energy Resource Benchmark*, Case No. 10-428-EL-ACP (Application filed on 4/2/2010 – Finding and Order issued on 4/28/2010). The latter case had no intervenors.

²⁰ Settled after several months were: (1) Duke Energy, Case No. 10-513-EL-ACP (Application filed 4/15/2010 – Finding and Order issued 2/9/2011); (2) FirstEnergy Solutions, Case No. 10-467-EL-ACP (Application filed 4/15/2010 – Finding and Order issued 2/23/2011); (3) Duke Energy Retail Sales, Case No. 10-509-EL-ACP (Application filed 4/15/2010 – Finding and Order issued 2/23/2011). The fourth case, Dayton Power and Light Energy Resources, Case No. 09-2006-EL-ACP - Application filed on December 30, 2009 – is still pending.

necessary, the portion of the rule that requires a decision in ninety days be waived by the Commission in order to allow all parties thorough and adequate preparation.²¹

OCEA is not suggesting that the Commission significantly delay its decision in this case. Rather OCEA is asking for a modification to the procedural schedule that allows for discovery activities to be conducted prior to the comment submission deadline, in order for the parties to review and incorporate discovery answers from the Companies into their comments. Accordingly, the modification of the procedural schedule to allow sufficient time for discovery requests to be served, answered and reviewed qualifies for an interlocutory review.

III. THE COMMISSION SHOULD REVIEW THE *ENTRY* ESTABLISHING THE PROCEDURAL SCHEDULE AND MODIFY IT TO ESTABLISH A DEADLINE FOR INITIAL COMMENTS ON APRIL 4, 2011, AND REPLY COMMENTS ON APRIL 11, 2011.

As previously indicated, OCC, on behalf of FirstEnergy residential customers, served discovery in this case.²² Discovery may provide additional, substantive information on how the Companies pursued the in-state solar requirements listed in R.C. 4928.64(B)(2) for 2010. FirstEnergy also failed to meet this goal in 2009.²³ In the 2009 case, the Commission granted the *force majeure* determination contingent on the Companies meeting their 2010 benchmarks, which were modified to include the 2009

²¹ Ohio Adm. Code 4901:1-40-02(B): “The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.”

²² OCC served discovery on March 1, 2011.

²³ *In the matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for approval of a Force Majeure Determination for a portion of the 2009 Solar Energy Resources Benchmark*, Case No. 09-1922-EL-EEC, Application at 1 (December 7, 2009).

shortfall.²⁴

In order to make informed comments on the Companies' Application, OCEA must have sufficient time to review the pending discovery. In order to do so, the initial comment deadline should be modified from March 23, 2011, to April 4, 2011, and the reply comment deadline should be modified from April 4, 2011, to April 11, 2011. These modifications allow discovery to be incorporated into OCEA's comments as necessary.

The Commission, through the comments submitted by parties in their comments, will be able to make an informed decision. Distributed generation and solar energy in particular are important parts of advancing Ohio's energy policies under S.B. 221. Thus it is important to for the PUCO to have comments that inform, but at the same time are informed. The outstanding discovery requests are an important part of the information gathering in this case. Therefore, the Commission should allow these discovery activities to be completed and employed in this case.

Under Ohio Adm. Code 4901-1-15(E)(1), the Commission may modify an Attorney Examiner's *Entry*. The Commission should modify the *Entry* and extend the procedural comment deadlines, for the reasons stated above.

As part of rescheduling the deadlines for the comments and reply comments to accommodate thorough case preparation, the Commission should also shorten the time for responding to discovery requests. Ohio Adm. Code 4901-1-19(A) and 4901-1-20(C) allow the PUCO to shorten the response times for discovery.

The short time frame established under rule 4901:1-40-06(A), coupled with the current procedural schedule, provides the parties with a very limited time in which to

²⁴ Id., Finding and Order at 4 (March 10, 2010).

review the Application and formulate recommendations regarding the Application. Yet at the same time, the issues presented by the Application have far-reaching effects on Ohio's renewable energy policies. Thus, the investigation of this Application is important. But the general twenty-day response period set under, for example, Ohio Administrative Code 4901-1-19(A) will not accommodate both an adequate review time and the short case timeline.

However, under Ohio Administrative Code 4901-1-19(A), the Commission, legal director, deputy legal director, or an attorney-examiner may direct responses to discovery to be served within a shorter period of time.²⁵ OCEA seeks a ruling that requires the Companies to respond to discovery within seven days of the service of discovery requests.²⁶ Moreover, the Commission should require service of all discovery requests and responses by email.²⁷

The shortened discovery response time, as requested, will allow OCEA to conduct discovery activities and use discovery responses to further develop positions in this proceeding. Further, it will not significantly alter the current procedural schedule. Finally, it will still allow the Commission time to review the comments and reply

²⁵ See also Ohio Adm. Code 4901-1-20(C) permitting the Commission, legal director, deputy legal director, or an attorney-examiner to shorten response times to a request for production of documents.

²⁶ Shortened discovery time has been granted by the PUCO in several cases; for example, in Case No. 10-2586-EL-SSO, discovery response time was shortened to seven days "in light of the time frame for this proceeding [which is ninety days]..." *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer*, Entry at 3 (November 16, 2010); In Case No. 10-734-EL-AEC, discovery response time was shortened to seven days at OCC's request to "facilitate thorough and adequate preparation for participation in this proceeding." *In the Matter of the Application of The Dayton Power and Light Company for Approval of a Unique Arrangement with Caterpillar Inc.*, Entry at 1-2 (July 30, 2010); and in Case No. 10-733-GA-RDR, the discovery response time was again shortened to seven days "In light of the time frame for this proceeding..." *In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Pipeline Infrastructure Replacement Program Cost Recovery Charge and Related Matters*, Entry at 3 (September 3, 2010).

²⁷ Service by email is allowed, but not required, under Ohio Adm. Code 4901-1-5(C).

comments within the ninety-day rule requirement. The Commission should grant the OCEA's requests for shortening the discovery response time and for serving discovery requests and responses by email.

IV. CONCLUSION

For the reasons set forth above, this Appeal should be certified to the Commission. This case, in which FirstEnergy seeks a second consecutive waiver of its solar energy requirements, presents the Commission with one of the most important questions under S.B. 221 since the law into effect in 2008. Upon review, the Commission should modify the Attorney Examiner's *Entry* by: (1) rescheduling the comment deadlines from March 23, 2011, to April 4, 2011 for initial comments, and from April 4, 2011, to April 11, 2011, for reply comments; (2) shortening the discovery response time from twenty days to seven; and (3) requiring service of discovery by email. This will eliminate the likelihood of undue prejudice and allow OCEA, on behalf of FirstEnergy's customers, including residential customers, to complete discovery activities and employ the information for preparation of comments.

Respectfully submitted,

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CONSUMERS' COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Interlocutory Appeal* was provided to the persons listed below via regular U.S. Mail Service, postage prepaid, this 7th day of March, 2011.

/s/ Christopher J. Allwein

Christopher J. Allwein
Assistant Consumers' Counsel

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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 Approval of a Force)
Majeure Determination for a Portion of the) Case No. 11-411-EL-ACP
2010 Solar Energy Resources Benchmark)
Requirement Pursuant to Section)
4928.64(C)(4), Revised Code, and Rule 4901:1-)
40-06, Ohio Administrative Code.)

ENTRY

The attorney examiner finds:

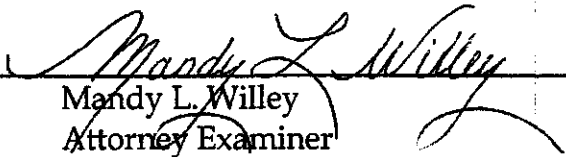
- (1) On January 24, 2011, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the Companies) filed an application requesting that the Commission make a force majeure determination regarding the Companies' compliance with the solar energy resources (SER) benchmark for 2010. In the application, the Companies assert that, despite implementing an aggressive strategy, the Companies were unable to meet their SER benchmark for 2010. Consequently, the Companies request that the Commission make a force majeure determination to reduce the Companies' aggregate SER benchmark to the amount actually acquired by the Companies in 2010.
- (2) In order to thoroughly review the Companies' application, the attorney examiner finds that the following procedural schedule should be established pursuant to Rule 4901:1-40-06(A), Ohio Administrative Code:
 - (a) The deadline for the filing of comments on the Companies' application shall be 21 days from the date of this entry.
 - (b) The deadline for all parties to file reply comments shall be 31 days from the date of this entry.

It is, therefore,

ORDERED, That the procedural schedule set forth in finding (2) be adopted. It is, further,

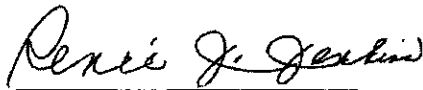
ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Mandy L. Willey
Attorney Examiner

JRG /sc

Entered in the Journal
MAR 02 2011



Renee J. Jenkins
Secretary

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in

Case No(s). 11-0411-EL-ACP

Summary: Text Interlocutory Appeal Request for Certification to the Commission and Application for Review by the Office of the Ohio Consumers' Counsel, The Ohio Environmental Council, and The Environmental Law and Policy Center electronically filed by Mrs. Mary V. Edwards on behalf of ALLWEIN, CHRISTOPHER J and The Office of the Ohio Consumers' Counsel