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 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.	**)**	**Case No. 11-411-EL-EEC**

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

I. Introduction

Pursuant to O.A.C. 4901-1-15(D), Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") submit this Memorandum Contra the Interlocutory Appeal, Request for Certification to the Commission and Application for Review (the "Request") filed by the Ohio Consumers' Counsel ("OCC"), the Ohio Environmental Council ("OEC"), and the Environmental Law and Policy Center ("ELPC") (collectively, the "Companies"). As set forth more fully below, Applicants fail to demonstrate that an interlocutory appeal is necessary in this matter. Applicants knew that R.C. § 4928.64(B)(4)(a) and the Commission's Rules required a decision on the Companies' *force majeure* request within 90 days of its filing. Applicants also knew that the Rules required the setting of a procedural schedule in this matter. The procedural schedule established by the Attorney Examiner in this proceeding does not involve a new or novel question of law or policy

and does not unduly prejudice Applicants. Accordingly, the Attorney Examiner should deny the Applicants request for a Rule 4901-1-15(B) certification of their request for interlocutory appeal.

II. Law and Argument

1. Case background and legal standards.

The Companies filed their Application on January 24, 2011 requesting that the Commission make a *force majeure* determination. In the Application, the Companies demonstrated that despite diligent efforts, they were unable to meet their solar energy resources benchmark in 2010. R.C. § 4928.64(B)(4)(a) and O.A.C. 4901:1-40-06(A) require the Commission to render a decision on the Companies' request within 90 days of its filing. Within two weeks of the Companies' filing, OCC and OEC moved to intervene and thereby were positioned to serve discovery on the Companies. *See* O.A.C. 4901-1-16(H). On March 2, 2011, the Attorney Examiner issued its Entry requiring comments on the Application to be filed within 21 days of the Entry with reply comments to be filed within 31 days of the Entry. This Entry is also mandated by O.A.C. 4901:1-40-06(A), which requires the commission, the legal director, deputy legal director, or attorney examiner to issue an entry establishing the timeframe for a decision on the Companies' request.

OCC did not serve discovery on the Companies until March 1, 2011.[1] On March 7, 2011, Applicants filed the instant interlocutory appeal request in which they requested that the Attorney Examiner certify for review by the Commission the issuance of a procedural schedule. Applicants further argued that, on appeal, the Commission should modify the Entry by extending the comment and reply comment deadline; shortening the discovery response time from twenty to seven days; and requiring the Companies to serve their discovery responses by email.

[1] As of this filing, neither the OEC nor the ELPC has served any discovery on the Companies despite their joinder to the Request and arguments that such discovery is necessary to comment on the Companies' Application.

Applicants are not seeking an immediate interlocutory appeal to the Commission, as nothing alleged in their joint interlocutory appeal would meet any of the requirements set forth in O.A.C. 4901-1-15(A). O.A.C. 4901-1-15(B) states that an appeal shall not be certified unless:

> 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 an undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

Applicants' interlocutory appeal does not meet the standard necessary for certification, and therefore should be denied.

2. The Entry does not involve a new or novel question of interpretation, law, or policy.

Applicants assert that the Entry presents a new or novel question of interpretation, law, or policy because this is the first Application in which the Commission has established a procedural schedule and because only two previous *force majeure* requests have been approved within the 90-day review period. Request, pp. 4-6. However, as previous attorney examiners have found, "the issuance of a procedural schedule does not involve a new or novel question of law or policy."[2] Indeed, "[e]stablishing a procedural schedule in a Commission proceeding is a routine matter with which the Commission and its examiners have had long experience."[3] The Entry and timeline associated therewith are reasonable and, in fact, necessary to meet the 90-day review period established by statute and the Commission's Rules. The schedule issued in this case is not new or novel – it is explicitly required by the Commission's Rules.

[2] *In the matter of the application of Vectren Energy Delivery of Ohio, Inc. for approval, pursuant to Revised Code Section 4929.11 of a Tariff to Recover Conservation Expenses and Decoupling Revenues pursuant to Automatic Adjustment Mechanisms and for such accounting authority as may be required to defer such expenses and revenues for future recovery through such adjustment mechanisms*, Entry (February 12, 2007) at ¶ 12 (denying request for certification of an interlocutory appeal from entry establishing procedural schedule).
[3] *Id.*

Applicants also assert that a new or novel question is presented here because the procedural schedule established by the Commission will not provide them with sufficient time to file comments on the Companies' Application. Accordingly, they request that the Commission waive the 90-day review period in this proceeding.[4] Request, pp. 5-6. However, O.A.C. 4901:1-40-02 states that the Commission may "waive any requirement of this chapter, *other than a requirement mandated by statute*." (emphasis added). Since the 90-day review period is statutorily mandated by R.C. § (B)(4)(b), it may not be waived. The procedural schedule did not prevent the Solar Alliance from filing its comments on the Companies' *force majeure* request. Moreover, Applicants fail to demonstrate how compliance with the Commission's Rules is a new or novel question. The procedural deadline established by the Attorney Examiner is necessary to "thoroughly review the Companies' application" and does not present a new or novel issue of law. Entry, ¶ 1. Accordingly, Applicants' request for certification should be denied.

3. The Entry does not represent a departure from past Commission precedent that unduly prejudices Applicants.

Applicants also fail to demonstrate that the Entry represents a departure from past precedent requiring an immediate Commission determination to prevent undue prejudice or expense. In fact, granting Applicants' request would unduly prejudice the Companies by possibly causing a delay of the Commission's decision on the Companies' Application. This would have a drastic effect on the Companies' compliance plans for next year. Likewise, if the request is not granted, the Companies will need to make the statutorily required renewable energy compliance payment, which will also affect its compliance plans for next year. Therefore, it is the Companies, not Applicants, who will be prejudiced by an interlocutory appeal of the procedural Entry that delays these proceedings.

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Applicants argue that the schedule established here prejudices them by failing to provide them with the "ample rights of discovery" or the "full and reasonable discovery" required by the Commission's Rules. Request, pp. 2-4. But the Entry is in fact consistent with the Commission's Rules. Applicants knew of the statutorily established 90-day review period of the Companies' request. Applicants also must be aware of the Commission's rule directing that "discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible." O.A.C. 4901-1-17(A). OCC's decision to wait until more than a third of the review period had passed, and the other intervenors' decision not to undertake any discovery efforts at all, is no one's fault but their own. Even if the Applicants could successfully argue that the Entry will unduly prejudice them, any prejudice is the result of their own failure to serve discovery requests despite knowledge that the Commission must render a decision on the Companies' request within 90 days. Accordingly, Applicants' request for certification to the Commission should be denied.

4. The Commission should not alter the procedural schedule established by the Attorney Examiner.

Finally, Applicants request that if their request is certified, the Commission should extend the comment deadlines, shorten the discovery response time, and require the Companies to serve their responses by e-mail. Request, pp. 6-9. Again, however, Applicants fail to justify their requested relief. The procedural schedule was established in this case to facilitate the thorough and complete review of the Companies' *force majeure* request in the time period required by the Commission's Rules. Applicants offer no persuasive justification for modifying the procedural schedule established by the Attorney Examiner, and their request to do so should be denied.

III. Conclusion

Applicants have failed to demonstrate that an appeal from the Entry establishing a procedural schedule in this matter either presents a new or novel question of interpretation, law, or policy or represents a departure from past precedent. Applicants knew, or should have known, that O.A.C. 4901:1-40-06 required the Commission to render a decision on the Companies' Application within 90 days of its filing. Accordingly, their request for certification should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra the Interlocutory Appeal, Request for Certification to the Commission and Application for Review of The Ohio Consumers Counsel, the Ohio Environmental Council and the Environmental Law and Policy Center* was served via regular U.S. Mail this 16th day of March, 2011 upon the following parties of record.

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Summary: Memorandum Contra the Interlocutory Appeal, Request for Certification to the Commission and Application for Review of the Office of the Ohio Consumers' Counsel, the Ohio Environmental Council and the Enviornmental Law and Policy Center electronically filed by Mr. Kevin P. Shannon on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company