

**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 Authority to)	Case No. 12-1230-EL-SSO
Establish a Standard Service Offer)	
Pursuant to R.C. § 4928.143 in the Form)	
of an Electric Security Plan.)	

**INTERLOCUTORY APPEAL
BY
ENVIRONMENTAL LAW AND POLICY CENTER
NATURAL RESOURCES DEFENSE COUNCIL
NORTHEAST OHIO PUBLIC ENERGY COUNCIL
NORTHWEST OHIO AGGREGATION COALITION
OFFICE OF THE OHIO CONSUMERS' COUNSEL
SIERRA CLUB**

The Environmental Law and Policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Council, Office of the Ohio Consumers' Counsel, and Sierra Club (collectively, the "Consumer Advocates" or "Appellants"), hereby submit this Interlocutory Appeal¹ to the Public Utilities Commission of Ohio ("PUCO" or "the Commission") and respectfully request the Commission to reverse the Attorney Examiner Entry issued April 19, 2012 in the above-referenced proceeding. That ruling is a departure from Ohio law and can be interpreted to impose limits on the ability of the Consumer Advocates to advocate for FirstEnergy customers in this case before the PUCO. The Attorney Examiners April 19, 2012 Entry established an unreasonable procedural schedule that departs from R.C. 4928.143 XXX and puts the Consumer Advocates at a distinct disadvantage preparing testimony and for

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

a hearing within 21 days and 38 days, respectively, from the date the Companies filed the Application without ample discovery.

Modification of the procedural schedule will prevent severe prejudice to Appellants that will result from denial of due process rights in this proceeding where issues involving fundamental rate making issues will be addressed.

The reasons for this Interlocutory Appeal are explained in the attached Memorandum in Support.

Respectfully submitted,

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**REQUEST FOR CERTIFICATION
AND
APPLICATION FOR REVIEW
AND
MEMORANDUM IN SUPPORT**

I. REQUEST FOR CERTIFICATION AND APPLICATION FOR REVIEW

Ohio Adm. Code 4901-1-15(B) states:

Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless [1] he or she finds that: the appeal presents a new or novel question of interpretation, law, or policy, or [2] 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 to one or more of the parties, should the commission ultimately reverse the ruling in question.

The Consumer Advocates Appeal meets both criteria for certification.

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

On April 13, 2012, FirstEnergy filed an application (“Application”) pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016. The application is for an electric security plan (ESP), filed pursuant to R.C. 4928.143. The Application included a Stipulation and Recommendation (“Stipulation”) agreed to by various parties regarding the terms of the proposed ESP (ESP 3).

Six days later, the Attorney Examiner issued an Entry establishing a procedural schedule. In the April 19, 2012 Entry the Attorney Examiner issued an Entry that established the procedural schedule for this case. The Entry states:

The attorney examiner finds that the following procedural schedule is practicable and should be established for this proceeding:

- (a) Supplemental testimony on behalf of FirstEnergy and other signatory parties should be filed by April 23, 2012.
- (b) Pursuant to Rule 4901:1-35-05, Ohio Administrative Code (O.A.C), a technical conference regarding the application should be held on April 26, 2012, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-B, Columbus, Ohio.
- (c) Pursuant to Rule 4901:1-35-06(B), O.A.C, motions to intervene in this proceeding should be filed by April 30, 2012.
- (d) Testimony on behalf of non-signatory parties should be filed by May 4, 2012.
- (e) The evidentiary hearing shall commence on May 21, 2012, at 10:00 a.m., at the offices of

12-1230-EL-SSO -3-the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-C, Columbus, Ohio.²

The Commission's Entry violates Ohio law and Commission rules.

Ohio law establishes the period of time for the Commission to review an ESP filing. R.C. 4928.143 (C)(1) states:

The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, **for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. * * *. (Emphasis Added).**

The law provides for a two hundred seventy-five day period of time for the review of FirstEnergy's ESP 3 plan. The Attorney Examiner entry falls far short of the period of time allotted under the statute and Commission precedent.

The Commission will review an Attorney Examiner's ruling if the Attorney Examiner (or other PUCO personnel) certifies the Appeal. As shown above, 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."³

² Entry at 2-3.

³ Ohio Adm. Code 4901-1-15(B).

A. The Ruling Represents a New or Novel Question of Interpretation, Law or Policy.

The ruling establishes a new or novel approach to the law regarding ESPs. In this regard, the 275-day schedule in the law for electric security plans has been dramatically reduced. This new and novel approach to the time line of an ESP will not allow for the processing of the case in a way that will provide the contemplated opportunity for all parties to advocate their positions to the PUCO for informed PUCO decision-making.

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

This Appeal should be certified to the Commission. First, an “immediate determination” by the Commission is needed to prevent undue prejudice to the Parties listed below 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.” 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 a deadline for filing of testimony of non-signatory parties by May 4, 2012 with a hearing deadline of May 21, 2012, does not provide the non-signatory parties 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.⁴

Therefore, the undersigned Parties and the FirstEnergy customers they represent, including residential consumers, 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 this request for certification.

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

III RECOMMENDATION AND CONCLUSION

The Commission should modify the procedural schedule to set a time line for this case that allows for at least three months of discovery before a deadline for non-signatory parties to file testimony and prepare for a hearing. For all the reasons stated above, the Commission should grant the Interlocutory Appeal.

⁴ *Ohio Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St.3d 300, 2005-Ohio-5789, 856 N.E.2d 213, at ¶86.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application was served upon the persons listed below, electronically, this 24th day of April 2012.

/s/ Larry S. Sauer

Larry S. Sauer

Assistant Consumers' Counsel

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Ohio Edison Company,)
The Cleveland Electric Illuminating)
Company, and The Toledo Edison)
Company for Authority to Provide for a) Case No. 12-1230-EL-SSO
Standard Service Offer Pursuant to Section)
4928.143, Revised Code, in the Form of an)
Electric Security Plan.)

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On April 13, 2012, FirstEnergy filed an application pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO) commencing as early as May 2, 2012, but no later than June 20, 2012, and ending May 31, 2016. The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation agreed to by various parties regarding the terms of the proposed ESP (ESP 3). FirstEnergy states in the stipulation that the stipulation is the product of lengthy, serious bargaining among knowledgeable and capable parties in a cooperative process. Additionally FirstEnergy states that FirstEnergy and numerous other parties have engaged in a wide range of discussions over a period of time related to the development of the ESP 3, which extends, with modifications, a stipulation and second supplemental stipulation modified and approved by the Commission in Case No. 10-388-EL-SSO (ESP 2) for an additional two years.

- (3) In its application, FirstEnergy requests that all parties who participated as intervenors in the ESP 2 be granted intervention in this proceeding without the need for the filing of additional motions. The attorney examiner finds that this request is reasonable and should be granted.
- (4) Further, FirstEnergy requests that the Commission set an expedited procedural schedule for the stipulated ESP because, if approved by May 2, 2012, the plan includes provisions to allow FirstEnergy to bid demand response resources and energy efficiency resources into the 2015/2016 PJM base residual auction on May 7, 2012, or, if approved by June 20, 2012, to permit adequate time to implement changes to the bidding schedule to capture a greater amount of generation at lower prices for the benefit of customers.
- (5) The attorney examiner finds that the following procedural schedule is practicable and should be established for this proceeding:
 - (a) Supplemental testimony on behalf of FirstEnergy and other signatory parties should be filed by April 23, 2012.
 - (b) Pursuant to Rule 4901:1-35-05, Ohio Administrative Code (O.A.C.), a technical conference regarding the application should be held on April 26, 2012, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-B, Columbus, Ohio.
 - (c) Pursuant to Rule 4901:1-35-06(B), O.A.C., motions to intervene in this proceeding should be filed by April 30, 2012.
 - (d) Testimony on behalf of non-signatory parties should be filed by May 4, 2012.
 - (e) The evidentiary hearing shall commence on May 21, 2012, at 10:00 a.m., at the offices of

the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-C, Columbus, Ohio.

- (6) Local public hearings will be scheduled, and publication of notice required, by subsequent entry.
- (7) In light of the time frame for preparation for the hearing in this matter, the attorney examiner requires that, in the event that any motion is made in this proceeding, any memoranda contra shall be required to be filed within five business days after the service of such motion, and any reply memorandum within three business days after the service of a memorandum contra. Moreover, the provisions of Rule 4901-1-07(B), O.A.C., which permits three additional days to take action if service is made by mail, will not apply. Parties are encouraged to take advantage of Rule 4901-1-05(C), O.A.C., which provides that service of pleadings may occur by facsimile transmission or electronic message. In addition, response time for discovery should be shortened to 10 days. Discovery requests and replies shall be served by hand delivery, e-mail or facsimile (unless otherwise agreed by the parties). An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming (unless otherwise agreed by the parties). To the extent that a party has difficulty responding to a particular discovery request within the 10-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution.

It is, therefore,


ORDERED, That the procedural schedule set forth in Finding (5) be observed by the parties. It is, further,


ORDERED, That all parties granted intervention in Case No. 10-388-EL-SSO be granted intervention in this proceeding. It is, further,

ORDERED, That all parties comply with the directives set forth in Finding (7). It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record in this proceeding and all parties of record in Case No. 10-388-EL-SSO.

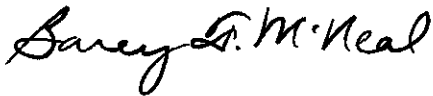
THE PUBLIC UTILITIES COMMISSION OF OHIO


By: Mandy L. Willey
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Barcy F. McNeal
Secretary

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Case No(s). 12-1230-EL-SSO

Summary: Request Interlocutory Appeal by Environmental Law and policy Center, Natural Resources Defense Council, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Sierra Club and the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.