

**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 Nos. 12-2190-EL-POR
Edison Company for Approval of Their	)	12-2191-EL-POR
Energy Efficiency and Peak Demand	)	12-2192-EL-POR
Reduction Portfolio Plans for 2013	)	
through 2015	)	

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**INTERLOCUTORY APPEAL BY ENVIRONMENTAL LAW AND POLICY CENTER,  
NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL,  
AND SIERRA CLUB**

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Environmental Law and Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club (collectively, “Appellants”), hereby submit this Interlocutory Appeal – pursuant to Ohio Administrative Code (“OAC”) Chapter 4901-1-15 – to the Public Utilities Commission of Ohio (“Commission”) and respectfully request the Commission reverse the Attorney Examiner Entry issued August 16, 2012 (“Entry”) in the above-captioned cases. That ruling is a departure from Ohio law. The Entry imposes limits on the ability of Appellants to participate in the cases and provide constructive comments and recommendations to the Commission regarding the proposed energy efficiency and peak demand reduction portfolio plans of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy” or “Companies”). The Entry establishes an unreasonable procedural schedule that departs from OAC 4901:1-39-04(D), unreasonably shortens the public comments period, and puts the Appellants at a disadvantage drafting testimony and preparing for hearings.

Appellants respectfully request that this Commission certifies their interlocutory appeal for these reasons, set forth in more detail in the attached Memorandum in Support.

August 21, 2012

Respectfully submitted,

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application pending)  
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**MEMORANDUM IN SUPPORT OF  
REQUEST FOR INTERLOCUTORY APPEAL**

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**I. REQUEST FOR CERTIFICATION**

OAC 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 he or she finds that 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 undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

As demonstrated below, Appellant's Appeal meets both criteria for certification, and therefore the Attorney Examiner should certify it for immediate review by the Commission.

## **II. THIS 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 certifies the Appeal. As shown above, the standard applicable to certifying an appeal is that (1) "the appeal presents a new or novel question of interpretation, law or policy" or (2) "an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense . . . ." OAC 4901-1-15(B).

On July 31, 2012, the Companies filed an application ("Application") pursuant to Ohio Revised Code ("ORC") § 4928.66, OAC 4901-1-15, and the Commission's February 29, 2012 Entry in Case No. 12-814-EL-UNC<sup>1</sup> for approval of their respective Energy Efficiency and Peak Demand Reduction Plans. The Companies included in their Application a request that the Commission approve a proposed expedited procedural schedule. Three days later, August 3, 2012, Appellants objected to the Companies' proposed procedural schedule. On August 16, 2012, the Attorney Examiner issued an Entry that established the procedural schedule in this case, mostly approving the Companies' request. The Entry states:

- (4) Chapter 4901:1-39, O.A.C., provides that the Commission should establish a procedural schedule for energy efficiency and peak demand reduction program portfolio plans. The attorney examiner has considered the procedural schedules proposed by FirstEnergy as well as the Environmental Advocates and finds that the following procedural schedule is appropriate for these proceedings:
  - (a) To assist interested persons in understanding the applications filed by FirstEnergy, a technical conference shall be held on August 30, 2012, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-B, Columbus, Ohio.
  - (b) Motions to intervene shall be filed by September 17, 2012.

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<sup>1</sup> In the Matter of the Commission's Review of the Participation of [the Companies] in May 2012 PJM Reliability Model Auction, Case No. 12-814-EL-UNC, Entry at 3 (February 29, 2012).

- (c) Pursuant to Rule 4901:1-39-04(D), O.A.C., all objections to FirstEnergy's energy efficiency and peak demand reduction program portfolio plans from 2013 through 2015 shall be filed by September 17, 2012. Pursuant to the rule, any person filing objections shall specify the basis for the objections, including any proposed additional or alternative programs or modifications to the electric utility's proposed program portfolio plan.
- (d) Testimony on behalf of interveners regarding FirstEnergy's energy efficiency and peak demand reduction program portfolio plans shall be filed by October 5, 2012.
- (e) Testimony on behalf of Staff regarding FirstEnergy's energy efficiency and peak demand reduction program portfolio plans shall be filed by October 9, 2012.
- (f) The evidentiary hearing shall commence on October 22, 2012, at 10:00 a.m., at the offices of the Commission, 180 E. Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio.

Ohio law provides for a sixty-day public comment period in which any person can file objections to an electric utility's program portfolio plan, including suggesting new programs and modifications. OAC 4901:1-39-04(D). The Attorney Examiners' Entry shortens this to forty-five days without any justification.

Not only has the Attorney Examiner significantly reduced the time Appellants and other members of the public have to analyze and comment on the plans, it does so without a firm date set for a technical conference. FirstEnergy has already cancelled the November 30, 2012 date set in the Entry, and might not conduct a conference until as late as September 12, 2012, leaving only five days to submit comments and suggested revisions. This shortened comment period will lead to inferior comments by Appellants and other members of the public and will result in inferior portfolio plans.

**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 energy efficiency and peak demand reduction program portfolio plans. The Attorney Examiner has, without explanation, reduced from sixty days to forty-five days the public comment period. In this abbreviated comment period, persons are expected to analyze the proposed plans and then specify “all objections, including any proposed additional or alternative programs, or modifications” to the plans. The Commission has recognized the importance of this comment period, granting an extension of the comment period when it was “concerned that interested parties may not have had a full and fair opportunity to file objections . . . .” Public Utilities Commission of Ohio, Entry, Case No. 09-1986-EL-POR (May 19, 2010). In this case, the shortened comment period is detrimental to the ability of interested parties to have a fair and full opportunity to file comments, especially given the complexity of these plans and the lack of a robust collaborative process leading up to the July 31 filing.

**B. An immediate determination is needed to prevent undue prejudice.**

An immediate determination by the Commission is needed to prevent undue prejudice to the Appellants, members of the public, and FirstEnergy’s customers. The undue prejudice will result from the denial of adequate discovery under the current timeline, which will not be rectifiable if the Commission later determines when it resolves this case that the Attorney Examiner did not provide enough time to conduct discovery, provide comments, and submit testimony.

Ohio law requires the Commission to give parties time for adequate preparation in advance of opportunities to advocate to the Commission. ORC § 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery.” Additionally, ORC § 4903.82

directs the Commission to ensure that parties are allowed “full and reasonable discovery” under its rules.

The Entry, in reducing the public comment period and establishing a deadline for filing intervenor testimony less than three weeks later, does not provide Appellants and other parties the “ample rights of discovery” or the “full and reasonable discovery” as required by law. Therefore, the undersigned Appellants will be unduly prejudiced by the schedule set by the Attorney Examiner.

In addition, the Commission has adopted OAC 4901-1-16(A), which 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 fact that there is not sufficient time even to conduct a technical conference more than at most a couple of weeks before comments are due is indicative of the rush that the Attorney Examiner’s Entry places on interested persons, including Appellants.

### **III. RECOMMENDATION AND CONCLUSION**

The Commission should modify the procedural schedule to restore the sixty-day public comment period and, as set forth in Appellant’s August 3, 2012 filing, set a schedule that allows for at least two and a half months of discovery before intervenor testimony is due. For the reasons stated above, the Commission should grant this Interlocutory Appeal.

August 21, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Interlocutory Appeal submitted on behalf of the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council, and Sierra Club was served by electronic mail, upon the following Parties of Record, this 21<sup>st</sup> day of August, 2012.

/s/ Justin Vickers

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Summary: Petition for Interlocutory Appeal electronically filed by Mr. Justin M Vickers on behalf of Sierra Club and Ohio Environmental Council and Natural Resources Defense Council and Environmental Law & Policy Center