

**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 Program Portfolio Plans for 2013)	
through 2015)	

**MEMORANDUM CONTRA INTERLOCUTORY APPEAL OF ENVIRONMENTAL LAW AND POLICY
CENTER, NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND
SIERRA CLUB OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY AND THE TOLEDO EDISON COMPANY**

I. INTRODUCTION

On July 31, 2012, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “Companies”) submitted an application for approval of their Energy Efficiency and Peak Demand Reduction (“EEPDR”) Program Portfolio Plans for 2013 through 2015 (“Plans”). These Plans are an extension of the EEPDR plans currently in effect and include one new program, existing measures and programs that have been combined and consolidated in order to streamline the administration of the current programs, and the addition of new measures within these consolidated programs.¹

Included in the Application was a proposed procedural schedule that was designed to complete the evidentiary hearings no later than October 31, 2012.² This request was made by the Companies for several reasons. First, Company counsel has a conflict starting in November with two cases in Pennsylvania, which will make the trying of this matter difficult after October. Moreover, counsel may have to be out for several weeks starting in November for personal reasons, but will not know for sure until mid-September. Second, one of the Companies’

¹ Company Exhibit 1 at 7 (Dargie Testimony)(July 31, 2012).

² Application, p. 13 (July 31, 2012).

witnesses is unavailable during the first two weeks of November for personal reasons.³ Therefore, if the hearing is not completed by the end of October, it will have to be postponed until mid- to late-November in order to accommodate the witness' and (perhaps) counsel's availability, which would create an unnecessary delay. And, third, many of the intervening parties, including Ohio Partners for Affordable Energy, Ohio Hospital Association, Ohio Energy Group, Industrial Energy Users of Ohio, Nucor Steel Marion, Inc., and the Council of Smaller Enterprises, do not object to the schedule as proposed by the Companies. Indeed, to date, only the environmental coalition comprised of the Environmental Law & Policy Center, Natural Resources Defense Council, Ohio Environmental Council and Sierra Club (collectively "Environmental Advocates") is opposing the schedule and proposing one that would have the hearing starting the week of November 5, 2012, notwithstanding their knowledge of counsel's potential conflict and the unavailability of the Companies' witness. In other words, there is a two week difference between the procedural schedule proposed by the Companies and that which was proposed by the Environmental Advocates.

On August 16, 2012, the Attorney Examiner issued an Entry in which the procedural schedule proposed by the Companies (with the exception of the date of the technical conference) was approved as proposed:

Companies File EEPDR Plans	July 31, 2012
Technical Conference	August 30, 2012 ⁴
Motions to Intervene Deadline	September 17, 2012
Objections to the EEPDR Plans Due	September 17, 2012
Intervenor Testimony Due	October 5, 2012
Staff Testimony Due	October 9, 2012
Evidentiary Hearing Commences	October 22, 2012

³ Company Exhibit 1, p. 19 (Dargie Testimony).

⁴ The Companies originally proposed an August 20, 2012 date for the technical conference. On August 24, 2012, the Attorney Examiner granted a Motion for Modification of the Procedural Schedule to change this date to September 6, 2012.

On August 17, 2012, representatives for the Environmental Advocates notified counsel for the Companies of a conflict with the August 30, 2012 date for the technical conference and both parties discussed the issue with the attorney examiner via conference call. The Companies agreed to query members of their Ohio Collaborative Group in an attempt to accommodate the Environmental Advocates' conflict. Based upon a polling of the members, the Companies determined that September 6, 2012 would be an acceptable alternative date for the vast majority of parties, including the Environmental Advocates. On August 23, 2012, the Companies filed a motion to change the technical conference date from August 30, 2012 to September 6, 2012. The Attorney Examiner granted the Companies' motion in an August 24, 2012 Entry.

On August 21, 2012, the Environmental Advocates filed a Petition for an Interlocutory Appeal of the Attorney Examiner's August 16, 2012 Entry in which the procedural schedule was established ("8/16 Entry"). The Companies submit their memorandum contra to this petition and urge the Commission to deny it.

II. ARGUMENTS

The Environmental Advocates ask the Commission to reverse the Attorney Examiner's Entry which shortens the procedural schedule suggested by the Environmental Advocates by two weeks because the ruling is ostensibly "a departure from Ohio law" and "imposes limits on the ability of [the Environmental Advocates] 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 [the Companies]."⁵

⁵ Environmental Advocates' Memorandum in Support of Interlocutory Appeal (hereinafter "Memo"), p. 1.

A. The Petition for Certification of the Interlocutory Appeal Does Not Meet the Necessary Requirements.

Before the Petition for an Interlocutory Appeal can be certified, it must demonstrate 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 “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.”⁶ This appeal doesn’t even come close to meeting these requirements.

As a preliminary matter, the Attorney Examiner was well within the scope of the Commission’s rules when setting a 45 day objection period. Rule 4901:1-39-04(D) provides: “*Unless otherwise ordered by the commission*, any person may file objections within sixty days after the filing of an electric utility’s program portfolio plan.”⁷ The Plans filed by the Companies are extensions of the EEPDR plans currently in effect and, therefore, parties should be relatively familiar with the content of the various programs. Further, the Companies have made several presentations on the programs included in the plans and solicited suggestions for improvement from members of the Collaborative Group throughout the development period starting in the fall of 2011.⁸ In this instance, the shortened comment period is reasonable and is consistent with the rule. Therefore there is no novel question surrounding the interpretation of the rule, law or policy; and the Environmental Advocates presented no explanation as to why they could not accommodate the schedule as set forth in the Entry or why additional time was necessary. Finally, the shortening of the objection period does not prejudice the Environmental Advocates.

⁶ §4901-1-15(B), Ohio Admin. Code.

⁷ §4901:1-39-04(D) (emphasis added.)

⁸ While the Environmental Advocates state that there was a “lack of a robust collaborative process” (Memo, p. 6), perhaps their position would be different had they taken a more active role in the discussions. According to collaborative attendance records, NRDC and OEC attended 1 and 5 meetings, respectively, of the 18 meetings or subcommittee meetings held by the Companies during 2011.

The above rule is permissible, not mandatory. Therefore, if the Environmental Advocates fail to file objections, they have another opportunity to voice their concerns surrounding the Companies' EEPDR Plans in testimony which is not due until October 5, 2012.

In light of the foregoing, the procedural schedule established in the Entry (and as modified to accommodate the Environmental Advocates' conflict with the scheduled technical conference) is reasonable, is clearly within the discretion of the Commission to establish and prejudices no one. Accordingly the request for certification must be rejected.

The Environmental Advocates argue that the Attorney Examiner "significantly reduced the time Appellants and other members of the public have to analyze and comment on the plans" and did so "without a firm date set for a technical conference."⁹ Notwithstanding the fact that the difference at issue is two weeks, it is unclear as to the Environmental Advocates' concerns regarding the date of the conference. As indicated above, the Attorney Examiner established the date in the 8/16 Entry. Upon discovering the Environmental Advocate's conflict, arrangements were made to change the date. And while it is true that the Companies cancelled the originally scheduled date for the technical conference (August 20, 2012)¹⁰, this was done as a result of the 8/16 Entry. Moreover, the technical conference is not scheduled for September 12, 2012, as projected by the Environmental Advocates, but rather it has been scheduled for September 6, 2012, and would have been scheduled during the last week of August, but for some of the Environmental Advocates again not being available.

The Environmental Advocates other reasoning similarly lacks merit. It is not the "public's" duty to analyze and comment on the plans. The public in general is not qualified to evaluate these plans. Moreover, the "public" is represented by various parties, including the

⁹ Memo, p. 5.

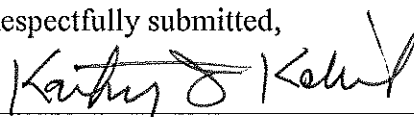
¹⁰ Memo, p. 5. The Environmental Advocates stated that the date of the technical conference was November 30, 2012. It is unclear as to whether they were referring to the originally scheduled date of August 20, 2012, which was changed as a result of the 8/16 Entry, or the revised date of August 30, 2012 as set forth in the 8/16 Entry, which was changed at the request of the Environmental Advocates.

Office of Consumers' Council, Ohio Partners for Affordable Energy, and the Environmental Advocates. As for the time frame the Environmental Advocates have to analyze the Plans, as has already been explained, they have more than the sixty days provided for in the Commission's rules. They also have two months in which to participate in discovery before testimony is due, with their request for a ten day response period being granted in the 8/16 Entry.

III. CONCLUSION

In sum, the Environmental Advocates Petition for an Interlocutory Appeal should be denied as failing to meet the criteria established in Rule 4901-1-15. The procedural schedule established in the 8/16 Entry is reasonable and is consistent with Commission rules. There are no novel issues of law, interpretation or policy and, because the Environmental Advocates have more than 60 days to submit their concerns with the Companies' Plans, they are not prejudiced by the 8/16 Entry.

Respectfully submitted,

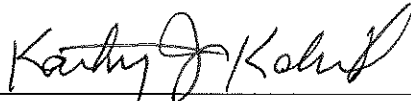


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CERTIFICATE OF SERVICE

I hereby certify that this Memorandum Contra Petition for Interlocutory Appeal of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company, was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 24th day of August, 2012.

A handwritten signature in black ink, appearing to read "Kathy J. Kolch", written over a horizontal line.

Kathy J. Kolch

One of the Attorneys for Applicants, Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company

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Summary: Memorandum Contra Interlocutory Appeal