

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 No. 12-2190-EL-POR
Edison Company for Approval of Their) Case No. 12-2191-EL-POR
Energy Efficiency and Peak Demand) Case No. 12-2192-EL-POR
Reduction Program Portfolio Plans for 2013)
through 2015.)

ENTRY

The Legal Director finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or Companies) are public utilities as defined in Section 4905.02, Revised Code, and, as such, are subject to the jurisdiction of this Commission.
- (2) On July 31, 2012, FirstEnergy filed an application for approval of the Companies' energy efficiency and peak demand reduction program portfolio plans for 2013 through 2015 pursuant to Section 4928.66, Revised Code, Rules 4901:1-39-04, 4901:1-39-05, 4901:1-39-06, and 4901:1-39-07, Ohio Administrative Code (O.A.C.), and the Commission's February 28, 2012, entry in Case No. 12-814-EL-UNC. In addition, FirstEnergy filed testimony in support of the application.

The Companies' application contains a proposed procedural schedule including a suggested deadline of September 17, 2012, for objections to the application and a suggested evidentiary hearing start date of October 22, 2012. In its procedural schedule proposal, FirstEnergy notes that its counsel has a conflict the first week of November 2012, and that one of the Companies' witnesses will be unavailable the first two weeks of November 2012. Additionally, FirstEnergy requests that the Commission issue its order by December 12, 2012, in order to avoid any potential delay in implementing the plans on January 1, 2013.

- (3) Thereafter, on August 6, 2012, the Environmental Law and Policy Center, the Sierra Club, the Ohio Environmental

Council, and the Natural Resources Defense Council (collectively, Environmental Advocates), filed a collective objection to the Companies' proposed procedural schedule. In their collective objection, the Environmental Advocates assert that FirstEnergy's proposed procedural schedule provides for a 45-day period from the date the application was filed for parties to file objections to the application. The Environmental Advocates point out that Rule 4901:1-39-04(D), O.A.C., provides for a 60-day period for the filing of objections, subject to change by the Commission. Additionally, the Environmental Advocates assert that FirstEnergy's proposed portfolio plans are large and complex and require more time for examination than FirstEnergy has allotted in its proposed procedural schedule. Further, the Environmental Advocates argue that FirstEnergy should have planned around its witness's and counsel's unavailability and filed its application sooner than July 31, 2012, if it desired a Commission order no later than December 12, 2012.

- (4) By entry issued on August 16, 2012 (August 16 Entry), the attorney examiner issued the following procedural schedule, pursuant to Chapter 4901:1-39, O.A.C.:
 - (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.
 - (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.

Additionally, in the August 16 Entry, the attorney examiner found that the Companies should publish legal notice of the scheduled hearing in accordance with Rule 4901:1-39-04(E), O.A.C., and established discovery guidelines in these proceedings.

- (5) Thereafter, on August 21, 2012, the Environmental Advocates filed a request for certification to the Commission of an interlocutory appeal pursuant to Rule 4901-1-15, O.A.C., from the attorney examiner's August 16 Entry.
- (6) On August 23, 2012, FirstEnergy filed a motion for modification of the procedural schedule, specifically, the August 30, 2012, technical conference. In its motion, FirstEnergy explains that the Environmental Advocates have indicated that they have a conflict with the scheduled technical conference date. FirstEnergy further states that, upon inquiry, the collaborative members, including the Environmental Advocates, indicated that September 6, 2012, would be an appropriate date for the technical conference. Thereafter, on August 24, 2012, the attorney examiner issued an entry rescheduling the technical conference for September 6, 2012.
- (7) Also on August 24, 2012, FirstEnergy filed a memorandum contra the Environmental Advocates' request to certify the interlocutory appeal to the Commission.
- (8) Rule 4901-1-15, O.A.C., provides two avenues for parties who are adversely affected by an examiner's procedural ruling to

file an interlocutory appeal to the Commission. First, paragraph (A) provides that an immediate interlocutory appeal may be taken to the Commission, if the ruling being appealed: grants a motion to compel discovery or denies a motion for protective order; denies a motion to intervene, terminates a party's right to participate, or requires the consolidation of examination or presentation of testimony; refuses to quash a subpoena; or requires the prosecution of documents or testimony over an objection based on privilege.

- (9) Secondly, paragraph (B) of Rule 4901-1-15, O.A.C., provides that, except as provided for in paragraph (A), no party may take an interlocutory appeal to the Commission unless an examiner certifies the appeal to the Commission. Moreover, this provision states that the reviewing examiner shall not certify an interlocutory appeal to the Commission 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 [C]ommission is needed to prevent undue prejudice or expense to one or more of the parties, should the [C]ommission ultimately reverse the ruling in question."
- (10) Here, the Environmental Advocates argue that their interlocutory appeal should be certified for the Commission to consider modifying the procedural schedule established by the August 16 Entry on the basis that the entry represents a new or novel question of interpretation, law, or policy, and that an immediate determination is needed to prevent undue prejudice.

More specifically, the Environmental Advocates argue that the procedural schedule established in the August 16 Entry presents a new or novel question of law because it reduces the public comment period without explanation from 60 days to 45 days. The Environmental Advocates argue that a 45-day comment period will not provide a fair and full opportunity for interested persons to analyze the Companies' proposed plan and file comments. Additionally, the Environmental Advocates state that there is no firm date established for a technical conference because FirstEnergy cancelled the scheduled technical conference date and may not conduct a conference until September 12, 2012.

Further, the Environmental Advocates specify that an immediate determination is needed to prevent undue prejudice because adequate discovery will be denied under the current procedural schedule, which will not be rectifiable if the Commission later determines that the attorney examiner did not provide enough time to conduct discovery, provide comments, and submit testimony.

- (11) In its memorandum contra the request for certification of the interlocutory appeal, FirstEnergy argues that the Environmental Advocates have failed to demonstrate the requirements for certification of an interlocutory appeal. Specifically, FirstEnergy argues that the attorney examiner was well within the scope of the Commission rules when setting a 45-day objection period, as Rule 4901:1-39-04(D), O.A.C., provides for a 60-day objection period “[u]nless otherwise ordered by the [C]ommission.” Additionally, FirstEnergy notes that the plans filed by the Companies are extensions of the current plans and, therefore, the parties should be relatively familiar with their content. FirstEnergy also points out that it made several presentations on the programs included in the plans and solicited suggestions from the Collaborative beginning in the fall of 2011.

Further, FirstEnergy states that it cancelled the technical conference date apparently agreed upon by the parties because the August 16 Entry established a new date for the technical conference. FirstEnergy also points out that, subsequently, the attorney examiner rescheduled the technical conference for September 6, 2012, due to a conflict with the Environmental Advocates’ schedules.

- (12) Upon consideration of the arguments made by the parties, the Legal Director finds that the issues raised on appeal by the Environmental Advocates do not satisfy the requirement of a new or novel question of interpretation, law, or policy. Initially, the Legal Director finds that establishing a procedural schedule in a Commission proceeding is a routine matter with which the Commission and its examiners have had long experience. *In re Ohio Edison Company*, Case No. 11-411-EL-ACP, Entry (Mar. 16, 2011) at 4, citing *In re Vectren Energy Delivery of Ohio*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Company*, Case No. 05-

376-EL-UNC, Entry (May 10, 2005) at 2. Further, the Legal Director notes that Rule 4901:1-39-04(D), O.A.C., provides that “[u]nless otherwise ordered by the [C]ommission, any person may file objections within sixty days after the filing of an electric utility’s program portfolio plan.” Thus, the Commission may order a time period for the filing of objections that is not 60 days. Further, Rule 4901:1-39-04(D), O.A.C., contains no requirement that the Commission provide justification for ordering a time period that is not 60 days. Here, however, justification does exist for the 45-day time period for the filing of objections in order to provide sufficient time for the Commission to consider the application and evidence presented at the evidentiary hearing prior to the end of the current portfolio plan.

In addition, the Legal Director finds that the Environmental Advocates have failed to demonstrate that the 45-day period for objections will lead to inferior portfolio plans. The Legal Director notes that the purpose of the filing of objections is to raise issues that might be brought up at the hearing. However, nothing limits parties from raising issues at the evidentiary hearing that were not raised in objections. Consequently, the Legal Director cannot find that the established schedule for the filing of objections will result in inferior portfolio plans.

In light of the preceding, the Legal Director finds that the issues raised on appeal by the Environmental Advocates do not satisfy the requirement of a new or novel question of interpretation, law, or policy, and, further, are not taken from a new ruling that represents a departure from past precedent upon which an immediate determination of the Commission is needed to prevent the likelihood of undue prejudice or expense to the Environmental Advocates. Consequently, the Legal Director finds that the request for certification of the interlocutory appeal does not meet the requirements of Rule 4901-1-15(B), O.A.C., and should not be certified to the Commission.

It is, therefore,

ORDERED, That the Environmental Advocates’ interlocutory appeal shall not be certified to the Commission. It is, further,

ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/ Elizabeth C. Stevens

By: Elizabeth C. Stevens
Legal Director

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8/27/2012 4:08:02 PM

in

Case No(s). 12-2190-EL-POR, 12-2191-EL-POR, 12-2192-EL-POR

Summary: Attorney Examiner Entry that the Environmental Advocates' interlocutory appeal shall not be certified to the Commission electronically filed by Vesta R Miller on behalf of Elizabeth C. Stevens, Legal Director, Public Utilities Commission of Ohio