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 Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan	**)**	**Case No. 14-1297-EL-SSO**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE JOINT INTERLOCUTORY APPEAL, ETC., OF NORTHWEST OHIO AGGREGATION COALITION AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

The Joint Movants'[1] Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review and Comments on Tariffs (the "Request") includes several arguments. It improperly purports to be an interlocutory appeal of the Attorney Examiner's May 10, 2016 Entry (the "Entry"), which directed "the Companies to file their proposed tariffs, consistent with the Opinion and Order, by May 13, 2016." It also asks that the Attorney Examiner certify this appeal to the Commission, which is a prerequisite to filing an interlocutory appeal in the first instance. Lastly, the Request serves as comments objecting to the Retail Rate Stability Rider ("Rider RRS") filed with the Companies' compliance tariffs on May 13, 2016. None of these arguments merits serious consideration.

[1] "Joint Movants" refers collectively to Northwest Ohio Aggregation Coalition and the Office of the Ohio Consumers' Counsel.

First, the Request does not and cannot constitute an application for interlocutory appeal in and of itself, despite being styled in the first instance as a "Joint Interlocutory Appeal." As the Joint Movants recognize, pursuant to O.A.C. 4901-1-15(B) and under the facts here, no party may file an interlocutory appeal unless the appeal is first certified to the Commission.[2] Thus, despite the caption of Joint Movants' filing and their recommendation that the Commission "should reverse the Attorney Examiner's ruling," the Request is simply a request for certification, which must be granted before an interlocutory appeal can be filed. Therefore, the Commission cannot treat this filing as an interlocutory appeal.

Second, the Request should be denied because it does not satisfy both of the requirements to certify an interlocutory appeal of the Entry: (1) the Entry directing a compliance filing presents no novel question of law, fact or policy; and (2) the Entry also does not impart any undue prejudice on the Joint Movants that warrants the Commission's immediate determination.[3] Rather, the Entry simply set a date for the Companies to file compliance tariffs required by the Commission's March 31, 2016 Opinion and Order (the "Order") in this matter. Indeed, the Companies complied with the Entry by filing their compliance tariffs on May 13, 2016. As a result, the Joint Movants' criticisms of the Entry are now moot, and the Commission's review of the Entry would serve no purpose.

Third, Joint Movants have not shown that Rider RRS as filed on May 13, 2016 is not in compliance with the Order. Although Joint Movants object that the Companies could not file Rider RRS without first having a functioning purchase power agreement ("PPA") in place

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[2] *See* Request, p. 3.

[3] *See* O.A.C. 4901-1-15(B).

between the Companies and FirstEnergy Solutions Corp. ("FES"), the Order made clear that the Commission's approval of Rider RRS was not contingent on the Companies entering into such a PPA.[4] The Commission approved Rider RRS in the Order as a new retail rate stability rider that would be reconciled quarterly.[5] Thus, for the Companies' compliance filing to actually comply with the Order and the Entry, the Companies had to file Rider RRS with its other Commission-approved tariffs. Joint Movants have not stated grounds for the Commission to reject the compliance filing.

II. STANDARD OF REVIEW

For Joint Applicants' appeal to move forward, it must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." O.A.C. 4901-1-15(B). In order to seek the Attorney Examiner's certification of the Joint Movants' proposed interlocutory appeal of the Entry, the Joint Movants must meet both of the requirements of O.A.C. 4901-1-15(B):

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
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> [1] 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
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> [2] 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.[6]

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[4] Order, p. 87 ("The Companies are under no requirement by this Commission or FERC to enter into the arrangements proposed under the Economic Stability Program").

[5] Order, pp. 89-90.

[6] O.A.C. 4901-1-15(B).

Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g., In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions,* Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677 at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 12-1230-EL-SSO,* 2012 Ohio PUC LEXIS 619 at *8-10 (June 21, 2012) (same); *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of an Alternative Form of Regulation,* Case No. 11-5515-GA-ALT, 2012 Ohio PUC LEXIS 484 at *13-14 (May 18, 2012) (same); *In the Matter of the Commission's Investigation into Intrastate Carrier Access Reform Pursuant to Sub. S.B. 162,* Case No. 10-2387-TP-COI, 2011 Ohio PUC LEXIS 494 at *2-3 (April 20, 2011) (same).

III. ARGUMENT

A. Joint Movants Have Failed To Meet Their Burden To Establish Either Requirement For Certification Of An Interlocutory Appeal.

1. The Entry presents no new or novel question of interpretation, law or policy.

Joint Movants argue that the Entry raises new questions because, according to Joint Movants, the version of Rider RRS filed by the Companies on May 13, 2016, was preempted or otherwise in conflict with an order issued by the Federal Energy Regulatory Commission

("FERC") on April 27, 2016.[7] Not only is this point entirely incorrect (as discussed below), it also fails to establish a basis for Commission review of the Entry. The Entry was a routine directive for the Companies to file compliance tariffs on a certain date. The Entry further stated that "such tariffs will be effective June 1, 2016, subject to Commission review and final approval."[8] Similar entries have been issued in many, many cases. There is nothing new or novel about such routine entries. Joint Movants are improperly attempting to boot-strap their complaints about Rider RRS into an appeal of the Entry. But the Entry itself gives the Attorney Examiner no basis to certify an appeal.

Moreover, Joint Movants' description of the Companies' compliance filing is entirely fictitious. The Entry did not "contravene" the FERC Order, and Rider RRS is not dependent on or "premised on" there being a PPA between the Companies and FES.[9] To the contrary, the Order stated that Rider RRS is a retail rate stability rider that is not dependent on the Companies entering into a PPA with FES: "[t]he Companies are under no requirement by this Commission or FERC to enter into the arrangements proposed under the Economic Stability Program."[10] The FERC Order did not set "conditions precedent to Rider RRS being implemented," as claimed by Joint Movants without any citation to the FERC Order.[11] The FERC Order simply directed that the contemplated PPA be filed for FERC's review before it could go into effect.

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[7] *See EPSA v. FirstEnergy Solutions Corp.*, 155 FERC ¶61,101, FERC Docket No. EL16-34-000, Order Granting Complaint (April 27, 2016) ("FERC Order").

[8] Entry, p. 2.

[9] Request, p. 4.

[10] Order, p. 87.

[11] Request, p. 5.

Further, although several parties sought rehearing of the Commission's Order approving Rider RRS (including the Companies), the Order was effective immediately.[12] The Order obligated the Companies to file proposed tariffs consistent with the Stipulated ESP IV as modified by the Order.[13] The Entry merely fixed the date for that filing to be made. Rider RRS is a retail tariff approved in the Order and, thus, the Companies would have violated the Order and the Entry if they had not filed it on May 13, 2016. Given that Rider RRS does not currently have a mechanism in place to set the charge, the Companies filed this retail tariff, temporarily, with no specified rate.

Joint Movants have not shown how the Entry raises a new or novel question of interpretation, law or policy.

2. The Entry does not depart from past precedent.

Joint Movants' argument that the Entry departs from past precedent is similarly based on the fiction that filing a retail rate stability rider without a specified rate is preempted by the FERC Order. Joint Movants do not explain how this is so. They simply assert it to be true. They are wrong. The Order approved a retail rate stability mechanism, not a wholesale purchase power agreement, and the Companies were required to file a compliance tariff that reflected what was approved in the Order. There is no preemption issue here.

Regardless, the requested appeal is from the Entry, not the compliance filing. The Attorney Examiner's Entry setting a date for the compliance filing did not depart from the Commission's past precedent. The Attorney Examiner simply set a date after the Order and

[12] R.C. 4903.15.

[13] *See* Order, p. 121 ("ORDERED, That the Companies file proposed tariffs consistent with the Stipulated ESP IV as modified").

before June 1, 2016, the start date of Stipulated ESP IV. The Entry did not depart from past precedent.

3. An immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expense to Joint Movants.

Immediate Commission review of the Entry will change nothing; the Companies have already complied with the Entry by filing their compliance tariffs on May 13, 2016. To the extent Joint Movants believe that the implementation of Rider RRS on June 1, 2016, may cause them undue prejudice, that is a result of the Order, which resulted in the compliance filing, not the Entry. Any criticisms of the date set in the Entry for filing compliance tariffs is now a moot point, and there is no possibility that the Commission could "ultimately reverse the ruling in question."

Joint Movants' reference to "rates being subject to refund"[14] also is irrelevant under the circumstances presented here. The Rider RRS filed on May 13, 2016, has no specified rate. There are no charges to refund and no possible prejudice.

Joint Movants' reliance on R.C. 4928.143(C)(2)(b) also is irrelevant because the Companies have not withdrawn Stipulated ESP IV. Instead, they are proceeding through the rehearing process authorized by Ohio law and Commission rule.[15] Indeed, the Commission granted rehearing on May 11, 2016 – the day after the Entry – to consider, among other things, the Companies' proposal to modify how Rider RRS is calculated. Given that the Companies have proposed to calculate Rider RRS charges and credits using the specific costs and generation

[14] Request, p. 6.

[15] *See* R.C. 4903.10 and O.A.C. 4901-1-35.

output that the Commission relied upon in finding that Rider RRS would result in an estimated $256 million net credit to customers, Joint Movants' mischaracterization of Rider RRS as "an entirely new Rider RRS" and "fundamentally entirely different"[16] is simply untrue.

Joint Movants have not shown how they would be prejudiced absent immediate Commission review of the Entry. Likewise, because Joint Movants have failed to meet their burden to establish both requirements for certification of an interlocutory appeal, the Attorney Examiner should deny certification.

B. Joint Movants' Comments Should Be Disregarded.

The section of Joint Movants' Request titled "Comments" is simply fiction masquerading as legal argument. Contrary to Joint Movants' fear mongering, the Rider RRS tariff filed on May 13, 2016 is not tied to a PPA, either as originally proposed or as filed on May 13, 2016. While Joint Movants suggest that Rider RRS has no mechanism to reconcile rates until May 31, 2024,[17] Rider RRS states: "The charges contained in this Rider shall be updated on a quarterly basis."[18] This is consistent with the Order's requirement of quarterly reconciliation. The tariffs filed on May 13, 2016, are thus consistent with the Order.

Joint Movants also are incorrect that the Companies' rehearing proposal of a modified Rider RRS is the equivalent of a new standard service offer.[19] The Commission approved, with modifications, the Companies' Stipulated ESP IV, with Rider RRS as one component thereof.[20]

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[16] Request, p. 2.

[17] Request, p. 7.

[18] *See* Companies' May 13, 2016 compliance filing, Original Sheet 127.

[19] Request, p. 8.

[20] Order, p. 121.

The Commission then granted rehearing to consider the Companies' proposed modifications to how Rider RRS is calculated.[21] Once the Commission issues an entry on rehearing either adopting or rejecting those modifications (and ruling on other arguments made on rehearing), the Companies will have the opportunity to accept Stipulated ESP IV as modified or to withdraw it from consideration. Until the Companies actually reject Stipulated ESP IV, the Companies are not obligated to file a new application for a standard service offer.

IV. CONCLUSION

For the reasons state above, the Commission should deny Joint Movants' Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review and Comments on Tariffs.

Respectfully Submitted,

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[21] Entry on Rehearing, p. 3 (May 11, 2016).

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CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 23rd day of May, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ James F. Lang
One of Attorneys for the Companies

Summary: Memorandum Contra Joint Interlocutory Appeal, etc., of OCC/NOAC electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company