

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

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA
THE JOINT INTERLOCUTORY APPEAL AND JOINT REQUEST FOR
CERTIFICATION OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC
POWER SUPPLY ASSOCIATION**

The Joint Movants'¹ Joint Interlocutory Appeal and Joint Request for Certification (the "Request") filed June 8, 2016 asks the Attorney Examiner to certify an appeal from the Attorney Examiner's June 3, 2016 Entry (the "Entry"), which sets a procedural schedule to allow parties the opportunity to present evidence regarding the Companies' proposed modifications to how Rider RRS is calculated (the "Proposal"). Joint Movants argue that no rehearing process can take place until after the Commission decides a jurisdictional argument made in their Memorandum Contra the Companies' Application for Rehearing.² Joint Movants also argue that the Attorney Examiner cannot set a rehearing schedule before the Commission grants rehearing in compliance with R.C. 4903.10.³ Yet a scheduling entry authorized by long-standing Commission rules is neither new nor novel and does not depart from past precedent. Nor have

¹ "Joint Movants" refers collectively to the PJM Power Providers Group and the Electric Power Supply Association.

² Request, p. 3.

³ *Id.*

Joint Movants shown that they would be unduly prejudiced if the Commission does not immediately review the Entry. Thus, the Request should be denied.

I. 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:

[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

[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.⁴

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*

⁴ O.A.C. 4901-1-15(B).

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).

II. ARGUMENT

A. Joint Movants Have Failed To Demonstrate That The Entry Presents A New Or Novel Question Of Interpretation, Law Or Policy.

Because the Commission has already granted rehearing in this proceeding on May 11, 2016 (“First Entry on Rehearing”), the Attorney Examiner is under no obligation to suspend all proceedings until after the Commission considers Joint Movants’ argument that the Commission lacks jurisdiction to consider the Proposal.⁵ The Commission granted rehearing so that additional evidence could be taken on the Companies’ Proposal. The Commission expressly explained in the First Entry on Rehearing that the Companies, as a recommended solution to three of their proffered assignments of error: (1) proposed a “modified calculation for [their] retail rate stability rider (Rider RRS) as approved” in the Commission’s March 31, 2016 Opinion and Order (the “Order”); (2) recommended an expedited procedural schedule for the Commission to consider the proposed modifications; and (3) filed rehearing testimony

⁵ See Request, pp. 5-6.

supporting the proposed modifications.⁶ As a result, the First Entry on Rehearing “allow[ed] parties to begin discovery” because the Companies’ Proposal created “the potential for further evidentiary hearings.”⁷

Once the Commission made the decision to reopen the record to consider the Proposal, the Entry was well within the Attorney Examiner’s authority to establish hearing procedures. The Entry merely implements the First Entry on Rehearing pursuant to well-established, and often used, Commission rules: (1) Rule 4901-1-17(G) authorizing an attorney examiner to set discovery deadlines; (2) Rule 4901-1-29(A) authorizing an attorney examiner to set deadlines for filing expert testimony; and (3) Rule 4901-1-27(A) authorizing an attorney examiner to set the time and date for hearing.⁸ Nothing in the Entry presents a new or novel question of interpretation, law or policy.

By setting a procedural schedule, the Attorney Examiner has not prejudged Joint Movants’ jurisdiction argument. The Commission remains free to consider (and reject) that argument in due course.⁹ Joint Movants have not shown that it is new or novel for a case to proceed along its ordinary procedural course when one or two parties have raised legal arguments against the relief requested or against the Commission’s jurisdiction.

⁶ First Entry on Rehearing, pp. 2-3.

⁷ First Entry on Rehearing, p. 3.

⁸ See Entry, ¶¶ 17, 18 (setting expert testimony deadlines, discovery deadlines, and a hearing date).

⁹ The Companies demonstrated the fallacy of Joint Movants’ jurisdictional argument in their Memorandum Contra P3/EPSC Motion for Stay of Discovery, pp. 3-8 (May 26, 2016), and will not belabor the point here.

Nor is the Attorney Examiner required to wait for further instructions from the Commission before setting a schedule to take evidence on the Companies' Proposal. The Entry did not usurp the Commission's authority to grant rehearing as argued by Joint Movants.¹⁰ Instead, as noted and in response to Joint Movants' earlier filings,¹¹ the First Entry on Rehearing specified the purpose and scope of rehearing as required by R.C. 4903.10. The Commission already has found that sufficient reason exists for rehearing. It has described the purpose for which it is granting rehearing, and specified that additional evidence is appropriate regarding the Companies' Proposal.¹² The Entry simply implements the Commission's findings. Indeed, the Entry references the memoranda contra the applications for rehearing filed by multiple intervenors as additional support that questions of fact exist justifying an evidentiary hearing regarding the Proposal.¹³ Given these questions, setting the time and date for an evidentiary hearing pursuant to Rule 4901-1-27(A) is both an obvious and lawful course of action. Joint Movants have not shown how the Entry raises a new or novel question of interpretation, law or policy.

B. An Immediate Determination By The Commission Is Not Needed To Prevent The Likelihood Of Undue Prejudice Or Expense To Joint Movants.

Joint Movants complain that they may incur expenses related to the hearing scheduled to begin on July 11, 2016. However, immediate consideration of the Entry would not prevent Joint Movants from incurring those expenses. The only likely result of an appeal would be that the

¹⁰ See Request, pp. 6-8.

¹¹ See Companies' Memorandum Contra P3/EPSC Motion for Stay of Discovery, pp. 2-3 (May 26, 2016).

¹² First Entry on Rehearing, pp. 2-3.

¹³ Entry, ¶ 15.

Commission would reiterate the need to take evidence on the Companies' Proposal. Indeed, as the Companies have previously demonstrated, Commission precedent supports taking evidence to resolve issues of fact on rehearing.¹⁴ Thus, an appeal would simply result in the hearing Joint Movants are hoping to avoid. Nothing is gained by certifying the requested appeal – the only practical effect would be needless delay. Joint Movants have not shown how they would be prejudiced absent immediate Commission review of the Entry.

III. CONCLUSION

Joint Movants have failed to meet their burden to establish both requirements for certification of an interlocutory appeal. Therefore, for the reasons stated above, the Commission should deny Joint Movants' Request.

Respectfully Submitted,

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¹⁴ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 304, 2006-Ohio-5789 (The Commission has discretion under R.C. 4903.10 "to decide whether a subsequent hearing is necessary to take additional evidence."); *Columbus & S. Ohio Elec. Co. v. Pub. Util. Comm.*, 10 Ohio St.3d 12, 13, 460 N.E.2d 1108 (1984) (Commission granting OCC application for rehearing based on NRC order issued seven days after initial opinion and order, then conducting full evidentiary hearings over one month); *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 209, 364 N.E.2d 852 (1977) (Commission granting rehearing and conducting evidentiary hearing); *Pa. R. Co. v. Pub. Util. Comm.*, 123 Ohio St. 203, 204, 174 N.E. 737 (1931) (Commission granting rehearing and taking additional evidence).

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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 13th day of June, 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

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Summary: Memorandum Contra P3/EPSC Request for Certification of Interlocutory Appeal electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Electric Illuminating Company