

# 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

## ENTRY

Entered in the Journal on June 14, 2016

### I. SUMMARY

{¶ 1} In this Entry, the attorney examiner finds that the motion for certification of an interlocutory appeal filed by Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition should be denied.

### II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in R.C. 4928.01(A)(6) and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide customers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for an SSO to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (ESP IV).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in this proceeding, approving FirstEnergy's application and the stipulations filed in this proceeding with several modifications (Opinion and Order).

{¶ 6} On April 27, 2016, the Federal Energy Regulatory Commission (FERC) issued an order granting a complaint filed by the Electric Power Supply Association, the Retail Energy Supply Association, Dynegy Inc., Eastern Generation, LLC, NRG Power Marketing LLC, and GenOn Energy Management, LLC, and rescinding the waiver of its affiliate power sales restrictions previously granted to FirstEnergy Solutions Corporation (FES). 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} On April 29, 2016, FirstEnergy filed a motion for an extension of time to file its tariffs in this proceeding in order to fully consider the FERC Order and its impact on the Companies' tariffs to be filed pursuant to the Opinion and Order.

{¶ 8} By Entry issued April 29, 2016, the attorney examiner granted the Companies' request, noting the new filing deadline would be established by subsequent entry. By Entry issued May 10, 2016 (Entry), the attorney examiner directed the Companies to file their proposed tariffs, consistent with the Opinion and Order, by May 13, 2016, and noted such tariffs would be effective June 1, 2016, subject to Commission review and final approval.

{¶ 9} On May 13, 2016, FirstEnergy filed proposed tariffs in the above captioned case and Case No. 16-541-EL-RDR, pursuant to the Opinion and Order. The filed

proposed tariffs include a Retail Rate Stability Rider (Rider RRS) charged to all customers, with no kWh value applied to the rider.

{¶ 10} On May 16, 2016, Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (jointly, OCC/NOAC) filed a joint interlocutory appeal to the Commission and request for certification to the full Commission.

{¶ 11} On May 20, 2016, Staff filed its review and recommendations regarding the Companies' proposed tariff filing, concluding that it was consistent with the Opinion and Order. Additionally, on May 20, 2016, Ohio Energy Group (OEG) filed a memorandum contra OCC/NOAC's interlocutory appeal and request for certification.

{¶ 12} Thereafter, on May 23, 2016, Industrial Energy Users-Ohio (IEU-Ohio), FirstEnergy, and Nucor Steel Marion, Inc. (Nucor) filed memoranda contra OCC/NOAC's interlocutory appeal and request for certification.

{¶ 13} By Finding and Order issued May 25, 2016 (Finding and Order), the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the Opinion and Order, did not appear to be unjust and unreasonable, and therefore, was approved for rates effective June 1, 2016. On May 31, 2016, OCC/NOAC filed an application for rehearing regarding the Finding and Order.

{¶ 14} Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the

attorney examiner finds that the appeal presents a new or novel question of 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. Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g., In re Self Complaint of Suburban Natural Gas Co.*, Case No. 11-5846-GA-SLF, Entry (July 6, 2012); *In re FirstEnergy*, Case No. 12-1230-EL-SSO, Entry (June 21, 2012).

{¶ 15} In their joint interlocutory appeal and request for certification, OCC/NOAC assert that the Entry, which directed FirstEnergy to file proposed tariffs consistent with the Opinion and Order, should be certified for an immediate determination by the Commission because it presents a new or novel question of interpretation, law, and policy; departs from past general practices; and is necessary in order to prevent undue prejudice to Ohio consumers and their representatives. Additionally, OCC/NOAC assert that, upon review, the Commission should reverse or modify the attorney examiner's Entry.

{¶ 16} In their memorandum in support, OCC/NOAC assert that it was error for the Entry to require the Companies to file tariffs that otherwise cannot be implemented due to the FERC Order. OCC/NOAC explain that FERC's ruling rescinded the waiver upon which FirstEnergy's application and settlement agreements were premised with regard to the purchase power agreement (PPA) proposed in the application, and requires a federal filing by FES before a PPA may be executed. OCC/NOAC assert that, because no such filing has been made by FES at FERC, the Commission's Opinion and Order is preempted and the Entry allowing for tariffs to be filed contravenes the FERC Order.

{¶ 17} In its memorandum contra, OEG asserts that the Commission should dismiss OCC/NOAC's request. Initially, OEG asserts that OCC/NOAC's argument is based upon a fundamental mischaracterization of the FERC Order, which does not preempt the Commission from taking action at the retail level with respect to Rider RRS, but merely directs that, if FES intends to proceed with its proposed wholesale sale of electric power to FirstEnergy, FERC requires review and approval of the wholesale transaction. Further, OEG asserts that claims of undue prejudice are baseless, as the Rider RRS tariff filed by the Companies has no charge and customers will pay nothing if the rider goes into effect June 1, 2016. However, OEG claims, customers will suffer undue prejudice, if the ESP approved by the Commission is not put into effect on June 1, 2016, as the other benefits of the ESP will not be timely. In particular, OEG asserts that many of its members have already executed service contracts with competitive suppliers in reliance on the Commission's decision that FirstEnergy's Rider ELR program would continue and be open to participation by shopping customers as of June 1, 2016.

{¶ 18} In its memorandum contra, IEU-Ohio asserts that OCC/NOAC have failed to demonstrate any injury from the implementation of the Entry appealed from, as Rider RRS will be implemented at a rate of zero for all customers, but that customers of FirstEnergy will suffer a detriment if the appeal is granted. More specifically, IEU-Ohio asserts that the relief sought by OCC/NOAC would cause irreparable hardship on customers who have sought to enter new contractual relationships with FirstEnergy and competitive suppliers in reliance on the Opinion and Order. Further, IEU-Ohio bemoans any delay of implementation of the provisions in the ESP expanding the interruptible program and transmission pilot that will offer the opportunity for customers to reduce their total energy bills by managing their demand levels.

{¶ 19} In its memorandum contra, Nucor asserts that granting the appeal would perpetuate additional and unwarranted delay. Initially, Nucor argues that the Entry does not raise a new and novel question of interpretation of law or policy and does not depart from past precedent. Nucor points out that the FERC Order rescinded FES' market-based rate authority for purposes of the originally proposed PPA, but never forbid Rider RRS from going forward, holding only that, if FES wishes to pursue the wholesale PPA, it must be filed with FERC for its review. Additionally, Nucor points out that the Rider RRS was filed with a zero value. Next, Nucor argues that no undue prejudice will befall OCC/NOAC if the tariffs are filed as required, as the Commission granted all requests for rehearing for purposes of further consideration of the issues, including OCC/NOAC's. Finally, Nucor asserts that, if the tariffs were not filed, parties would be unable to take advantage of the many benefits of the ESP IV, including expansion of energy efficiency and peak demand reduction programs, the improvement and extension of Rider ELR, the Rider NMB pilot, and various incentives benefiting commercial and low-income customers.

{¶ 20} In its memorandum contra, FirstEnergy initially points out that no party may file an interlocutory appeal unless the appeal is first certified to the Commission. Next, FirstEnergy asserts that the request for certification should be denied because it does not satisfy both of the requirements for certification of an interlocutory appeal of the Entry, as it presents no novel question of law, fact, or policy; and does not impart any undue prejudice on OCC/NOAC that warrants immediate determination. FirstEnergy points out that the Entry was a routine entry that simply set a date for the Companies to file compliance tariffs required by the Opinion and Order, and that similar entries have been issued in many cases; thus, there is nothing new or novel about such an entry. Further, FirstEnergy asserts that, as it complied with the Entry and filed its tariffs on May 13, 2016, the criticisms of the Entry are now moot. Further, FirstEnergy claims that the Commission's approval of Rider RRS was not contingent on

the Companies entering into a PPA, and, in fact, the Companies were required to file Rider RRS with the Commission in order to comply with the Opinion and Order. Next, FirstEnergy argues that the Entry did not contravene the FERC Order, as Rider RRS is not dependent on a PPA existing between the Companies and FES, and the FERC Order merely directed that the contemplated PPA be filed for FERC's review before it may go into effect.

{¶ 21} Next, FirstEnergy argues that the Entry did not depart from past precedent, citing that the Companies were required to file a compliance tariff that reflected what was approved in the Opinion and Order. Further, FirstEnergy argues that an immediate determination by the Commission is not necessary in order to prevent the likelihood of undue prejudice or expense to OCC/NOAC, arguing that the Companies have already complied with the Entry by filing their compliance tariffs on May 13, 2016, making this argument a moot point. Finally, FirstEnergy asserts that OCC/NOAC's comments should be disregarded, as the Rider RRS tariff is not tied to a PPA.

{¶ 22} Upon consideration of the arguments made by the parties, the attorney examiner finds that the issues raised by OCC/NOAC do not satisfy the requirement of a new or novel question of interpretation, law, or policy, or a ruling which represents a departure from past precedent and an immediate determination is needed to prevent the likelihood of undue prejudice or expense to one or more parties. As FirstEnergy has argued, the Entry appealed from was a routine entry that merely directed the Companies to file compliance tariffs on a particular date, and presented no new or novel questions. Further, the attorney examiner finds that OCC/NOAC's argument has been rendered moot by the Companies' May 13, 2016 tariff filing and the Commission's approval of the same in the Finding and Order.

{¶ 23} In light of the preceding, the attorney examiner finds that the issues raised by OCC/NOAC 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 or undue prejudice or expense to OCC/NOAC. Consequently, the attorney examiner finds that the request for certification of the interlocutory appeal does not meet the requirements of Ohio Adm.Code 4901-1-15(B), and should not be certified to the Commission.

### III. ORDER

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That OCC/NOAC's motion for certification of an interlocutory appeal be denied. It is, further,

{¶ 26} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles

By: Mandy Willey Chiles  
Attorney Examiner

JRJ/sc



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Summary: Attorney Examiner Entry denying the motion for certification of an interlocutory appeal filed by Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio