

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. 12-1230-EL-SSO
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	)	

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**THE FIRSTENERGY OHIO UTILITIES’  
MEMORANDUM CONTRA THE JOINT MOVANTS’  
REQUEST FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL**

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The Joint Movants’<sup>1</sup> Request for Certification of an interlocutory appeal (the “Request”) should be denied because the Request meets neither of the two requirements for an interlocutory appeal of the Entry, pursuant to O.A.C. 4901-1-15(B): (1) The Attorney Examiner’s April 19, 2012 Entry (the “Entry”) setting a procedural schedule in this proceeding presents no novel question of law, fact or policy. (2) The Entry also does not impart any undue prejudice on the Joint Movants that warrants the Commission’s immediate determination. Rather, the Entry sets forth a reasonable (and not uncommon - and certainly not illegal) procedural schedule that provides sufficient time for discovery in a proceeding that involves only a few new issues not previously considered by the Joint Movants or the Commission.

It also should be noted that the Joint Movants’ Request does not and cannot constitute an application for interlocutory appeal in and of itself. As the Joint Movants recognize, pursuant to O.A.C. 4901-1-15(B) and under the facts here, “no party may take an interlocutory appeal . . .

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<sup>1</sup> The “Joint Movants” shall refer collectively to the Environmental Law and Policy Center, the Natural Resources Defense Council, the Northeast Ohio Public Energy Council, the Northwest Ohio Aggregation Coalition, the Office of the Ohio Consumers’ Counsel (“OCC”), and the Sierra Club.

unless the appeal is certified to the commission by the . . . attorney examiner . . . .” Thus, despite the caption of Joint Movants’ filing<sup>2</sup> and their final recommendation that the Commission “grant the interlocutory appeal,” the Joint Movants’ Request is simply a request for certification, which must be granted before an interlocutory appeal can be filed. Therefore, any suggestion in the Joint Movants’ Request that would seek a ruling on any interlocutory appeal must be stricken. Moreover, as set forth herein, the Joint Movants have not established their right to a certification for an interlocutory appeal of the Attorney Examiner’s essentially routine Entry.

## II. ARGUMENT

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.<sup>3</sup>

Here, the Joint Movants have failed to meet their burden to establish either requirement.

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<sup>2</sup> On April 24, 2012, the Joint Movants filed a 2-page “Interlocutory Appeal,” attached to a “Request for Certification and Application for Review and Memorandum in Support.”

<sup>3</sup> O.A.C. 4901-1-15(B).

**A. The Routine Entry Presents No New Or Novel Question Of Interpretation, Law Or Policy, Or Any Departure From Past Precedent.**

The Joint Movants argue that the Entry meets the first requirement of O.A.C. 4901-1-15(B) because the Entry's procedural schedule "falls far short of the period of time allotted under the statute and Commission precedent."<sup>4</sup> However, the only statute that they cite -- R.C. § 4928.143(C)(1) -- does not conflict with the Entry in any respect. Section 4928.143(C)(1) provides an outer limit of time in which the Commission must issue an order on a utility's application for approval of an electric security plan:

The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date.<sup>5</sup>

Thus, the statute is inapplicable to the Entry altogether. The Entry does not establish any deadline for a Commission order on the Companies' ESP 3 Application. And, even if it did, the timelines set for the hearing would not conflict with the *maximum* 275 day deadline. Therefore, Section 4928.143(C)(1) establishes no basis on which the Joint Movants could meet the first requirement for a request for certification of an interlocutory appeal

The Joint Movants also cite no Commission precedent from which the Entry departs -- and there is none. In fact, the Entry's procedural schedule for this proceeding is in line with the schedules set for other recent SSO proceedings.<sup>6</sup> The Entry's schedule reflects the fact that the Commission and the vast majority of the Intervenors (including counsel for all of the Joint

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<sup>4</sup> Request, p. 3.

<sup>5</sup> R.C. § 4928.143(C)(1) (emphasis added).

<sup>6</sup> See Case No. 11-346-EL-SSO, Sept. 16, 2011 Entry (setting new calendar for consideration of ESP partial stipulation and consolidated cases, including hearing on Oct. 4, 2011); Case No. 11-346-EL-SSO *et al.*, Apr. 2, 2012 Entry (setting new calendar for consideration of modified ESP application, including hearing on May 14, 2012); Case No. 10-388-EL-SSO, Mar. 24, 2011 Entry (setting schedule for consideration of ESP stipulation, including hearing on Apr. 20, 2012).

Movants) previously considered and deliberated the bulk of the terms of the proposed ESP 3 in connection with the Companies' current ESP, while allowing for a "practicable"<sup>7</sup> schedule for consideration of the limited new terms. The Joint Movants have failed to make any showing that the Entry presents a new or novel interpretation of Ohio law, regulation or policy, or a departure from Commission precedent. As such, they have failed to meet one of two requirements for certification of an interlocutory appeal of the Entry. The Joint Movants' Request must be denied for this reason alone.

**B. The Commission's Immediate Determination Is Not Needed To Prevent Undue Prejudice To The Joint Movants.**

Even if the Joint Movants could meet the first requirement under O.A.C. 4901-1-15(B), the Request should be denied because they also fail to meet the second requirement. The Joint Movants vaguely argue that the Commission should hear their interlocutory appeal because the Entry will preclude them from "adequate discovery."<sup>8</sup> However, in the Commission's April 25, 2012 Entry granting in part the Companies' request for waivers (over the Joint Movants' memorandum contra), the Commission found that the Companies had established good cause for their waiver requests, noting that "the application and stipulation filed in this proceeding appear on their face to extend for an additional two years, with modifications, the electric security plan originally modified and approved by the Commission in the ESP 2."<sup>9</sup> The issues for which the Joint Movants or any Intervenor would need discovery are, therefore, significantly limited. There is no need for three months of discovery, as suggested by Joint Movants, under such circumstances -- particularly when such an unnecessary discovery schedule would eliminate the

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<sup>7</sup> Entry, p. 2.

<sup>8</sup> Request, p. 4.

<sup>9</sup> Entry, dated Apr. 25, 2012, ¶ 11.

Companies' ability to implement the proposed changes to the bidding schedule to capture a potentially greater amount of generation at historically lower prices for the benefits of customers.

The Entry provided for an expedited turnaround of discovery and several of the Joint Movants have already issued discovery requests in the proceeding, including four sets issued by OCC. The Entry, therefore, allows for sufficient discovery and due process, without any undue prejudice to the Joint Movants or other parties. In addition, as set forth above, the Entry is in line with the schedules established for other SSO proceedings and reflects that the Companies' ESP 3 proposal is primarily a continuation of the Companies' current ESP, which was deliberated and approved in Case No. 10-388-EL-SSO.

There also is no need for the Commission's "immediate determination" through an interlocutory appeal. To certify the Joint Movants' request for an interlocutory appeal of such a routine Entry would improperly lower the standards for these expedited procedures and threaten to open the floodgates for interlocutory appeals from parties concerned by any number of the routine procedural and administrative rulings that the Attorney Examiners must issue to keep the Commission processes functioning. O.A.C. 4901-1-15(A) recognizes that certain issues warrant an immediate right to an interlocutory appeal, but those issues are not present here. Thus, the Joint Movants must make the heightened showing under the two requirements of subpart (B). They have failed to meet either one.

### **III. CONCLUSION**

For the foregoing reasons, the Companies request that the Attorney Examiner deny the Joint Movants' Request for Certification of an interlocutory appeal of the Entry.

Respectfully submitted,

/s/ James W. Burk

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *The FirstEnergy Ohio Utilities' Memorandum Contra the Joint Movants' Request for Certification of an Interlocutory Appeal* was served this 30th day of April, 2012, via e-mail upon the parties below.

/s/ Laura C. McBride

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Summary: Memorandum Contra the Request for Certification of an Interlocutory Appeal electronically filed by Ms. Laura C. McBride on behalf of The Cleveland Electric Illuminating Company and Ohio Edison Company and The Toledo Edison Company