BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Legal Director finds:

(1) Ohio Edison Company (OE), The Cleveland Electric Illuminating Company (CEI), and the Toledo Edison Company (TE) (collectively, FirstEnergy or the 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 April 13, 2012, FirstEnergy filed an application, pursuant to Section 4928.141, Revised Code, to provide for a standard service offer (SSO). The application is for an electric security plan (ESP), in accordance with Section 4928.143, Revised Code, and the application includes a stipulation and recommendation agreed to by various parties regarding the terms of the proposed ESP (ESP 3). In its application, FirstEnergy requests that the Commission take administrative notice of the evidentiary record established in the Companies' current ESP, Case No. 10-388-EL-SSO (ESP 2), and incorporate by reference that record for purposes of ESP 3.

(3) The attorney examiner presiding in this case (presiding examiner) granted intervention in this proceeding to the Northeast Ohio Public Energy Council (NOPEC), Northwest Ohio Aggregation Coalition (NOAC), and the office of the Ohio Consumers' Counsel (OCC) (collectively, Consumer Advocates).

(4) The matter proceeded to hearing on June 4, 2012, and continued until June 8, 2012.

(5) At the hearing on June 4, 2012, FirstEnergy renewed its request for the Commission to take administrative notice of the record in ESP 2. The presiding examiner deferred ruling on the request at the time, requesting that FirstEnergy provide a list specifying the documents in the ESP 2 record for which the Companies sought administrative notice. Thereafter, at the hearing on June 6, 2012, the Companies provided a list as requested by the presiding examiner specifying documents from ESP 2, as well as documents from the record in Case No. 09-906-EL-SSO (MRO), which had been incorporated into the record of ESP 2 via administrative notice. On that date, the presiding examiner orally granted FirstEnergy's request and took administrative notice of the documents from ESP 2 and MRO specified in the list. In doing so, the presiding examiner cited to ESP 2, Entry on Rehearing (May 13, 2010), citing to *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, 8, 647 N.E.2d 136 (1995), citing *Allen v. Pub. Util. Comm.*, 40 Ohio St.3d 184, 186, 532 N.E.2d 1307 (1988).

(6) On June 11, 2012, the Consumer Advocates filed an interlocutory appeal from the oral ruling by the presiding examiner on June 6, 2012, granting the request of the Companies to take administrative notice of specific portions of the record in ESP 2 and MRO, requesting that the interlocutory appeal be certified to the Commission for consideration. FirstEnergy filed a memorandum contra the interlocutory appeal on June 14, 2012.

(7) Rule 4901-1-15, Ohio Administrative Code (O.A.C.), provides two avenues for parties who are adversely affected by an attorney 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 production of documents or testimony over an objection based on privilege. Upon review of the request for interlocutory appeal filed by the Consumer Advocates, it appears that the appellants agree that their request does not

warrant an immediate appeal to the Commission under this provision.

(8) 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 the appeal is certified to the Commission by an attorney in the Commission's Legal Department (reviewing examiner). 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]omission is needed to prevent undue prejudice or expense to one or more of the parties, should the [C]omission ultimately reverse the ruling in question."

(9) The Consumer Advocates contend that their interlocutory appeal should be certified to the Commission under Rule 4901-1-15(B), O.A.C., because it presents a new or novel question of interpretation, law, or policy, is a departure from past Commission precedent, and severely prejudices the Consumer Advocates because it reduces the Companies' burden of proof, raises constitutional questions, and prevents non-signatory parties from the opportunity to review, explain, and rebut the information at issue. Further, the Consumer Advocates argue that an immediate determination by the Commission is necessary under Rule 4901-1-15(B), O.A.C., to prevent the likelihood of undue prejudice or expense, because the Commission has established an "expedited" briefing schedule, requiring post-hearing briefs by June 22, 2012, and reply briefs by June 29, 2012. The Consumer Advocates contend that, if the Commission reverses the presiding examiner's ruling after briefs are filed, there would be considerable confusion regarding which portions of the briefs would need to be ignored because they relied on documents of which administrative notice was improperly taken.

(10) Specifically, the Consumer Advocates contend that the ESP 3 application is not simply an extension of ESP 2, and that FirstEnergy's motion requesting that the presiding examiner take administrative notice was admission of "backdoor" evidence from two prior cases to bolster its case in this

proceeding. Additionally, the Consumer Advocates argue that the ruling is contrary to Ohio Supreme Court precedent in *Canton Storage & Transfer Co.*, 72 Ohio St.3d 1, 647 N.E.2d 136, because the Consumer Advocates had no prior knowledge of the facts administratively noticed until the third day of the evidentiary hearing and, therefore, had no opportunity to explain and rebut the facts administratively noticed. Further, the Consumer Advocates contend that the facts that constituted the subject of administrative notice were outside the scope of the type of facts appropriate for administrative notice since the facts were not entirely undisputed.

(11) Conversely, in its memorandum contra, FirstEnergy responds that the Consumer Advocates have not demonstrated that the ruling involves a novel question or is a departure from past precedent because the contested ruling mirrors a ruling made by the attorney examiner in ESP 2. FirstEnergy points out that, in ESP 2, the attorney examiner took administrative notice of the entire record in MRO, finding that the parties had ample opportunity to prepare and respond to the evidence administratively noticed through discovery, subpoenas, cross-examination, and testimony at hearing. Further, FirstEnergy points out that the ruling of the attorney examiner in ESP 2 was upheld on rehearing. Finally, FirstEnergy emphasizes that administrative notice is permissible, as long as the parties had prior knowledge of and an opportunity to rebut the facts administratively noticed and the parties will not suffer undue prejudice, citing to *Allen*, 40 Ohio St.3d at 185-186, 532 N.E.2d 1307. In the present case, FirstEnergy points out that the Consumer Advocates had knowledge that the Companies planned to seek administrative notice of records from ESP 2 and MRO well before the presiding examiner's ruling, because the Companies requested that the presiding examiner take such administrative notice in their application and stipulation filed on April 13, 2012. Further, the presiding examiner instructed the Companies to specify which documents it sought to be administratively noticed during the first day of the evidentiary hearing on June 4, 2012, and the Companies provided the specific list on the third day of hearing on June 6, 2012.

(12) FirstEnergy also contends that the Consumer Advocates have had multiple opportunities to explain and rebut the materials administratively noticed from ESP 2 and MRO because all of

the parties filing the interlocutory appeal were also intervenors in the ESP 2 and MRO cases, in which they were permitted to cross-examine witnesses and file post-hearing briefs.

(13) FirstEnergy further contends that the Consumer Advocates have not demonstrated that they will suffer prejudice because administrative notice was granted. Specifically, the Companies state that their burden has not been lessened and the presiding examiner has not "accepted" any disputed facts by finding any facts from ESP 2 or MRO to be conclusive.

(14) Upon review of the arguments made by the parties, the reviewing examiner finds that the issues raised on appeal by the Consumer Advocates do not satisfy the requirement of a new or novel question of interpretation, law, or policy, or a departure from past precedent. As pointed out by FirstEnergy, in ESP 2, the attorney examiner took administrative notice of the entire record in MRO and found that the parties had ample opportunity to prepare and respond to the evidence administratively noticed through discovery, subpoenas, cross-examination, and testimony at hearing, and that the attorney examiner's ruling was upheld on rehearing. Further, as discussed in *Allen*, 40 Ohio St.3d at 185-186, 532 N.E.2d 1307, the Supreme Court of Ohio has found that administrative notice is permissible where the parties have prior knowledge of and an opportunity to rebut the facts administratively noticed, and will not suffer prejudice. As pointed out by FirstEnergy, the Consumer Advocates were on notice of FirstEnergy's intent to seek administrative notice of the entire record of ESP 2 and MRO on April 13, 2012, when the Companies made this request in their application and stipulation. Additionally, the Consumer Advocates were again notified of the Companies' intent during the adjudicatory hearing on June 4, 2012.

In light of these facts, the reviewing examiner cannot find that the Consumer Advocates have demonstrated a new or novel question of interpretation, law, or policy, or a departure from past precedent. Further, the reviewing examiner finds that the Consumer Advocates had sufficient prior knowledge and an opportunity to rebut the facts administratively noticed. As such, the Consumer Advocates have not demonstrated that they will suffer prejudice. Therefore, the request for

certification of the interlocutory appeal filed by the Consumer Advocates should be denied.

It is, therefore,

ORDERED, That the Consumer Advocates' request that their interlocutory appeal be certified to the Commission is denied. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Elizabeth C. Stevens
Legal Director

JRJ/vrm

Entered in the Journal
JUN 21 2012

Barcy F. McNeal
Secretary