

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. )

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.
- (2) On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for a standard service offer (SSO) to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an electric security plan (ESP), in accordance with R.C. 4928.143. The hearing commenced on August 31, 2015.
- (3) On October 13, 2015, FirstEnergy filed a request for certification and application for review of an interlocutory appeal of certain oral rulings of the attorney examiners. In its request for certification, FirstEnergy argues that the Commission should reverse rulings made by the attorney examiners denying the Companies' motions to strike portions of the supplemental testimony of Interstate Gas Supply, Inc. (IGS) witness White (White Exhibit) and the second supplemental testimony of Ohio Manufacturers' Association Energy Group (OMAE) witness Hill (Hill Exhibit), containing copies of purported legislative committee testimony of Leila Vespoli, an officer of the Companies' parent corporation, FirstEnergy Corp., before the Public Utilities Committee of the Ohio House of

Representatives and the Public Utilities Committee of the Ohio Senate (jointly, the Rulings). FirstEnergy argues that the White and Hill Exhibits were not authenticated pursuant to the Ohio Rules of Evidence, were not signed by Ms. Vespoli, and were devoid of any indication of their provenance. Although FirstEnergy notes that both witness White and witness Hill later claimed to have brought certified copies with them at the time they took the stand at hearing, FirstEnergy maintains that neither IGS nor OMAEG sought to admit the purportedly certified copies as separate exhibits. FirstEnergy asserts that the Rulings allowed IGS and OMAEG to amend their witnesses' supplemental testimony months after it was due in order to cure defects with the as-filed testimony and exhibits. FirstEnergy argues that the Rulings represent a departure from past precedent and Commission review is necessary to prevent the likelihood of undue prejudice to the Companies. Consequently, FirstEnergy argues that the Commission should certify the interlocutory appeal and reverse the Rulings.

- (4) On October 19, 2015, IGS and OMAEG filed memoranda contra FirstEnergy's request for certification and application for review of an interlocutory appeal.

In its memorandum contra, IGS asserts that the Rulings did not deviate from precedent and FirstEnergy has failed to demonstrate prejudice from the Rulings. Initially, IGS notes that the Commission is not bound by the rules of evidence. IGS further argues that it submitted sufficient evidence to pass the standard required for authentication, as the source of the document was clearly stated on the document itself, that witness White testified the document was consistent with policy positions FirstEnergy had taken before the General Assembly, and that witness White testified the document was first obtained from FirstEnergy's website. Further, IGS argues that witness White's testimony established that the certified copy he brought with him to the stand was a public record stored by the General Assembly, and that witness White's obtaining of the certified copy made any failure to authenticate the document moot, as it is self-authenticating and an admission of a party-

opponent. Finally, IGS contends that FirstEnergy suffered no prejudice, as witness White testified that the certified copy contained the exact words as the document he relied upon in his prefiled testimony; thus, he did not amend his prefiled testimony.

In its memorandum contra, OMAEG also asserts that the Rulings did not deviate from past precedent or present a new or novel question of law and FirstEnergy has failed to demonstrate undue prejudice. OMAEG initially points out that Ms. Vespoli's testimony is not hearsay and is an admission by a party opponent pursuant to Evid.R. 801(D)(2). OMAEG further asserts that the testimony was properly authenticated, as it is a public record. OMAEG asserts that it exercised reasonable diligence in attempting to obtain a certified copy of the testimony and produced an affidavit at the hearing attesting that Deputy Legal Counsel at the Ohio Senate stated that the Ohio Senate does not certify records for these purposes and the position of the Ohio Senate is that such legislative testimony is self-authenticating, and provided supporting email correspondence from the Deputy Legal Counsel. Next, OMAEG asserts that the Rulings do not present a new or novel question of interpretation, law, or policy, as interpretation and application of evidentiary rules and application of such rulings during a hearing are not new or novel issues. Additionally, OMAEG contends that the Rulings are not contrary to Commission precedent. Finally, OMAEG asserts that the Companies can demonstrate no prejudice, as the versions of testimony prefiled and brought to the stand at hearing were identical, and thus, there was no unfair surprise.

- (5) 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).

- (6) The Rulings at dispute in this request for certification involve a form of evidence not commonly presented at Commission hearings: copies of purported legislative committee testimony of a company officer before committees of the Ohio House of Representatives and Ohio Senate. The uniqueness of this evidentiary issue is heightened by the production of certified copies of the testimony by a witness at the hearing, as well as an affidavit by another witness purportedly supporting the authenticity of the testimony. Although the attorney examiner agrees that interpretation and application of evidentiary rules by the Commission's attorney examiners are typically routine matters that do not present a new or novel question of law or policy, the attorney examiner finds that, under the unique facts presented in this proceeding, FirstEnergy's appeal of the Rulings presents a new and novel question of law or policy. Further, given the nature of the testimony at issue in the Rulings, the attorney examiner finds that a determination by the Commission is needed to prevent the likelihood of undue prejudice to FirstEnergy, should the Commission ultimately reverse the Rulings. Therefore, the attorney examiner finds that FirstEnergy's request for certification meets the requirements set forth in Ohio Adm.Code 4901-1-15(B) and should be certified to the Commission for review.

It is, therefore,

ORDERED, That FirstEnergy's motion for certification of an interlocutory appeal be granted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Mandy W. Chiles

By: Mandy Willey Chiles  
Attorney Examiner

JRJ/sc

**This foregoing document was electronically filed with the Public Utilities**

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**in**

**Case No(s). 14-1297-EL-SSO**

Summary: Attorney Examiner Entry granting FirstEnergy's motion for certification of an interlocutory appeal. - electronically filed by Sandra Coffey on behalf of Mandy Willey Chiles, Attorney Examiner, Public Utilities Commission of Ohio