

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

**MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL OF THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL AND NORTHWEST OHIO AGGREGATION COALITION**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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The Office of the Ohio Consumers' Counsel ("OCC") and Northwest Ohio Aggregation Coalition ("NOAC") filed an interlocutory appeal of an Attorney Examiner's Entry directing Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("FirstEnergy") to file tariff sheets in compliance with the Opinion and Order by May 13, 2016. Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review and Comments on Tariffs by Northwest Ohio Aggregation Coalition and the Office of the Ohio Consumers' Counsel (May 16, 2016) ("Interlocutory Appeal"). According to OCC and NOAC, the inability of FirstEnergy to comply with the terms of the Opinion and Order due to an intervening decision by the Federal Energy Regulatory Commission ("FERC") "preempts" the Public Utilities Commission of Ohio ("Commission") from proceeding with the approval of the tariff sheets to implement the standard service offer ("SSO") approved in the Opinion and Order in this case. As relief, OCC and NOAC seek the continuation of the current electric security plan ("ESP"). OCC and NOAC, however, have not presented a sound legal basis for the Commission to grant the Interlocutory Appeal. Further, OCC and NOAC fail to

demonstrate any injury from the implementation of the Entry they are challenging, but customers of FirstEnergy will suffer a detriment if the appeal is granted. Accordingly, the Interlocutory Appeal should be denied.

I. BACKGROUND

The Commission issued its Opinion and Order in this matter on March 31, 2016. Opinion and Order (Mar. 13, 2016). In the Opinion and Order, the Commission modified and approved an application for an ESP to be effective June 1, 2016 and directed FirstEnergy to file tariff sheets in compliance with the Commission's decision. *Id.* at 122. After the Commission issued its Opinion and Order, FERC issued a decision that has at least delayed the approval of the purchased power agreement ("PPA") on which the authorized Retail Rate Stability Rider ("RRS") was based. *Electric Power Supply Association v. FirstEnergy Solutions*, FERC Docket No. EL16-34, Order Granting Complaint (Apr. 27, 2016) ("*ESPA*"). FirstEnergy sought rehearing of the Opinion and Order and proposed an alternative to the proposed RRS. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Application for Rehearing (May 2, 2016). Other intervenors also sought rehearing and opposed the alternative proposal submitted by FirstEnergy. In response to the applications for rehearing, the Commission granted rehearing for further consideration of the applications for rehearing. Entry on Rehearing (May 11, 2016).

While the matters discussed above were transpiring, FirstEnergy sought an extension of the order to file tariff sheets that complied with the Opinion and Order. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Motion For Extension of Time to File Tariffs (Apr. 29, 2016). On May 10, 2016, the Attorney Examiner directed FirstEnergy to file tariff sheets that complied with

the Commission's Opinion and Order by May 13, 2016. Entry (May 10, 2016) ("Attorney Examiner's Entry").

FirstEnergy made the compliance filing on May 13, 2016. The filing contains a tariff sheet for the RRS. The rates for the RRS for each customer class are set at zero. Letter from Eileen Mikkelsen to Barcy McNeal on Behalf of the Ohio Edison Company, Attachment 2, Tariff Sheet 127 (May 13, 2016). (Similar filings were made on behalf of the other two electric distribution utilities.) The tariff sheets also contained sheets that would implement other terms and conditions such as the expansion of the interruptible load program and the non-market based transmission pilot. *Id.*

On May 20, 2016, the Staff of the Commission filed a letter stating that it had reviewed the tariff sheets filed by FirstEnergy and concluded that the sheets appear to be in compliance with the Commission's Opinion and Order. Letter from Tamara Turkenton and David Lipthrott to Docketing Division (May 20, 2016).

On May 16, 2016, however, OCC and NOAC filed an Interlocutory Appeal of the Attorney Examiner's Entry. OCC and NOAC assert that it was error to require FirstEnergy to file tariff sheets that otherwise cannot be implemented due to the recent ruling of FERC. Interlocutory Appeal at 2. In support of the Interlocutory Appeal, OCC and NOAC assert that FirstEnergy's proposal in its application for rehearing is different from the proposal approved in the Opinion and Order and the Entry directing FirstEnergy to file tariffs contravenes the ruling by FERC requiring the PPA on which FirstEnergy was relying to be filed for FERC review and approval. OCC and NOAC further assert that "[t]hrough its tariff filing, FirstEnergy is attempting to withdraw and terminate its application" in violation of the process for withdrawing an application for an ESP set out in R.C. 4928.143. *Id.* at

8. OCC and NOAC conclude that the Commission must order FirstEnergy to continue the SSO under the terms and conditions of the current offer. *Id.*

II. OCC AND NOAC FAIL TO STATE A LAWFUL BASIS FOR GRANTING THE INTERLOCUTORY APPEAL AND STAYING IMPLEMENTATION OF THE TARIFF SHEETS FILED IN COMPLIANCE WITH THE OPINION AND ORDER

Regardless of the merits of OCC and NOAC's position on the viability of the RRS after the FERC order in *EPSA* or the lawfulness of FirstEnergy's proposal to modify the RRS, the Interlocutory Appeal is without merit. Nothing in the tariffs filed by FirstEnergy is inconsistent with the Opinion and Order, as the Staff found, and the tariff sheets' inclusion of rates set to zero would not impose any injury on the customers represented by OCC and NOAC. On the other hand, the relief that OCC and NOAC seek would work an irreparable hardship on those customers that have sought to enter new contractual relationships with FirstEnergy and competitive retail electric service providers in reliance on the Opinion and Order. Accordingly, the Commission should deny the Interlocutory Appeal.

Rule 4901-1-15, Ohio Administrative Code, provides that a party may seek an interlocutory appeal. Divisions (A) and (B) of the rule govern the circumstances under which a party may seek an interlocutory appeal and provide:

- (A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference that does any of the following:
 - (1) Grants a motion to compel discovery or denies a motion for a protective order.
 - (2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony.
 - (3) Refuses to quash a subpoena.

- (4) Requires the production of documents or testimony over an objection based on privilege.
- (B) Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that 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 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.

Since this appeal does not seek review of a circumstance set out under division (A), division (B) requires OCC and NOAC to demonstrate that their 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 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.

As a ground for granting the Interlocutory Appeal, OCC and NOAC assert that the Attorney Examiner's Entry presents a novel issue. Interlocutory Appeal at 4. The facts, however, do not demonstrate that the Attorney Examiner's Entry did anything other than manage the case. Specifically, the Commission ordered FirstEnergy to file tariffs on May 13, 2016. The FERC order on April 27 upset FirstEnergy's plans. Two days after FERC released *EPSA*, FirstEnergy asked for additional time to make its compliance filing. Based on that request, the Attorney Examiner's Entry on May 10 granted FirstEnergy until May 13 to file the tariff sheets that complied with the Opinion and Order. As the Staff determined, the tariff sheets comply with the terms of the Opinion and Order. Thus, the Attorney Examiner's Entry does not present any new or novel issue.

In the guise of claiming that a new issue is presented, however, OCC and NOAC assert that the rates filed with the tariff sheets, if implemented, “will put into effect standard service offer rates that are fundamentally inconsistent with the FERC preemptive ruling.” *Id.* at 6. As OCC and NOAC explain, the Commission approved the RRS on the basis that there would be an approved PPA and FERC has not provided that approval. *Id.* at 4-5. They then claim that accepting the RRS contravenes FERC authority and is preempted. *Id.* at 5. Accordingly, OCC and NOAC assert that residential customers will be harmed because the retail tariff will be inconsistent with FERC’s authority to review a PPA. *Id.* at 5-6. Further, OCC and NOAC allege that the tariff sheets do not comply with the Opinion and Order. *Id.* at 8.

OCC and NOAC’s stated grounds for the Interlocutory Appeal should be rejected for several reasons.

First, although OCC and NOAC claim that there is something in the tariff sheets that is inconsistent with the FERC’s decision in *EPSA*, OCC and NOAC do not point to anything in those tariffs that conflicts with the Opinion and Order, and there is not. Moreover, approval of the compliance filing would not trigger any apparent conflict between FERC and the Commission, but there is no explanation of what that conflict might be. Accordingly, there is no merit in OCC and NOAC’s claim that *EPSA* somehow “preempts” the Commission from approving the compliance filing.

OCC and NOAC also must show undue prejudice or harm, but do not do so. OCC and NOAC’s stated concern is that the Commission may authorize FirstEnergy to bill and collect under the rider. As OCC and NOAC explain, “If the PUCO authorizes tariffs consistent with its Opinion and Order without rates being subject to refund (which the

PUCO has declined to order), customers may be unable to obtain refunds for charges later determined to be unlawful.” Interlocutory Appeal at 6.

As filed, however, the tariff sheets set the RRS at zero for all customers, and if accepted by the Commission, RRS rates will remain at zero until the Commission authorizes some other rate. R.C. 4905.22 (utility may charge only the rate on file). Simply put, OCC and NOAC have not demonstrated any prejudice resulting from the Attorney Examiner’s Entry.

On the other hand, other customers that have taken action based on the terms and conditions approved as part of the modified and approved ESP will be injured if the Commission grants the Interlocutory Appeal and directs FirstEnergy to continue to operate under the current SSO. The ESP to become effective on June 1, 2016 contains provisions expanding the interruptible program and a transmission pilot that will offer the opportunity for some customers to reduce their total energy bills by managing their demand levels. These programs that have the effect of reducing system demand during peak periods have the potential to benefit all customers, including those served by OCC and NOAC. For example, the benefits of the interruptible program include increased system reliability and stability, the prevention of load shedding (*i.e.*, rolling blackouts) during emergency events, and job retention. See citations to transcript in the Post-Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 108 and n. 521-23 (Feb. 16, 2016) (“Cos. Initial Brief”); Post-Hearing Brief of the Ohio Energy Group at 24-25 (Feb. 16, 2016) (“OEG Initial Brief”); and Initial Brief in Support of ESP IV Stipulation by Nucor Steel Marion, Inc. at 12-15 (“Nucor Initial Brief”). By providing eligible customers a means of reducing their electric generation expenses, continuation of a modified interruptible program also

further Ohio industrial companies' effectiveness in the global economy. Cos. Initial Brief at 148. As the record demonstrates, an interruptible rate program advances "numerous benefits, including the promotion of economic development and the retention of manufacturing jobs." *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 40 (Feb. 25, 2015). Thus, although OCC and NOAC cannot demonstrate any prejudice if the RRS is implemented at a rate of zero for all customers, granting the relief OCC and NOAC seek will harm not only large energy users, but all customers of FirstEnergy generally.

III. **CONCLUSION**

OCC and NOAC fail to state a substantive ground for granting the relief they seek in the Interlocutory Appeal. Further, good policy dictates that the Interlocutory Appeal be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra the Interlocutory Appeal of the Office of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 23rd day of May 2016, via electronic transmission.

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Summary: Memorandum IEU-Ohio's Memorandum Contra the Interlocutory Appeal of the Office of the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio