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 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

JOINT INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO FULL COMMISSION AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, NORTHWEST OHIO AGGREGATION COALITION, AND OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

Larry S. Sauer (0039223)
Counsel of Record
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov

June 8, 2016

Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com

Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com

Counsel for OMAEG

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 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

JOINT INTERLOCUTORY APPEAL,
REQUEST FOR CERTIFICATION TO FULL COMMISSION
AND APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
NORTHWEST OHIO AGGREGATION COALITION, AND
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

The Office of the Ohio Consumers' Counsel ("OCC")[1], Northwest Ohio Aggregation Coalition ("NOAC") and Ohio Manufacturers' Association Energy Group ("OMAEG"), ("Joint Appellants") on behalf of the electric customers of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively "FirstEnergy" or "the Utility") submit this Interlocutory Appeal to the Public Utilities Commission of Ohio ("PUCO" or "the Commission"). Joint Appellants respectfully request that this appeal be certified to the full Commission for review of the Attorney Examiner's June 3, 2016 Entry ("Entry").[2] The Entry ordered, inter alia, that a hearing should be held regarding the provisions of FirstEnergy's Modified RRS Proposal. The Entry limited the scope of the hearing to the provisions of,

---

[1] The Consumers' Counsel is the state's representative of residential utility consumers and submits this filing on behalf of 1.9 million consumers of FirstEnergy.

[2] Consistent with Ohio Adm. Code 4901-1-15(c), we have attached a copy of the June 3, 2016 Entry. (Attachment 1).

and alternatives to, the Modified RRS Proposal. The Entry prohibited any further testimony regarding other assignments of error raised by parties. The Entry also set forth a procedural schedule that it determined was reasonable.[3]

The interlocutory appeal should be certified[4] 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. Upon review,[5] the PUCO should reverse the Attorney Examiner's Entry, which sets the scope of rehearing that allows FirstEnergy to modify the electric security plan the PUCO approved and modified without first withdrawing and terminating the plan in compliance with R.C. 4928.143(C). Instead, the PUCO should direct the Utility to follow the law that requires it to withdraw its current application, thereby terminating it, and file a new standard service offer.[6]

The reasons for this Interlocutory Appeal, including the Request for Certification and the Application for Review are explained in the attached Memorandum in Support.

---

[3] The "reasonableness" of the procedural schedule is the subject of an upcoming pleading. OCC and others will propose an alternative schedule that permits intervenors a full opportunity to challenge the modified RRS proposal and alternatives to that proposal.

[4] Ohio Adm. Code 4901-1-15(B).

[5] Ohio Adm. Code 4901-1-15(C).

[6] See R.C. 4928.143 (C)(2)(a) (If FirstEnergy withdraws its ESP Application, then FirstEnergy must file a standard service offer in the form of either an ESP or a market rate offer).

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer (0039223)
Counsel of Record
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov

(All Attorneys Will Accept Service Via E-mail)

/s/ Thomas R. Hays
Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com
(Will accept service via E-mail)

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(Will accept service via E-mail)

Counsel for OMAEG

TABLE OF CONTENTS

PAGE

I. BACKGROUND 1

II. STANDARD OF REVIEW 3

III. CERTIFICATION OF INTERLOCUTORY APPEAL.....4

A. The Entry raises a new and novel question of interpretation, law, and policy.....4

B. The Entry departs from past precedent. 9

C. An immediate determination by the Commission is needed to prevent the likelihood of undue prejudice to the Joint Appellants and other parties involved in this action. 12

1. Parties will suffer undue prejudice if the Entry is not reversed because customers will be unjustly charged. 12

2. The parties will suffer undue prejudice if the Entry is not reversed because it will set a legal precedent that is harmful to consumers. 13

IV. APPLICATION FOR REVIEW 14

V. CONCLUSION.....15

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 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

MEMORANDUM IN SUPPORT

I. BACKGROUND

On March 31, 2016, the PUCO issued its Opinion and Order in this case ("March 31 Opinion and Order"). That Order approved a series of stipulations that resulted in a standard service offer containing, inter alia, a Retail Rate Stability rider ("Rider RRS"). Under the terms of the PUCO-approved Rider RRS, FirstEnergy was to enter into a purchase power agreement ("PPA") with its affiliate, FirstEnergy Solutions. All customers of FirstEnergy were required to pay for the Rider RRS over the next eight years. Indeed the Rider RRS was the primary basis that made the electric security plan more favorable in the aggregate to customers than a market rate offer.[7]

[7] The PUCO found the utility's ESP was more favorable to customers in the aggregate than a market rate offer on a quantitative basis by $307 million, with $256 million directly attributable to the PPA Rider. Opinion and Order at 119. The PUCO also found the PPA Rider was in the public interest because it would avoid transmission investment in the range of $400 million to $1.1 billion and will encourage resource diversity by supporting 2,220 MW in existing coal fired plants and 908 MW of nuclear generation. Opinion and Order at 87-88. The PUCO also described the significant economic impact upon the regions in which the plans are locating, noting the "economic impact of plant closures and the impact on local communities" is of concern to it. Opinion and Order at 88. With a new FirstEnergy "Modified RRS proposal" that modifies the costs and revenues that flow through Rider RRS and purports to eliminate the support of and tie to FirstEnergy Solutions' generating units contained in the original PPA proposal (see Mikkelsen Rehearing Testimony at 1, 3-7, 11, 13) all of the PUCO's findings are no longer valid.

But, on April 27, 2016, FERC issued an Order that rescinded an earlier waiver given to FirstEnergy Corporation.[8] FERC found that, prior to being allowed to transact under the Affiliate PPA, FirstEnergy Solutions (or any other FirstEnergy Ohio Market affiliate) would have to submit the Affiliate PPA for review and approval under the tests set forth in the *Edgar*[9] and *Allegheny*[10]cases in accordance with 18 C.F.R. § 35.39(b).[11]In other words, FirstEnergy needs its PPA to be approved by FERC before moving forward with Rider RRS.

The PUCO-authorized Rider RRS must be reviewed and approved by FERC prior to implementation, be eliminated, or vastly change as a result of the FERC Order. Indeed, FirstEnergy recognized this and attempted to present a new Modified RRS Proposal in conjunction with its Application for Rehearing on May 2, 2016. Under FirstEnergy's Modified RRS Proposal, as set forth in the Rehearing Testimony of Eileen Mikkelsen, there are no *actual* revenues to be booked as part of any *actual* wholesale capacity or energy transactions.[12] There are no *actual* costs attributable to operating *actual* generation facilities. The Modified RRS Proposal is based on a comparison of forecasted costs that the Utilities will not incur versus forecasted PJM market revenue that the Utilities will not receive.[13]

On May 2, 2016, Joint Appellants filed Applications for Rehearing ("AFRs") on the March 31 Opinion and Order. On May 12, 2016, Joint Appellants filed Joint

---

[8] *EPSA v. FirstEnergy Solutions*, 155 FERC ¶ 61,101 (Apr. 27, 2016) ("FERC Order").

[9] See *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) ("*Edgar*").

[10]*Allegheny Energy Supply Co., LLC*., 108 FERC ¶ 61,082 at P 18 (2004) ("*Allegheny*").

[11] FERC Order at 22.

[12] Mikkelsen Rehearing Testimony at 6.

[13] Id. at 5 (forecasted PJM market revenue will be calculated by multiplying projected capacity MWs with actual base residual auction pricing).

Memoranda Contra FirstEnergy's Application for Rehearing and Modified RRS Proposal. In their Memoranda Contra, Joint Appellants explained that the Modified RRS Proposal is unreasonable and unlawful for a variety of reasons.

On June 3, 2016, the Attorney Examiner issued the Entry, which, without explicit reasoning, implicitly granted FirstEnergy's AFR on its Modified RRS Proposal, denied other parties' AFRs, and limited the scope of rehearing to FirstEnergy's Modified RRS Proposal. The Attorney Examiner ruling essentially allows FirstEnergy to withdraw the PUCO-modified and approved electric security plan ("ESP") and modify it without complying with the statutory process prescribed under R.C. 4928.143(C). Such a decision is a departure from past practice and precedent.

The PUCO should certify this interlocutory appeal. Upon considering this interlocutory appeal, the PUCO should reverse the ruling. Instead, the PUCO should direct the Utility to follow the law that requires it to withdraw its current ESP application, thereby terminating it, and file a new standard service offer that must then be approved by the PUCO.[14]

II. STANDARD OF REVIEW

If a party does not satisfy the criteria set forth in Ohio Adm. Code 4901-1-15(A), the Commissions' procedural rules require an interlocutory appeal to be certified to the Commission. The rule states, in pertinent part:

> [N]o 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.

[14] See R.C. 4928.143 (C)(2)(a) (If FirstEnergy withdraws its ESP Application, then FirstEnergy must file a standard service offer in the form of either an ESP or a market rate offer).

> 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.[15]

This appeal should be certified. It presents a new and novel question of interpretation, law, and policy, it represents a departure from past precedent and an immediate determination is needed to prevent undue prejudice to the Joint Appellants and other parties. Upon considering this interlocutory appeal, the PUCO should reverse the Attorney Examiner's ruling.

III. CERTIFICATION OF INTERLOCUTORY APPEAL

The full Commission will review an Attorney Examiner's ruling if the Attorney Examiner (or other PUCO personnel) certifies the appeal. An interlocutory appeal should be certified if it 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…" That standard is met in this instance and the appeal should be certified.

A. The Entry raises a new and novel question of interpretation, law, and policy.

The Attorney Examiner Entry raises a new or novel question of interpretation, law, or policy. The Attorney Examiner's Entry permitted FirstEnergy to modify its electric security plan, which the PUCO modified and approved, without first

[15] Ohio Adm. Code 4901-1-15(B).

withdrawing and terminating the plan in compliance with the statutory process prescribed under R.C. 4928.143(C).

Under R.C. 4928.143(C)(2), once the PUCO issues an Opinion and Order modifying a utilities' ESP application the utility has two subsequent options. A utility can either accept the PUCO's changes to the ESP application or withdraw and terminate its ESP application. In the current proceeding, the former would have required FirstEnergy to first seek review and approval of its PPA with FirstEnergy Solutions by FERC. Notwithstanding the two statutory options, the Attorney Examiner Entry has provided FirstEnergy with a third option-- an option not found under the statute. This second issue involves a new and novel interpretation of law.

Although the PUCO has addressed similar procedural issues under Am. Sub. Senate Bill 3 ("S.B. 3"), the PUCO has not addressed this precise question. In Case No. 03-93-EL-ATA (the "CG&E Case"), the Commission directed Cincinnati Gas & Electric Co. ("CG&E") to file a rate stabilization plan ("RSP") to stabilize prices following the end of CG&E's market development period generation following S.B. 3. CG&E complied and filed an RSP.[16] CG&E then entered into a stipulation[17] with several intervenors, including PUCO staff, resolving all issues with the RSP. OCC and others opposed the stipulation. The Commission approved the stipulation but modified some of its terms.[18] CG&E and others filed AFRs.[19]

---

[16] *See* The Cincinnati Gas & Electric Company's Filing in Response to the Request of the Public Utilities Commission of Ohio to File a Rate Stabilization Plan, Case No. 03-93-EL-ATA (Jan. 26, 2004).

[17] *See* Stipulation and Recommendation, Case No. 03-93-EL-ATA (May 19, 2004).

[18] *See* Opinion and Order, Case No. 03-93-EL-ATA (Sept. 29, 2004).

[19] *See* The Cincinnati Gas & Electric Company's Application for Rehearing, Case No. 03-93-EL-ATA (Oct. 29, 2004) (the "CG&E AFR").

In its AFR, CG&E proposed that the stipulation be further modified through an "Alternative Proposal." The Commission (not an Attorney Examiner) approved the Alternative Proposal. In response to applications for rehearing, the PUCO held that the Alternative Proposal was not a separate proposal but instead was an assignment of error.[20] According to the PUCO, it simply "modified its opinion and order" based on CG&E's proposal, "just as it might do based on any other party's arguments."[21]

On appeal the Supreme Court of Ohio affirmed the PUCO's decision and found that the PUCO (not an Attorney Examiner) properly exercised its authority under R.C. 4903.10(B) to modify an order if the Commission determines that its "original order or any part thereof is in any respect unjust or unwarranted, or should be changed."[22] The Supreme Court also rejected OCC's argument that the Alternative Proposal was an application for a rate increase and OCC's argument that the PUCO should have held additional hearings to consider the Alternative Proposal.[23]

The situation here is distinguishable from the *CG&E Case* and thus presents a new or novel question of interpretation, law, or policy. While the PUCO in an earlier ruling granted rehearing to further consider the matters raised in numerous parties' applications, it did not specify the scope of rehearing on one of the AFR issues. This is a change from past precedent and is inconsistent with R.C. 4903.10, which requires the Commission to grant rehearing and identify the scope of rehearing.

---

[20] Second Entry on Rehearing, Case No. 03-93-EL-ATA (Jan. 19, 2005).

[21] *Id.* at 8.

[22] *See OCC v. PUC*, 111 Ohio St. 3d 300, 304 (2006).

[23] *Id.* at 305.

Second, the scope of FirstEnergy's proposed changes to its ESP far exceed the changes that CG&E made in its case. CG&E's RSP changed through an iterative process as the case progressed. CG&E filed the RSP and then engaged in negotiations with various parties. The parties agreed to a stipulation that made changes to provisions in the RSP. The PUCO approved the stipulation but made its own changes to provisions in the stipulation. CG&E filed an AFR that made additional changes to individual provisions in the stipulation in response to the PUCO's changes. The changes to the RSP and stipulation, though material at times, did not fundamentally alter the nature of the PUCO approved RSP. Nor did those changes alter the purpose of the RSP—to create a plan to transition to a deregulated market for generation. This is materially different than FirstEnergy's case, where FirstEnergy is not seeking to modify individual, distinct provisions in the ESP stipulation based on guidance from the PUCO. With its AFR concerning its Modified RRS Proposal, FirstEnergy is also not seeking to respond to the PUCO's modifications. Rather, FirstEnergy is seeking to fundamentally change the stipulation and ESP plan that were litigated and modified and approved by the PUCO.

Third, in the *CG&E Case* the PUCO did not reopen the record. Yet, here, that is exactly what FirstEnergy requested and appears to be what the Attorney Examiner permitted. Both the PUCO and the Ohio Supreme Court in *CG&E* stressed the fact that the Alternative Proposal was, in fact, not a separate proposal, but was merely an assignment of error.[24] Because the PUCO found that the Alternative Proposal was an assignment of

[24] *See* Second Entry on Rehearing ¶ 27 ("While CG&E may have styled certain of the arguments in its first application for rehearing as an 'alternative proposal,' the Commission did not consider them as a separate proposal. Rather, the Commission treated them as CG&E's first assignment of error."); *OCC v. PUC*, 111 Ohio St. 3d at 304 ("The commission treated CG&E's alternative proposal as an assignment of error on rehearing and not as a new or separate proposal.").

error, it did not reopen the record, did not allow discovery, did not receive additional testimony or other evidence, and did not hold a hearing on the Alternative Proposal.

In the instant case, the Modified RRS Proposal is in fact a new proposal—a proposal that rejects the PUCO's modified and approved electric security plan for FirstEnergy. The Modified Rider RRS proposal is not simply an assignment of error. FirstEnergy filed additional supporting testimony along with its AFR. FirstEnergy also admitted multiple times in its AFR that the record needs to be reopened to consider its new proposal.[25] By filing testimony, inviting discovery and testimony, and suggesting a hearing date, FirstEnergy admits that the scope of its modifications far exceed the scope of the modifications in *CG&E*, and thus, *CG&E* does not stand for the proposition that FirstEnergy's Modified RRS Proposal can be approved through an Application for Rehearing.

Another difference is that the *CG&E case* involved a different statutory scheme. In CG&E, the PUCO was dealing with S.B. 3. In the instant case, the PUCO must comply with S.B. 221 provisions.

Lastly, *CG&E* is distinguishable because the changes that CG&E made to its stipulation were driven by the PUCO's proposed changes. FirstEnergy's Modified RRS Proposal is driven by changes made by a third party –FERC. FirstEnergy is trying to avoid

[25] *See* FirstEnergy AFR at 21 ("The record need not, and in fact, should not be reopened <u>except as necessary for the limited purpose to explain the modified Rider RRS</u>.") (emphasis added); FirstEnergy AFR at 22 (proposing that intervenors be permitted to depose Ms. Mikkelsen and file testimony and that a hearing would be held or briefs would be filed); FirstEnergy AFR at 22 (noting that the modified Rider RRS rests "largely," but not entirely, on the existing record).

complying with a FERC Order that will require it to engage in a lengthy process with an unknown result.[26]

Therefore, the Entry raises a new or novel question of interpretation, law, or policy and a change in past precedent. The appeal should be certified.

B. The Entry departs from past precedent.

The Entry departs from past precedent and, therefore, should be reviewed by the PUCO for numerous reasons. First, the Entry departs from past precedent because it effectively grants rehearing on an issue that was not properly raised as an assignment of error in the March 31 Opinion and Order. An AFR will not be granted unless it specifically states the grounds on which the applicant believes the PUCO order to be unreasonable or unlawful.[27] Here, however, FirstEnergy failed to specifically state why the March 31 Opinion and Order is unreasonable or unlawful with regard to the PUCO's approval of Rider RRS and how that relates to an error committed by the PUCO with regard to its Modified RRS Proposal. FirstEnergy could not state how or why the PUCO committed an error with regard to its Modified RRS Proposal because one does not exist. The only rationale that FirstEnergy could muster was to state that the March 31 Opinion and Order is unreasonable and the PUCO should grant rehearing, to consider its Modified RRS Proposal, because the March 31 Opinion and Order does not "reflect" the FERC Order. However, the March 31 Opinion and Order could not have possibly "reflected" the FERC Order as the FERC Order did not exist at the time the PUCO issued its decision. Accordingly, there is no error and could not have been any error by the PUCO

[26] See, e.g., FirstEnergy application for rehearing at 13-14.

[27] See R.C. 4903.10(B); *In re Columbus S. Power Co.*, 129 Ohio St. 3d 271, 951 N.E.2d 751, 2011 Ohio 2638 (2011) (Intervenor failed to satisfy its burden to identify a legal problem with a PUCO Order because the intervenor did not provide a persuasive explanation of why or how the order failed to accord with reason).

with regard to the subsequent FERC decision and its impact on the approved Rider RRS. Without such error FirstEnergy could not have lawfully asked for rehearing on this basis.

Recognizing the shortcomings of its assignment of error, FirstEnergy attempted to tie the PUCO decision and overall approval of Rider RRS to the subsequent FERC Order by stating that the FERC Order has "complicated" FirstEnergy's and the PUCO's efforts to approve the Rider RRS and has rendered the March 31 Opinion and Order "unreasonable" because seeking approval of the Affiliate PPA from FERC "would likely require a much more lengthy time period to come to a conclusion."[28]

The fact that FirstEnergy would now need to get its PPA reviewed and approved by FERC prior to transacting under the PPA that was approved by the PUCO, instead of relying on its previous waiver, does not directly render the March 31 Opinion and Order unreasonable or unlawful. In fact, the FERC Order has no direct impact on the March 31 Opinion and Order. As FirstEnergy admits, the March 31 Opinion and Order can be effectuated if FirstEnergy submits, and the FERC approves, the PPA. FirstEnergy has not demonstrated that the PUCO Opinion and Order is unreasonable or unlawful in this regard. The Entry allowing FirstEnergy to shoehorn an amended ESP application into a legally insufficient application for rehearing is a departure from PUCO precedent and practice.

The Entry also departs from past precedent because it allows the PUCO to unlawfully consider evidence that could have been offered during the original hearing. Under R.C. 4903.10(B) if the PUCO grants an AFR "it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original

[28] See FirstEnergy Application for Rehearing at 13-14 (May 2, 2016).

hearing."[29] Here, FirstEnergy could have, with reasonable diligence, offered its Modified RRS Proposal during the original hearing. Many intervenors objected throughout the proceeding, including in the early phases of this proceeding, that the original PPA proposal would need to be reviewed and approved by FERC. FirstEnergy chose not to heed such warnings and chose not to modify its proposal or offer alternatives. Thus, FirstEnergy was well aware of the deficiencies that it now admits its initial Rider RRS proposal contained. It had ample opportunity to consider its position and modify its proposed application at any time during the proceedings. There was nothing that prevented FirstEnergy from doing so.

The fact that FirstEnergy does not explain why this additional evidence could not have been presented earlier is telling. FirstEnergy had a fair opportunity to produce its alternative proposal as part of the eighteen month process it characterized as an "extraordinarily lengthy, thorough and exhaustive evidentiary process with more than 4,100 discovery requests and 41 days of hearing,"[30] But it did not. The Entry is a departure from past precedent (and departs from the law) because it allows FirstEnergy to introduce evidence that could have been offered at the original hearing in violation of R.C. 4903.10(B).

The Entry also departs from past precedent because an Attorney Examiner does not have the authority to issue an entry on rehearing. FirstEnergy's AFR sought the opportunity to address a significant modification to its Rider RRS. The Entry implicitly grants FirstEnergy's AFR on one issue by allowing FirstEnergy the opportunity it sought to present evidence at a hearing on its new Modified RRS Proposal. Thus, the Entry is

[29] See R.C. 4903.10(B).

[30] FirstEnergy Application for Rehearing at 15.

essentially an entry on rehearing. In the past, the PUCO has issued all entries on rehearing.[31] This is a departure from past PUCO practice and precedent. This is also inconsistent with R.C. 4903.10, which requires the Commission to grant rehearing and identify the scope of rehearing.

The Entry also departs from past precedent because it omitted any explicit reasoning for its decision to grant rehearing. Specifically, the Entry omitted any explicit reason prompting its decision to establish a procedural schedule or hold a hearing with respect to the Modified RRS Proposal, and that proposal alone.[32] It omitted any explicit decision or discussion of the merits of the intervenors' Applications for Rehearing or intervenors' memoranda contra FirstEnergy's Application for Rehearing. In the past, the PUCO has set forth the reasons prompting its decisions as it is required to do so by law.[33] In the past, the PUCO has also provided a discussion of all arguments before stating its decision. The Attorney Examiner Entry here, omitting any discussion of the reasons for its decisions, departs from that past precedent.

C. An immediate determination by the Commission is needed to prevent the likelihood of undue prejudice to the Joint Appellants and other parties involved in this action.

1. Parties will suffer undue prejudice if the Entry is not reversed because customers will be unjustly charged.

An immediate determination is needed by the Commission here to prevent the likelihood of millions of Ohioans from being unjustly, or at the very least prematurely, charged for FirstEnergy's Modified RRS Proposal. Under R.C. 4928.143(C)(2), once the

[31] See R.C. 4903.10.

[32] See Entry at P 15 ("Upon consideration of the arguments raised in the applications for rehearing and the memoranda contra the application for rehearing, a hearing should be held regarding the provisions of the Modified RRS Proposal.")

[33] See 4903.09.

PUCO issues an Opinion and Order modifying a utilities' electric security plan application the utility has two subsequent options. A utility can either accept the PUCO's changes to the application or withdraw and terminate the application and file a brand new proposal. Here, FirstEnergy is neither accepting the PUCO's modifications nor withdrawing and terminating its application. Instead, FirstEnergy has proposed a Modified RRS Proposal in its Request for Rehearing. That is, FirstEnergy is seeking and the Attorney Examiner Entry is allowing an alternative option not provided for under the law.

Allowing FirstEnergy to make its Modified RRS Proposal at this juncture, instead of withdrawing, terminating, and refiling its proposal, is significantly accelerating the speed at which FirstEnergy's modified electric security plan may come to a conclusion. This will unduly prejudice consumers because, if approved by the PUCO, consumers will be forced to pay for the Modified RRS Proposal much sooner. Consequently, aggrieved parties will be left with much less time to legally combat the Modified RRS Proposal. And, as the Supreme Court of Ohio clearly explained in *Keko Industries, Inc. v. The Cincinnati & Suburban Bell Tel. Co.,* 151 N.E. 2d 465 (1957), revenues collected prior to a court's decision should not be refunded when a court vacates a commission order. Therefore, there will be no remedy for Ohioans. If the Entry is not reversed now, and FirstEnergy is not ordered to comply with current law and precedent, consumers will be unduly harmed.

2. The parties will suffer undue prejudice if the Entry is not reversed because it will set a legal precedent that is harmful to consumers.

The Entry, if not reversed, allows FirstEnergy to circumvent numerous provisions of the Ohio Revised Code. This would establish harmful legal and policy precedent to

consumers. And it may cause customers to pay rates that are otherwise higher than they would be. Additionally, the Entry, if not reversed, would allow rehearing to be had on an issue that was unrelated to any error committed by the PUCO. It would allow rehearing on evidence that could have been offered during the original hearing, but was not. It would allow a Utility to amend its ESP Application through the rehearing process. It would allow an Attorney Examiner to issue what is essentially an entry on rehearing. And, it would allow for a decision that is not explicitly supported by any reason or explanation. If the Entry is not reversed, this legal precedent could be relied on to the detriment of consumers. The PUCO should reverse or modify the Attorney Examiner Entry.

IV. APPLICATION FOR REVIEW

The PUCO should reverse the Attorney Examiner's June 3, 2016 Entry because it is unjust and unreasonable. The Entry, without any explicit rationale, disregards the intervenors' requests for rehearing and memoranda contra and implicitly grants FirstEnergy's unlawful and defective AFR. The Entry should be reversed.

This Application for Review meets the terms of Oho Adm. Code 4901-1-15(C), because the application has been filed "within five days after the ruling is issued" and the application does "set forth the basis of the appeal and citations of any authorities relied upon." The PUCO should reverse or modify the Attorney Examiner Entry, consistent with Ohio Adm. Code 4901-1-15(E). Upon review,[34] the PUCO should reverse the Attorney Examiner's Entry which sets the scope of rehearing that allows FirstEnergy to withdraw and terminate the electric security plan the PUCO approved and modified

[34] Ohio Adm. Code 4901-1-15(C).

without complying with the process set forth under R.C. 4928.143(C). Instead, the PUCO should direct the Utility to follow the law that requires it to withdraw its current application, thereby terminating it, and file a new standard service offer, or FirstEnergy could continue its currently approved ESP until a subsequent one is approved.[35]

V. CONCLUSION

For the reasons discussed above, this Appeal should be certified to the full Commission and the Commission should reverse the Attorney Examiner's ruling.

Respectfully submitted,

BRUCE J. WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Larry S. Sauer
Larry S. Sauer (0039223)
Counsel of Record
Maureen R. Willis (0020847)
William J. Michael (0070921)
Kevin F. Moore (0089228)
Ajay Kumar (0092208)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone [Sauer]: (614) 466-1312
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Moore]: (614) 387-2965
Telephone [Kumar]: (614) 466-1292
Larry.sauer@occ.ohio.gov
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov
Ajay.kumar@occ.ohio.gov
(All Attorneys Will Accept Service Via E-mail)

[35] See R.C. 4928.143 (C)(2)(a) (If FirstEnergy withdraws its ESP Application, then FirstEnergy must file a standard service offer in the form of either an ESP or a market rate offer).

/s/ Thomas R. Hays
Thomas R. Hays (0054062),
Counsel of Record
For NOAC and the Individual
Communities
8355 Island Lane
Maineville, Ohio 45039
Telephone: 419-410-7069
trhayslaw@gmail.com
(Will accept service via E-mail)

/s/ Kimberly W. Bojko
Kimberly W. Bojko (0069402)
Danielle M. Ghiloni (0085245)
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
(Will accept service via E-mail)

Counsel for OMAEG

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Interlocutory Appeal was served via electronic service upon the parties this 8th day of June 2016.

/s/ Larry Sauer
Larry Sauer
Assistant Consumers' Counsel

SERVICE LIST

mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
stnourse@aep.com
mjsatterwhite@aep.com
yalami@aep.com
ghull@eckertseamans.com
dparram@taftlaw.com
Schmidt@sppgrp.com
ricks@ohanet.org
mkl@smxblaw.com
gas@smxblaw.com
wttpmlc@aol.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
mdortch@kravitzllc.com
rparsons@kravitzllc.com
gkrassen@bricker.com
dstinson@bricker.com
dborchers@bricker.com
DFolk@akronohio.gov
mkimbrough@keglerbrown.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
dwolff@crowell.com
rlehfeldt@crowell.com
rkelter@elpc.org
evelyn.robinson@pjm.com
mhpetricoff@vorys.com
burkj@firstenergycorp.com
cdunn@firstenergycorp.com
jlang@calfee.com
talexander@calfee.com
dakutik@jonesday.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
cmooney@ohiopartners.org
callwein@keglerbrown.com
joliker@igsenergy.com
mswhite@igsenergy.com
Bojko@carpenterlipps.com
ghiloni@carpenterlipps.com
barthroyer@aol.com
athompson@taftlaw.com
Christopher.miller@icemiller.com
Gregory.dunn@icemiller.com
Jeremy.grayem@icemiller.com
blanghenry@city.cleveland.oh.us
hmadorsky@city.cleveland.oh.us
kryan@city.cleveland.oh.us
tdougherty@theOEC.org
jfinnigan@edf.org
Marilyn@wflawfirm.com
todonnell@dickinsonwright.com
matt@matthewcoxlaw.com
mfleisher@elpc.org
drinebolt@ohiopartners.org
meissnerjoseph@yahoo.com
LeslieKovacik@toledo.oh.gov
trhayslaw@gmail.com

mjsettineri@vorys.com
glpetrucci@vorys.com

Jeffrey.mayes@monitoringanalytics.com
msoules@earthjustice.org
sfisk@earthjustice.org
Thomas.mcnamee@ohioattorneygeneral.gov
Thomas.lindgren@ohioattorneygeneral.gov
Steven.beeler@ohioattorneygeneral.gov

Attorney Examiners:

Gregory.price@puc.state.oh.us
Mandy.willey@puc.state.oh.us
Megan.addison@puc.state.oh.us

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 3, 2016

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner issues a procedural schedule that sets an additional hearing in this matter to begin on July 11, 2016.

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 (EPSA), the Retail Energy Supply Association (RESA), Dynegy Inc. (Dynegy), 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. 155 FERC ¶ 61,101 (2016) (FERC Order).

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On April 29, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: Sierra Club; Dynegy; the PJM Power Providers Group and EPSA (jointly, P3/EPSA); and RESA.

{¶ 9} Thereafter, on May 2, 2016, applications for rehearing regarding the Opinion and Order were filed by the following parties: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (CMSD); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials, d/b/a Power4Schools (collectively, Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund (collectively, Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (jointly, OCC/NOAC).

{¶ 10} In its application for rehearing, and as a recommended resolution to three of its proffered assignments of error, FirstEnergy proposed a modified calculation (Modified RRS Proposal) for its retail rate stability rider (RRS) as approved in the ESP IV Opinion and Order, in order to reflect the FERC Order. Additionally, FirstEnergy recommended an expedited procedural schedule in order for the Commission to consider the proposed modifications to Rider RRS.

{¶ 11} By Entry on Rehearing issued May 11, 2016, the Commission granted the applications for rehearing filed by the Companies, Sierra Club, P3/EPSA, Dynegy, RESA, MAREC, CMSD, Power4Schools, NOPEC, Environmental Advocates, OMAEG, and OCC/NOAC, for further consideration of the matters specified in the applications for rehearing. In that Entry, the Commission also found that given "the number and complexity of the assignments of error raised in the applications for rehearing, as well as the potential for further evidentiary hearings in this matter, * * * it is appropriate to grant rehearing at this time. This will allow parties to begin discovery in anticipation of potential further hearings." Entry on Rehearing (May 11, 2016) at 3.

{¶ 12} On May 19, 2016, P3/EPSA filed a joint motion for a stay of discovery and a joint motion for an expedited ruling, arguing that a stay would allow the parties to avoid unnecessary expenses and time conducting and responding to discovery until such time that the Commission resolves the pending issues on rehearing and objections to the Commission's jurisdiction to consider FirstEnergy's Modified RRS Proposal.

{¶ 13} On May 20, 2016, the attorney examiner granted P3/EPSA's motion to stay discovery, on a limited basis, in order to allow parties to file memoranda in response to the motion to stay. Additionally, the attorney examiner noted that the stay of discovery may be extended or terminated once the attorney examiners had the opportunity to review memoranda in response to the motion to stay.

{¶ 14} On May 26, 2016, FirstEnergy filed its motion contra P3/EPSA's motion to stay discovery, stating no party to the proceeding was prejudiced by the Commission's

decision to inform parties to engage in additional discovery. Contrarily, FirstEnergy argues that denying parties the opportunity to engage in discovery at this point will prejudice parties if an additional hearing is required by the Commission. In fact, FirstEnergy indicated that it had already received discovery requests from another intervenor. FirstEnergy further argues that P3/ESPA raised no sufficient grounds to stay discovery, as the Commission sufficiently specified the scope of any additional proceeding, as required by R.C. 4903.10. Moreover, FirstEnergy states that an additional hearing to consider the Modified RRS Proposal is well within the Commission's jurisdiction, noting that the Ohio Supreme has previously found that the Commission may grant rehearing, take additional evidence, and consider proposed modifications to the plan originally approved. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 304, 2006-Ohio-5789). Finally, FirstEnergy contends that if further clarification is needed as to the scope of any additional proceeding, the Commission may provide such clarification in a future order.

{¶ 15} Upon consideration of the arguments raised in the applications for rehearing and the memoranda contra the applications for rehearing, a hearing should be held regarding the provisions of the Modified RRS Proposal. The scope of the hearing will be limited to the provisions of, and alternatives to, the Modified RRS Proposal. No further testimony will be allowed regarding other assignments of error raised by parties.

{¶ 16} In addition, in light of the decision to hold an evidentiary hearing regarding the provisions of the Modified RRS proposal contained in FirstEnergy's application for rehearing, the stay of discovery is hereby terminated in order to provide parties the ability to conduct discovery in anticipation of the forthcoming hearing.

{¶ 17} Further, in order to provide the parties sufficient time and opportunity to present evidence related to the Modified RRS Proposal, the attorney examiner finds the following procedural schedule is reasonable and should be established for this proceeding:

(a) Testimony on behalf of intervenors should be filed by June 22, 2016.

(b) Discovery requests regarding the Modified RRS Proposal, except for notices of deposition, should be served by July 1, 2016.

(c) The evidentiary hearing shall commence on July 11, 2016, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, Hearing Room 11-A, Columbus, Ohio.

{¶ 18} Further, the attorney examiner finds that the response time for discovery should continue to be seven days for all discovery served in this proceeding. Discovery requests and replies shall be served by hand delivery, e-mail or facsimile (unless otherwise agreed by the parties). An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him/her that a request will be forthcoming (unless otherwise agreed by the parties). To the extent that a party has difficulty responding to a particular discovery request within the seven-day period, counsel for the parties should discuss the problem and work out a mutually satisfactory solution.

III. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That the stay of discovery previously granted in this proceeding be terminated, in accordance with Paragraph 16. It is, further,

{¶ 21} ORDERED, That the procedural schedule set forth in Paragraph 17 be observed by the parties. It is, further,

{¶ 22} ORDERED, That the discovery timeline set forth in Paragraph 18 be observed by the parties. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison

By: Megan J. Addison
Attorney Examiner

GAP/sc

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/3/2016 3:03:08 PM

in

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

Summary: Attorney Examiner Entry setting a procedural schedule and terminating the stay of discovery imposed in the May 20, 2016 Attorney Examiner Entry. - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/8/2016 4:59:32 PM

in

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

Summary: Request Joint Interlocutory Appeal, Request for Certification to Full Commission and Application for Review by the Office of the Ohio Consumers' Counsel, Northwest Ohio Aggregation Coalition and Ohio Manufacturers' Association Energy Group electronically filed by Ms. Deb J. Bingham on behalf of Sauer, Larry S.