

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 30, 2016

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner finds that the requests for certification of interlocutory appeals filed on June 8, 2016, should be granted and that the applications for interlocutory appeals should be certified for the Commission's review. Additionally, the attorney examiner finds that the motion to extend the procedural schedule, as established in the June 3, 2016 Entry, should be denied. Finally, the attorney examiner finds that the Ohio Manufacturers' Association Energy Group's motion for leave to file out-of-time should be granted.

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

{¶ 7} On April 29, 2016, applications for rehearing were filed by the following parties: Sierra Club; Dynegy, Inc. (Dynegy); the PJM Power Providers Group and the Electric Power Supply Association (collectively, P3/EPSCA); and the Retail Energy Supply Association (RESA).

{¶ 8} Thereafter, on May 2, 2016, applications for rehearing were filed by the following parties in this proceeding: FirstEnergy; Mid-Atlantic Renewable Energy Coalition (MAREC); Cleveland Municipal School District (Cleveland Schools); The Ohio Schools Council, Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials, dba Power4Schools (Power4Schools); Northeast Ohio Public Energy Council (NOPEC); Environmental Law and Policy Center, Ohio Environmental Council, and Environmental Defense Fund

(Environmental Advocates); the Ohio Manufacturers' Association Energy Group (OMAEG); and the Ohio Consumers' Counsel and Northwest Ohio Aggregation Coalition (collectively, OCC/NOAC).

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

{¶ 10} On May 11, 2016, the Commission issued an Entry on Rehearing (First Entry on Rehearing). In the First Entry on Rehearing, the Commission granted the numerous applications for rehearing filed in this proceeding on April 29, 2016 and May 2, 2016, for further consideration of the arguments raised in the applications for rehearing.

{¶ 11} On May 13, 2016, FirstEnergy filed proposed tariffs in the above captioned case and Case No. 16-541-EL-RDR, pursuant to the Opinion and Order. The filed proposed tariffs include a Retail Rate Stability Rider (Rider RRS) charged to all customers, with no kWh value applied to the rider.

{¶ 12} On May 20, 2016, Staff filed its review and recommendations regarding the Companies' proposed tariff filing, concluding that it was consistent with the Opinion and Order.

{¶ 13} Additionally, by Entry issued May 20, 2016, the attorney examiner granted PJM Power Providers, Inc. and Electric Power Supply Association (collectively, P3/EPSA)'s motion to stay discovery in this proceeding. The attorney examiner noted, however, that the stay of discovery was to be granted on a limited basis to allow the

attorney examiners enough time to review any filed memoranda contra the motion to stay discovery and issue a ruling to either extend or terminate the stay.

{¶ 14} By Finding and Order issued May 25, 2016, the Commission found that, in accordance with Staff's review and recommendations, the Companies' proposed tariff filing was consistent with the Opinion and Order, did not appear to be unjust and unreasonable, and therefore, was approved for rates effective June 1, 2016.

{¶ 15} On June 3, 2016, the attorney examiner issued an Entry establishing a procedural schedule for an additional hearing in this matter. The attorney examiner also lifted the temporary stay of discovery in order to allow parties to conduct discovery in the event an additional evidentiary hearing was required to discuss the Modified RRS Proposal.

{¶ 16} On June 8, 2016, OCC/NOAC and OMAEG (collectively, Joint Appellants) and P3/EP SA filed requests for certification and applications for review of an interlocutory appeal of the June 3, 2016 Entry.

{¶ 17} On June 10, 2016, Industrial Energy Users - Ohio (IEU-Ohio) filed a memorandum contra Joint Appellants' request for certification and application for review of an interlocutory appeal. Thereafter, on June 13, 2016, FirstEnergy filed memoranda contra P3/EP SA and Joint Appellants' requests for certification and applications for review of interlocutory appeals.

{¶ 18} In their memorandum in support, P3/EP SA assert that the June 3, 2016 Entry should be reversed for two reasons. P3/EP SA first argue that the attorney examiner cannot assert jurisdiction over the Modified RRS Proposal until the Commission rules on whether FirstEnergy's failure to include its new proposal in its application for rehearing, as required by R.C. 4903.10, prevents the Commission from hearing the proposal on rehearing. As a result, P3/EP SA argue that a hearing cannot be held unless the Commission first determines that the argument for the Modified RRS

Proposal was raised in an assignment of error in the application for rehearing and the Commission has jurisdiction. Second, P3/EP SA contend that only the Commission, can grant rehearing and set the scope of rehearing, including the evidence to be taken on the Modified RRS Proposal. P3/EP SA argue, however, that the attorney examiner, nonetheless, ordered that a hearing on the Modified RRS Proposal take place and set a procedural schedule without the requisite authority of a preceding Commission order, which is contrary to R.C. 4903.10 and past precedent. Specifically, P3/EP SA argue that R.C. 4903.10 requires the Commission, rather than an attorney examiner, to conclude the following before a hearing may be held: sufficient reason for rehearing exists; the purpose for which rehearing is being granted; the scope of additional evidence to be taken at hearing, if any; and that the designated evidence could not have been offered during the original hearing, with reasonable diligence. As no authority to issue the June 3, 2016 Entry existed, P3/EP SA recommend that it should be vacated in its entirety to ensure compliance with R.C. 4903.10. Additionally, P3/EP SA contend an immediate Commission determination is needed to prevent undue prejudice and expense to the parties, as the procedural schedule straddles the Fourth of July holiday weekend and it is very likely that the Commission may issue a decision that differs from the June 3, 2016 Entry. Therefore, P3/EP SA believes that the June 3, 2016 Entry presents a new or novel question of interpretation, law, or policy, and requires an immediate Commission determination to prevent undue prejudice or expense.

{¶ 19} In its memorandum contra P3/EP SA's request for certification of an interlocutory appeal, FirstEnergy argues that the attorney examiner was not required to delay all proceedings until such time the Commission considers P3/EP SA's jurisdictional argument, further noting that the Commission granted rehearing in order to allow for additional evidence to be gathered regarding the Modified RRS Proposal. Upon granting rehearing, FirstEnergy asserts the decision to establish a procedural schedule was well within the attorney examiner's authority. The Companies further acknowledge that the Commission will still have the ability to consider Joint

Appellants' jurisdictional arguments, but that should not halt all other matters pertaining to this proceeding. The Companies allege that the June 3, 2016 Entry was merely implementing the Commission's First Entry on Rehearing and, thus, does not raise a new or novel question of interpretation, law, or policy. FirstEnergy further argues that an immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expense to Joint Appellants, as it is likely the Commission would reiterate the need to take additional evidence in regard to the Modified RRS Proposal.

{¶ 20} Joint Appellants request that its appeal be certified to the Commission in order to review the attorney examiner's June 3, 2016 Entry, setting an evidentiary hearing regarding the provisions of FirstEnergy's Modified RRS Proposal. In their memorandum in support, Joint Appellants contend that the Entry allowed the Companies to modify their ESP "without first withdrawing and terminating the plan in compliance with the statutory process prescribed under R.C. 4928.143(C)," and, thus, raises a new and novel question of interpretation, law, and policy. Joint Appellants contend that the June 3, 2016 Entry provided FirstEnergy with the option to propose a revised plan, which is not authorized under the applicable statute, and differs significantly from past decisions. *In re Ohio Consumers' Counsel*, 111 Ohio St.3d 300, 2006-Ohio-5789 (*CG&E Case*). Initially, Joint Appellants argue that, although the *CG&E Case* was very similar procedurally to this proceeding, this case varies from the *CG&E Case* in five important respects: (1) the Commission failed to specify the scope of rehearing to the Modified RRS Proposal or determine that the Modified RRS Proposal was properly raised as an assignment of error; (2) the scope of FirstEnergy's proposed changes "fundamentally alter the nature" of the approved ESP, far exceeding the changes proposed in the *CG&E Case*; (3) the Commission did not reopen the record in *CG&E Case* upon determining that the alternative proposal was merely an assignment of error, whereas the Modified RRS Proposal is a new proposal which effectively rejects the approved ESP IV; (4) this proceeding is subject to a different statutory scheme than

the one applicable for the *CG&E Case*; and (5) the changes proposed in the *CG&E Case* were driven by the Commission's proposed changes, whereas the Modified RRS Proposal is driven by the FERC Order.

{¶ 21} Further, Joint Appellants allege that the June 3, 2016 Entry departs from past precedent, arguing that the attorney examiner granted rehearing on an issue that was not properly raised as an assignment of error in the Opinion and Order, as it failed to specifically state the grounds on which FirstEnergy believed the Opinion and Order to be unlawful or unreasonable. Joint Appellants further note that FirstEnergy's argument that the Opinion and Order did not reflect the FERC Order cannot be considered reasonable, given the fact that the FERC Order was issued after the Opinion and Order. Joint Appellants also contend that the June 3, 2016 Entry departs from past precedent because it would allow the Commission to consider evidence that could have been offered during the original hearing, in direct violation of R.C. 4903.10(B). Joint Appellants argue that FirstEnergy had the opportunity to raise the Modified RRS Proposal during the 18-month process, especially since many of the intervening parties raised objections to the fact that the original RRS proposal, which included a purchase power agreement with an affiliate company, would need to be reviewed and approved by FERC. As FirstEnergy elected not to offer its Modified RRS Proposal during that time, Joint Appellants believe the Companies should not be given an additional opportunity to do so now in violation of R.C. 4903.10(B). Finally, Joint Appellants claim that the June 3, 2016 Entry departs from past precedent as it is essentially an entry on rehearing, which, according to R.C. 4903.10, can only be issued by the Commission, as well as lacks any explicit reasoning for the decision to establish a procedural schedule or hold a hearing with respect to the Modified RRS Proposal.

{¶ 22} Joint Appellants also state that an immediate determination by the Commission is needed to prevent undue prejudice to the intervening parties in this proceeding, noting that customers may be unjustly and prematurely charged for

FirstEnergy's Modified RRS Proposal, if the Commission approves this proposal, rather than directing FirstEnergy to withdraw its application and file a new application pursuant to the process found in R.C. 4928.143(C)(2). Moreover, Joint Appellants argue that allowing for the hearing to take place will establish harmful precedent for Ohio consumers, effectively permitting utility companies to amend their ESP applications through the rehearing process by proposing changes unrelated to an error committed by the Commission, allowing evidence which could have been offered during the original hearing, allowing an attorney examiner to issue an entry on rehearing, and allowing a decision that is not supported by reason or explanation to stand. For all of these reasons, Joint Appellants request certification of its interlocutory appeal.

{¶ 23} In its memorandum contra Joint Appellants' request for certification of an interlocutory appeal, IEU-Ohio argues that because the Commission approved the ESP in its Opinion and Order and FirstEnergy has not withdrawn its application, there is no lawful basis for the Commission to order the utility to file tariffs to continue its most recent SSO, pursuant to R.C. 4928.143(C)(2)(b). IEU-Ohio also notes that customers have already engaged to enter into new contracts for service with FirstEnergy or competitive retail electric service (CRES) providers in reliance on the Opinion and Order and these customers, as well as the remaining customer base in FirstEnergy's service territory, will be harmed as they will not be able to fully realize the numerous benefits resulting from the approved ESP if this proceeding is further delayed.

{¶ 24} In its memorandum contra Joint Appellants' request for certification of an interlocutory appeal, FirstEnergy asserts that the June 3, 2016 Entry was merely setting a procedural schedule in order to conduct further evidentiary hearings that the Commission alluded to in its First Entry on Rehearing. Additionally, FirstEnergy notes that agreeing with the position of the Joint Appellants would effectively eliminate the rehearing and appeal process provided in R.C. Chapter 4903 as it applies to electric utilities, thereby forcing them to either choose to accept the Commission's modifications

to a proposed ESP or withdraw their application pursuant to R.C. 4928.143(C)(2). FirstEnergy further argues that a scheduling entry is neither new nor novel and does not depart from past precedent. The Companies specifically contend Joint Appellants' attempt to distinguish this proceeding from the *CG&E Case* does not constitute a new or novel issue, noting that receiving evidence on rehearing in order to comply with R.C. 4903.09 is authorized by R.C. 4903.10 and was specifically acknowledged by the Supreme Court of Ohio in the *CG&E Case*. *CG&E Case* at 304. Moreover, FirstEnergy states this issue is moot, as the First Entry on Rehearing already made the decision to reopen the record. Additionally, the Companies claim that the scope of rehearing was adequately identified, as no other application for rehearing granted in the First Entry on Rehearing requested additional evidentiary hearings.

{¶ 25} The Companies assert the June 3, 2016 Entry does not depart from past precedent, as it was simply establishing a procedural schedule after the Commission had issued its First Entry on Rehearing. Further, FirstEnergy states that it had no lawful basis to introduce evidence to support the Modified RRS Proposal until after the Commission had issued the First Entry on Rehearing. Finally, FirstEnergy argues that the Joint Appellants would not be unduly prejudiced if the Commission does not immediately review the June 3, 2016 Entry; rather, the Companies contend that customers will be prejudiced if the Commission should decide to further delay this proceeding, and thus, consequently delay the benefits associated with the Commission approved ESP.

{¶ 26} 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 the 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).

{¶ 27} Although the attorney examiner agrees that establishing procedural schedules typically involve routine matters that do not present new or novel questions of law or policy, the attorney examiner finds that, under the unique facts presented in this proceeding, Joint Appellants and P3/EPSA's appeals regarding the June 3, 2016 Entry present new or novel questions of law or policy. Further, given the expedited procedural schedule, the attorney examiner finds that a determination by the Commission is needed to prevent the possibility of undue expense to Joint Appellants and P3/EPSA. Accordingly, the attorney examiner finds that the requests for certification meet the requirements set forth in Ohio Adm.Code 4901-1-15(B) and the joint interlocutory appeals should be certified to the Commission for review.

{¶ 28} Additionally, on June 10, 2016, Joint Appellants filed a motion for an extension of the procedural schedule and request for an expedited ruling. In their memorandum in support of their motion, Joint Appellants contend that sufficient time is needed in order to allow intervening parties to conduct discovery and prepare for the evidentiary hearing, noting that the Modified RRS Proposal varies significantly from the ESP approved in the Opinion and Order. Joint Appellants specifically argue that the procedural schedule denies intervening parties due process and a just and reasonable opportunity to be heard by the Commission, contrary to Ohio Adm.Code 4901-1-16, given the fact that parties will only have 13 business days to prepare new

testimony, review the Modified RRS Proposal and FirstEnergy's May 2, 2016 application for rehearing, and identify and select expert witnesses available for the hearing dates. Joint Appellants also state that there is no real need for an expedited procedural schedule, as the Companies' tariffs are in place and there are no upcoming auctions that would require an expedited decision. Arguing that the procedural schedule set forth in the June 3, 2016 Entry is prejudicial, unjust, and unreasonable, the Joint Appellants propose the following procedural schedule:

- (a) Intervenor's testimony to be filed by July 22, 2016.
- (b) Written discovery deadline to be served by July 29, 2016.
- (c) Evidentiary hearing to commence on August 8, 2016.

{¶ 29} FirstEnergy filed a memorandum contra Joint Appellants' motion to extend on the procedural schedule on June 17, 2016. FirstEnergy argues that any further delay is unnecessary, as the additional hearing has been sufficiently narrowed to the Modified RRS Proposal and that the underlying forecasts have already been subject to cross examination. Additionally, the Companies state that, although parties have had the ability to review the Modified RRS Proposal from the date it was submitted in FirstEnergy's application for rehearing in this proceeding, Joint Appellants elected to wait more than a month to issue any discovery requests. The Companies also argue that Joint Appellants cannot blame the temporary stay of discovery, as they did not file any memoranda contra the motion to stay nor raise any objections at the time it was filed. Finally, FirstEnergy contends that Joint Appellants fail to provide any authority that supports their claim that due process requires additional time to conduct discovery, noting that the hearing will provide them the opportunity to raise their objections to the Modified RRS Proposal.

{¶ 30} Although Joint Appellants assert that the procedural schedule set forth in the June 3, 2016 procedural schedule is prejudicial, unjust, and unreasonable, they fail to

address the fact that the Commission initially reopened the record in the First Entry on Rehearing and allowed additional discovery to be conducted in preparation of potential future hearings on May 11, 2016. Moreover, Joint Appellants fail to provide any legal precedent to support their assertions that the June 3, 2016 Entry violates due process. Additionally, as the scope of the hearing has been limited to the Modified RRS Proposal, the attorney examiner finds adequate time has been afforded to the parties to prepare for the additional hearing. Accordingly, the attorney examiner finds that Joint Appellants' motion to extend the procedural schedule should be denied.

{¶ 31} As a final matter, OMAEG filed a motion for leave to file out-of-time on June 23, 2016, requesting permission to file the direct testimony of Thomas N. Lause. In its memorandum in support, OMAEG states that it filed the testimony less than 24 hours after the established deadline due to the expert witness' inability to obtain the requisite management approval in light of concerns regarding confidential information. OMAEG further asserts that this testimony will assist in the effort to create a full and complete record for the Commission's consideration and will not create any undue prejudice on the other parties to this proceeding.

{¶ 32} Ohio Adm.Code 4901-1-13(A) states that "continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown * * *."

{¶ 33} The attorney examiner finds that OMAEG has demonstrated good cause for its late filing, given the unique circumstances of this case and the concerns regarding confidential and sensitive business information. Furthermore, the attorney examiner agrees that no other parties will be prejudiced by allowing the testimony to be filed in this proceeding, and such a filing will contribute to the development of a full and complete record. Accordingly, the attorney examiner finds that OMAEG's motion for leave to file out-of-time should be granted.

III. ORDER

{¶ 34} It is, therefore,

{¶ 35} ORDERED, That Joint Appellants and P3/EPSA's requests for certification of interlocutory appeals be granted. It is, further,

{¶ 36} ORDERED, That Joint Appellants' motion for an extension of the procedural schedule be denied. It is, further,

{¶ 37} ORDERED, That OMAEG's motion for leave to file out-of-time be granted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Megan Addison

By: Megan J. Addison
Attorney Examiner

JRJ/sc

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

Summary: Attorney Examiner Entry granting Joint Appellants and P3/EPSA's requests for certification of interlocutory appeals, denying Joint Appellants' motion for an extension of the procedural schedule, and granting OMAEG's motion for leave to file out-of-time. - electronically filed by Sandra Coffey on behalf of Megan Addison, Attorney Examiner, Public Utilities Commission of Ohio