

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company of a Grid Modernization Business Plan |) |) | Case No. 16-481-EL-UNC |
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| In the Matter of the Filing by Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Application for Approval of a Distribution Platform Modernization Plan |) |) | Case No. 17-2436-EL-UNC |
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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company to Implement Matters Relating to the Tax Cuts and Jobs Act of 2017 |) |) | Case No. 18-1604-EL-UNC |
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| In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Tariff Change |) |) | Case No. 18-1656-EL-ATA |

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO FULL COMMISSION, AND APPLICATION FOR REVIEW BY THE OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP

The Attorney Examiner should deny the Request for Certification (the “Request”) filed by The Ohio Manufacturers’ Association Energy Group (“OMAEG”). The Request seeks certification of an interlocutory appeal from the Hearing Examiner’s Entry dated November 15, 2018 (“Entry”), which granted the Motion to Consolidate filed in these four proceedings by Ohio

Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, the “Companies”).¹ OMAEG argues that the decision to consolidate these proceedings departed from past precedent and presents new or novel questions of law and policy. Yet an entry consolidating proceedings that are being resolved via a joint stipulation is neither new nor novel and does not depart from past precedent. Nor has OMAEG argued or shown, as is required by O.A.C. 4901-1-15(B), that it would be unduly prejudiced if the Commission does not immediately review the Entry. Thus, the Request should be denied.²

I. STANDARD OF REVIEW

For OMAEG’s appeal to move forward, it must first be certified by the “legal director, deputy legal director, attorney examiner, or presiding hearing officer.” O.A.C. 4901-1-15(B). In order to seek the Attorney Examiner’s certification of the Joint Movants’ proposed interlocutory appeal of the Entry, OMAEG must meet both of the requirements of O.A.C. 4901-1-15(B):

The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:

[1] 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

[2] 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.

¹ The Entry appears to have been issued on an expedited basis under O.A.C. 4901-1-12(F), given that the ruling did not adversely affect a substantial right of any party.

² If the appeal is certified to the Commission, the entry consolidating these proceedings should be affirmed for the same reasons as set forth herein.

O.A.C. 4901-1-15(B). *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test).

Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018) (“The failure to demonstrate the second element, even where the first is satisfied, is fatal to any application for certification of an interlocutory appeal under Ohio Adm. Code 4901-1-15(B)”); *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions*, Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012) (same).

II. ARGUMENT

A. **Joint Movants Have Failed to Demonstrate that the Entry Presents a New or Novel Question of Interpretation, Law or Policy, or Is Taken from a Ruling Which Represents a Departure from Past Precedent.**

The consolidation of these four proceedings was reasonable because the Stipulation filed in each of the proceedings on November 9, 2018 is a package that, if adopted by the Commission, will resolve the issues in all four proceedings. *See Stipulation*, pp. 7, 28-29. Indeed, a substantive provision of the Stipulation is that these four proceedings should be

consolidated.³ *Id.*, pp. 9-10. An order consolidating multiple proceedings for purposes of applying the Commission's three-part stipulation test presents neither new nor novel questions and is consistent with past Commission precedent.

On previous occasions, the Commission has consolidated diverse proceedings for purposes of settlement. *See, e.g., In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Entry at ¶ 7 (Sept. 16, 2011) (following submission of a partial stipulation intended to resolve multiple cases, procedural entry consolidates AEP Ohio's ESP case, merger case, two emergency curtailment service rider cases, a capacity charge case, and two deferred fuel costs cases). The Commission also has consolidated diverse proceedings involving one utility, even prior to settlement. *See, e.g., In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, 2003 Ohio PUC LEXIS 392, Opinion and Order, at *5-9 (Sept. 2, 2003) (entry consolidated four cases: an application to extend the market development period, an application for accounting authority to defer costs associated with the implementation of revised Electric Service and Safety Standards, a complaint case against the utility for violating a stipulation in a prior proceeding, and an application to modify current tariffs to withdraw some services and to modify others).

³ If these proceedings had not been consolidated, any Signatory Party to the Stipulation could initiate the process that permits withdrawal from the Stipulation. *See id.*, pp. 29-30.

The reasonableness of the settlement for the utility and its customers is the common issue justifying consolidation of proceedings here. As was explained in a recent proceeding: “The Stipulation purports to be a package that simultaneously resolves the issues in all four cases. It is logical, then, for the Commission to consider all the cases together and thus consolidate them.” *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 17-32-EL-AIR, *et al.*, 2018 Ohio PUC LEXIS 525, Entry at ¶ 8 (May 9, 2018). A consolidation for purposes of settlement does not present new or novel questions of law or policy and is *consistent with* past precedent. In fact, OMAEG does not cite even one prior Commission decision finding otherwise.

OMAEG’s attempt to distinguish the recent consolidation of ten Duke Energy dockets falls flat. *See* OMAEG Br., p. 6. OMAEG argues that the ten Duke dockets that were consolidated all “related to costs recovered by Duke from customers,” and, thus, are distinguishable from the four dockets consolidated here. But the Duke Energy stipulation addressed the same two topics addressed here *and many more*. As is the case here, the Duke Energy stipulation addressed the Tax Cuts and Jobs Act of 2017 (“TCJA”) and grid modernization. Duke Stip., pp. 16-18, 25 and Att. F. It also addressed Duke’s base distribution rates. *Id.*, pp. 7-13, 14-16. It also addressed Duke’s electric security plan, its provision of generation and transmission service, and supplier issues. *Id.*, pp. 4-7, 20-24, 25-26. It also addressed Duke’s offering of a price stabilization rider. *Id.*, pp. 18-20. And it addressed Duke’s minimum reliability performance standards. *Id.*, p. 13. The fact that the stipulation resolved all of these complex issues as a package is what justified consolidation there, and it also justifies consolidation here.

OMAEG's proposal is to have four separate hearings on the Stipulation in each of the four dockets. Request, p. 8. But the question before the Commission is whether the Stipulation satisfies the three-part test applied to settlements:

- (1) Is the settlement a product of "serious bargaining" among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest? and
- (3) Does the settlement package violate any important regulatory principle or practice?

See In re Ohio Edison Co., 146 Ohio St.3d 222, 2016-Ohio-3021, 54 N.E.3d 1218, ¶ 37 (noting that Ohio Supreme Court has endorsed this test). Indeed, the Companies already have filed the Direct Testimony of Santino L. Fanelli answering each of these questions in the affirmative. *See* Direct Testimony of Santino L. Fanelli (Nov. 9, 2018). Despite OMAEG's suggestion that consolidating these proceedings will not streamline them because there will be no overlap between witnesses, the Companies were able to address *all* Stipulation issues through one witness. In contrast, OMAEG's proposal defies common sense and would impose burdens on all parties and the Commission by requiring separate hearings to address the same three-part test, and the same testimony, in each proceeding.

One consolidated proceeding is eminently reasonable. Requiring Mr. Fanelli to provide the same testimony in four separate proceedings is not. OMAEG has not shown how the Entry raises a new or novel question of interpretation, law or policy or represents a departure from past Commission precedent.

B. OMAEG Cannot Show that an Immediate Determination by the Commission Is Needed to Prevent the Likelihood of Undue Prejudice or Expense.

OMAEG makes no attempt to satisfy the second prong of the test for an interlocutory appeal, and the Request can be summarily denied on that basis alone. In reality, since OMAEG

appears to agree fully with the settlement and consolidation of the TCJA proceedings (Request, pp. 3, 6), its only complaint appears to be with the terms of the settlement of the grid modernization proceedings. This is not a complaint regarding consolidation, but a complaint with the stipulation. And it is not a complaint that requires immediate determination by the Commission. Instead, OMAEG is free to raise any appropriate objections it has to the proposed settlement of grid modernization issues in the hearing scheduled for February 4, 2019. *See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Section 4929.11, Revised Code, of a Tariff to Recover Conservation Expenses and Decoupling Revenues Pursuant to Automatic Adjustment Mechanisms and for such Accounting Authority as May Be Required to Defer Such Expenses and Revenues for Future Recovery Through such Adjustment Mechanisms*, Case No. 05-1444-GA-UNC, 2007 Ohio PUC LEXIS 131, Entry at ¶ 15 (Feb. 12, 2007) (finding that an immediate determination by the Commission is not needed because the complaining party cannot demonstrate any undue prejudice or expense resulting from an entry setting forth the procedural schedule for a new evidentiary hearing, given that the party will be able to conduct discovery and present testimony at hearing).

OMAEG has not shown how it would be prejudiced absent immediate Commission review of the Entry. Because nothing is gained by certifying the requested appeal, the Request should be denied.

III. CONCLUSION

OMAEG has failed to meet its burden to establish both requirements for certification of an interlocutory appeal. Therefore, for the reasons stated above, the Commission should deny OMAEG's Request.

Respectfully Submitted,

/s/ James F. Lang

Brian J. Knipe (0090299) (Counsel of Record)
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
bknipe@firstenergycorp.com
330-384-5795
330-384-3875 (fax)

James F. Lang (0059668)
Mark T. Keaney (0095318)
CALFEE, HALTER & GRISWOLD LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
mkeaney@calfee.com

ATTORNEYS FOR OHIO EDISON COMPANY,
THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY

CERTIFICATE OF SERVICE

I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 26th day of November, 2018. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

 /s/ James F. Lang
One of Attorneys for the Companies

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Case No(s). 16-0481-EL-UNC, 17-2436-EL-UNC, 18-1604-EL-UNC, 18-1656-EL-ATA

Summary: Memorandum Contra Interlocutory Appeal and Request for Certification electronically filed by Mr. James F Lang on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company