

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Ohio Edison Company, The Cleveland )  
Electric Illuminating Company, and )  
The Toledo Edison Company for ) Case No. 14-1297-EL-SSO  
Authority to Provide for a Standard )  
Service Offer Pursuant to R.C. 4928.143 )  
in the Form of an Electric Security Plan. )

ENTRY

The attorney examiner finds:

- (1) Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are public utilities as defined in R.C. 4905.02 and, as such, are subject to the jurisdiction of this Commission.
- (2) On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to provide for a standard service offer (SSO) to provide generation pricing for the period of June 1, 2016, through May 31, 2019. The application is for an electric security plan (ESP), in accordance with R.C. 4928.143.
- (3) During the pendency of FirstEnergy's application, on February 25, 2015, the Commission modified and approved an ESP for Ohio Power Company d/b/a AEP Ohio (AEP Ohio), which will ultimately determine AEP Ohio's SSO rates from June 1, 2015, through May 31, 2018. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (*AEP Ohio ESP III*), Opinion and Order (Feb. 25, 2015) (*AEP Ohio Order*). The Commission declined to adopt the purchase power agreement (PPA) rider proposal, as put forth in *AEP Ohio ESP III*; however, the Commission authorized the establishment of a placeholder PPA rider, at the initial rate of zero, with AEP Ohio being required to justify any requested cost recovery in future filings before the Commission. The Commission also presented several factors it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated

with PPAs. Those factors were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. AEP Ohio Order at 25. In addition, the Commission indicated that the rider proposal must address additional issues specified by the Commission, including a proposed process for periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and an alternative plan to allocate the rider's financial risk between both AEP Ohio and its ratepayers. Further, the Commission indicated the PPA proposal must include a severability provision that recognizes that all the provisions of AEP Ohio's ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction. AEP Ohio Order at 25-26.

- (4) Thereafter in this case, by Entry issued March 23, 2015 (March Scheduling Entry), the attorney examiner modified the procedural schedule in order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding. According to the current procedural schedule, supplemental testimony on behalf of FirstEnergy and the intervenors is due by May 4, 2015, testimony on behalf of Staff is due by May 29, 2015, the prehearing conference is scheduled for June 2, 2015, and the hearing is scheduled for June 15, 2015.
- (5) On March 30, 2015, the Northeast Ohio Public Counsel, Northwest Ohio Aggregation Coalition, Ohio Manufacturers' Association Energy Group, Ohio Partners for Affordable Energy, and the Office of the Ohio Consumers' Counsel (collectively, Joint Movants) filed a joint interlocutory appeal, requesting certification of the March Scheduling Entry to the Commission for its review. Joint Movants assert that this appeal is being pursued to afford parties a fair opportunity to submit testimony that could be

affected by pending applications for rehearing in *AEP Ohio ESP III* and provide the Commission a sufficient and thorough record on which to base its findings. Joint Movants further argue that the interlocutory appeal should be certified for immediate determination, pursuant to Ohio Adm.Code 4901-1-15(B), 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. Joint Movants urge the Commission to reverse or modify the March Scheduling Entry, requiring supplemental testimony only after the applications for rehearing in *AEP Ohio ESP III* have been substantively ruled upon. In addition, Joint Movants believe the revised procedural schedule should require intervenor supplemental testimony to be filed after FirstEnergy's supplemental testimony.

- (6) On April 1, 2015, the Retail Energy Supply Association, the PJM Power Providers Group, the Electric Power Supply Association, IGS Energy, Direct Energy Services LLC, Direct Energy Business LLC, and Direct Energy Business Marketing, LLC (collectively, Suppliers) filed a joint memorandum in response to the Joint Movants' interlocutory appeal and request for certification. In their memorandum, Suppliers support the procedural schedule presented by Joint Movants, noting such a continuance will allow supplemental testimony on the Commission's final decision regarding the proposed AEP Ohio Order factors. Additionally, Suppliers request that, in the event the interlocutory appeal is neither certified nor granted, the attorney examiner amend the procedural schedule to require intervenor supplemental testimony to be filed after FirstEnergy's supplemental testimony.
- (7) Sierra Club filed a memorandum in response to Supplier's request to amend the procedural schedule on April 3, 2015, providing its support for both Suppliers' scheduling request and Joint Movants' interlocutory appeal, for many of the same reasons asserted by those parties. Sierra Club supports Suppliers' recommendation for intervenor supplemental testimony to be filed after FirstEnergy's in the event the interlocutory appeal is denied. However, Sierra Club asserts

these amendments will only be appropriate so long as FirstEnergy does not modify its ESP proposal.

- (8) On April 6, 2015, FirstEnergy filed a memorandum contra Joint Movants' request for certification of its interlocutory appeal. FirstEnergy argues that the March Scheduling Entry does not present a new or novel question of interpretation, law, or policy; represent a departure from past precedent; or create a likelihood of undue prejudice for any of the Joint Movants such that an immediate determination by the Commission is necessary. Given its lack of merit, FirstEnergy believes the request for certification should be denied.

#### STANDARD OF REVIEW

- (9) Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. Requests for certification that fail to meet both of these requirements are summarily denied. See, e.g., *In re Self Complaint of Suburban Natural Gas Co.*, Case No. 11-5846-GA-SLF, Entry (July 6, 2012); *In re FirstEnergy*, Case No. 12-1230-EL-SSO (*FirstEnergy ESP III*), Entry (June 21, 2012).

#### NEW AND NOVEL QUESTION OF INTERPRETATION, LAW, AND POLICY & DEPARTS FROM PAST PRECEDENT

- (10) Joint Movants argue that the March Scheduling Entry directing parties to address an interceding decision and treating a non-final order as a final order without regard to the rehearing process introduces a novel interpretation of

law and policy. Joint Movants claim that the March Scheduling Entry also departs from past precedent by requiring intervenors to submit supplemental testimony on the AEP Ohio Order factors at the same time FirstEnergy is required to do so. Joint Movants assert that this ruling denies them the opportunity to respond to FirstEnergy's supplemental testimony, which defies the traditional practice of allowing intervening parties and Staff the opportunity to file responsive testimony. See, e.g., *AEP Ohio ESP III*, Entry (Jan. 24, 2014) at 1; *In re Duke Energy Ohio*, Case No. 14-841-EL-SSO, Entry at 2 (June 6, 2014); *FirstEnergy ESP III*, Case No. 12-1230-EL-SSO, Entry (Apr. 19, 2012) at 2.

- (11) In its memorandum contra, FirstEnergy claims that requiring additional testimony tailored to a specific topic merely assists the Commission by providing a more thorough record and does not present a new or novel question of interpretation, law, or policy nor departs from past precedent. FirstEnergy notes attorney examiners in several past cases have allowed additional testimony from all parties on a particular set of issues to be filed on the same day. See, e.g., *In re Duke Energy Ohio, Inc.*, Case No. 11-4393-EL-RDR, Entry (May 9, 2012); *In re Ohio Power Co.*, Case No. 10-501-EL-FOR, Opinion and Order (Jan. 9, 2013); *In re Complaint of Ohio Direct Communications, Inc. v. ALLTEL Ohio, Inc. and the Western Reserve Tele. Co.*, Case No. 95-819-TP-CSS, Opinion and Order (Feb. 14, 1996); *In re GTE North Inc.*, Case No. 87-1307-TP-AIR, Entry (Dec. 28, 1988). FirstEnergy also argues that the March Scheduling Entry merely authorizes parties to submit additional testimony and engage in additional discovery limited to the factors set forth in the AEP Ohio Order, which is well supported by Commission precedent. Additionally, rather than binding the Commission, FirstEnergy states that the March Scheduling Entry does not treat these proposed factors as conclusive nor indicate whether or how these factors may apply to this proceeding. Accordingly, FirstEnergy concludes that the March Scheduling Entry contains no new or novel question of interpretation, law, or policy.
- (12) Moreover, FirstEnergy asserts that the Commission "has the discretion to decide how, in light of its internal organization

and docket considerations, it may best proceed to manage and expedite the orderly flow of business, avoid undue delay and eliminate unnecessary duplication of effort.” *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15, 18 (2000). Further, FirstEnergy emphasizes that no rule or statute precludes the Commission from ordering that testimony from intervenors and an applicant be filed on the same day, especially when such testimony is limited to a specific topic or issue, citing several precedent supporting its assertion. See, e.g., *In re Columbia Gas of Ohio*, Case No. 14-2078-GA-RDR, Entry (Mar. 5, 2015); *In re Duke Energy Ohio, Inc.*, Case No. 14-2051-GA-RDR, Entry (Mar. 4, 2015); *In re The East Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 14-2134-GA-RDR, Entry (Mar. 3, 2015); *In re CSX Transportation, Inc.*, Case No. 14-379-RR-UNC, Entry (Feb. 2, 2015). FirstEnergy argues that the mere three cases cited by Joint Movants do not provide a rule that usurps an attorney examiner’s authority and discretion in setting the due dates for testimony as he or she determines are most appropriate.

#### UNDUE PREJUDICE

- (13) Joint Movants claim they will suffer undue prejudice if this proceeding continues prior to the issuance of a final entry on rehearing in *AEP Ohio ESP III*. Joint Movants note that the Commission may elect to make changes to the AEP Ohio Order, including omitting or adding to the factors the Commission may consider when addressing future requests for PPAs. As a result, Joint Movants assert that the record in this proceeding may be incomplete or contain irrelevant evidence, which would, in turn, prevent the Commission from having a sufficient record on which to base its decision, pursuant to R.C. 4903.09. Thus, Joint Movants believe that the attorney examiner should wait until a final order is issued on rehearing before requiring testimony on the AEP Ohio Order factors.
- (14) FirstEnergy argues that Joint Movants have failed to show how an immediate determination by the Commission is needed to prevent undue prejudice or expense to the parties, citing the lack of precedent where the Commission stayed a particular proceeding simply because different utilities raised similar issues in rate cases. FirstEnergy also asserts

that Joint Movants fail to establish that the disposition of the issues raised in their *AEP Ohio ESP III* applications for rehearing will have any affect on the instant proceeding, as the arguments in those applications will rely on the specific facts on that case and should not be determinative of issues in this proceeding. Additionally, FirstEnergy asserts that Joint Movants will have the opportunity to advance any argument they believe is relevant during the hearing. Finally, FirstEnergy maintains that if the Commission were to determine, either in this proceeding or in *AEP Ohio ESP III*, that certain factors should not apply, the Commission may simply disregard the evidence discussing those inapplicable factors. Thus, FirstEnergy contends that Joint Movants will not be prejudiced in any way by allowing for the evidentiary hearing to proceed as scheduled.

- (15) Joint Movants also claim that requiring the filing of supplemental testimony on the same day as FirstEnergy unduly prejudices them. Joint Movants contend that they should be afforded an opportunity to respond to FirstEnergy's supplemental testimony because allowing FirstEnergy to provide additional testimony to address the AEP Ohio Order factors is essentially permitting FirstEnergy to amend its application. Further, Joint Movants allege that if they are not provided the opportunity to respond to the effectively amended application, the record may not be as developed as it should be for the purposes of R.C. 4903.09.
- (16) FirstEnergy believes no such prejudice will exist due to all parties being required to file their testimony on the same date. FirstEnergy asserts that Joint Movants should be well aware of what FirstEnergy's supplemental testimony will contain, as they have had access to a voluminous amount of information regarding its application in this proceeding. Additionally, FirstEnergy notes that the March Scheduling Entry requesting additional testimony and allowing additional discovery was the result of a sua sponte decision and was not initiated by any party to this proceeding. Moreover, FirstEnergy alleges that Suppliers or Sierra Club offer no evidence that supports their claim that changing the procedural schedule set forth in the March Scheduling Entry would lead to a more thorough and organized record. FirstEnergy believes that revising the procedural schedule

will greatly restrict the time allotted to it to take depositions regarding the intervenor's supplemental testimony and jeopardize its ability to conduct the upcoming October 2015 auction.

## CONCLUSION

- (17) As noted earlier, Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds both enumerated requirements have been met. In this case, neither provision was satisfied.
- (18) With respect to the first provision, Joint Movants have raised a number of arguments in the applications for certification and interlocutory appeal; however, none of these arguments raise a new or novel question of interpretation, law, or policy or demonstrate that the March Scheduling Entry represents a departure from past precedent within the ambit of Ohio Adm.Code 4901:1-15(B). With respect to the March Scheduling Entry, the issuance of a procedural schedule does not involve a new or novel question of law or policy. Establishing a procedural schedule in a Commission proceeding is a routine matter with which the Commission and its attorney examiners have had long experience. *In re Columbus S. Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2; *FirstEnergy ESP III*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4.
- (19) Further, the attorney examiner finds that the joint interlocutory appeal is not taken from a ruling that represents a departure from past precedent. As recognized by FirstEnergy, there is a plethora of past precedent in which an attorney examiner, within his or her discretion, has ordered that testimony from intervenors and an applicant be filed on the same day, especially when such testimony is limited to a specific topic or issue.
- (20) In addition, the attorney examiner finds that an immediate determination of the Commission regarding the March Scheduling Entry is not needed to prevent the likelihood of undue prejudice. As members of the Joint Movants have noted in other cases, pursuant to R.C. 4905.15, Commission orders are effective immediately. *In re Ohio Power Co.*, Case



No. 15-386-EL-WVR, Entry (Apr. 22, 2015) at 3. The attorney examiner agrees with FirstEnergy that Joint Movants will have sufficient opportunity to raise its arguments concerning the AEP Ohio Order factors before, during, and after the evidentiary hearing. This hearing will be held over ten months after the filing of the application in this proceeding and nearly sixteen weeks after the AEP Ohio Order was issued. Moreover, Joint Movants will have the opportunity to conduct discovery regarding the AEP Ohio Order factors prior to the hearing. Joint Movants will also have the opportunity to present supplemental and rebuttal testimony at the hearing regarding those factors, as well as cross-examine any witnesses. Joint Movants will further have the opportunity to file briefs to address all issues raised by FirstEnergy's application, including the AEP Ohio Order factors. Additionally, the attorney examiner emphasizes the fact that the March Scheduling Entry was provided sua sponte and no party to this proceeding requested additional time to consider the AEP Ohio Order factors prior to the issuance of the March Scheduling Entry. Thus, Joint Movants cannot demonstrate any undue prejudice resulting from the March Scheduling Entry, which simply sets forth a revised procedural schedule for the limited purpose of addressing the AEP Ohio Order factors and reschedules the evidentiary hearing at a later date.

- (21) Further, contrary to the claims made by Joint Movants, Suppliers, and Sierra Club, the procedural schedule established by the March Scheduling Entry does not prejudice any party to this proceeding by allowing testimony of all parties regarding the AEP Ohio Order factors to be filed on the same day. Therefore, the attorney examiner finds that all parties have been provided ample time for preparation for the evidentiary hearing.
- (22) Accordingly, because the joint interlocutory appeal did not present a new or novel question of law or policy, is not taken from a ruling which represents a departure from past precedent, and because an immediate determination by the Commission is not needed to prevent the likelihood of undue prejudice or expenses to one or more of the parties, the attorney examiner finds that the joint interlocutory appeal should not be certified to the Commission for review.

- (23) However, although certification of the interlocutory appeal will be denied, the attorney examiner finds that there is merit in Suppliers' request to allow intervenors to file supplemental testimony after FirstEnergy, in order to fully develop the record for the Commission's consideration. Accordingly, the procedural schedule will be modified to establish May 11, 2015 as the deadline for the filing of supplemental testimony regarding the AEP Ohio Order factors by intervenors. All other dates prescribed by the March Scheduling Entry shall remain intact. As such, the evidentiary hearing shall begin on June 15, 2015.

It is, therefore,

ORDERED, That the joint motion of NOPEC, NOAC, OMAEG, OPAC, and OCC for certification of an interlocutory appeal be denied. It is, further,

ORDERED, That the procedural schedule shall be modified to establish May 11, 2015 as the deadline for the filing of supplemental testimony regarding the AEP Ohio Order factors by intervenors. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Gregory Price

By: Gregory A. Price  
Attorney Examiner

JRJ/sc

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Summary: Attorney Examiner Entry denying certification of an interlocutory appeal and modifying the procedural schedule. - electronically filed by Sandra Coffey on behalf of Gregory Price, Attorney Examiner, Public Utilities Commission of Ohio