

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into an Affiliate Power)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider)	

In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 14-1694-EL-AAM
Certain Accounting Authority)	

**OHIO POWER COMPANY'S MEMORANDUM CONTRA
ENVIRONMENTAL LAW & POLICY CENTER'S REQUEST FOR CERTIFICATION
AND APPLICATION FOR REVIEW OF AN INTERLOCUTORY APPEAL**

Ohio Power Company ("AEP Ohio" or the "Company") files this memorandum contra the Environmental Law & Policy Center's ("ELPC") improper request for certification of an interlocutory appeal, filed December 23, 2015. ELPC purported to file their request for certification under O.A.C. 4901-1-15(B). However, the filing concerning the request to change the hearing date failed to apply to an actual procedural ruling, as required, and failed to present a new or novel question of interpretation that would justify certification of the issue to the Commission. The Examiner should deny certification of the request.

The issue at the center of the request for certification of an interlocutory appeal is the procedural schedule controlling the processing of this case. ELPC, and others, filed a motion to extend the schedule on December 16, 2015. On December 18, 2015, AEP Ohio filed a memorandum contra the request to extend. On December 21, 2015, ELPC, and others, filed a reply to AEP Ohio's memorandum contra and requested a ruling by December 23, 2015. Two days later on December 23, 2015 at 3:26 PM, ELPC filed for certification of an interlocutory

appeal, due to the fact that the Examiners **did not rule** on the motion to extend the hearing schedule.

Certification of an interlocutory appeal to the Commission under O.A.C. 4901-1-15(B) requires the presence of an actual ruling, and then a certification of the appeal to the Commission from the legal director, deputy legal director attorney examiner or presiding hearing officer. The plain language of the rule is clear and ELPC's request does not meet the standard within O.A.C. 4901-1-15(B):

(B) Except as provided in paragraph (A) of this rule, no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.

The first requirement of the rule is that there is an actual ruling. However, in this particular scenario there is no ruling from which ELPC appeals. The rule provides that the path to certification starts with "any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference." ELPC seeks to avoid this requirement by asserting that there is a constructive denial of the motion to extend because the Examiners have not acted on the motion.¹ Nowhere in the rule does it provide for a request for certification of an interlocutory appeal where the Examiners have not ruled on a request. The rule provides for a request for certification "**from any ruling,**" not the absence of a ruling.

¹ ELPC Motion at 1.

Therefore, the ELPC request does not qualify under O.A.C. 4901-1-15(B) and should be denied certification on this basis.

The second requirement for certification of an interlocutory appeal under O.A.C. 4901-1-15(B) is that the appeal is unique in some manner in its interpretation of law or a departure from past precedent that requires immediate determination by the Commission. The issue sought for certification at this time is the timing of the procedural schedule, including the due date for testimony and the hearing date. There is nothing new or novel about the power of the Commission to set a procedural schedule. Likewise, there is no departure from precedent involved in the Commission's discretion to manage its docket because that is solely in the control of the Commission. In fact, the Supreme Court of Ohio has declared that the Commission has complete discretion in the management of its docket. Specifically, the Court has stated:

It is well-settled that pursuant to R.C. 4901.13, 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 its business, avoid undue delay and eliminate unnecessary duplication of effort.” (Footnote omitted.) *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 559, 560, 23 O.O.3d 474, 475, 433 N.E.2d 212, 214.

Weiss v. Pub. Util. Comm. (2000), 90 Ohio St.3d 15 at ¶11. The matter of establishing a procedural schedule is within the clear authority of the Commission, does not provide a new or novel question, and cannot be treated as a departure from precedent when it is a discretionary matter completely in the control of the Commission. Therefore, the ELPC request does not qualify under O.A.C. 4901-1-15(B) and should be denied certification on this basis as well.

Despite the Commission's discretion in this area, ELPC seeks to justify its request under an assertion that the Commission has departed from past precedent.² The past precedent cited by ELPC is the schedule in the pending FirstEnergy ESP proceeding (Case No. 14-1297-EL-SSO). ELPC's reliance on the FirstEnergy ESP proceeding is misplaced. First, and most importantly, the Commission has the authority to manage its docket and expedite the orderly flow of its business to avoid undue delay as it sees fit. The fact that another docket is on a different schedule is not a departure from past precedent, it is just a different case on a different schedule. The Commission or its attorney examiners may have good reason to process the cases on different schedules and that is a matter left to the Commission to decide how best to manage those cases. *Weiss*, 90 Ohio St.3d 15 at ¶11. Second, although irrelevant to the Commission's discretion in this area, the FirstEnergy proceeding involves the approval of an entire electric security plan. Third, as indicated in the December 18, 2015 AEP Ohio memorandum contra to the Motion to Extend the procedural schedule (incorporated herein by reference to avoid restating the same points), the joint movants did not justify their request for delay in the initial filing.

Finally, as an additional argument seeking a delay in the procedural schedule, not clearly grounds for seeking certification of an interlocutory appeal, ELPC references a settlement agreement entered into between AEP Ohio and IEU as a "significant new development." In reality, the Global Settlement between AEP Ohio and IEU (appended to ELPC's application for review as Attachment A) has no bearing on the procedural

² ELPC Motion at 2; Memorandum in Support at 3-4 (discussing Commission docket, Case No. 14-1297-EL-SSO). ELPC makes no effort to claim that the processing of a procedural schedule involves a new or novel issue.

schedule. As can be readily determined by the face of the Global Settlement agreement, several proceedings before the Supreme Court of Ohio and the Commission are being resolved as between AEP Ohio and IEU – and IEU’s decision not to oppose the Stipulation is merely an additional component of the Global Settlement. In any case, a unilateral decision by a party not to oppose the Stipulation clearly has no bearing on ELPC and provides no basis for delay; on the contrary, such a welcome development helps streamline this case and renders the existing schedule even more efficient.

Ultimately, the ELPC request is procedurally flawed and therefore invalid. O.A.C. 4901-1-15(B) requires a party to seek certification of a ruling by an Attorney Examiner –here no ruling exists. Likewise, the certification of an interlocutory appeal requires a departure from past precedent. However, the Commission’s discretion to set its docket how it sees fit to best manage its cases is broad and is not the type of issue certified to the Commission for interlocutory review. The request is invalid procedurally and the delay initially sought is not supported by the arguments provided. Therefore, AEP Ohio respectfully requests that Examiners deny certification of the appeal as an interlocutory appeal as requested by ELPC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of *Ohio Power Company's Memorandum Contra Environmental Law & Policy Center's Request for Certification and Application for Review of an Interlocutory Appeal* was served by e-mail upon the following counsel of record for all parties on this 28th day of December, 2015:

/s/ Matthew J. Satterwhite

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Summary: Memorandum Contra Environmental Law & Policy Center's Request for Certification and Application for Review of an Interlocutory Appeal electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company