

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION  
OF OHIO POWER COMPANY FOR  
AUTHORITY TO ESTABLISH A  
STANDARD SERVICE OFFER PURSUANT  
TO R.C. 4928.143, IN THE FORM OF AN  
ELECTRIC SECURITY PLAN.

CASE No. 16-1852-EL-SSO

IN THE MATTER OF THE APPLICATION  
OF OHIO POWER COMPANY FOR  
APPROVAL OF CERTAIN ACCOUNTING  
AUTHORITY.

CASE No. 16-1853-EL-AAM

### ENTRY

Entered in the Journal on February 8, 2018

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or Company) is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} R.C. 4928.141(B) directs the Commission to set the time for hearing of an MRO or ESP filing, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory.

{¶ 4} In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved, pursuant to R.C. 4928.143, AEP Ohio's application for an ESP for the period of June 1, 2015, through May 31, 2018. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015).

{¶ 5} On November 23, 2016, in the above-captioned cases, AEP Ohio filed an application that, if approved, would modify the current ESP and extend its term through May 31, 2024.

{¶ 6} By Entry dated February 7, 2017, a procedural schedule was established in these matters, including an evidentiary hearing to commence on June 6, 2017.

{¶ 7} By Entry dated March 7, 2017, four local public hearings were scheduled - one in Marietta, one in Bucyrus, and two in Columbus - to occur on various dates in April 2017. The Entry also directed AEP Ohio to publish notice of the hearings.

{¶ 8} On June 6, 2017, the evidentiary hearing was rescheduled to commence on August 8, 2017, in order to afford the parties sufficient time to fully explore the possibility of reaching a resolution of some or all of the issues raised in these proceedings. On August 3, 2017, the attorney examiner granted a motion for continuance filed by Staff, such that the evidentiary hearing was continued to a date to be determined in the future.

{¶ 9} On August 25, 2017, AEP Ohio filed a joint stipulation and recommendation (Stipulation) for the Commission's consideration, which, if approved, would resolve all of the issues raised in these proceedings.

{¶ 10} In order to assist the Commission in its review of the Stipulation, the attorney examiner established a procedural schedule on September 5, 2017, including an evidentiary hearing to commence on November 1, 2017.

{¶ 11} The four local public hearings were held as scheduled in April 2017. The evidentiary hearing on the Stipulation commenced, as scheduled, on November 1, 2017, and concluded on November 6, 2017.

{¶ 12} On December 28, 2017, AEP Ohio filed a motion for relief from the Entry issued on March 7, 2017. AEP Ohio stated that it inadvertently failed to publish notice of

the hearings in a newspaper of general circulation in each county in its service territory, as directed in the March 7, 2017 Entry. Accordingly, AEP Ohio requested that the Commission waive or otherwise grant relief from the directive to publish notice of the hearings or, in the alternative, that the Commission schedule an additional public hearing.

{¶ 13} On January 12, 2018, the Ohio Consumers' Counsel (OCC) filed a memorandum contra AEP Ohio's motion for relief.

{¶ 14} By Entry dated January 22, 2018, the attorney examiner scheduled an additional hearing to be held in Columbus, Ohio, on February 12, 2018, and directed AEP Ohio to publish notice one time in a newspaper of general circulation in each county in its certified territory.

{¶ 15} On January 29, 2018, OCC filed an interlocutory appeal, request for certification to the Commission, and application for review with respect to the January 22, 2018 Entry. On February 5, 2018, AEP Ohio filed its proofs of publication of notice of the February 12, 2018 hearing, as well as a memorandum contra OCC's interlocutory appeal.

{¶ 16} Ohio Adm.Code 4901-1-15 sets forth the Commission's requirements 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 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 interpretation, law, or policy, or is taken from a ruling that 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, if the Commission should ultimately reverse the ruling in question.

{¶ 17} Initially, OCC contends that its interlocutory appeal may be taken immediately to the Commission under Ohio Adm.Code 4901-1-15(A)(2), because the January 22, 2018 Entry terminated the public's right to participate in these proceedings. According to OCC, customers were not afforded the required hearing notice and, therefore, their opportunity to participate fully in these proceedings was terminated. Alternatively, if its interlocutory appeal is determined not to satisfy Ohio Adm.Code 4901-1-15(A)(2), OCC requests that the appeal nonetheless be certified to the Commission for review, pursuant to Ohio Adm.Code 4901-1-15(B). OCC asserts that its interlocutory appeal should be certified to the Commission, because the January 22, 2018 Entry represents both a departure from past precedent and presents a new or novel question of interpretation, law, or policy. OCC adds that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice to AEP Ohio's residential consumers and other members of the public.

{¶ 18} Specifically, OCC claims that the January 22, 2018 Entry departs from past precedent and presents a new or novel question of interpretation, law, or policy, because the Commission has consistently ordered the electric distribution utility to publish notice of hearings in each county in its certified territory as required by R.C. 4928.141(B). OCC asserts that the Commission has also departed from past precedent by ignoring the General Assembly's determination that the public has a right to know about proposals that can increase their monthly utility bills and to participate in the hearing process. Finally, OCC maintains that an immediate determination on its interlocutory appeal is needed to prevent undue prejudice to consumers. Noting that the parties have already filed their post-hearing briefs, OCC argues that the Commission could, at any time, issue an Opinion and Order authorizing AEP Ohio to increase its rates, before consumers have been given a properly noticed and statutorily required opportunity to participate fully in these proceedings.

{¶ 19} With respect to the merits of its interlocutory appeal, OCC claims that the January 22, 2018 Entry ignored the non-waivable requirement in R.C. 4928.141(B) that notice of local public hearings and evidentiary hearings must be published in a newspaper of general circulation in each county in the utility's certified territory. OCC notes that the statute refers to notice requirements related to a "hearing of a filing" under R.C. 4928.142 or R.C. 4928.143, which must be interpreted to mean not only the local public hearings, but also the evidentiary hearing. OCC claims that, if a different interpretation is adopted, parties and the interested public would be denied the right to challenge evidence supporting a requested rate increase. OCC adds that AEP Ohio's residential consumers will be harmed and prejudiced if the January 22, 2018 Entry is not reversed or modified, as consumers will not have been given the ability to participate in all hearings, including a properly noticed evidentiary hearing.

{¶ 20} In its memorandum contra, AEP Ohio responds that OCC is not entitled to take an immediate interlocutory appeal from the January 22, 2018 Entry under Ohio Adm.Code 4901-1-15(A)(2), because the Entry did not terminate either OCC's or the public's right to participate in these proceedings. AEP Ohio notes that, contrary to OCC's position, the January 22, 2018 Entry extended the public's ability to participate in these cases by establishing another hearing and affording the opportunity for the public to offer testimony on the record. Next, AEP Ohio contends that OCC's interlocutory appeal meets none of the criteria for certification to the Commission under Ohio Adm.Code 4901-1-15(B). Regarding past precedent, AEP Ohio notes that OCC has not identified any prior instance in which the Commission held that it cannot remedy an electric distribution utility's failure to publish notice of a hearing by holding another hearing and publishing notice. With respect to whether the January 22, 2018 Entry presents a new or novel question of interpretation, law, or policy, AEP Ohio asserts that OCC's position is based on the misimpression that the Entry did not direct that a new evidentiary hearing be held or instruct the Company to publish notice in each country in its certified territory.

Finally, on the matter of prejudice, AEP Ohio argues that OCC has failed to explain how either OCC or customers would be prejudiced if the February 12, 2018 hearing is held, even if the Commission's Opinion and Order ultimately finds that the January 22, 2018 Entry was improper.

{¶ 21} Additionally, AEP Ohio argues that, if OCC's interlocutory appeal is certified to the Commission, OCC's request for modification or reversal of the January 22, 2018 Entry should be denied. According to AEP Ohio, R.C. 4928.141(B) does not mandate what the newspaper notice must say or when it must be published and, instead, directs the Commission to adopt rules for SSO filings. AEP Ohio asserts that, taken together, R.C. 4928.141(B) and the Commission's hearing rules, Ohio Adm.Code 4901-1-27(C) and 4901:1-35-06, contemplate that an evidentiary hearing in an ESP case will have two sessions: (1) the "evidentiary hearing," at which the "parties" may present evidence and cross-examine witnesses; and (2) the "local public hearings," at which the public may offer testimony. AEP Ohio further asserts that, although the public hearing may commonly be described as a separate hearing, Ohio Adm.Code 4901-1-27(C) makes clear that it is merely a separate "session" of the evidentiary hearing specifically designated for public testimony, where such testimony is given under oath before a court reporter, subject to cross-examination by the parties, and then considered part of the record on which the Commission bases its decision. AEP Ohio maintains that neither R.C. 4928.141(B) nor Ohio Adm.Code 4901:1-35-06 specifically requires the Commission to publish notice of the "evidentiary hearing" session, as opposed to the "public hearing" sessions. AEP Ohio adds that nothing in the statute or rule requires the Commission to publish the required notice before the intervention deadline so that members of the public can challenge evidence at the evidentiary hearing session. AEP Ohio concludes that the attorney examiner's decision to schedule a fifth public hearing to provide another opportunity for public input, with proper notice of the hearing, was reasonable and lawful and should be affirmed.

{¶ 22} As a preliminary matter, the reviewing examiner finds that the January 22, 2018 Entry did not terminate OCC's or any other party's right to participate in these proceedings. On the contrary, the January 22, 2018 Entry scheduled an additional hearing for February 12, 2018, thereby affording the parties and the public an additional opportunity to participate in these cases. OCC, therefore, has not shown that it may take an immediate interlocutory appeal to the Commission under Ohio Adm.Code 4901-1-15(A)(2).

{¶ 23} Turning to Ohio Adm.Code 4901-1-15(B), the rule provides that an interlocutory appeal shall not be certified to the Commission unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling that represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, if the Commission should ultimately reverse the ruling in question. Therefore, in order to certify an interlocutory appeal to the Commission, both requirements must be met. Here, OCC has satisfied neither provision.

{¶ 24} First, the reviewing examiner finds that OCC's interlocutory appeal does not present a new or novel question of law or policy. The Commission and its attorney examiners have extensive experience with respect to scheduling hearings and directing publication of notice in SSO proceedings and other cases affecting rates. *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. Additionally, the underlying premise of OCC's argument is incorrect. In claiming that the January 22, 2018 Entry presents a new or novel question of law or policy, OCC mistakenly asserts that the Entry failed to direct

that notice of the February 12, 2018 hearing be published in each county in AEP Ohio's certified territory. However, the January 22, 2018 Entry clearly directed AEP Ohio to publish notice of the February 12, 2018 hearing "one time in a newspaper of general circulation in each county in its certified territory." January 22, 2018 Entry at ¶ 16. OCC also argues that the January 22, 2018 Entry failed to order that a new evidentiary hearing be noticed and held. The January 22, 2018 Entry scheduled a hearing for February 12, 2018, for the purpose of taking testimony from the general public. January 22, 2018 Entry at ¶ 16. The February 12, 2018 hearing, therefore, will afford the public the opportunity to offer testimony or other evidence and "to challenge evidence" supporting AEP Ohio's ESP proposal in these cases, as OCC seeks through its interlocutory appeal.<sup>1</sup>

{¶ 25} Further, the reviewing examiner finds that OCC's interlocutory appeal is not taken from a ruling that departs from past precedent. Again, OCC is mistaken in its belief that the January 22, 2018 Entry did not direct AEP Ohio to publish notice of the February 12, 2018 hearing in each county in its certified territory. January 22, 2018 Entry at ¶ 16. Consequently, there is no merit in OCC's contention that the January 22, 2018 Entry departs from past precedent in this regard. Neither does the reviewing examiner find any merit in OCC's claim that the January 22, 2018 Entry departs from past precedent by not requiring proper notice of the evidentiary hearing. R.C. 4928.141(B) directs the Commission to set the time for hearing of an MRO or ESP filing, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The statute does not require any particular content for the notice. Although the Commission has not imposed a standard format, the notices used by the Commission in prior SSO proceedings have all provided, at a minimum, the date and time for the portion of the hearing designated for

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<sup>1</sup> No party, including OCC, has claimed that it lacked notice of the November 1, 2017 evidentiary hearing or was otherwise not offered a full opportunity to participate in that hearing. The reviewing examiner notes that no party is precluded from also electing to participate in the additional hearing on February 12, 2018.



the taking of public testimony, in accordance with Ohio Adm.Code 4901-1-27(C). By scheduling an additional hearing and directing that notice be published throughout AEP Ohio's service territory, the January 22, 2018 Entry has ensured that the requirements of the statute have been satisfied, consistent with the Commission's precedent.

{¶ 26} Finally, OCC has not established that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties. Although OCC addresses purported prejudice to consumers, OCC has made no showing that any party, including OCC, has been prejudiced by the January 22, 2018 Entry. Further, the reviewing examiner notes that the additional hearing scheduled for February 12, 2018, has been properly noticed, as evidenced by AEP Ohio's proofs of publication of notice in each county in its certified territory, which were filed in these dockets on February 5, 2018. As OCC has not satisfied the requirements of Ohio Adm.Code 4901-1-15(B), the reviewing examiner finds that OCC's request for certification of its interlocutory appeal to the Commission should be denied.

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That OCC's request for certification of its interlocutory appeal to the Commission be denied. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

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By: Sarah J. Parrot  
Attorney Examiner

JRJ/sc

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Summary: Attorney Examiner Entry denying OCC's request for certification of its interlocutory appeal to the Commission electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio