BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters.	))))	**Case No. 18-0501-EL-FOR**
In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter Into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider.	)))))	**Case No. 18-1392-EL-RDR**
In the Matter of the Application of Ohio Power Company to Amend its Tariffs	))	**Case No. 18-1393-EL-ATA**

JOINT MEMORANDUM CONTRA TO THE INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO FULL COMMISSION AND APPLICATION FOR REVIEW BY THE NATURAL RESOURCES DEFENSE COUNCIL, OHIO ENVIRONMENTAL COUNCIL, AND THE SIERRA CLUB

I. INTRODUCTION

On October 22, 2018, the Attorney Examiner issued an Entry consolidating these proceedings and bifurcating the hearing process.[1] The Entry bifurcated the hearing process into two hearings: one to resolve the determination of need that AEP requested and, in the event a determination of need is affirmatively made, a second hearing to resolve the two projects AEP is seeking approval of pursuant to a finding of need.[2] In response, the Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Manufacturers' Association ("OMA"), and the Kroger Company ("Kroger") (collectively, "Joint Appellants") filed an Interlocutory Appeal and

[1] Pub. Util. Comm. Case Nos. 18-0501-EL-FOR, 18-1392-EL-RDR, and 18-1393-EL-ATA ("AEP Solar Cases"), Attorney Examiner Entry ¶33 (Oct. 22, 2018). ("Entry").
[2] *Id.*

Request for Certification to Full Commission and Application for Review Regarding a Fair Process for AEP's Customers ("Interlocutory Appeal") on October 29, 2018.

Joint Appellants claim that the Entry amounts to a termination of their rights to participate in the proceeding and therefore is automatically eligible for an interlocutory appeal pursuant to Ohio Admin. Code 4901-1-15(A)(2).[3] Alternatively, Joint Appellants argue that if they fail to satisfy O.A.C. 4901-1-15(A)(2), the Attorney Examiners should nonetheless certify the appeal to the full Commission pursuant to O.A.C. 4901-1-15(B).[4]

The Natural Resources Defense Council ("NRDC"), the Ohio Environmental Council ("OEC"), and the Sierra Club (collectively, "Environmental Intervenors") now file this Memorandum Contra to the Joint Appellants' Interlocutory Appeal pursuant to O.A.C. 4901-1-15(D).

II. STANDARD OF REVIEW

Interlocutory appeals are authorized pursuant to O.A.C. 4901-1-15, which automatically authorizes appeals in certain designated instances. In this case, Joint Appellants are seeking automatic approval pursuant to O.A.C. 4901-1-15(A)(2). Ohio Admin. Code 4901-1-15(A)(2) states,

> (A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission 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 that does any of the following:
> * * *
> (2) Denies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony. * * * .

[3] Interlocutory Appeal at 4.
[4] *Id.*

If the circumstances do not warrant an automatic appeal, a party may still request certification of an appeal to the full Commission pursuant to O.A.C. 4901-1-15(B). Ohio Admin Code. 4901-1-15(B) states,

> 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.

Under O.A.C. 4901-1-15(B), a party who fails to satisfy the criteria listed in the subsections of 4901-1-15(A) can only appeal if they prove their appeal presents a new or novel question of law or policy, or that the underlying ruling is such a departure from past precedent that it will result in undue prejudice or expense. Requests for certification that fail to meet both of these requirements are summarily denied.[5]

III. LAW AND ARGUMENT

Environmental Intervenors respectfully request that the Joint Appellants' Interlocutory Appeal be denied because it fails to satisfy the requirements of O.A.C. 4901-1-15.

[5] 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).

A. Contrary to the Joint Appellants' Assertions, the Attorney Examiners' Entry Did Not Terminate Their Right to Participate In the Proceeding, and Therefore Their Interlocutory Appeal Cannot Be Taken Without Certification.

Joint Appellants repeatedly claim that the Attorney Examiners' Entry "effectively terminates Joint Appellants' rights to meaningfully participate in the proceeding"[6], thereby depriving them of their due process rights and satisfying O.A.C. 4901-1-15(A)(2).[7] Ohio Admin Code 4901-1-15(A)(2) allows immediate interlocutory appeals when a ruling, "[d]enies a motion to intervene, terminates a party's right to participate in a proceeding, or requires intervenors to consolidate their examination of witnesses or presentation of testimony." Joint Appellants have in no way been deprived of the opportunity to participate in this proceeding.

All of the Joint Appellants intervened before the deadline set within the procedural schedule established by the Entry.[8] The procedural schedule afforded them almost a month and a half for paper discovery while imposing a seven calendar day response requirement on AEP.[9] Joint Appellants are allowed to put on expert testimony, cross-examine witnesses, and submit briefs prior to a decision from the Commission.[10]

Pursuant to Commission precedent, Joint Appellants' argument regarding an alleged "effective" termination of rights is meritless.[11] In *Vectren*, the Ohio Consumers' Counsel argued that a condensed procedural schedule "potentially" terminated its rights to participate; however,

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[6] Interlocutory Appeal at 4.
[7] *Id.* at 3, 5; Memorandum in Support of Interlocutory Appeal ("Memorandum in Support") at 3, 4, 9, 10, 11.
[8] *See* Pub. Util. Comm. Case No. 18-0501-EL-FOR, OCC Motion to Intervene (Oct. 4, 2018); OMA Motion to Intervene (Oct. 4, 2018); Kroger Motion to Intervene (Oct. 4, 2018).
[9] Entry ¶33.
[10] *Id.*
[11] *In re 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*, Case No. 05-1444-GA-UNC, Entry, at ¶11 (Feb. 12, 2007). (*"Vectren").*

the Attorney Examiner disagreed.[12] The Attorney Examiner held that because the schedule gave OCC the same rights to discovery and testimony as every other party their participation could not reasonably be considered terminated.[13]

In this case, not only do Joint Appellants have the same full rights as every other party, but Joint Appellants will also have the opportunity to participate in the second portion of this bifurcated hearing process, the schedule for which has not yet been set, and fully participate in that hearing as well. In short, they are permitted full rights and privileges within the entire proceeding.

Joint Appellants have failed to prove they satisfied the requirements laid out in O.A.C. 4901-1-15(A)(2) and therefore are not entitled to an immediate interlocutory appeal. The Entry Joint Appellants are appealing simply established a procedural schedule with which they disagree. It in no way terminated or otherwise abrogated their rights in this proceeding. Environmental Intervenors respectfully request that the Attorney Examiner reject the Joint Appellants' Interlocutory Appeal and uphold the procedural schedule as ordered.

B. Joint Appellants Have Failed to Prove the Attorney Examiners' Entry Satisfies the Requirements for Certification.

Joint Appellants alternatively claim that they satisfy the criteria for certification of their Interlocutory Appeal to the full Commission.[14] An appeal should only be certified if 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."[15]

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[12] *Id.*
[13] *Id.*
[14] Interlocutory Appeal, Memorandum in Support at 5.
[15] O.A.C. 4901-1-15(B).

Joint Appellants claim their appeal satisfies all three criteria because: (1) the Entry goes against precedent by allowing the need filing to be heard in anything other than a Rider case pursuant the Commission's prior Order[16]; (2) the Entry present a new interpretation of law because it "appears to accept the notion that R.C. 4928.143(B)(2)(c) can be satisfied by a showing of generalized need"[17]; and (3) "because the ruling requires parties to move forward with testimony and a hearing, parties will be prejudiced if the PUCO ultimately reverses the ruling."[18]

i. The Entry Does Not Violate Past Precedent.

Any argument that the Entry violates past precedent is specious at best. At the outset, Joint Appellants' claim that the Entry goes against precedent by allowing the need filing, which was originally filed in a Forecast case and then consolidated with the Rider cases pursuant to the Entry, is moot. Any error as to the mode in which AEP filed its request for a finding of need – and Environmental Intervenors do not concede there was any such error – was rectified when the Entry consolidated the filing with the Rider cases, thereby satisfying the very precedent Joint Appellants cite.[19] In fact, Joint Appellants opposed consolidation and attempted to block AEP from correcting the error Joint Appellants' allege AEP made in the first place.

Additionally, Joint Appellants' assertion that establishing a procedural schedule that differs from a previous case involving the same subject (i.e. solar generation) before the

[16] Interlocutory Appeal, Memorandum in Support at 5.
[17] *Id.*
[18] *Id.* at 6.
[19] *Id.* at 6, Fn. 25 (*In re Application of Ohio Power Co. for Authority to Est. a Standard Serv. Offer Pursuant to R.C. 4928.143, in the Form of an Elec. Security Plan*, Case No. 16-1852-EL-SSO, Opinion & Order ¶ 227 (Apr. 25, 2018); *see also id.*, Second Entry on Rehearing ¶ 50 (Aug. 1, 2018) ("AEP Ohio will be required to demonstrate, in each EL-RDR proceeding proposing a specific project, need for the proposed project and to satisfy all other requirements of R.C. 4928.143(B)(2)(c).").

Commission violates precedent has no basis whatsoever.[20] Procedural schedules vary from case to case and are the function of the specific circumstances in each case (*e.g.*, expiring tax credits). Joint Appellants' attempts to characterize the situation as violating past practice fails.

ii. The Entry Does Not Present a New or Novel Question of Law or Policy.

In Section IV.B. of Joint Appellants' Memorandum in Support, entitled "[t]he Entry presents a new or novel question of interpretation, law, or policy that will harm consumers"[21], Joint Appellants appear to abandon their original claim that the Entry presented a novel question noting that the Entry "appears to accept the notion that R.C.4928.143(B)(2)(c) can be satisfied by a showing of general need."[22] So, Joint Appellants pivot and claim that the Entry's novel question is instead whether the Entry safeguards administrative predictability.[23] Then, Joint Appellants again point to the procedural schedule established in another case over eight years old.[24]

Neither of the arguments made to show that there is a novel question of law succeeds. First and foremost, the Entry did not determine that a generalized showing of need is sufficient under R.C. 4928.143(B)(2)(c), nor did it make any other substantive determination. It merely established a procedural schedule. And establishing a procedural schedule does not create a new or novel question of law or policy. Arguments to the contrary are routinely rejected and multiple Attorney Examiners have stated, "[t]he issuance of a procedural schedule does not involve a new or novel question of law or policy. Establishing a procedural schedule in a Commission

[20] Interlocutory Appeal, Memorandum in Support at 7.
[21] *Id.*
[22] *Id.* at 5.
[23] *Id.* at 8.
[24] *Id.*

proceeding is a routine matter with which the Commission and its examiners have had long experience."[25]

Second, as previously discussed, procedural schedules are not bastions of administrative predictability. A procedural schedule can change depending on a host of factors ranging from a party's counsel being on vacation to a need for additional time for settlement discussions. Procedural schedules are unique to each case and are not required to adhere to identical or even similar timelines across cases. Joint Appellants have failed to establish that the Entry presents a new or novel question of law or policy, and their request should be denied.

iii. The Entry Does Not Harm or Unduly Prejudice any Party.

Joint Appellants raise several arguments that the Entry harms or unduly prejudices parties and customers. First, Joint Appellants claim that the condensed timeframe to prepare testimony has made it difficult to engage expert witnesses, which has been exacerbated by AEP's inclusion of two other witnesses.[26] However, the Attorney Examiners explicitly authorized AEP to use testimony filed in any of the above-captioned proceedings in any or all hearings during the bifurcated process to enable a well-developed record.[27] Pursuant to that order, AEP noted it plans to exercise its option to use the testimony of two additional witnesses whose testimony was filed as part of the AEP Solar Cases,[28] and cited the economic impact study upon which they will

[25] See, *Vectren* at ¶12; *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 05- 376-EL-UNC, Entry at 2. (May 10, 2005); *In the Matter of Ohio Edison Co., The Cleveland Illuminating Co., and The Toledo Edison Company*, Case No. 12-1230-EL-SSO at ¶9 (May 2, 2012).
[26] Interlocutory Appeal at 3.
[27] Entry at ¶32.
[28] Direct Testimony of Steven Buser and Bill Lafayette, PUCO Case Nos. 18-1392 and 18-1393, (Sept. 27, 2018).

testify.[29] The testimony of these witnesses was filed September 27, 2018. As Joint Appellants have also intervened in both of the AEP Solar Cases, they have also had over a month to review the "new" testimony AEP will include in the need case.

Further, expert witnesses for Joint Appellants have an entire month to review the filings and compose testimony. One of the Joint Appellants, OCC, even has expert witnesses on staff who have therefore had the opportunity to review and prepare testimony long before the Entry setting the procedural schedule was issued.

Next, Joint Appellants claim that the Entry's use of a condensed procedural schedule "to resolve issues potentially costing Ohioans hundreds of millions, if not billions, of dollars – is unjust, unreasonable, * * * limits due process and unduly prejudices Intervenors."[30] This is not accurate. While the Entry consolidated the proceedings, it also bifurcated the hearings: establishing one for the determination of need and a procedural schedule for that hearing only, while ordering that a second hearing for the specific projects be held separately.[31] No procedural schedule or dates have yet been set in relation to the second portion of the bifurcated hearing process.

The procedural schedule Joint Appellants are appealing is for the need determination hearing only, and that is not a hearing that will result in any money being charged to customers. The specific project hearings, which may not even occur if AEP fails to prove need, are the hearings where costs recovery may be an issue. However, no procedural schedule has been set for that hearing yet.[32] There is no risk, whatsoever, of customers being deprived of due process

[29] AEP Solar Case, Ohio Power Company's Notice of Additional Witnesses (Oct. 26 2018); Ohio Power Company's Amended Notice of Additional Witnesses (Nov. 1 2018).
[30] *Id.*
[31] Entry at ¶33.
[32] Entry at ¶37.

and being charged any money, let alone "billions of dollars", as a result of the Entry's procedural schedule. Significantly, Joint Appellants also gloss over the fact that there is a statutory requirement for a hearing within 90 days.

Finally, Joint Appellants claim that, because the Entry establishes a procedural schedule, if the Commission were to ultimately reverse the ruling, parties would be prejudiced because they would already have put forth testimony and cross-examined witnesses.[33] Such an argument is a straw man. If the Joint Appellants are suggesting that the Commission might reverse the procedural schedule after the conclusion of the hearing, the suggestion is baseless and that scenario is unlikely to ever occur absent extremely unusual circumstances.

Joint Appellants have failed to establish that any undue prejudice or harm would result from the Entry. Joint Appellants simply disagree with the procedural schedule and are trying to creatively bend the rules to assist in their effort to push the hearing date back. Environmental Intervenors respectfully request that the Interlocutory Appeal be denied.

IV. CONCLUSION

Contrary to the claims of Joint Appellants, the Entry has not violated the parties or customers' due process rights, terminated any parties' participation in the process, or unfairly exposed customers to heightened risk. It merely established a procedural schedule that Joint Appellants oppose and nothing more. Therefore, Environmental Intervenors respectfully request that the Interlocutory Appeal be denied.

[*Signature blocks on the next page.*]

[33] Interlocutory Appeal, Memorandum in Support at 9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via electronic mail upon the following counsel of record, this 5th day of November, 2018:

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Summary: Memorandum Contra the Office of the Ohio Consumers' Counsel, The Ohio Manufacturers' Association, and the Kroger Co.'s Interlocutory Appeal and Request for Certification to the Full Commission and Application for Review electronically filed by Mr. Robert Dove on behalf of Natural Resources Defense Council and Ohio Environmental Council and Sierra Club