

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term)	
Forecast Report on behalf of Ohio Power)	Case No. 18-0501-EL-FOR
Company and Related Matters.)	

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into Renewable Energy)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)	
Renewable Generation Rider.)	

In the Matter of the Application of Ohio)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)	

**MOTION *IN LIMINE* TO EXCLUDE EVIDENCE PURPORTING TO SHOW
NEED BASED ON ECONOMIC IMPACT AND CUSTOMER SURVEYS
OR, IN THE ALTERNATIVE, MOTION TO STRIKE IRRELEVANT
TESTIMONY OF AEP OHIO WITNESSES**

**BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP
THE KROGER CO.
THE OHIO COAL ASSOCIATION
INTERSTATE GAS SUPPLY, INC.
AND IGS SOLAR, LLC**

AEP's proposal is against the law and should not be approved by the PUCO. In any event, AEP cannot show its proposal is meeting the need for generation in Ohio considering its proposal *is not* to sell the renewable energy in Ohio, but rather to deliver this energy into the PJM multi-state market.

AEP is seeking government approval to add charges for 400 monopoly megawatts of power plants to the electric bills of its 1.5 million captive utility customers. But the Ohio General Assembly has spoken on this matter. Ohio law prohibits monopolies (electric utilities) from owning power plants (and charging customers for those power

plants) unless the utility can show that it meets the limited exception created under R.C. 4928.143(B)(2)(c). A crucial part of meeting that statutory exception is for the utility to show there is “a need for the facility based on resource planning projections submitted by the electric distribution utility.”

The PUCO correctly determined, in the Ohio Power Company’s (“AEP”) previous attempt to obtain regulated customer funding for another power plant (the Turning Point project), that need is determined by measuring supply versus demand, consistent with the plain words of the statute (R.C.4928.143(B)(2)(c)). Additionally, the PUCO ruled that need should not be broadly defined in terms of economic impacts that the power plants would have on the state.¹

The PUCO has authority to control its proceedings.² The Office of the Ohio Consumers’ Counsel (“OCC”), the Ohio Manufacturers’ Association Energy Group (“OMAEG”), The Kroger Co. (“Kroger”), the Ohio Coal Association (“OCA”), Interstate Gas Supply, Inc. and IGS Solar, LLC (“IGS”) (hereafter the “Customer/Competitor Parties”) move through this pleading to exclude, or alternatively strike evidence at the upcoming evidentiary hearing that is linked to economic impacts and customer surveys. This includes the entirety of the testimony of AEP witnesses Fry, Horner, Lafayette, and Buser, and the following portions of the testimony of William Allen filed in Case No. 18-501-EL-FOR: (a) page 4, line 7, the words “economically beneficial”, (b) page 5, lines 7-12, (c) page 9, line 8 through page 16, line 5. Such evidence not relevant to the PUCO’s determination of whether AEP’s proposal meets the definition of need, as contained in

¹ *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR *et seq.*, Opinion and Order at 25-27 (Jan. 9, 2013) (“Turning Point”).

² *See* O.A.C. 4901-1-27(B). The PUCO also possesses inherent authority to do so.

the plain words of the statute and as the PUCO has defined need in the Turning Point case.³

Excluding such evidence will further the interests of administrative economy by avoiding unnecessary delay and focusing on the explicit need that must be shown before customers can be charged for the power plants, rather than focusing on extraneous and prejudicial matters. Granting this motion will also serve to exclude testimony that is not relevant and not probative of one of the ultimate issues that the PUCO must address: Has AEP shown that there is a need for monopoly-sourced generation based on its resource planning projections? Further, granting this motion will assist the PUCO in developing a record that will aid it in timely determining these important matters.

The reasons for granting this motion are set forth in the attached memorandum in support.

³ See R.C. 4928.143(B)(2)(c); Turning Point, Opinion and Order at 25-27 (Jan. 9, 2013).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In these consolidated cases, Ohio Power Company (“AEP”) seeks to impose charges on consumers to subsidize certain generation facilities. AEP is taking the first step toward government approval of consumer subsidies for 400 MW (and eventually 900 MW) of monopoly-sourced generation despite the General Assembly’s directive that power plants in Ohio should be deregulated, and generation resource needs should be met through the competitive market. AEP relies on an exception to the General Assembly’s decision to allow competitive markets to decide what generation facilities are built. That limited exception is found in R.C. 4928.143(B)(2)(c).⁴

This statute provides that utilities cannot charge consumers for generation facilities unless 1) the facilities will be “owned or operated” by the utility, 2) the PUCO

⁴ See, e.g., *In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and Related Matters, et al.*, Case No. 18-501-EL-FOR, Entry at 3 (Oct. 22, 2018); Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company (Sept. 19, 2018).

determines that there is a “need” for the facilities based on resource planning projections submitted by the utility, and 3) the utility dedicates the capacity and energy from the generation facilities to Ohio consumers.⁵ The PUCO has also ruled that the utility must show that its “generation needs cannot be met through the competitive market.”⁶ These express conditions under which captive customers can be charged for monopoly megawatts are independent of one another. In other words, all four conditions must be satisfied before AEP’s customers can be charged for monopoly megawatts that AEP is proposing.

The PUCO ordered the first phase (beginning with the evidentiary hearing on January 15, 2019) of these consolidated cases to address the threshold issue of need. At the same time, the Attorney Examiner offered to allow AEP to submit its direct testimony from the tariff case, at the hearing on the issue of need. Consequently, AEP noticed parties that it would call Witnesses Buser and Lafayette as part of phase one. These witnesses present an economic impact study of the effect of two specific solar projects on Ohio’s economy. AEP’s notice was met with objections by OCC, OMAEG, and Kroger. However, there has been no ruling on the objections to the Buser and Lafayette testimony.

In any event, the elements that AEP must prove to proceed with its plan to charge consumers to subsidize monopoly megawatts are clear. At this stage, AEP must show that there is a need for the power, according to “resource planning projections.” Evidence not relevant to and probative of need, as defined under the statute and

⁵ R.C. 4928.143(B)(2)(c).

⁶ *In re Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case No. 10-501-EL-FOR, Opinion & Order at 26 (Jan. 9, 2013).

interpreted by the PUCO, should not be entertained. Accordingly, the Customer/Competitor Parties move the PUCO to issue an order to exclude AEP's testimony that describes need in terms of economic impacts or customer wants or desires (e.g., surveys). Doing so will further the interests of administrative economy by focusing the hearing on relevant evidence to help the PUCO determine whether AEP's proposal complies with the law and is consistent with PUCO precedent. Other matters which are not useful in determining whether need is met, should be excluded from this hearing, thereby avoiding unnecessary delay. This will assist the PUCO by creating a manageable, relevant record that can aid it in its deliberations and facilitate a timely decision by the PUCO in these important matters.

II. MOTION IN LIMINE OR, IN THE ALTERNATIVE, MOTION TO STRIKE

The Supreme Court of Ohio has noted that motions *in limine* are “to avoid injection into trial of matters which are irrelevant, inadmissible, and prejudicial”⁷ The PUCO has also recognized motions *in limine*.⁸ The PUCO has granted motions *in limine* to narrow issues for hearing.⁹ The PUCO also grants motions to strike where

⁷ *State v. Gibb*, 28 Ohio St. 3d 199, 200 (1986); *see also* Ohio Rule of Evidence 401 (“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.”); Ohio Rule of Evidence 402 (evidence that is not relevant is not admissible).

⁸ *In the Matter of the Establishment of a Permanent Rate for the Sale of Energy from Montgomery County's Energy-From-Waste Facility to The Dayton Power and Light Company*, Case No. 88-359-EL-UNC (“Montgomery County”), Entry (July 6, 1988). Motions in limine have also been used in administrative contexts in other jurisdictions. *See, e.g., In re Review of Florida Power Corporation's earnings, including effects of proposed acquisition of Florida Power Corporation by Carolina Power & Light*, 2003 Fla. PUC Lexis 458 (2003); *In the Matter of Aylin, Inc., et al.*, 2016 EPA ALJ Lexis 23 (U.S. EPA 2016).

⁹ *See, e.g., In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. For Approval Pursuant to Revised Code Section 4929.11 of Tariffs to Recover Conservation Expenses*, Case No. 05-1444-GA-UNC, Hearing Transcript (Feb. 28, 2007) at 72 (Attorney Examiner Lesser granting motion *in limine* limiting scope of proceeding).

testimony is found to be irrelevant.¹⁰ Further, motions *in limine* and motions to strike serve administrative economy.¹¹ In addition to the PUCO's authority under O.A.C. 4901-1-27(B)(7) to take such actions as are necessary to avoid delay and prevent the presentation of irrelevant evidence, granting motions *in limine* and motions to strike is part of a tribunal's inherent authority to control its proceedings.¹² Trial tribunals have wide discretion in granting motions *in limine* and motions to strike, as decisions on them are reviewed on an abuse of discretion standard.¹³

Under Rule 401 of Ohio Rules of Evidence, relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. Under Rule 402, evidence that is not relevant is not admissible.

Applying these rules of evidence, evidence regarding “need” that is to be addressed in phase one should not include evidence of economic impact or customers wants or desires. Such evidence is irrelevant and thus inadmissible.¹⁴ Admitting evidence not relevant to the determination of need, as defined by the statute and PUCO precedent, would cause unnecessary delay, complicate the record, and require

¹⁰ See, e.g., *In re Application of the Ohio Dev. Serv. Agency*, Case NO. 17-1377-EL-USF, Opinion & Order ¶ 16 (Oct. 11, 2017) (striking irrelevant testimony); *In re Application of Duke Energy Ohio, Inc. for Authority to Adjust Rider AU*, Case No. 17-690-GA-RDR, Opinion & Order (Sept. 14, 2017) (striking irrelevant comments).

¹¹ See, e.g., *Montgomery County; Josolowitz v. State Farm Mut. Auto. Ins. Co.*, 2012 Ohio Misc. LEXIS 6419 (2012) (granting motion to strike “for reasons of judicial economy”).

¹² See *State v. Gibb*, 28 Ohio St. 3d at 201; *Montgomery County; Senior Citizens Coalition v. PUCO*, 69 Ohio St. 2d 625, 627 (1982) (PUCO has inherent authority to manage the orderly flow of its business); see also Ohio Rule of Evidence 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.”).

¹³ See, e.g., *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St. 3d 440, 445 (2013); *State v. McKelton*, 148 Ohio St. 3d 261, 290 (2016) (denying motion to strike because trial court did not abuse its discretion).

¹⁴ Ohio Rule of Evidence 402.

stakeholders (including the PUCO) to expend unnecessary resources. The evidence sought to be admitted can also be considered prejudicial. Thus, an order *in limine* excluding evidence of economic impact studies and customer wants or desires (e.g., surveys), or striking all testimony on those issues, would serve administrative economy.¹⁵

AEP admits that that the “wholesale markets are adequately supplying capacity and energy to the AEP Ohio load zone.”¹⁶ It also admits that it is not “proposing through this filing that it has a traditional integrated resource planning (IRP) need for generation.”¹⁷

Recognizing this problem, AEP invites the PUCO to consider a whole host of other issues that are not probative of the “need for the facility based on resource planning projections submitted by the electric distribution utility.” AEP presents an economic impact analysis showing the alleged effect of the projects on the Ohio economy. AEP also invites the PUCO to consider evidence of customers’ desire for in-state renewable energy, through customer surveys.

But the plain language of the statute controls here. Under the statute, “no surcharge shall be authorized unless the commission first determines in the proceeding that *there is a need for the facility based on resource planning projections* submitted by the electric distribution utility.”¹⁸ Resource planning projections consider whether the

¹⁵ See, e.g., *Montgomery County*.

¹⁶ Amendment to the 2018 Long-Term Forecast Report of Ohio Power Company at 3 (Sept. 19, 2018).

¹⁷ *Id.*

¹⁸ R.C. 4928.143(B)(2)(c) (*italics added*).

projected supply meets projected demands of customers.¹⁹ And, resource planning looks at whether there is excess capacity available above and beyond the expected peak demand of customers.²⁰ In this regard, in the multi-state PJM region (which Ohio is part of), the “reserve margin” for extra generation available to serve customers (if needed) is well above the PJM target reserve margin.

In AEP’s previous request concerning the need for renewable generation facilities (the Turning Point plant), the PUCO appropriately cited to the legislature’s words in R.C. 4928.143(B)(2)(c) and narrowly defined “need.” The PUCO tied need to resource planning projections submitted by the utility during the long-term forecast period.²¹ The PUCO specifically declined to broadly define “need” in terms of economic impacts that the power plants would have on the state.²² The PUCO should follow the precedent established earlier in the Turning Point case. *See In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443 (2017) (“We have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law. If the commission departs from precedent, it must explain why.”) (citations and quotations omitted).

¹⁹ See R.C. 4935.04(C)(1) (referring to the “resource planning projections to meet demand”); Ohio Adm. Code 4901:5-5-01(L); *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 113 Ohio St. 3d 180, 183 (2007) (“The purpose of a long-term forecast report is to project customers’ future demands for [commodity] and to determine how to acquire sufficient commodity ... to meet demand”).

²⁰ See R.C. 4935.04(C) (requiring long-term forecast report to include a year-by-year, ten-year forecast of annual peak load as well as month-by-month forecast of peak load for electric utilities).

²¹ *Id.*

²² *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Cas Nos. 10-501-EL-FOR *et seq.*, Opinion and Order at 25-27 (Jan. 9, 2013).

A. Evidence that purports to show that customers want or desire in-state renewable power is not relevant or probative of the need for the generation plants and is prejudicial.

One premise that AEP seeks to establish is that need is related to an alleged “strong desire on the part of AEP Ohio customers for in-state renewable power.”²³ AEP presents the testimony of two witnesses, Trina Horner and Nicole Fry, who testify on this issue. These two witnesses explain how, through an AEP-initiated survey, they attempted to measure the interests of AEP Ohio customers in renewable energy. AEP Witness Trina Horner testifies in support of the AEP initiated survey findings, while AEP Witness Nicole Fry describes how the survey was designed and implemented.²⁴

Neither testimony is relevant or probative of the “need” for the generation plants. The fact that some customers might *want* something does not mean that they *need* it. Besides, the competitive market is providing ample opportunities for Ohioans to choose renewable energy for their everyday electricity needs. So if customers want renewable energy, their wants can be fulfilled—right now—without AEP’s proposed power plant subsidies. Admitting such testimony would be prejudicial and will not assist the PUCO in reaching a determination of need. The PUCO should rule that AEP’s testimony in this regard is inadmissible. Alternatively, the testimony should be stricken in its entirety.

B. Evidence that purports to show that certain renewable projects provide economic development benefits is not relevant or probative of the need for the generation plants and is prejudicial.

Part of AEP’s definition of “need” is related to AEP’s contention that renewable projects are beneficial because they provide economic development opportunities in the

²³ Direct Testimony of William A. Allen at 7, Case No. 18-501-EL-FOR.

²⁴ See Direct Testimony of Nicole Fry (Sept. 19, 2018) at 2.

state of Ohio.²⁵ In this regard, AEP presents testimony of two witnesses, Stephen Buser and Bill LaFayette. AEP Witness Buser provides a summary of the economic impact study that he co-authored with Bill LaFayette. The study attempts to show the potential economic impact of the two solar projects, Highland Solar and Willowbrook Solar. AEP Witness Bill LaFayette provides an explanation of the economic impact study methodology.

Neither Mr. Buser's testimony nor Mr. LaFayette's testimony is relevant or probative of the "need" for the generation plants. The PUCO has specifically declined to broadly define "need" in terms of economic impacts that the power plants would have on the state.²⁶ The PUCO should follow the precedent established in the Turning Point case. *See In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443 (2017) ("We have instructed the commission to respect its own precedents in its decisions to assure the predictability which is essential in all areas of law, including administrative law. If the commission departs from precedent, it must explain why.") (citations and quotations omitted).

Admitting such testimony would be prejudicial and is not relevant to or probative of need. The testimony should not be admitted at hearing. Alternatively, the PUCO should strike the testimony.

III. CONCLUSION

The focus in this case should be on the law and whether AEP's proposal is consistent with Ohio law (which it is not). The PUCO's own Staff has said that the issues

²⁵ Direct Testimony of William A. Allen at 10, Case No. 18-501-EL-FOR.

²⁶ *In the Matter of the Long-Term Forecast of Ohio Power Company and Related Matters*, Case Nos. 10-501-EL-FOR *et seq.*, Opinion and Order at 25-27 (Jan. 9, 2013).

involved in this case are novel and complex.²⁷ They should not be made more complex by hearing evidence that is not relevant and not probative of the issues before the PUCO—whether AEP’s proposal meets the statutory definition of need (which it does not). Additionally, AEP’s testimony will cause unnecessary delay, thus sacrificing administrative economy. Evidence at this phase of the hearing should exclude irrelevant testimony of economic impact studies and surveys. Instead “need” testimony should address the “resource planning projections” submitted by AEP as required under the statute, and as interpreted by PUCO precedent (the Turning Point case). That means that the entirety of the testimony of AEP Witnesses Horner, Frye, Lafayette, and Buser should be excluded, as well as the portions of AEP Witness Allen’s testimony identified herein.²⁸ Alternatively, the PUCO should strike the testimony from the record.

²⁷ See Motion for a Hearing and Memorandum in Support Submitted on behalf of the Staff of the Public Utilities Commission of Ohio (Sept. 21, 2018).

²⁸ See *supra* (identifying the sections of the Allen testimony to be excluded).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served on the persons stated below
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Summary: Motion Motion In Limine to Exclude Evidence Purporting to Show Need Based on Economic Impact and Customer Surveys or, in the Alternative, Motion to Strike Irrelevant Testimony of AEP Ohio Witnesses by the Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Association Energy Group, the Kroger Co., the Ohio Coal Association, Interstate Gas Supply, Inc. and IGS Solar, LLC electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.