

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. 18-501-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

**OHIO POWER COMPANY'S MEMORANDUM CONTRA INTERVENORS'
MOTION *IN LIMINE* TO EXCLUDE THE COMPANY'S ECONOMIC-IMPACT AND
CUSTOMER-SURVEY EVIDENCE**

I. Introduction

Ohio Power Company ("AEP Ohio" or the "Company") respectfully asks the Public Utilities Commission of Ohio ("Commission") to deny the eleventh-hour motion *in limine* ("Motion") filed by Intervenor 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. ("IGS"), and IGS Solar, LLC ("IGS Solar") (collectively, "Intervenors").

The opening sentence of Intervenor's Motion, which declares that "AEP's proposal is against the law and should not be approved by the PUCO," confirms that Intervenor is not seeking merely to exclude certain evidence from the imminent hearing (which is the appropriate topic of an *in limine* motion), but instead is openly asking the Commission to prejudge the merits of these proceedings. The Commission should decline to take the bait.

Intervenors’ untimely Motion, which seeks to exclude critical economic impact and customer survey testimony and reports from no fewer than five different AEP Ohio witnesses, is a textbook example of “trial by ambush.” Intervenors have been in possession of all of the testimony and exhibits they now seek to exclude since last September, when AEP Ohio filed it all in support of the Company’s Applications in the above-captioned *Long-Term Forecast* and *Tariff* cases. Even so, and even though AEP Ohio’s witnesses (not to mention Intervenors’ own witnesses) have since devoted significant time and effort to preparing for the imminent hearing – and even though numerous intervenor witnesses have already filed lengthy written testimony of their own rebutting the economic impact and customer survey evidence – Intervenors waited several months after the Company testimony was filed to file their expansive and misguided *in limine* motion.¹ The Commission should not reward Intervenors’ calculated delay by excluding the critical evidence of “need” for in-state renewable energy that they now seek to sweep under the rug.

Even if Intervenors’ motion had been more timely, it would nevertheless fail on the merits. The economic impact and customer survey evidence that Intervenors seek to bar relates directly to the central issue to be determined by the Commission at the upcoming hearing; that is, whether AEP Ohio can demonstrate a “need” for at least 900 MW of renewable energy resources in Ohio, pursuant to R.C. 4928.143(B)(2)(c). Allowing AEP Ohio to present evidence in support of its demonstration of “need” (a term left undefined by the General Assembly, and thus open to this Commission’s reasonable interpretation and application under longstanding principles of administrative deference) would be consistent with the commitments set forth in a prior

¹ By contrast, AEP Ohio’s motion to strike testimony was filed three business days after the pertinent intervenor testimony was filed.

stipulation approved by the Commission – a settlement and order that the Ohio Supreme Court just affirmed by a vote of 7-0, over the vociferous protests from some of the same Intervenors.

Although Intervenors hang their hats on the Commission’s prior *Turning Point* decision to seek exclusion of the challenged testimony and exhibits, Intervenors’ accounting of that proceeding is flawed and incomplete. The *Turning Point* Opinion and Order rejecting the Company’s demonstration of “need” for an entirely different project was based on the specific facts, circumstances, and record developed *in that proceeding*. And Intervenors’ own cited case law from the Ohio Supreme Court confirms that this Commission is not bound to follow *Turning Point* in any event, so long as the Commission *explains* the basis for its distinction or departure from that precedent. As former Commissioner Lesser’s dissenting opinion in *Turning Point* confirms, Commissioners indeed can and will have different opinions about what a showing of “need” for new renewable generation under R.C. 4928.143(B)(2)(c) should entail or require. The current members of this Commission, none of whom signed the Opinion and Order in *Turning Point*, do not wear straightjackets sewn by their predecessors. With their Motion, Intervenors simply seek to deny this Commission any exposure whatsoever to the type of reliable, probative evidence of “need” that supports an informed distinction from *Turning Point*.

As more fully described in the attached Memorandum in Support, AEP Ohio respectfully requests that the Commission promptly deny Intervenors’ untimely motion *in limine* in its entirety. The Commission should hear and consider AEP Ohio’s economic-impact and customer-survey evidence – along with Intervenors’ corresponding responsive testimony – as part of a full and fair assessment at the upcoming hearing of whether there is a “need” for at least 900 MW of renewable energy projects in Ohio.

II. Background

On September 19, 2018, the Company submitted an amendment to its 2018 Long-Term Forecast Report (“2018 LTFR”) in the above-captioned *Long-Term Forecast Case*, consistent with the Commission’s orders in Case Nos. 14-1693-EL-RDR, *et al.*, and 16-1852-EL-SSO, *et al.*, to demonstrate the need for at least 900 megawatts of renewable energy projects in Ohio. In the *REPA* and *Green Tariff Cases* (collectively, the “*Tariff Cases*”), filed September 27, 2018, consistent with the Commission’s orders in Case Nos. 14-1693-EL-RDR, *et al.*, and 16-1852-EL-SSO, *et al.*, the Company seeks an order approving the inclusion in the Company’s Renewable Generation Rider (“RGR”) of two solar energy resources totaling approximately 400 MW of nameplate capacity solar energy, as well as the creation of a new Green Power Tariff, pursuant to which customers may purchase renewable energy credits for the solar energy resources’ environmental attributes.

On October 22, 2018, the Attorney Examiner consolidated the *Long-Term Forecast* and *Tariff* cases and established a procedural schedule, directing that the proceedings should continue in two phases, with the first phase to consist of a hearing on the issue of “need,” and a separate hearing to consider the distinct issues raised by AEP Ohio’s application in the *Tariff* cases. *See Long-Term Forecast Case*, Entry, ¶ 32 (Oct. 22, 2018) (“Procedural Entry”). In that Procedural Entry, the Attorney Examiner expressly provided that AEP Ohio could offer “its direct testimony, as submitted in support of the application in the *Tariff* cases, at the hearing on the issue of need.” *Id.* Pursuant to this express provision in the Procedural Entry, the Company promptly filed a notice of additional witnesses whose testimony was filed in the *Tariff* cases – witnesses Buser and LaFayette. *See Long-Term Forecast Case*, Ohio Power Company’s Notice of Additional Witnesses (Oct. 26, 2018). Yet despite this express provision in the Procedural Entry, Intervenor OCC, OMAEG, and Kroger docketed an “Objection” to AEP Ohio’s Notice.

See Long-Term Forecast Case, Objection to Ohio Power Company’s Notice to Present Additional Witnesses (November 5, 2018). Intervenor’s “Objection” remains pending and parrots many of the same arguments now set forth in Intervenor’s Motion – namely, that the challenged testimony is “irrelevant to the determination of need.” *Id.* at 2.

Now, with the first-phase hearing set to commence in just days, Intervenor’s eleventh-hour Motion *in Limine* seeks to exclude from the phase-one “need” hearing the entirety of the testimony of the following four AEP Ohio witnesses (including, but not limited to, the same two witnesses targeted in the prior “Objection”):

- **Trina Horner**, Director of Navigant Consulting, who sponsors Navigant’s customer survey report titled “AEP Ohio Voice of the Customer: Attitude & Expectations of Renewable Energy”;
- **Nicole Fry**, Associate Director at Navigant Consulting, who describes the design and implementation of Navigant’s primary research of customer interest in renewable energy generated in Ohio and delivered by AEP Ohio;
- **Stephen A. Buser**, PhD, Emeritus Professor of Finance, Fisher College of Business at The Ohio State University, who demonstrates that the proposed renewable projects will benefit Ohio’s economy, based on a formal economic impact study; and
- **Bill LaFayette**, PhD, Owner of Regionomics, LLC, who is jointly sponsoring the economic-impact study demonstrating the solar projects’ favorable economic impacts, and summarizes the model and data employed in the study.

Navigant’s report, sponsored by witnesses Horner and Fry, demonstrates that the Company’s customers want competitively-priced, Ohio-generated renewable energy. *See generally* Horner Testimony (Sept. 19, 2018), Exhibit TH-1. As Ms. Horner testifies:

Navigant considered the statewide environment for renewable energy, reflecting on legislative and regulatory developments relevant to AEP Ohio's service territory and recent Ohio business leader commitments to sustainability and renewable energy. Results from the online survey indicate that a strong majority of customers believe it is important that AEP Ohio make greater use of renewable energy above current levels. The survey also revealed that a majority of residential customers and many small C&I customers are willing to pay some additional amount on their electricity bills for AEP Ohio investments in renewable energy. All of the factors examined by Navigant indicate that AEP Ohio customers are planning for, and expecting to be served by, more renewable generation to supply their energy needs going forward.

See Horner Testimony at 3-4.

And the economic-benefits analysis sponsored by witnesses Buser and Lafayette confirms that solar projects located in Ohio will result in quantifiable economic impacts arising from construction and operation of the facilities, as well as less quantifiable economic and social benefits in a region of southern Ohio that has suffered from the opioid crisis and lagged the rest of the State in growth during the recent expansion. *See generally* Buser Testimony (Sept. 27, 2018), Exhibit SB/BL-1. Among other things, the economic-impact analysis shows that construction of the proposed solar facilities will create 3,870 new jobs; earnings for Ohio workers will grow by more than \$250 million; output will grow by nearly \$700 million; and the value-added measure of the net effect on Ohio's gross domestic product will grow by nearly \$390 million. Buser Testimony at 4. The analysis from Dr. Buser and Dr. Lafayette that Intervenor seek to exclude also shows that post-construction annual operating economic effects are smaller in magnitude but will continue indefinitely. *Id.*

In addition to seeking to exclude all of the testimony and reports of the foregoing four AEP Ohio witnesses, Intervenor also move to exclude significant portions of the testimony of **William Allen**, the Company's Director of Regulatory Case Management, where he testifies

regarding the economic benefits of renewable energy projects located in Ohio, refers to and summarizes the testimony of the foregoing four witnesses, and responds to questions regarding considerations relevant to the Commission's review of the "need" for renewable energy projects (including, *inter alia*, Ohio currently being a net importer of energy, the growing demand for locally produced renewable energy, and the local economic development benefits associated with such projects). For the following reasons, the Commission should promptly deny Intervenor's untimely and fundamentally misguided motion *in limine*.

III. Argument

A. Intervenor's Motion impermissibly seeks a decision on the merits of the main question presented and, if granted, would undercut the Commission's prior approval of the Stipulation leading to this proceeding, as well as the Commission's approval of the Renewable Generation Rider in its recent ESP IV decision.

As the opening line of Intervenor's Motion ("AEP's proposal is against the law * * *") makes apparent, Intervenor's request is not so much a request for an *in limine* evidentiary ruling as it is a request for the Commission to predetermine the merits of the central question presented here. This is an inappropriate object for a motion *in limine*, particularly in light of the fact that AEP Ohio is now following through on a stipulated commitment (one approved by the Commission) to pursue the development of renewable-energy projects.

The concept of developing 900 MW of renewable energy stems from the Power Purchase Agreement ("PPA") Rider settlement and Order, which the Ohio Supreme Court just affirmed 7-0 over OCC's and OMAEG's strenuous objections. *See In re Application Seeking Approval of Ohio Power Co.'s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR ("PPA Case"), Joint Stipulation and Recommendation, Section III.I.1 (Dec. 14, 2015); *PPA Case*, Opinion and Order, at 84 (Mar. 31, 2016); *see also In re Application of Ohio Power Co.*, Slip Opinion No. 2018-

Ohio-4698. While the stipulating parties clearly reserved the right to challenge the Company's showing of need, it goes too far to argue that the Company should be blocked or prevented from even *presenting* that showing, which is the clear aim of Intervenor's overbroad Motion. Notably, one of the Intervenor's joining the instant Motion *in Limine*, IGS, was a signatory party to the Stipulation in Case No. 14-1693-EL-RDR, and thus now seeks to prevent the Company from presenting evidence in support of the very commitment to develop renewable energy that IGS previously agreed was appropriate.

Further, in the recent Opinion and Order for Case No. 16-1852-EL-SSO, *et al.* (the "*ESP IV*" case), the Commission approved a recovery mechanism specifically for the Company's recovery of costs associated with future renewable projects, the RGR, and it once again noted that the Company would need to file a separate EL-RDR proceeding to propose specific renewable projects, demonstrate the need for each proposed facility, and satisfy the other criteria in R.C. 4928.143(B)(2)(c). *See In re Application of Ohio Power Co. 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, *et al.*, Opinion and Order at ¶ 227 (April 25, 2018). That is exactly what AEP Ohio is now doing, and that is precisely the purpose of next week's "need" hearing, but Intervenor's now seek to pre-emptively bar compelling evidence that the Company proffers to support a finding of "need." Instead of cutting the legs out from under AEP Ohio's evidentiary presentation, the Commission should deny Intervenor's untimely and overbroad Motion and permit the Company to make its case. Although the Supreme Court affirmed the PPA Rider (*i.e.*, the predecessor to the RGR), OCC has also filed an appeal seeking reversal of the Commission's *ESP IV* decision. Sup. Ct. Case No. 2018-1396. Thus, it is not surprising that Movants want to continue to fight implementation of the RGR that was adopted in the *ESP IV* order.

At bottom, Intervenor's Motion is in many respects an untimely challenge (akin to an interlocutory appeal or rehearing request) to the Procedural Entry by the Attorney Examiner that established the procedural schedule in this case and afforded AEP Ohio the opportunity to present evidence supporting a "need" finding, and to present its witnesses' testimony in the first phase of the bifurcated hearing. *See Long-Term Forecast Case*, Entry, ¶ 32 (Oct. 22, 2018). The Commission should not allow Intervenor's to make a belated end-run around the procedural rules applicable to interlocutory appeals and requests for rehearing.

B. The evidence Intervenor's seek to exclude is indeed relevant to and probative of the "need" for in-State renewable generation, notwithstanding Intervenor's flawed and unduly cramped conception of resource planning.

Intervenor's assert that the testimony and evidence they seek to exclude is "not relevant" (e.g., Motion at 2) because it is "not probative of one of the ultimate issues that the PUCO must address: Has AEP shown that there is a need" (*id.* at 3) for in-state renewable generation. And Intervenor's posit that the customer survey and economic impact evidence is "not relevant to and probative of *need, as defined under the statute*" (Motion, Mem. in Supp. at 2; emphasis added), failing to acknowledge that the applicable statute does *not*, in fact, define the term "need." *See generally* R.C. 4928.143. Because the ESP statute, R.C. 4928.143(B)(2)(c), provides that a nonbypassable surcharge can be established when "the [Commission] first determines in the proceeding that there is need for the facility *based on resource planning projections* submitted by the electric distribution utility" (emphasis added), the basis for Intervenor's assertions challenging the relevance of AEP Ohio's evidence is Intervenor's unduly restrictive and cramped conception of resource planning. Specifically, Intervenor's claim:

Resource planning projections consider *whether the projected supply meets projected demands* of customers. And, resource planning looks at *whether there is excess capacity available* above and beyond the expected peak demand of customers. In this regard, in the multi-state PJM region (which Ohio is part of), the "reserve

margin” for extra generation to serve customers (if needed) is well above the PJM target reserve margin.

(*Id.* at 6.) Based on this solely capacity-based understanding of “resource planning,” Intervenors claim that the Company’s customer-survey and economic-benefit evidence is irrelevant to whether there is a need for renewable in-State generation. (*Id.* at 7-8.)

But Intervenors’ presumed definition of resource planning is overly narrow and fundamentally flawed. Under that statute, a hearing on a long-term forecast report “shall include” information on “projected loads and energy requirements “ and “[t]he estimated installed capacity and supplies to meet the projected load requirements.” R.C. 4935.04(E)(2). But the Ohio General Assembly has specifically directed the Commission not to limit the hearing on a long-term forecast report to those two issues. *See id.* (“The hearing shall include, *but not be limited to*,” the two listed topics). The Commission has recognized that the list of topics in R.C. 4935.04(E)(2) is “non-exhaustive” and “do[es] not limit [the Commission’s] review to the sole issue of AEP-Ohio’s traditional generation capacity * * *.” *In re Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case Nos. 10-501-EL-FOR, Opinion and Order at 22 (Jan. 9, 2013). Instead, when an electric distribution utility files a long-term forecast report to support a filing for an allowance under R.C. 4928.143(B)(2)(c), the utility is directed to discuss “[a]ll major factors” when describing how the utility determined “the need for additional electricity resource options.” (Emphasis added.) Ohio Adm. Code 4901:5-5-06(B)(2).

Under the Commission’s rules, resource planning includes the evaluation of alternatives – including renewable alternatives – to meet customers’ requirements at the least reasonable cost. *See* Ohio Adm. Code 4901:5-5-01 (defining “integrated resource plan” to mean a “plan * * * to furnish electric energy services in a *cost-effective and reasonable* manner consistent with the provision of adequate and reliable service”) (emphasis added). Indeed, one of OCC’s own

witnesses, Dr. Lesser, expressly acknowledges that resource planning includes a least-cost component, defining resource planning to mean “forecasting future energy and peak loads of customers as accurately as possible, and then ensuring that customer’ electric needs can be met at the lowest expected cost (‘least cost’) with a portfolio of resources.” (Testimony of Jonathan A. Lesser, PhD, at 22 (Jan. 2, 2019).) Adding low-cost, fixed-price renewable resources clearly meets this legitimate resource-planning objective, and related evidence and testimony is thus relevant and probative here.

Indeed, resource planning requires the Commission to consider much more than just cost and capacity. A long-term forecast report supporting a filing under R.C. 4928.143(B)(2)(c) must include an integrated resource plan and “information sufficient for the commission to determine the reasonableness of the resource plan,” including several other items regarding the plan’s [1] adequacy, [2] reliability, and [3] cost-effectiveness,” [4] its “[p]otential rate and customer bill impacts,” [5] significantly here – its “[e]nvironmental impacts,” [6] “[*o*]ther significant economic impacts,” [7] “strategic considerations including flexibility, diversity, * * * and lost opportunities for investment,” [8] “[t]he impacts of the plan over time,” and [9] “[*s*]uch other matters the commission considers appropriate.” (Emphasis added.) Ohio Adm. Code 4901:5-5-06(B)(3)(e).

Accordingly, the evidence that Intervenors seek to exclude is not only relevant and probative, but squarely within the scope of the statutory language. The broad language of the Commission’s rules gives the Commission ample leeway to consider customer desire for in-state renewable power, and the local economic development benefits that power could produce, when weighing the Company’s long-term forecast report. And, the economic impact and customer survey evidence is *not*, as Intervenors contend (at 5) prejudicial. Intervenors will be presenting

responsive direct testimony on these topics, and (of course) there is no jury here. The Commission can consider and reconsider policy questions and reach different results in different cases while avoiding prejudicial effects, based on its assessment of the probative value of the evidence presented.

C. The Turning Point Opinion and Order is not controlling here.

Intervenors posit that the exclusion of AEP Ohio's customer-survey and economic-benefit evidence is compelled by the Commission's decision in the *Turning Point* case, *In re the Long-Term Forecast Report of Ohio Power Company and Related Matters*, Case No. 10-501-EL-FOR, Opinion and Order (Jan. 9, 2013). For numerous reasons, however, *Turning Point* does not compel the Commission to grant Intervenors' Motion.

As a threshold matter, the Commission's Opinion and Order in *Turning Point* was based on the specific facts and circumstances presented, as well as the unique evidentiary record developed, in that docket. The *Turning Point* Order represents a policy decision by a prior Commission. As Intervenors' own cited precedent from the Ohio Supreme Court confirms, the Commission can distinguish and even reconsider its former decisions, so long as it provides an adequate explanation for doing so. *See* Intervenors' Motion at 6 & 8, citing *In re Duke Energy Ohio, Inc.*, 150 Ohio St. 3d 437, 443 (2017) ("If the commission departs from precedent, it must explain why.").

Moreover, Intervenors ascribe too much rigidity to the discussion of "need" in *Turning Point*. A careful review of the Opinion and Order confirms that the Commission expressly declined to "decide" the precise scope of what "need" must always necessarily mean or encompass under R.C. 4928.143(B)(2)(c). For example, in footnote 10 of the *Turning Point* Opinion and Order, the Commission emphasized that it only assumed, but did not decide, that the determination of "need" under the statute may take into account SER benchmarks in R.C.

4928.64(B)(2). *See Turning Point* Opinion and Order at 26, n. 10. And the Commission also noted that it found no language in R.C. 4928.143(B)(2)(c) “that expressly excludes alternative energy resources from its parameters,” thereby eschewing the unduly narrow and restrictive interpretation of the statute that was advanced by certain intervenors in that case. Put simply, with “need” left undefined by the General Assembly, nothing in the *Turning Point* decision compels this Commission to abandon its critical role in interpreting and applying statutes within its realm of administrative expertise, based on the unique evidentiary record to be developed in this proceeding. *Accord, State ex rel. Brown v. Dayton Malleable, Inc.*, 1 Ohio St.3d 151, 155 (1982) (“[w]hen faced with a problem of statutory construction, [the Ohio Supreme Court] will show great deference to the interpretation given the statute by the officers or agency charged with its administration.”).

Because Intervenors rely so heavily on *Turning Point* in their Motion, another aspect of that proceeding is worth noting. In that case, intervenors Industrial Energy Users-Ohio (“IEU-Ohio”) and First Energy Solutions (“FES”) filed a motion to strike and *in limine*, which requested that the *Turning Point* provision be stricken from the stipulation. The attorney examiner denied that motion. Then, during the hearing, IEU-Ohio and FES also moved to strike portions of the testimony of AEP Ohio witness Castle and Staff witness Bellamy, who testified regarding the “need” for the *Turning Point* project. These motions, too, were properly denied by the Attorney Examiner, and the Commission affirmed. *See Turning Point*, Opinion and Order, at 7. As such, *Turning Point* is hardly compelling precedent supporting the blanket *in limine* exclusion of the testimony proffered by the Company here to support a “need” determination. Instead, *Turning Point* reflects the Commission denying overbroad *in limine* motions to ensure a more complete evidentiary record upon which to render an informed decision.

D. Intervenor’s other cited authority is inapposite and does not support the *in limine* exclusion of AEP Ohio’s customer survey and economic impact evidence.

Beyond *Turning Point*, the other precedent cited in Intervenor’s Motion also fails to support the relief they seek. Not only is it not binding on this Commission, Intervenor’s case law is distinguishable and provides no basis to exclude the relevant and probative evidence challenged here. In fact, certain cases cited in Intervenor’s Motion plainly support denial of the Motion.

For example, to support the proposition that “other jurisdictions” have employed *in limine* orders such as the one sought here, Intervenor’s cite (at 3, n. 8) *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). But the motion *in limine* in that proceeding bore no resemblance whatsoever to Intervenor’s Motion here. In the *Florida Power* case, the motion *in limine* related to matters raised in a party’s response to a motion to enforce a settlement. *See id.* at *15. The party moving to enforce the settlement claimed that the other party’s *response* – not its testimony, nor the comprehensive reports of its consultants – included matters outside the scope of the settlement and purported to modify the contractual obligations embodied in the settlement. *Id.* The material sought to be excluded in the *Florida Power* case thus bears no resemblance to the relevant and probative customer-survey and economic-impact testimony and reports that Intervenor’s now seek to exclude entirely from the “need” hearing.

Intervenor’s also cite (at 3, n. 8) *In the Matter of Aylin, Inc., et al.*, 2016 EPA ALJ Lexis 23 (U.S. EPA 2016) but that case – also readily distinguishable on its facts – directly supports denial of Intervenor’s Motion. There, the motion *in limine* sought to exclude two specific exhibits from consideration by an Administrative Law Judge (“ALJ”): (1) the results of an

online search for bankruptcies, judgments, and liens; and (2) a copy of a final rulemaking proposing that those who provide financing to underground storage tank owners be exempt from regulation. *Id.* at *61-66. The ALJ *denied* the motion, after quoting a colleague for this important principle about motions *in limine* that is tellingly absent from Intervenor's Motion:

In Federal court practice, a motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. Motions in limine are generally disfavored. If evidence is not clearly inadmissible, evidentiary rulings may be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in that context.

Id. at *62 (internal quotation omitted). As such, the *Aylin* case cited by Intervenor's Motion squarely supports denial of Intervenor's Motion.

Intervenor's citation to Ohio precedent fares no better. For example, Intervenor cites a hearing transcript from a Vectren Energy matter to show that former Attorney Examiner Lesser once granted a motion *in limine* to limit the scope of a proceeding. *See* Motion at 3, n. 9, citing *In re: Application of Vectren Energy Delivery of Ohio, Inc. for Approval Pursuant to R.C. 4929.11 of Tariffs to Recover Conservation Expenses*, Case No. 05-1444-GA-UNC, Hearing Transcript (Feb. 28, 2007) at 72. But the point of the motion *in limine* in the *Vectren* case was to limit the scope of a hearing to new issues raised by an amended stipulation that were not already addressed by a prior opinion and order – not to exclude testimony or exhibits resembling what Intervenor seeks to exclude here. *See id.*, *Motion in Limine* at 9 (February 15, 2007).

And although Intervenor (at 4, n. 10) cites two prior Commission decisions for the proposition that the Commission will strike irrelevant testimony, those decisions are also readily distinguishable – and both were losing decisions for OCC. Ironically, one of those decisions, *In re Application of the Ohio Dev. Serv. Agency*, Case No. 17-1377-EL-USF, Opinion and Order ¶ 16 (October 11, 2017), involved OCC unsuccessfully defending an Ohio State University

Study on food insecurity against a motion to strike filed by Kroger. The Attorney Examiner granted Kroger’s motion to strike, which argued that the study was inadmissible hearsay, and that the author of the study did not even testify at the hearing. *Id.* at ¶ 18. The Commission affirmed, concluding that the study regarding access to food was not only hearsay, but also did not relate to a “fact of consequence in the case” because “the need for the [Universal Service Fund] assistance programs is not a matter in dispute.” *Id.* at ¶ 19. Here, in stark contrast, “need” is very much in dispute – it is the very essence of the parties’ dispute, and the authors of the challenged survey and economic impact analysis will be on the stand subject to cross-examination. Another decision cited by Intervenor (at 4, n. 10), *In re Application of Duke Energy Ohio, Inc. for Authority to Adjust Rider AU*, Case No. 17-690-GA-RDR, Opinion and Order (Sept. 14, 2017) is equally distinguishable. There, the Attorney Examiner concluded that OCC’s comments on Duke’s future plans to replace its advanced metering infrastructure technology were more appropriate for submission in another open docket. *Id.* at ¶ 18. Here, in contrast, there is no other docket in which AEP Ohio can introduce its customer survey and economic impact evidence supporting “need” for in-state renewable resources. As the Attorney Examiner’s October 22, 2018 Procedural Entry confirms, *this* is the docket in which “need” must and shall be determined at the hearing to begin next week.

As the foregoing examples illustrate, Intervenor’s cited precedent fails to support the untimely and overbroad motion *in limine* they have filed only days before the “need” hearing is set to commence.

E. OCC purports to represent Ohio residential customers, yet seeks to exclude a comprehensive survey reflecting customers’ stated preferences for renewable energy.

There is no small irony that OCC’s name appears first on the caption of Intervenor’s baseless Motion. OCC wants the Commission to disregard residential customers’ views and

opinions relevant to “need,” as those views are expressed in the Navigant survey that OCC now seeks to exclude *in limine* in its entirety. This litigation strategy is perhaps not surprising, for the public hearing and discovery exchanged to date have confirmed that the positions espoused by OCC’s *counsel* in these consolidated proceedings do not mesh with the positions of the actual *consumers* whom OCC purports to represent.

At the public hearing, more than 50 consumers showed up to make their voices heard; they spoke unanimously *in favor* of AEP’s proposal. *See generally In the Matter of the 2018 Long-Term Forecast Report of Ohio Power Company and Related Matters*, Transcript of Public Hearing (Dec. 14, 2018). And when AEP Ohio served an interrogatory upon OCC to ascertain whether OCC had sought any feedback or opinions from customers regarding the Company’s Applications in these proceedings, the answer was no. *See* OCC Supp. Response to AEP Ohio Interrogatory No. 8 (attached hereto as Exhibit 1). And when the Company asked whether any residential customer of AEP Ohio had ever contacted OCC to express concerns about or opposition to the Company’s proposal, again the answer was “none.” OCC Supp. Response to AEP Ohio Interrogatory No. 9 (attached hereto as Exhibit 2). OCC’s desired exclusion of AEP Ohio’s customer survey and economic impact evidence only reinforces the disconnect between OCC’s litigation positions and the preferences of its clients, who (for the reasons stated in the very evidence that Intervenors ask the Commission to exclude) *prefer and will indeed benefit from* the in-state renewable generation at issue, which the Company promised to pursue in a Commission-approved Stipulation that has been unanimously confirmed by the Ohio Supreme Court.

IV. Conclusion

For the foregoing reasons, AEP Ohio respectfully asks the Commission to deny Intervenor's eleventh-hour motion *in limine*, which improperly asks the Commission to prejudge the merits of the central issues yet to be determined in the upcoming hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Ohio Power Company's Memorandum Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 9th day of January 2019, via electronic transmission.

/s/ Steven T. Nourse

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EXHIBIT 1

**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.)	

**SUPPLEMENTAL RESPONSES AND OBJECTIONS TO OHIO POWER COMPANY'S
FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF
DOCUMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), by and through its counsel, hereby submits these Supplemental Responses and Objections to the First Set of Interrogatories and Requests for Production of Documents submitted by Ohio Power Company ("AEP" or "the Company") in the above-captioned cases. OCC's responses to these discovery requests are being provided subject to, and without waiver of, the general objections stated below and the specific objections posed in response to each interrogatory and request for production of documents. OCC's responses to these discovery requests are submitted without prejudice to, and without waiving any objections not expressly set forth therein.

The provision of any response below shall not waive OCC's objections. The responses below, while based on diligent investigation and reasonable inquiry by OCC and its counsel, reflect only the current state of OCC's knowledge and understanding and belief with respect to

the matters about which the discovery requests seek information, based upon the information and discovery to date. OCC's investigation is not yet complete and is continuing as of the date of the responses below. OCC anticipates the possibility that it may discover additional information and/or documents, and without obligating itself to do so, OCC reserves the right to continue its investigation and to modify or supplement the responses below, as required by the Ohio Adm. Code, with such pertinent information or documents as it may reasonably discover. The responses below are made without prejudice to OCC's right to rely upon or use subsequently discovered information or documents, or documents or information inadvertently omitted from the responses below as a result of mistake, error, or oversight. OCC reserves the right to object on appropriate grounds to the use of such information and/or documents. The fact that OCC, in the spirit of cooperation, has elected to provide information below in response to the Company's discovery requests shall not constitute or be deemed a waiver of OCC's objections. OCC hereby fully preserves all of its objections to the discovery request or the use of its responses for any purpose.

Furthermore, OCC's provision of responses to these discovery requests shall not be construed as a waiver of the attorney-client privilege, the trial preparation doctrine, or any other applicable privilege or doctrine. OCC reserves its right to file a motion for protective order under Ohio Adm. Code 4901-1-24 in order to protect OCC from annoyance, embarrassment, oppression or undue burden or expense or for any other reason.

Interrogatory No. 8 Before forming your legal positions in the Long-Term Forecast Report proceeding and the Tariff Cases, did you seek out feedback or opinions from customers of AEP Ohio regarding AEP Ohio's filings or positions in these cases? If so, how did you solicit that feedback or those opinions?

RESPONSE: Objection. The manner in which OCC forms its legal positions is protected by the attorney-client privilege and work-product doctrine and thus is not discoverable. Further, the information sought in this interrogatory is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, as required by Ohio Adm. Code 4901-1-16(B). Further, OCC's formation of legal positions is an ongoing process that will continue throughout this proceeding, so the question is vague and ambiguous as it pertains to a time period that occurred "before forming [OCC's] legal positions" in these cases. Subject to and without waiving these objections: OCC's legal position in these cases is based on its understanding of the laws that the General Assembly enacted (and PUCO precedent) that require the utility to meet a number of conditions before it may own or operate generation plant (including renewables). OCC did not seek the opinions of its customers on whether AEP has met conditions imposed under the laws enacted by the General Assembly. Further, the law (R.C. 4911.021) prohibits OCC from operating a telephone call center for consumer complaints, which would include complaints about AEP Ohio's filings and positions in these cases.

Prepared by: Counsel

EXHIBIT 2

Interrogatory No. 9 Please identify the residential customers of AEP Ohio (if there are any) who have contacted OCC (whether in-person, by telephone, by e-mail, or by other written communication) to express their discontent with, concerns about, or opposition to, or to urge OCC to oppose, AEP Ohio's filings or positions in the Long-Term Forecast Report proceeding or the Tariff Cases. If you are unable to identify such residential customers by name, please estimate the number of AEP Ohio residential customers who have contacted OCC to express their discontent with, concerns about, or opposition to, or to urge OCC to oppose, AEP Ohio's filings or positions in the Long-Term Forecast Report proceeding or the Tariff Cases.

RESPONSE: Objection. The information sought in this interrogatory is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, as required by Ohio Adm. Code 4901-1-16(B). Subject to and without waiving these objections: none.

Prepared by: Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of Ohio Consumer's Counsel's Supplemental Responses and Objections to Ohio Power Company's First Set of Interrogatories and Request for Production of Documents was served in accordance with Ohio Adm. Code 4901-1-18, by electronic transmission upon all parties of record this 28th day of December, 2018.

/s/ Christopher Healey
Christopher Healey
Assistant Consumers' Counsel

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in

Case No(s). 18-0501-EL-FOR, 18-1392-EL-RDR, 18-1393-EL-ATA

Summary: Memorandum - Ohio Power Company's Memorandum Contra Intervenors' Motion in Limine to Exclude the Company's Economic-Impact and Customer-Survey Evidence electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company