

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Long-Term)	
Forecast Report 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)	

**NATURAL RESOURCES DEFENSE COUNCIL’S AND OHIO PARTNERS FOR
AFFORDABLE ENERGY’S JOINT MEMORANDUM CONTRA OHIO CONSUMERS’
COUNSEL’S IMMEDIATE INTERLOCUTORY APPEAL OR REQUEST FOR
CERTIFICATION AND APPLICATION FOR REVIEW**

Natural Resources Defense Counsel and Ohio Partners for Affordable Energy (collectively “Joint Movants”) now timely file¹ this Memorandum Contra to the Ohio Consumers’ Counsel’s Interlocutory Appeal or Request for Certification and Application for Review filed on January 30, 2019 (“Interlocutory Appeal”). Joint Movants respectfully request that OCC’s request for an Interlocutory Appeal be denied because it plainly contradicts long-established Commission rules which allow Attorney Examiners to request written motions.² In addition, it mischaracterizes the

¹ Ohio Administrative Code (“OAC”) 4901-1-15(D) states that “Unless otherwise ordered by the commission, any party may file a memorandum contra within five days after the filing of an interlocutory appeal.” This memorandum contra is being respectfully submitted for consideration one day after OCC’s filing.

² OAC rule 4901-1-12(G) states that “The presiding hearing officer may direct that any motion made at a public hearing or transcribed prehearing conference be reduced to writing and filed and served in accordance with this rule.”

motion properly requested by the hearing officers and submitted on January 28, 2019. Finally, the Interlocutory Appeal is moot because the briefing ordered has already been completed.

I. INTRODUCTION

AEP Ohio (the “Company”) submitted an amendment to its 2018 Long-Term Forecast Report (“2018 LTFR”) in the 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.³ In the subsequently filed REPA and Green Tariff Cases (collectively, the “Project Cases”), which were also filed 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.⁴

On September 27, 2018, AEP Ohio moved to consolidate the Long-Term Forecast and Tariff cases.⁵ On October 22, 2018, the Attorney Examiners determined that consolidating all three cases is “reasonable and appropriate” in light of the administrative efficiencies to be gained from consolidation.⁶ On January 2, 2019, the Office of the Ohio Consumers’ Counsel (“OCC”) filed the Direct Testimony of Noah Dormady in the LTFR (“Need”) Case. On January 17, 2019,

³ *Amendment to 2018 Long Term Forecast Report*, filed in Pub. Util. Comm. Case No. 18-0501-EL-FOR (“Need Case”) on Sept. 9, 2018.

⁴ *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 and to amend its tariffs*, filed in Pub. Util. Comm. Case Nos. 18-1392-EL-RDR et al. (“Project Cases”) on Sept. 27, 2018.

⁵ *Motion to Consolidate Proceedings*, filed in the Need and Projects Cases on Sept. 27, 2018.

⁶ Entry filed in Need and Project Cases on Oct. 22, 2018, ¶32.

Dr. Dormady filed an application to become a Commissioner at the PUCO on April 11, 2019, when a seat opens.⁷ On January 25, 2019, the PUCO Nominating Council announced Dr. Dormady would be one of the nine applicants selected to be interviewed for the position.⁸ At the evidentiary hearing in the Need Case, on January 25, 2019, Joint Movants made a motion to exclude the Direct Testimony of Dr. Noah Dormady.

After the motion was made the Attorney Examiners took a recess and returned to request briefing on motion. Joint Movants briefed their Motion to Exclude and submitted a Memorandum in Support on January 28, 2019. On January 29, 2019, OCC, the Ohio Manufacturers Association Energy Group, Kroger Co., and the Industrial Energy Users of Ohio all filed individual memorandum contra. On January 30, 2019, OCC filed an Immediate Interlocutory Appeal or Request for Certification and Application for Review.

II. THE COMMISSION SHOULD DENY THE OCC'S INTERLOCUTORY APPEAL

A. The OCC is Not Entitled to Take an Immediate Interlocutory Appeal from the Attorney Examiner's January 25 Request for Briefing.

The Ohio Consumers' Counsel states,

The PUCO Commissioners should immediately hear this appeal of the Attorney Examiners' Ruling. The Ruling was that the PUCO would entertain a written motion to exclude OCC's testimony based on state ethics law, thus allowing NRDC and OPAE to memorialize further scurrilous claims about OCC's witness, OSU Professor Dormady.⁹

⁷ Dr. Dormady's application is attached as Exhibit A.

⁸ <https://www.puco.ohio.gov/media-room/media-releases/puco-nominating-council-to-meet-january-31/>

⁹ Need Case, OCC's Immediate Interlocutory Appeal or Request for Certification and Application for Review Memorandum in Support ("Interlocutory Appeal) page 3, filed on January 30, 2019.

The OCC cites to Ohio Admin. Code 4901-1-15 (“Rule 15”) and states it allows for immediate interlocutory appeals under certain circumstances.¹⁰ Those circumstances are explicitly laid out in Rule 15(A) which states,

(A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from * * * any oral ruling issued during a public hearing or prehearing conference that does any of the following:

(1) Grants a motion to compel discovery or denies a motion for a protective order.

(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) Refuses to quash a subpoena.

(4) Requires the production of documents or testimony over an objection based on privilege. O.A.C. 4901-1-15(A)(1)-(4).

The Attorney Examiners’ oral Ruling on January 25, 2019, ordered an oral motion to be briefed it did not grant or deny a motion to compel, deny a motion to intervene or otherwise terminate a party’s right to participate in the proceeding, order parties to consolidate their cross examination of witnesses, refuse to quash a subpoena, or require the production of privileged documents. Therefore, the OCC is not entitled to an immediate interlocutory appeal. Joint Movants respectfully request the OCC’s Request for an Immediate Interlocutory Appeal be denied.

B. The OCC’s Request for Certification Should be Denied Because it is Procedurally Deficient and Mischaracterizes the Joint Movants’ Motion.

In the alternative, the OCC argues that the Attorney Examiners’ January 25 oral Ruling requesting the Joint Movants’ motion be briefed meets the criteria for certification of an interlocutory appeal to the full Commission.¹¹ Under the Commission’s rules, the Legal

¹⁰ Id.

¹¹ OCC’s Interlocutory Appeal, Memorandum in Support page 4.

Director, Deputy Legal Director, or Attorney Examiners may certify an interlocutory appeal to the Commission if they “find * * * that the appeal (1) presents a new or novel question of interpretation, law, or policy, or (2) is taken from a ruling which represents a departure from past precedent **and** an immediate determination * * * 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.” (Emphasis added.) Ohio Adm. Code 4901-1-15(B); see *In re Application of Ohio Edison Co., et al. for Authority to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Entry at ¶ 7 (Sept. 30, 2008) (explaining that the requirements for certification are independent).

The OCC has failed to prove any of these criteria are satisfied. First and foremost, as the OCC recognized, the ruling at issue is the oral Ruling to brief the motion to exclude.¹² The OCC has provided no evidence that the Ruling requesting additional briefing presents a new or novel question of law. Instead, OCC attempts to conflate the ruling to brief the motion with the subject matter of the pending motion itself, which has not been ruled upon.¹³ OCC contends that the Commission has no authority to entertain conflicts of interest under Ohio ethics laws and asking them to do so presents a new or novel question of law.¹⁴ This assertion is flawed for two reasons.

First, the original motion has not been ruled upon and therefore OCC has no standing to raise an interlocutory appeal of a decision that has yet to be made. OCC already asserted it is seeking an interlocutory appeal “of the Attorney Examiners’ Ruling. The Ruling was that the PUCO would entertain a written motion to exclude OCC’s testimony based on state ethics law *

¹² Id. at 3.

¹³ Id. at 6.

¹⁴ Id.

* * .”¹⁵ Therefore, under OCC’s own motion, it is appealing the oral Ruling to brief the oral motion not the motion itself (which has yet to be decided). The Ruling to brief the motion does not present new or novel issues of law OCC claims, it, in fact, does not present a question of law at all it requests briefing of an oral motion.

Secondly, OCC’s assertion that Joint Movants’ motion presents new or novel questions and is outside the scope of the Commission’s jurisdiction is a similar mischaracterization. Joint Movants never asked the Commission to enforce an ethics violation or otherwise punish Dr. Dormady. Joint Movants’ motion noted that Dr. Dormady’s participation in an active case while applying to be a Commissioner creates a conflict of interest under Ohio’s ethics laws, as well as carries with it the appearance of impropriety and therefore his direct testimony should be excluded or withdrawn.¹⁶ The ability and the duty of the Commission to protect the integrity of its hearings is neither new nor novel.

The Ohio Supreme Court has held that the PUCO “is a body vested with broad discretionary powers as to both the conduct and place of its hearings.” *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 444, 110 N.E.2d 59 (Ohio 1953). Even the United States Supreme Court has recognized administrative agencies broad discretion to conduct their own processes while simultaneously reminding those agencies that given their power they must safeguard the integrity of the process. *Ohio Bell Tel. Co. v. Pub. Util. Comm.*, 301 U.S. 292, 304, 57 S.Ct. 724 (1937). (“Regulatory Commissions have been invested with broad powers within the sphere of duty assigned to them by law. * * * Indeed, much that they do within the realm of administrative discretion is exempt from supervision if [constitutional] restraints have been

¹⁵ Id. at 3. (Emphasis added.)

¹⁶ Joint Movant’s Motion to Exclude, Memo in Support, at 4, 10, 11.

obeyed. All the more insistent is the need, when the power has been bestowed so freely, that the ‘inexorable safeguard’ (Citation omitted) of a fair and open hearing be maintained in its integrity.” Quoting *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 73); *Morgan v. U.S.*, 304 U.S. 1, 14-15, 58 S.Ct. 773 (1938). (“[I]n administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand ‘a fair and open hearing,’ essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.” Quoting *Ohio Bell* 304-305.)

The PUCO is a quasi-judicial body. *City of Cleveland v. Pub. Util. Comm.*, 127 Ohio St. 432, 443, 189 N.E. 5 (1934). Therefore, under *Ohio Bell* and *Morgan* it has a duty to maintain the integrity of its hearings and maintain the public’s confidence in its proceedings. This duty is neither new nor novel. Under *Elyria*, the PUCO has broad discretion in how it conducts its hearings and the manner in which it protects the integrity of those hearings. Any assertions or claims otherwise are incorrect.

C. The Attorney Examiners’ Oral Ruling Requesting the Oral Motion be Briefed Does Not Depart from Past Precedent nor Did It Unduly Prejudice the OCC.

The Attorney Examiners’ oral Ruling that Joint Movants’ motion be briefed is in accordance with the Commission’s practice. The Ruling is not a departure from past precedent nor did it result in any undue prejudice to the OCC. The Attorney Examiners asked only that the oral motion be briefed and did not rule on the merits of the Joint Motion. This is not prejudice, this is process. The OCC is no more prejudiced by the motion being briefed than it was when the motion was made orally. Ohio Admin. Code 4901-1-15(G) states, “the presiding hearing officer may direct that any motion made at a public hearing or transcribed prehearing conference be reduced to writing and filed and served in accordance with this rule.”

The Rule above expressly authorizes the hearing officers, in this case the Attorney Examiners, to direct parties to reduce oral motions to writing. As it is expressly allowed by the rules governing the Commissions' hearings, the Attorney Examiners' Ruling cannot be claimed to be either "new or novel" or "unduly prejudicial". Additionally, the Ruling ordering further briefing has already been complied with by all interested parties. Therefore, there can be no prejudice and OCC's Interlocutory Appeal is moot. The OCC has failed to establish that the Attorney Examiners oral Ruling departs from past precedent or is unduly prejudicial. The OCC's request for certification should be denied.

III. CONCLUSION

For the foregoing reasons, Joint Movants respectfully request that OCC's request an Immediate Interlocutory Appeal or Request for Certification and Application for Review be denied.

[Signatures on the following page]

Respectfully submitted,

/s/ Robert Dove

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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 31st day of January, 2019:

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Summary: Memorandum Contra the Ohio Consumers' Counsel's Immediate Interlocutory Appeal or Request for Certification and Application for Review electronically filed by Mr. Robert Dove on behalf of The Natural Resources Defense Council and Ohio Partners for Affordable Energy