

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application)
Of Columbus Southern Power Company and)
Ohio Power Company for Authority to)
Recover Costs Associated with the) Case No. 05-376-EL-UNC
Construction and Ultimate Operation of an)
Integrated Gasification Combined Cycle)
Electric Generating Facility.)

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JOINT INTERLOCUTORY APPEAL AND MOTION FOR CERTIFICATION TO
THE FULL COMMISSION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND THE OHIO ENERGY GROUP

Pursuant to Ohio Adm. Code 4901-1-15, the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Energy Group (collectively, "Intervenors") hereby jointly submit this Interlocutory Appeal to the Public Utilities Commission of Ohio ("PUCO" or "Commission") and respectfully move the legal director, deputy legal director, attorney examiner or presiding hearing officer to certify this appeal to the full Commission for review.¹ The Interlocutory Appeal should be certified to allow the Commission to review the Attorney Examiner's procedural schedule issued in this proceeding on April 19, 2005 ("AE Entry").²

As set forth in the attached Memorandum in Support, the AE Entry established a procedural schedule that is inadequate to permit intervening parties to properly prepare for and litigate this matter. The procedural schedule is inadequate to permit a full development of the record that the Commission needs to adjudicate this important

¹ Ohio Adm. Code 4901-1-15(B).

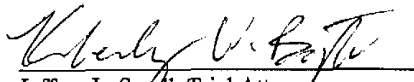
² As required by Ohio Adm. Code 4901-1-15(C), a copy of the AE Entry is attached.

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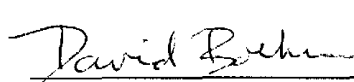
proceeding. The expedited and compressed procedural schedule limits due process and unduly prejudices the Intervenor in violation of Ohio law and the Commission's rules. This appeal presents new and novel issues of law and policy and should be certified to the Commission, and the appeal should be granted.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. BACKGROUND

On March 18, 2005, the Columbus Southern Power Company and the Ohio Power Company (collectively, “AEP” or the “Company”) filed an application (“Application”) in the above-captioned matter to recover costs associated with the construction of a new technology generating plant -- an integrated gasification combined-cycle (“IGCC”) facility.

The Application is vague regarding the authority under which it is filed. The Company states that it has an obligation “to provide a firm supply of generation service” “[p]ursuant to §§ 4928.35(D) and 4928.14, Ohio Rev. Code,”³ and that the Commission recently stated that it “is exploring regulatory mechanisms by which utilities, given their POLR responsibilities, might recover the costs of these new facilities.”⁴ A similar filing for authority to recovery costs associated with ownership of additional generating capacity by the Cincinnati Gas & Electric Company (“CG&E”) on December 2, 2004 states that it is “made pursuant to R.C. 4928.14 and R.C. 4909.18.”⁵

The Application also offers a vague commitment to “submit in this docket a more detailed discussion outlining the technology and economic benefits associated with an IGCC facility.”⁶ The filing by CG&E on December 2, 2004 similarly promised an “upcoming analysis of the cost-effectiveness of acquiring generating facilities within

³ Application at 1.

⁴ *Id.* at 2, citing *In re AEP Post-MDP Service*, Case No. 04-169-EL-UNC, Order at 38 (January 26, 2005).

⁵ *In re CG&E Request for Costs Associated with New Generation*, Case No. 04-1811-EL-AAM, *et al.*, Application at 2 (December 2, 2004).

⁶ Application at 3.

certain parameters....”⁷ Neither the Application nor CG&E’s submission has been supplemented. Nonetheless, only AEP’s case has been the subject of attorney examiner entries.

On April 12, 2005, a prehearing conference was conducted during which AEP proposed a greatly expedited procedural schedule for this proceeding that would have set a discovery deadline (without expedited discovery times and service procedures) for Intervenor on May 16, 2005 and an evidentiary hearing on July 7, 2005. AEP proposed to more fully explain its Application only in the form of testimony. Intervening parties assembled at the prehearing conference opposed the proposed schedule as inappropriate for the new and novel legal issues presented in this case as well as the magnitude of the project -- estimated by AEP at over one billion dollars before carrying costs.⁸ The procedural schedule proposed by AEP was modified by the Attorney Examiner in the AE Entry dated April 19, 2005. The AE Entry set a technical conference on May 16, 2005, the discovery deadline (without expedited discovery⁹) for Intervenor on July 25, 2005, and an evidentiary hearing on August 8, 2005. It is this AE Entry that is the subject of this appeal.

⁷ *In re CG&E Request for Costs Associated with New Generation*, Case No. 04-1811-EL-AAM, *et al.*, Application at 7 (December 2, 2004).

⁸ Application at 9.

⁹ Arrangements were made at the technical conference for compiling an e-mail list for parties, but the April 19, 2005 Entry makes no mention of the use to which such a list will be made. Discovery requests have been made of AEP, but it is the understanding of Intervenor that AEP will not consent to service by electronic message as is required for service by electronic message in the absence of an order by the commission, the legal director, the deputy legal director, or the attorney examiner. Ohio Adm. Code 4901-1-05(A) and 4901-1-05(C)(4).

II. CERTIFICATION OF INTERLOCUTORY APPEAL

The Commission should review the unreasonable schedule set out in this case. Pursuant to Ohio Adm. Code 4901-1-15(B), certification of this Interlocutory Appeal to the full Commission should be granted because this 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 “[a]n immediate determination by the commission is needed to prevent the likelihood of undue prejudice.” The Commission should grant an extension to the procedural schedule that will allow an adequate time to prepare testimony and prepare for hearing.

The AE Entry presents a new and novel, implicit interpretation of Ohio law and Commission policy regarding the procedural requirements applicable to including an electric generating facility in a public utility’s rate base (and in the rates consumers pay) in the wake of Ohio’s electric restructuring legislation. The Entry also represents a departure from past precedent in Ohio. The Commission previously stated that it is “exploring regulatory mechanisms” for supporting power plant construction and ownership,¹⁰ and the expedited schedule set in the AE Entry suggests that (at least) the procedural requirements for such a mechanism have been determined without being stated.

Before Ohio’s electric restructuring legislation became effective, the inclusion of a major generating facility in rate base (and in the rates consumers pay for electric service) required a pre-filing notice consistent with R.C. 4909.43, an application and supporting information consistent with Ohio Adm. Code Chapter 4901-7 and R.C.

¹⁰ *In re AEP Post-MDP Service*, Case No. 04-169-EL-UNC, Order at 38 (January 26, 2005).

4909.18, a Staff Report pursuant to R.C. 4909.19 and Ohio Adm. Code 4901-1-28(A), and objections/testimony filed with 30 days of the Staff Report according to R.C. 4909.19 and Ohio Adm. Code 4901-1-28(B) (objections) and Ohio Adm. Code 4901-1-29(A)(1)(b) (testimony).¹¹ The AE Entry does not follow such a deliberate and time-tested procedural schedule. The AE Entry fails to explain how enactment of electric restructuring legislation authorizes an expedited procedural schedule or supports a Commission policy that abandons a studied approach to the consideration of including in rates a facility that would cost more than one billion dollars.

The Commission has previously recognized the need for an adequate amount of time to conduct discovery.¹² Further, the issue of what constitutes a sufficient amount of time to conduct discovery and prepare for hearing under circumstances where AEP proposes to construct a generating plant using new technology whose stated justification is anticipated changes in markets and environmental laws¹³ presents another novel question of interpretation, law, and policy.¹⁴ Intervening parties objected at the prehearing conference to the procedural schedule based upon inadequate time to obtain expert advice under these unusual circumstances. The expedited scheduling in this case is also an unexpected and unexplained departure from the Commission's approach, thus far, to the similar application regarding a new power plant proposed by CG&E. The Commission's

¹¹ In making proposals in this pleading, the OCC does not waive or concede any arguments regarding the applicability of these or other requirements in Ohio law that may be applicable to this case.

¹² See, e.g., *WPS Energy Services, Inc. and Green Mountain Energy Company v. FirstEnergy Corp.*, Case No. 02-1944-EL-CSS, Entry at 5 (December 12, 2002).

¹³ Application at 3.

¹⁴ See, e.g., *WPS Energy Services, Inc. and Green Mountain Energy Company v. FirstEnergy Corp.*, Case No. 02-1944-EL-CSS, Entry at 5 (December 12, 2002).

“regulatory mechanism” for analyzing utility plans for major electric facilities should be reviewed, and the haste in conducting this case should be removed.

The Commission’s immediate attention is required to prevent undue prejudice. The existing schedule provides for a technical conference on May 16, 2005 that is scheduled so soon that Intervenor’s may not be able to assemble key personnel to participate in the conference. For example, the OCC, as a State agency, is required to obtain its outside expert witnesses by means of a request for proposal process that has been initiated. However, that process probably will not result in authorization for an outside expert to participate in the technical conference as the conference is currently scheduled.

Also, given the extraordinary time constraint of a hearing date in August, the Company should be required to receive discovery requests and respond electronically, and on an expedited basis, to take advantage of the time provided. Such discovery protocols were recently ordered in cases involving the post-MDP service by the FirstEnergy Companies, CG&E, and AEP as well as in other recent cases.¹⁵

Additionally, an immediate determination by the Commission is required to prevent undue prejudice to the Intervenor’s if the Commission ultimately reverses the procedural schedule as a violation of procedural protections provided by Ohio law.¹⁶ If unchanged, the procedural schedule will prejudice and inhibit the ability of the

¹⁵ The Commission has established a standardized procedure for expedited discovery in cases having an abbreviated procedural schedule. See, e.g., *In re AEP Post-MDP Service*, Case No. 04-169-EL-UNC, Entry at 2 (March 11, 2004); *In re Complaints Against DP&L*, Case No. 03-2405-EL-CSS, *et al.*, Entry at 3-4 (February 18, 2004).

¹⁶ At the prehearing conference, AEP sought an entry that would permit it to respond to pleadings by intervening parties in final briefs rather than according to the time periods provided in the Ohio Adm. Code. This Joint Appeal shows the prejudice that can result from such a blanket suspension of the timing requirements provided for under the Commission’s rules.

Intervenors to adequately prepare and present their case in violation of Ohio law and sound regulatory policy.¹⁷ The abbreviated procedural schedule will also preclude the Commission from having a complete record in this matter to make an informed decision under Ohio law in the best interests of Ohioans.

III. APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL

Intervenors appreciate the addition of a technical conference in the AE Entry that should provide additional information that was not provided for in AEP's proposed schedule. However, the technical conference only serves its intended goal if appropriate personnel for both interested parties and the Company attend. Due to the unusual technical nature of the instant case and the unexpected schedule towards hearing AEP's case, intervening parties may have difficulty in obtaining outside technical advice until after the date currently scheduled for the technical conference. As stated previously, OCC is not likely to be able to obtain outside technical advice until approximately one month after the currently scheduled May 16, 2005 technical conference. Accordingly, Intervenors propose a June 20, 2005 date for the technical conference. Consistent with Ohio Adm. Code 4901:1-35-05, AEP should be ordered to "have the necessary personnel in attendance at this conference so as to explain, among other things, the structure of the filing, the work papers, the data sources, and the manner in which methodologies were devised."¹⁸

¹⁷ AEP has not demonstrated, or even stated, that it will be harmed or unjustly prejudiced by an extension to the procedural schedule in this matter of any duration.

¹⁸ The "work papers" should include, in the case of AEP's proposed recovery mechanism, those normally furnished as part of a ratemaking case.

The Commission has stated a procedure for applications to establish terms of a standard service offer under R.C. 4928.14. The purpose of the Commission rules under Ohio Adm. Code Chapter 4901:1-35 is "to establish rules for the form and process under which an EDU shall file an application for standard service offer ... and the Commission's review of that application."²⁰ After an application is properly served²¹ and the technical conference takes place, Ohio Adm. Code Chapter 4901:1-35 provides for comments on the Application twenty days after the technical conference (thirty days for Staff) and fifty days for responsive comments.²² This process should help the Commission determine whether Ohio law contains a regulatory mechanism such as that described in the Application and as explained by AEP at the technical conference. Following this timeline, responsive comments would be due on August 9, 2005.

After comments are filed by interested persons, the landmark for the timeline under the Ohio Adm. Code is the hearing. The required evidentiary hearing could be conducted by October 2005 in the event that the Commission decides to proceed on AEP's Application. According to Ohio Adm. Code 4901:1-35-06(A), the Commission "shall publish notice of the hearing in accordance with Section 4909.18 of the Revised Code." Interested persons have thirty-days to intervene after issuance of the entry setting the hearing.²³

²⁰ Ohio Adm. Code 4901:1-35-2 ("Purpose and scope").

²¹ Ohio Adm. Code 4901:1-35-04. The Application has not been properly served under this rule.

²² Ohio Adm. Code 4901:1-35-05.

²³ Ohio Adm. Code 4901:1-35-06(B).

Compressing the procedural schedule has the effect of limiting the discovery process, in violation of Ohio Adm. Code 4901-1-16(A) and R.C. 4903.082. Ohio Adm. Code 4901-1-16(A) states that discovery rules are designed to “encourage the prompt and expeditious use of pre-hearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings.” The procedure announced by the Attorney Examiner denies Intervenor’s the full range of discovery rights required under Ohio law.²⁴ Intervenor’s and other parties will not be able to prepare adequately for participation in the hearings in this docket if they are precluded from participating in ample discovery as permitted by the law and the Commission’s rules.

Nonetheless, if the Commission sets an early date for a hearing, expedited treatment of discovery is all the more important. Ohio Adm. Code 4901-1-19(A) and Ohio Adm. Code 4901-1-20(C) allow the PUCO to shorten the time period for responses to interrogatories and the production of documents, respectively. Accordingly, Intervenor’s propose a ten-day response period and mandatory service of discovery requests and responses by electronic transmission. Expedited treatment of discovery and electronic transmission are critical elements for a fair process that is capable of exploring both the unusual regulatory and technical aspects of this case. The Commission will also need to be mindful of AEP’s cooperation in timely responding to discovery.

²⁴ R.C. 4903.082 states that “[a]ll parties and intervenors shall be granted ample rights of discovery” and that the Commission’s discovery rules should “aid full and reasonable discovery by all parties.” The Commission’s rules provide that “any party * * * may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding.” Ohio Adm. Code 4901-1-16(B).

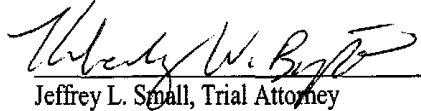
IV. CONCLUSION

For the reasons set forth above, this appeal should be certified to the full Commission and the Commission should reverse the Attorney Examiner's ruling regarding the procedural schedule in this case. An extension to the procedural schedule should be granted that would allow parties an adequate time to prepare testimony and an adequate time to prepare for hearing as required by Ohio law. Intervenors propose that the technical conference be rescheduled from May 16, 2005 to June 20, 2005 and that a hearing date be established after responsive comments are due on August 9, 2005. Such an evidentiary hearing could be conducted by October 2005. Also, the Commission's expedited discovery procedures, followed in cases having an abbreviated procedural schedule, should be ordered in this case.

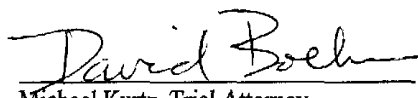
Although the Intervenors are cognizant of the Commission's desire to proceed to a hearing in a timely and orderly fashion, an expedited and compressed procedural schedule that has the effect of limiting participation is unreasonable. Given the magnitude of this proceeding for approximately 1.2 million customers in Ohio and the potential impact of the proposed billion-dollar power plant on customers' rates, the opportunity for development of a complete record is imperative for the Commission to fulfill its decision-making responsibilities under R.C. 4903.09 and other authority. A record that results from a rushed, expedited proceeding that denies due process and that may result in an unjust and unreasonable outcome will not suffice for advancing the interests of Ohioans on these issues.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Joint Interlocutory Appeal and Motion For Certification To Full Commission has been served upon the below-named counsel via U.S. Mail or hand-delivery (hand-delivery upon the Company), as well as electronic transmittal, this 25th day of April 2005.


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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
Southern Power Company and Ohio Power)
Company for Authority to Recover Costs) Case No. 05-376-EL-UNC
Associated with the Construction and)
Ultimate Operation of an Integrated Gasifi-)
cation Combined Cycle Electric Generating)
Facility.)

ENTRY

The attorney examiner finds:

- (1) On March 18, 2005, Columbus Southern Power Company and Ohio Power Company (AEP) filed an application for authority to recover costs associated with the construction and ultimate operation of an integrated gasification combined cycle electric generating facility.
- (2) On April 12, 2005, a prehearing was conducted to discuss the schedule for the proceeding.
- (3) The following schedule is established for this case:
 - (a) Applicant testimony to be filed by May 5, 2005.
 - (b) Technical conference on May 16, 2005, at 10:00 a.m., in Room 11F, at the offices of the commission, 180 E. Broad St., Columbus, Ohio, 43215.
 - (c) Motions to intervene to be filed by July 1, 2005.
 - (d) Intervener testimony to be filed by July 13, 2005.
 - (e) Discovery requests to be submitted by Interveners and Applicant by July 25, 2005.
 - (f) Staff testimony to be filed by July 25, 2005.
 - (g) Applicant supplemental testimony to be filed by August 1, 2005.
 - (h) Evidentiary hearing to begin on August 8, 2005.

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- (4) Motions for intervention were filed by Industrial Energy Users-Ohio, The Ohio Energy Group, First Energy Solutions Corp., and the Ohio Consumers' Counsel. Reasonable grounds for intervention have been stated and the motions should be granted.
- (5) Public hearings in this matter will be set by separate entry.

It is, therefore,


ORDERED, That the schedule for this proceeding is adopted as delineated in Finding 3. It is, further,

ORDERED, That the evidentiary hearing shall begin at 10:00 a.m. on August 8, 2005, at the offices of the Commission, Room 11C, 180 E. Broad St., Columbus, Ohio 43215. It is, further,

ORDERED, That the motions for intervention filed by Industrial Energy Users-Ohio, The Ohio Energy Group, First Energy Solutions Corp., and the Ohio Consumers' Counsel are granted. It is, further,

ORDERED, That a copy of this entry be served upon each party of record in this docket and Case No. 04-169-EL-UNC.

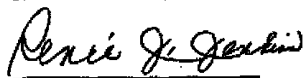
THE PUBLIC UTILITIES COMMISSION OF OHIO

By: 
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Renee J. Jenkins
Secretary