

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Authority to)
Establish a Standard Service Offer) Case No. 13-2385-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of Ohio)
Power Company for Approval of Certain) Case No. 13-2386-EL-AAM
Accounting Authority.)

**ENVIRONMENTAL LAW & POLICY CENTER MEMORANDUM CONTRA OHIO
POWER COMPANY’S MOTION FOR ORAL ARGUMENT**

I. INTRODUCTION

Pursuant to Ohio Administrative Code (“OAC”) 4901-1-12(C), the Environmental Law & Policy Center (“ELPC”) hereby files its memorandum contra the Motion for Oral Argument and Request for Expedited Ruling (“Motion”) filed by Ohio Power Company (“AEP”) on November 4, 2014. AEP’s Motion seeks oral argument before the Public Utilities Commission of Ohio (“PUCO” or “Commission”) on any and all legal and policy issues regarding its pending Application for approval of an Electric Security Plan. However, AEP has identified no need for oral argument at this stage of the proceedings, when the parties have already had ample opportunity to explore all of these issues through their presentation of evidence and post-hearing briefing, and the rehearing process will provide further avenues for input.

Because AEP seeks oral argument that will simply rehash the parties’ arguments, the Commission should deny AEP’s Motion. In the alternative, if the Commission does believe that oral argument is necessary to address any issue that was not already covered in the parties’ briefs, then any order granting AEP’s Motion must also impose procedural protections to make

sure that every party has a full and fair opportunity to provide its input on those issues. Those protections should include providing the parties at least thirty days to prepare for argument and allowing each party equal time to argue before the Commission.

II. DISCUSSION

A. AEP Has Not Demonstrated Any Need for Oral Argument in This Case.

AEP has failed to identify any specific issue on which the parties have not had a full opportunity to offer extensive factual evidence and legal argument, and therefore its motion presents no valid basis for the Commission to exercise its discretion to order oral argument. Although OAC 4901-1-32 does authorize the Commission to “hear oral arguments at any time during a proceeding,” that does not mean parties should use the rule simply to seek another bite at the apple where they have already had ample opportunity to make their case. Here, AEP has not provided any reason to believe that oral argument is necessary to serve any other purpose besides giving it the chance to once again present the same arguments contained in its witnesses’ testimony and its post-hearing briefs.

While AEP and the other parties to this case could undoubtedly utilize oral argument to rehash their arguments in person, the Commission indicated in a 2011 ruling on a motion similar to AEP’s that oral argument should not be granted for that purpose. The City of Reynoldsburg had filed a complaint against Columbus Southern Power (“CSP”) – an AEP subsidiary – regarding a dispute about the relocation of distribution facilities, and sought oral argument after an evidentiary hearing and the filing of post-hearing briefs “to clarify the nature of the statutory and constitutional arguments made by CSP.”¹ CSP argued that the city “had already had ample

¹ *In the Matter of the Complaint of the City of Reynoldsburg, Ohio v. Columbus Southern Power Company*, Pub. Util. Comm. No. 08-846-EL-CSS, 2011 Ohio PUC LEXIS 429, at 59-60 (Apr. 5, 2011).

opportunity to develop its case and its legal arguments in its briefing,” and the Commission agreed, holding that “Reynoldsburg has failed to set forth reasonable grounds as to any new issues that have arisen that would necessitate the holding of an oral argument.”² It is difficult to discern how AEP’s request for oral argument here differs from the motion it opposed in the *City of Reynoldsburg* case.

As in *Reynoldsburg*, the parties in this case have had ample opportunity to provide their view of the facts and the law to the Commission, over the course of thirteen days of hearings and approximately 1500 pages of post-hearing briefing. AEP itself filed a 148-page initial brief and a 133-page reply brief. That extensive record renders this case very different from the partial settlement in the *ESP II* case, which was unaccompanied by such extensive adversarial presentation of evidence briefing, that AEP cites as its only example of an instance where the Commission requested oral argument.³ Otherwise, AEP’s motion does not identify a single specific issue discussed in those hundreds of pages, or raised since, that was not addressed by the parties. Although AEP suggests that “one issue under review that potentially could benefit from oral argument is the Company’s request for approval of a purchased power agreement rider and the application of that rider to the Company’s OVEC entitlement,” the Motion does not describe any legal or policy arguments regarding that proposed rider that have not been presented to the Commission already in these sources.⁴

In support of its request, AEP references a letter filed in the docket on October 23, 2014, which presents statements by a number of companies opposing its proposed rider.⁵ But that letter offers no new substance requiring oral argument – it simply presents the commenters’ view

² *Id.* at 60, 62.

³ Motion at 2.

⁴ *Id.* at 3.

⁵ *Id.*

that the proposed rider is “unfair to shopping customers and harmful to competitive markets,”⁶ a thesis that was addressed by a number of the parties in their post-hearing briefs.⁷ Additionally, AEP’s suggestion that the opposition of PUCO Staff to the proposed rider renders this a “unique situation” where the Commission cannot reach a decision without further input from the parties is belied by the fact that it is not uncommon for the PUCO Staff to object to portions of a utility’s electric security plan.⁸ In any case, AEP certainly had the opportunity to provide its counterarguments to the Staff’s objections during the usual rebuttal testimony and post-hearing briefing in this case.

AEP’s request for oral argument is particularly troubling to the extent it may, inadvertently or not, open the door to introducing new issues or arguments to this case long after the conclusion of the evidentiary hearing and post-hearing briefing. Although AEP states that “the oral argument procedure should not be used as a venue for any party to introduce new evidence or make claims outside of the closed evidentiary record,” the very next sentence suggests that oral argument “should serve as an opportunity for the Commissioners to explore the legal basis of specific provisions requested in the case or the policy implications of decisions that they might make.”⁹ It is unclear whether AEP believes that oral argument to further “explore” legal arguments or policy implications would allow it to advance new arguments in support of its

⁶ Correspondence in Opposition Filed by Various Companies at 1 (Oct. 17, 2014).

⁷ See, e.g., PUCO Staff Br. at 2-6 (July 23, 2014); Constellation NewEnergy, Inc. Br. at 6-8 (July 23, 2014); Ohio Consumers’ Counsel Br. at 47-48 (July 23, 2014).

⁸ See, e.g., *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets; In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Pub. Util. Comm. Nos. 08-917-EL-SSO, 08-918-EL-SSO, 2009 Ohio PUC LEXIS 210, at 40, 64, 71, 82, 90-92, 96, 127 (Mar. 18, 2009) (referencing Staff opposition to various aspects of AEP’s proposed electric security plan).

⁹ Motion at 2-3.

Application beyond those in the hundreds of pages of testimony and briefing that AEP has filed in this case (including 281 pages of argument in its initial and reply briefs). Regardless, there is certainly no need to risk that outcome where all of the relevant issues have already been fully litigated by the parties.

In sum, AEP's Motion does not provide any valid reason for requiring the numerous parties to undertake the burden of showing up for oral argument simply to reiterate their well-established positions on the issues in the case. Accordingly, granting the Motion would signal that OAC 4901-1-32 is available to parties as a tool to maneuver for procedural advantage or make up for deficiencies in their briefing. That is not a precedent the Commission should readily set.

B. If the Commission Grants AEP's Motion, It Should Ensure that No Party Gains Any Undue Procedural Advantage Through Oral Argument.

Although AEP does not identify any specific issue that the parties have not already addressed in their briefs, it may be that the Commission has identified some question where oral argument would be helpful. In that case, ELPC requests that the Commission ensure that the parties may address that issue on equal footing. In particular, any order by the Commission granting AEP's motion should provide that oral argument be held no sooner than thirty days from the date of the order. Although AEP asks for oral argument "in the near future," it would be counterproductive to seek the parties' input without providing sufficient time to prepare that input. Given the extensive record in this case, thirty days is likely to be necessary, especially given the upcoming Thanksgiving holiday. Additionally, although ELPC does not object to AEP presenting opening and rebuttal argument, each intervening party should have equal time to address the Commission, just as each has had an equal, independent opportunity to present evidence and briefing. Otherwise, the intervening parties might be left without adequate time to

individually present their unique perspectives on the matters at issue to the Commission, potentially depriving the Commission of the clarity it seeks.

III. CONCLUSION

The Commission has sufficient evidence and argument before it to rule on AEP's Application, and thus oral argument is unnecessary. The Commission should therefore deny AEP's Motion.

Respectfully submitted,

/s/ Robert Kelter

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum Contra*, submitted on behalf of the Environmental Law & Policy Center, was served by electronic mail, upon the following Parties on November 12, 2014.

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Summary: Memorandum ENVIRONMENTAL LAW & POLICY CENTER MEMORANDUM
CONTRA OHIO POWER COMPANY'S MOTION FOR ORAL ARGUMENT electronically filed
by Mr. Robert Kelter on behalf of Environmental Law & Policy Center