

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 Pursuant to Section)	Case No. 16-1852-EL-SSO
4928.143, Revised 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. 16-1853-EL-AAM
Accounting Authority.)	

**OHIO POWER COMPANY’S
REPLY MEMORANDUM IN SUPPORT OF
ITS MOTION FOR RELIEF**

The Office of the Ohio Consumers’ Counsel (“OCC”) does not assert that it, or any other party to this proceeding, was prejudiced because Ohio Power Company (“AEP Ohio” or the “Company”) failed to publish notice of the local public hearings in this proceeding in newspapers of general circulation. Indeed, OCC and all of the other intervenors received actual notice of the hearings when the March 7, 2017 Entry was served by the Commission on all parties. OCC instead declares that AEP Ohio’s customers were “deprived * * * of information regarding AEP’s proposal and the opportunity to participate in the hearing process.” (OCC Memo Contra at 3.) OCC wrongly asserts that AEP Ohio’s Application is “unlawful” (*see, e.g., id.* at 2) and ignores AEP Ohio’s alternative request in its Motion for Relief (at 5) that the Commission conduct an additional public hearing concerning adoption of the Joint Stipulation and Recommendation (“Stipulation”). Through its Motion for Relief, the Company unilaterally disclosed its oversight regarding publication of notice and brought forth a suggestion for resolving the issue. OCC’s response does not present a productive or practical solution and merely reflects continuation of its ongoing campaign opposing adoption of the Stipulation. The Commission should resolve the issue by granting the Company’s alternative request to

expeditiously schedule an additional public hearing regarding the Stipulation, to be properly noticed approximately 15 days before the hearing occurs.

First, while the Supreme Court consistently holds that a party challenging Commission orders must demonstrate concrete harm,¹ OCC has not established that AEP Ohio customers were deprived of information about the Company's Application or prevented from participating in the hearing process. As explained in AEP Ohio's Motion for Relief from Commission Entry, the Company's customers received information about AEP Ohio's Application from multiple sources and had numerous opportunities to testify and comment on AEP Ohio's Application. The Commission held four local public hearings "for the purpose of providing an opportunity for interested members of the public to testify in this proceeding": one in Bucyrus, one in Marietta, and two in Columbus. (Entry at 2 (Mar. 7, 2017).) The Commission publicized these hearings through press releases and website postings, as did groups such as Citizen Action and the Sierra Club. (*See generally* AEP Ohio Motion for Relief.) The press also covered these hearings, with event notices and articles listing the upcoming hearing dates, times, and locations. (*See id.*) Dozens of AEP Ohio customers attended the public hearings, and almost 50 such customers provided testimony. (*See id.*) Thousands more customers submitted written comments. (*See id.*) And over two-dozen parties representing a variety of interests intervened in this action directly, with almost twenty witnesses submitting pre-filed testimony. (*See id.*) There has been no lack of public participation in this proceeding.

¹ *See, e.g., In re Complaint of Buckeye Energy Brokers, Inc. v. Palmer Energy Co.*, 139 Ohio St.3d 284, 2014-Ohio-1532, 11 N.E.3d 1126, ¶ 19; *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12; *Myers v. Pub. Util. Comm.*, 64 Ohio St.3d 299, 302, 595 N.E.2d 873 (1992).

Second, OCC is mistaken that it can rely on the failure to publish newspaper notices as a basis to assert that the Company's Application is unlawful. OCC attended the local public hearings, participated in the evidentiary hearing, and said nothing about the lack of public notices. By waiting until January 2018 to object to AEP Ohio's failure to publish the notices in newspapers of general circulation, OCC has waived its objections, even though the publication was statutorily required. *See Liberty Hwy. Co. v. Pub. Util. Com.*, 128 Ohio St. 586, 589-590, 193 N.E. 407 (1934) (holding that two companies waived their objections to a competitor's certificates of public convenience and necessity by waiting almost three years to challenge the certificates, where the companies were aware of the competitor's operation throughout the period, even though the Commission had violated a statutory requirement to provide the companies public notice of the hearing on their competitor's application). *See also Parma v. Pub. Util. Comm.*, 86 Ohio St.3d 144, 148, 1999-Ohio-141, 712 N.E.2d 724 (holding the City of Parma waived any objection to a hearing notice by waiting until the rehearing stage to raise its objections); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, ¶ 14-18 (holding that OCC forfeited its objections regarding a natural gas company's compliance with the public-notice requirements for ratemaking proceedings, by waiting until six months after the Commission approved the proposed public notice to challenge it).

Third, OCC's attempt to insert a new substantive issue into this proceeding – mentioned for the first time in response to AEP Ohio's Motion for Relief is also untimely and should be ignored. OCC's memorandum (at 4) raises what it calls a "significant consumer issue" regarding federal corporate tax reductions as a matter that should be noticed for discussion in any additional public hearing. In addition to being untimely (after the close of the evidentiary record

and the post-hearing briefs), this issue is beyond the scope of this proceeding and is the subject of the Commission's own investigation in Case No. 18-47-AU-COI. The issue in this case is whether the Commission should adopt the Stipulation and that is the only issue that should be contained in the publication of notice for any additional public hearing.

Regardless, the easiest solution to remediate this procedural glitch is to schedule another public hearing and publish proper notices for it. The Commission's rules track R.C. 4928.141(B)'s two basic requirements, stating: "After the filing of a standard service offer application * * *, the commission [1] shall set the matter for hearing and [2] shall cause notice of the hearing to be published one time in a newspaper of general circulation in each county in the electric utility's certified territory." Ohio Admin. Code 4901:1-35-06(A). The Commission's rules add that, when a "portion or session of [a] hearing [is] designated for the taking of public testimony[,]" the "presiding hearing officer shall permit members of the public that are not parties to the proceeding[] the opportunity to offer testimony * * * ." Ohio Admin. Code 4901-1-27(C). If OCC is concerned that AEP Ohio's oversight has deprived the public of the opportunity to participate in the hearing process (*see* OCC Memo Contra at 3, 4), the Commission can correct that mistake by doing exactly what the statute and rules requires: (1) order that an additional public hearing be held, (2) cause notice of the hearing to be published one time in a newspaper of general circulation in each county in AEP Ohio's certified territory, and (3) allow members of the public to offer testimony at that public hearing. Not only would this provide customers another opportunity to offer testimony about AEP Ohio's Application, with proper advance notice; it would also allow customers to offer testimony about the Stipulation, which was not finalized and filed until months after the original public hearings.

CONCLUSION

Accordingly, as AEP Ohio pointed out in its Motion for Relief (at 5), the Commission can still fully accomplish publication of notice by scheduling one additional public hearing on the Joint Stipulation and Recommendation, in Columbus or another location of the Commission's choosing, with notice published in each county in AEP Ohio's certified territory approximately 15 days in advance of the hearing. OCC has not opposed AEP Ohio's recommended resolution of the notice issue. The notice ordered by the Commission in connection with any additional public hearing should be limited to adoption of the Stipulation, which is the sole issue at this stage in the proceedings, and should not incorporate any new issues.

Respectfully submitted,

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In addition, I hereby certify that a service copy of the foregoing was sent by, or on behalf of, the undersigned counsel to the following parties of record this 16th day of January, 2018, via electronic transmission.

/s/ Steven T. Nourse

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Summary: Reply Memorandum In Support of Its Motion for Relief electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company