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 4928.143, Revised Code, in the Form of an Electric Security Plan.	)))))	Case No. 16-1852-EL-SSO
In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority.	)))	Case No. 16-1853-EL-AAM

OHIO POWER COMPANY'S MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S INTERLOCUTORY APPEAL AND REQUEST FOR CERTIFICATION

I. Introduction

On December 28, 2017, Ohio Power Company ("AEP Ohio" or the "Company") informed the Public Utilities Commission of Ohio ("Commission") that the Company had inadvertently failed to publish notice of the hearings on its electric security plan ("ESP") application in newspapers of general circulation in each county in its certified territory, as required by the Commission's March 7, 2017 Entry. To ensure that every AEP Ohio customer is aware of this proceeding and has an opportunity to provide testimony if the customer so desires, the Attorney Examiner scheduled another public hearing on February 12, 2018. The Attorney Examiner also directed AEP Ohio to "publish notice of the public hearing one time in a newspaper of general circulation in each county in its certified territory." Entry at ¶ 16 (Jan. 22, 2018) (the "January 22 Entry"). AEP Ohio published those notices last week, and filed proof of publication today. (*See* Proof of Publication (Feb. 5, 2018).)

No AEP Ohio customer has claimed that it was prejudiced by AEP Ohio's inadvertent failure to publish the original notices or would be prejudiced by the January 22 Entry. Still, the Office of the Ohio Consumers' Counsel (OCC) objects that the Attorney Examiner has failed to

protect the rights of AEP Ohio's residential customers to participate in this hearing. OCC dismisses as irrelevant (*see* OCC Mem. Supp. Interlocutory Appeal at 8) the Attorney Examiner's finding that "the public was made aware of the hearings through the Commission's news release and website, various parties to the proceedings, newspaper articles, and interested organizations." January 22 Entry at 5. OCC makes no mention of the Attorney Examiner's finding that the prior "local public hearings were well-attended[,] 46 persons offered testimony[,]" and thousands of people submitted comments in the case docket. *Id.*at 5. And OCC disregards that it intervened in this proceeding "on behalf of AEP Ohio's 1.2 million residential utility customers" (OCC Motion to Intervene at 1 (Oct. 5, 2016)) and has since actively opposed AEP Ohio's Application and the Joint Stipulation and Recommendation ("Stipulation"), purportedly on behalf of those customers. Instead of acknowledging any of those undisputed facts, OCC speculates that there may be customers who would like to provide testimony or evidence on topics that OCC and other customers did not cover, and that such evidence could have "made a difference" in the Commission's determination. (OCC Mem. Supp. Interlocutory Appeal at 9.)

OCC ignores that the Attorney Examiner has granted the primary relief OCC seeks. OCC repeatedly, and mistakenly, insists that the Attorney Examiner "did not order AEP to publish public notices in each county in its certified territory." (*Id.* at 6; *see also id.* at 5-6, 7, and 8.) Yet the Attorney Examiner did exactly that. *See* January 22 Entry at ¶ 16. And the Company already submitted its proofs of publication that demonstrate publication has been achieved in each county in its certified territory. (*See* Proof of Publication (Feb. 5, 2018).) OCC also mistakenly asserts that the Attorney Examiner failed to "order a new evidentiary hearing to be noticed or held." (OCC Mem. Supp. Interlocutory Appeal at 6.) Yet the express purpose of

the public hearing is to "provid[e] an opportunity for interested members of the public to testify * * *." (Emphasis added.) January 22 Entry at ¶ 16. To the extent OCC seeks further relief, such as additional public hearings in *each* of the 61 counties in AEP Ohio's certified territory (*see* OCC Mem. Sup. Interlocutory Appeal at 4), it fails to demonstrate any legal entitlement to such relief.

As set forth in greater detail below, the Commission should decline to certify OCC's request to certify this issue for interlocutory appeal and affirm the Attorney Examiner's January 22 Entry.

II. The Commission Should Deny OCC's Motion for Interlocutory Appeal.

A. OCC is not entitled to take an immediate interlocutory appeal from the Attorney Examiner's January 22 Entry.

The Commission's rules permit a "party who is adversely affected [ ]by" an Attorney Examiner's ruling on a procedural motion to "take an immediate interlocutory appeal" from that ruling under certain circumstances, including when the ruling "terminates a party's right to participate in a proceeding * * *." Ohio Adm. Code 4901-1-15(A)(2). OCC argues that its motion qualifies for an immediate interlocutory appeal because either: (1) this interlocutory appeal "terminates OCC's rights to participate in the proceeding" (OCC Interlocutory Appeal at 2) or (2) "[t]he January 22 Entry has terminated customers' rights in this proceeding" (OCC Mem. Supp. Interlocutory Appeal at 3).

Neither of OCC's arguments states grounds for an immediate interlocutory appeal. OCC's first argument is unclear, and OCC does not elaborate on it. What *is* clear is that the January 22 Entry did not terminate OCC's rights to participate in this proceeding. To the extent this proceeding continues on rehearing, OCC can and undoubtedly will continue to participate in it. Nor did the January 22 Entry terminate "the ability of the public to participate in this

proceeding[,]" as OCC asserts. (OCC Mem. Supp. Interlocutory Appeal at 4.) To the contrary, the January 22 Entry *extended* the public's ability to participate in this proceeding, by setting another public hearing at which any customer who wishes to share their opinions regarding the Stipulation will have the opportunity to offer testimony on the record. Moreover, OCC's participation in this proceeding has been wholly unaffected by the notice of publication issue; OCC in its statutory representative role intervened and had actual notice of all aspects of the proceeding, including the public hearings as reflected in the March 7, 2017 Entry that was served on OCC. Because the January 22 Entry did not terminate either OCC's or the public's right to participate in this proceeding, neither OCC nor the public are adversely affected by the Entry, and OCC is not entitled to an immediate interlocutory appeal of the January 22 Entry.

B. The Commission should not certify an interlocutory appeal of the Attorney Examiner's January 22 Entry.

In the alternative, OCC argues that its opposition to the January 22 Entry meets the criteria for certification of an interlocutory appeal to the full Commission. Under the Commission's rules, the Legal 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 is taken from a ruling which represents a departure from past precedent[,] *and* [2] 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;

"*both* requirements need to be met"). Contrary to OCC's assertions, this appeal meets none of the foregoing criteria.

The January 22 Entry does not depart from past precedent. OCC has not identified any prior instance in which the Commission has held that it cannot remedy an EDU's failure to publish notice of a hearing in an ESP proceeding by holding another public hearing and publishing another notice. (*See* OCC Mem. Supp. Interlocutory Appeal at 5-6.) OCC also has not shown the January 22 Entry presents a new or novel question of interpretation, law, or policy. OCC's argument on this point is based on its misimpression that the January 22 Entry "did not order AEP to publish public notices in each county in its certified territory" and did not "order a new evidentiary hearing to be noticed or held." (*Id.* at 6.) Neither of those points is correct, as discussed above. And lastly, OCC has not demonstrated that any party (or the public) would be unduly prejudiced if the Commission declined to certify this interlocutory appeal. OCC argues that customers could be injured if the Commission approves the Stipulation and the Company then begins charging new rates. (*See* OCC Mem. Supp. Interlocutory Appeal at 7.) But OCC's (incorrect) position regarding the substantive merits of this case is not relevant to prejudice analysis the Attorney Examiner must make under Rule 4901-1-15(B).

As the Commission has explained, the final criterion for certification of an interlocutory appeal asks whether the Commission must address the question at issue now or can wait until it rules on the merits:

> Because an immediate ruling is essential only where the potential for undue prejudice and expense exists, the rule should require that a party establish the need for an immediate Commission determination before any interlocutory appeal will be entertained.

In re Amendment of Chapter 4901-1 of the Ohio Administrative Code and the Rescission of Certain Provisions of Chapter 1551:1-7 of the Ohio Administrative Code, Case No. 87-84-AU-

ORD, 1987 Ohio PUC LEXIS 49, ¶ 13 (Oct, 14, 1987); *see also In re Application of Vectren Energy Delivery of Ohio, Inc., for Approval of a Tariff*, Case No. 05-1444-GA-UNC, Entry at 7 (Feb. 12, 2007) (declining to certify an interlocutory appeal where the attorney examiner [found] that an immediate determination of the Commission regarding an Entry was *not* needed to prevent the likelihood of undue prejudice or expense to OCC). In the normal course, the Commission would address OCC's objections to the January 22 Entry in its opinion and order regarding the overall case. OCC does not explain how it, or AEP Ohio's customers, would be unduly prejudiced if the Commission were to move forward with the February 12, 2018 hearing, even if the Commission's opinion and order ultimately holds that the January 22 Entry was improper.

For all of these reasons, OCC has not met the criteria in Ohio Adm. Code 4901-1-15(B), and the Commission should not certify OCC's interlocutory appeal.

III. The Commission Should Deny OCC's Request to Reverse or Modify the Attorney Examiner's January 22 Entry.

If the Commission does decide to certify OCC's interlocutory appeal (which it should not), it should deny OCC's request to reverse or modify the January 22 Entry. Putting aside OCC's misunderstanding regarding the geographical breadth of the newspaper notices required, and published, for the February 12, 2018 hearing (discussed above), OCC's main critique is that the January 22 Entry does not "order a new evidentiary hearing to be noticed [and] held." (OCC Mem. Supp. Interlocutory Appeal at 6.) OCC contends that statute requires the Commission to publish notice of both the "local public hearings and the evidentiary hearing." (*Id.* at 8.) Moreover, OCC contends that "the interested public" must have the opportunity, not only to offer testimony at a public hearing, but also "the right to challenge evidence" at the evidentiary hearing. (*Id.* at 8.) Because OCC believes the January 22 Entry does not "order[ ] a new

evidentiary hearing in which the public [can] participate" (*id.* at 4), and "require proper notice for the evidentiary hearing as well" (*id.* at 8), OCC contends the Entry is unlawful. OCC's position misconstrues the relevant statute and regulations and is inconsistent with the Commission's traditional practice in ESP cases.

The statute, R.C. 4928.141(B), directs the Commission to "set the time for hearing of a [standard service offer] filing * * *, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory." The statute does not mandate what the newspaper notice must say or when it must be published. Instead, it directs the Commission to "adopt rules regarding filings under [the SSO statutes]." *Id.* The Commission's rule for SSO hearings, Ohio Adm. Code 4901:1-35-06, also states that "notice of the hearing" must be published in the newspaper. But it, too, does not specify what the notice must say or when it must be published, though it adds that "[i]nterested parties wishing to *participate* in the hearing shall file a motion to intervene * * *." (Emphasis added.) The Commission's general rule for hearings, at Ohio Adm. Code 4901-1-27(C), further states that "[t]he presiding hearing officer shall permit members of the public that are *not* parties to the proceeding, the opportunity to offer testimony at the portion or session of the hearing designated for the taking of public testimony." (Emphasis added.) Combined, these laws and rules contemplate that an evidentiary hearing on an ESP will have two sessions: (1) the "evidentiary hearing," at which the "parties" may present evidence and cross-examine witnesses; and (2) the "local public hearings," at which the public may offer testimony. *See, e.g.*, Entry at ¶ 4 (Mar. 7, 2017).

These are not truly separate hearings, despite how they are commonly described. As Ohio Adm. Code 4901-1-27(C) says, the public hearing is merely a separate "session" of the

evidentiary hearing specifically designated for public testimony. (*See also, e.g.*, Apr. 10, 2017 Tr. at 6 ("The four local public hearings scheduled in this case are * * * one aspect of this case process.").) It is still an evidentiary hearing. At the public hearings, testimony is given under oath, before a court reporter, and subject to cross-examination by the parties. (*See id.* at 6-7.) That testimony is then "part of the record and considered when [the Commission] make[s] a decision." (*Id.* at 3; *see also id.* at 4 ("again, this becomes part of the record"); *see also id.* at 7.) Thus, the public hearings are just as much "evidentiary" hearings as the "evidentiary hearing." The difference is that the public hearings are limited to the taking of public testimony. Full participation in the evidentiary hearing is limited to those interested parties that intervene.

R.C. 4928.141(B) and Ohio Adm. Code 4901:1-35-06 do not specifically require the Commission to publish notice of the "evidentiary hearing" session, as opposed to the "public hearing" sessions. OCC acknowledges that "[t]he PUCO has ordered publication of notice for [ESP] hearings on two occasions [that] did *not* mention the evidentiary hearing"– Dayton Power & Light's 2008 and 2012 ESP cases. ((Emphasis added.) *See* OCC Mem. Supp. Interlocutory Appeal at 6 n.17.) Nor is there anything in the statute or regulations that requires the Commission to publish the required notices before the deadline for intervention in an ESP proceeding. In this case, the Commission issued the original Entry directing AEP Ohio to publish newspaper notices on March *7*, 2017 – six days after the deadline for filing motions to intervene. (*See* Entry ¶ 5 (Feb. 7, 2017).) OCC did not object to the March 7, 2017 Entry. Only now, months after the evidentiary hearing concluded, does OCC contend that the Commission was and is required to publish advance, newspaper notices of the "evidentiary hearing" so that members of the public can "challenge evidence" (*i.e.*, cross-examine witnesses) at that specific hearing. (*See* OCC Mem. Supp. Interlocutory Appeal at 8.)

As the Supreme Court of Ohio has recognized, R.C. 4901.13 gives the Commission "'broad discretion in the conduct of its hearings.'" *Weiss v. PUC*, 90 Ohio St.3d 15, 19, 2000-Ohio-5, 734 N.E.2d 775, quoting *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264 (1978). "'[T]he commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.'" *Id.*, quoting *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212 (1982). Here, and in other ESP proceedings, the Commission and its attorney examiners have exercised that discretion to create separate and streamlined public hearings that allow members of the public to provide evidence and testimony, consistent with the Commission's published rules.

OCC's position improperly conflates the distinct purposes of the public hearing session and the evidentiary hearing session, in a transparent attempt to advance its primary objective of challenging the Stipulation. But OCC intervened, received actual notice of the public and evidentiary hearing sessions, attended both sessions, presented testimony during the evidentiary hearing and otherwise fully participated in all aspects of the proceeding. Thus, OCC suffered no prejudice regarding publication of notice, and it has no factual basis to assert that a theoretical member of the public may have wanted to attend a prior hearing session in this proceeding. In any case, to the extent such theoretical customers exist, they will have an opportunity to participate in the upcoming hearing on February 12, 2018.

The Attorney Examiner's decision to schedule a fifth public hearing that will provide yet another opportunity for public input in this case, and its directive to ensure the public received

proper notice of that hearing, was eminently reasonable and lawful, and the Commission should affirm it.

IV. CONCLUSION

After more than a year of filings, hundreds of pages of pre-filed testimony, four well-attended public hearings, four days of evidentiary hearing, and hundreds of pages of briefing on the Stipulation and OCC's objections to it, AEP Ohio realized and reported that it had inadvertently failed to publish notices of the hearings in newspapers throughout its certified territory. According to OCC, the only cure for that oversight is to restart this ESP proceeding: reset the deadline for intervention, schedule new public hearings in every county in the Company's certified territory, schedule another full evidentiary hearing, and publish new notices of both hearings. The statute and the Commission's rules do not require such a drastic response. Nor would such response provide any more process of notice than the public is already receiving; rather, it would be superfluous and administratively wasteful. The Attorney Examiner lawfully and reasonably concluded that the best way to "ensure the public is notified of these proceedings and offered an opportunity to provide testimony" is to schedule another public hearing and make sure the proper notices are published. January 22 Entry at ¶ 15. AEP Ohio respectfully requests that the Commission deny OCC's interlocutory appeal and affirm the Attorney Examiner's January 22 Entry.

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 5th day of February, 2018, via electronic transmission.

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Summary: Memorandum - Ohio Power Company's Memorandum Contra the Office of the Ohio Consumers' Counsel's Interlocutory Appeal and Request for Certification electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company