BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters.	)))	Case No. 18-501-EL-FOR
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.	)))))	Case No. 18-1392-EL-RDR
In the Matter of the Application of Ohio Power Company to Amend its Tariffs.	))	Case No. 18-1393-EL-ATA

OHIO POWER COMPANY'S MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE OHIO MANUFACTURERS' ASSOCIATION, AND KROGER CO.'S INTERLOCUTORY APPEAL AND REQUEST FOR CERTIFICATION TO FULL COMMISSION AND APPLICATION FOR REVIEW

I. Introduction

In these three consolidated proceedings, Ohio Power Company ("AEP Ohio" or the "Company") is fulfilling its commitment to develop renewable-energy projects in Ohio, subject to Commission approval pursuant to R.C. 4928.143(B)(2)(c) and cost recovery through the Renewable Generation Rider, consistent with the Commission's orders in Case Nos. 14-1693-EL-RDR, *et al.* and 16-1852-EL-SSO, *et al.* In the *Long-Term Forecast* case,[1] the Company submitted an amendment to its 2018 Long-Term Forecast Report to demonstrate the need for at least 900 megawatts of renewable energy projects in Ohio, including at least 400 MW nameplate

[1] Case No. 18-0501-EL-FOR.

capacity for solar energy projects. In the subsequently filed *REPA*[2] and *Green Tariff*[3] cases (collectively, "*Tariff Cases*"), the Company asks the Commission to approve the inclusion of two solar energy resources totaling approximately 400 MW of nameplate capacity in the Company's Renewable Generation Rider, as well as the creation of a new Green Power Tariff through which customers may purchase renewable energy credits.

The interlocutory appeal and request for certification filed by the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Manufacturers' Association ("OMA") and Kroger Co. ("Kroger") disputes the procedural schedule that the Attorney Examiner established in her Entry of October 22, 2018. In that Entry, the Attorney Examiner found that it is appropriate to proceed initially with a review of AEP Ohio's LTFR amendment (in phase one of the consolidated proceedings) and then, separately, to address the Company's application in the *Tariff Cases*. The schedule established in that Entry pertains only to the first phase – to the "need" issues presented in AEP Ohio's LTFR amendment. Consistent with R.C. 4935.04(D)(3), which requires the Commission to fix a time for hearing not later than 90 days after the report is filed, the schedule requires intervenors' testimony to be filed by November 21, 2018, and a hearing to commence on December 4, 2018. The Attorney Examiner has not yet established a procedural schedule for consideration of AEP Ohio's application in the *Tariff Cases*.

As set forth in greater detail below, the Commission should decline to certify movants' request to certify the October 22 Entry for interlocutory appeal. And if the Commission does decide to certify the interlocutory appeal, it should deny the movants' request to reverse or modify the Entry.

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[2] Case No. 18-1392-EL-RDR.

[3] Case No. 18-1393-EL-ATA.

II. The Commission Should Deny the Movants' Motion for Interlocutory Appeal.

A. The movants are not entitled to take an immediate interlocutory appeal from the Attorney Examiner's October 22 Entry.

The movants first assert that they are entitled to an immediate Commission review of the scheduling order, "without the need for certification of the appeal by the Legal Director, Deputy Legal Director, or Attorney Examiner." (Interlocutory Appeal at 4.) The movants cite Ohio Adm. Code 4901-1-15(A)(2), which authorizes 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 * * *."

Of course, the scheduling order did not terminate OCC's, OMA's, or Kroger's rights to participate in this proceeding. The Commission has yet to rule on their motions to intervene, much less deny that intervention entirely. And the movants appear to concede that, if the Commission does not grant them an interlocutory appeal, they will "comply with [the] schedule and * * * go forward with their case presentation * * *." (Mem. Supp. Interlocutory Appeal at 9.) Consequently, the movants argue instead that requiring them "to be ready for the [first phase] hearing in a scant month and a half" "*effective[ly]* terminat[es]" their rights "to participate *fully* in the proceeding with *due process*." (Emphasis added.) (*Id.* at 4, 10.)

But the Commission's rules do not grant an immediate interlocutory appeal from an attorney examiner's order simply because the order does not allow a party to participate in a proceeding in the manner, or to the full extent, it would prefer. Indeed, the Commission has repeatedly rejected OCC's efforts to stretch Ohio Adm. Code 4901-1-15(A)(2) to cover situations not contemplated by the rule's express language. *See, e.g., In re Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2013 SmartGrid Costs*, Case No. 14-

1051-GE-RDR, Entry, ¶ 14 (Feb. 5, 2015) (rejecting OCC's argument that striking approximately 10 pages of prefiled testimony from an OCC witness triggered the right to an immediate interlocutory appeal, because it prevented OCC from participating "fully"). As then-Attorney Examiner Lesser held in a 2007 opinion, the issuance of a scheduling order that purportedly fails to "accommodate a [sufficient] degree of preparation for the evidentiary hearing * * * cannot be reasonably interpreted to terminate [a party's] right to participate in [a] proceeding[,]" if the order leaves that party with "the same rights as any other party to participate in discovery, to present testimony and to cross-examine witnesses called by other parties." *In re Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Section 4929.11, Revised Code, of a Tariff to Recover Conservation Expenses and Decoupling Revenues*, Case No. 05-1444-GA-UNC, Entry, at ¶¶ 10-11 (Feb. 12, 2007). And the movants cite no precedent to the contrary.

In short, because the October 22 Entry does not actually terminate OCC's, OMA's, or Kroger's right to participate in these consolidated proceedings, the movants are not entitled to an interlocutory appeal under Ohio Adm. Code 4901-1-15(A)(2).

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

In the alternative, the movants argue that their opposition to the October 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] [a]** presents a new or novel question of interpretation, law, or policy, or **[b]** 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). Contrary to the movants' assertions, this appeal meets none of the foregoing criteria.

1. The October 22 Entry does not present a new or novel question of interpretation, law, or policy.

The movants' general argument against the October 22 Entry is that it does not provide "sufficient time to facilitate meaningful participation by all parties." (Interlocutory Appeal at 5.) AEP Ohio disagrees with the premise that eleven weeks – the period of time between the filing of the Amendment to the 2018 Long-Term Forecast Report (September 19) and the hearing date (December 4) – is insufficient time for parties with OCC's, OMA's, and Kroger's experience and resources to meaningfully participate in the first phase of this proceeding.

Regardless, scheduling orders like the October 22 Entry generally "do[ ] not present a new or novel question of law or policy." *In re Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, Entry, ¶ 24 (Feb. 8, 2018). As the Commission recognized nine months ago, in rejecting another OCC request to certify an interlocutory appeal, "[t]he Commission and its attorney examiners have extensive experience with respect to scheduling hearings * * * in SSO proceedings and other cases affecting rates." *Id.*, citing *In re Dayton Power and Light Co.*, Case Nos. 12-426-EL-SSO *et al.*, Entry at 5 (Jan. 14, 2013); *In re Duke Energy Ohio, Inc.*, Case Nos. 08-920-EL-SSO, *et al.*, Entry at 7 (Oct. 1, 2008); *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry at 3 (Sept. 30, 2008); and *In re Columbus Southern Power Co. and Ohio*

Power Co., Case No. 05-376-EL-UNC, Entry at 2 (May 10, 2005). *See also In re Application of Vectren Energy Delivery of Ohio, Inc. for Approval, pursuant to Section 4929.11, Revised Code, of a Tariff to Recover Conservation Expenses and Decoupling Revenues*, Case No. 05-1444-GA-UNC, Entry, at ¶ 12 (Feb. 12, 2007) ("[T]he issuance of a procedural schedule does not involve a new or novel question or law or policy"). The movants offer no citations to the contrary.

The movants also argue that the October 22 Entry represents a departure from the procedural schedule in AEP Ohio's 2010 long-term forecast case (the "Turning Point" project), which "raises the new or novel question of interpretation, law, or policy of whether the Entry safeguards the predictability that is essential in all areas of the law, including administrative law." (Mem. Supp. Interlocutory Appeal at 9.) But whether a procedural entry "represents a departure from past precedent" is a separate and distinct ground for seeking an interlocutory appeal, which the Company discusses below. Ohio Adm. Code 4901-15(B).

Lastly, the movants argue that the October 22 Entry "presents a new interpretation of Ohio law, because it appears to accept the notion that R.C. 4928.143(B)(2)(c) can be satisfied by showing a generalized need for renewable generation facilities (under a forecast case), as opposed to a specific need for a specific facility." (Mem. Supp. Interlocutory Appeal at 5.) But the scheduling order does not say that. The October 22 Entry says that the first phase of the consolidated proceedings will consider "the need for [the] proposed generating facilit[ies] * * * generally[,]" per the requirements of Ohio Adm. Code 4901:5-5-05 and 4901:5-5-06(B), and the second phase will consider "whether all of the criteria set forth in R.C. 4928.143(B)(2)(c), *including need for the facility*, have been satisfied * * *." October 22 Entry at 11-12. In short, the October 22 Entry did not adopt the "new interpretation of Ohio law" that the movants attempt to rely on as a basis for interlocutory appeal. (Mem. Supp. Interlocutory Appeal at 5.)

For all of these reasons, the movants have not demonstrated that the October 22 Entry presents a new or novel question of interpretation, law, or policy justifying a discretionary interlocutory appeal.

2. The October 22 Entry does not depart from past precedent.

The October 22 Entry also does not depart from past precedent. Here, the movants appear to make two arguments: first, that the Commission held in the *ESP IV* case (Case Nos. 16-1852-EL-SSO, *et al*.) that AEP Ohio must demonstrate need for the solar facilities "in a rider case, not a forecast case"; and second, that the Commission adopted a "call and continue process" in the Turning Point case (Case Nos. 10-501-EL-FOR, *et al*.) for considering long-term forecast cases seeking "approval of charges to customers for solar energy * * *." (Mem. Supp. Interlocutory Appeal at 6-7.) Neither of these arguments demonstrates an actual conflict between the October 22 Entry and Commission precedent.

First, the October 22 Entry is consistent with the Commission's holdings in the *ESP IV* case. In that case, the Commission recognized the requirement in "R.C. 4928.143(B)(2)(c) * * * that 'no surcharge shall be authorized unless the [C]ommission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.'" *ESP IV*, Opinion and Order at 104, ¶ 227. The Commission went on to say that "AEP Ohio will be required to demonstrate need for each proposed facility and to satisfy all of the other criteria in R.C. 4928.143(B)(2)(c)" in "each EL-RDR proceeding proposing a specific project * * *." *Id.* at 104-105, ¶ 227. That is exactly the process described in the scheduling order: a demonstration of general need in the first phase, based on resource planning projections, followed by a demonstration of specific need in the second phase. *See* October 22 Entry at ¶ 32. The movants' argument that the scheduling order departs from precedent by requiring AEP Ohio to demonstrate "the need for these discrete [solar] projects, within the

context of an abbreviated case" (*i.e.*, phase one of the consolidated proceedings) (Mem. Supp. Interlocutory Appeal at 5) is based on a fundamental misreading of the October 22 Entry.

Second, the adoption of an agreed-upon, extended procedural schedule in the Turning Point case is not binding precedent here. In the Turning Point case, Staff moved the Commission to hold a hearing and schedule it within 90 days, "but to call and continue that hearing to allow sufficient time for investigation and settlement discussions." *In re Long Term Forecast Report of the Ohio Power Co. and Related Matters*, Case Nos. 10-501-EL-FOR, *et al*., Motion for a Hearing (Jan. 12, 2011). AEP Ohio chose not to oppose that motion, thereby waiving any argument in that case that a "call-and-continue" process violated the requirements of R.C. 4935.04(D)(3). Accordingly, the Commission granted Staff's motion without ruling upon or discussing the lawfulness of the "call-and-continue" process. *See generally In re Long Term Forecast Report of the Ohio Power Co. and Related Matters*, Case Nos. 10-501-EL-FOR, *et al*., Entry (Jan. 26, 2011). Because the Commission's scheduling order and other holdings in the Turning Point case did not consider, address, or turn on the meaning of the 90-day hearing requirement in R.C. 4935.04(D)(3), the Turning Point case does not establish any precedent from which the October 22 Entry could depart.

In sum, the October 22 Entry is fully consistent with the Commission's opinions, orders, and entries in the *ESP IV* proceeding. And the adoption of a different procedure in the Turning Point case, in the absence of any objection from AEP Ohio, does not establish adverse precedent for this case. Thus, the movants have not demonstrated a departure from past precedent justifying a discretionary interlocutory appeal here.

3. A review of the scheduling order in the normal course will not unduly prejudice the movants.

Lastly, the movants have not demonstrated that any party (or the public) would be unduly prejudiced if the Commission declined to certify this interlocutory appeal. Initially, in their motion, the movants suggest that the October 22 Entry prejudices them because it will be "very difficult" to develop cross-examination outlines and expert witness testimony under the current schedule. (*See* Interlocutory Appeal at 2-3.) But they do not say that it will be impossible, given their individual and combined resources. Moreover, OCC is a well-funded state agency with sufficient resources (internal counsel and subject matter experts) to litigate this case. And in their supporting Memorandum, the movants relinquish that argument entirely, asserting instead that the October 22 Entry prejudices them because it requires them "to litigate the wrong issue" (*i.e.*, "the generic need for 900 MW of renewable generation") "in the wrong forum" (*i.e.*, "the LTFR Case rather than the Rider Case"). (Mem. Supp. Interlocutory Appeal at 9.) In other words, the movants assert that requiring them to present evidence and cross-examination on an issue they believe is irrelevant, in the first phase (and not the second phase) of consolidated hearings, qualifies as "prejudice" entitling them to an interlocutory review of the October 22 Entry.

But "prejudice" is not the standard for a discretionary interlocutory appeal under the Commission's rules – "undue prejudice" is the standard. And the movants offer no support for a conclusion that the scenario they describe – being required to litigate issues that the Commission may ultimately determine to be irrelevant, at an earlier point in consolidated proceedings than the movants would prefer – qualifies as "undue prejudice." For all of these reasons, the movants have not met the criteria in Ohio Adm. Code 4901-1-15(B), and the Commission should not certify an interlocutory appeal.

III. The Commission Should Deny the Movants' Request to Modify the Attorney Examiner's October 22 Entry.

If the Commission does decide to certify the interlocutory appeal (which it should not), it should deny the movants' request to reverse or modify the October 22 Entry. 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. Pub. Util. Comm.*, 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). The October 22 Entry, which consolidates the related *Long-Term Forecast* and *Tariff* cases and divides the hearing into two discreet phases, reflects a judicious application of that discretion.

The scheduling order is fully consistent with the governing statutes and regulations. Under R.C. 4928.143(B)(2)(c), the Commission cannot authorize a charge for electric generating facilities without first determining a need for the facilities "based on resource planning projections submitted by the electric distribution facility." The Commission's rules clarify that "[t]he need for the proposed facility must have already been reviewed and determined by the commission through an integrated resource planning process filed pursuant to Rule 4901:5-5-05 of the Administrative Code." Ohio Adm. Code 4901:1-35-03(C)(9)(b)(i). AEP Ohio filed the amendment to its 2018 long-term forecast report to demonstrate the need for at least 900 MW of renewable energy projects in Ohio on September 19, 2018. And, as the Attorney Examiner

correctly recognized, R.C. 4935.04(D)(3) requires the Commission to hold a hearing on that long-term forecast report "no later than 90 days after the report is filed." October 22 Entry at 12.

The movants may complain about the difficulties of complying with the statutory 90-day hearing requirement, but they do not argue that the Attorney-Examiner's interpretation of that requirement is faulty, or that the Commission would be at liberty to adopt a "call-and-continue" process under R.C. 4935.04(D)(3) without AEP Ohio's consent. And although the movants argue that the scheduling order is inconsistent with the Commission's prior rulings in *ESP IV*, those arguments misread the Commission's opinions.

The October 22 Entry is fully consistent with the Commission's governing statutes, implementing regulations, and prior opinions, and it judiciously expedites the Commission's consideration of the important issues in these consolidated proceedings. For all of these reasons, if the Commission does choose to grant movants a discretionary interlocutory appeal, it should affirm the October 22 Entry.

IV. CONCLUSION

The movants have failed to meet the requirements for an immediate interlocutory appeal in Ohio Adm. Code 4901-1-15(A)(2). They have failed to meet the requirements for a discretionary interlocutory appeal in Ohio Adm. Code 4901-1-15(B). And they have failed to demonstrate that the Attorney Examiner's procedural schedule is unlawful, unjust, or unreasonable. For all of the reasons provided above, AEP Ohio respectfully requests that the Commission deny OCC, OMA, and Kroger's interlocutory appeal and affirm the Attorney Examiner's October 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 2nd day of November, 2018, via electronic transmission.

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