

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
	)	

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**MOTION OF OHIO POWER COMPANY  
TO STRIKE OR DEFER CERTAIN INTERVENOR TESTIMONY THAT IS BEYOND  
THE SCOPE OF THE FIRST-PHASE HEARING SET BY THE ATTORNEY  
EXAMINERS’ OCTOBER 22, 2018 PROCEDURAL ENTRY**

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Ohio Power Company (“AEP Ohio” or the “Company”) respectfully moves, the Public Utilities Commission of Ohio (“Commission”), pursuant to Ohio Adm. Code 4901-1-12 and the Attorney Examiners’ October 22, 2018 Entry (“Procedural Entry”) in Case No. 18-501-EL-FOR (“*Long-Term Forecast Case*”), Case No. 18-1392-EL-RDR (“*REPA Case*”), and Case No. 18-1393-EL-ATA (“*Green Tariff Case*”), for an order striking intervenor testimony that is beyond the scope of the first-phase hearing in these proceedings, which is set to commence on January 15, 2019. At today’s prehearing conference, the Attorney Examiners established an expedited briefing schedule on this Motion, with responsive briefs due on January 9, 2019, and no reply permitted.

The Commission’s Procedural Entry made clear that the first-phase hearing in these consolidated proceedings would address AEP Ohio’s “plan to demonstrate the need for at least

900 megawatts of renewable energy generation resources in Ohio.” Procedural Entry, ¶ 36. Yet four intervening witnesses have filed testimony that relates in whole or in part to issues raised by AEP Ohio’s application in the *REPA* and *Green Tariff* cases (collectively, the “*Tariff Cases*”), which are not properly addressed until the second phase of the hearing. *See id.*, ¶ 32.

The specific testimony identified in the accompanying Memorandum strays well beyond the limited scope of the first-phase hearing and would undermine the separation of issues established by the Attorney Examiners in the Procedural Entry. Allowing that testimony in the first-phase hearing would prejudice AEP Ohio, by raising issues not yet presented in AEP Ohio’s first-phase testimony; would prejudice other intervenors whose witnesses properly complied with the separation of issues established in the Procedural Entry; would prejudice the public, who have not been given an opportunity to be heard on the issues raised in the *Tariff Cases*; and would make the Commission’s determination of “need” needlessly vulnerable to reversal on procedural grounds. On the other hand, striking the limited intervenor testimony at issue in this Motion would not prejudice those intervenors in any way, because they will retain the opportunity to introduce that evidence in the second phase of these proceedings, if they wish.

For all of these reasons, as more fully described in the attached Memorandum in Support, AEP Ohio respectfully requests that the Commission strike the intervenor testimony that relates to issues more properly raised in the second phase of this proceeding.

Respectfully submitted,

*/s/ Steven T. Nourse*

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## MEMORANDUM IN SUPPORT

### **I. Background**

The Company submitted an amendment to its 2018 Long-Term Forecast Report (“2018 LTFR”) in the *Long-Term Forecast Case*, consistent with the Commission’s orders in Case Nos. 14-1693-EL-RDR, *et al.*, and 16-1852-EL-SSO, *et al.*, to demonstrate the need for at least 900 megawatts of renewable energy projects in Ohio. In the subsequently filed *REPA* and *Green Tariff Cases* (collectively, the “*Tariff Cases*”), which were also filed consistent with the Commission’s orders in Case Nos. 14-1693-EL-RDR, *et al.*, and 16-1852-EL-SSO, *et al.*, the Company seeks an order approving the inclusion in the Company’s Renewable Generation Rider (“RGR”) of two solar energy resources totaling approximately 400 MW of nameplate capacity solar energy, as well as the creation of a new Green Power Tariff, pursuant to which customers may purchase renewable energy credits.

On September 27, 2018, AEP Ohio moved to consolidate the *Long-Term Forecast* and *Tariff* cases, and requested an expedited ruling in light of the Company’s efforts to take advantage of certain Investment Tax Credits that would improve the projects’ overall benefits to customers. Certain intervenors, including the Office of Ohio Consumers Counsel (“OCC”) and Ohio Manufacturers Association Energy Group (“OMAEG”) opposed consolidation.

On October 22, 2018, the Attorney Examiners determined that consolidating all three cases is “reasonable and appropriate” in light of the administrative efficiencies to be gained from consolidation. The Attorney Examiners noted, however, that:

The Commission’s rules, therefore, contemplate that the need for a proposed generating facility should generally be *heard first as a distinct issue*. Separately, the Commission will also consider, through its review of the electric utility’s EL-SSO or EL-RDR filing, whether all of the criteria set forth in R.C. 4928.143(B)(2)(c), including need for the facility, have been satisfied, in advance of

authorizing any cost recovery through a nonbypassable surcharge. The attorney examiner, therefore, finds that it is appropriate under the circumstances to proceed *initially* with the review of AEP Ohio's LTFR amendment and, *separately*, to address the Company's application in the *Tariff Cases*. Accordingly, the consolidated cases should proceed in two phases, with the first phase to consist of a hearing on the issue of need, as set forth below. In the second phase of the consolidated proceedings, a separate hearing will be held to consider the issues raised by AEP Ohio's application in the *Tariff* cases. The attorney examiner notes that the bifurcation of the hearing process does not preclude AEP Ohio from offering its direct testimony, as submitted in support of the application in the *Tariff* cases, at the hearing on the issue of need.

Procedural Entry, ¶ 32 (emphasis added). The Procedural Entry – based on the Commission's interpretation of the ESP statute and the Commission's interpretation of its own rules – circumscribed the scope of the first-phase hearing, expressly providing that a “separate hearing” in the second phase will address issues specific to the *Tariff Cases* after the hearing on the *Long-Term Forecast* case. The Procedural Entry also scheduled a public hearing for December 4, 2018, to review AEP Ohio's “2018 long-term forecast report” and “the company's plan to demonstrate the need for at least 900 megawatts of renewable energy generation resources in Ohio” – *i.e.*, the phase-one issues. *Id.*, ¶ 36. Promptly upon receipt of the Procedural Entry, and consistent with the final above-quoted sentence in paragraph 32 of that Entry, AEP Ohio identified the direct testimony of Stephen Buser and William Lafayette as testimony that it would present at the first-phase hearing on the issue of need. Thus, the bifurcated process for the two filings was established as two separate and sequential hearings.

Although the Company and most intervenors complied with the separation-of-issues compelled by the Attorney Examiners' Procedural Entry, and appropriately limited the scope of their witnesses' first-phase testimony, four witnesses submitted direct testimony for the first-

phase hearing that raises assertions and arguments relevant only to the second-phase issues, as discussed below.

## **II. Argument**

Evidence, including witness testimony, that is not relevant to the issues before the Commission in a proceeding should be stricken. *See In re Application of Columbus Southern Power Co. for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, et al., Entry at 6 (July 19, 2011) (striking witness testimony relating to issues outside the scope of issues on remand); *In re Verizon Wireless*, Case No. 03-515-TP-ARB, Opinion at 4 (Nov. 13, 2003) (striking witness affidavit based in part upon the fact that the information contained therein was “not relevant” to the case); *In re TDS MetroCom, Inc.*, Case No. 02-1254-TP-ARB, Entry at 2 (Sept. 27, 2002) (striking witness testimony on issues that did “not assist the Commission” in deciding the relevant issues in the case).

The Company is conservative in its request and has not moved to strike general policy or background statements that refer to the EL-RDR in passing. The motion, instead, is focused on substantive analysis that clearly belongs in the second phase of the bifurcated hearing in accordance with the October 22 Entry. The topics that are severable and clearly within the scope of phase two of the hearing (the EL-RDR issues) include the Request for Proposals (RFPs) that led to execution of the Renewable Energy Purchase Agreements (REPAs), the specific terms and conditions and associated costs of the REPAs proposed for approval in the EL-RDR filing, the cost recovery proposals (including the Debt Equivalency Cost proposal advanced in the EL-RDR filing), and the Green Tariff proposed in Case No. 18-1393-EL-ATA.

The following chart identifies the four witnesses for intervenors Kroger, the Ohio Coal Association (“OCA”), and the Office of the Ohio Consumers’ Counsel (“OCC”) whose

testimony should be stricken, either in whole or in part, as beyond the scope of the first-phase hearing. The last column in the chart includes a description of the inappropriate testimony, with page and line references where applicable:

<u><b>Intervenor</b></u>	<u><b>Witness</b></u>	<u><b>Irrelevant Testimony</b></u>
Kroger	<b>Justin Bieber,</b> Energy Strategies, LLC	<p>--Page 4, lines 14-22 (Bieber addresses second-phase issues regarding cost recovery REPAs and debt equivalency costs under the EL-RDR).</p> <p>--Page 5, lines 11(beginning with the word “or”)-16; 22-23 (except for “exists.” at the beginning of line 22) (same).</p> <p>--Page 6, line 4 through page 7, line 2 (Bieber addresses debt equivalency costs under the EL-RDR and the fixed price structure of REPAs to be presented in phase two).</p> <p>--Page 14, line 6 (beginning with the word “or”)-7 (ending with the word “RGR”) and Page 15, line 9 (beginning with the word “[p]assing”)-14 (ending with the word “costs” and inclusive of footnote 27) (same).</p> <p>--Page 16, lines 12-18 (same).</p> <p>--Page 18, line 1, through page 26, line 11, including Exhibits JDB-1 and JDB-2 (With numerous citations to AEP Ohio testimony filed in the <i>Tariff</i> cases, Bieber challenges the proposed REPAs and their price structure, the Company’s proposal to recover debt equivalency costs through the EL-RDR, the RFP, and other issues to be addressed in the second phase).</p> <p>--Page 26, lines 15 through 17 and Page 26, line 21 through page 27, line 4 (Bieber concludes that AEP Ohio has not established a need for the specific projects to be addressed the EL-RDR phase, and</p>

<u>Intervenor</u>	<u>Witness</u>	<u>Irrelevant Testimony</u>
		challenges the recovery of debt equivalency costs to be addressed in phase two).
OCA	<b>Richard E. Brown,</b> Ph.D., P.E., Exponent	<p>--Page 4, beginning with conclusion 2, through Page 5, conclusion 7 (Brown summarizes his conclusions regarding the REPAs' terms and structure, the recovery of debt equivalency costs, and the EL-RDR recovery mechanism's structure).</p> <p>--Expert Report, pages 8-12 (comparing the RGR's benefits to the company with the REPAs and criticizing the debt equivalency cost proposal).</p> <p>--Expert Report, pages 18-24 (discussing the specific economics of the REPAs).</p> <p>--Expert Report, pages 42-46 (discussing EL-RDR issues, including the ownership and operation of the projects that are the subject of the REPAs).</p> <p>--Expert Report, pages 56-58 (discussing the testimony of AEP Ohio witness Williams offered in the EL-RDR phase of these proceedings).</p> <p>--Expert Report, page 59, beginning with conclusion 2, through page 60, conclusion 7 (Brown summarizes his conclusions regarding the REPAs' terms and structure, the recovery of debt equivalency costs, and the EL-RDR recovery mechanism's structure).</p>
	<b>Emily S. Medine,</b> Energy Ventures Analysis, Inc.	<p>--Page 11, lines 10 through 29 (addressing the REPAs and Green Tariff proposals that are the subject of phase two).</p> <p>--Page 13, line 24, through page 17, line 26 (discussing the RFP and REPAs' structure).</p>



<u>Intervenor</u>	<u>Witness</u>	<u>Irrelevant Testimony</u>
		<p>--Page 25, line 2, through page 26, line 12 (discussing the debt equivalency cost recovery proposal).</p> <p>--Page 32, line 22, through page 3, line 3 (addressing REPA terms regarding disposition of energy and capacity generated by the solar facilities).</p>
OCC	<b>Jonathan A. Lesser,</b> Ph.D.	<p>--Page 8, line 3 through page 9, line 12 (Dr. Lesser challenges AEP Ohio's position regarding the REPAs' benefits and value and the recovery of debt equivalency costs).</p> <p>--Page 20, line 6, through page 21, line 4, including Exhibit JAL-6 (discussing specific terms of the REPAs that are the subject of phase two).</p> <p>--Page 62, line 4, through page 69, line 16 (discussing REPA costs and debt equivalency cost proposal).</p> <p>--Confidential Exhibits JAL-9, JAL-12, and JAL-16 (same).</p>

The testimony and excerpts identified in the foregoing chart should be struck. As the last column in the chart confirms, the cited testimony is simply irrelevant to the issues being considered in the first phase and well beyond its scope. It is relevant, if at all, only in the second phase, when the Commission reviews the specific projects proposed for inclusion in the RGR, along with their attendant costs and benefits. Issues concerning the RFP leading up to the REPAs proposed in the *Tariff Cases* and the specific retail cost recovery issues related to those proposed REPAs (including the debt equivalency cost incurred by AEP Ohio in taking on the REPAs) are clearly within the scope of phase two of the bifurcated hearing process and out of bounds for the phase one hearing.

More fundamentally, admitting the testimony would prejudice AEP Ohio because it would allow these witnesses to “rebut,” in the first phase, issues and testimony that AEP Ohio will not present until the second phase. It would be unfair to the other intervenors and witnesses who have appropriately circumscribed their testimony and adhered to the separation of issues established in the Procedural Entry. The Commission should not (and, practically, cannot) allow Kroger, OCA, and OCC to submit evidence in the phase-one hearing on the specific costs and benefits of the two proposed solar projects, their inclusion in the Renewable Generation Rider, and the debt equivalency cost recovery, while at the same time postponing consideration of the other intervenors’ testimony on those topics until the second phase. And it would be unfair to the public, who have not yet been given an opportunity to be heard on the specific solar projects proposed in the *Tariff Cases*, the proposed Green Tariff, or other related issues.

Finally, given these potential inequities, considering the challenged testimony before the second phase commences would substantially increase the risk that the Supreme Court of Ohio would reverse any “need” determination on a procedural infirmity. That reversal could readily be avoided by deferring the challenged testimony to the second-phase hearing, where it would be within the allowed scope of proceedings. Moreover, exclusion of this testimony from phase one of the hearing is without prejudice to intervenors presenting the same (or additional) arguments in phase two.

### III. Conclusion

For the foregoing reasons, AEP Ohio respectfully moves for an order striking the intervenor testimony from the four witnesses identified in the foregoing chart, without prejudice. Admitting that testimony in the first phase of the hearing would undermine the phased approach established by the Attorney Examiners in the Procedural Entry, would prejudice AEP Ohio (by allowing those four witnesses to rebut second-phase testimony not yet presented by the Company in the first phase), would prejudice those intervenors who endeavored to comply with the issue-separation requirements of the Procedural Entry, would prejudice the public, and could needlessly subject the Commission's determination of "need" to reversal on procedural grounds. As an alternative to striking the testimony as requested above, the Commission should, at a minimum, permit the Company and other supportive intervenors to reserve cross-examination for those portions of testimony and defer ruling on the admission of the same until phase two of the hearing, subject to the same intervenor witness appearing in the second hearing and pending cross-examination and objections as part of the second hearing.

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 *Ohio Power Company's Motion* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 7<sup>th</sup> day of January 2019, via electronic transmission.

/s/ Steven T. Nourse \_\_\_\_\_

Steven T. Nourse

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Summary: Motion - Motion of Ohio Power Company to Strike or Defer Certain Intervenor  
Testimony that is Beyond the Scope of the First-Phase Hearing Set by the Attorney  
Examiners' October 22, 2018 Procedural Entry electronically filed by Mr. Steven T Nourse on  
behalf of Ohio Power Company