BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2018 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 19-1338-EL-UNC
In the Matter of the Determination of the Existence of Significantly Excessive Earnings for 2019 Under the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.	)	Case No. 20-1034-EL-UNC
In the Matter of the Quadrennial Review Required by R.C. 4928.143(E) for the Electric Security Plan of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company	)	Case No. 20-1476-EL-UNC

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA THE INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE COMMISSION, AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND NORTHEAST OHIO PUBLIC ENERGY COUNCIL

The Attorney Examiner should deny the Request for Certification (the "Request") jointly filed by The Office of the Ohio Consumers' Counsel ("OCC") and Northeast Ohio Public Energy Council ("NOPEC") (together "Appellants"). The Request seeks certification of an interlocutory appeal from the Attorney Examiner's Entry dated September 4, 2020 ("Entry"), which consolidated the quadrennial review with the pending 2018 and 2019 annual significantly excessive earnings test ("SEET") proceedings and set a procedural schedule for the consolidated cases. However, the Request does not meet the legal standard for certification.

Appellants incorrectly argue that their Request is warranted as a departure from precedent because Dayton Power & Light Company's ("DP&L") quadrennial review – a single prior case

with significantly different issues – followed a different procedural schedule, and further claim they will suffer undue prejudice if the schedule does not follow that set for DP&L. Yet a routine scheduling entry setting a hearing process based upon the characteristics of the case at hand is not bound by procedural schedules established in other cases involving different issues. Nor have Appellants shown, as is required by O.A.C. 4901-1-15(B), that they would be unduly prejudiced if the Commission does not immediately review the Entry. Having failed to meet either of the prongs, let alone both, the Request should be denied.[1]

I. STANDARD OF REVIEW

For Appellants' Request to move forward, it must first be certified by the "legal director, deputy legal director, attorney examiner, or presiding hearing officer." O.A.C. 4901-1-15(B). In order to seek the Attorney Examiner's certification of the proposed interlocutory appeal of the Entry, Appellants must meet both of the requirements of O.A.C. 4901-1-15(B):

> The . . . attorney examiner . . . shall not certify such an appeal unless he or she finds that:
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> [1] the appeal 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
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> [2] an immediate determination by the commission 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.

O.A.C. 4901-1-15(B). *See In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, Entry at ¶ 24 (May 25, 2018) (noting conjunctive two-part test); *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and*

[1] If the appeal is certified to the Commission, the Entry should be affirmed for the same reasons as set forth herein.

the Sale or Transfer of Certain Generating Assets, Case No. 08-917-EL-SSO, Entry at ¶ 8 (Oct. 21, 2008) ("In order to certify an interlocutory appeal to the Commission, both requirements need to be met.").

Requests for certification that fail to meet both of these requirements are summarily denied. *See, e.g., In the Matter of the Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.*, Case No. 17-2168-GA-CSS, 2018 Ohio PUC LEXIS 603, Entry at ¶ 24 (May 25, 2018) ("The failure to demonstrate the second element, even where the first is satisfied, is fatal to any application for certification of an interlocutory appeal under Ohio Adm. Code 4901-1-15(B)"); *In the Matter of the Self Complaint of Suburban Natural Gas Company Concerning its Existing Tariff Provisions,* Case No. 11-5846-GA-SLF, 2012 Ohio PUC LEXIS 677, at *1-3 (July 6, 2012) (denying request for certification because movant failed to show that entry at issue presented any new or novel question of interpretation, law, or policy, or a departure from past precedent, and that immediate determination by the Commission was not necessary to avoid undue prejudice); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, 2012 Ohio PUC LEXIS 619, at *8-10 (June 21, 2012) (same).

II. ARGUMENT

A. OCC Has Failed to Demonstrate that the Entry Presents a Departure from Precedent.

For the first prong, Appellants argue only that the Entry sets a "constrained" schedule for testimony and hearing that departs from "precedent" purportedly established in DP&L's

quadrennial review case for its first electric security plan ("ESP").[2] Yet, a procedural schedule entered in one proceeding based on the peculiar facts of that proceeding hardly serves as precedent here, particularly given that Appellants have made no attempt to show the two proceedings share disputed issues. Indeed, despite claiming that the test for whether an ESP continues to be more favorable in the aggregate than a market rate offer ("ESP vs. MRO test") "involves new and complex issues," Appellants do not cite even one such issue.[3] Whatever new and complex issues have arisen in DP&L's quadrennial review case – such as the treatment of environmental cleanup costs for a power plant - those issues are not present here. The two cases could scarcely be more different: DP&L's case involves multiple terminations and withdrawals of ESPs, reverting to DP&L's first ESP approved more than a decade earlier. In contrast, the ESP vs. MRO test here in the Companies' fourth ESP ("ESP IV") will cover well-trodden ground, since the terms and conditions of the Companies' ESP IV have undergone no material changes that would impact the test. At the end of the day, both this case and DP&L's case were set for an evidentiary hearing.[4] There is no "precedent" requiring that the Entry include a procedural schedule that is more extended or more complicated.

Unless otherwise prescribed by rule,[5] the Commission has discretion to set procedural schedules that match the complexity of the issues in the case at hand.[6] Further, the Commission

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[2] Request, Memorandum in Support at 4, citing *In the Matter of the Application of The Dayton Power and Light Company for a Finding That Its Current Electric Security Plan Passes the Significantly Excessive Earnings Test and More Favorable in the Aggregate Test in R.C. 4928.143(E)*, Case No. 20-680-EL-UNC

[3] See Request, Memorandum in Support at 5.

[4] One day after the attorney examiner set the DP&L case for hearing, a different attorney examiner set the Companies' case for hearing.

[5] See, for example, Ohio Admin Code 4901:1-36-03(F) (setting a deadline for intervention forty days from the date of the Application).

[6] *See, e.g., In the Matter of the Review of the Non-Market Based Services Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 18-1818-EL-RDR, Entry at ¶15 (April 24, 2019)("we hold considerable discretion in our authority to hold a hearing in any matter coming before the Commission.").

and its attorney examiners have had years of experience scheduling matters for hearings on a case-by-case basis.[7] The DP&L case did not establish a procedural schedule precedent, and the Attorney Examiner's decision to set a schedule appropriate for the issues in this case does not represent a departure warranting an interlocutory appeal. Appellants have failed to satisfy the first prong, and their Request should be denied.

B. OCC Cannot Show that an Immediate Determination by the Commission Is Needed to Prevent the Likelihood of Undue Prejudice or Expense.

The Entry does not unduly prejudice Appellants, who only allege prejudice with respect to the quadrennial review portion of the consolidated cases, nor any other party.[8] The Entry places no undue restrictions on Appellants that would prevent them from adequately preparing for the hearing. Compared to the issues in the DP&L case, such as the termination and withdrawal of not one but two ESPs and the reversion to DP&L's first ESP with old charges some intervenors assert were obviated by intervening events, the Companies' quadrennial review is relatively mundane. The Companies are still operating under their most recently approved ESP IV, and with the ESP vs. MRO test having been addressed as recently as August 16, 2017,[9] everyone is familiar with the issues. Indeed, the prospective ESP vs. MRO test should be simple and direct since there have been no material changes to ESP IV that would impact the outcome of the test subsequent to the Commission's prior decisions in the ESP IV case. As such, Appellants' claim of prejudice for not following the DP&L case's procedural schedule is unfounded.

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[7] *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry at ¶ 7 (May 10, 2005) ("Establishing a procedural schedule in a Commission hearing proceeding is a routine matter with which the Commission and its examiners have had long experience.").

[8] Request, Memorandum in Support at 5.

[9] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide For a Standard Service Offer Pursuant to R.C. 4928.143 in the Form Of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Eighth Entry on Rehearing at ¶ 156-75 (Aug. 16, 2017).

In addition, the period for discovery on the quadrennial review allowed by the Entry is nearly three months. Appellants do not need to wait for the Companies to file testimony before serving discovery. Plus, the Entry provides Appellants four weeks for discovery after the Companies file their testimony, which is more than sufficient to explore the familiar issues so recently explored in depth by intervenors, including Appellants, during the Companies' ESP IV proceeding.[10] A quadrennial review should not give occasion for relitigating the underlying ESP or demand time for discovery sufficient to do so—it need only address whether the outcome of the earlier determination still holds. As the Commission has explained, the quadrennial review is "merely intended to act as a 'check-up'" on an ESP.[11]

Further weighing against granting Appellants' Request is that doing so would result in undue prejudice and expense *to the Companies* by unnecessarily delaying these proceedings more than four months simply to follow the timing of another significantly different and more complex case. Scheduling both comments and testimony at the outset of this proceeding would be redundant and administratively inefficient.

Every procedural schedule in litigated proceedings places appropriate parameters on procedure necessary to move cases toward resolution. The vast majority of attorney examiner entries, including the Entry in this case, can be adequately addressed by the standard motion practice set forth in the Commission's rules. The two-prong test for certifying an interlocutory appeal of an attorney examiner's procedural schedule is a high bar for good reason: to maintain the presiding officers' ability to manage their cases and to limit forcing the full Commission to

[10] See, e.g., *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry at ¶ 7 (May 10, 2005) Entry at ¶ 8 (denying interlocutory appeal asserting broad allegations of undue prejudice regarding discovery where there were no specific demonstrations such as discovery responses being unduly delayed). Similarly, OCC has years of experience drafting and serving discovery in SEET reviews.
[11] ESP IV, Fifth Entry on Rehearing at ¶ 338 (Oct. 12, 2016).

rule on mere procedural matters. The standard of review for the second prong is the need for an immediate decision by the full Commission to prevent undue prejudice or cost to a party. Appellants have shown neither that the schedule is inappropriate for the circumstances nor that the Attorney Examiner must be circumvented immediately. Thus, the second requirement for certifying an interlocutory appeal also is not met, and the Request should be denied.

III. CONCLUSION

Appellants have failed to meet their burden to establish both requirements for certification of an interlocutory appeal. Therefore, for the reasons stated above, the Attorney Examiner should deny Appellants' Request.

Respectfully submitted,

/s/ Robert M. Endris
Robert M. Endris (0089886)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Telephone: (330) 384-5728
Facsimile: (330) 384-3875
E-mail: rendris@firstenergycorp.com

ATTORNEY FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 14th day of September, 2020. The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Robert M. Endris
One of the Attorneys for the Companies

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Summary: Memorandum Memo Contra of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Interlocutory Appeal of OCC/ NOPEC electronically filed by Mr Robert M Endris on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company