

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates)))	Case No. 20-585-EL-AIR
In the Matter of the Application of Ohio Power Company for Tariff Approval)))	Case No. 20-586-EL-ATA
In the Matter of the Application of Ohio Power Company for Approval to Change Accounting Methods)))	Case No. 20-587-EL-AAM

**OHIO POWER COMPANY’S MEMORANDUM IN OPPOSITION TO
ONE ENERGY ENTERPRISES LLC AND
THE ENVIRONMENTAL LAW AND POLICY CENTER’S
JOINT INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION
TO THE FULL COMMISSION AND APPLICATION FOR REVIEW**

I. BACKGROUND

Ohio Power Company (“AEP Ohio” or the “Company”) filed its application in this proceeding on June 8, 2020. The Environmental Law & Policy Center (“ELPC”) moved to intervene eight days later on June 16, 2020. One Energy Enterprises LLC (“One Energy”), in comparison, waited almost six months to intervene on December 4, 2020. By that point, Staff had filed the written report of its investigation (“Staff Report”) on November 18; the Attorney Examiner had ruled that objections to the Staff Report were due within 30 days after the Staff Report was filed (*see* Entry at ¶ 6 (Nov. 23, 2020) (citing R.C. 4909.19 and Ohio Adm.Code 4901-1-28(B)); *see also* Entry at ¶ 9 (Dec. 1, 2020) (granting a motion to extend certain

deadlines, but affirming that “[a]ll other deadlines * * * remain unchanged”); and the discovery deadline had passed on December 2 (*see* Ohio Adm.Code 4901-1-17(B)).

ELPC and One Energy do not explain why they waited until after the discovery cutoff deadline to serve discovery requests on AEP Ohio. (*See* Interlocutory Appeal at 6-7 (asserting only that “potential intervenors, *like* One Energy, were *entitled* to rely on the * * * language in the New Staff Report * * * that the Initial Staff Report had been ‘superseded and replaced in its entirety’ by the New Staff Report”) (emphasis added).) But they did. And when AEP Ohio reasonably declined to respond to their late discovery requests, One Energy asked the Commission to “clarify” whether Staff’s filing of a corrected version of the Staff Report reset the deadlines for filing discovery requests and objections. (*See* One Energy Motion to Clarify the Filing Date of the Staff Report (Dec. 7, 2020).) ELPC did not join the motion and did not even *attempt* to serve its first discovery on AEP Ohio¹ until after One Energy filed its motion. (*See* Interlocutory Appeal at 4.)

On December 10, 2020, the Attorney Examiner issued an Entry “clarify[ing] that the filing date of the Staff Report is November 18, 2020” – the date it was actually filed – and not when Staff filed a corrected report that inserted three omitted values into certain schedules. Entry at ¶ 12 (Dec. 10, 2020) (the “December 10th Entry”). ELPC and One Energy now ask the Commission to certify an interlocutory appeal of the December 10th Entry, reverse it, and extend the discovery deadline to December 9 and the objection deadline to December 28.

¹ As further discussed below, Counsel of Record for AEP Ohio did not receive the ELPC discovery on December 9, as alleged by ELPC in the Interlocutory Appeal. Upon receiving the Interlocutory Appeal, Counsel of Record for AEP Ohio requested documentation from ELPC counsel concerning the allegation; an email was forwarded after business hours on December 14 that contained an erroneous, misspelled email address for AEP Ohio’s Counsel of Record and ELPC Counsel apologized for the error.

The issue presented in this interlocutory appeal – whether the correction of minor clerical errors in a Staff report of investigation resets the statutory and regulatory deadlines for discovery and objection – is neither new nor novel. Neither ELPC nor One Energy has demonstrated that it would be unduly prejudiced if it cannot obtain discovery from AEP Ohio. And the movants’ argument that correcting the Staff Report was equivalent to withdrawing and replacing it is baseless and nonsensical. Further, none of the claims of prejudice or the late discovery requests relate to the clerical errors that were corrected on November 25. Rather than serving timely discovery requests or working to complete their objections, these parties continue to expend considerable time and resources contesting deadlines through litigation. For the reasons provided below, the Commission should decline to certify the interlocutory appeal or affirm the Attorney Examiner’s December 10th Entry.

II. THE COMMISSION SHOULD DECLINE TO CERTIFY THE INTERLOCUTORY APPEAL

Under the Commission’s rules, “[t]he legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify [an interlocutory] appeal unless he or she finds that 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 an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties * * * .” Ohio Adm.Code 4901-1-15(B). Here, ELPC and One Energy assert that the determination of the deadlines for filing discovery and objections in this case is a “new and novel question of interpretation and law” and that “denying their rights to discovery” will result in undue prejudice. (Interlocutory Appeal at 9.) They further assert that the December 10th Entry was mistaken and should be reversed. But ELPC and One Energy have not demonstrated that they are entitled to a certification of their interlocutory appeal, and in any

instance have not demonstrated that the Attorney Examiner erred by concluding that the filing of the corrected Staff Report did not reset the Commission's discovery and objection deadlines.

A. The December 10th Entry does not raise a new or novel question.

For a rate case, the deadlines for serving discovery requests and filing objections to a Staff Report are clearly set forth in statute and in the Commission's regulations. Discovery requests must be served "no * * * later than fourteen days after the filing and mailing of the staff report of investigation * * * ." Ohio Adm.Code 4901-1-17(B). And objections to a Staff report of investigation must be filed "within thirty days after such report is filed with the commission." Ohio Adm.Code 4901-1-28(B); *see also* R.C. 4909.19(C). ELPC and One Energy do not contest that Staff filed its Report on November 18, 2020. The calculation of "fourteen days" and "thirty days" from that date is not a "new or novel question of interpretation and law"; it is simple grade school math.

As a related matter, the fact that an intervenor may intervene at a time when discovery has ended is not a novel situation. Indeed, the default process reflected in the Commission's procedural rules permits intervention after the discovery deadline in a general rate proceeding. *See* OAC 4901-1-11(E) and 4901-1-17(B). More importantly, the November 23, 2020 Entry establishing the procedural schedule in this case established an intervention deadline of December 18, 2020 and a discovery cutoff deadline of December 2, 2020. Generally, the default discovery cutoff established by rule can be changed at the discretion of the Commission – but it certainly should not be changed retroactively after the deadline passes. The intervenors' procrastination does not form the basis to conclude that a novel question is presented and does not support a conclusion that the December 10, 2020 Entry was erroneous. Thus, even if the Commission wants to deem the revised filing date of the Staff Report as November 25, 2020

(based on the clerical corrections) for purposes of the statutory deadline for objections, it should not retroactively adjust the discovery cutoff deadline.

ELPC and One Energy insist that the true issue presented by their Interlocutory Appeal is “whether a staff report that has been replaced in its entirety can serve as the basis for computations of time under R.C. 4909.19(C).” (Interlocutory Appeal at 5.) But that is a false premise because the Staff Report was *not* actually “replaced in its entirety,” despite the language used in the cover letter accompanying the corrections. Of course, Staff used that language simply to make clear that the corrected Staff Report should be the one to be used in the proceeding. As the Attorney Examiner correctly found, Staff actually just refiled an “amended version” of its Report with a few “minor” corrections. December 10th Entry at ¶ 12. Staff described the nature of those amendments in its letter notifying municipalities of the corrected Staff Report, which explained simply:

[T]he Staff Report filed by the Staff of the Public Utilities Commission of Ohio on November 18, 2020, and sent to you by certified mail on November 19, 2020, in accordance with R.C. 4909.19, was *amended* in order to correct a clerical error contained within the schedules of the Staff Report for which *three values* were erroneously deleted. Staff notes that this clerical error does not affect the revenue requirement, adjustments, or *any other recommendations* contained in the text of the Staff Report.

(Emphasis added.) (Staff Letter Notifying Municipalities (Dec. 1, 2020) (filed with the Commission on Dec. 2, 2020).) Thus, Staff did not “effectively withdraw” its Report, as ELPC and One Energy argue. (Interlocutory Appeal at 7.) It simply corrected schedules by inserting three omitted values into its 211-page Report, and did not alter “the narrative portion of the report in any way.” December 10th Entry at ¶ 12.

Thus, the real issue presented by ELPC and One Energy’s interlocutory appeal is not whether withdrawing and replacing a Staff report seven days later would reset the deadlines for discovery and objections. The real issue is whether correcting three clerical errors in the Staff

Report somehow changed its filing date from November 18 to November 25. This is not a new or novel question of law. As the docket reflects, the Staff Report was filed on November 18, and this interlocutory appeal should not be certified.

B. ELPC and One Energy have not argued that the December 18th deadline for objections would prejudice them, and have not demonstrated that the December 2nd deadline for discovery will prejudice them.

ELPC and One Energy also cannot demonstrate that declining to certify this interlocutory appeal would unduly prejudice them. Neither ELPC nor One Energy has asserted that it would be unduly prejudiced if the Commission failed to certify an interlocutory appeal for the Attorney Examiner's ruling regarding the parties' deadline to file objections. (*See* Interlocutory Appeal at 6.) Instead, ELPC and One Energy generally assert that they would be unduly prejudiced if the Commission does not allow them to engage in discovery. (*Id.*) Accordingly, the Commission should decline to certify the interlocutory appeal with regard to the objection deadline.

With regard to the discovery deadline, neither party showed any particular interest in serving discovery in this proceeding until the last minute. ELPC intervened in this proceeding in June, waited 176 days, and then only attempted to serve its discovery requests *after* AEP Ohio filed its memorandum in opposition to One Energy's motion to clarify. And One Energy waited 179 days from the filing of the Company's Application, two days after the discovery deadline had passed, to file its motion to intervene and serve its discovery requests. If ELPC and One Energy truly believed they would be prejudiced if they could not obtain discovery in this proceeding, they would have been more diligent in intervening (in One Energy's case) and serving that discovery well before the deadline. Similarly, One Energy continues to expend considerable time litigating deadlines instead of completing its objections.

Indeed, ELPC waited so long to serve discovery that it would not benefit even if the Commission adopted its proposed discovery deadline of December 9, 2020. ELPC asserts that it served discovery on AEP Ohio on December 9. (*See* Joint Interlocutory Appeal at 4.) But as the attached email correspondence demonstrates, ELPC failed to perfect service of that discovery on AEP Ohio’s counsel of record until December 14 – five days after ELPC’s requested discovery cut-off date. (*See* E-mails between Caroline Cox and Steve Nourse (Dec. 14, 2014), attached as Exhibit A.) Specifically, ELPC served its discovery requests on “stnorse@aep.com” rather than “stnourse@aep.com.” And although the e-mail bounced back, ELPC did not re-send the discovery requests until AEP Ohio alerted ELPC of its error on December 14. (*See* Exhibit A.) Under the Commission’s rules, discovery requests must be served on all parties by e-mail, *see* Ohio Adm.Code 4901-1-18, and must be served upon the counsel of record if one is designated, *see* Ohio Adm.Code 4901-1-05(C). Service by e-mail “is not effective if the serving party learns that it did not reach the person served.” Ohio Adm.Code 4901-1-05(D)(4). While ELPC counsel did apparently serve other attorneys (including other AEP attorneys) on December 9, AEP Ohio Counsel of Record is responsible for coordinating discovery and did not receive the document until after business hours on December 14 – long after the discovery cutoff deadline under any interpretation of OAC 4901-1-17(B) in this case. Because ELPC’s discovery requests did not reach AEP Ohio’s Counsel of Record before the discovery deadline it is requesting, its appeal is moot and should not be certified.

Finally, neither party has explained why the inability to obtain responses to its late-served discovery requests would hamper its “ability to prosecute this case.” (Interlocutory Appeal at 2.) In fact, neither party attached its discovery requests to the Interlocutory Appeal, or even described the topics on which it sought discovery from AEP Ohio. And it does not appear that

either party has made any effort to ascertain whether it could obtain the information it seeks by reviewing the responses to the other parties' and Staff's requests. AEP Ohio gave both ELPC and One Energy access to all of the non-confidential discovery and Staff data requests/responses in the case well prior to their Interlocutory Appeal filing. Without such a review, ELPC and One Energy cannot demonstrate that it would need discovery to prosecute its case, or that the inability to obtain that discovery would unduly prejudice them.

Finally in this regard, most of the questions in these late discovery sets involve extraneous and/or harassing questions that do not go to the substance of any issue in this case; for example, the majority of ELPC's interrogatories ask for details of any meetings with the Commission/Staff regarding energy efficiency and legislative issues. More to the point, neither ELPC nor One Energy raise any specific unanswered questions or claimed prejudice related to the unanswered questions in their late discovery requests. And neither party challenging the Entry mentions even a passing interest in the clerical errors that were corrected on November 25, let alone a significant interest or claim of prejudice as a result of the corrections. Rather, their interests relate solely to the November 18 Staff Report – and that is the Staff Report that triggers the objection and discovery deadline.

III. IF THE COMMISSION DOES CERTIFY THE INTERLOCUTORY APPEAL, IT SHOULD AFFIRM THE ATTORNEY EXAMINER'S RULING

If the Commission does conclude that ELPC and One Energy have met the requirements for certification of an interlocutory appeal in Ohio Adm.Code 4901-1-15(B), it should affirm the Attorney Examiner's December 10th Entry. As explained above, ELPC and One Energy's argument for extending the discovery and objection deadlines rests on the false premise that Staff

withdrew the Report it filed on November 18, 2020. But Staff did no such thing. It simply filed a corrected version of the Report and notified the parties and municipalities of the correction.

Under the Commission’s procedural rules, a Staff report of investigation “shall be deemed to be admitted into evidence as of the time it is filed with the commission * * * .” Ohio Adm.Code 4901-1-28(A). The only way to keep the report out of evidence is if “the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case, or * * * any party[,]” moves to strike the report. *See id.* No one has moved to strike the November 18, 2020 version of the Staff Report. Accordingly, it has not been “withdrawn,” and the Commission should affirm that the discovery and objection deadlines in this proceeding must be calculated from the November 18, 2020 filing date.

IV. CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission decline to certify ELPC and One Energy’s interlocutory appeal or, in the alternative, affirm the Attorney Examiner’s December 10th Entry. At a bare minimum, even if the Commission deems the Staff Report filing date to be November 25, it should leave the discovery cutoff in place.

Respectfully submitted,

/s/ Steven T. Nourse

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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 *Memorandum* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 16th day of December 2020, via electronic transmission.

/s/ Steven T. Nourse

Steven T. Nourse

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From: [Caroline Cox](#)
To: [Steven T Nourse](#); [Rob Kelter](#)
Subject: [EXTERNAL] RE: AEP Ohio rate case (20-585)
Date: Monday, December 14, 2020 6:12:00 PM
Attachments: [image001.png](#)

This is an **EXTERNAL** email. **STOP. THINK** before you **CLICK** links or **OPEN** attachments. If suspicious please click the '**Report to Incidents**' button in Outlook or forward to incidents@aep.com from a mobile device.

Steve,

Thanks for the quick response. I just called and left you a brief message, but thank you for clarifying. Despite our evident technological failure with your email address, I am set up with the sharesite and have access to the non-confidential discovery and staff data requests.

Again, I appreciate the clarification, and we'll make sure your email is not mistyped in the future.

All the best,
Caroline

From: Steven T Nourse <stnourse@aep.com>
Sent: Monday, December 14, 2020 6:06 PM
To: Caroline Cox <ccox@elpc.org>; Rob Kelter <RKelter@elpc.org>
Subject: RE: AEP Ohio rate case (20-585)

Since you had an incorrect email address (and presumably received an error message for delivery failure), I just got this today from you for the first time. In any case, the discovery requests are late since the discovery cutoff was December 2 in this case and the Company will not respond further on that set of requests.

If you would like, however, I am happy to get you set up right away in the sharesite so you can access all of the non-confidential discovery and staff data requests/responses in the case – please advise.



STEVEN T NOURSE | VP-LEGAL
STNOURSE@AEP.COM | D:614.716.1608
1 RIVERSIDE PLAZA, COLUMBUS, OH 43215

From: Caroline Cox <ccox@elpc.org>
Sent: Monday, December 14, 2020 5:58 PM
To: Steven T Nourse <stnourse@aep.com>; Rob Kelter <RKelter@elpc.org>
Subject: [EXTERNAL] RE: AEP Ohio rate case (20-585)

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Hi Steve,

I just forwarded you the discovery we served that day. Please let me know if there's an issue.

Thanks,
Caroline

From: Steven T Nourse <stnourse@aep.com>
Sent: Monday, December 14, 2020 5:56 PM
To: Caroline Cox <ccox@elpc.org>; Rob Kelter <RKelter@elpc.org>
Subject: AEP Ohio rate case (20-585)
Importance: High

You claimed in a pleading filed today in this case that ELPC served discovery on AEP Ohio on December 9, 2020. I did not receive any such discovery request. Please prove that you sent me the alleged discovery.



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Case No(s). 20-0585-EL-AIR, 20-0586-EL-ATA, 20-0587-EL-AAM

Summary: Memorandum -OHIO POWER COMPANY'S MEMORANDUM IN OPPOSITION TO ONE ENERGY ENTERPRISES LLC AND THE ENVIRONMENTAL LAW AND POLICY CENTER'S JOINT INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE FULL COMMISSION AND APPLICATION FOR REVIEW electronically filed by Mr. Steven T Nourse on behalf of Ohio Power Company