

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

ENTRY

Entered in the Journal on December 18, 2020

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric light company as defined by R.C. 4905.03 and a public utility as defined by R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 2} In Case No. 16-1852-EL-SSO, et al., the Commission modified and approved a stipulation and recommendation (Stipulation) filed by AEP Ohio, Staff, and numerous other signatory parties, which authorized the Company to implement an electric security plan for the period of June 1, 2018, through May 31, 2024. Among the commitments in the Stipulation, AEP Ohio agreed to file a base distribution rate case by June 1, 2020. *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018) at ¶ 45.

{¶ 3} On April 29, 2020, in the above-captioned cases, AEP Ohio filed a pre-filing notice of its intent to file an application for approval of an increase in its electric distribution rates, tariff modifications, and changes in accounting methods.

{¶ 4} On June 8, 2020, AEP Ohio filed its application to increase its rates pursuant to R.C. 4909.18.¹ AEP Ohio filed direct testimony in support of its application on June 15, 2020.

{¶ 5} Pursuant to R.C. 4909.19, Staff conducted an investigation of the facts, exhibits, and matters relating to the application. On November 18, 2020, as corrected on November 25, 2020, Staff filed a written report of its investigation (Staff Report).

{¶ 6} By Entry dated November 23, 2020, the attorney examiner established a procedural schedule.

{¶ 7} On November 25, 2020, an unopposed joint motion to extend certain filing dates in the procedural schedule by 30 days, along with a request for expedited treatment, was filed by AEP Ohio, Staff, and numerous intervenors, including Interstate Gas Supply, Inc. (IGS) and Environmental Law & Policy Center (ELPC). The joint motion indicated that it was not intended to affect discovery deadlines or filing dates established by statute.

{¶ 8} On December 1, 2020, the attorney examiner issued an Entry that granted the requested extension to the extent set forth in the Entry and established a revised procedural schedule.

{¶ 9} On December 4, 2020, One Energy Enterprises LLC (One Energy) filed a motion to intervene in these cases. Subsequently, on December 7, 2020, One Energy filed a motion seeking clarification regarding the filing of the Staff Report. One Energy noted that the Staff Report was initially filed on November 18, 2020, and was amended on November 25, 2020, to correct certain clerical errors. One Energy asserted that the filing date must be clarified, as it determines both the discovery deadline under Ohio Adm.Code 4901-1-17(B)

¹ Due to the closure of the Commission's offices from June 1, 2020, through June 5, 2020, the application for a rate increase, which was submitted by AEP Ohio on June 1, 2020, was accepted for filing on June 8, 2020, and deemed timely filed in accordance with R.C. 1.14 and Ohio Adm.Code 4901-1-07 and 4901-1-13. *In re the Extension of Filing Dates for Pleadings and Other Papers Due to a Building Emergency*, Case No. 20-1132-AU-UNC, Entry (June 8, 2020).

and the deadline for objections to the Staff Report under R.C. 4909.19(C). Specifically, One Energy proposed that the December 2, 2020 service date of the amended version of the Staff Report be used for purposes of establishing the discovery deadline under Ohio Adm.Code 4901-1-17(B) and establishing the due date for filing objections to the Staff Report under R.C. 4909.19(C).

{¶ 10} On December 8, 2020, AEP Ohio filed a memorandum contra One Energy's motion. On December 9, 2020, IGS filed a memorandum in response to One Energy's motion.

{¶ 11} By Entry dated December 10, 2020, the attorney examiner clarified that the deadlines for discovery requests and objections to the Staff Report should be determined based on the Staff Report's initial filing date of November 18, 2020.

{¶ 12} On December 14, 2020, One Energy and ELPC filed a joint interlocutory appeal, request for certification to the Commission, and application for review regarding the clarification provided by the attorney examiner in the December 10, 2020 Entry. One Energy and ELPC argue that their joint interlocutory appeal raises a new and novel question and interpretation of law, because the Commission's precedent has not addressed whether a report of investigation filed by Staff that has been superseded and replaced in its entirety can serve as the basis for the computation of time under R.C. 4909.19(C). One Energy and ELPC assert that, although there is precedent pertaining to the Commission's discretion in establishing procedural schedules, the issue in this case constitutes a new question of law. Additionally, One Energy and ELPC contend that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice. One Energy and ELPC explain that, if the filing date of the amended version of the Staff Report is used to establish the discovery deadline, discovery requests were required to be served by December 9, 2020. Noting that they each served discovery requests on AEP Ohio on that date, One Energy and ELPC state that, given the findings in the December 10, 2020 Entry, the Company is not required to respond, and has refused to respond, to their discovery requests, which One

Energy and ELPC claim has impeded their ability to engage in discovery prior to hearing and violated their due process rights. One Energy and ELPC conclude that the Commission should find that the deadlines for discovery and objections must be based on the date of the amended version of the Staff Report, meaning that discovery requests were due by December 9, 2020, with objections due on December 28, 2020.

{¶ 13} In support of their request for review by the Commission, One Energy and ELPC argue that the attorney examiner's finding that November 18, 2020, is the correct filing date of the Staff Report ignores that potential intervenors like One Energy were entitled to rely on the representation in the amended version that it was intended to supersede and replace the original filing in its entirety. One Energy and ELPC add that the amended version also noted that objections were due "within 30 days of the date of the filing of this report." According to One Energy and ELPC, Staff effectively withdrew the original version of the Staff Report and the fact that the changes in the amended version are minor has no bearing on the legal question of whether a withdrawn report can serve as the basis for the computation of time under R.C. 4909.19(C). One Energy and ELPC also question the attorney examiner's finding that the December 1, 2020 Entry "definitively" established the procedural schedule for these proceedings, because that Entry did not specifically address the deadlines for discovery requests and objections, and instead merely noted that "[a]ll other deadlines set forth in the November 23, 2020 Entry remain unchanged." Finally, One Energy and ELPC claim that their request to reset the discovery and objection deadlines will not affect any party's ability to prepare for hearing or otherwise prejudice any party.

{¶ 14} On December 16, 2020, ELPC filed correspondence to clarify that all of AEP Ohio's attorneys except Steven T. Nourse, who is counsel of record, were served with ELPC's discovery requests on December 9, 2020. ELPC states that, upon discovery of a misspelling in Mr. Nourse's electronic mail address, ELPC corrected its error and successfully provided its discovery requests to Mr. Nourse on December 14, 2020.

{¶ 15} AEP Ohio filed a memorandum contra the joint interlocutory appeal on December 16, 2020. AEP Ohio argues that, despite the language used in Staff's cover letter accompanying the amended version of the Staff Report, the report was not actually replaced in its entirety or effectively withdrawn; rather, Staff simply corrected certain schedules by inserting three omitted values and did not alter the narrative portion of the report. AEP Ohio notes that Staff's "supersede and replace" language merely makes clear that the amended Staff Report is the version that should be used in these proceedings. AEP Ohio concludes that the docket reflects that the Staff Report was filed on November 18, 2020; that the determination of the deadlines for discovery and objections based on that date is a matter of simple math; and, therefore, that the December 10, 2020 Entry does not raise a new or novel question of interpretation and law, as One Energy and ELPC claim.

{¶ 16} Additionally, AEP Ohio contends that One Energy and ELPC have not asserted that they will be prejudiced by the December 18, 2020 deadline for filing objections. With respect to the discovery deadline, AEP Ohio argues that both One Energy and ELPC waited until after the December 2, 2020 deadline to serve their discovery requests on the Company and that, if One Energy and ELPC truly believed that they would be prejudiced without discovery responses, they would have been more diligent in their participation in these proceedings. AEP Ohio adds that, because ELPC's discovery requests did not reach the Company's counsel of record before the revised December 9, 2020 discovery deadline requested in the joint interlocutory appeal, ELPC's appeal is moot. Further, AEP Ohio argues that One Energy and ELPC have failed to provide their late-served discovery requests to the Commission for review; to discuss the topics of their discovery requests; to confirm that the information that they seek through their discovery requests is not already available through discovery responses provided to other parties; or to explain why their inability to obtain responses to their discovery requests would hamper their ability to prosecute these cases. According to AEP Ohio, the late-served discovery requests of One Energy and ELPC and their claim of prejudice also have no relation to the clerical errors that were corrected by Staff on November 25, 2020.

{¶ 17} AEP Ohio concludes that the joint interlocutory appeal should not be certified to the Commission and that, if it is nonetheless certified, the Commission should affirm the December 10, 2020 Entry. Additionally, if the Commission determines that the correct filing date of the Staff Report is November 25, 2020, AEP Ohio requests that, at a minimum, the discovery deadline remain unchanged, as the deadline should not be modified after it has already passed.

{¶ 18} On December 17, 2020, IGS filed correspondence supporting the joint interlocutory appeal. IGS states that it believes that the deadlines for discovery and objections should be set based on the correct and final version of the Staff Report, as it would be unfair and potentially harmful to allow statutory deadlines to begin based on a document that is later superseded in its entirety by another document. IGS adds that the amount and type of errors in the original document do not matter and making such a distinction will only lead to ambiguity and disputes in future cases.

{¶ 19} Ohio Adm.Code 4901-1-15 sets forth the Commission's requirements for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule.

{¶ 20} As One Energy and ELPC appear to acknowledge, the ruling that is the subject of their joint interlocutory appeal is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). One Energy and ELPC instead assert that their joint interlocutory appeal should be certified to the Commission pursuant to Ohio Adm.Code 4901-1-15(B). The rule provides that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling that 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, if the Commission

should ultimately reverse the ruling in question. Although both requirements must be met, One Energy and ELPC have failed to satisfy either provision.

{¶ 21} Initially, the attorney examiner finds that the joint interlocutory appeal does not present a new or novel question of interpretation, law, or policy.² As the Commission has noted on numerous prior occasions, the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and determining filing deadlines, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426-EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. The December 10, 2020 Entry was issued to provide clarity to One Energy and the parties regarding the procedural schedule, particularly with respect to the filing deadlines for discovery requests and objections to the Staff Report. The attorney examiner is not persuaded by One Energy's and ELPC's claim that they were entitled to rely on the amended Staff Report's representations that it was "intended to supersede and replace in its entirety" the original version and that objections were due "within 30 days of the date of the filing of this report."³ As noted above, Staff's role in these proceedings is to conduct an investigation of the facts, exhibits, and matters relating to AEP Ohio's application, in accordance with R.C. 4909.19. The Commission and its attorney

2 One Energy and ELPC do not allege that the interlocutory appeal is taken from a ruling that departs from past precedent.

3 As to the latter representation, the attorney examiner notes that it is merely carryover language from the initial version of the Staff Report. As noted in the December 10, 2020 Entry, the changes in the amended Staff Report were limited to three values in certain schedules; otherwise, the initial and amended versions, including the language referenced by One Energy and ELPC, are the same.

examiners, rather than Staff, render any necessary factual determinations and legal conclusions in these matters.

{¶ 22} Further, the attorney examiner finds that One Energy and ELPC have failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the December 10, 2020 Entry. One Energy and ELPC have not alleged that the December 18, 2020 deadline for objections to the Staff Report may result in any undue prejudice, and instead focused solely on their request that the discovery deadline be extended from December 2, 2020, to December 9, 2020. One Energy and ELPC, however, have had ample opportunity to diligently seek intervention and serve discovery requests after the filing of AEP Ohio's application on June 8, 2020, and to prepare for a hearing on a date that has already been extended at the request of most of the parties from February 2, 2021, to March 4, 2021. Further, One Energy and ELPC have not claimed that the changes in the amended version of the Staff Report have any bearing on their late-served discovery requests or offered any explanation as to how their inability to receive responses from AEP Ohio will impede their capacity to participate in these proceedings. Accordingly, the joint interlocutory appeal will not be certified to the Commission for review.

{¶ 23} Nonetheless, in order to ensure that all parties are thoroughly prepared for the hearing commencing on March 4, 2021, the attorney examiner finds that a brief extension of the discovery deadline from December 2, 2020, to December 9, 2020, should be granted pursuant to Ohio Adm.Code 4901-1-17(G). AEP Ohio is directed to respond to the discovery requests served by One Energy and ELPC, despite ELPC's delayed service on the Company's counsel of record, and to provide responses to any other outstanding discovery requests that were served by December 9, 2020. Discovery responses should be provided by January 7, 2021.

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That the request for certification of the joint interlocutory appeal to the Commission be denied. It is, further,

{¶ 26} ORDERED, That the discovery deadline be modified as set forth in Paragraph 23. It is, further,

{¶ 27} ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Sarah J. Parrot

By: Sarah J. Parrot
Attorney Examiner

MJA/mef

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

Summary: Attorney Examiner Entry denying the request for certification of the joint interlocutory appeal and modifying the discovery deadline. electronically filed by Ms. Mary E Fischer on behalf of Sarah J. Parrot, Attorney Examiner, Public Utilities Commission of Ohio