

**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. 20-0585-EL-AIR
In the Matter of the Application of Ohio Power Company For Tariff Approval)))	Case No. 20-0586-EL-ATA
In the Matter of the Application of Ohio Power Company For Approval to Change Accounting))))	Case No. 20-0587-EL-AAM

**JOINT INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION TO THE
FULL COMMISSION AND APPLICATION FOR REVIEW BY ENVIRONMENTAL
LAW & POLICY CENTER, INTERSTATE GAS SUPPLY, INC., OHIO
ENVIRONMENTAL COUNCIL, OHIO PARTNERS FOR AFFORDABLE ENERGY,
AND NATURAL RESOURCES DEFENSE COUNCIL**

The Environmental Law & Policy Center (“ELPC”), Interstate Gas Supply, Inc. (“IGS”), Ohio Environmental Council (“OEC”), Ohio Partners For Affordable Energy (“OPAE”), and Natural Resources Defense Council (“NRDC”) (collectively, the “Appellants”) submit this interlocutory appeal to the Public Utilities Commission of Ohio (“PUCO” or “Commission”) and respectfully request the Commission modify the procedural schedule established in the Attorney Examiners’ Entry filed on April 5, 2021 (“April 5 Entry”). The procedural schedule deprives the Appellants of their rights to discovery and due process.

This interlocutory appeal is in response to a decision made by the Attorney Examiners that is a departure from past precedent. A determination by the Commission is needed to prevent undue prejudice to the Appellants. The procedural schedule established in the April 5 Entry is insufficient for several reasons. It does not permit enough time for even one round of discovery

following testimony submitted in support of the Stipulation. It does not provide sufficient time for parties opposed to the Stipulation to prepare their testimony. At least one of the Parties has an outstanding public records request to PUCO Staff that may not be fulfilled within the accelerated procedural schedule established in this case. Further, despite discussion during the prehearing conference held on March 26, 2021 that at least one expert witness would be unavailable from May 15 through May 31, and objections by multiple parties, including but not limited to Appellants, that a hearing in mid-May was too soon to properly prepare to litigate the case, the hearing was scheduled to reconvene on May 12th, 2021.

Permitting the April 5 Entry to stand will cause the Appellants immediate and undue prejudice. If the present procedural schedule is followed, Appellants cannot properly represent their interests before the Commission. Failure to amend the April 5 Entry and establish a procedural schedule in line with a deadline for filing testimony that permits at least one round of discovery will have an immediate and prejudicial effect on the Appellants' due process rights and their ability to litigate this case, and is a departure from precedent.

The Appellants recommend providing an additional three weeks for opponent testimony, integrating a timeline for rebuttal testimony, and reconvening the hearing on June 7, 2021. The grounds supporting this Interlocutory Appeal are more fully stated in the accompanying Memorandum in Support.

April 6, 2021

Respectfully Submitted,

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In the matter of the Application of Ohio)	Case No. 20-0585-EL-AIR
Power Company For an increase in Electric)	
Distribution Rates)	
)	
In the Matter of the Application of Ohio)	Case No. 20-0586-EL-ATA
Power Company For Tariff Approval)	
)	
In the Matter of the Application of Ohio)	Case No. 20-0587-EL-AAM
Power Company For Approval to Change)	
Accounting)	
)	

I. INTRODUCTION AND STATEMENT OF FACTS

A. The effect of the procedural schedule established in the April 5 Entry.

(1) Testimony in support of the Stipulation is due by April 9, 2021.

(2) Testimony in opposition to the Stipulation and testimony supporting objections to the Staff Report is due by April 16, 2021.

(3) The evidentiary hearing will reconvene on May 12, 2021.

In addition, the Attorney Examiners shortened the response time for discovery to seven calendar days. *See* April 15 Entry, ¶ 17, attached.

The combined effect of the Attorney Examiner's procedural schedule and the shortened response time for discovery results in undue prejudice to the Appellants. If Appellants want to file discovery requests with any party following their testimony filed in support of the Stipulation so as to inform the Appellants' testimony in opposition to the Stipulation, Appellant(s) must file the discovery request immediately on April 9, 2021, the same day the testimony in support of the Stipulation will be filed. Assuming a party receives supporting testimony early enough in the day on April 9th so it can review it, draft discovery, and serve discovery before close of business on the 9th, a seven day response time means the discovery responses are not due until April 16, 2021--the same day testimony in opposition of the Stipulation is due. The end result is that there is no way for Appellants to do even one round of discovery after the stipulating parties file their testimony in support of the Stipulation before Appellants must file their own testimony in opposition. The de-facto elimination of post-testimony discovery for opposing parties severely limits their due process rights.

Further, IGS has a currently outstanding public records request pending with Staff that has yet to be fulfilled, and may not be within the time period set forth by the Attorney Examiners. Finally, Ohio Partners for Affordable Energy noted during the prehearing conference that its witness would be unavailable for one week beginning May 15th, but the hearing was set for Thursday, May 12th regardless, meaning its witness will likely need to be taken out of order

if AEP and parties supporting the stipulation have yet to finish presenting witnesses. Additional objections were made by multiple parties, including but not limited to Appellants, that a hearing in mid-May was too soon to properly prepare to litigate the case given the short timeline.

II. STANDARD OF REVIEW

O.A.C. 4901-1-15 establishes the standard of review for interlocutory appeal before the Commission:

...no party may take an interlocutory appeal from any ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an 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, should the commission ultimately reverse the ruling in question.

This appeal 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.” The April 5 Entry should be modified because the dates for opponent testimony unduly prejudice the Appellants because they do not allow sufficient time for discovery to occur. Without sufficient time for discovery, the Appellants do not have a proper opportunity to prosecute their interests in the present case.

III. LAW AND ARGUMENT

To satisfy the standard of review outlined in O.A.C. 4901-1-15, the Appellants must show how the April 5 Entry both departs from past precedent at the Commission and causes undue prejudice. The abbreviated discovery schedule, combined with the short timeframe for opposition testimony, and satisfies both requirements.

A. The April 5 Entry is a departure from past precedent.

The April 5 Entry provides a procedural schedule that deviates from the ordinary approach typically often provided in cases where parties oppose a Stipulation. In the April 5 Entry, the Attorney Examiners allowed seven days for discovery responses with only seven days between testimony in support of the Stipulation and testimony in opposition of the Stipulation. This shortened discovery response timeline coupled with the seven day window between testimony in support and in opposition of the Stipulation is a deviation from past precedent, which has permitted significantly more time between the filing of testimony in support and opposition to a Stipulation so that parties opposing the Stipulation were fully able to prepare their case.

For example, in Duke's recent rate case, the attorney examiners provided twenty-six days after testimony in support of the Stipulation was filed before intervenors needed to file their testimony (May 25, 2018 to June 20, 2018). *In re: App. of Duke Energy Ohio*, Case No. 17-32-EL-AIR, Entry at ¶ 11 (May 9, 2018). Discovery responses were required within seven days following service of the requests. *Id.* at ¶ 12. In Dayton Power & Light's rate case, Case No. 15-1830-EL-AIR, et al., the attorney examiners required testimony in support of the stipulation to be filed by June 26, 2018, with opposition testimony due July 16, 2018. *In re: App. of Dayton Power & Light to Increase Rates*, Case No. 15-1830-EL-AIR, et al., Entry at ¶ 8 (June 21, 2018). The discovery deadline was July 18, 2018, but parties were required to respond to any discovery request within five business days. *Id.*

In both Case Nos. 17-32-EL-AIR and 15-1830-EL-AIR, opponents to the Stipulation were provided with sufficient time to conduct discovery *following* testimony filed in support of

the Stipulation and *prior* to the due date for their own testimony in opposition. In particular, the procedural schedule in Case No. 15-1830-EL-AIR permitted an opponent to file a discovery request the day after testimony in support was filed and receive a response over two weeks before the opponent's testimony was due. In the present case, the April 5 Entry provides no time to prepare testimony in response to discovery responses.

In addition, the procedural schedule established in the April 5 Entry does not explicitly provide a schedule for rebuttal testimony in response to testimony submitted by Staff, the Applicant, or other supporters of the Stipulation. While the Appellants have yet to make decisions on whether they will draft rebuttal testimony prior to seeing testimony in support of the Stipulation, the Commission rules allow any party to "present rebuttal testimony in response to direct testimony or other evidence presented by any other party or by the commission staff." O.A.C. 4901-1-28(C).

B. The April 5 Entry unduly prejudices Appellants.

The April 5 Entry unduly prejudices the Appellants because of the unreasonable discovery and testimony timeline. This undue prejudice satisfies the second prong of the interlocutory appeal standard. While it is not unusual to shorten discovery response time to seven days in Commission proceedings, in this case the Attorney Examiners also made testimony in opposition to the Stipulation due seven days from the date for submission of testimony in support of the Stipulation. As a result, Appellants do not have the opportunity for a single round of discovery after the testimony in support of the Stipulation is filed. Assuming a party receives supporting testimony early enough in the day on April 9th so it can review it, draft discovery, and serve discovery before close of business on the 9th a seven day response time allows the recipient to delay response until April 16, 2021, which is the same day testimony in opposition of

the Stipulation is due. That is the best-case scenario. It is more likely supporting parties will not file their testimony until just before close of business on April 9th. In that scenario, opposing parties will be unable to serve any discovery regarding supporting testimony that would be received in time to be used in their opposition testimony. This amounts to a de-facto elimination of opposing parties' meaningful right to discovery.

Further, at least one party currently has an outstanding public records request that may not be fulfilled prior to the deadline for opposition testimony, which further illustrates the unreasonable timeline set by the Attorney Examiners: Testimony in support of the Stipulation is due just four days after the April 5 Entry setting the procedural schedule was made, and testimony in opposition to the Stipulation is due just seven days after that. In the prehearing conference discussing the schedule, Appellants objected to such a quick timeline for testimony and scheduling the hearing for mid-May because of the rush to prepare their cases in opposition to the Stipulation. While AEP argued that it needed a quick turnaround for the hearing because it was a rate case that needed to go into effect in June, Appellants pointed out that it was AEP that had taken over six months to negotiate the case and Appellants should not be prejudiced in preparing their cases in opposition to the Stipulation because of that.

Finally, Ohio Partners for Affordable Energy (OPAE) noted during the prehearing conference that its witness would be unavailable beginning on May 15th through May 31st. The hearing has been set for May 12th, which will likely require OPAE's witness to be taken out of order if AEP and signatory parties are not yet finished putting on their case in defense of the Stipulation. Appellants reiterate here their objections that a hearing in mid-May is too soon to properly prepare to litigate the case, and the procedural schedule set in the April 5 Entry will prejudice Appellants in their efforts to present their case.

IV. CONCLUSION

The April 5 Entry goes against Commission precedent for procedural schedules while simultaneously creating undue prejudice for the Appellants. For the reasons identified above, the Appellants respectfully ask the Commission to order the Attorney Examiners to modify the procedural schedule to alleviate the problems identified and permit Appellants appropriate time to present their case in opposition to the Stipulation. We recommend allowing three additional weeks for opponent testimony to the Stipulation, integrating a timeline for rebuttal testimony, and reconvening on June 7, 2021.

Respectfully Submitted,

April 6, 2021

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Joint Interlocutory Appeal, Request for Certification to the Full Commission and Application for Review* was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on April 6, 2021. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Miranda Leppla
Miranda Leppla

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 April 5, 2021

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or 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 March 9, 2020, the governor signed Executive Order 2020-01D (Executive Order), declaring a state of emergency in Ohio to protect the well-being of Ohioans from the dangerous effects of COVID-19. As described in the Executive Order, state agencies are required to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Additionally, all citizens are urged to heed the advice of the Department of Health regarding this public health emergency in order to protect their health and safety. The Executive Order

was effective immediately and will remain in effect until the COVID-19 emergency no longer exists. The Department of Health is making COVID-19 information, including information on preventative measures, available via the internet at coronavirus.ohio.gov/.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} On November 18, 2020, as amended on November 25, 2020, Staff filed a written report of its investigation (Staff Report). Pursuant to R.C. 4909.19 and Ohio Adm.Code 4901-1-28(B), objections to the Staff Report were due by December 18, 2020. Objections to the Staff Report were filed by various parties on December 18, 2020.

{¶ 7} By Entry issued on November 23, 2020, as amended by Entries issued on December 1, 2020, January 14, 2021, January 27, 2021, and February 1, 2021, the procedural schedule was established in these cases such that a public hearing was held on February 8, 2021, a prehearing conference and technology test session were held on February 11, 2021, and the evidentiary hearing commenced on March 4, 2021, all through Webex. Pursuant to the February 1, 2021 Entry, the due dates for direct expert testimony supporting objections to the Staff Report, motions to strike objections to the Staff Report, and memoranda contra motions to strike objections to the Staff Report were indefinitely extended at the request of the parties.

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).

{¶ 8} At the February 11, 2021 prehearing conference, the parties informed the attorney examiners that they were engaged in negotiations in an attempt to reach a settlement. AEP Ohio requested that, if a stipulation was not filed before March 4, 2021, the evidentiary hearing be called and continued. AEP Ohio also agreed to provide an update on the status of negotiations at that time.

{¶ 9} On March 4, 2021, the evidentiary hearing was called and the proceedings continued to permit the parties to engage in further settlement negotiations. At that time, AEP Ohio informed the attorney examiners that the Company had reached a settlement in principle with some of the parties and that they expected to file a stipulation by March 12, 2021.

{¶ 10} On March 12, 2021, a Joint Stipulation and Recommendation (Stipulation) was filed by AEP Ohio and 13 other parties to the proceedings. In a correspondence included with the Stipulation, AEP Ohio indicated that the parties had begun discussions in an effort to negotiate a separate agreement to address matters relating to the virtual hearing process, consistent with the directives discussed at the prehearing conference.

{¶ 11} By Entry issued March 17, 2021, a prehearing conference was scheduled for March 26, 2021, via Webex, for the purpose of updating the attorney examiners on the parties' progress regarding matters relating to the virtual hearing process. The prehearing conference was held as scheduled and the parties offered proposals for the virtual hearing process and proposed hearing dates.

{¶ 12} After considering the parties' proposals and concerns, the attorney examiner finds the procedural schedule shall be established as follows:

- (a) Testimony in support of the Stipulation on behalf of the Company, Staff, and intervenors, as well as AEP Ohio's testimony supporting objections to the Staff Report, is due by April 9, 2021.

- (b) Testimony in opposition to the Stipulation and testimony supporting objections to the Staff Report is due by April 16, 2021.
- (c) Motions to strike objections to the Staff Report are due by April 20, 2021.
- (d) Memoranda contra motions to strike objections to the Staff Report are due by April 27, 2021.
- (e) Staff testimony in response to objections to the Staff Report is due by May 4, 2021.

{¶ 13} A prehearing conference and technology test session will be held on May 10, 2021, at 10:00 a.m. Counsel for each of the parties shall ensure that their witnesses participate in the technology test session from the location to be utilized during the evidentiary hearing. Instructions for participation in the prehearing conference and technology test session, as well as the evidentiary hearing, will be sent by electronic mail to counsel for the parties.

{¶ 14} The evidentiary hearing will reconvene on May 12, 2021, at 10:00 a.m., via Webex. Interested individuals who wish to attend the hearing remotely can do so by accessing the Webex event by internet at <http://bit.ly/20-585-EVH2> and entering PUCO as the password or dialing 1-408-418-9388 and entering 129 946 5221 as the access code. Additional information is available by contacting the Commission's Consumer Call Center at 1-800-686-7826.

{¶ 15} To facilitate the evidentiary hearing by Webex, counsel shall observe the following procedures:

Exhibits

- (a) The parties shall serve any exhibits that they anticipate using during the day of hearing on counsel for all of the parties and the attorney examiners via e-mail by no later than noon EST the day prior to the day of hearing.

- (b) The parties will identify by e-mail, no later than 2 p.m. EST the day prior to the day of hearing, any documents in the Commission case dockets or previously admitted exhibits in these cases that they anticipate using at hearing the following day. Only documents not docketed in these cases are required to be exchanged as exhibits.
- (c) All exhibits shall be pre-marked and, unless agreed otherwise in advance with the consent of the attorney examiners, will be in PDF format. Counsel may send, but shall not discuss, any exhibits received from opposing counsel to their respective witnesses prior to the use of the exhibit at the hearing.
- (d) Nothing in the foregoing paragraphs shall prevent a party from presenting an exhibit that it has not previously identified, provided the party offers a reasonable explanation of why counsel did not disclose the exhibit in advance.
- (e) The parties supporting the Stipulation will make a good faith effort to coordinate regarding the compilation and service of exhibits. To the extent any of the parties supporting the Stipulation plan to use the same exhibit during hearing, those parties will make a good faith effort to submit only one version of the proposed exhibit for use at hearing. Similarly, the parties opposing the Stipulation will make a good faith effort to coordinate regarding the compilation and service of exhibits. To the extent any of the parties opposing the Stipulation plan to use the same exhibit during hearing, those parties will make a good faith effort to submit only one version of the proposed exhibit for use at hearing.

Witnesses

- (f) After hearing each day, each party shall e-mail all exhibits it offered and that were admitted into evidence or proffered that day to the court reporter and copy the attorney examiners. Parties shall not file hearing exhibits in the case dockets.

Deposition transcripts may be filed to the extent required under Ohio Adm.Code 4901-1-21(N).

- (g) While testifying, witnesses shall not communicate (electronically via text or instant messaging, or via any other method) with any other person including, but not limited to, their respective counsel or other witnesses. After cross-examination, witnesses may confer with counsel for the purpose of redirect.
- (h) While testifying, witnesses shall not use, or be asked to use electronic or digital media, including the internet, other than to access hearing exhibits or filings made in the case dockets.
- (i) During the prehearing conference on May 10, 2021, witnesses should be prepared to test their audio/visual equipment. Witnesses should be instructed to participate in this test in the same location and using the same equipment that they will use to provide testimony during the hearing.
- (j) Counsel for each of the parties shall ensure that each witness has access while testifying to all docketed documents and all exhibits exchanged for the hearing.
- (k) The parties will coordinate to develop a witness list, the order of testimony to be presented, and the date on which testimony is expected to be offered. The parties shall also provide estimates of the duration of their cross-examination for hearing scheduling purposes. The witness order proposal and cross-examination estimates shall be submitted to the attorney examiners as soon as possible prior to hearing but by no later than 4:00 p.m. on May 7, 2021. Parties will not be strictly held during hearing to their estimated cross-examination time provided pursuant to this paragraph.

{¶ 16} The attorney examiner directs that, in the event that any motion is made in these proceedings prior to the issuance of the Commission's order, any memorandum contra shall be filed within five business days after the service of such motion, and a reply

memorandum to any memorandum contra shall be filed within three business days. Parties shall provide service of pleadings via hand delivery, facsimile, or e-mail.

{¶ 17} In addition, the attorney examiner finds that the response time for discovery shall be shortened to seven calendar days. Unless otherwise agreed to by the parties, discovery requests and replies shall be served by hand delivery, facsimile, or e-mail. An attorney serving a discovery request shall attempt to contact, in advance, the attorney upon whom the discovery request will be served to advise him/her that a request will be forthcoming.

{¶ 18} It is, therefore,

{¶ 19} ORDERED, That the procedural schedule be established as set forth above in Paragraphs 12 through 14. It is, further,

{¶ 20} ORDERED, That all persons comply with the procedural directives as set forth above in Paragraphs 15 through 17. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Greta See

By: Greta See
Attorney Examiner

JRJ/hac

This foregoing document was electronically filed with the Public Utilities

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in

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

Summary: Attorney Examiner Entry ordering that the procedural schedule be established as set forth above in Paragraphs 12 through 14 and ordering that all persons comply with the procedural directives as set forth above in Paragraphs 15 through 17 electronically filed by Heather A Chilcote on behalf of Greta See, Attorney Examiner, Public Utilities Commission

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4/6/2021 1:27:15 PM

in

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

Summary: Motion Joint Interlocutory Appeal, Request for Certification to the Full Commission and Application for Review by Environmental Law & Policy Center, Interstate Gas Supply, Inc., Ohio Environmental Council, Ohio Partners for Affordable Energy, and Natural Resources Defense Council electronically filed by Ms. Miranda R Leppla on behalf of Environmental Law & Policy Center and Interstate Gas Supply, Inc. and Ohio Environmental Council and Ohio Partners for Affordable Energy and Natural Resources Defense Council