

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

I. BACKGROUND

After several months of negotiation, Ohio Power Company (“AEP Ohio” or the “Company”) filed a joint stipulation and recommendation (“Stipulation”) signed by the Company, Staff, the Office of the Ohio Consumers’ Counsel (“OCC”), and eleven other parties on March 12, 2021. Two weeks later, the Attorney Examiners held a prehearing conference to discuss the upcoming virtual hearing in these proceedings. At that conference, all of the parties to these proceedings had the opportunity to share their opinions regarding the appropriate timeframes for filing testimony in support of or opposition to the Stipulation, to complete pre-hearing discovery, and to begin the hearing in this matter.

After taking those competing opinions into consideration, Attorney Examiner See issued an Entry setting forth a procedural schedule on April 5, 2021. Among other deadlines, the April 5th Entry required the filing of testimony in support of the Stipulation by April 9th and the filing of testimony in opposition to the Stipulation by April 16th. It set the virtual hearing for this proceeding to begin on May 12, 2021. And it shortened the time to respond to discovery requests to seven calendar days.

Five of the intervenors who did not join the Stipulation -- 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, “Appellants”) – now assert that the procedural schedule is so unduly prejudicial that the Attorney Examiners should certify the procedural schedule to the full Commission and let the Commissioners reset the testimony deadlines and hearing date. This is ELPC’s second interlocutory appeal in this proceeding. The Attorney Examiners should decline to certify the interlocutory appeal and affirm the existing procedural schedule.

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, Appellants assert that the Commission’s procedural schedule represents “a departure from past precedent” and must be extended to avoid undue prejudice. (Interlocutory Appeal at 2.)

Appellants' complaints about the procedural schedule do not meet the Commission's requirements for certifying an appeal to the Commission. The fact that a procedural schedule does not provide the same amount of time to conduct discovery, submit testimony, or prepare for hearing as some earlier entry does not qualify as a "departure from past precedent" for purposes of Rule 4901-1-15. And none of the Appellants' complaints about the procedural schedule demonstrates "undue prejudice." For both of these reasons, as further discussed below, AEP Ohio asks the Attorney Examiners to decline to certify the procedural schedule for interlocutory appeal and affirm the timelines previously set in the April 5th Entry.

A. The April 5th Entry does not represent a departure from past precedent.

The April 5th Entry gives the parties greater power to conduct pre-hearing discovery, more time to file testimony opposing the Stipulation, and more time to prepare for hearing than either statute or the Commission's regulations require. The default deadline for serving discovery requests in a rate case is "no * * * later than fourteen days after the filing and mailing of the staff report of investigation * * * ." Ohio Adm.Code 4901-1-17(B). The Commission previously extended the discovery deadline to December 9, 2020. (*See* December 18, 2020 Entry at ¶ 23.) The April 5th Entry now allows the parties to continue serving discovery up to the week before hearing and shortens the response time to seven calendar days. The Commission's rules also do not require it to give parties any particular amount of time to file testimony in opposition to a written stipulation. *See* Ohio Adm.Code 4901-1-30(D). But the April 5th Entry gave Appellants seven days. And the Commission's governing statutes require the Commission to give the parties only "ten days' written notice" of the time and place to take testimony in a rate case. R.C. 4909.19(C). The April 5th Entry gave the parties five weeks' advance notice – over three times the statutory requirement. The procedural schedule set by the April 5th Entry is lawful and reasonable.

Appellants argue that the procedural schedule is still a departure from past precedent established in Case Nos. 17-32-EL-AIR and 15-1830-EL-AIR. (Interlocutory Appeal at 4-5.) However, those two proceedings did not establish a precedent for all subsequent rate case proceedings. “[E]stablishing a procedural schedule * * * is fully within the Commission’s broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.” *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 18-397-EL-RDR, Entry at ¶ 10 (July 2, 2019) (citing *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978), and *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982)).

Not surprisingly, procedural schedules vary from case to case. Appellants acknowledge this, arguing only the procedural schedule in this matter “deviates from the *ordinary* approach *typically* [or] *often* provided in cases where parties oppose a Stipulation.” (Interlocutory Appeal at 4 (emphasis added).) And while Appellants point to cases in which the parties opposing a stipulation had twenty or twenty-six days to file their testimony “after testimony in support of the Stipulation was filed” (Interlocutory Appeal at 4), they ignore a case in which the parties opposing the stipulation had eleven days to file their testimony after testimony supporting the stipulation was filed. *See In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Increase in Gas Rates*, Case Nos. 18-0298-GA-AIR *et al.*, Jan. 7, 2019 Transcript at 6:15-21 (Jan. 11, 2019). The timeline for filing testimony in this case is not significantly different from that one.

Appellants also suggest that the procedural schedule departs from past precedent because it “does not explicitly provide a schedule for rebuttal testimony * * * .” (Interlocutory Appeal at 5.) But they do not point to any prior case in which the Commission has established a deadline for rebuttal testimony in advance of hearing, much less an opinion holding that the failure to do so justifies an interlocutory appeal to the full Commission.

Commission precedent is clear that the Commission and its examiners have discretion to set procedural schedules that match the complexity of the issues in the case. After due consideration of the opposing parties’ arguments regarding the procedural schedule during the prehearing conference on March 26, the Attorney Examiners set a reasonable procedural schedule for this proceeding. The fact that the procedural schedule was different from the one Appellants proposed at the prehearing conference, and different from the procedural schedules set in some other Commission proceedings, does not make the procedural schedule a departure from past precedent. *See In the Matter of the Application of P.H. Glatfelter Co. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-EL-REN, Entry, ¶ 10 (Oct. 15, 2009) (holding that challenges to a procedural schedule do not meet the requirements for certifying interlocutory appeals, because “[s]etting procedural schedules * * * is a routine matter with which the Commission and its examiners have significant experience, and, thus, * * * is not a departure from past precedent.”).¹ Appellants have failed to satisfy the first prong of Ohio Adm.Code 4901-1-15(B) for certifying an interlocutory appeal and, therefore, their interlocutory appeal should be not be certified to the Commission.

¹ *See also In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2010 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4), Revised Code, and Section 4901:1-40-06 of the Ohio Administrative Code*, Case No. 11-411-EL-ACP, Entry, ¶ 7 (Mar. 16, 2011); *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, Entry, ¶ 9 (May 2, 2012).

B. The movants have not demonstrated that the April 5th Entry's deadlines will unduly prejudice them.

Appellants also have not met the second requirement for certification of an interlocutory appeal: undue prejudice. Appellants offer four reasons why they believe the procedural schedule is unduly prejudicial to them, none of which demonstrates actual prejudice.

Appellants' first concern is that, if they serve discovery requests regarding testimony filed in support of the Stipulation, they will not receive the responses until April 16th, effectively "eliminat[ing] post-testimony discovery for opposing parties * * * ." (Interlocutory Appeal at 2.) AEP Ohio and Staff filed their testimony in support of the Stipulation before 1:30 pm on April 9th, giving Appellants the rest of the afternoon to prepare discovery related to that testimony. If Appellants serve a manageable number of discovery requests on AEP Ohio on April 9th, AEP Ohio will endeavor to respond to those requests within six days, rather than seven, so that Appellants may consider the Company's responses in finalizing their testimony. Regardless, if Appellants serve discovery requests after April 9th and do not receive responses before April 16th, Appellants can still use those responses to cross-examine witnesses at hearing. Moreover, if the discovery responses raise new issues that Appellants do not cover in their direct testimony, Appellants can cover those issues on rebuttal. In addition, there is frequently an opportunity to stipulate to discovery responses as exhibits independent of witness testimony in evidentiary hearings before the Commission. As Appellants note, "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.'" (*Id.* (quoting Ohio Adm.Code 4901-1-28(C)).) Either way, Appellants retain the ability to conduct meaningful post-testimony under the April 5th Entry.

Appellants' second concern is that IGS "has an outstanding public records request," seeking information that the Appellants do not describe, "that may not be fulfilled" before the April 16th deadline for testimony opposing the Stipulation. (Interlocutory Appeal at 2.) Here, any potential prejudice to Appellants is too vague, and too uncertain, to justify an interlocutory appeal. Appellants do not explain what information IGS has requested; how it relates to this proceeding; when they requested it; whether IGS has even *asked* the Commission to respond before April 16th; whether the same information would be available through discovery (or some other process); or why IGS needs the requested information to prepare its testimony in opposition to the Stipulation. Without this information, Appellants have not shown that it would be unduly prejudicial to require IGS to submit testimony without responses to its record request. More to the point, a public records request is not a substitute for discovery or other procedural remedies in a Commission proceeding and is merely an independent, parallel and irrelevant development.

Appellants' third concern is that OPAE has a witness who will be unavailable in the latter half of May, necessitating that OPAEs's witness "be taken out of order." (*Id.* at 6.) Appellants offer no legal support for the proposition that being required to offer a witness "out of order" qualifies as "undue prejudice" warranting interlocutory review. That said, before the Appellants even filed their motion, counsel for AEP Ohio had already agreed to work with counsel for OPAE to allow its witness to take the stand on May 14, 2021. AEP Ohio is also working with ELPC to ensure that the Company witness it plans to subpoena will be available to testify that same day. Indeed, counsel for AEP Ohio and both ELPC and OPAE have reached an agreement on recommending to the Attorney Examiners that the anticipated OPAE witnesses appear at 9:00 a.m. on May 14 and the ELPC witness being called that morning immediately following the

OPAE witness. And AEP Ohio will continue to work cooperatively with the Appellants to ensure that their other witnesses can testify on dates when they are available.

Appellants' fourth concern is that beginning the hearing in mid-May "is too soon to properly prepare to litigate the case * * * ." (*Id.*) But Appellants do not explain why two months (the period of time between the filing of the Stipulation and the beginning of the hearing) is insufficient time to prepare for hearing in a case that has been pending since April 2020. As noted above, the Commission's governing statutes only require the Commission to give the parties "ten days' written notice" of the hearing in a rate case. R.C. 4909.19(C). Appellants received almost four times the notice required by Ohio law.

For all of these reasons, Appellants have not demonstrated that the procedural schedule for this matter is unduly prejudicial, and the Commission should not certify an interlocutory appeal.

III. CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission decline to certify Environmental Law & Policy Center, Interstate Gas Supply, Inc., Ohio

Environmental Council, Ohio Partners for Affordable Energy, and Natural Resources Defense Council's interlocutory appeal or, in the alternative, affirm the April 5th Entry.

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 12th day of April, 2021, via e-mail.

/s/ Steven T. Nourse

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Summary: Memorandum - Ohio Power Company's Memorandum in Opposition to Environmental Law & Policy Center, Interstate Gas Supply, Inc., Ohio Environmental Council, Ohio Partners for Affordable Energy, and Natural Resources Defense Council'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