

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE
POWER PURCHASE AGREEMENT RIDER
OF OHIO POWER COMPANY FOR 2018.

CASE NO. 18-1004-EL-RDR

IN THE MATTER OF THE REVIEW OF THE
POWER PURCHASE AGREEMENT RIDER
OF OHIO POWER COMPANY FOR 2019.

CASE NO. 18-1759-EL-RDR

ENTRY

Entered in the Journal on October 5, 2021

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric distribution utility as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 2} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 3} In Case No. 13-2385-EL-SSO, et al., the Commission modified and approved AEP Ohio's application for an ESP for the period of June 1, 2015, through May 31, 2018, pursuant to R.C. 4928.143. *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al. (*ESP 3 Case*), Opinion and Order (Feb. 25, 2015), Second Entry on Rehearing (May 28, 2015), Fourth Entry on Rehearing (Nov. 3, 2016), Seventh Entry on Rehearing (Apr. 5, 2017). Among other matters, the Commission authorized AEP Ohio to establish a placeholder Power Purchase Agreement (PPA) Rider and required AEP Ohio to justify any future request for cost recovery in a separate proceeding. *ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 20-22, 25-26.

{¶ 4} Subsequently, in Case No. 14-1693-EL-RDR, et al., the Commission modified and approved a stipulation and recommendation pertaining to AEP Ohio's proposal to

populate the placeholder PPA Rider approved in the *ESP 3 Case. In re Ohio Power Co.*, Case No. 14-1693-EL-RDR, et al. (*PPA Rider Case*), Opinion and Order (Mar. 31, 2016), Second Entry on Rehearing (Nov. 3, 2016), Fifth Entry on Rehearing (Apr. 5, 2017). The Commission directed that the PPA Rider be subject to an annual audit. *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 89-90.

{¶ 5} In Case No. 16-1852-EL-SSO, et al., the Commission modified and approved a stipulation and recommendation, which authorized AEP Ohio to implement an ESP for the period of June 1, 2018, through May 31, 2024, and provided for the continuation of the PPA Rider. *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018) at ¶ 53.

{¶ 6} By Entry dated January 15, 2020, the Commission directed Staff to issue a request for proposal for the audit services necessary to assist the Commission with the audit of AEP Ohio's PPA Rider for the period of January 1, 2018, through December 31, 2019.

{¶ 7} On March 11, 2020, the Commission selected London Economics International LLC (LEI) to conduct the prudency and performance audit of AEP Ohio's PPA Rider. Confidential and public versions of LEI's audit report were filed on September 16, 2020, in Case No. 18-1004-EL-RDR, and on September 17, 2020, in Case No. 18-1759-EL-RDR.

{¶ 8} By Entry issued on December 7, 2020, a procedural schedule was established, with an intervention deadline of January 15, 2021, and initial and reply comments to be filed by January 22, 2021, and February 12, 2021, respectively.

{¶ 9} On January 7, 2021, the Ohio Consumers' Counsel (OCC) filed a notice to take depositions and request for production of documents, seeking to depose on January 13, 2021, a person with knowledge and expertise regarding AEP Ohio's obligations under an agreement with the Ohio Valley Electric Corporation (OVEC), among other designated matters.

{¶ 10} On January 11, 2021, AEP Ohio filed a motion for protective order that would find that the Company need not produce witnesses and documents in response to OCC's notice. In the motion, AEP Ohio asserts that OCC failed to give the Company reasonable written notice of the deposition, as required by Ohio Adm.Code 4901-1-21(B), and also failed to comply with the 20-day response period under Ohio Adm.Code 4901-1-20(C) for a request for production of documents. AEP Ohio states that OCC's request afforded the Company only six days to respond. AEP Ohio also emphasizes that these proceedings have not been scheduled for a hearing, nor is a hearing contemplated, given that the established procedural process merely provides an opportunity to file comments and reply comments in response to LEI's audit report. Further, AEP Ohio states that, in addition to responding fully to OCC's four sets of written discovery, the Company offered to answer OCC's questions informally or in writing before the due date for comments. According to AEP Ohio, OCC replied that it would take the Company's suggestions under consideration and notify the Company of OCC's response. AEP Ohio adds that, without further discussion or response, OCC directly proceeded to file the January 7, 2021 notice to take depositions and request for production of documents. AEP Ohio notes that it remains willing to respond to informal discovery requests, as well as to respond to a reasonable number of written interrogatories in an expedited fashion, so that OCC may obtain answers to its questions before the comment deadline.

{¶ 11} By electronic mail sent on January 12, 2021, to counsel for the parties and the attorney examiners, OCC advised that the deposition planned for January 13, 2021, would not go forward on that date. OCC noted that it would file an amended notice with a new date and time.

{¶ 12} On January 14, 2021, OCC again filed a notice to take depositions and request for production of documents, seeking to conduct a deposition on January 21, 2021.

{¶ 13} By correspondence filed on January 15, 2021, AEP Ohio reiterated the assertions in its January 11, 2021 motion for protective order. Further, AEP Ohio stated that the Company does not withdraw its motion for protective order, as it continues to be applicable to the ongoing course of conduct of OCC to pursue depositions and to bypass the 20-day discovery deadline applicable to the request for production of documents.

{¶ 14} By Entry dated January 19, 2021, the attorney examiner noted that, pursuant to Ohio Adm.Code 4901-1-12, memoranda contra AEP Ohio's motion for protective order were due by January 26, 2021, with replies to any memoranda contra due on or before February 2, 2021. In order to prevent prejudice to any party or interested person, the attorney examiner, therefore, vacated the existing deadlines for the filing of initial and reply comments.

{¶ 15} On January 20, 2021, OCC filed a memorandum contra AEP Ohio's motion for protective order. OCC argues that AEP Ohio has not explained how a deposition would result in annoyance, embarrassment, oppression, or undue burden or expense, as required under Ohio Adm.Code 4901-1-24(A). OCC further argues that it is permitted, in accordance with R.C. 4903.082 and Ohio Adm.Code 4901-1-21, to take the testimony of any party by deposition on oral examination with respect to matters within the scope of discovery in these proceedings. OCC adds that it has the right to prepare its case using the discovery tools that it chooses and, therefore, AEP Ohio's contention that OCC should be directed to proceed with discovery through means other than a deposition lacks merit. Additionally, OCC asserts that the Commission's discovery rules do not prohibit the use of depositions in cases in which no hearing is scheduled. As to the timing of the notice to take depositions, OCC states that it contacted AEP Ohio several days before the notice was filed and that the Company failed to propose an alternate date or even to respond.

{¶ 16} On January 26, 2021, Ohio Manufacturers' Association Energy Group (OMAEG) filed a memorandum contra AEP Ohio's motion for protective order. OMAEG

contends that the motion is an unwarranted attempt to limit the scope of the Commission's review and to prevent the intervenors from thoroughly and adequately preparing their positions and arguments in these proceedings. OMAEG emphasizes that the Commission's rules do not require that a hearing be scheduled in a proceeding for the parties to engage in discovery. OMAEG also argues that AEP Ohio has failed to meet its burden under Ohio Adm.Code 4901-1-24(A) to show that a protective order is necessary to protect the Company from annoyance, embarrassment, oppression, or undue burden or expense. Noting that AEP Ohio had the option to cooperate with OCC to select a more convenient time for the noticed deposition, OMAEG urges the Commission to reject the Company's claim that OCC's notice to take depositions was inadequate.

{¶ 17} On January 27, 2021, AEP Ohio filed a reply in support of its motion. As to the request for production of documents, AEP Ohio notes that OCC and OMAEG appear to concede that OCC failed to comply with the 20-day response period required by the Commission's discovery rules. With regard to the notice to take depositions, AEP Ohio argues that, contrary to OCC's position, Ohio Adm.Code 4901-1-24(A)(3) permits the Commission to issue a protective order providing that discovery may be had only by a method of discovery other than that selected by the party seeking discovery. Further, AEP Ohio maintains that, in proceedings in which no statute requires a hearing, the Commission has the discretion to determine whether to allow discovery, depositions, and testimony. AEP Ohio reiterates that OCC should not be allowed to conduct any depositions unless and until the Commission schedules an evidentiary hearing in these proceedings. AEP Ohio adds that, if the deposition is ordered to occur, the Commission should avert OCC's apparent intention to file the deposition transcript and use it as evidence.

{¶ 18} On March 17, 2021, OCC and OMAEG filed a joint motion seeking to compel AEP Ohio to make witnesses available for a deposition and to produce the documents as requested by OCC on January 7, 2021. Noting that AEP Ohio's motion for protective order remains pending, OCC and OMAEG request that the motion be denied and that their joint

motion to compel be granted. OCC and OMAEG assert that they have satisfied the requirements in Ohio Adm.Code 4901-1-23(C) for a motion to compel. OCC and OMAEG also reiterate many of the arguments raised in their respective memoranda contra AEP Ohio's motion for protective order.

{¶ 19} On April 1, 2021, AEP Ohio filed a memorandum contra the joint motion to compel. Among other arguments, AEP Ohio asserts that the parties' positions have already been fully briefed through the earlier pleadings and that the joint motion to compel, therefore, serves no apparent purpose. For the reasons previously stated, AEP Ohio renews its request that the Commission grant the Company's motion for protective order.

{¶ 20} On April 8, 2021, OCC and OMAEG filed a joint reply in support of their motion to compel. OCC and OMAEG again request that the Commission reject AEP Ohio's attempt to resist a deposition.

{¶ 21} On July 8, 2021, OCC and OMAEG filed a joint motion seeking a consolidated hearing in these cases and a similar audit proceeding in Case No. 20-167-EL-RDR involving Duke Energy Ohio, Inc. (Duke).

{¶ 22} On July 23, 2021, AEP Ohio filed a memorandum contra the joint motion for a consolidated hearing. On July 26, 2021, Staff filed a motion for leave to file instanter a memorandum contra the joint motion, along with its proposed memorandum. AEP Ohio opposed the proposed consolidated hearing, while also asserting that the Commission should not schedule an evidentiary hearing until comments by Staff and intervenors are filed in these cases. Staff, for its part, opposed the request for a consolidated hearing, but did not appear to object to the proceedings for AEP Ohio and Duke being separately scheduled for hearing. On July 30, 2021, the Natural Resources Defense Council (NRDC) and Ohio Partners for Affordable Energy (OPAE) filed a joint reply in support of the motion for a consolidated hearing. On that same date, OCC and OMAEG also filed a joint reply

withdrawing their request for a consolidated hearing, as well as requesting that separate evidentiary hearings be scheduled in AEP Ohio's and Duke's proceedings.

{¶ 23} By Entry dated September 10, 2021, the attorney examiner granted motions to intervene in these proceedings filed by OCC, OMAEG, NRDC, OPAGE, The Kroger Co., and Ohio Energy Group.

{¶ 24} At this time, upon review of LEI's audit report and the various pleadings of the parties, the attorney examiner finds that the following procedural schedule should be established:

- (a) November 12, 2021 - Deadline for the filing of initial comments in response to LEI's audit report.
- (b) December 3, 2021 - Deadline for the filing of reply comments.
- (c) December 22, 2021 - Deadline for the filing of direct testimony on behalf of AEP Ohio.
- (d) December 29, 2021 - Deadline for the filing of direct testimony on behalf of Staff and intervenors.
- (e) An evidentiary hearing shall commence on January 12, 2022, to be held remotely, via Webex, at 10:00 a.m. Instructions for participation in the evidentiary hearing will be sent by electronic mail to counsel for the parties. Anyone interested in observing the evidentiary hearing as a non-party can access the hearing using the link <https://bit.ly/18-1004-EVH>, and entering the password PUCO, or by calling 1-408-418-9388, and entering access code 2342 522 4999.

{¶ 25} All exhibits intended to be used on direct-examination or cross-examination, with the exception of exhibits that have been filed in the dockets, should be provided to the parties and the attorney examiner by electronic mail no later than 10:00 a.m., on January 11,

2022. Counsel for the parties should ensure that their witnesses have access to all of the exhibits that have been filed in the dockets or exchanged among the parties.

{¶ 26} Counsel and witnesses that will speak during the hearing should join the Webex event through internet access and must have a computer or smart device with a camera, microphone, and speakers; an electronic mail address; and reliable internet service.

{¶ 27} With respect to AEP Ohio's motion for protective order, as filed on January 11, 2021, as well as the joint motion to compel filed by OCC and OMAEG on March 17, 2021, the attorney examiner finds that, with the scheduling of an evidentiary hearing through this Entry, the motions should be denied as moot, in light of the fact that no party disputes that a deposition is an appropriate discovery method in a proceeding in which a hearing has been scheduled. The attorney examiner directs AEP Ohio and OCC to work together to determine a mutually agreed upon date and time for a deposition of a person with knowledge and expertise regarding the Company's obligations under the OVEC agreement and the other matters identified in OCC's January 7, 2021, and January 14, 2021 notices to take depositions. In addition, OCC should ensure that AEP Ohio is afforded at least 20 days to respond to OCC's request for production of documents.

{¶ 28} It is, therefore,

{¶ 29} ORDERED, That the procedural schedule set forth in Paragraph 24 be adopted. It is, further,

{¶ 30} ORDERED, That the parties adhere to the procedures set forth in Paragraphs 25 through 27. It is, further,

{¶ 31} ORDERED, That AEP Ohio's motion for protective order, as filed on January 11, 2021, and the joint motion to compel filed by OCC and OMAEG on March 17, 2021, be denied as moot. It is, further,

{¶ 32} ORDERED, That a copy of this Entry be served upon all interested persons and parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Sarah J. Parrot

By: Sarah J. Parrot
Attorney Examiner

GAP/kck

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10/5/2021 3:39:36 PM

in

Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

Summary: Attorney Examiner Entry ordering that the procedural schedule set forth in Paragraph 24 be adopted; ordering that the parties adhere to the procedures set forth in Paragraphs 25 through 27 and ordering that AEP Ohio's motion for protective order, as filed on January 11, 2021, and the joint motion to compel filed by OCC and OMAEG on March 17, 2021, be denied as moot.
electronically filed by Kelli C. King on behalf of Sarah J. Parrot, Attorney Examiner, Public Utilities Commission of Ohio