

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 January 5, 2022

{¶ 1} Ohio Power Company d/b/a AEP Ohio (AEP Ohio or the Company) is an electric distribution utility (EDU) 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 EDU 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 dated January 19, 2021, the attorney examiner granted motions to intervene in these proceedings filed by the Ohio Consumers' Counsel (OCC) and Industrial Energy Users-Ohio. On September 10, 2021, the attorney examiner also granted motions for intervention filed by Ohio Energy Group, Ohio Manufacturers' Association Energy Group (OMAEG), The Kroger Co. (Kroger), Ohio Partners for Affordable Energy, and Natural Resources Defense Council.

{¶ 9} On October 5, 2021, the attorney examiner established a procedural schedule for these cases, including an evidentiary hearing to commence on January 12, 2022.

{¶ 10} On November 19, 2021, OCC filed a notice to take a deposition of a representative of AEP Ohio and a request for production of documents.

{¶ 11} On December 3, 2021, AEP Ohio filed a motion for protective order pursuant to Ohio Adm.Code 4901-1-24(A)(4) and 4901-1-12. In the motion, AEP Ohio stated that, although it had reached an agreement with OCC to produce the Company's hearing witnesses for deposition on December 23, 2021, the Company was unable to agree with OCC on the scope of the document requests and deposition topics. AEP Ohio, therefore, sought an order providing that the Company is not required to provide testimony or to produce documents relating to matters that fall outside the scope and purpose of these audit proceedings. AEP Ohio explained that, among other things, OCC seeks analyses related to the Ohio Valley Electric Corporation (OVEC) that may have been developed, and communications and discussions that may have occurred, after the audit period at issue.

{¶ 12} On December 20, 2021, memoranda contra AEP Ohio's motion for protective order were filed by OCC and jointly by Kroger and OMAEG. On December 22, 2021, AEP Ohio filed a reply in support of its motion for protective order.

{¶ 13} By Entry dated December 23, 2021, the attorney examiner found that AEP Ohio's motion for protective order should be granted, in part, and denied, in part. In the December 23, 2021 Entry, the attorney examiner noted that OCC seeks to obtain reports, forecasts, policies, and other information that pertains to 2020 and 2021, which is beyond the period under review in these proceedings. The attorney examiner determined that such information is not relevant to the subject matter of these cases or reasonably calculated to lead to the discovery of admissible evidence and, therefore, directed that the deposition and production of documents be limited to topics related to the period up to and including the end of the audit period, December 31, 2019.

{¶ 14} On December 28, 2021, as corrected on that same date, OCC filed an interlocutory appeal, request for certification to the Commission, and application for review

in response to the December 23, 2021 Entry. OCC argues that its interlocutory appeal is taken from a ruling that represents a departure from past precedent. OCC notes that, in Case No. 05-219-GA-GCR, the attorney examiner determined that OCC could obtain discovery of certain transactions going back ten years, despite the fact that the case involved a prudency review of gas costs for the two-year period ending October 31, 2005. *In re The Ohio Gas Co. d/b/a Dominion East Ohio*, Case No. 05-219-GA-GCR (*Dominion Audit Case*), Entry (July 28, 2006). OCC further notes that, in reaching the conclusion that the information requested in discovery was relevant to whether the costs during the audit period and also during prior audit periods were just and reasonable, the attorney examiner in the *Dominion Audit Case* referenced several other proceedings in which discovery of matters outside of the audit period was permitted. Based on the Entry in the *Dominion Audit Case*, OCC asserts that Commission precedent establishes that evidence from outside the audit period should be considered if it relates to whether the charges covered by the audit are just and reasonable. OCC adds that the Commission should consider “current evidence” of OVEC’s actual costs in relation to original projections, given that the Ohio Supreme Court has found that the Commission is entitled to modify a prior order, provided that it explains the change and the new regulatory course is permissible. *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 16. OCC also argues that, as the Court recently found, OCC should not be denied its right to discovery under R.C. 4903.082 and Ohio Adm.Code 4901-1-16 et seq. *In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630. OCC contends that it seeks discovery to show that the OVEC PPA will not at any point result in a bill credit for customers and, therefore, the PPA Rider is unjust and unreasonable. Additionally, OCC claims that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice. OCC maintains that, with the evidentiary hearing currently scheduled for January 12, 2022, an immediate ruling is needed to ensure that residential consumers are not unduly prejudiced by paying unjust and unreasonable charges, as well as to enable OCC to fully evaluate the OVEC charges and to provide

adequate information to the Commission in these proceedings. OCC concludes that the ruling precluding it from obtaining information from 2020 and 2021 should be reversed and that the Commission should order AEP Ohio to produce the requested witness and information by January 3, 2022.

{¶ 15} On January 3, 2022, AEP Ohio filed a memorandum opposing OCC's interlocutory appeal. In addressing whether the December 23, 2021 Entry represents a departure from past precedent, AEP Ohio responds that the ruling of the attorney examiner is entirely consistent with the *Dominion Audit Case* and other Commission precedent. With respect to the *Dominion Audit Case* in particular, AEP Ohio notes that the case makes clear that the Commission's practice is generally to only review matters during the audit period, although exceptions are made for consideration of clerical or financial errors or fraudulent transactions alleged to have occurred during prior audit periods. AEP Ohio asserts that OCC's request for 2020 and 2021 OVEC information does not fall within these exceptions, as OCC seeks a review of new information that arose after the audit period. With respect to Ohio Supreme Court precedent, AEP Ohio contends that the December 23, 2021 Entry, in denying OCC's request for discovery related to irrelevant matters, does not in any way depart from the Court's ruling in *In re FirstEnergy Advisors*, which, according to the Company, merely instructed the Commission to decide certain motions to compel discovery on the merits rather than mootness grounds. *In re FirstEnergy Advisors for Certification as a Competitive Retail Elec. Serv. Power Broker & Aggregator*, Slip Opinion No. 2021-Ohio-3630, ¶¶ 17, 41-42. As to OCC's contention that it has been prevented from comparing projections with actual costs, AEP Ohio argues that OCC is unlawfully attempting to challenge the Commission's approval of the inclusion of OVEC costs in the PPA Rider, which the Company notes was affirmed by the Ohio Supreme Court. AEP Ohio adds that any prospective consideration of this issue is moot, in light of the General Assembly's replacement of the PPA Rider with the Legacy Generation Resource Rider, which was implemented on January 1, 2020, pursuant to R.C. 4928.148. In addition, AEP Ohio maintains that OCC has not demonstrated that an immediate determination by the

Commission is required to avoid undue prejudice. AEP Ohio emphasizes that OCC does not explain how customers or OCC itself would be unduly prejudiced if the Commission waits to address OCC's objections to the December 23, 2021 Entry until a post-hearing order is issued. Noting that OCC claims that customers will be unduly prejudiced by having to continue to pay unjust and unreasonable OVEC charges, AEP Ohio asserts that, because charges are now assessed under the Legacy Generation Resource Rider rather than the PPA Rider, the Commission's review of the December 23, 2021 Entry would not impact current customer charges even if the Commission ultimately reversed the ruling in the Entry. AEP Ohio concludes that the interlocutory appeal should not be certified to the Commission and that, if it is nonetheless certified, the Commission should affirm the December 23, 2021 Entry.

{¶ 16} 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.

{¶ 17} As OCC appears to acknowledge, the ruling that is the subject of its interlocutory appeal is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). OCC instead asserts that its 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, OCC has failed to satisfy either provision.

{¶ 18} Initially, the attorney examiner finds that the interlocutory appeal is not taken from a ruling that represents a departure from past precedent.¹ OCC points to the *Dominion Audit Case* in support of its argument that the Commission has permitted parties to obtain information outside of the audit period where appropriate. However, as OCC acknowledges, the attorney examiner in the *Dominion Audit Case* permitted discovery of information dating back before the audit period in that case. More specifically, the attorney examiner found that certain information related to alleged fraudulent transactions was relevant and appropriate for discovery, where the transactions occurred prior to the audit period, were not previously revealed in prior audits, and may have impacted the costs under review in the current audit. *Dominion Audit Case*, Entry (July 28, 2006) at 5-6. The attorney examiner also noted that, aside from information pertaining to financial or clerical errors occurring in prior audit periods, the Commission's general practice is to limit its review to matters transpiring during the audit period. *Dominion Audit Case* at 5. In the December 23, 2021 Entry in the present proceedings, the attorney examiner determined that reports, forecasts, policies, and other information from 2020 and 2021 is not discoverable because such information relates to a period occurring after the audit term under review. Nothing in the December 23, 2021 Entry precluded OCC from seeking relevant OVEC-related information dating from before or during the audit period and, therefore, no part of the Entry is inconsistent with the ruling in the *Dominion Audit Case*, which did not involve or even address information dating after the audit period in that case. Additionally, although OCC appears to claim that the December 23, 2021 Entry is counter to Ohio Supreme Court precedent, OCC fails to fully explain its argument, and the cases cited by OCC have no bearing on the issue of whether discovery on matters occurring after the audit period is relevant and should be permitted.

¹ OCC does not allege that the interlocutory appeal presents a new or novel question of interpretation, law, or policy.

{¶ 19} Aside from its contention that the December 23, 2021 Entry departs from past precedent, OCC also asserts that it has been prevented from offering evidence of OVEC's actual costs – both in the current proceedings and in the *PPA Rider Case*. OCC's claims miss the mark. Although the attorney examiner found in the December 23, 2021 Entry that OVEC reports or other information from 2020 or 2021 is not relevant, the Entry does not preclude OCC from presenting evidence related to actual OVEC costs for 2018 and 2019. Further, the Commission fully considered, in the *PPA Rider Case*, OCC's arguments regarding the rider's costs. *PPA Rider Case*, Opinion and Order (Mar. 31, 2016) at 105, Second Entry on Rehearing (Nov. 3, 2016) at ¶¶ 271, 278-280. OCC appears to conflate the Commission's OVEC-related findings and conclusions in the *PPA Rider Case* with those pertaining to costs associated with potential future renewable energy projects.

{¶ 20} In addition, the attorney examiner finds that OCC has failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the December 23, 2021 Entry. OCC merely argues, without support, that an immediate ruling is necessary so that it can fully evaluate OVEC charges. Again, no part of the December 23, 2021 Entry prevented OCC from seeking OVEC-related information pertaining to the time before and during the current audit period and, thus, the Entry does not inhibit OCC's full evaluation of OVEC costs for 2018 and 2019 based on the information known at that time. Accordingly, the interlocutory appeal will not be certified to the Commission for review.

{¶ 21} It is, therefore,

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

{¶ 23} 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

NJW/mef

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

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