

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company for Authority to)	Case No. 23-23-EL-SSO
Establish a Standard Service Offer)	
Pursuant to §4928.143, Ohio Rev. Code,)	
in the Form of an Electric Security Plan.)	

In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 23-24-EL-AAM
Certain Accounting Authority)	

**OHIO POWER COMPANY’S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S
INTERLOCUTORY APPEAL, REQUEST FOR CERTIFICATION,
AND APPLICATION FOR REVIEW**

I. Introduction

Pursuant to Ohio Adm.Code 4901-1-15(D), Ohio Power Company (“AEP Ohio” or “Company”) submits this Memorandum Contra the March 22, 2023 interlocutory appeal filed by the Office of the Ohio Consumers’ Counsel (“OCC”). On January 6, 2023, AEP filed an application seeking approval of its fifth electric security plan (“ESP” or “ESP V”), which will commence upon the expiration of its current ESP IV (June 1, 2024) and continue through May 31, 2030. By Entry issued March 2, 2023, the Commission established the procedural schedule for this case, setting the evidentiary hearing for July 10, 2023. And in order to “provide customers of [AEP Ohio] a reasonable opportunity to provide public testimony in these proceedings,” on March 21, 2023, the Commission issued an Entry ordering that five local public hearings be conducted in-person on various dates between April 13, 2023 and May 23, 2023. (March 21st Entry at ¶ 6.)

On March 22, 2023, OCC filed an interlocutory appeal of the Commission’s March 21st Entry, asking the Commission to certify the appeal and modify or reverse the Entry. (OCC Interlocutory Appeal at 1.) In particular, OCC argues that the Entry should have added virtual

public hearings, in addition to the five in-person hearings scheduled; should have required webcasting of the in-person hearings; and should have scheduled the public hearings for a later date. (*Id.* at 2.) OCC, however, has not met the criteria necessary for certification of an interlocutory appeal. The Commission's March 21st Entry provides AEP Ohio customers with five, separate opportunities to publicly testify, and the Commission further offers any interested parties who cannot attend those public hearings the opportunity to submit written comments on the Commission's website. Because the Commission's March 21st Entry is consistent with past precedent and does not present any undue prejudice to interested parties, the Commission should not certify OCC's interlocutory appeal. And if the Commission does decide to certify the interlocutory appeal, it should deny OCC's request to reverse or modify the Entry.

II. The Commission Should Deny OCC's Motion for Interlocutory Appeal.

A. OCC is not entitled to take an immediate interlocutory appeal from the Attorney Examiner's March 21st Entry.

The Commission's rules permit a "party who is adversely affected []by" an Attorney Examiner's ruling on a procedural motion to "take an immediate interlocutory appeal" from that ruling under certain circumstances, including when the ruling "terminates a party's right to participate in a proceeding * * *." Ohio Adm.Code 4901-1-15(A)(2).¹ Because the March 21st Entry did not terminate either OCC's or the public's right to participate in this proceeding, OCC is not entitled to an immediate interlocutory appeal of the March 21st Entry. OCC appears to concede that it is not entitled to an immediate interlocutory appeal.

¹ None of the other three reasons for granting an immediate interlocutory appeal (granting a motion to compel, refusing to quash a subpoena, or requiring production of documents over privilege objection) are even arguably at issue in this request for interlocutory appeal.

B. OCC does not meet the criteria to certify an interlocutory appeal of the Attorney Examiner’s March 21st Entry.

Instead, OCC argues that its opposition to the March 21st Entry meets the criteria for certification of an interlocutory appeal to the full Commission. Under the Commission’s rules, the Legal Director, Deputy Legal Director, or Attorney Examiners may certify an interlocutory appeal to the Commission if they “find[] that the appeal [1] 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 [2] an immediate determination * * * 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.” (Emphasis added.) Ohio Adm.Code 4901-1-15(B); *see In re Application of Ohio Edison Co., et al. for Authority to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 08-935-EL-SSO, Entry at ¶ 7 (Sept. 30, 2008) (explaining that the requirements for certification are independent; “*both* requirements need to be met”). This appeal meets neither of the foregoing criteria.

1. The March 21st Entry does not present a new or novel question of interpretation, law, or policy.

OCC does not satisfy the first element of the test for certifying an interlocutory appeal under Ohio Adm.Code 4901-1-15(B), because it has not shown that this appeal “presents a new or novel question of interpretation, law, or policy.” It is well-established that the Commission and its attorney examiners have experience in establishing appropriate procedural schedules—including scheduling public hearings—in cases before the Commission. *In the Matter of the Determination of the Existence of Significantly Excessive Earnings For 2018 Under the Electric Security Plans of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 19-1338-EL-UNC, Entry, ¶ 11 (Oct. 29, 2020). Scheduling in-person public hearings in ESP cases, in particular, is neither new nor novel—indeed, in one of

the first ESP cases, the Commission found that OCC and other parties' complaints regarding the sufficiency of an entry scheduling public hearings did *not* present a new or novel question of law. *In the Matter of the Application of Duke Energy Ohio, Inc., for the Approval of an Electric Security Plan*, Case Nos. 08-920-EL-SSO, *et al.*, Entry, ¶ 14 (Oct. 1, 2008) (denying OCC's interlocutory appeal because "the Commission and its attorney examiners have had years of experience scheduling local public hearings in cases affecting rates"). Accordingly, OCC's interlocutory appeal fails to meet the first requirement for certification.

2. The March 21st Entry does not represent a departure from past precedent.

OCC has also not demonstrated that the Attorney Examiner's order scheduling local public hearings is contrary to precedent. OCC notes that the Commission set virtual public hearings in the Dayton Power and Light Company ("AES Ohio") and AEP Ohio's recent rate cases. (OCC Memo. Supp. Interlocutory Appeal at 2.) But the fact that the Commission allowed virtual public hearings in two past proceedings—both of which took place during the height of the COVID-19 pandemic—does not demonstrate that the March 21st Entry represents a "departure from past precedent." Rather, in the cases OCC cited, the Commission was responding to an unprecedented global pandemic. The March 21st Entry does not depart from past precedent, but instead is a "return to normalcy" that is to be expected as the country emerges from the COVID-19 pandemic.

On March 9, 2020, Governor DeWine signed Executive Order 2020-01D (the "2020 Executive Order"), declaring a state of emergency in Ohio and requiring state agencies to implement procedures consistent with recommendations from the Department of Health to prevent or alleviate the public health threat associated with COVID-19. Accordingly, the Commission scheduled a virtual public hearing in AEP Ohio's recent rate case. *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case Nos. 20-585-EL-

AIR, *et al.*, Entry, ¶ 9 (Jan. 14, 2021). Similarly, the Commission scheduled virtual public hearings in AES Ohio’s recent rate case “in light of the ever-evolving health and safety concerns engendered by the pandemic.” *In the Matter of the Application of the Dayton Power and Light Company to Increase its Rates for Electric Distribution*, Case Nos. 20-1651-EL-AIR, *et al.*, Entry, ¶ 15 (Sept. 27, 2021).

However, Governor DeWine has since rescinded the 2020 Executive Order (*see* Executive Order 2021-08D), and the Commission has returned to conducting local public hearings in person. For example, the Commission rejected a request from OCC to allow consumers to participate virtually in local public hearings in Columbia Gas’s recent rate case. *See In the Matter of the Application of Columbia Gas of Ohio, Inc. For Authority to Amend its Filed Tariffs to Increase the Rate and Charges For Gas Services and Related Matters*, Case No. 21-637-GA-AIR, Entry, ¶ 14 (Sept. 9, 2022). In denying OCC’s motion, the Commission noted that five local public hearings had already taken place and that most of the hearings had only garnered a few comments from local consumers or representatives. *Id.* The Commission further determined that live-streamed hearings were unnecessary because consumers were overwhelmingly participating by filing written comments, and explained that “[a]ppropriate equipment, IT troubleshooting, and even internet access for streaming may not be available at all venues.” *Id.* at fn. 1. And just a handful of months ago, in a November 21, 2022 Entry, the Commission set a single in-person local public hearing for AES Ohio’s currently pending fourth electric security plan. *In the Matter of the Application of the Dayton Power and Light company d/b/a AES Ohio for Approval of its Electric Security Plan*, Case No. 22-900-EL-SSO, Entry at ¶ (Nov. 21, 2022). Notably, OCC took no interlocutory appeal of this single in-person local public hearing in the exact same type of case. Therefore, the March 21st Entry does not depart from past precedent; on the contrary, the Attorney

Examiner's decision not to schedule virtual or live-streamed public hearings is consistent with the Commission's past and current practices.

OCC also has not argued that scheduling the local public hearings before discovery is completed and before the intervenors file their testimony (*see* OCC Memo Contra at 7) is contrary to precedent. Attorney examiners in other recent ESP cases have set procedural schedules similar to the one set here. *See, e.g., In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, *et al.*, Entry (Mar. 7, 2017) (scheduling four in-person public hearings to take place before the conclusion of discovery and intervenor testimony); *In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio For Approval of its Electric Security Plan*, Case Nos. 22-900-EL-SSO, Entry (Nov. 21, 2022) (scheduling in-person public hearings before the close of discovery and deadline for intervenor testimony). For this reason as well, OCC has not met the criteria for a discretionary interlocutory appeal.

3. No immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to OCC or the public.

Finally, OCC has not met the second, independent requirement for certification of an interlocutory appeal: undue prejudice absent an immediate determination. *See* Ohio Adm.Code 4901-1-15(B). Under Ohio Adm.Code 4901-1-15(B), the party requesting a discretionary interlocutory appeal must make “a showing that 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 were ultimately to reverse the ruling in question.” *In re the 2018 Long-Term Forecast Report of Ohio Power Co. and Related Matters*, Case Nos. 18-501-EL-FOR *et al.*, Entry ¶ 38 (Nov. 13, 2018).

OCC correctly notes that the “opportunity for consumers to be heard is particularly important.” (Memo. Supp. Interlocutory Appeal at 6.) But that is exactly why the Commission scheduled *five* public hearings in various locations throughout AEP Ohio’s service territory: to provide consumers an opportunity to interact directly with the Commission. OCC cites no evidence to suggest that adding two additional virtual hearings will meaningfully improve consumers’ ability to comment on this proceeding. And OCC acknowledges this fact, noting that “[c]onsumers do have other ways to express their opinion regarding the case,” such as “call[ing] the PUCO, writ[ing] the PUCO by mail, or submit[ing] comments on the PUCO’s website.” (*Id.* at 8.) Thus, OCC has failed to demonstrate undue prejudice absent an immediate determination by the Commission.

III. If the Commission Does Certify the Interlocutory Appeal, It Should Deny OCC’s Request to Modify the Attorney Examiner’s March 21st Entry.

If the Commission does decide to certify OCC’s interlocutory appeal (which it should not), it should deny OCC’s request to modify the March 21st Entry. In addition to requesting two, additional virtual hearings, OCC also asks the Commission to reschedule the local hearings until a later date, although OCC does not suggest dates for consideration. (OCC Interlocutory Appeal at 2.) Rescheduling the local public hearings would only act to unnecessarily delay this proceeding, without any cognizable benefit to the parties or justification for doing so. OCC claims that the delay will allow customers to know “more about the issues that other stakeholders * * * have in the case.” (*Id.* at 3.) But the public hearings scheduled in the March 21st Entry are timely and fit within the current procedural schedule. AEP Ohio filed its application and supporting testimony on January 6, 2023. The first public hearing is scheduled for April 13, 2023—more than three months later. March 21st Entry at ¶ 6. The last two public hearings are at the end of May. Three to four months is more than adequate time for interested persons to review and

comment upon AEP Ohio's application. OCC's requests are nothing more than a bid for delay without justification or good cause and would only serve to interfere with the Commission's obligation to issue an order within 275 days of the January 6, 2023 filing date. *See*, R.C. 4928.143(C)(1).

And attorney examiners in other recent ESP cases have set similar procedural schedules. *See, e.g., In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, *et al.*, Entry (Mar. 7, 2017) (scheduling four in-person public hearings to take place before the conclusion of discovery and intervenor testimony). *See also In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio For Approval of its Electric Security Plan*, Case Nos. 22-900-EL-SSO, Entry (Nov. 21, 2022) (scheduling in-person public hearings before the close of discovery and deadline for intervenor testimony). Therefore, there is no need to modify the March 21st Entry, as it would needlessly delay this proceeding.

The Supreme Court of Ohio has held that R.C. 4901.13 gives the Commission “‘broad discretion in the conduct of its hearings.’” *Weiss v. PUC*, 90 Ohio St.3d 15, 19, 2000-Ohio-5, 734 N.E.2d 775, quoting *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264 (1978). “[T]he commission has 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.” *Id.*, quoting *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212 (1982). Here, and in other ESP proceedings, the Commission and its attorney examiners have exercised that discretion to create separate and streamlined public hearings that allow members of the public to provide evidence and testimony, consistent with the Commission's published rules. And the

statute and rules leave the choice of the locations for those hearings, and the timing of those hearings, up to the Commission's discretion as well. *See* Ohio Adm.Code 4901-1-27(C) ("The presiding hearing officer shall permit members of the public that are not parties to the proceeding, the opportunity to offer testimony at the portion or session of the hearing designated for the taking of public testimony.") The public hearing schedule set forth in the March 21st Entry is consistent with the Commission's typical practice in ESP proceedings. Therefore, should the Commission decide to certify OCC's interlocutory appeal, it should affirm the schedule in the March 21st Entry.

IV. Conclusion

For the reasons set forth above, the Commission should deny OCC's request to certify an interlocutory appeal of the Attorney Examiner's March 21st Entry scheduling local public hearings. OCC's request does not meet the requirements for a discretionary interlocutory appeal under Ohio Adm.Code 4901-1-15(B) and the appeal otherwise lacks merit.

If the Commission should choose to certify the interlocutory appeal, it should deny the appeal and affirm the current local public hearing schedule. OCC's interlocutory appeal seeks to add unnecessary virtual public hearings and would needlessly delay this proceeding.

Respectfully submitted,

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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 3rd day of April 2023, via email.

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