

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 NO. 23-23-EL-SSO

IN THE MATTER OF THE APPLICATION OF
OHIO POWER COMPANY FOR APPROVAL
OF CERTAIN ACCOUNTING AUTHORITY.

CASE NO. 23-24-EL-AAM

ENTRY

Entered in the Journal on August 16, 2023

{¶ 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 mandates that an electric distribution utility shall provide to all 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 service. 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} On January 6, 2023, AEP Ohio filed an application that, if approved, would establish the Company's fifth ESP for a period to commence on June 1, 2024, and continue through May 31, 2030. AEP Ohio also filed an application for approval of certain accounting authority to implement aspects of the proposed ESP. In its application, AEP Ohio proposed a procedural schedule including that the hearing commence on July 10, 2023.

{¶ 4} A technical conference on AEP Ohio's ESP application was held on February 7, 2023.

{¶ 5} By Entry issued March 2, 2023, the attorney examiner set the procedural schedule for the Commission's consideration of AEP Ohio's ESP application and related matters and, among other things, established the following procedural dates: a prehearing conference on June 22, 2023; Staff testimony to be filed by June 30, 2023; and, the evidentiary hearing to commence on July 10, 2023.

{¶ 6} By Entries issued April 17, 2023, and May 30, 2023, the following parties were granted intervention in these cases: Ohio Energy Group, Armada Power, LLC, The Ohio Manufacturers' Association Energy Group (OMAEG), Citizens' Utility Board of Ohio, Ohio Partners for Affordable Energy (OPAE), Calpine Retail Holdings, LLC, Nationwide Energy Partners, Ohio Hospital Association, ChargePoint, Inc., Walmart Inc., Interstate Gas Supply, LLC, Environmental Law & Policy Center (ELPC), The Kroger Company (Kroger), One Energy Enterprises Inc. (One Energy), Ohio Environmental Council, Ohio Consumers' Counsel (OCC), Retail Energy Supply Association, Ohio Energy Leadership Council f.k.a. Industrial Energy Users-Ohio, Constellation Energy Generation, LLC and Constellation NewEnergy, Inc., Ohio Telecom Association, Ohio Cable Telecommunications Association, Northeast Ohio Public Energy Council, Enel North America, Inc., and Direct Energy Business Services LLC and Direct Energy Services LLC.

{¶ 7} On June 16, 2023, Staff filed a motion for continuance, and request for expedited consideration, to file Staff testimony on July 28, 2023 and to commence the hearing on August 15, 2023 to allow the parties to continue settlement discussions. On June 23, 2023, OPAE, ELPC, OMAEG, and Kroger filed a limited memorandum contra Staff's motion that did not object to a continuance of the procedural schedule but noted that these parties could have conflicts with the specific hearing date proposed by Staff.

{¶ 8} By Entry issued June 27, 2023, the attorney examiner granted Staff's motion for continuance and rescheduled the evidentiary hearing to commence on August 28, 2023. This Entry also scheduled a procedural/prehearing conference for August 10, 2023, at the Commission offices, and amended the deadline for filing Staff testimony to July 28, 2023.

{¶ 9} On July 12, 2023, Staff filed a second motion for an extension of the deadline for filing its testimony and a request for expedited consideration. In this motion and supporting memorandum, Staff requested that its deadline for filing testimony be extended to August 21, 2023, to allow Staff to adequately prepare and file testimony while also continuing productive settlement discussions. Over the objections of OCC, by Entry issued July 18, 2023, the attorney examiner granted Staff's motion for an extension of the deadline to file Staff testimony until August 18, 2023.

Motion to Establish a Reasonable Protective Agreement

{¶ 10} On July 31, 2023, One Energy filed a motion to establish a reasonable protective agreement. In its motion, One Energy argues that it has been unable to enter into a reasonable protective agreement with AEP Ohio that would facilitate One Energy obtaining and reviewing discovery responses that the Company has designated as confidential, competitively-sensitive confidential, and/or restricted access confidential (RAC). One Energy states that it offered to enter into a protective agreement with the Company but that the agreement proposed by AEP Ohio contains provisions that unreasonably preclude One Energy, its employees, and consultants from accessing information needed to evaluate AEP Ohio's application.

{¶ 11} One Energy takes issue with three provisions in paragraph 3 of the proposed protective agreement. First is a provision that prohibits all competitive retail electric service (CRES) employee-witnesses from viewing RAC information. One Energy argues that its expert witness in this case is Mr. Jereme Kent, the company's Chief Executive Officer, and the proposed protective agreement would preclude Mr. Kent from reviewing discovery

responses solely because he is an employee of One Energy. One Energy contends that this is simply a backhanded way for a utility to withhold information from another party's expert witness due to his or her status as an employee. Second, One Energy takes issue with a provision that allows a CRES employee to view competitively-sensitive confidential information only if the employee is not engaged in competitive pricing, sales, or marketing, or involved in other CRES-related business activities of One Energy. One Energy asserts that this language is overly broad, particularly because AEP Ohio interprets it to cover broker activities such as those performed by a subsidiary of One Energy. One Energy proposes modifying this language. Third, One Energy disagrees with a provision which requires it to give AEP Ohio notice of an individual who will view protected information, and which gives the Company the right to object to such an individual being granted access; ultimately, if there is an unresolved disagreement, the matter is to be presented to the attorney examiner for a ruling. One Energy views this as granting AEP Ohio unilateral control to hinder One Energy's efforts to meaningfully evaluate the Company's proposals and discovery responses. Further, One Energy believes that the proposed dispute resolution goes against the policy of striving to keep the Commission out of discovery disputes.

{¶ 12} On August 9, 2023, AEP Ohio filed a memorandum contra One Energy's motion to establish a reasonable protective agreement, responding that One Energy's motion should be denied and that the Commission should determine that the protective agreement proposed by AEP Ohio on July 19, 2023, is reasonable. As an initial matter, AEP Ohio highlights that One Energy is the only party in these proceedings to challenge AEP Ohio's protective agreement language. Further, after receiving feedback from One Energy, AEP Ohio states that it did modify its standard provisions in order to allow in-house counsel appearing in this matter to view RAC material.

{¶ 13} As to One Energy's first issue, AEP Ohio argues that the protective agreement should prohibit CRES employee-witnesses from viewing RAC material. AEP Ohio submits that allowing a CRES employee to view RAC material ("highly sensitive and

could cause significant damage to the producing party or other parties if made available to individuals that have influence or knowledge about the CRES-related activities of Intervenor”) would cause precisely the harm that the designation was created to prevent. AEP Ohio states that giving a CRES employee, working for a competitive entity, such highly confidential information is the same as giving the information directly to the entity itself. Whether the employee is a witness in this matter is irrelevant, according to AEP Ohio, as once that information is given to an employee it is impossible for such an employee-witness to disregard this information when making future decisions for One Energy’s competitive activities. AEP Ohio counters that if One Energy truly felt access to such information was vital for its witness, it could have presented an outside witness on these issues, as other parties in the case have done. AEP Ohio states that every other competitive entity or CRES representative in this case has agreed to the provisions One Energy disagrees with and entered into a protective agreement.

{¶ 14} As to One Energy’s second argument, AEP Ohio insists that the protective agreement should prohibit CRES employee-witnesses from viewing competitively sensitive material if they are involved with CRES-related activities. AEP Ohio’s reasoning is largely the same as that provided in response to the first argument – it would cause the harm which the protective agreement is intended to prevent. Further, AEP Ohio points out that the motion fails to identify how this information would even be relevant to the issues raised by One Energy in the case, as Mr. Kent has already filed his testimony. Finally, AEP Ohio states that broker activities are clearly within the definition of a competitive retail electric service under R.C. 4928.01(A)(27), that power brokers are registered CRES providers, and, therefore, One Energy’s desired distinction for its broker subsidiary is unwarranted.

{¶ 15} Finally, as to One Energy’s third argument, AEP Ohio responds that the dispute resolution procedure in its agreement is reasonable. AEP Ohio disagrees with One Energy’s characterization of this provision granting the Company unilateral veto power over individuals accessing competitively-sensitive or RAC material. AEP Ohio notes that

any objection it makes to an individual must be reasonable and that only if a dispute cannot be resolved will the matter be submitted to the attorney examiner for resolution. Because the attorney examiner will ultimately rule on any unresolved objection, AEP Ohio states that its power cannot be classified as unilateral.

{¶ 16} Having reviewed the motion and memorandum contra filed by the respective parties, the attorney examiner finds that One Energy's motion to establish a reasonable protective agreement should be denied. The attorney examiner agrees with AEP Ohio that the type of access which One Energy seeks for its employee-witness, in the case of RAC material, and for CRES-related employees for viewing competitively-sensitive material, is precisely what the protective agreement is intended to prevent. While Mr. Kent may be a witness in this proceeding, he is also the president of a CRES provider that actively competes in the marketplace. The attorney examiner finds AEP Ohio's representation that all other competitive intervenors have agreed to these provisions to be telling. Even with a protective agreement in place, it would be impossible for any individual to completely forget or disregard the type of information requested by One Energy in discovery. Further, Mr. Kent has already prefiled his direct testimony in this case. To the extent that review of the protected documents is needed for cross-examination purposes, AEP Ohio's revised agreement allows for counsel, whether in-house or outside, to view all levels of confidential information. With respect to the proposed objection process and dispute resolution in the agreement, the attorney examiner does not find this provision unreasonable either. It provides for "reasonable" objections to be made by AEP Ohio and ultimately for the attorney examiner to resolve disputes that cannot be worked out between the parties. While it is preferred to keep the Commission out of the discovery process, it is not uncommon for discovery matters that cannot be settled to be presented to the attorney examiner for determination.

{¶ 17} The attorney examiner finds, therefore, that the protective agreement proposed by AEP Ohio, attached to its memorandum contra as Exhibit A, imposes

reasonable limits on competitor employee-witnesses viewing highly sensitive and confidential data. The parties are free to explore other potential workarounds, but One Energy has not demonstrated that AEP Ohio's proposed provisions are unreasonable or the necessity for the attorney examiner to dictate any revisions to the agreement.

Motion for a Continuance

{¶ 18} On August 9, 2023, Staff filed a third motion for a continuance. In the motion, Staff requests that the prehearing conference, scheduled for August 10, 2023, the hearing, scheduled to start on August 28, 2023, and the deadline for Staff to file testimony be continued for two weeks. Staff states that, while substantial progress has been made on significant issues, a continuance is necessary for the parties to engage in further negotiations and finalize a stipulation.

{¶ 19} In light of Staff's motion, on August 9, 2023, the attorney examiner informed counsel for the parties that the prehearing conference scheduled for August 10, 2023, would be canceled and rescheduled at a later date.

{¶ 20} On August 10, 2023, OCC filed a memorandum contra Staff's motion for an extension to file testimony, until September 1, 2023. OCC responds that delaying Staff testimony for an additional two weeks will impede settlement discussions, not improve them, because other parties will not have a clear understanding of Staff's position. Further, OCC opposes the continuance of the prehearing conference to facilitate the opportunity for parties to address Staff's motion. Accordingly, OCC argues that Staff's request to continue the deadline for filing testimony and the August 10, 2023 prehearing should be denied.

{¶ 21} The attorney examiner finds Staff's motion for a continuance of the procedural schedule reasonable in light of the progress toward a settlement and continuing negotiations among the parties. In the event that negotiations are no longer productive and a stipulation has not been agreed to, the parties should promptly notify the attorney

examiner and advise as to mutually agreeable proposed dates on which to commence the evidentiary hearing. The procedural schedule shall be amended as follows:

- a. In the event that a stipulation has not been filed, Staff's testimony is due by September 8, 2023.
- b. The prehearing conference shall be rescheduled for September 11, 2023, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.
- c. Upon execution of a stipulation, the parties should file the stipulation on the docket and testimony in support of the stipulation, by any party, should be filed within three business days of the filing of the stipulation.
- d. Testimony in opposition to the stipulation should be filed within 10 business days of the filing of the stipulation.
- e. The evidentiary hearing shall be rescheduled to commence on October 10, 2023, at 10:00 a.m., at the offices of the Commission, Hearing Room 11-A, 180 East Broad Street, Columbus, Ohio.

{¶ 22} The attorney examiner reminds the parties, pursuant to the Entry issued May 30, 2023, at this stage of the proceedings with respect to any motion made 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, preferably, e-mail.

{¶ 23} It is, therefore,

{¶ 24} ORDERED, That One Energy's motion to establish a reasonable protective agreement be denied, as stated in Paragraphs 16 and 17. It is, further,

{¶ 25} ORDERED, That Staff's third motion for a continuance be granted in accordance with the terms of Paragraph 21. It is, further,

{¶ 26} ORDERED, That the parties observe the revised deadlines and instructions provided in Paragraph 21. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ David M. Hicks

By: David M. Hicks
Attorney Examiner

NJW/dr

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8/16/2023 4:34:45 PM

in

Case No(s). 23-0023-EL-SSO, 23-0024-EL-AAM

Summary: Attorney Examiner Entry denying One Energy's motion to establish a reasonable protective agreement, as stated in Paragraphs 16 and 17; granting Staff's third motion for a continuance in accordance with the terms of Paragraph 21; and directing that the parties observe the revised deadlines and instructions provided in Paragraph 21 electronically filed by Debbie S. Ryan on behalf of David M. Hicks, Attorney Examiner, Public Utilities Commission.