

BEFORE 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 Section)	Case No. 23-23-EL-SSO
4928.143, Revised Code, in the Form of an)	
Electric Security Plan)	

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

**AEP OHIO’S MEMORANDUM CONTRA
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL’S INTERLOCUTORY
APPEAL**

Under Ohio Administrative Code (“OAC”) 4901-1-15, Ohio Power Company (“AEP Ohio”) submits this Memorandum Contra the August 21, 2023 Interlocutory Appeal of the Office of the Ohio Consumers’ Counsel (“OCC”), which seeks certification of an interlocutory appeal of the Attorney Examiner’s August 16, 2023 Entry (“Entry”) insofar as it set forth a procedural schedule. For the following reasons, OCC’s interlocutory appeal should be dismissed or denied.

I. OCC’s Should be Dismissed or Denied Because it is Unreasonable and Failed to Establish that the Attorney Examiner Departed from Past Precedent.

The Commission should deny OCC’s interlocutory appeal because it is neither a departure from past precedent nor prejudicial and the very arguments that OCC raises to support its interlocutory appeal justify the dismissal and/or denial. Citing *In Re Suvon, L.L.C.*, OCC repeatedly argues that the Entry “den[ied] OCC’s (and parties’) discovery rights if a settlement is filed,” (OCC Appeal at 2-4) and that “any party opposing a settlement has a mere seven days to prepare testimony in opposition” which it deems to be “highly prejudicial.” (OCC Appeal at 2-

3)¹. Notably, although OCC alleges in its sub-heading that this presents a new or novel question of interpretation, law, or policy (OCC Appeal at 2), OCC never goes on to specifically identify how or why this is a new or novel issue; therefore, that assertion should be deemed abandoned and ignored. To support its request for an interlocutory appeal that the Entry “departs from past precedent” OCC relies, largely in part, upon the entry issued in the most recent electric security plan case of AES Ohio. Specifically, OCC argues that “[i]n AES Ohio’s recent application to establish an electric security plan, parties were permitted to conduct discovery until one week after a settlement was filed.” (OCC Appeal at 3, citing Case No. 22-900-EL-SSO, Entry (April 3, 2023) (“AES Ohio Scheduling Entry”) at 4). But the Attorney Examiner has provided a similar, if not more generous procedural schedule in this matter, which by OCC’s own description of the AES Ohio case, creates sufficient due process rights.

In AES Ohio Scheduling Entry, the Attorney Examiner set a specific discovery deadline of April 17, which turned out to be one week after the filing of the Stipulation (the specific filing date of the Stipulation was not known at the time of the Entry). (Id. at ¶ 13.) The AES Ohio Scheduling Entry also established a supporting testimony deadline of April 10 (the same day the stipulation was filed) and an opposing testimony deadline of April 17 (only seven calendar days from the time the stipulation was filed). (Id.) Interestingly, OCC did not file an interlocutory appeal of the AES Ohio scheduling entry; in fact, ***OCC cites it as a schedule that “allowed parties to investigate the settlement that differed from AES Ohio’s application.”*** (OCC Appeal at 3) (emphasis added). OCC did later file an expedited motion for extension of time to file testimony in opposition to the stipulation and a shortened discovery response deadline. Citing to the fact that “parties had been in settlement negotiations for some time,” and only after

¹ “OCC Appeal” refers to the “Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by Office of the Ohio Consumers’ Counsel” filed in this docket on August 21 2023.

concession by AES Ohio, the Attorney Examiner extended the opposing testimony date to April 21 (only ten calendar days from the time the stipulation was filed). (See Case No. 22-900-EL-SSO, Entry at ¶ 17 (April 17, 2023) (“AES Rescheduling Entry”)).

In this case, however, the Attorney Examiner did nothing to abridge the standard discovery rights that “discovery must be completed prior to the commence of the hearing.” Ohio Adm. Code 4901-1-17(A). Thus, OCC’s cite to *In Re Suvon, L.L.C.* is inapposite and the discovery rights in this matter are even more robust than the discovery rights that were explicitly limited to one week after the filing of the stipulation in the AES Ohio case. Moreover, any opposing parties will be afforded more time to file testimony than in the AES Ohio case; whereby, supporting testimony is not due until three business days after the settlement is filed and opposing testimony is not due until *ten business days* after supporting testimony. (Entry at ¶ 21). Thus, while OCC argues that it only has one week to prepare testimony in opposition (despite contradictorily arguing that this is not enough time while citing the same amount of time as sufficient in the AES case), opposing parties would in fact get up to two weeks to prepare opposing testimony. This is hardly prejudicial or a departure from past precedent that is merely a couple months old.

Moreover, much like the AES Ohio case, the parties have been engaged in settlement negotiations for quite some time – nearly three months, with over 10 “all parties” meetings that have systematically refined the issues in settlement. In fact, as OCC pointed out, Staff represented as far back as August 9 that, “substantial progress has been made on most of the significant issues in the case.” Thus, any party that opposes the stipulation (to the extent any parties end up opposing) will not be surprised or prejudiced as they have all been a part of a transparent and organic process and cannot “demonstrate a lack of due process or sufficient time

to present a case against the reasonableness of the Stipulation.” (AES Rescheduling Entry at ¶ 17). For these reasons the Commission should deny OCC’s interlocutory appeal.

To the extent the legal director, deputy legal director, attorney examiner, or presiding hearing officer is inclined to certify and/or the Commission is inclined grant OCC’s interlocutory appeal, the relief sought by OCC is unnecessary and prejudicial. OCC requests: (1) discovery until 14 days after the filing of testimony in support of settlement, (2) a discovery response time of five calendar days, and (3) testimony in opposition due five weeks after the filing of the settlement. (OCC Appeal at 3.) Not only is this timeline inconsistent with past precedent (and the reason why this interlocutory appeal should not be granted in the first place) it is an unreasonable amount of time. As an initial matter, OCC’s first request (for a discovery cutoff of 14 days prior to the hearing) is not inconsistent with the Entry and AEP Ohio supports this suggestion for clarity. However, a five-calendar-day turnaround time for discovery (when OCC is known for issuing large sets of discovery) could prove to be exceptionally burdensome and even turn into a three-business-day turnaround if served on a Friday. This is unnecessary when the hearing is not until mid-October. With a discovery cutoff of 14 days prior to the hearing, a 10-calendar-day turn around would be sufficient to ensure that OCC had any discovery in advance of the hearing. Moreover, a five-week deadline for testimony in opposition to the stipulation is unreasonably long under the circumstances and would likely unnecessarily delay the hearing in this case. OCC has cited no recent precedent to support such leisurely and prolonged deadline for opposing testimony. To the contrary, as previously discussed, the AES Ohio procedural schedule afforded the same or less time for opposing testimony.

II. Conclusion

For the foregoing reasons, OCC’s interlocutory appeal should not be certified or granted because it states no grounds on which to overturn the Attorney Examiner’s Entry.

Respectfully submitted,

/s/ Steven T. Nourse

Steven T. Nourse (0046705)

Counsel of Record

Michael J. Schuler (0082390)

American Electric Power Service Corporation

1 Riverside Plaza, 29th Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1608 (Nourse)

Telephone: (614) 716-2928 (Schuler)

Facsimile: (614) 716-2950

stnourse@aep.com

mjschuler@aep.com

Eric B. Gallon (0071465)

Porter Wright Morris & Arthur

Huntington Center

41 S. High Street Columbus, Ohio 43215

Telephone: (614) 227-2190

egallon@porterwright.com

Christopher L. Miller

Ice Miller LLP

250 West Street

Columbus, Ohio 43215

Telephone: (614) 462-2339

Fax: (614) 222-4707

christopher.miller@icemiller.com

Matthew S. McKenzie (0091875)

M.S. McKenzie Ltd.

P.O. Box 12075

Columbus, Ohio 43212

Telephone: (614) 592-6425

matthew@msmckenzieltld.com

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 was sent by, or on behalf of, the undersigned counsel to the following parties of record this 28th day of August 2023, via e-mail:

/s/Steven T. Nourse

Steven T. Nourse (0046705)

Email Service:

mpritchard@mcneeslaw.com;
awalke@mcneeslaw.com;
William.michael@occ.ohio.gov;
angela.obrien@occ.ohio.gov;
connor.semple@occ.ohio.gov;
Alana.Noward@occ.ohio.gov;
Bojko@carpenterlipps.com;
Easley@carpenterlipps.com;
rkelter@elpc.org;
emcconnell@elpc.org;
paul@carpenterlipps.com;
wilcox@carpenterlipps.com;
dproano@bakerlaw.com;
ahaque@bakerlaw.com;
eprouy@bakerlaw.com;
pwillison@bakerlaw.com;
ctavenor@theOEC.org;
knordstrom@theOEC.org;
mkurtz@BKLlawfirm.com;
kboehm@BKLlawfirm.com;
jkylercohn@BKLlawfirm.com;
Alex.Kronauer@walmart.com;
cgrundmann@spilmanlaw.com;
dwilliamson@spilmanlaw.com;
slee@spilmanlaw.com;

sean.mcglone@ohiohospitals.org;
dparram@brickergraydon.com;
rmains@brickergraydon.com;
jlaskey@norris-law.com;
rdove@keglerbrown.com;
nbobb@keglerbrown.com;
Evan.Betterton@igs.com;
mnugent@igsenergy.com;
Stacie.Cathcart@igs.com;
jlang@calfee.com;
dromig@armadapower.com;
trent@hubaydougherty.com;
brian.gibbs@nationwideenergypartners.com;
dborchers@brickergraydon.com;
KHerrnstein@brickergraydon.com;
ktreadway@oneenergylc.com;
jdunn@oneenergylc.com;
little@litohio.com;
hogan@litohio.com;
cynthia.brady@constellation.com;
jesse.rodriguez@constellation.com;
mjsettineri@vorys.com;
glpetrucci@vorys.com;
aasanyal@vorys.com;
Fdarr2019@gmail.com;
dstinson@bricker.com;
gkrassen@nopec.org;
cpirik@dickinsonwright.com;
todonnell@dickinsonwright.com;
kshimp@dickinsonwright.com;
werner.margard@ohioattorneygeneral.gov
ambrosia.wilson@OhioAGO.gov;
ashley.wnek@OhioAGO.gov

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

8/28/2023 5:56:26 PM

in

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

Summary: Memorandum Memmo Contra to OCC's Interlocutory Appeal
electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power Company.