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 September 18, 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, and 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.

{¶ 10} On July 31, 2023, One Energy filed a motion to establish a reasonable protective agreement. In its motion, One Energy argued 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 took issue with three particular provisions in paragraph three of AEP Ohio's proposed protective agreement: (a) a provision prohibiting all competitive retail electric service (CRES) employee-witnesses from viewing RAC information: (b) 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; and (c) a provision requiring One Energy to give AEP Ohio notice of an individual who will view protected information, which it asserts grants AEP Ohio virtual veto power over individuals to be granted access. One Energy stated 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. On August 9, 2023, AEP Ohio filed a memorandum contra One Energy's motion.

{¶ 11} On August 9, 2023, Staff filed a third motion for a continuance. In the motion, Staff requested 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 stated that, while substantial progress had been made on significant issues, a continuance was necessary for the parties to engage in further negotiations and finalize a stipulation. On August 10, 2023, OCC filed a memorandum contra Staff's motion, arguing that delaying Staff testimony would impede settlement negotiations.

{¶ 12} By Entry issued August 16, 2023 (the August 16 Entry), the attorney examiner denied One Energy's motion to establish a reasonable protective agreement. In addition, the attorney examiner granted Staff's motion for a continuance and established the following procedural schedule: a prehearing conference on September 11, 2023; in the event that a stipulation has not been filed, Staff testimony due by September 8, 2023; testimony supporting a stipulation due within three business days of the filing of the stipulation; testimony opposing the stipulation due within ten business days of the filing of the stipulation; and the evidentiary hearing to commence on October 10, 2023.

{¶ 13} 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. Ohio Adm.Code 4901-1-15(B) specifies 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.

{¶ 14} On August 21, 2023, OCC filed an interlocutory appeal of the August 16 Entry, requesting certification of an interlocutory appeal with respect to the procedural schedule established by the attorney examiner in that Entry. OCC argues the procedural schedule does not facilitate discovery by parties that may oppose any stipulation filed.

{¶ 15} Also on August 21, 2023, One Energy filed an interlocutory appeal of the attorney examiner's decision in the August 16 Entry to deny its motion to establish a reasonable protective agreement.

{¶ 16} On August 29, 2023, AEP Ohio filed separate memoranda contra of OCC's interlocutory appeal and One Energy's interlocutory appeal, respectively. Accompanying these memoranda was a motion for leave to file the memoranda contra out of time. As explained in the motion, AEP Ohio's memoranda were due on August 28, 2023, and AEP Ohio attempted to file them with the Commission on that date. However, support staff for AEP Ohio's counsel experienced technical difficulties with the Commission's document information system (DIS), and this delay resulted in the memoranda being filed approximately 30 minutes after the close of the Commission offices and filed the next day. An affidavit of AEP Ohio support staff detailing efforts made to file the memoranda contra in DIS is attached to the motion. AEP Ohio submits that filings less than a half hour past the close of Commission offices does not prejudice other parties in anyway. AEP Ohio, therefore, requests that the filings be accepted as timely. No memoranda contra AEP Ohio's motion for leave to file out of time were filed.

{¶ 17} With respect to AEP Ohio's motion for leave to file the memoranda contra out of time, the attorney examiner finds that the motion is reasonable and that the filings will be accepted as timely filed.

{¶ 18} On September 6, 2023, a joint stipulation and recommendation was filed.

OCC Interlocutory Appeal

{¶ 19} In its request for certification of its interlocutory appeal, OCC argues that the procedural schedule set forth in the August 16 Entry denies fair and due process to OCC, as the schedule does not permit additional discovery following the filing of a stipulation and has deadlines that are too short for opposing parties to file testimony. OCC states that a stipulation could include terms that differ from those in AEP Ohio's application and, thus, parties must be permitted to conduct additional discovery as to any settlement. OCC asserts that parties opposing a stipulation have only seven days after supporting testimony is filed to file their own testimony in opposition. In support of its argument, OCC cites an entry issued in a recent ESP case for AES Ohio, in which OCC claims that the parties were permitted to conduct discovery until one week after a settlement was filed (*See* Case No. 22-900-EL-SSO, et al., Entry (April 3, 2023) at ¶ 13). OCC proposes that additional discovery be permitted on any settlement until 14 days after the filing of supporting testimony; that discovery response time is reduced to five days; and that testimony opposing any settlement must be filed within five weeks of the filing of the stipulation. OCC states that an immediate determination on this appeal is needed to prevent undue prejudice.

{¶ 20} In its memorandum contra OCC's appeal, AEP Ohio responds that OCC failed to establish that the August 16 Entry departed from past precedent. AEP Ohio first points out that OCC's characterization of the procedural deadlines is incorrect – rather than the "mere seven days" repeatedly stressed by OCC, parties opposing a stipulation have seven business days after the filing of supporting testimony to file their own opposing testimony. Further, AEP Ohio states that the attorney examiner did nothing to abridge standard discovery rights in Commission proceedings and, in fact, the discovery rights permitted in this case are more robust than those in the *In Re Suvon, L.L.C.* case cited by

OCC.[1] With respect to OCC's reliance on the AES Ohio scheduling entry, AEP Ohio notes that the facts of that proceeding were markedly different than those in this case and that the deadlines for supporting and opposing testimony are actually stricter than those in the August 16 Entry – the former being due on the date the stipulation was filed and the latter within seven calendar (not business) days of the filing of the stipulation. AEP Ohio notes that the parties have been engaged in settlement discussions for nearly three months, with more than ten such meetings being "all parties" affairs. Further, based on Staff's repeated filings which mentioned "substantial progress" in settlement discussions, no party could be surprised by the progress or reaching of a settlement. AEP Ohio states that any party opposing a stipulation is not prejudiced, as they all have been participants in the settlement process and cannot demonstrate a lack of due process.

{¶ 21} The attorney examiner finds that OCC's interlocutory appeal does not present a new or novel question of law or policy or a departure from past precedent. As the Commission has noted on numerous prior occasions, the Commission and its attorney examiners have extensive experience with respect to establishing procedural schedules and determining filing deadlines, which are routine matters that do not involve a new or novel question of interpretation, law, or policy. *See, e.g., In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426- EL-SSO, et al., Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, et al., Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08-935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05-376-EL-UNC, Entry (May 10, 2005) at 2. As to OCC's claim that the

---

[1] *In re Application of Suvon, LLC,* 166 Ohio St.3d 519, 2021-Ohio-3630, 188 N.E.3d 140.

procedural schedule is a departure from past precedent, the attorney examiner notes that, even in the cases cited by OCC, the procedural schedules vary, likely based on a number of factors unique to those proceedings. The filing deadlines set in the August 16 Entry are more expansive than those in the cases relied upon by OCC in support of its appeal. Further, as AEP Ohio points out, OCC's filing mischaracterizes the amount of time permitted for it to file opposing testimony, failing to appreciate the distinction of 10 *business days* after the filing of any stipulation.

{¶ 22} The attorney examiner also 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 August 16 Entry. OCC has had ample time to conduct discovery and prepare for hearing and, in short, has not shown that the procedural schedule is unduly prejudicial or unreasonable under the circumstances of these proceedings. OCC has been involved in settlement discussions throughout the entire process and does not demonstrate a lack of due process or an inability to adequately prepare for hearing based on the course of those discussions and this proceeding. Accordingly, the attorney examiner finds that OCC's interlocutory appeal should not be certified for Commission review.

One Energy Interlocutory Appeal

{¶ 23} In its interlocutory appeal, One Energy asserts that permitting the August 16 Entry's ruling regarding its motion to establish a reasonable protective agreement to stand deprives One Energy of its rights to discovery and due process, thus resulting in immediate and undue prejudice. One Energy claims that its interlocutory appeal is justified under Ohio Adm.Code 4901-1-15(A) because it "sought a reasonable protective agreement" and the August 16 Entry denied the motion. One Energy avers that allowing the ruling to stand creates a dangerous precedent that could allow AEP Ohio to anoint itself a "discovery gatekeeper" in future proceedings. One Energy states that One Energy itself is not a CRES provider, but rather it is its subsidiaries that function as CRES providers. One Energy states that whether its witness in this case, Jereme Kent, is the president of any One Energy affiliate

is irrelevant to this issue. One Energy responds to AEP Ohio's earlier concerns about sharing information with "competitors" by pointing out that AEP Ohio is an electric distribution utility (EDU) that cannot engage in competitive retail electric services. One Energy states that the effect of the August 16 Entry is that intervening parties in these types of cases will be forced to hire third-party experts when they have in-house subject matter experts. Finally, One Energy states that the attorney examiner failed to adequately consider the points it raised in its reply in support of its motion, as the August 16 Entry was docketed shortly after the reply itself was filed, which results in undue prejudice.

{¶ 24} AEP Ohio in its memoranda contra first points out that One Energy makes no attempt to justify certifying its request for an interlocutory appeal under Ohio Adm.Code 4901-1-15(B). Instead, One Energy appears to rely solely on Ohio Adm.Code 4901-1-15(A), governing immediate interlocutory appeals as of right. However, AEP Ohio states that One Energy did not seek a "protective order," but rather requested Commission intervention to establish a "reasonable protective agreement." Thus, without demonstrating satisfaction of the criteria for certification of an interlocutory appeal under Ohio Adm.Code 4901-1-15(B), AEP Ohio concludes that One Energy's appeal can be dismissed. AEP Ohio states that One Energy's distinction that it is not a CRES provider, but rather its subsidiaries are CRES providers, is easily dismissed. AEP Ohio points out that one of the entities making up One Energy is a wholly-owned subsidiary (OE Retail Services LLC d/b/a One Energy Analytics) which is registered with the Commission as a CRES provider. AEP Ohio attaches to its memorandum portions of CRES provider applications submitted by One Energy Analytics, which state that OE Retail Services LLC "is a member-managed limited liability company and *managed by One Energy Enterprises, Inc.*, the sole member." Further, the application states that OE Retail Services LLC has no direct officers or directors, but that its parent, One Energy, is managed by Jereme Kent. (AEP Ohio Memo Contra at Attachment A, Ex. A-12 (emphasis added).) AEP Ohio agrees with the attorney examiner's reasoning in the August 16 Entry that even with a protective agreement in place, once confidential information is released, it is impossible to retake such knowledge from those that view it (August 16 Entry

at ¶ 16). According to AEP Ohio, One Energy does not even attempt to engage with this reasoning. Finally, AEP Ohio states that its status as an EDU does not negate the fact that AEP Ohio does possess information that CRES providers could use to gain an unfair competitive advantage. AEP Ohio argues that even if EDUs do not provide competitive electric retail service, they still possess information that could cause harm to EDUs themselves if it were disclosed without appropriate protections in place.

{¶ 25} AEP Ohio concludes its memorandum contra by dismissing One Energy's timing arguments as to how much consideration was given to its reply by asserting that the reply offered no new arguments not already made in the initial motion. AEP Ohio reiterates that all other competitive intervenors have agreed to the provisions at issue in AEP Ohio's protective agreement. Further, AEP Ohio again points out that Mr. Kent has already filed his testimony in this case and One Energy had made no demonstration as to how access to the confidential information at this date would change Mr. Kent's testimony.

{¶ 26} The attorney examiner finds that One Energy's interlocutory appeal does not fall under any of the enumerated categories of Ohio Adm.Code 4901-1-15(A) which entitle a party to an immediate interlocutory appeal as of right. One Energy's contention that the August 16 Entry denial of its motion to establish a reasonable protective agreement is akin to the denial of a motion for a protective order is misguided. As explained by AEP Ohio in its memorandum contra, a motion for a protective order would be filed by a party from whom discovery is sought, which is not the position of One Energy on this issue. One Energy makes no attempt to demonstrate satisfaction of the criteria for certification of an interlocutory appeal under Ohio Adm.Code 4901-1-15(B). Even if such an attempt was made, however, the arguments laid out in its filing fail to demonstrate that the appeal presents a new or novel question of law or policy or is a departure from past precedent. One Energy's distinctions between itself and its CRES subsidiary are unavailing, for the reasons communicated in the Entry and outlined by AEP Ohio in its memorandum contra (August 16 Entry at ¶ 16; AEP Ohio Memo Contra at 4-7). One Energy's wholly-owned

subsidiary, which has no officers or directors of its own, is managed by One Energy and, as AEP Ohio demonstrates, Mr. Kent is identified personally in OE Retail Services LLC's CRES application, highlighting Mr. Kent's vast experience in the electric industry. Thus, the August 16 Entry's reasoning as to One Energy employees, such as Mr. Kent, being unable to forget or disregard the type of sensitive information AEP Ohio seeks to protect remains sounds (August 16 Entry at ¶ 16). One Energy's arguments as to the timing between the filing of its reply in support and the issuance of the August 16 Entry are inconsequential, as nothing in the reply alters the sound reasoning for the denial outlined in the August 16 Entry. Accordingly, the attorney examiner finds that One Energy's interlocutory appeal should not be certified for Commission review.

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That OCC's request for certification of interlocutory appeal be denied in accordance with Paragraph 22. It is, further,

{¶ 29} ORDERED, That One Energy's request for certification of interlocutory appeal be denied in accordance with Paragraph 26. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Megan J. Addison

By: Megan J. Addison
Attorney Examiner

PAS/dr

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/18/2023 11:58:03 AM

in

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

Summary: Attorney Examiner Entry denying both the Ohio Consumers' Counsel, and One Energy Enterprises Inc.'s requests for certification of interlocutory appeal. electronically filed by Ms. Mary E. Fischer on behalf of Megan J. Addison, Attorney Examiner, Public Utilities Commission of Ohio.