

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Company, and The Toledo Edison Company) Case No. 14-1297-EL-SSO
for Authority to Provide for a Standard Service)
Offer Pursuant to R.C. 4928.143 in the Form of)
An Electric Security Plan)**

**REPLY MEMORANDUM IN SUPPORT OF INTERVENORS’
JOINT MOTION TO MODIFY DISCOVERY TIME LIMITS
AND AMEND THE PROCEDURAL SCHEDULE**

BY

**OHIO PARTNERS FOR AFFORDABLE ENERGY, OHIO HOSPITAL
ASSOCIATION, OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP,
THE OHIO CONSUMERS’ COUNSEL, DIRECT ENERGY SERVICES, LLC,
THE KROGER COMPANY, INTERSTATE GAS SUPPLY, INC and SIERRA
CLUB**

I. INTRODUCTION

In their Joint Motion, Intervenor¹ explained that shortening the discovery response time from 20 days to 10 days, and extending the deadline for intervenor testimony is necessary to ensure a thorough review of Ohio Edison Company, The Cleveland Electric Company and The Toledo Edison Company’s (collectively, “FirstEnergy” or the “Companies”) proposed electric security plan (“ESP”). FirstEnergy’s application package—totaling more than 1,100 pages and testimony from 17 witnesses—is voluminous and incredibly complex. The application (whose most

¹ The moving Intervenor^s are the Ohio Partners for Affordable Energy, Direct Energy Services, LLC, Interstate Gas Supply, Inc., Ohio Hospital Association, Ohio Manufacturers’ Association Energy Group, the Kroger Company, the Ohio Consumers’ Counsel, and Sierra Club. In addition, the Public Utilities Commission of Ohio Staff did not oppose the proposed modifications presented in Intervenor^s Motion.

crucial cost- and price-related information was redacted) discusses numerous technical topics and modeling results. Given the myriad technical issues raised by this ESP, and its far-reaching consequences for Ohio ratepayers, the Commission should adopt a procedural schedule that enables a thorough review of these issues.

In its Memorandum Contra, FirstEnergy avoids any mention of the length and complexity of its filing, or the ESP's financial consequences for the Companies' customers. Instead, FirstEnergy stakes its argument on a procedural order from an unrelated case, involving fewer witnesses, fewer technical issues, and smaller economic ramifications. FirstEnergy also claims that Intervenor's proposed schedule would pose problems for its participation in PJM's May 2015 Base Residual Auction. But FirstEnergy's timing preferences—which have no bearing on Intervenor's request for a ten-day discovery response time—should not trump the need for a comprehensive review of this ESP application. Because there are compelling reasons to grant this motion, and because FirstEnergy's objections are without merit, the Intervenor respectfully request that the Commission approve and implement the amended procedural schedule presented in their motion.

II. ARGUMENT

A. Reducing the Discovery Response Time From Twenty Days to Ten Days Would Permit A Thorough Discovery of the Issues.

As Intervenor explained in their Motion, a ten-day discovery response time is necessary to ensure that the parties have sufficient opportunity to thoroughly investigate

the numerous, complex issues raised by FirstEnergy's ESP application.² In the Duke Energy Ohio, Inc. ("Duke") ESP proceeding, the Commission found that a ten-day response time was appropriate.³ In this Case, the need for a ten-day response time is just as compelling as in the Duke matter.

This case is extraordinarily complex: FirstEnergy's 1,126-page application package—which includes testimony from 17 separate witnesses—is replete with discussions of technical issues such as future energy prices, the transmission effects of plant retirements, and the profitability of FirstEnergy Corporation's generating plants. Multiple witnesses have filed testimony citing to various economic and energy models.⁴ Other witnesses have opined on whether, and the extent to which, the proposed ESP is purportedly reasonable and may benefit customers.⁵ In the Duke case, by contrast, the utility presented only ten witnesses, and its filing did not include modeling results like those presented here. This proceeding's enormous scope and technical complexity, standing alone, is a sufficient reason for shortening the discovery response time.

Given the scope of the FirstEnergy proposal, the financial consequences of this case are substantial. For example, in Duke, the utility proposed a power purchase rider for its 9% share of the output from the two Ohio Valley Electric Corporation ("OVEC")

² See generally Motion and Memorandum in Support of Intervenors' Joint Motion to Modify Discovery Time Limits and Amend the Procedural Schedule at 8-9 (hereinafter, "Intervenor Motion").

³ See Case Nos. 14-841-EL-SSO, 14-842-EL-ATA, Order ¶ 6 (June 6, 2014).

⁴ See, e.g., Direct Testimony of Judah L. Rose at 34-37, 39, 44-60 ; Direct Testimony of Jason Lisowski at 2-5; Direct Testimony of Sarah Murley at 3-4, 5-6, 8-9.

⁵ See, e.g., Direct Testimony of Eileen M. Mikkelson at 27-31; Direct Testimony of Santino L. Fanelli at 6-10.

coal-fired plants.⁶ Here, by contrast, FirstEnergy has not only put the economics of the OVEC facilities—Clifty Creek and Kyger Creek plants—at issue, but it is also seeking a 15-year power purchase rider for the *entire output* of the 2,200 MW Sammis coal-fired plant and the 900 MW Davis-Besse nuclear facility.⁷ The significance of the economic implications in this proceeding provides even further reason why the parties should be given a sufficient opportunity for thorough discovery.

For similar reasons, FirstEnergy’s reliance on an order from the American Electric Power (“AEP”) case is misplaced.⁸ FirstEnergy’s ESP is very complex in comparison to that proposed by AEP. In the AEP Case, the Utility requested a rider that would affect its 19% share of the OVEC plants. Because of the economic consequences involved in the FirstEnergy case, the argument for a 10-day discovery response time is justified and should be granted by the Public Utilities Commission of Ohio (“Commission”). In any event, as FirstEnergy acknowledges,⁹ the discovery period here is 15 days shorter than it was in the AEP case.

FirstEnergy’s further claim, that a ten-day response time would be unduly burdensome,¹⁰ is similarly unpersuasive. In its ESP, FirstEnergy is seeking the Commission’s approval of a 15-year rider that would tie Ohio ratepayers to the economic fortunes of four large generating stations. To Intervenor’s knowledge, the Commission has never before approved a power purchase rider of such scope. Given the magnitude of

⁶ Case Nos. 14-841-EL-SSO, 14-842-EL-ATA, Application at 13-14.

⁷ The fact that FirstEnergy’s case involves a type of facility—nuclear—not at issue in either the AEP or Duke ESP cases adds further complexity to the review of the proposed ESP here.

⁸ FirstEnergy Memorandum Contra at 4-5.

⁹ Id. at 4-5.

¹⁰ Id. at 5.

this proposed plan, and its technical complexity, it is unsurprising that stakeholders wish to thoroughly investigate the issues during this proceeding. Being asked to provide timely and complete responses to these serious inquiries is hardly an unreasonable burden. FirstEnergy therefore has a duty to devote sufficient attorney and staff resources to the discovery process to ensure that it can respond to all reasonable discovery requests in a timely fashion. In any event, the number of represented parties in this case is comparable to the number involved in the Duke proceeding, where a ten-day response time was found to be appropriate.

When setting a procedural schedule, and establishing the discovery rules for a case, a paramount goal should be ensuring that the process will facilitate a thorough review of the issues. This not only furthers the statutory mandate that “[a]ll parties and intervenors shall be granted ample rights of discovery,”¹¹ it helps ensure that the ESP, “including its pricing and all other terms and conditions,”¹² has been thoroughly evaluated prior to a Commission decision. Here, a ten-day response time promotes these important state policies without unreasonably burdening the applicant. The Commission should therefore grant Intervenors’ request to establish a ten-day discovery response.¹³

¹¹ R.C. 4903.082.

¹² R.C. 4928.143(C)(1).

¹³ Alternatively, if the Commission retains the twenty-day discovery response time, the intervenor testimony deadline should be extended to occur five days after the last discovery response is received.

B. The Procedural Schedule Should be Amended so Intervenors can Make Full Use of the Discovery Period.

Intervenors have already explained the importance of extending the deadline for intervenor testimony.¹⁴ The requested 18-day extension is more than appropriate given the length and complexity of FirstEnergy's filing and the importance of these issues to Ohio customers. In this regard, it's worth noting the narrowness of this request: Intervenors are not seeking to extend the discovery cut-off or proposing a lengthy delay of this case. Rather, they simply request a modest extension of time so they can make full use of the discovery period that FirstEnergy originally proposed. By contrast, the current schedule effectively truncates the discovery period for Intervenors, because any discovery served after November 14 would not require a response until after intervenor testimony is due.

FirstEnergy brushes aside these concerns, claiming that there is "ample time" for discovery.¹⁵ However, FirstEnergy ignores both the complexity of this case and its ramifications for Ohio ratepayers. Last month, FirstEnergy filed a 1,126-page application, encompassing 17 separate witnesses, that discusses numerous technical issues, and which cites to extensive modeling results.¹⁶ And all of this information relates to a proposal that will affect Ohio ratepayers for the next 15 years. Given these circumstances, it is crucial that Intervenors be granted a modest extension so they can make full use of the discovery period.

¹⁴ See generally Intervenor Motion at 9-12.

¹⁵ FirstEnergy Memorandum Contra at 6.

¹⁶ See *supra* at 3-4.

FirstEnergy claims that discovery responses served after the submission of intervenor testimony are nonetheless “valuable” because they can be used at depositions or hearings.¹⁷ But to make full use of FirstEnergy’s discovery responses, Intervenors and their experts must be given a chance to review those responses, and to address them in their testimony. This is particularly important for the latter stages of the discovery process, where the parties are submitting follow-up discovery requests. Such requests generally focus on the most important, technically challenging issues, and they help narrow the factual disputes that must be addressed in testimony and at the evidentiary hearing. Denying Intervenors’ experts the opportunity to review *all* of the information produced through discovery would not only prejudice Intervenors, it would hamper this Commission’s and the public’s review of the ESP. Both the Commission and Ohio ratepayers will benefit from a schedule that permits Intervenors’ experts to submit testimony based on the complete record, rather than a condensed version that might lack critical information.

Extending the due date for intervenor testimony is also appropriate given the redactions made to FirstEnergy’s ESP application.¹⁸ Although the redactions consist of relatively short excerpts, they encompass some of the most crucial information in the application, including market energy price projections and cost estimates that FirstEnergy used in developing its proposal.¹⁹ Simply put, the parties will not have the opportunity to fully evaluate the ESP without the complete, unredacted application.

¹⁷ FirstEnergy Memorandum Contra at 6.

¹⁸ See Intervenor Motion at 11 & n.8.

¹⁹ See, e.g., Rose Direct at 5-6, 36, 38, 40-42, 46-50, 56, 60-62, 87, 89; Lisowski Direct, Att. JIL-1 to -3.

Moreover, although the parties have been working to execute protective agreements, negotiating such an agreement takes time.²⁰ And as long as those negotiations are ongoing, the Intervenors lack access to some of the most important parts of the application. This impedes Intervenors' ability to review and conduct discovery on the proposed ESP.²¹

Finally, FirstEnergy urges the Commission to deny this motion because an extension would "run up against" the statutory deadline and impede FirstEnergy's participation in the May 2015 PJM Base Residual Auction.²² Neither contention has merit. Because the ESP application was filed on August 4, the 275-day statutory deadline is May 5, 2015.²³ If, as Intervenors have proposed, the evidentiary hearing were to begin on February 10, there would still be ample time for post-hearing briefing, and for the Commission to make a thorough, reasoned decision. Moreover, even if the Commission were to rule on the last possible date, that would still be nearly a week before the start of the Base Residual Auction. That may not be as much time as FirstEnergy would prefer, but it would still enable FirstEnergy to participate in the auction with the benefit of this Commission's ruling.

²⁰ To take one example, on September 11, 2014, counsel for Sierra Club proposed some edits to a draft protective agreement that FirstEnergy had sent the day before. It took 12 days for FirstEnergy to respond to these proposed edits. Although it is understandable that negotiations can take time, even a brief delay is problematic here, where the discovery cut-off is only nine weeks away.

²¹ FirstEnergy criticizes Intervenors for proposing a schedule that would permit more time for settlement negotiations. Memorandum Contra at 7-8. Intervenors believe that in this proceeding, where there are several separately represented parties, and where FirstEnergy is seeking approval of a rider that could extend for 15 years, it is not unreasonable to adopt a schedule that permits a few more weeks for settlement negotiations.

²² FirstEnergy Memorandum Contra at 8.

²³ See R.C. 4928.143(C)(1).

Nor should the timeframe of this proceeding be governed by the date that is most convenient for FirstEnergy. The Companies are requesting that the Commission rule by April 8, 2015—nearly a month before the statutory deadline. This unnecessarily truncates the Commission’s review, while impeding other parties’ efforts to thoroughly investigate FirstEnergy’s application. Moreover, FirstEnergy’s timing concern is largely a problem of its own making. If FirstEnergy had wanted to guarantee a decision by April 8, it should have filed its ESP application months earlier. FirstEnergy should not be rewarded via diminished scrutiny of its proposal for its own delay, especially when the price of that delay could be an incomplete review of the ESP application. Because a modest scheduling extension would ensure a more thorough review of the issues, the Commission should grant Intervenors’ request that their testimony be due on December 22, 2014.

III. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in their original motion, Intervenors respectfully request that the discovery response period be shortened to ten days and the procedural schedule be amended to permit full use of the discovery period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Reply to Memorandum Contra Joint Motion to Modify Discovery Time Limits and Amend the Procedural Schedule* has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on September 29, 2014.

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