BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA SIERRA CLUB'S MOTIONS TO AMEND PROCEDURAL SCHEDULE AND TO PERMIT LIMITED DISCOVERY

I. INTRODUCTION

Not content with responses to over 3,200 discovery requests, two weeks' worth of depositions and multiple extensions of the hearing, Sierra Club seeks more time and more discovery. Enough is enough.

The excuses proffered for further delay and further discovery are wrong at every turn. Sierra Club's main complaint seems to be that Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "the Companies") had the audacity actually to comply with the March 23 Entry in this case; i.e., that the Companies provided the Commission with a detailed explanation of how the Economic Stability Plan: (a) supports the continued operation of economic generation; (b) supports improved reliability of electric service to customers in Ohio; (c) paves the way for power that complies with current and contemplated environmental requirements; and (d) avoids steep long term costs for customers (from $1.7 billion to $4.1 billion). That the Companies would make such a showing shouldn't be surprising given the Companies' filings to date and the requirements of the Entry. That Sierra

Club is surprised by such a filing is of no moment and certainly isn't a reason to extend the date for the filing of intervenor testimony or to give intervenors yet another bite at the discovery apple.

Further, the proposed amendment to the procedural schedule would put the Companies at an additional distinct disadvantage.[1] Several intervenors have already delayed giving the Companies access to their witnesses for depositions until the final date for the filing of any supplemental testimony. Thus, there is already a long list of depositions that need to be taken. Given that it is likely that intervenor witnesses who are already deposed may file additional testimony or that there may be additional witnesses, the proposed amendment to the procedural schedule would effectively give the Companies only two weeks or so to take depositions of opposing witnesses.

Sierra Club's motion seeking more discovery fares no better. Essentially, Sierra Club complains that it is being placed in the position that the Companies and other similarly situated parties have had to deal with in numerous cases, i.e., not having written discovery after opposing testimony is filed. There is no right to additional written discovery simply because the Companies' have filed testimony. Sierra Club should have sought – and did seek -- whatever discovery that it sought fit to obtain already. Indeed, as the Companies and FirstEnergy Solutions Corp. ("FES") demonstrated in recent filings related to pending discovery motions, Sierra Club's discovery was overly broad.[2] Nevertheless, the Companies' supplemental testimony thoroughly addressed the vast amount of relevant discovery. To the extent that

[1] The Companies already lost a week of potential deposition time when the intervenor supplemental filing date was extended by a week from May 4 to May 11. *See* March 23 Entry at 10.

[2] *See* Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Memorandum Contra Sierra Club's Motion to Compel Discovery Responses at 11-16 (May 4, 2015) ("Companies Memorandum Contra"); Motion of FirstEnergy Solutions Corp. to Quash the Subpoena Duces Tecum of Sierra Club at 2; 26-27 (April 14, 2015) ("FES Motion to Quash").

additional material needs to be produced, the Companies are endeavoring to make that production available as soon as it can be made available. Accordingly, Sierra Club's motions to amend the procedural schedule and to seek further discovery should be denied.[3]

II. SIERRA CLUB'S MOTION TO AMEND THE PROCEDURAL SCHEDULE SHOULD BE DENIED.

Sierra Club seeks a second extension of the filing date for supplemental testimony. The March 23 Entry initially envisioned that all parties would file supplemental testimony on the same date. At the urging of various intervenors, the Attorney Examiners gave intervenors an additional week to file that testimony.[4] Now, Sierra Club says it needs even more time.

The ostensible basis of Sierra Club's request for a second extension is its apparent surprise at the scope of the Companies' testimony. But the Companies did exactly what the March 23 Entry requested. In that Entry, the Attorney Examiner listed four factors that the Commission said that it might consider for a rider proposed by AEP Ohio similar to the Companies' proposed Rider RRS:

> Those *factors* were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of

[3] Even Sierra Club's request for an expedited ruling misreads the rule. Sierra Club blithely asserts that the Attorney Examiner needn't wait for a response from the Companies for their procedural schedule amendment motion under the applicable rule. *See* Mem. in Support of Mot. To Amend Procedural Schedule at 9. Yet, Rule 4901-1-12 of the Ohio Administrative Code expressly provides that an immediate ruling may be made with the filing of memoranda only where the request is for "an extension of time to file pleadings or other papers of five days or less." Given that Sierra Club seeks to extend the filing of their testimony by seven days, this part of the rule does not apply.

[4] This extension was ordered even though no intervenor made any cogent argument why they should be given more time. Various intervenors attempted to argue that making intervneor and applicant testimony due on the same day departed from past Commission precedent (while in fact there was no such departure) or would somehow cause them undue prejudice (while in fact no such showing was made). *See* Joint Interlocutory Appeal, Request for Certification to Full Commission for Review by Northeast Ohio Public Energy Counsel, Northwest Ohio Aggregation Coalition, Ohio Manufacturers' Association Energy Group, Ohio Partners for Affordable Energy, and The Office of Ohio Consumer's Counsel at 6; 9-10 (Mar. 30, 2015); Sierra Club's Memorandum in Response to Supplier's Request to Amend the Procedural Schedule and the Joint Motion for Interlocutory Appeal at 3 (April 3, 2015).

> future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

The Entry requested the parties submit supplemental testimony "to address whether and how the Commission's findings in the AEP Ohio Order should be considered" in this case. March 23 Entry at 2.

All of the Companies' supplemental testimony goes to the issues identified by the March 23 Entry. Company witness Mikkelsen, in her Second Supplemental Testimony, describes how the Companies' Application and direct testimonies address the AEP Ohio Order factors. *See* Second Supplemental Testimony of Eileen M. Mikkelsen at 2 (May 4, 2015). Her testimony further describes how the Companies' other supplemental testimony additionally addresses those factors. *Id.* at 3-12. As she notes, as to the first AEP Ohio Order factor, Company witness Moul illustrates the financial need of the Sammis and Davis-Besse plants (collectively, " the Plants") and describes why simply covering avoidable costs does not assure the continued operation of the Plants. *Id.* at 3-4. Company witness Makovich describes the "missing money" problem that exists in power markets and how that problem contributes to the financial need at both of the Plants. *Id.* at 4.

As to the second AEP Ohio Order factor, Mr. Moul's testimony discusses the need to continue to operate the plants in light of future reliability concerns. *Id.* Company witness Phillips[5] describes why the continued operation of the plants is necessary from a reliability prospective. *Id*. Dr. Makovich illustrates the value of supply diversity. *Id.* at 5.

[5] Sierra Club complains that the Companies have introduced three new witnesses. *See* Mem. in Support of Mot. to Amend Procedural Schedule at 1. In truth, however, one of those witnesses, Rodney Phillips, has taken over

As to the third AEP Ohio Order factor, Mr. Evans provides information on the Plants' current compliance with environmental regulations and the plan for compliance with pending environmental regulations. *Id.*

As to the fourth AEP Ohio Order factor, Mr. Phillips describes the range of investment that would be necessary to maintain reliability if the Plants were removed from the transmission grid. *Id.* at 6. Ms. Mikkelsen also outlines the impact on electric prices for the electric customers in Ohio. *Id.* Ms. Murley describes the economic development impact of the closure of the Plants. *Id.*

Notably, Sierra Club never says that any of the Companies' supplemental testimony is outside the scope of the testimony solicited by the March 23 Entry. Nor could it. The best that Sierra Club can say is that the Companies somehow should have been limited to the Application or the testimony that had been already filed. *See* Mem. in Support of Mot. To Amend Procedural Schedule at 6. Sierra Club cites nothing to support this position. Nor does it explain why this is so. The reason for that omission is obvious: there is no reason why the Companies should be limited to what they had already filed.

Indeed, the AEP Ohio Order factors extend beyond the specific issues that the Commission has traditionally considered when reviewing electric security plans. In other cases, the Commission has usually looked to three sets of issues: (1) whether the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under a market rate offer; (2) whether the ESP complies with state policies as articulated under Revised Code Section 4928.02; and (3) whether the Stipulation presented to resolve the ESP case meets

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for Company witness Gavin Cunningham, who retired. Given that no one ever bothered to take Mr. Cunningham's deposition, it's hard to see how the introduction of Mr. Phillips prejudices anyone.

the three part test for reviewing and approving stipulations.[6] *See, e.g.*, *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 24-57 (July 18, 2012) ("Case No. 12-230-EL-SSO"); *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, Opinion and Order at 6-47 (Nov. 22, 2011) ("Case No. 11-3549-EL-SSO"); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 10-388-EL-SSO, Opinion and Order at 20-45 (Aug. 25, 2010) ("Case No. 10-388-EL-SSO").

That the AEP Ohio Order factors introduced a new potential framework for consideration was the very reason why the March 23 Entry was issued and asked for additional testimony. Otherwise, why was all this necessary?

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[6] Regarding this test, the Commission has held as follows:

> In considering the reasonableness of a stipulation, the Commission has used the following criteria:
>
> (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
>
> (2) Does the settlement, as a package, benefit ratepayers and the public interest?
>
> (3) Does the settlement package violate any important regulatory principle or practice?

Case No. 11-3549-EL-SSO at 41. *See also*, Case No. 12-1230-EL-SSO at 24 (same); Case No. 10-388-EL-SSO at 20 (same).

In truth, the specific "new" issues that Sierra Club identified aren't "new" at all. For example, Sierra Club complains about the transmission upgrade costs in Mr. Phillips' testimony. *See* Mem. in Support of Mot. to Amend Procedural Schedule at 4; 7; Mem. in Support of Mot. to Permit Limited Written Discovery at 5. But, as noted,[7] Company witness Cunningham addressed the same issue. Sierra Club complains about new estimates of the economic impact of the Plants. *See* Mem. in Support of Mot. to Amend Procedural Schedule at 7. But Ms. Murley already presented some of those impacts and she presents the very impacts that at least one of the intervenors' witnesses criticized her for not providing. *See* Direct Testimony of Mathew I. Kahal at 43 (Dec. 22, 2014). Further, these are also the very impact that the March 23 Entry sought information about, i.e., the impact on economic development from the closure of the Plants. Sierra Club complains about "an entirely new theory about the dynamics of pricing in wholesale and capacity markets." *See* Mem. in Support of Mot. to Amend Procedural Schedule at 7. But intervenor witnesses have discussed the same "missing money" issue. *See, e.g.*, Direct Testimony of Bruce Burcat at 5-8 (Dec. 22, 2014); Direct testimony of Joseph E. Bowring at 2-4 (Dec. 22, 2014). More to the point, the Commission specifically sought supplemental testimony related to financial need and supply diversity. These topics were addressed in part in the Companies' direct testimony and in Dr. Makovich's testimony, among others. Sierra Club complains that Company witness Evans discusses the Plants' compliance with environmental regulations. *See* Mem. in Support of Mot. to Amend Procedural Schedule at 7. But, as extensively discussed relating to the pending discovery motions, this has been part of the discovery already. *See* Companies Memorandum Contra at 14; FES Motion to Quash at 27-30. Sierra Club complains about Mr. Moul's testimony about the financial condition of the Plants.

[7] *See* n. 5 *supra*.

See Mem. in Support of Mot. to Amend Procedural Schedule at 7. That too has been extensively addressed in discovery already. *See* Companies' Memorandum Contra at 13; FES Motion to Quash at 15.

Simply put, the issues presented by the Companies' supplemental testimony in response to the March 23 Entry should have been contemplated by Sierra Club. Accordingly, it's claim of surprise rings hollow.

In any event, the relief that Sierra Club seeks, while without merit, is also decidedly one-sided and unfair. As proposed, it would put the Companies at a significant disadvantage. Filing intervenor testimony on May 18, 2015 would improperly contract an already tight time period for the completion of depositions. It is unlikely that depositions would begin until later that week at the earliest. Thus, with the Memorial Day holiday, there will be less than fifteen business days to take depositions. As noted, several intervenors have already used the fact that there is another filing deadline as a reason to delay the depositions of their witnesses. If some or most of the fifty-plus intervenors in this case take the opportunity to file supplemental testimony, the list of depositions that need to be taken will grow longer than the time allowed to take them.

There is no need to extend the filing for intervenors' testimony.[8] The Companies' filings complied with the request of the March 23 Entry. Sierra Club should get about the business of doing the same. This case should move forward.

[8] As the lone authority in either of its Motions, Sierra Club seeks to rely on *In the Matter of the Report of Duke Energy Ohio, Inc. Concerning its Energy Efficiency and Peak-Demand Reduction Programs and Portfolio Planning*, Case No. 09-1999-EL-POR, Entry (Mar. 19, 2010), as supposed justification for extending the deadline for supplemental intervenor testimony. That reliance is misplaced. In *Duke Energy*, the utility allegedly had failed to respond to any intervenor discovery requests at all. *See id.* at 3. As noted, that is clearly not the case here, where the Companies have responded to over 3,200 discovery requests. *Duke Energy* thus has no bearing on the instant matter.

III. SIERRA CLUB'S MOTION FOR MORE WRITTEN DISCOVERY SHOULD BE DENIED.

As the recent memoranda filed by the Companies and FES showed, Sierra Club hasn't been shy about seeking discovery. In fact, it abused its opportunity to do so by attempting to seek discovery that went well beyond any reasonable reading of the March 23 Entry and then filed frivolous pleadings to support its unsupportable conduct. *See generally*, FES Motion to Quash; Companies' Memorandum Contra. Therefore, any claim by Sierra Club regarding its desire to seek "limited discovery" should be taken with a very skeptical grain of salt.

As the Companies and FES have showed, the March 23 Entry placed the Companies and FES in a difficult position. The Companies already have responded to over 3,200 discovery requests, approximately 300 (not including subparts) propounded after the March 23 Entry. With one or two exceptions, almost everything that was responsive to relevant discovery that had not already been produced was developed as part of the Companies' effort to draft supplemental testimony responsive to the March 23 Entry. Thus, this material was work product or privileged. The Companies could not determine what would be waived as a result of the testimony until the testimony was filed.

Now that the Companies have filed their supplemental testimony, a good portion of the substance of the relevant discovery propounded after March 23 has been addressed in the Companies' supplemental testimony. The Companies further supplemented some discovery responses throughout the week and intend to continue to supplement others where appropriate. The information provided already include the very information that Sierra Club specifically complains that it needs: i.e. (1) the workpapers of Company witness Phillips regarding his calculations of the costs of additional transmission upgrades that would be necessary if the Plants were to close; and (2) the data relied upon by Company witness Moul regarding the financial

need of the Plants. The Companies are in the process of identifying any other information that might be responsive to over 300 post-March 23 requests (not including subparts) and that would not remain privileged or work product.

As with its request for more time for filing intervenors' supplemental testimony, Sierra Club's request for more discovery is one-sided and unfair. Frankly, neither Sierra Club nor any other party have any right to additional discovery simply because the Companies filed additional testimony. The Companies didn't have the right to conduct additional written discovery after the intervenors filed their testimony in this case. In fact, the procedural schedule depriving the applicant of follow up written discovery after the filing of an opposing party's testimony is quite common before the Commission. *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Entry at 2 (June 6, 2014); *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. 13-2385-EL-SSO, Entry at 1 (Jan. 24, 2014); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Entry at 2 (May 3, 2012); see also, in the instant proceeding, Entry at 5 (Oct. 6, 2014). Sierra Club cites to no authority to support its special entitlement to discovery.

Further, the suggestion that the Companies be required to respond within five days is particularly unfair. Intervenors in this case have regularly served discovery (often hundreds of

requests at a time) after 5:00 p.m on a Friday. In light of such gamesmanship, Sierra Club has little standing to request such expedited discovery responses.

Sierra Club has taken advantage of its numerous opportunities to take discovery – and then some. It has or will receive shortly everything that it is entitled to regarding the Companies' supplemental testimony. There is no basis for Sierra Club's request for even more discovery. Indeed, given that it has abused the discovery process already, Sierra Club should be given no further opportunities to do so.[9]

IV. CONCLUSION

For the foregoing reasons, Sierra Club's motions to amend the procedural schedule and to permit limited discovery should be denied.

[9] In the unlikely and unfortunate event that Sierra Club and other intervenors are given any additional opportunity for discovery, the Companies should be given an equal opportunity to conduct discovery against the intervenors.

Date: May 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on May 8, 2015.

/s/David A. Kutik

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Summary: Memorandum Contra Sierra Club's Motion to Amend the Procedural Schedule and Motion to Permit Limited Written Discovery electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company