

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into an Affiliate)	
Power Purchase Agreement for)	Case No. 14-1693-EL-RDR
Inclusion in the Power Purchase)	
Agreement Rider)	

In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 14-1694-EL-AAM
Certain Accounting Authority)	

**MEMORANDUM IN OPPOSITION TO INTERVENORS' MOTIONS TO
ESTABLISH A PROCEDURAL SCHEDULE**

As part of its ESP III proposal (Case Nos. 13-2385-EL-SSO et al.), Ohio Power Company (AEP Ohio) proposed the power purchase agreement (PPA) Rider and sought the inclusion of the Ohio Valley Electric Corporation (OVEC) contractual entitlement in that Rider. At the same time, AEP Ohio reserved the ability to request inclusion of additional PPAs or similar products in the PPA Rider during the ESP term, and AEP Ohio indicated that it would file a separate rider Application (*i.e.*, this proceeding) to seek approval of any additional PPA.

On October 3, 2014, AEP Ohio filed the Application to initiate this proceeding, requesting approval of the Company's proposal to enter into a new Affiliate PPA between the Company and AEP Generation Resources, Inc. (AEPGR) and its inclusion in the PPA Rider. On February 25, 2015, as part of its *ESP III Order*, the Commission authorized the Company to establish a PPA Rider on a placeholder basis, at an initial rate of zero, for the term of the ESP.

On May 15, 2015, AEP Ohio filed an Amended Application and supporting testimony in this proceeding that updated its PPA Rider proposal. The primary purposes of the Amended Application are to (1) incorporate the OVEC PPA into the proposal, along with the Affiliate PPA, for inclusion in the PPA Rider; (2) explicitly address the factors and requirements set forth in the *ESP III Order*; and (3) update AEP Ohio's supporting testimony to reflect a current analysis of the amended proposal.

As part of the Amended Application, AEP Ohio requested a procedural schedule that would facilitate a decision in this case by October 1, 2015. Numerous intervenors filed motions seeking considerably longer procedural schedules. Motions proposing specific timelines were filed by the Sierra Club and jointly by a group of eight intervenors (Joint Movants).¹ Another intervenor, the Environmental Law & Policy Center (ELPC), filed a motion asking the Commission to reject AEP Ohio's proposed schedule, but rather than proposing an alternative timeline, the motion requested that the Commission establish an unspecified "reasonable schedule." ELPC Motion 1.

The intervenors' motions should be denied, and the Commission should adopt the procedural schedule proposed in AEP Ohio's Amended Application. As discussed below, there are compelling reasons for a timely resolution of this proceeding, and intervenors' grounds for extended schedules are meritless.

I. A timely resolution of this proceeding is critical.

As explained in AEP Ohio's Amended Application and the accompanying letter from Pablo A. Vegas, AEP Ohio's President, time is of the essence in this proceeding.

¹ The Joint Movants include the Appalachian Peace and Justice Network, the Environmental Defense Fund, IGS Energy, the Office of Ohio Consumers Counsel, the Ohio Environmental Council, the Ohio Hospital Association, the Ohio Manufacturers' Association Energy Group, and Ohio Partners for Affordable Energy.

As AEP Ohio intends to demonstrate, the PPAs at issue in this case will bring significant benefits to ratepayers in Ohio. Among other things, the PPAs will help stabilize fluctuating market prices, ensure the existence of reliable base load generation in this State, and stimulate the economy. But these benefits may be lost if the Commission delays in reaching a decision here. Following the divestiture of AEP Ohio's generation facilities to AEPGR, AEP Ohio's parent company AEP is facing an imminent need to make long-term strategic decisions regarding the former AEP Ohio plants, including whether to make additional investments in the plants or, potentially, to sell the plants. Thus, AEP must know – and know in a reasonable timeframe – whether the State of Ohio wishes to take advantage of the price stability and other benefits that this PPA proposal offers. Otherwise AEP may have to pursue other long-term strategic options. Accordingly, as part of its Amended Application, AEP Ohio proposed a procedural schedule that sought to facilitate a Commission decision by October 1, 2015 – the date the proposed PPAs would commence.

In that context, intervenors' protracted schedules are no more than thinly-veiled attempts to defeat the PPA proposal through delay. Intervenors know that a prompt resolution of this case is critical for ratepayers to secure the benefits offered by the PPAs, and thus intervenors, who oppose the PPAs, have proposed timelines that would draw out this proceeding for months: Sierra Club seeks to extend AEP Ohio's proposed schedule by three and a half months, *see* Sierra Club Motion 1-2, and Joint Movants seek to extend the schedule by six months, *see* Joint Movants Motion 2.²

² As described above, ELPC failed to propose a specific timeline, and that alone is grounds to deny its motion. ELPC's request for an unspecified "reasonable schedule," ELPC Motion 1, cannot be taken seriously when ELPC itself apparently is unable to say what "reasonable" means.

Those timelines are unreasonable and, if adopted, would seriously threaten the viability of the PPA proposal. AEP Ohio has provided compelling reasons for prompt treatment of this case. No matter how the Commission eventually decides the case, it should not effectively reject the PPAs and the potential benefits available to ratepayers by adopting an unduly lengthy procedural schedule that would force AEP to pursue other strategic options for the plants at issue. Instead, at the very least, the Commission should preserve the option of approving AEP Ohio's PPA proposal and the potential benefits available to ratepayers by establishing the procedural schedule set forth in the Amended Application.

II. Intervenor have had eight months since AEP Ohio's initial application to serve discovery and develop testimony, and the incremental changes in AEP Ohio's Amended Application do not justify an extended schedule.

As part of their effort to defeat the PPA proposal through delay, intervenors cite a number of grounds for a protracted schedule. For instance, intervenors cite the supposed complexity and length of AEP Ohio's application as grounds for extending the time for discovery. *See, e.g.*, ELPC Motion 1-2; Joint Movants Motion 9; Sierra Club Motion 5-6. They also claim that AEP Ohio's proposed schedule affords inadequate time for intervenors to prepare witnesses and develop expert testimony. *See id.* These arguments might have some merit if intervenors were starting from scratch in this case. But intervenors are not starting from scratch. The vast majority of AEP Ohio's PPA proposal has been available – in great detail – to intervenors for many months.

AEP Ohio filed its initial application and testimony in this proceeding on October 3, 2014. AEP Ohio's Amended Application and testimony, filed May 22, 2015, builds significantly on that initial application in response to the Commission guidance provided in the *ESP III Order*. Yet although the Amended Application and testimony provide

updated forecasts and additional supporting evidence (all provided to Staff and the intervenors on May 20, 2015), that data and evidence are merely *incremental* to the initial application. The majority of the proposal – including, most importantly, the structure and justification of the PPAs – remains effectively the same as it was on October 3, 2014. The only substantive change in the Amended Application was simply the addition of the OVEC PPA, which was previously addressed in detail as part of the AEP Ohio’s ESP III proceeding.

Thus, intervenors’ protracted schedules are inappropriate given that intervenors have already had almost *eight months* to analyze the proposal, take discovery, and develop testimony in this proceeding (and they have had even longer to do so for the OVEC PPA). Indeed, parties have already served 295 data requests on the Company in this case, and approximately 70 of those data requests are presently being supplemented to reflect the inclusion of OVEC data and updated forecast numbers. Intervenors have had every opportunity to serve additional discovery, and if intervenors had used their time wisely, AEP Ohio’s proposed procedural schedule would offer ample opportunity for intervenors to take discovery and make amendments to their prepared testimony to account for the incremental changes in the Amended Application.³ But if, on the other hand, intervenors have procrastinated over the past eight months and have not analyzed the proposal, taken discovery, or developed testimony, intervenors’ lack of diligence does

³ While Sierra Club cites its non-profit status and “limited resources” as a basis for slowing down this proceeding, *see* Sierra Club Motion 6 n.10, Sierra Club is represented by sophisticated and experienced local and national counsel and has demonstrated through its active pleadings and discovery practices in this case that it has adequate legal resources to vigorously represent its interests. Based on the last year that tax returns are publically available – 2013 – Sierra Club had revenues of approximately \$100 million and had net assets of \$63 million. Thus, the Sierra Club’s non-profit status is not relevant and does not form a valid basis for delaying this proceeding.

not constitute proper grounds upon which to delay the significant ratepayer benefits that the PPAs offer as well as the benefits to Ohio's economy (including the benefit of ensuring the continued existence of reliable generation in Ohio) – benefits that may become unavailable if this proceeding is not concluded in a timely manner.⁴

III. The FirstEnergy ESP IV case is not comparable to this proceeding and cannot serve as a model for the procedural schedule here.

Among the intervenors, only Sierra Club offers a precedent for its proposed schedule: the FirstEnergy ESP IV proceeding (Case No. 14-1297-EL-SSO), which Sierra Club claims is “an appropriate model” for this proceeding. *See* Sierra Club Motion 2. (Joint Movants provide no precedent for their radical proposal, and as discussed above, ELPC offers no schedule whatsoever.) But Sierra Club is mistaken. The FirstEnergy ESP IV case is not comparable to this proceeding, and if the FirstEnergy ESP IV schedule were applied here, it would cause needless delay.

As an initial matter, this proceeding is not comparable to the FirstEnergy ESP IV case because parties here have already litigated – and the Commission has already determined – that the PPA Rider is lawful and supported by Ohio energy policy.⁵ Thus, many of the most important legal and policy questions that are open in the FirstEnergy ESP IV case have already been answered here. Intervenors have already had every opportunity to take discovery and make arguments regarding those legal and policy issues

⁴ As for the alleged complexity of AEP Ohio's proposal, the detail provided in AEP Ohio's application should make it *easier*, not harder, for intervenors to develop testimony. AEP Ohio has striven to support its proposal with thorough evidence and data. The detail provided in AEP Ohio's filings, therefore, should provide ample information for intervenors to develop testimony, thus limiting the need for discovery. Moreover, the Commission's *ESP III Order* narrows the set of issues that remain. In any event, as discussed above, intervenors have had eight months to study AEP Ohio's application. That is sufficient time to grasp even complex proposals.

⁵ In addition, many of the same over-arching issues were recently litigated in the Duke Energy Ohio ESP case (Case No. 14-842-EL-SSO).

in AEP Ohio's ESP III proceeding, including the PPA proposal, and indeed, intervenors presented voluminous testimony and briefing on the PPA proposal in that case.⁶ The Commission has already thoughtfully considered and subsequently rejected many of intervenors' legal and policy arguments and approved a placeholder PPA Rider, and intervenors should not be given an opportunity to re-litigate those issues as they apply to AEP Ohio in this proceeding. Accordingly, the Sierra Club's analysis is flawed, the FirstEnergy ESP IV procedural schedule is not analogous to this proceeding and provides an inappropriate model.

In addition, the FirstEnergy ESP IV procedural schedule is inapposite because that case, as a comprehensive ESP case, involved many complex issues that were completely unrelated to the FirstEnergy's PPA proposal. Here, by contrast, the Commission has already ruled on AEP Ohio's ESP III case, and this proceeding is limited to the question of whether to include the proposed PPAs in AEP Ohio's PPA Rider. That question is necessarily narrower than the question of whether to approve a comprehensive ESP, and thus the FirstEnergy ESP IV procedural schedule provides an inaccurate model.

Lastly, as discussed above, the parties have already had eight months to take discovery in this proceeding, and the parties have propounded 240 data requests in that time (of which a significant number are being updated in conjunction with the Amended Application). Applying the FirstEnergy ESP IV procedural schedule here, therefore,

⁶ Sierra Club had every opportunity to intervene in AEP Ohio's ESP III case and chose not to do so. Sierra Club should not be permitted to re-litigate issues decided in the ESP III proceeding simply because it chose not to be a party.

would be inappropriate given the significant work that has already been accomplished in this case.⁷

IV. The FirstEnergy ESP IV case schedule is not grounds to delay this proceeding.

As another ground for delay, intervenors argue that the Commission should adjust the procedural schedule in this case to account for FirstEnergy's pending ESP IV proceeding (Case No. 14-1297-EL-SSO). *See* Joint Movants Motion 9-10; ELPC Mem. in Opp. 4. But the schedule proposed in the Amended Application does not involve overlapping *hearings* – under the current schedule, FirstEnergy's ESP IV hearing would take place well before the hearing in this proceeding. Insofar as there will be overlap for discovery and briefing periods, that is an inescapable feature of practice before this Commission. There will always be multiple companies with pending cases before the Commission, and though the Commission can attempt to minimize overlap, it cannot eliminate it. That is why intervenors have multiple counsel, and they have repeatedly shown that they are capable of litigating more than one case at a time. Any overlap with the FirstEnergy ESP IV case schedule is not grounds to delay this proceeding.

V. The Commission should not delay this proceeding to wait for FERC to make a decision on the PJM Capacity Performance proposal.

ELPC argues that the Commission should delay this case until FERC rules on the pending Capacity Performance proposal to modify the PJM markets. *See* ELPC Mem. in Supp. 3-4. But apart from offering labels, *see id.* at 3 (outcome of Capacity Performance proposal is a “core issue”); *id.* at 4 (these are “consequential issues”), ELPC offers scant

⁷ As discussed above, Joint Movants offer no precedent for their schedule, which significantly exceeds even the FirstEnergy ESP IV model. For all the reasons why the FirstEnergy ESP IV schedule is inappropriate here, Joint Movants' schedule is even more inappropriate. Joint Movants propose a schedule for this limited proceeding that is even longer than the Commission granted for a full ESP case. That defies logic.

details about how, precisely, FERC's resolution of the Capacity Performance proposal will affect this proceeding. After all, no matter the outcome of the Capacity Performance proposal, the PPAs will still provide a critical hedge against fluctuating market rates; they will ensure the continued viability of reliable base load generation; and they will stimulate the economy.

In fact, ELPC's argument provides yet another example of how intervenors' position would involve the Commission ceding control of pricing and reliability to FERC, whereas AEP Ohio's PPA proposal would permit the Commission to continue to exercise reasonable oversight over those issues. If AEP Ohio's PPA proposal is defeated (either on the merits or through intervenors' onerous procedural schedule), the Commission will find itself "waiting on FERC" – as ELPC proposes here – far more often. This problem is particularly crucial to avoid here, where a delay could render the potential benefits moot if there is no timely response from the Commission; placing the fate of a timely decision for the State of Ohio in the hands of FERC would be a strategic mistake. Instead, the Commission should adopt AEP Ohio's proposed timeline – and its PPA proposal – in order to help ensure price stability and generation reliability in Ohio no matter what FERC does now or in the future.

CONCLUSION

For the foregoing reasons, intervenors' Motions for a Procedural Schedule should be denied, and the Commission should adopt the procedural schedule proposed in AEP Ohio's Amended Application in this proceeding.

May 27, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Ohio Power Company's *Memorandum in Opposition* have been served upon the below-named counsel and Attorney Examiners by electronic mail to all Parties this 27th day of May, 2015.

/s/ Steven T. Nourse
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