

**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)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider.)	

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

**ENVIRONMENTAL LAW & POLICY CENTER'S REQUEST FOR CERTIFICATION
AND APPLICATION FOR REVIEW OF AN INTERLOCUTORY APPEAL OF THE
ATTORNEY EXAMINERS' CONSTRUCTIVE DENIAL OF THE JOINT MOTION TO
EXTEND THE PROCEDURAL SCHEDULE**

Pursuant to Ohio Administrative Code 4901-1-15(B), the Environmental Law & Policy Center ("ELPC") requests that an Interlocutory Appeal be certified arising from the Attorney Examiners' constructive denial of ELPC's and other parties' Joint Motion to Extend the Procedural Schedule in this case, filed on December 16, 2015. The Joint Motion seeks a three week extension of an extremely abbreviated procedural schedule issued in this case on December 15, 2015, regarding Commission review of a Joint Stipulation and Recommendation filed on December 14, 2015. That schedule includes a pending deadline of December 28, 2015 – the Monday after the coming Christmas weekend – for filing of testimony in opposition to the Stipulation. The Attorney Examiners have not yet issued a ruling on the Joint Motion.

As demonstrated in the attached Memorandum in Support, the lack of any ruling on the pending Joint Motion effectively operates as a constructive denial of the requested extension, since absent a decision the parties opposing the Stipulation will have no choice but to proceed with preparing and finalizing testimony over the holiday weekend (to the extent possible given

experts' availability). The two-week timeline (generously including the Christmas holiday weekend) for obtaining discovery on and analyzing a Stipulation that presents significant new issues in a vitally important proceeding is inadequate and a departure from past precedent, as evidenced by the schedules issued in similar circumstances in Case No. 14-1297-EL-SSO. Immediate review by the Commission is therefore necessary to prevent the likelihood of undue prejudice to ELPC and other intervening parties. The Attorney Examiners should certify ELPC's interlocutory appeal, and the Commission should grant the requested extension.

Date: December 23, 2015

Respectfully submitted,

/s/ Madeline Fleisher

Madeline Fleisher

Environmental Law & Policy Center

21 W. Broad Street, Suite 500

Columbus OH 43215

614-670-5586

312-795-3730 (fax)

mfleisher@elpc.org

**Counsel for the Environmental Law & Policy
Center**

**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)	Case No. 14-1693-EL-RDR
Purchase Agreement for Inclusion in the)	
Power Purchase Agreement Rider.)	

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

**MEMORANDUM IN SUPPORT OF ENVIRONMENTAL LAW & POLICY CENTER'S
REQUEST FOR CERTIFICATION AND APPLICATION FOR REVIEW OF AN
INTERLOCUTORY APPEAL OF THE ATTORNEY EXAMINERS' CONSTRUCTIVE
DENIAL OF THE JOINT MOTION TO EXTEND THE PROCEDURAL SCHEDULE**

On Monday, December 14, 2015, Ohio Power Company ("AEP Ohio" or "Company") filed a Joint Stipulation and Recommendation in this case. On Tuesday, December 15, 2015, the Attorney Examiners issued a schedule providing that testimony in opposition to the Stipulation be filed by December 28 and that an evidentiary hearing start on January 4, 2016. On Wednesday, December 16, 2015, Constellation NewEnergy, Inc., Exelon Generation Company LLC, the Electric Power Supply Association, the Environmental Defense Fund, the Environmental Law & Policy Center ("ELPC"), the Office of the Ohio Consumers' Counsel, the Ohio Environmental Council, PJM Power Providers Group, the Retail Energy Supply Association, and the Appalachian Peace and Justice Network (collectively, "Joint Movants") filed a Joint Motion seeking a three-week extension of the Attorney Examiner's procedural schedule established by the December 15, 2015 Entry in this proceeding. On Friday, December 18, 2015, AEP Ohio filed a Memorandum Contra. A reply in support of the Joint Motion was

filed on Monday, December 21, which requested a ruling before December 23, 2015. The Attorney Examiners have yet to rule on the pending Joint Motion.

As discussed in the Joint Motion, the current schedule is inadequate given the significant new issues raised by the Stipulation, and will prejudice the parties opposing the Stipulation. This case concerns a significant proposal by AEP Ohio to require customers to bear the costs of over 3000 megawatts of currently uneconomic coal generation owned by the Company and its generation affiliate over the next eight years, in return for the uncertain benefits of selling the output of those plants on the wholesale market. The Stipulation filed on December 14, 2015, with the signature of several formerly opposing parties – including Commission Staff – adds a number of substantial new issues to this proceeding, including changes to the underlying power purchase agreement (“PPA”) terms and the calculation of PPA Rider credits and charges, as well as AEP Ohio commitments to pursue a six-year extension of its Electric Security Plan along with several new or amended riders, retirement or conversion to natural gas for some of the PPA coal units, purported grid modernization and energy efficiency measures, and development of 900 MW of new renewable generation. Stipulation at 5-6, 10-16, 19-21, 30-32. According to AEP Ohio, this Stipulation “goes well beyond the proposal initially supported by AEP Ohio.” Allen Direct Test. in Support of AEP Ohio’s Settlement Agreement (Dec. 14, 2015) at 14:8. Moreover, significant new developments are still occurring: on December 22, 2015, Industrial Energy Users-Ohio (“IEU-Ohio”) filed a letter withdrawing opposition to the proposed PPA arrangement, and the same day AEP Ohio produced in discovery a side agreement providing for a payment of \$8 million to IEU-Ohio, ostensibly in settlement of other pending litigation. *See* Attachment A.

The Commission must review the Stipulation as a “package” to determine whether it “benefits ratepayers and the public interest.” *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test*, Case No. 15-665-EL-UNC, Opinion and Order (Sept. 16, 2015) at 4. AEP Ohio takes the position that, under this standard, the “provisions of the Stipulation expand and enhance the benefits to rate payers identified in the Company’s Amended Application and address concerns raised by the Staff and other parties in this proceeding.” Allen Direct Test. in Support of AEP Ohio’s Settlement Agreement (Dec. 14, 2015) at 2:19-21. Therefore, the Commission’s consideration of the expansive new issues introduced by the Stipulation cannot be separated from the core merits of this case, which concerns a momentous proposal for an affiliate deal that could cost AEP Ohio customers billions of dollars and impact the entire competitive electricity market in the region. Moreover, the Commission’s ruling on the Stipulation will bind the parties with respect to all of the topics it addresses, even if there may be future proceedings involving those issues. Given this context, it is vital for the parties opposing the Stipulation to have sufficient time to fully analyze and prepare testimony for the Commission regarding the merits of AEP Ohio’s new proposals.

The parties have been afforded that opportunity in a case directly parallel to this one, Case No. 14-1297-EL-SSO, in which Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “FirstEnergy”) have proposed a similar PPA rider arrangement. FirstEnergy filed an initial stipulation in that case on December 22, 2015. The Attorney Examiners in that case subsequently issued a new schedule delaying hearing from January 28 to February 24, 2015 and providing intervenors until February 5, 2015 (more than five weeks) to prepare opposing testimony. Case No. 14-1297-EL-SSO, Entry (Jan. 14, 2015) at 2-3. When FirstEnergy filed a Supplemental and Second Supplemental

Stipulation on May 28 and June 4, 2015 respectively, the Attorney Examiners ultimately issued a schedule allowing another two months for intervenors to file supplemental testimony. Case No. 14-1297-EL-SSO, Entry (July 2, 2015) at 4. Finally, when FirstEnergy filed a Third Supplemental Stipulation on December 1, 2015, the Attorney Examiners established a schedule under which intervenors have a month from that date, until December 30, 2015, to file testimony. Case No. 14-1297-EL-SSO, Entry (Dec. 9, 2015) at 4. The significant concerns raised by this case and the Stipulation itself merit a schedule that similarly provides a real opportunity for the parties to provide the analysis and evidence necessary for the Commission to undertake thorough consideration of the proposed Stipulation.

For the above reasons, the Attorney Examiners should certify this appeal to the full Commission, and the Commission should grant the three-week extension requested in the Joint Motion.

Respectfully submitted,

/s/ Madeline Fleisher

Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad Street, Suite 500
Columbus OH 43215
614-670-5586
614-487-7510 (fax)
mfleisher@elpc.org

**Counsel for the Environmental Law & Policy
Center**

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on December 23, 2015 upon all persons/entities listed below.

/s/ Madeline Fleisher
Madeline Fleisher

stnourse@aep.com
mjsatterwhite@aep.com
msmckenzie@aep.com
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com
myurick@taftlaw.com;
mkurtz@bkllawfirm.com
dboehm@bkllawfirm.com
jkyler@bkllawfirm.com
tony.mendoza@sierraclub.org;
schmidt@sppgrp.com
tdougherty@theoec.org
joliker@igsenergy.com
ghull@eckertseamans.com
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com
tobrien@bricker.com
jlang@calfee.com
tallexander@calfee.com
jeffrey.mayes@monitoringanalytics.com
lhawrot@spilmanlaw.com
dwilliamson@spilmanlaw.com
kurt.helfrich@thompsonhine.com
scott.campbell@thompsonhine.com
stephanie.chmiel@thompsonhine.com
ricks@ohanet.org
bojko@carpenterlipps.com
William.michael@occ.ohio.gov
stheodore@epsa.org

sfisk@earthjustice.org
mdortch@kravitzllc.com
kristen.henry@sierraclub.org
msoules@earthjustice.org
Jodi.bair@occ.ohio.gov
Kevin.moore@occ.gov
DStinson@bricker.com
laurac@chappelleconsulting.net
gthomas@gtpowergroup.com
msmalz@ohiopovertylaw.org
mfleisher@elpc.org
cmooney@ohiopartners.org
mhpetricoff@vorys.com
mjsettineri@vorys.com
glpetrucci@vorys.com
werner.margard@puc.state.oh.us
steven.beeler@puc.state.oh.us
twilliams@snhslaw.com
rsahli@columbus.rr.com
charris@spilmanlaw.com
ghiloni@carpenterlipps.com
sechler@carpenterlipps.com
gpoulos@enernoc.com
chris@envlaw.com
laurie.williams@sierraclub.org
jennifer.spinosi@directenergy.com
jvickers@elpc.org
ckilgard@taftlaw.com
rseiler@dickinsonwright.com
todonnell@dickinsonwright.com
drinebolt@ohiopartners.org

Attachment A

GLOBAL SETTLEMENT AGREEMENT

This Global Settlement Agreement (“Agreement”) memorializes a global settlement of several separate regulatory and litigation matters. It is made by Ohio Power Company (“AEP Ohio”) and Industrial Energy Users-Ohio (“IEU”) for the benefit of IEU’s members. In this Agreement, AEP Ohio and IEU are collectively referred to as the “Parties.”

In consideration of the mutual covenants contained herein and intending to be legally bound hereby, the Parties agree as follows:

1. **Dismissal of IEU Litigation.** Within 10 days after the PPA Stipulation is executed and filed in the PPA Cases, IEU will take the following actions:
 - A. IEU will file a voluntary application to dismiss its appeal with prejudice in each of the following cases pending before the Supreme Court of Ohio (“S.Ct.”): (a) S.Ct. Case No. 2012-2098 (first capacity charge appeal); (b) S.Ct. Case No. 2013-228 (second capacity charge appeal); (c) S.Ct. Case No. 2013-521 (ESP II appeal); and (d) S.Ct. Case No. 2013-1014 (corporate separation appeal).
 - B. IEU will move to withdraw its intervention in the following proceedings: (a) PUCO Case No. 14-1186-EL-RDR (RSR implementation plan); (b) PUCO Case Nos. 09-872-EL-FAC et al (2009 FAC); (c) PUCO Case Nos. 11-4920-EL-RDR et al. (phase in recovery rider); (d) PUCO Case No. 13-1939-EL-RDR (gridSMART Phase II); and (e) PUCO Case No. 15-1022-EL-UNC (2014 SEET).
 - C. IEU-Ohio will limit its participation in PUCO Case Nos. 11-5906-EL-FAC, 12-3133-EL-FAC, 13-572-EL-FAC, 13-1286-EL-FAC, and 13-1892-EL-FAC to the prosecution of the PUCO’s investigation of AEP-Ohio’s alleged double recovery of certain capacity related costs.
2. **AEP Ohio’s Support of Energy Efficiency Opt-Out.** AEP Ohio will support expansion of the streamlined opt-out provisions enacted by SB 310 (130th General Assembly) so as to make the streamlined opt-out available, effective January 1, 2019, to “mercantile customers” as recommended in the report issued by the SB 310 Mandate Study Committee.
3. **IEU’s Non-opposition to AEP Ohio’s PPA Proposal.**
 - A. IEU agrees not to oppose the Joint Stipulation and Recommendation (“PPA Stipulation”) to be filed by AEP Ohio and certain other parties in Public Utilities Commission of Ohio (“PUCO”) Case Numbers 14-1693-EL-RDR and 14-1694-EL-AAM (“PPA Cases”). IEU’s non-opposition recognizes the substantive terms in the PPA Stipulation that benefit its members. In recognition of its non-opposition and the benefits provided its members, IEU agrees not to challenge, or support any change to, the PPA Stipulation in any legal proceeding.

- B. IEU will file a letter in the PPA Cases stating that IEU does not oppose the PPA Stipulation. This letter will indicate that AEP Ohio and IEU have reached a global settlement of several separate regulatory and litigation matters and that IEU's non-opposition to the PPA Stipulation is one of several terms and conditions involved with the settlement.
- C. Notwithstanding the foregoing and anything else in this Agreement, if the PPA Stipulation is not finalized and filed with the PUCO, this Agreement will become null and void.

4. **IEU's Non-Participation in Oral Argument.** As a preliminary step toward dismissal of capacity charge appeals, IEU agrees to waive and not otherwise participate in the oral argument scheduled for December 15, 2015 in the first and second capacity charge appeals (to the extent permissible under the rules of the Ohio Supreme Court). AEP Ohio acknowledges that IEU has made a filing with the Supreme Court indicating that it will not participate in that oral argument.

5. **No Principle Established.** Nothing contained in this Agreement, or the fact of its submission to the Parties, shall be admissible evidence in any judicial, administrative, or other legal proceeding (except for a proceeding to enforce the terms of this Agreement), or be construed as an admission on the part of the Parties.

6. **Settlement Payments.** Within 10 days of IEU filing the last motion to dismiss its appeal or motion to withdraw required by Paragraph 1 above, AEP Ohio will pay, as a one-time nonrevocable payment, \$8 million to IEU for the benefit of its members. The Parties agree that this payment relates primarily to the cases addressed in Paragraph 1 above. IEU will continue, even after the payment is made and in the face of any opposition by other parties, to pursue the applications and motions referenced in Paragraph 1 until all of those applications and motions are ruled upon and are final. Upon dismissal or the granting of withdrawal pursuant to Paragraph 1 above, IEU will have no further involvement in the proceedings or any appeals or actions relating to the proceedings. This provision does not prevent IEU members from receiving any benefits resulting from a Supreme Court of Ohio remand proceeding.

7. **Disclosure of this Agreement.** IEU understands that this Agreement will likely be disclosed through discovery or another compulsory legal process. In addition, AEP Ohio may voluntarily and unilaterally disclose this Agreement after providing reasonable prior notice to IEU. AEP Ohio will endeavor to provide a minimum of 24 hours' notice.

8. **Entire Agreement.** The Parties acknowledge that this Agreement is the complete and final agreement between the Parties with respect to the subject matter of this Agreement, and that there are no other agreements, written or oral, that form any part of the agreement between the Parties regarding the matters set forth herein.

9. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Ohio. The delay or failure of either Party to assert or

enforce in any instance performance of any of the terms of this Agreement or to exercise any rights hereunder conferred shall not be construed as a waiver or relinquishment to any extent of its rights to assert or rely upon such terms or rights at any later time.

10. Modification. Any waiver or modification of this Agreement must be in writing.

11. Severability. Should any one or more of the terms or conditions of this Agreement be held to be void, invalid, illegal, or unenforceable in any respect, this will not affect any other term or condition of this Agreement, but the remainder of this Agreement will be effective as though such term or condition had never been contained herein.

12. Authorization. The Parties warrant that they have the power and authority, and the legal right, to make, deliver and perform under this Agreement, and have taken all necessary actions to authorize execution, delivery and performance under this Agreement. Specifically, IEU warrants that its participating members have authorized IEU to make, deliver and perform under this Agreement.

13. Notice. Unless otherwise stated herein, all notices, demands, or requests required or permitted under this Agreement must be in writing and must be delivered by overnight express, mail, courier service, electronic mail, or facsimile transmission to the other Party.

14. Costs and Expenses. Each Party is responsible for its own costs and expenses, including attorneys' fees, related to any civil action brought to enforce this Agreement.

15. Execution in Counterparts. This Agreement may be executed in counterparts.

Ohio Power Company

By: 

Name: Pablo A. Vegas

Title: President & COO

Date: December 14, 2015

Industrial Energy Users-Ohio

By: 

Name: Kevin M. Sroog

Title: Executive Director

Date: December 14, 2015

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/23/2015 3:26:25 PM

in

Case No(s). 14-1693-EL-RDR, 14-1694-EL-AAM

Summary: Motion Request for Certification and Application for Review of an Interlocutory Appeal and Memorandum in Support electronically filed by Madeline Fleisher on behalf of Environmental Law and Policy Center