



December 29, 2015

Barcy F. McNeal, Secretary
Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street, 11th Floor
Columbus, Ohio 43215

Re: Objection to Notice of Deposition – Case Nos. 14-1693-EL-RDR, et al.

Dear Secretary McNeal:

On December 23, 2015, Ohio Consumers' Counsel ("OCC") filed a notice to take the deposition(s) of Sierra Club employee(s) on December 30, 2015 with knowledge and expertise in three areas: (1) AEP Ohio's proposed revised PPA and its inclusion in the power purchase agreement rider; (2) the Joint Stipulation filed on December 15, 2015; and (3) Sierra Club's position regarding the Joint Stipulation. Sierra Club objects to OCC's Notice as its request is unreasonable and oppressive as it seeks information that is duplicative, about confidential settlement negotiations that is not likely to lead to admissible evidence, that is protected by attorney-client privilege, and impinges on Sierra Club's First Amendment rights. Based on these objections, Sierra Club does not intend to produce a witness for deposition on December 30, 2015.

Background

On December 20, 2013, AEP Ohio filed an Application in its most recent Electric Security Plan ("ESP") proceeding (Case Nos. 13-2385-EL-SSO et al.) seeking the establishment of a Power Purchase Agreement ("PPA") Rider and the inclusion in the PPA Rider of the net impacts of AEP Ohio's contractual entitlement to a share of the electrical output of generating units owned by the Ohio Valley Electric Corporation's ("OVEC PPA"). On February 25, 2015, the Commission issued an Opinion and Order approving the PPA Rider on a placeholder basis (Case Nos. 13-2385-EL-SSO et al., Opinion and Order, at pages 25-27 (February 25, 2015) (the *ESP III Order*)). On October 3, 2014, AEP Ohio filed an Application in this proceeding – and on May 15, 2015, AEP Ohio filed an Amended Application in this proceeding – seeking inclusion of a new affiliate power purchase agreement between Ohio Power Company ("AEP Ohio") and AEP Generation Resources, Inc. ("Affiliated PPA"), as well as the net impacts of the OVEC PPA, in the PPA Rider. An evidentiary hearing was held in this proceeding, starting on September 28, 2015 and ending on November 3, 2015, with the parties sponsoring and examining thirty-seven witnesses. Sierra Club submitted testimony and supplemental testimony on AEP Ohio's Amended Application. Sierra Club's expert witness was deposed twice prior to testifying at the hearing.

On December 14, 2015, AEP Ohio and nine other Signatory Parties entered into a Joint Stipulation and Recommendation (“Joint Stipulation”) that proposes to resolve all of the issues raised in this proceeding. The Joint Stipulation is based, in part, upon a proposal by AEP Ohio to sign a revised affiliate power purchase agreement between AEP Ohio and AEP Generation Resources, Inc. (“Revised Affiliate PPA”). Sierra Club was one of the Signatory Parties to the Joint Stipulation.

On December 14, 2015, AEP Ohio submitted the testimony of William Allen describing and supporting the Joint Stipulation. AEP Ohio made William Allen available for deposition on December 23, 2015. No other witness has submitted testimony to support the Stipulation.

On December 17, 2015, OCC served written discovery on Sierra Club asking broad questions about the settlement discussions and about Sierra Club’s rationale for entering into the Joint Stipulation and agreeing not to oppose or abstain from various provisions in the Joint Stipulation. Sierra Club responded to these discovery requests on December 23, 2015.

On December 23, 2015, Ohio Consumers’ Counsel filed a notice to take the deposition(s) of Sierra Club employee(s) on December 30, 2015 with knowledge and expertise in three areas: (1) AEP Ohio’s proposed revised PPA and its inclusion in the power purchase agreement rider; (2) the Joint Stipulation filed on December 15, 2015; and (3) Sierra Club’s position regarding the Joint Stipulation. OCC’s notice was filed pursuant to OAC 4901-1-21(B), which states “[a]ny party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the commission. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification.”

Sierra Club’s Objection’s to OCC’s Deposition Notice

Sierra Club objects to OCC’s request that Sierra Club present a witness for deposition as the request is unreasonable and oppressive and not likely to lead to the discovery of admissible evidence for at least four reasons.

First, Sierra Club objects that OCC’s Notice of Deposition is duplicative. Sierra Club submitted Direct and Supplemental Testimony at an earlier stage of this proceeding. Sierra Club’s expert witness was deposed twice and testified at the earlier proceeding. Sierra Club has not and does not intend to present any testimony or witness in support of the Joint Stipulation. Sierra Club’s position regarding the Stipulation is self-evidence from the document itself. Moreover, AEP Ohio Witness Allen has already submitted pre-filed testimony, was deposed regarding the Joint Stipulation, and intends to testify on January 4, 2016 regarding the Joint Stipulation.

Second, OCC in its written discovery and during a meet-and-confer conference indicated that it intends to ask questions about the settlement negotiations that went on between Sierra Club and AEP Ohio. While Sierra Club is aware that the state of Ohio does not recognize an absolute settlement privilege, see *Consumers’ Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 300, that is not the reason Sierra Club objects to the Deposition Notice. The Commission’s procedural rules generally do not permit the admission of evidence related to settlement negotiations. See O.A.C. 4901-1-26. The information sought by OCC about the settlement negotiations may be discoverable only if the information sought is reasonably calculated to lead to the discovery of admissible

evidence. O.A.C. 4901-1-16. However, the discovery requests, many of which seek privileged explanations for why Sierra Club decided to footnote out of certain provisions of the Stipulation, cannot be construed to be reasonably calculated to lead to admissible evidence, and OCC cannot cure this problem by simply asserting that the information sought to be discovered is relevant to the prongs of the Commission's three-prong test for the consideration of stipulations. *See, e.g., In re Vectren*, 2007 WL 738508, Case No. 05-1444-GA-UNC (Mar. 7, 2007). Sierra Club has already responded to the OCC discovery requests about the settlement negotiations that could have led to the discovery of admissible information; Sierra Club noted that it had not carried out certain analyses about particular provisions of the stipulation, and provided a copy of the bilateral agreement entered into by Sierra Club and AEP Generation Resources. This is consistent with the holding in *Ohio Consumers Counsel*.

Third, Commission rules permit discovery of "any matter, not privileged, which is relevant to the subject matter of the proceeding." O.A.C. 4901-1-16(B) (emphasis added). The Commission protects privileged matters from discovery. *See, e.g., In the Matter of the Complaint of LEEMar Steel Company, Inc. v. Ohio Bell Telephone Company*, Case No 84-360-TP-CSS (Sept. 11, 1984). The Commission and the state of Ohio recognize both attorney-client and work product privilege. *See, e.g., R.C. 2317.02(A); Jackson v. Greger*, 110 Ohio St.3d 488.

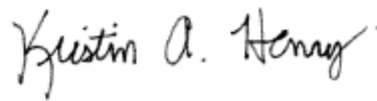
OCC wants to know why Sierra Club signed the Joint Stipulation and why Sierra Club agreed not to oppose or abstain from certain provisions in the Joint Stipulation. Sierra Club's rationale for each of these decisions is based on confidential communications between attorneys and client in which the attorneys shared their thoughts on relevant facts, legal theories, and strategies so that their client could make an informed decision. The two are inextricably connected. There is no way to parse out Sierra Club's rationale for certain decisions from attorney communications and advice. So the rationale for why Sierra Club made certain decisions with regard to the entire Joint Stipulation and its various provisions is protected from discovery.

Finally, OCC's intent to probe Sierra Club's rationale for signing the Joint Stipulation and including various footnotes impinges on Sierra Club's First Amendment privilege on information reflecting advocacy communications and internal strategy deliberations. Disclosure of Sierra Club's rationale for such decisions would infringe on Sierra Club's First Amendment associational and free speech rights by chilling its participation in political and civic activities and deterring the free flow of information within the organization. *See Perry v. Schwarzenegger*, 591 F.3d 1147, 1157, 1162-63 (9th Cir. 2010) (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963)); *AFL-CIO v. FEC*, 333 F.3d 168, 176-77 (D.C. Cir. 2003); *City of Greenville v. Syngenta Crop Prot., Inc.*, Case Nos. 11-mc-10; 11-mc-1031; and 11-mc-1032, 2011 WL 5118601, at *6-10 (C.D. Ill. Oct. 27, 2011).

For the above reasons, Sierra Club does not intend to produce a witness for deposition on December 30, 2015. Sierra Club is not at this time filing a motion for a protective order from the Commission for two reasons. First, pursuant to O.A.C. 4901-1-24(B), Sierra Club cannot seek a protective order from the Commission until it "has exhausted all other reasonable means of resolving any differences with the party seeking discovery." Since December 24, 2015, Sierra Club counsel Kristin Henry has been in conversation with OCC counsel William Michael to determine if the two parties could come to any agreement on limitations on the scope of discovery that would resolve Sierra Club concerns. Those efforts have not been exhausted yet so a motion for a

protective order is premature. Second, Sierra Club has only been served with a Notice of Deposition and not a subpoena. If Sierra Club is served with a subpoena and it has exhausted efforts to resolve the differences regarding the scope of discovery, Sierra Club will file either a Motion to Quash or a Motion for a Protective Order. At this time such a motion is premature.

Best regards,

A handwritten signature in black ink that reads "Kristin A. Henry". The signature is written in a cursive, flowing style.

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

Summary: Correspondence Letter Objecting to Notice of Deposition electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club