

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**SIERRA CLUB'S MEMORANDUM *CONTRA* BUCKEYE POWER INC.'S
WITHDRAWAL FROM THE STIPULATION AND
APPLICATION FOR REHEARING**

Sierra Club submits this Memorandum *Contra* Buckeye Power Inc.'s Withdrawal from the Stipulation and Application for Rehearing, filed in this proceeding on December 5, 2016 ("Buckeye Application for Rehearing").¹ Sierra Club opposes Buckeye's attempt to effectively re-negotiate the Joint Stipulation and Recommendation, filed in this proceeding on December 14, 2015 ("Stipulation"). First, Buckeye long ago waived any argument it had against the Stipulation provision that mandates the retirement, refueling, or repowering of Cardinal unit 1 by 2030—a unit for which Buckeye has no ownership interest. Similarly, Buckeye has waived its argument that the Commission should require an affiliate of Ohio Power Company ("AEP Ohio") to make investments in the affiliate Power Purchase Agreement ("PPA") generating units. Second, Buckeye's attempt to argue that the Cardinal unit 1 retire, refuel, or repower provision is contrary to the public

¹ Sierra Club takes no position on Buckeye's withdrawal from the Stipulation.

interest is based entirely on speculation, which, even if credited, would not be sufficient to upend the Stipulation. Buckeye speculates that the requirement to retire, repower, or refuel Cardinal unit 1 by December 2030 *may* one day injure *Buckeye* and thus wishes that the multiple-party bargain reached in the Stipulation were titled more in its favor. Such speculation is no basis to upend this multi-party Stipulation, especially because Buckeye has pointed to no regulatory or legal infirmity with the Cardinal unit 1 provision. Third, even if Buckeye's arguments were properly before the Commission—which they are not—the Commission should decline to entertain Buckeye's sour-grapes request to re-negotiate one provision of the Stipulation after-the-fact. Allowing a seemingly dissatisfied signatory party to attack one element of this complex Stipulation would have a chilling effect on settlements in future Commission proceedings, as parties would then have an incentive to seek to re-negotiate the nature of the bargain in dueling applications for rehearing.

I. The Arguments in Buckeye's Application for Rehearing Have Been Waived.

A. Buckeye has waived the right to challenge the stipulation provision that requires AEP to retire, repower, or refuel Cardinal unit 1.

Buckeye has waived its right to challenge the retirement, refueling, or repowering obligation for Cardinal unit 1, which is wholly owned by AEP Generation Resources, an affiliate of AEP Ohio. This requirement was included in the Stipulation² that was signed by multiple parties, including Buckeye, on December 14, 2015 and approved by the

² See Stipulation at III.D.10.

Commission with modifications in its March 31, 2016 Opinion and Order.³ If Buckeye wished to argue that the Cardinal unit 1 retire, refuel, or repower obligation provision violates an important regulatory principle or practice or that the inclusion of this provision rendered the Stipulation, as a whole, contrary to AEP Ohio's customers' or the public's interest,⁴ it was required to do so within thirty days of the March 31, 2016 order.⁵ Buckeye made no such argument. The Commission's first Entry on Rehearing granted the applications of some parties—again, not including Buckeye—“for the purpose of further consideration of *the matters specified in the applications for rehearing*.”⁶ Buckeye did not raise the Cardinal unit 1 provision as a “matter specified” in an application for rehearing and thus it was not at issue in the Commission's Second Entry on Rehearing, issued on November 3, 2016. The Commission's Second Entry on Rehearing does not address the Cardinal unit 1 retirement, refueling, or repowering

³ See Public Utilities Commission of Ohio, Opinion and Order, *In Re: In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider* (March 31, 2016) (Case No. 14-1693 et al.) (“AEP PPA Opinion and Order”) at pgs. 35-36 (reciting Cardinal unit 1 obligation).

⁴ See AEP PPA Opinion and Order at 45 (reciting test under which the Commission addresses a stipulation).

⁵ Ohio Admin. Code 4901-1-35(A) (requiring party to file application for rehearing within 30 days of Commission order that affects its rights).

⁶ Public Utilities Commission of Ohio, Entry on Rehearing, *In Re: In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider* (May 25, 2016) (Case No. 14-1693 et al.) at pg. 1 (emphasis added).

obligation at all and is not an invitation to re-litigate this element of the Stipulation.⁷

Buckeye's failure to raise any arguments against this provision at the time the Commission first approved the Stipulation with modifications means that Buckeye has waived this argument.

B. Buckeye has waived the right to request that the Commission require AEP to make investments in all the affiliate PPA units.

Buckeye has also waived its right to request that the Commission require AEP Ohio and its affiliate to make "necessary investments" in the PPA units⁸ before selling or transferring them.⁹ In its May 2, 2016 application for hearing, AEP Ohio explicitly stated that it sought cost recovery for the Ohio Valley Electric Corporation ("OVEC") units only and that it may forego cost recovery for the other PPA units in this proceeding. If Buckeye wanted to challenge that decision or suggest an alternative vehicle to allow for cost recovery and spending on the PPA units in this proceeding—an alternative that could stand up to Federal Energy Regulatory Commission review—it should have done so at that time. Buckeye has now waived its arguments on this issue. Further, Buckeye has not shown "good cause" to re-open this proceeding to allow for the presentation of

⁷ See Public Utilities Commission of Ohio, Second Entry on Rehearing *In Re: In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider* (November 3, 2016) (Case No. 14-1693 et al.).

⁸ The PPA units subject to Buckeye's request to modify the Stipulation include Cardinal Unit 1; Conesville Units 4, 5, and 6; Stuart Units 1, 2, 3, and 4; and Zimmer Unit 1. See Buckeye Application for Rehearing at 1 n.1. Most of Buckeye's argument focuses on the impact on Cardinal unit 1, but it asks that the Commission require AEP to make investments in all the PPA units.

⁹ See Buckeye Application for Rehearing at 21.

testimony to support an alternative cost-recovery vehicle for the PPA units.¹⁰ Buckeye is simply asking the Commission to create a new PPA rider out of thin air, a rider that AEP Ohio itself is not seeking. The Commission should reject this request.

II. The Commission Should Deny Buckeye's Request to Remove the Cardinal Unit 1 Retire, Repower, or Refuel Obligation from the Stipulation As Buckeye's Argument Lacks Any Legal Foundation and Relies On Factual Speculation Only.

Even if Buckeye's belated attack on the Cardinal 1 retire, refuel, or repower obligation were not waived—which it is—Buckeye has still failed to assert any legal ground for removing this provision from the Stipulation and its factual argument is based on speculation, which, even if credited, is irrelevant. Rehearing is necessary only where a party raises significant and relevant new facts, issues, or arguments that warrant further consideration.¹¹ Buckeye has offered no persuasive reason to make its suggested changes to the multi-party Stipulation. Buckeye does not point to any regulatory principle or practice that is violated by this Stipulation provision. Since Buckeye has offered no legal foundation to support its application, the Commission should reject this request.

Instead, Buckeye makes opaque references to the public interest, focusing mostly on purported harm to itself. Buckeye's factual arguments about how this Stipulation provision might one day hurt Buckeye is purely speculative. Buckeye does not claim that AEP Ohio's customers will one day suffer as a result of the Stipulation provision that requires AEP to retire, refuel, or repower Cardinal unit 1 in 2030. Instead, Buckeye

¹⁰ Ohio Admin. Code 4901-1-34(A).

¹¹ *In the Matter of the Petition of Theresa Sichau & Numerous Other Subscribers of the Sharon Ctr. Exch. of Gte N., Inc., Complainants*, 88-297-TP-PEX, 1990 WL 10654795, at *1–2 (Jan. 17, 1990); *In Re Toledo Edison Co.*, 170 P.U.R.4th 397 (June 12, 1996).

claims that this Stipulation provision *might* make it difficult for Buckeye to find a future partner to invest in its Cardinal units 2 and 3.¹² Buckeye has not offered any evidence to support this hypothetical and speculative future harm. Moreover, Cardinal units 2 and 3 are not even part of the Stipulation and are completely irrelevant to the Commission’s Second Entry on Rehearing. There is nothing in the Stipulation that prevents Buckeye from finding a private-sector partner to invest in Cardinal units 2 and 3, as the Stipulation, March 31, 2016 Opinion and Order, and Second Entry of Rehearing have never addressed these units. Importantly, the parties that actually have a tangible interest in Cardinal unit 1—AEP Ohio and its affiliate—agreed to the inclusion of this provision in the Stipulation. Buckeye has failed to show that its hypothetical, irrelevant harms render the Stipulation as a whole contrary to the public interest.

III. Allowing An Individual Signatory Party to Successfully Challenge A Single Provision of a Large Multi-Party Stipulation Would Discourage Settlement of Commission Cases.

Commission policy favors settlement as an efficient and often equitable means to resolve contested cases.¹³ The Stipulation in this case was signed by eleven parties. There are dozens of separate provisions. The Stipulation represents a complex resolution to a contentious proceeding. The incentive for an individual party to join such a multi-party settlement would be greatly reduced if the Commission were to permit one signatory party to cherry pick an attack on a single provision from a complex agreement

¹² Buckeye Application for Rehearing at 12.

¹³ *See e.g.*, AEP PPA Opinion and Order at pg. 18 (affirming attorney examiners’ quashing of subpoenas due to “chilling effect” on settlement negotiations).

via an application for rehearing. The Commission should deny Buckeye's request to create this bad public policy that would discourage settlement.

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For the foregoing reasons, Buckeye Power Inc.'s Application for Rehearing should be denied.

Dated: December 15, 2016

Respectfully submitted,

/s/ Tony Mendoza

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing Sierra Club's Memorandum *Contra* Buckeye Power Inc.'s Withdrawal from Stipulation and Application for Rehearing upon the following parties via electronic mail.

Date: December 15, 2016

/s/ Tony G. Mendoza

Tony G. Mendoza

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Summary: Memorandum Contra Buckeye Power Inc.'s Application for Rehearing electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club