**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 Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider.  In the Matter of the Application of Ohio Power Company for Approval of Certain Accounting Authority. | )  )  )  )  )  )  )  ) | Case No. 14-1693-EL-RDR  Case No. 14-1694-EL-AAM |

**MOTION TO STRIKE CORRESPONDENCE FILED BY SIERRA CLUB**

**BY**

**THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

On December 29, 2015, Sierra Club filed “correspondence” in this case objecting “to OCC’s request Sierra Club present a witness for deposition.” Sierra Club does not dispute that it is a party to this case, a Signatory Party to the Stipulation, and that it was properly noticed for the deposition. Instead, it asserts meritless objections to the Notice of Deposition.

The Office of the Ohio Consumers’ Counsel (“OCC”) hereby moves to strike Sierra Club’s correspondence from the docket. The proper procedural method for Sierra Club to raise its objections is objecting to specific questions during the deposition or filing a motion for a protective order under Ohio Admin. Code 4901-1-24. A motion would then provide a process for OCC to respond, for the Sierra Club to reply, and for the Public Utilities Commission of Ohio (“PUCO”) to resolve this issue on the record. By not filing such a motion, it is apparent that Sierra Club acknowledges that such a motion would be unsuccessful. Sierra Club’s effort to supplant the Civil Rules and the PUCO’s Rules by filing a correspondence instead of a motion, thus denying OCC process and discovery, should not be tolerated. Thus, the correspondence should be stricken.

Further grounds supporting this request are set forth in the attached Memorandum in Support.

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)

CONSUMERS’ COUNSEL

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**MEMORANDUM IN SUPPORT OF THE MOTION TO STRIKE**

**I. INTRODUCTION**

Ohio Adm. Code 4901-1-24 provides a mechanism for a person from whom discovery is sought to obtain an order that is necessary to protect a party or person from discovery. That is a motion for a protective order. *See* Ohio Adm. Code 4901-1-24.

Sierra Club did not follow the governing rules and file a motion. Instead, it is attempting to short-circuit the process and deny OCC discovery by filing a correspondence. This is an affront to the PUCO’s procedural rules and OCC respectfully requests that the PUCO strike the correspondence from the docket.

**II. ARGUMENT**

Ohio Adm. Code 4901-1-24 provides a clear procedure for parties seeking protection from discovery – a motion for a protective order. Ohio Rule of Civil

Procedure 7 provides that any “application to the court for an order shall be by motion.”[[1]](#footnote-1) The rules provide an established procedural method for a party to seek relief from the PUCO, for the non-moving party to respond, and for the motion to be decided after adequate adversarial process.[[2]](#footnote-2) Sierra Club is ignoring this procedure.

Sierra Club has asserted meritless objections to OCC’s proper and timely deposition notice. In the normal course of events, such objections would be raised in response to questions during the deposition or in a motion for a protective order. Sierra Club’s “correspondence” is an improper method for raising its objections.

Sierra Club’s correspondence docketed in this case contains misstatements and factual inaccuracies. On page 2 of its December 29, 2015 correspondence, Sierra Club states that “AEP Ohio made William Allen available for deposition on December 23, 2015.” This statement is not true. William Allen was not deposed on December 23, 2015. And Sierra Club goes on to assert that “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.”[[3]](#footnote-3) This is another erroneous statement made by Sierra Club because Sierra Club docketed its letter on December 29, 2015 and William Allen had not been deposed regarding the Joint Stipulation. Sierra Club also asserts in its correspondence that this Notice of Deposition is duplicative of prior discovery; however, methods of discovery are not mutually exclusive and parties are entitled to discovery on the Stipulation, as indicated by the Entry.[[4]](#footnote-4)

There is no reason why Sierra Club cannot assert objections during the deposition or file a motion for a protective order. Nevertheless, Sierra Club must produce a witness for deposition.[[5]](#footnote-5) At the deposition, Sierra Club may assert objections in response to specific questions, or file a motion for a protective order. However Sierra Club raises objections in its letter that should be raised at a deposition – “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.”[[6]](#footnote-6) This is not a valid objection to be made in a correspondence letter in the docket. This is an objection that can be raised at the deposition. And in fact, Sierra Club recognizes that “[t]he information sought by OCC about the settlement negotiations *may be discoverable*.”[[7]](#footnote-7) Sierra Club admits that what OCC seeks may be discoverable; however, Sierra Club fails to follow the Ohio Rules of Procedure and produce a witness who can answer “information that may be discoverable.” Sierra Club raises an objection[[8]](#footnote-8) that should be raised at the deposition, not in a letter before a deposition occurs. Sierra Club’s December 29, 2015 “correspondence” should be stricken from the docket and the Commission should disregard its contents.

**III. CONCLUSION**

For the reasons outlined above, OCC requests that the Commission strike Sierra Club’s December 29, 2015 correspondence from the docket for this proceeding and disregard its contents.

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)

CONSUMERS’ COUNSEL

*/s/ William J. Michael*

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**Outside Counsel for the Office of the Ohio Consumers’ Counsel**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Strike was served via electronic transmission to the persons listed below on this 30th day of December, 2015.

*/s/ William J. Michael*

William J. Michael

Assistant Consumers’ Counsel

**SERVICE LIST**

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1. *See also* Ohio Admin. Code 4901-1-12. The Commission “look[s] to them [the Civil Rules] as persuasive authority.” *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*, Case No. 14-1297-EL-SSO, Entry at 7 (July 22, 2015). [↑](#footnote-ref-1)
2. *See* Ohio Admin. Code 4901-1-12. [↑](#footnote-ref-2)
3. Sierra Club correspondence at 2. [↑](#footnote-ref-3)
4. Entry at 3 (Dec. 15, 2015). [↑](#footnote-ref-4)
5. Of course, without an Order granting a motion for protective order after due process, OCC’s deposition notice to Sierra Club, a party to this case, compels Sierra Club to produce a witness or witnesses for the deposition as noticed. *See* Ohio Rule of Civil Procedure 30. [↑](#footnote-ref-5)
6. Sierra Club correspondence at 2. [↑](#footnote-ref-6)
7. Sierra Club correspondence at 2 (emphasis added). [↑](#footnote-ref-7)
8. Sierra Club states that it is not filing a motion for a protective order at this time and will not until it has exhausted all other means of resolving the issue. The governing procedural rules require that, when a party seeks to protect information sought through discovery, at that time, the party seeks a protective order as required by Ohio Adm. Code 4901-1-24. Sierra Club failed to file such a motion by its own admission. Sierra Club correspondence at 3. [↑](#footnote-ref-8)