

**BEFORE THE  
PUBLIC UTILITIES COMMISSION OF OHIO**

|  |                               |
|--|-------------------------------|
| <b>In the Matter of the Long-Term Forecast )</b> |                               |
| <b>Report of Ohio Power Company and )</b>        | <b>Case No. 10-501-EL-FOR</b> |
| <b>Related Matters. )</b>                        |                               |

|  |                               |
|--|-------------------------------|
| <b>In the Matter of the Long-Term Forecast )</b> |                               |
| <b>Report of Columbus Southern Power )</b>       | <b>Case No. 10-502-EL-FOR</b> |
| <b>Company and Related Matters. )</b>            |                               |

---

**OHIO POWER COMPANY’S MEMORANDUM CONTRA  
FIRSTENERGY SOLUTIONS CORP. AND INDUSTRIAL ENERGY USERS-  
OHIO MOTION TO EXTEND THE DEADLINE FOR TESTIMONY, DELAY  
THE HEARING DATE, AND EXPEDITE THE DISCOVERY SCHEDULE AND  
REQUEST FOR EXPEDITED RELIEF**

---

**INTRODUCTION**

It is time to process these proceedings. The Industrial Energy Users-Ohio (IEU) and FirstEnergy Solutions (FES) (collectively “Joint Movants”) present the Commission with an incomplete picture of the procedural history of this case and tell the Commission what it must do, all in an effort to circumvent the Commission’s rules and seek rights it has had since the day each filed for intervention in January and February of 2011. Ultimately, this case relates back to a December 2010 supplemental filing and a March 2011 Entry granting a hearing. Ohio Power Company (Ohio Power or AEP Ohio) respectfully submits that the expired discovery period, the due date for the remaining testimony, and the established hearing date should not be disturbed. It is time to move forward with this case and process this Commission docket without further delay.

The Commission rules contain an explicit provision cutting off discovery 25 days prior to a hearing in these matters. However, the Commission rule did not stop FES from serving discovery on AEP Ohio anyway yesterday, past the timeframe allowed as recognized in its own motion.

The Commission should adhere to the schedule established by the Attorney Examiner in the procedural ruling and continue to follow its rules barring discovery at this late stage of the proceeding. The Commission should also ignore the claims of unfairness and lack of timeliness to prepare when the case has been pending for over a year on simple defined issues. The Commission should uphold the procedural schedule provided in the February 29, 2012 Entry and consider the matter expeditiously.

## **ARGUMENT**

The Ohio Administrative Code has a rule on point dealing with discovery for long term forecast reporting (LTFR) cases. O.A.C. 4901-1-17(E) cuts the right to discovery off 25 days from the hearing in the case. Specifically, the rule states:

(E) In long-term forecast report proceedings, **no party may serve a discovery request later than twenty-five days prior to the commencement of the evidentiary hearing.** Discovery may begin in long-term forecast report proceedings:

- (1) Immediately after the filing with the commission of a long-term forecast report which contains a substantial change from the preceding report as defined by section 4935.04 of the Revised Code.
- (2) Immediately after the filing with the commission of a long-term forecast report when the most recent hearing on a forecast report by the reporting person has been more than four years prior.
- (3) Immediately after good cause to conduct a hearing on a long-term forecast report has been determined by order of the commission.

(4) Immediately after a reporting person files its first long-term forecast report under section 4935.04 of the Revised Code.

Emphasis added. As stated in plain language in the rule “no party may serve a discovery request later than twenty-five days prior to the commencement of the evidentiary hearing.” Also as indicated, the discovery may start in a number of scenarios to understand the filing.

This governing Commission rule is dismissed quickly in the Joint Movants’ motion, instead focusing on their request for an exception to the stated rule. Joint Movants introduce the potential exception in O.A.C. 4901-1-17(G) in the same sentence as the rule defining discovery in the LTFR proceedings. The language in subsection “G” provides that “the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown.” Yet, the Joint Movants provide no justification or good cause to deviate from the explicit language governing discovery in LTFR proceedings. The failure to not act for over a year on discovery cannot be claimed as good cause for a further delay or extension of an explicit discovery deadline defined by rule.

A quick review of the docket card shows that the Joint Movants had adequate time to conduct discovery in this matter. AEP Ohio filed its supplement that included the addition of the solar facility in December of 2010. On January 26, 2011, the Commission granted the Staff request for a hearing on the addition of the solar facility. IEU filed its motion to intervene on January 28, 2011. FES filed its motion to intervene on February 17, 2011. Joint Movants were present at the public hearing held on March 9, 2011. On

August 8, 2011, both of the Joint Movants filed memorandum contra AEP Ohio's motion to establish a procedural schedule and request for companion treatment of the case with the AEP Ohio ESP. Staff and AEP Ohio filed the settlement agreement on November 21, 2011, after providing both Joint Movants multiple opportunities to sign on to the agreement. Joint Movants also filed a motion to strike and *in limine* concerning that agreement on December 14, 2011.

The Joint Movants claim that they are prevented from conducting any discovery is untrue, and the lack of any developed discovery is a matter that was under their control and not based on the time provided by the Commission in this case. Joint Movants had ample time and opportunity to pursue discovery, in fact they had over a year (411 days for IEU and 391 days for FES) since filing for intervention. In fact, IEU did serve discovery on AEP Ohio on March 2011 and AEP Ohio responded on April 4, 2011.<sup>1</sup> IEU even executed a protective order with AEP Ohio to ensure any sensitive documents requested in discovery would be provided and kept confidential. IEU executed this agreement on May 25, 2011. IEU actually conducted discovery and nothing precluded FES from conducting discovery at any time from their motion to intervene up until the timeframe in the Commission rule.

FES cannot argue it was unaware of the nature of the proceeding or the issues it would seek to explore on discovery. As indicated by the arguments raised in the different filings in this case both party were aware of the issues involved. FES even raised the issues covered in the settlement agreement and supported in the testimony of AEP Ohio

---

<sup>1</sup> IEU contacted AEP Ohio yesterday seeking a confidential critical infrastructure information document identified as responsive to IEU's request subsequent to the response and AEP Ohio will supplement that discovery to provide IEU that document.

witness William Castle, in its motion for intervention on February 17, 2011. In fact, FES pointed out the intent of AEP Ohio to enter into an arrangement for 49.9 MW of solar resources and the recognition by the Company of its intention to demonstrate the need for the facility in the LTFR proceeding for the non-bypassable surcharge in R.C. 4928.143. See FES February 17, 2011 Motion to Intervene at 4-5. Both IEU and FES also made arguments opposing AEP Ohio's motion to establish a procedural schedule that recognized this consideration of the solar project and the need for the facility in their respective August 8, 2011 memorandum contra. Joint Movants cite no authority for its due process and fairness claims of good cause to ignore the explicit Commission rule and grant an extended discovery and to extend the date of the hearing. It is customary in many Commission proceedings for testimony to be filed in the weeks prior to the evidentiary hearing. Joint Movants assertion that it has a due process right to submit discovery after the testimony is filed is without merit. The scope of the hearing is focused on the addition of the solar facility. AEP Ohio already indicated it is not seeking to establish a surcharge in this case only the need for such a facility. That analysis can be found at the root of the December 2010 Supplemental filing that Joint Movants' have had over a year to submit discovery. The only due process at risk of being violated in this proceeding is the delay in reaching the hearing day by AEP Ohio. But the Commission has set that date and provided AEP Ohio that opportunity. Further delay should not be allowed.

AEP Ohio filed its supplemental filing in December of 2010 and is still awaiting its opportunity to support the need for a solar facility in a hearing before the Commission. Further delay by the Joint Movants is not warranted. As indicated in the 11-346 et al.

docket and the 10-2929 docket there are a number of proceedings involving AEP Ohio coming up before the Commission. Delaying this hearing past its currently set date pushes this hearing, potential rebuttal if needed, and briefing back into those other timelines. There are a number of other AEP Ohio cases that will be taking up Commission hearing room space, the time is now to process this case and ensure the most efficient use of party and Commission resources. Further delay is unnecessary. It also bears pointing out that the Joint Movants filed this motion for an extension after AEP Ohio filed its testimony. The Attorney Examiner established an appropriate level of time for the Joint Movants to consider the testimony of Staff and AEP Ohio supporting the need for the solar facility in the pre-filed Supplement from December of 2010. Now Joint Movants seek to hold AEP Ohio to the filing date but provide more time to craft a response. Regardless, the Commission should deny any request for any further extension in this proceeding.

Any argument that discovery is needed to provide an efficient proceeding again ignores the time already available to Joint Movants to seek discovery. As shown above and in the docket, Joint Movants had the time and means to seek discovery in this proceeding and chose its own path. The Commission should not be concerned with the curious statement that cross-examination could be longer if further discovery is not granted or that these matters could have been avoided by granting the Joint Movants' motion to strike/*in limine*. FES should not blame its inability to take advantage of the 391 days and IEU the 411 days it had to seek discovery on the proper processing of the issues in the case by the Attorney Examiner entries applying the Commission rules and laws. In fact, perhaps it is Joint Movants inability to accept the Commission's authority

to consider need in the LTFR proceeding that led it to not seek further discovery earlier. That unwillingness to accept the Commission's jurisdiction and process should not be used as acceptable grounds for delay and extension of the discovery and hearing dates already established.

The issues are known and are understood in this narrow proceeding and therefore any further delay of the hearing date or extension of clearly established Commission rules is unnecessary. As indicated in the Joint Movants' motion to strike part of the settlement agreement and motion *in limine* of the hearing, their interest is in the legal arguments related to the establishment of a surcharge and not the limited question of need. The Commission should send a clear message that the hearing will not entertain the expansion of the issues beyond the Commission's stated scope and not extend the discovery or hearing timeline based on the legal disagreement Joint Movants have with the Commission on the proper scope of this hearing.

## CONCLUSION

Joint Movants fail to establish good cause for an extension of the expired discovery period defined by rule, a delay in its due date for testimony, and failed to provide any grounds for an extension of the hearing date. It is time to hear this case on the limited issues involved. Joint Movants' attempts to expand the case beyond the scope determined by the Commission should be denied along with the requests to change the established schedule.

Respectfully Submitted,

//ss//Matthew J. Satterwhite

Matthew J. Satterwhite

Steven T. Nourse

American Electric Power

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215-2373

Telephone: (614) 716-1915

Facsimile: (614) 716-2950

[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

[stnourse@aep.com](mailto:stnourse@aep.com)



## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Ohio Power Company's Memorandum Contra FirstEnergy Solutions Corp. and Industrial Energy Users-Ohio Motion to Extend the Deadline for Testimony, Delay Hearing Date, and Expedite the Discovery Schedule, and Request for Expedited Relief has been served upon the below-named counsel via traditional and electronic mail this 14<sup>th</sup> day of March, 2012.

//ss//Matthew J. Satterwhite

Matthew J. Satterwhite

Thomas McNamee  
Assistant Attorney General  
180 East Broad Street  
Columbus, OH 43215  
[Thomas.mcnamee@puc.state.oh.us](mailto:Thomas.mcnamee@puc.state.oh.us)

Joseph Olikier  
Frank P. Darr  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)

Mark Hayden  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)

James F. Lang  
Laura C. McBride  
N. Trevor Alexander  
CALFEE, HALRTER & GRISWOLD LLP  
1400 KeyBank Center  
Cleveland, OH 44114  
[jlang@calfee.com](mailto:jlang@calfee.com)  
[lmcbride@calfee.com](mailto:lmcbride@calfee.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**3/14/2012 9:42:38 AM**

**in**

**Case No(s). 10-0501-EL-FOR, 10-0502-EL-FOR**

Summary: Memorandum Contra electronically filed by Mr. Matthew J Satterwhite on behalf of Ohio Power Company and Columbus Southern Power Company