

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)	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 REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO
ESTABLISH A PROCEDURAL SCHEDULE FOR AMENDED APPLICATIONS**

Sierra Club respectfully submits this reply in support of its proposed procedural schedule for this proceeding. Sierra Club's proposed schedule—or the one proposed by the Joint Movants—would allow sufficient time for investigation of the complex issues presented in this proceeding. The schedule proposed by the Ohio Power Company ("AEP" or the "Company"), by contrast, would not. Indeed, AEP's proposed schedule would inhibit the parties' ability to develop a thorough, informed record for the Commission's review. AEP's proposed schedule should be rejected.

I. The Schedule in the FirstEnergy Proceeding is an Appropriate Model And, Further, the FirstEnergy Hearing Conflicts with AEP's Proposed Schedule.

The schedule in the FirstEnergy proceeding (Case No. 14-1297-EL-SSO) is an appropriate model for this proceeding and AEP's attempts to distinguish it are inapposite. First, AEP claims that the Commission has resolved in the AEP ESP III order many of the important legal and policy issues that are open in the First Energy case. AEP is wrong. On May 28, 2015, the Commission issued its ESP III Rehearing Order and stated:

[O]n April 22, 2015, the Commission granted rehearing for further consideration of all assignments of error, including those relating to the PPA. *This Commission will defer ruling on the assignments of error related to the PPA at this time.*

Case No. 13-2385-EL-SSO, Second Entry on Rehearing at 5 (May 28, 2015) (emphasis added) (“ESP III Rehearing Order”). The Commission has not finally, definitively ruled that the PPA Rider is lawful and supported by Ohio energy policy. Sierra Club, as well as all parties, can address whether the proposed PPA Rider is consistent with Ohio law and allowed under federal preemption law.

Second, AEP claims that the FirstEnergy case is more complex than this case. Not so. This docket involves a proposed rider for 20 coal-fired units at 6 coal-fired power plants while the First Energy case involves 19 units at 4 plants. In addition, AEP is proposing a PPA transaction that could continue through 2051, while the FirstEnergy case involves a proposed rider that could continue through 2031. This case is thus larger in scope and presents more potential for long-term risk to ratepayers. The FirstEnergy docket thus represents a generous model for establishing a procedural schedule.

In addition to serving as an appropriate model, the FirstEnergy proceeding provides another reason for rejecting AEP’s proposed schedule: As Sierra Club and other parties explained in their scheduling motions, AEP’s proposed schedule interferes with the evidentiary hearing in the FirstEnergy case, which Sierra Club and many other parties are litigating. *See* Sierra Club Mot. at 6 n.10; Joint Movants Mot. at 9-10; ELPC Mem. at 4. AEP minimized this problem, emphasizing that its proposed schedule “does not involve overlapping *hearings*.” AEP Opp. at 8 (emphasis in original). Even if that argument otherwise had merit—it does not—AEP’s argument now fails on its own terms. On May 29, 2015, the Attorney Examiners in the

FirstEnergy ESP case amended the procedural schedule. Under the current schedule, the evidentiary FirstEnergy hearing is scheduled to begin on July 27, 2015—one week *after* the hearing would begin under AEP’s preferred schedule. Because it is no longer true that “FirstEnergy’s ESP IV hearing would take place well before the hearing in this proceeding,” AEP Opp. at 8, the inadequacy of AEP’s proposed schedule is confirmed.

II. AEP’s Amended Application is Not an “Incremental” Change but Rather a Significant Revision to the Application.

As Sierra Club and other Intervenors explained in their scheduling motions, the complexity of AEP’s application supports their proposed schedules. *See, e.g.*, Sierra Club Mot. 5-6; *see also* ELPC Mot. 1-2; Joint Movants Mot. 9. In its opposition, AEP claims that “[t]hese arguments might have some merit if intervenors were starting from scratch in this case. But intervenors are not starting from scratch.” AEP Opp. at 4. AEP’s argument is without merit.

As an initial matter, Intervenors are starting from scratch with regard to more than half of the units now covered by the joint application, namely, the OVEC plants. AEP’s initial application in this proceeding sought a PPA Rider for nine units owned by its affiliates. In its amended application, AEP also seeks a PPA Rider for the eleven OVEC units. Sierra Club and all intervenors are starting from scratch in this proceeding with regard to those units. If the Commission were to adopt a procedural schedule that essentially prevented discovery on these units, it would prejudice Sierra Club and other parties.

AEP is wrong in suggesting that because the OVEC plants were part of the ESP III case, additional time for discovery is not needed in this docket. *See* AEP Opp. at 4-5. The ESP III docket is a separate and unique docket in which the company submitted its application and initial

testimony nearly one-and-a-half years ago, and discovery closed more than a year ago, in May 2014.¹ At this point, much of the information from the ESP III docket regarding the economics of the proposed PPA Rider and the coal plants included therein is outdated. So the mere fact that some of the intervenors had the opportunity to carry out discovery in the ESP III docket should have little bearing on the scope of discovery allowed in this case.² Furthermore, AEP cites no authority for the proposition that discovery in a separate proceeding absolves the Commission of its statutory obligation to allow robust discovery in this proceeding (even assuming the information in the separate proceeding were not stale).

Moreover, the Commission held in the ESP III case that it was “not persuaded, based on the evidence in the record in these proceedings, that AEP Ohio’s PPA Rider proposal would provide customers with sufficient benefit from the rider’s financial hedging mechanism or any other benefit that is commensurate with the rider’s potential cost.” AEP ESP III Order at 24. Presumably, AEP will attempt to offer additional evidence and arguments beyond what was submitted in the ESP III case in an effort to justify a proposed PPA Rider that has, in part, already been rejected by the Commission. AEP’s proposed schedule would effectively deny Intervenors any meaningful opportunity to evaluate, carry out discovery, and submit testimony regarding such evidence and arguments.

¹ Case Nos. 13-2385-EL-SSO, 13-2386-EL-AAM, Entry ¶ 3 (Jan. 24, 2014).

² Moreover, Sierra Club was not a party to the ESP III case and did not have an opportunity to submit discovery and develop expert testimony regarding the OVEC plants. AEP’s further claims—that because Sierra Club did not intervene in the ESP case it has essentially forfeited the right to challenge a rider associated with those plants—is without merit. *See* AEP Opp. at 7 n.6. AEP did not prevail on its prior proposal, and it has now amended its application in this docket to cover those OVEC plants. AEP cannot short-circuit Sierra Club’s right to serve discovery and develop expert testimony *in this docket* based on AEP’s previous failed rider attempt.

AEP further argues that additional time for discovery is not needed as to the non-OVEC units in its proposal as its amended application was “merely [an] incremental” change to its initial application and that “most importantly, the structure and justification of the PPAs remains effectively the same.” AEP Opp. at 5. This argument is unpersuasive. The Commission held that the “rate impact of the rider” hinges on “data assumptions that attempt to predict OVEC’s costs and revenues.” AEP ESP III Order at 24. Thus, the Commission and all parties must delve into the details regarding specified issues, including the finances of the generating plant, costs to comply with future environmental regulations, reliability constraints, forecasts for electric prices, in order to evaluate the reasonableness of the proposed PPA Rider. So while it is nice to know that the structure of the PPA Rider and justification remain the same, it is the updates to the forecasts and cost assumptions that are truly the “most important” issues for parties to analyze through discovery and testimony.

III. The Commission’s Rehearing Order in AEP’s ESP III Proceeding Shows That Sierra Club’s Proposed Schedule Is Reasonable.

The Commission’s ruling on the various motions for rehearing in AEP’s ESP III proceeding shows that Sierra Club’s proposed schedule—or one that allows more time—is reasonable. In its ESP III Rehearing Order, in deferring ruling on the PPA-related claims, the Commission focused on the need for more certainty regarding federal policy:

In consideration of the PPA, the Commission acknowledged the considerable uncertainty with respect to pending PJM Interconnection, LLC (PJM) market reform proposals, environmental regulations, and federal litigation. Thus, the Commission acknowledges the potential impact of these matters on the financial needs of generating plants and on grid reliability. The Commission will continue to closely monitor developments in these matters.

ESP III Rehearing Order at 4-5 (citations removed). The Order specifically referred to PJM's capacity market auction and EPA's Clean Power Plan as policies with uncertain impact on the PPA proposal. *See id.* at 5.

Sierra Club's proposed procedural schedule, which has Intervenor testimony due on October 1, 2015, and a hearing starting on November 2, provides a more reasonable opportunity for the Commission and parties to get further clarity regarding the future events that the Commission believes will impact the reasonableness of the PPA Rider.

First, the U.S. Environmental Protection Agency is expected to issue the final Clean Power Plan in August 2015.³ The Clean Power Plan will limit greenhouse gas emissions from existing coal-fired power plants and could significantly impact the economics of the proposed PPA Rider and the coal plants included therein.

Second, PJM has filed proposals with the Federal Energy Regulatory Commission ("FERC") that could entail significant reforms to PJM's capacity market. PJM has requested that FERC rule on its Capacity Performance Proposal before it conducts its Base Residual Auction for the 2018/2019 delivery year, which by FERC order is to be held no later than August 10-14, 2015. As the Commission has already found in declining to rule on the PPA portions of the ESP III rehearing petitions, these PJM proposals could materially impact the economics of the proposed PPA and the coal plants included therein.

³ The U.S. Environmental Protection Agency will finalize the Clean Power Plan sometime in August, according to agency's recently issued "Unified Agenda." *See* U.S. EPA, Unified Agenda at: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=2060-AR33>

Sierra Club's proposed procedural schedule would allow all parties to address the impact of the Clean Power Plan and newly approved PJM policies on the PPA Rider proposal.⁴ By contrast, AEP's proposed schedule would have all discovery, testimony, and, likely, the evidentiary hearing completed before EPA finalizes the Clean Power Plan, FERC decides the Capacity Performance proposal, and PJM holds its 2018/2019 Base Residual Auction. Since the Commission has expressly stated its interest in more clarity regarding these future events, Sierra Club's proposed procedural schedule is more appropriate as it will allow for further development of these issues before testimony is filed and the hearing begins.

IV. AEP's Claim That Intervenors "Procrastinated" In This Proceeding is Misplaced Because the Commission Made Clear That It Intended to Decide the ESP Case First and, Since that ESP Ruling, AEP Has Stated That It Intended to Amend its Application In This Proceeding.

AEP argues that its abbreviated procedural schedule is appropriate because intervenors "procrastinated over the past eight months" and that intervenors should have used that time to serve additional discovery and develop testimony. AEP Opp. at 5. AEP's argument is misplaced. It was reasonable for Sierra Club and other intervenors not to invest their time and resources in developing their expert analysis of AEP's initial proposal because it was reasonable to assume that the Commission would rule on the ESP III case before addressing this case and because, after the Commission issued the ESP III order, AEP announced it intended to amend its application.

First, the Attorney Examiners' inaction on fully-briefed procedural schedule motions signaled a desire for the Commission to issue its decision in the ESP III case before substantively

⁴ Joint Intervenors' Proposed Procedural Schedules would also allow for sufficient time to bring more clarity regarding these future consequential events.

starting this case. Sierra Club filed a Motion for a Procedural Schedule on October 16, 2014, which was fully briefed by November 5, 2014. The Attorney Examiners never ruled on this pending motion (nor did the Attorney Examiners otherwise establish a procedural schedule). This delay reasonably indicates that the Attorney Examiners were awaiting the Commission's order on the ESP III case before substantively digging into this case so that AEP and all parties could address the issues and factors the Commission deemed necessary to establish a reasonable and prudent PPA Rider.

Second, after the Commission issued an Order in the ESP III case, it became obvious that AEP would either withdraw or amend its applications in this proceeding. In fact, AEP publicly stated that it would amend its application in this proceeding to address the Commission's directive: AEP's Chief Executive Officer, Nick Akins, stated on the company's Q1 2015 investors' call: "We also, in October, 2014, filed a larger PPA proposal for several other units amounting to approximately 2,700 megawatts. And we will supplement that filing soon with additional information requested from the ESP order and will recommend an expedited procedural schedule from the Commission."⁵ It was therefore reasonable for intervenors not to invest time and resources in developing expert testimony on the initial application given that AEP publicly stated that it would amend its application. The reasonableness of intervenors' assumption is proven by AEP's amended application, which significantly changed its initial application, most importantly by adding eleven coal-fired units to this case.

⁵ American Electric Power Q1 investors' call, available online at (last accessed June 1, 2015), available at: <http://www.nasdaq.com/aspx/call-transcript.aspx?StoryId=3098156&Title=american-electric-power-company-s-aep-ceo-nick-akins-on-q1-2015-results-earnings-call-transcript>

V. Conclusion

For the foregoing reasons, as well as the reasons set forth in its scheduling motion and memorandum in support, Sierra Club respectfully requests that the Attorney Examiners adopt the procedural schedule set forth in Sierra Club's Motion to Establish a Procedural Schedule.

Dated: June 3, 2015

Respectfully submitted,

/s/ Tony G. Mendoza

Tony G. Mendoza
Sierra Club
85 Second Street, Second Floor
San Francisco, CA 94105-3459
Telephone: 415-977-5589
Fax: 415-977-5793
Email: tony.mendoza@sierraclub.org

Christopher J. Allwein, Counsel of Record (#0084914)
Kegler Brown Hill & Ritter LPA
Capitol Square, Suite 1800
65 E. State Street
Columbus, OH 43215
Telephone: (614) 462-5496
Facsimile: (614) 464-2634
callwein@keglerbrown.com

Attorneys for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served via email to the persons listed below, on June 3, 2015.

/s/ Tony G. Mendoza
Tony G. Mendoza

SERVICE LIST

haydenm@firstenergycorp.com jmcdermott@firstenergycorp.com scasto@firstenergycorp.com jlang@calfee.com talexander@calfee.com dboehm@BKLLawfirm.com mkurtz@BK.Llawfirm.com jkyler@BKLLawfirm.com Kurt.Helfrich@ThompsonHine.com Scott.Campbell@ThompsonHine.com Stephanie.Chmiel@ThompsonHine.com tdougherty@theOEC.org jeffrey.mayes@monitoringanalytics.com toddm@wamenergylaw.com Bojko@carpenterlipps.com mhpetricoff@vorys.com mjsettineri@vorys.com glpetrucci@vorys.com joliker@igsenergy.com mswhite@igsenergy.com cmooney@ohiopartners.org mdortch@kravitzllc.com msmalz@ohiopoverlylaw.org ricks@ohanet.org tobrien@bricker.com	stnourse@aep.com mjsatterwhite@aep.com msmckenzie@aep.com sam@mwncmh.com fdarr@mwncmh.com mpritchard@mwncmh.com myurick@taftlaw.com callwein@keglerbrown.com tony.mendoza@sierraclub.org todonnell@dickinsonwright.com lhawrot@spilmanlaw.com dwilliamson@spilmanlaw.com Stephen.Chriss@walmart.com schmidt@sppgrp.com jfinnigan@edf.org William.michael@occ.ohio.gov Jodi.bair@occ.ohio.gov Kevin.moore@occ.ohio.gov DStinson@bricker.com joseph.clark@directenergy.com ghull@eckertseamans.com stheodore@epsa.org laurac@chappelleconsulting.net gthomas@gtpowergroup.com mfleisher@elpc.org thomas.mcnamee@puc.state.oh.us Katie.johnson@puc.state.oh.us Attorney Examiners: Sarah.parrot@puc.state.oh.us Greta.see@puc.state.oh.us
--	---

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/3/2015 3:22:32 PM

in

Case No(s). 14-1693-EL-RDR

Summary: Reply Sierra Club's Reply Memorandum in Support of its Motion to Establish a Procedural Schedule for Amended Applications electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club