

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 16-395-EL-SSO
for Approval of its Electric Security Plan)	
In the Matter of the Application of)	
The Dayton Power and Light Company)	Case No. 16-396-EL-ATA
for Approval of Revised Tariffs)	
In the Matter of the Application of)	
The Dayton Power and Light Company)	
for Approval of Certain Accounting)	Case No. 16-397-EL-AAM
Authority Pursuant to Ohio Rev.)	
Code § 4904.13)	

**MOTION FOR AN EXTENSION OF THE ATTORNEY EXAMINER’S
PROCEDURAL SCHEDULE BY SIERRA CLUB,
THE PJM POWER PROVIDERS GROUP,
THE ELECTRIC POWER SUPPLY ASSOCIATION,
THE RETAIL ENERGY SUPPLY ASSOCIATION, AND
INTERSTATE GAS SUPPLY, INC.
AND
REQUEST FOR EXPEDITED RULING**

Pursuant to Rule 49-1-12, Ohio Administrative Code, Sierra Club, the PJM Power Providers Group (“P3”), the Electric Power Supply Association (“ESPA”), the Retail Energy Supply Association (“RESA”), Interstate Gas Supply, Inc. (“IGS Energy”) (collectively, “Joint Movants”) respectfully move the Public Utilities Commission of Ohio (“Commission”) for an extension of the procedural schedule issued by the Attorney Examiner on August 16, 2016. The Dayton Power & Light Company (“DP&L”) is requesting approval of an Electric Security Plan (“ESP”) and a “Reliable Electricity Rider,” which would allow the company to charge its customers the costs associated with

guaranteeing the profits for its non-regulated affiliate's ownership share of power plants that are supposed to operate on the competitive market.¹

Joint Movants request that the procedural schedule be extended so that intervenor testimony and the evidentiary hearing occur after the Commission issues its rehearing order in the FirstEnergy ESP proceeding, Case No. 14-1297-EL-SSO. Specifically, Joint Movants request that the procedural schedule be modified to the following:

- A. Intervenors' Testimony 30 Days from FirstEnergy ESP Rehearing Order
- B. Pre-Hearing Conference 55 Days from FirstEnergy ESP Rehearing Order
- C. Evidentiary Hearing 60 Days from FirstEnergy ESP Rehearing Order²

If any of these days were to fall on a weekend or holiday, then the operative deadline should be the next business day.

This extension is warranted because the record in the FirstEnergy ESP proceeding involves issues that will bear on the Commission's consideration of the DP&L ESP, particularly its proposed Reliable Electricity Rider. DP&L's proposal is the latest in a series of Ohio utility applications that have sought out-of-market customer support for generation units. The standards that the Commission applies to determine whether to consider such proposals have changed over time. In 2015, the Commission announced a four-part test that it would use to consider an inter-affiliate Power Purchase Agreement ("PPA") proposal in the AEP Ohio ESP III Order.³ The Commission's decision led to changes in the procedural schedule in another inter-affiliate PPA proceeding so that parties could "address whether and how the Commission's findings in the AEP Ohio

¹ See Application, pp. 1-7.

² The September 27, 2016 date for local public hearings need not be revised.

³ See Public Utilities Commission of Ohio Opinion and Order *In Re: In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan* (Feb. 25, 2015) (Case Nos. 13-2385-EL-SSO, 13-2386-EL-AAM) at pg. 25.

Order should be considered in evaluating” the other pending application.⁴ Despite how recently this test was articulated, there is currently uncertainty regarding whether the Commission will still consider the four-factor test in deciding inter-affiliate PPAs or similar proposals in light of a Federal Energy Regulatory Commission (“FERC”) Order issued in April 2016, and resulting changes to the inter-affiliate PPAs and the structure of associated riders.⁵

In the FirstEnergy ESP proceeding, the Commission is poised to issue a decision on rehearing in the coming weeks in which it is expected to articulate how, in light of everything, what factors the Commission will now consider in reviewing such requests and what the Commission will consider an appropriate structure, if any, for inter-affiliate PPAs and associated riders.⁶ However, in this DP&L proceeding, the Attorney Examiner’s schedule likely requires the intervenors to prepare and file testimony before that ruling has been issued. By briefly extending the procedural schedule in this docket until after the Commission issues its rehearing order in the FirstEnergy proceeding, Joint Movants and all other parties will be able “to address whether and how the Commission’s findings in the [First Energy ESP] Order should be considered in evaluating [DP&L’s] application in this [p]roceeding,” including providing parties “sufficient time [to] conduct

⁴ See Attorney Examiners’ Order, dated Mar. 23, 2015, FirstEnergy ESP (Case No. 14-1297-EL-SSO) (“In order for the parties to address whether and how the Commission’s findings in the AEP Ohio Order should be considered in evaluating FirstEnergy’s application in this proceeding, the attorney examiner finds that amending the procedural schedule at this time is reasonable.”).

⁵ Elec. Power Supply Ass’n, et al. v. FirstEnergy Solutions Corp., et al., 155 FERC ¶ 61,101 (Apr. 27, 2016).

⁶ FirstEnergy ESP case (Case No. 14-1297-EL-SSO).

additional discovery and to evaluate and offer [. . .] testimony addressing the [First Energy ESP Order].”⁷

Moreover, extending the procedural schedule will ensure that Joint Movants and other parties are not unduly prejudiced in this proceeding. Ohio law requires that the Commission allow ample time for discovery and for parties to adequately prepare for participation in the evidentiary hearing.⁸ Pending the outcome of the FirstEnergy ESP proceeding on rehearing, the legal framework, at least as the Commission perceives it, for DP&L’s “Reliable Electricity Rider” and its alternative proposal remains unknown. Simply put, to ensure that all parties are not unduly prejudiced from presenting facts and evidence that effectively address the Commission’s concerns, the Commission should extend the procedural schedule in this docket. Also, the requested extension will avoid multiple rounds of pre-filed testimony, which could otherwise become necessary following the rehearing decision in the FirstEnergy ESP proceeding.

This would likely be just a short extension. Briefing was completed in the FirstEnergy proceeding on rehearing on August 29, 2016 and, if the Commission takes the same time it has taken to decide similar cases, a decision can be expected within the next several weeks. The reasons the Commission should grant this motion to extend the procedural schedule and issue an expedited ruling pursuant to Ohio Adm. Code 4901-1-12(C) are more fully explained in the attached memorandum in support.

⁷ See Attorney Examiners’ Entry, dated Mar. 23, 2015, FirstEnergy ESP (Case No. 14-1297-EL-SSO).

⁸ Ohio Adm. Code 4901-1-16; Ohio Revised Code 4903.082.

Dated: September 14, 2016

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION FOR AN EXTENSION OF
ATTORNEY EXAMINER’S PROCEDURAL SCHEDULE BY SIERRA CLUB,
THE PJM POWER PROVIDERS GROUP, THE ELECTRIC POWER SUPPLY
ASSOCIATION, AND THE RETAIL ENERGY SUPPLY ASSOCIATION, AND
INTERSTATE GAS SUPPLY, INC.
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REQUEST FOR EXPEDITED RULING**

I. INTRODUCTION

Sierra Club, the PJM Power Providers Group (“P3”), the Electric Power Supply Association (“ESPA”), the Retail Energy Supply Association (“RESA”), and Interstate Gas Supply, Inc. (“IGS Energy”) (collectively, “Joint Movants”) respectfully move the Public Utilities Commission of Ohio (“Commission”) for an extension of the procedural schedule issued by the Attorney Examiner on August 16, 2016. The Dayton Power & Light Company (“DP&L”) is requesting approval of an Electric Security Plan (“ESP”) and a “Reliable Electricity Rider,” which would allow the company to charge its customers the costs associated with guaranteeing the profits for its non-regulated affiliate’s ownership share of power plants that are supposed to operate on the

competitive market.⁹ DP&L’s request is the latest in a series of Ohio utility applications that have sought out-of-market customer support for affiliate-owned generation units.

The standards that the Commission applies to determine whether to consider such proposals have changed over time. In 2015, the Commission announced a four-part test that it would use to consider inter-affiliate Power Purchase Agreement (“PPA”) proposals in the AEP Ohio ESP III Order.¹⁰ That decision led to a new procedural schedule in another pending inter-affiliate PPA proceeding. The Attorney Examiners in the FirstEnergy ESP matter extended the briefing schedule to allow parties “to address whether and how the Commission’s findings in the AEP Order should be considered in evaluating FirstEnergy’s application in this Proceeding,” including providing parties “sufficient time [to] conduct additional discovery and to evaluate and offer [. . .] testimony addressing the AEP Ohio Order.”¹¹ There is currently uncertainty regarding whether the Commission’s recently announced four-part test is still applicable given an April 2016 order issued by the Federal Energy Regulatory Commission (“FERC”) that required several Ohio utilities (including the FirstEnergy distribution utilities) that wanted to enter into such an inter-affiliate PPA to seek federal review and approval of the

⁹ See Application, pp. 1-7; see also Application, p. 7. (“The Commission should approve the fixed, nonbypassable amount for the same reasons that it should approve the RER -- namely, that without these amounts, the generation plants would be at risk, the closure of those plants would have significant adverse effects in Ohio, and the financial health of DPL Inc., and DP&L would be threatened.”).

¹⁰ See Public Utilities Commission of Ohio Opinion and Order *In Re: In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan* (Feb. 25, 2015) (Case Nos. 13-2385-EL-SSO, 13-2386-EL-AAM) at pg. 25.

¹¹ See Attorney Examiners’ Entry, dated Mar. 23, 2015, FirstEnergy ESP (Case No. 14-1297-EL-SSO).

PPA before executing it and how utilities have restructured their requests in light of that decision.¹²

This extension is warranted because the record in the FirstEnergy ESP proceeding involves issues that will bear on the Commission's consideration of the DP&L ESP, particularly its proposed Reliable Electricity Rider. The Commission is on the cusp of issuing a rehearing decision so the requested extension will be brief.

II. ARGUMENT

A. The Commission Should Extend the Attorney Examiner's Procedural Schedule to Allow Consideration of the Commission's Decision in the FirstEnergy ESP Proceeding.

In February 2016, DP&L filed its application for its ESP and associated "Reliable Electricity Rider."¹³ On August 16, 2016, the Attorney Examiner issued a procedural schedule for this case. Under the Attorney Examiner's schedule, Joint Movants and other intervenors would have to complete their analysis of DP&L's Application and its Reliable Electricity Rider and "alternative" proposal; coordinate, prepare, and file testimony from their own witnesses; prepare and serve remaining discovery; receive and analyze Staff testimony; and prepare for an evidentiary hearing over approximately two months. The factual and legal framework as perceived by the Commission for this case remains in a state of uncertainty pending a Commission decision in the FirstEnergy ESP

¹² Elec. Power Supply Ass'n, et al. v. FirstEnergy Solutions Corp., et al., 155 FERC ¶ 61,101 (Apr. 27, 2016).

¹³ See Application, pp. 1-7; *see also* Application, p. 7. ("The Commission should approve the fixed, non-bypassable amount for the same reasons that it should approve the RER -- namely, that without these amounts, the generation plants would be at risk, the closure of those plants would have significant adverse effects in Ohio, and the financial health of DPL Inc., and DP&L would be threatened.").

proceeding.¹⁴ Joint Movants respectfully move the Commission for an extension of the procedural schedule so that all major deadlines occur after the Commission issues its First Energy ESP order.

1. There is Currently Uncertainty Over the Legal Standard that the Commission Applies to Generation Subsidy Requests.

Ohio law establishes a comprehensive scheme for regulating retail electric service.¹⁵ Among other things, the statutory scheme requires electric distribution utilities to provide a standard service offer (“SSO”), and directs utilities to submit an application for either a market rate offer or an ESP, including accompanying rider requests.

Starting in 2013, Ohio utilities began filing a series of ESP applications that sought to guarantee cost recovery for power plants owned by non-regulated affiliates.¹⁶ The first such proposal that the Commission considered was in the AEP Ohio ESP III

¹⁴ *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 Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan* (Case No. 14-1297-EL-SSO) (hereafter referred to as the “FirstEnergy ESP case”)

¹⁵ R.C. 4928.

¹⁶ *See e.g., In Re: Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan* (Cause No. 13-2385-EL-SSO, 13-2386-EL-AAM); *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 Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan* (Case No. 14-1297-EL-SSO); *In Re: 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* (Case Nos. 14-1693-EL-RDR, 14-1694-EL-AAM); *In the Matter Of The Application Of Duke Energy Ohio, Inc. For Authority To Establish A Standard Service Offer Pursuant To Section 4928.143 Revised Code, In The Form Of An Electric Security Plan, Accounting Modifications And Tariffs For Generation Service* (Case No. 14-841-EL-SSO).

case.¹⁷ In its order from that case, the Commission announced a new four-part test that it would use to consider inter-affiliate PPAs and associated riders of this type:¹⁸

In its filing, AEP Ohio should, at a minimum, address the following factors, which the Commission will balance, but not be bound by, in deciding whether to approve the Company's request for cost recovery: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. The Commission also reserves the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application. AEP Ohio must also, in its PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers. Finally, AEP Ohio must include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or in part at any point, by a court of competent jurisdiction.

The Commission's newly announced standard led to a change in the procedural schedule in the FirstEnergy ESP proceeding because the AEP Ohio proposal was similar to the FirstEnergy proposal and the Attorney Examiners had to provide parties time to address this Order. The Attorney Examiner issued an order extending the procedural schedule that held:

In order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding, the attorney examiner finds that amending the procedural schedule at this time is reasonable. In order

¹⁷ *In Re: Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan* (Cause No. 13-2385-EL-SSO, 13-2386-EL-AAM).

¹⁸ In this Motion, Joint Movants take no position on the legality of the test articulated by the Commission in the ESP III Case.

to provide the parties in this proceeding sufficient time conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case.¹⁹

Even though the four-part test was only recently issued, there is uncertainty regarding its current applicability. On April 27, 2016, the FERC issued an order which required that several Ohio utilities (including the First Energy distribution utilities), that wanted to enter into an inter-affiliate PPA, to first seek advanced federal review and approval of the PPA.²⁰ In its order, FERC rescinded the waiver that applied to FirstEnergy's affiliate transactions, and held that, before any sales could be made pursuant to the an inter-affiliate PPA, that PPA must be submitted for FERC review and approved by the agency.²¹ In the FirstEnergy proceeding, in the wake of the FERC Order, the utility proposed a "Modified Rider RRS" that, while still shifting market risks to customers, would theoretically not be linked directly to generation units owned by its non-regulated affiliate. The Commission Staff then proposed a wholly new "Distribution Modernization Rider" ("DMR") aimed at providing credit support to the FirstEnergy regulated utilities and their parent company, which FirstEnergy has proposed to further expand.

In light of all of this, there is a cloud of uncertainty over what factors the Commission will now consider and what the Commission believes is the appropriate way, if any, to structure these inter-affiliate PPAs and/or associated Riders. The Commission should extend the procedural schedule in DP&L's ESP proceeding because

¹⁹ Attorney Examiners' Order, dated Mar. 23, 2015, FirstEnergy ESP (Case No. 14-1297).

²⁰ *Elec. Power Supply Ass'n, et al. v. FirstEnergy Solutions Corp., et al.*, 155 FERC ¶ 61,101 (Apr. 27, 2016).

²¹ *Id.* ¶¶ 53 & n.91, 62.

the record in the FirstEnergy ESP proceeding involves issues that will bear on the Commission's consideration of the DP&L ESP, particularly its proposed Reliable Electricity Rider. In its application, DP&L proposed the "Reliable Electricity Rider," which is similarly structured to the "Modified Rider RRS" that First Energy first proposed in the wake of the FERC order. In its ESP Application, DP&L also proposed an alternative proposal, which is similar to the Distribution Modernization Rider that the Commission Staff proposed in the FirstEnergy ESP case in the sense that both are fixed payments over a term of years, except that the monies paid to DP&L under its "alternative" proposal would explicitly be used to prop up the economics of the coal-burning plants owned by its unregulated affiliate.²² By briefly extending the procedural schedule in this docket until after the Commission issues its rehearing order in the FirstEnergy proceeding, Joint Movants and all other parties will be able "to address whether and how the Commission's findings in the [First Energy ESP] Order should be considered in evaluating [DP&L's] application in this [p]roceeding," including providing parties "sufficient time [to] conduct additional discovery and to evaluate and offer [. . .] testimony addressing the [First Energy ESP Order]."²³ Moreover, the Commission's decisions in the FirstEnergy ESP case may focus the parties' consideration on a certain factual framework that is presently unknown to the parties (such as factors related to the

²² Application, p. 7. ("The Commission should approve the fixed, nonbypassable amount for the same reasons that it should approve the RER – namely, that without these amounts, the generation plants would be at risk, the closure of those plants would have significant adverse effects in Ohio, and the financial health of DPL Inc., and DP&L would be threatened.").

²³ See Attorney Examiners' Order, dated Mar. 23, 2015, FirstEnergy ESP (Case No. 14-1297).

distribution grid), just as the Commission's decision in AEP's ESP III case (13-2385-EL-SSO) created new factors for consideration of inter-affiliate PPA proposals.

Briefing was completed in the FirstEnergy rehearing proceeding on August 29, 2016 and, if the Commission takes the same time it has taken to decide similar cases, a decision can be expected over the coming weeks. Given that we are on the cusp of another potentially watershed moment in the evolution of how the Commission considers subsidy requests and that this decision is likely to be critical to analyzing the DP&L application, a brief extension of the schedule is necessary and reasonable.

2. Granting the Extension Will Ensure that No Party Suffers Undue Prejudice.

Extending the procedural schedule will also ensure that Joint Movants and all other parties are not unduly prejudiced in this proceeding. Ohio law requires that the Commission allow ample time for discovery and for parties to adequately prepare for participation in the evidentiary hearing.²⁴ Pending the outcome of the FirstEnergy ESP proceeding, what the Commission views as the correct legal framework under Ohio law for DP&L's "Reliable Electricity Rider" and alternative rider proposals remains uncertain. Simply put, to ensure that all parties are not unduly prejudiced from presenting facts and evidence that effectively address the Commission's concerns, the Commission should extend the procedural schedule in this docket.

B. The PUCO Should Adopt Joint Movants's Proposed Schedule.

To assure a just and reasonable proceeding, an extension to the current procedural schedule is needed. Joint Movants therefore request that the Commission briefly extend

²⁴ Ohio Adm. Code 4901-1-16; 4903.082.

the Attorney Examiner's August 16, 2016 procedural schedule and adopt the following schedule:

- A. Intervenor's Testimony 30 Days from FirstEnergy ESP Rehearing Order
- B. Pre-Hearing Conference 55 Days from FirstEnergy ESP Rehearing Order
- C. Evidentiary Hearing 60 Days from FirstEnergy ESP Rehearing Order²⁵

If any of these days were to fall on a weekend or holiday, then the operative deadline should be the next business day.

C. An Expedited Ruling on this Motion for an Extension is Just and Reasonable.

The Attorney Examiner's August 16, 2016 Entry (at ¶ 6) called for an expedited motion procedure for this proceeding:

[A]ny memoranda contra to motions filed in this proceeding be filed within five business days after service of the motion, and any reply memoranda filed within three business days of the memoranda contra.

Pursuant to Ohio Adm. Code 4901-1-12(C), Joint Movants request that this Motion be decided on an expedited schedule. An expedited ruling is reasonable because the deadline for intervenor testimony is rapidly approaching and a decision before that deadline is necessary to avoid unnecessary waste of intervenor resources. Accordingly, Joint Movants respectfully request an expedited ruling on this Motion. Joint Movants are unable to certify that no party objects to the issuance of an expedited ruling.

III. CONCLUSION

For these reasons, the Commission should briefly extend the procedural schedule in this case so that all major filings occur after the Commission issues the First Energy ESP decision.

²⁵ The September 27, 2016 date for local public hearings need not be revised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Extension of the Attorney Examiner's Procedural Schedule was served via regular electronic transmission to the persons listed below, on this 14th day of September, 2016.

/s/ Tony G. Mendoza

Tony G. Mendoza

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Summary: Motion for an Extension of the Attorney Examiner's Procedural Schedule electronically filed by Mr. Tony G. Mendoza on behalf of Sierra Club and PJM Power Providers Group and Electric Power Supply Association and Retail Energy Supply Association and Interstate Gas Supply, Inc.