

PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of the Power)
Purchase Agreement Rider of Ohio Power) Case No. 18-1004-EL-RDR
Company for 2018.)
)
In the Matter of the Review of the Power)
Purchase Agreement Rider of Ohio Power)
Company for 2019.) Case No. 18-1759-EL-RDR

NRDC’S MOTION FOR LEAVE TO FILE A SURREPLY

Pursuant to Rule 4901-1-12, Natural Resources Defense Council (“NRDC”) hereby moves for leave to file a Surreply to AEP Ohio’s Reply Brief. NRDC seeks to respond to an argument—that NRDC is estopped from making disallowance claims in this case due to its representation by Sierra Club—that AEP Ohio could have raised earlier but raised for the first time in its Reply. Support for this Motion is provided in the Memorandum in Support. NRDC’s proposed Surreply is attached.

Dated: May 4, 2022

Respectfully submitted,

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MEMORANDUM IN SUPPORT

In its Reply Brief, AEP Ohio makes, for the first time, an argument that it could have raised in its Initial Brief or earlier. Specifically, AEP Ohio argues that NRDC should be “estopped” from making arguments in this proceeding because NRDC’s witness in this case is a Sierra Club employee, NRDC has been represented by Sierra Club staff attorneys, and Sierra Club signed the Stipulation that created the PPA Rider. AEP Ohio Reply Brief at 31-35. AEP Ohio argues that because NRDC is represented by Sierra Club attorneys that NRDC should be prohibited from “attacking the PPA Rider decision,” “seeking total disallowance of all costs,” and from “advocating for retirement of the OVEC units.” AEP Ohio Reply Brief at 34. As we explain in the attached Surreply, even assuming NRDC can be estopped through the past actions of Sierra Club, AEP Ohio’s arguments are meritless because: (1) the Stipulation did not prevent Sierra Club from participating in the audit process; (2) AEP erroneously conflates the disallowance NRDC seeks with termination of the PPA Rider; and (3) the Order adopting the Stipulation and PPA Rider contemplated exactly the relief NRDC requests in this proceeding.

Moreover, AEP Ohio's decision to delay raising this argument until its Reply Brief prejudices NRDC.

NRDC respectfully requests leave to file the attached Surreply to respond to AEP Ohio's late-raised estoppel argument. AEP Ohio has known for a year before it filed its Opening Brief, that Sierra Club counsel represent NRDC in this case. *See* Motion to Appear Pro Hac Vice of Megan Wachspres, filed on February 24, 2021. Additional Sierra Club attorneys filed motions to appear in this case before the evidentiary hearing and participated in the evidentiary hearing. *See* Motion for Permission to Appear Pro Hac Vice of Kristin Henry filed on January 7, 2022 and Motion for Permission to Appear Pro Hac Vice of Tony Mendoza filed on January 10, 2022. AEP Ohio has known since December 29, 2021, that Dr. Jeremy Fisher, a Sierra Club employee, would testify on behalf of NRDC. NRDC's recommended disallowances and concurrence with the Auditor's initial conclusions that the plants are not in customers' interest were both part of NRDC's pre-filed testimony. *See* Direct Testimony of Dr. Jeremy Fisher on behalf of NRDC at 5-8 (summarizing findings and recommendations, including the recommendations that the "Commission make ratepayers whole for the period covered by the audit" and that the "Commission re-instate the Auditor's findings that the OVEC plants are not in the best interests of customers."). Despite this, AEP Ohio declined to raise its estoppel argument at any prior point in the proceeding, notably moving to strike a portion of Dr. Fisher's testimony (rather than a broader motion to strike that would have given AEP Ohio's newfound estoppel arguments a full hearing). After failing to raise this issue in a pre-hearing motion, during the hearing, or in its Opening Brief, AEP makes these arguments for the first time on Reply, when NRDC no longer has an opportunity to respond absent leave from the Commission. Under these circumstances, NRDC respectfully requests leave to file a short Surreply.

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SURREPLY OF NATURAL RESOURCES DEFENSE COUNCIL

In its Reply, AEP Ohio argues that somehow because NRDC is represented by Sierra Club staff that NRDC should be prohibited from “attacking the PPA Rider decision,” “seeking total disallowance of all costs,” and from “advocating for retirement of the OVEC units.”¹ The premise of AEP Ohio’s argument appears to be that Sierra Club itself could not have made these arguments in this case and instead has done so inappropriately through NRDC. The Commission should reject AEP Ohio’s meritless effort to avoid the force of NRDC’s testimony and briefing.

First, Sierra Club itself could have raised each of the arguments advanced by NRDC in this proceeding. Neither the December 2015 Stipulation nor the March 2016 Order that created the PPA Rider preclude parties to the Stipulation from participating in the audit process, nor guarantee AEP Ohio complete cost recovery. In fact, AEP Ohio concedes this point in its Reply:

To be sure, any party from the PPA Rider cases (i.e., both settling or opposing) can make imprudence arguments and claims in this audit proceeding. So normal prudence claims that were within the scope of the audit are fair game by any party.²

¹ AEP Ohio Reply Brief at 34.

² AEP Ohio Reply Brief at 34.

The March 2016 Order placed on AEP Ohio the “burden of proof in demonstrating the prudence of all costs and sales during the review, as well as that such actions were in the best interest of retail ratepayers.”³ Sierra Club, or any party to the December 2015 Stipulation, remains free to hold AEP Ohio to its proof that the expenditures at issue in a specific audit proceeding were prudently incurred. Indeed, the *availability* of such a mechanism was a condition of the Stipulation itself.⁴

Second, AEP Ohio conflates NRDC’s request for a disallowance with termination of the Rider and from this conflation, argues NRDC (and by extension, Sierra Club) is engaged in a collateral attack on the subject of the Stipulation. This is wrong. The Commission’s issuance of a disallowance will not terminate the PPA Rider. NRDC has not argued in this case, either in the testimony of Dr. Fisher or in briefing, that the PPA Rider be terminated. NRDC’s position has been that the operation of the OVEC units without regard to PJM energy market prices, and further capital expenditures at the OVEC units, are imprudent given the relative cost of those units to other generation resources. This imprudence is established, in part, by Dr. Fisher’s finding that the OVEC units have not served as a hedge against energy market price increases. Ohio law is clear that the creation of a rider and the population of costs into it are distinct legal issues.⁵ NRDC has limited itself to challenging the costs associated with maintaining and

³ Opinion and Order, Case Nos. 14-1693-EL-RDR and 14-1694-EL-AAM (March 31, 2016) at 89; *see also* accord Second Entry on Rehearing, Case Nos. 14-1693-EL-RDR and 14-1694-ELAAM (November 3, 2016) ¶178 (“AEP Ohio will bear the burden of proof, in each annual audit, to establish the prudence of all costs and sales flowing through the PPA rider and to demonstrate the Company’s actions were in the best interests of retail ratepayers.”).

⁴ *See* Joint Stipulation and Recommendation, Case Nos. 14-1693-EL-RDR and 14-1694-EL-AAM (December 14, 2015), page 7 (proposing a “Rigorous Review of PPA Rider” provision).

⁵ *See* Ohio Consumers’ Couns. v. Pub. Util. Comm., 2007-Ohio-4276, ¶ 14, 114 Ohio St. 3d 340, 343, 872 N.E.2d 269, 273.

operating the OVEC units during the 2018-19 period and urging the Commission to order AEP Ohio to follow the Auditor’s recommendation to consider retiring the OVEC units.

Third, it is simply not true, as AEP Ohio alleges, that Sierra Club “fully supported the original PPA Rider Settlement.”⁶ Sierra Club did not even agree to the OVEC PPA Rider, instead agreeing only not to oppose the relevant provision in the Stipulation, and was never obligated to support the reasonableness of the Stipulation as a whole, only not to oppose it before the Commission.⁷ But, in any event, nothing in the 2015 Stipulation, the 2016 Order, or any other law prohibits any party of the Stipulation from advocating for the retirement of the OVEC units. To the contrary, the Stipulation *expressly states* that “AEP Ohio will continue reasonable efforts to explore divesture of the OVEC asset,” and that such divesture is consistent with the existence of the PPA Rider.⁸ Again, *even if* Sierra Club’s past position can be imputed to NRDC, NRDC’s testimony and briefing in this proceeding are entirely consistent with Sierra Club’s obligations under the Stipulation with respect to the PPA Rider, and with AEP Ohio’s own commitments to investigate the prudence of removing the OVEC units from its customers’ rates.

Fourth, AEP Ohio has failed to present any legal basis for asserting that NRDC should be subject to the terms of the Stipulation or precluded from challenging the March 2016 Order even though it was not a party to either.⁹ The U.S. Supreme Court has rejected the suggestion that shared counsel can be the basis for “privity” and the exercise of preclusion against a non-party to

⁶ AEP Ohio Reply Brief at 31.

⁷ Joint Stipulation and Recommendation, Case Nos. 14-1693-EL-RDR and 14-1694-EL-AAM (December 14, 2015) at fn. 6, 17.

⁸ *Id.* at 5.

⁹ NRDC is represented not just by Sierra Club attorneys but also by Robert Dove of the firm Kegler Brown Hill & Ritter Co., LPA.

an earlier proceeding.¹⁰ The only case AEP Ohio cites to claim that non-party preclusion applies here does not even address claim or issue preclusion in the context of successive litigation; it addresses *promissory* estoppel in the context of a contractual dispute and is a complete non-sequitur.¹¹ AEP Ohio's assertions of reliance (themselves unfounded) and supposed benefits to Sierra Club are irrelevant to whether NRDC, which was not a party to the proceeding, can be estopped from asserting a position on the prudence of 2018-19 expenditures at the OVEC units based on Sierra Club's actions in 2015 and 2016.

Finally, the Commission should prohibit AEP Ohio from raising these types of fairness complaints at this late stage of the proceeding. AEP Ohio has known that Sierra Club represented NRDC for over a year and it has known that it would rely on a Sierra Club employee for testifying expertise since December 2021. Had AEP Ohio raised these concerns and sought Commission redress in a timely manner, then NRDC could have retained different staffing if it lost on this issue. To preclude NRDC from raising its arguments now would cause undue prejudice to NRDC.

Simply put, AEP Ohio's estoppel arguments are all meritless. The Commission should reject AEP Ohio's arguments and instead focus its resources on protecting Ohio customers from AEP's imprudent management and resource planning for the OVEC plants.

¹⁰ *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168, 119 S. Ct. 1180 (1999).

¹¹ See AEP Ohio Reply Brief at 33 (citing *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 198-199 (2006), which sets forth the elements of promissory estoppel).

Dated: May 4, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion for Leave to File a Surreply* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 4th day of May, 2022, via electronic transmission.

/s/Robert Dove
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5/3/2022 5:39:29 PM

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Case No(s). 18-1004-EL-RDR, 18-1759-EL-RDR

Summary: Motion NRDC'S Motion For Leave To File a Surreply electronically filed
by Mr. Tony G. Mendoza on behalf of Natural Resources Defense Council