

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO POWER COMPANY’S
MEMORANDUM IN OPPOSITION TO NRDC’s MOTION FOR LEAVE
TO FILE A SUR-REPLY**

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MEMORANDUM IN OPPOSITION

Natural Resources Defense Council, supported by Sierra Club (NRDC/Sierra Club),¹ filed a motion for leave to file a sur-reply² in response to an argument made in Ohio Power Company's (AEP Ohio's) Reply Brief in this proceeding. Rather than wait for a ruling on its motion for leave, NRDC/Sierra Club filed its sur-reply instant. AEP Ohio opposes the motion for leave for the reasons stated herein; but if the motion is granted or the instant filing is heard by the Commission, then the entirety of this memorandum in opposition should also be similarly considered (including both points against the motion and points in response to the sur-reply).

NRDC/Sierra Club complains that AEP Ohio raised this point for the first time in its Reply Brief. (NRDC/Sierra Club Motion at 1, 3.) NRDC/Sierra Club even goes as far as suggesting (at 8) that *AEP Ohio* should have proactively monitored NRDC's use of counsel and retained expert witnesses and raised the issue to obtain a ruling based on a timeline that ensured they could retain different supporting personnel. In reality, most of the facts supporting the Company's position initially came out during the evidentiary hearing and were not cemented until the filing of NRDC/Sierra Club's Initial Brief. The specific facts raised by AEP Ohio to support its argument were that the "NRDC" witness appeared as a Sierra Club employee, Sierra Club attorneys handling legal issues for NRDC and making argument during the hearing, Sierra

¹ While NRDC was the entity that intervened in this case, a Sierra Club employee was the NRDC's only witness and other Sierra Club employees served as legal counsel advancing arguments and cross examination. Therefore, AEP Ohio will refer to that entity as NRDC/Sierra Club.

² Because NRDC/Sierra Club's "sur-reply" is the first time it responded to this issue, NRDC/Sierra Club's filing instant is more accurately considered an initial response and not a sur-reply.

Club attorneys filing the NRDC brief to advance Sierra Club arguments, and advancing arguments in their initial brief that crossed the line into *res judicata*. Hence, AEP Ohio's response on reply was timely since most of those facts did not materialize until one read the NRDC/Sierra Club post-hearing brief. On the contrary, because its own sketchy legal strategy created this entire issue, NRDC/Sierra Club could easily have affirmatively defended its own position on brief instead of seeking a sur-reply nearly a month after briefing closed in the case.

NRDC/Sierra Club's response also completely ignores *additional* key facts raised in support of AEP Ohio's argument on brief – because they have no response or explanation to these points:

- Sierra Club's original deal included the 2,671 MW of affiliated fossil generation as part of the package, which subsequently dropped out of the deal. (*PPA Rider Order* at 3, 7, 23.)
- All the benefits created by the AEP commitments – negotiated by the same Sierra Club counsel that is now arguing on behalf of NRDC – were touted by the Commission as conveying substantial ongoing benefits (despite the affiliate PPA being dropped) when it adopted the OVEC-only PPA Rider. (*PPA Rider Order* at 82 (the Stipulation package would provide “numerous benefits for customers that are in the public interest and consistent with the policy of the state, as set forth in R.C. 4928.02.”)) (See also *PPA Rehearing* at ¶¶ 57, 62-63, 141, 145, 149, 152 (numerous other provisions of Stipulation developing renewable energy, advancing grid modernization, and promoting retail competition will continue to provide substantial benefits even though affiliate PPA dropped).) From Sierra Club's perspective, all the benefits it bargained for relative to the expanded PPA Rider have become much more valuable because they got to retain them even though the additional 2,671 MW of fossil generation that Sierra Club expected to be part of the PPA Rider was dropped on rehearing (resulting in less than 15% of the original fossil generation units from the original settlement).
- Sierra Club continues to receive even greater environmental benefits than it originally bargained for through an agreement filed with the Commission on September 21, 2021. (*In the Matter of the Application of Ohio Power Company for an Update to its Environmental Commitment*, Case No. 21-978-EL-UNC (*Environmental Commitment Case*), October 6, 2021 Entry.) That agreement swapped the original commitment to retire, refuel or repower Cardinal Unit 1

(590 MW) by 2030 with an agreement to either retire Unit 1 or Unit 3 (620 MW) by 2028. (*Id.* at 2.) Sierra Club entered into a separate enforcement contract to ensure that AEP Ohio and its affiliates would fully comply with each and every commitment. *Environmental Commitment Case*, Application (September 21, 2021) at Attachment. This new agreement presents the opportunity to retire the unit two years earlier than original agreed and for a larger unit (30 MW larger) to be retired. This was filed at the same time Sierra Club was marshalling its legal resources to oppose implementation of the PPA Rider decision in the case at bar.

NRDC/Sierra Club now claims that its circuitous approach should not be questioned because “Sierra Club itself could have raised each of the arguments advanced by NRDC in this proceeding.” (NRDC/Sierra Club Memo at 5.) But Sierra Club did not attempt to make the same arguments directly here; and if it truly believed that was permissible, it would have conducted itself differently. There would be no other reason to take such a surreptitious and highly unusual (if not completely unprecedented) approach here. In reality, the Sierra Club combined multiple extraordinary (but uncontested) factual components into an extraordinary course of conduct in this proceeding:

- A party that frequently intervenes and is restricted in what it can argue in the case decides not to intervene but provides an employee to be witness for a second party who has no restrictions on what it can argue in the case.
- A party that frequently intervenes and is restricted in what it can argue in the case decides not to intervene but provides employees to be legal counsel for a second party who has no restrictions on what it can argue in the case.
- A party that frequently intervenes and is restricted in what it can argue in the case decides not to intervene but make restricted arguments through a second party who has no restrictions on what it can argue in the case.
- In a future case not involving the argument restriction, the party goes back to intervening directly and using its own resources to advance its own interests.

NRDC/Sierra Club next states that it “has limited itself to challenging the costs associated with maintaining and operating the OVEC units during the 2018-2019 period and urging the Commission to order AEP Ohio to follow the Auditor’s recommendation to consider

retiring the OVEC units.” (NRDC/Sierra Club Memo at 6-7.) Of course, arguing that all costs incurred during the entire audit period should be disallowed is not limiting itself in any way! Rather, it limits operation of the PPA Rider adopted by the Commission based on Sierra Club’s previous deal with AEP Ohio.

This is not merely a case of outside legal counsel representing different clients.³ Rather, the three attorneys representing NRDC here are Sierra Club employees – and the only expert witness presented by NRDC is also a Sierra Club employee. (NRDC/Sierra Club Br. at 25; NRDC/Sierra Club Ex. 3 at 1.) Sierra Club is not a law firm representing multiple clients with different interests but is a public interest advocacy group with a singular purpose and mission. The same Sierra Club counsel that signed the PPA Rider Stipulation also signed a post-hearing brief in this case arguing that all PPA Rider costs flowed through should be disallowed; that AEP Ohio should not continue to remain a party to the ICPA; and that the Company should seek to wind down the OVEC units and urges *retirement* of OVEC units in order to protect ratepayers. (NRDC/Sierra Club Br. at 5, 25 (emphasis added).) All those ideas directly undermine the operation of the OVEC-only PPA Rider as approved in the *PPA Rider Order*. Similarly, through his testimony, Sierra Club employee Fisher advocated for a total disallowance of net OVEC costs during the audit period. (NRDC/Sierra Club Ex. 3 at 8.)

³ NRDC/Sierra Club relies on *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) for the mundane proposition that shared outside legal counsel does not establish privity for collateral estoppel. (NRDC/Sierra Club Memo in Support at 7-8.) But Sierra Club is not a law firm and there are several additional facts beyond a shared lawyer here, so that decision offers no help.

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. But attacking the PPA Rider decision, seeking total disallowance of all costs and advocating for retirement of the OVEC units undermines the very essence of the rider mechanism created for the purpose of flowing net costs/charge through to retail customers. That result should not be permitted by any party. But it is especially true for Sierra Club since they *already received all the benefits* of their original bargain when they agreed to AEP Ohio's share of OVEC (400 MW) plus the additional 2,671 MW of fossil generation to be part of the PPA Rider; and Sierra Club was subsequently able to further extract additional benefits during this audit case by swapping up to a large unit retirement two years ahead of the agreed schedule.

Just like when a party has a side deal or acts on the record for reasons that are not transparently disclosed, the Commission should be concerned when parties act in covert and secretive ways that obfuscate the party's known identity and stated basis for intervention in the proceeding. Here, Sierra Club opaquely maneuvered to support a deception that NRDC was taking a position that Sierra Club wanted to take (but was restricted from taking based on its prior deal with AEP Ohio). Consequently, Sierra Club should be categorically estopped (including through NRDC) from making such arguments.

CONCLUSION

For the reasons provided above, AEP Ohio respectfully requests that the Commission deny NRDC/Sierra Club's motion for leave in the manner described above.

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 *Ohio Power Company's Memo Contra* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 19th day of May, 2022, via e-mail.

/s/ Steven T. Nourse

Steven T. Nourse

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Summary: Memorandum Memo in Opp to NRDC's Motion for Leave to File Sur-
Reply electronically filed by Mr. Steven T. Nourse on behalf of Ohio Power
Company