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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider	))))))	Case No. 10-1454-EL-RDR

REPLY COMMENTS OF FIRSTENERGY SOLUTIONS CORP.

Pursuant to the Commission's March 9, 2011 Entry, FirstEnergy Solutions Corp. ("FES"), which is an interested party by virtue of being a competitive retail electric service provider in the territory of Ohio Power Company ("OPCo"), hereby submits its Reply Comments in response to the Initial Comments filed in this matter. FES objects to OPCo's proposal to seek recovery from all of its customers over $50 million in purported "early closure costs" and an undetermined amount of "future costs" relating to its Sporn-5 competitive generating unit.

The Initial Comments filed by other interested parties confirm that OPCo's request is contrary to Ohio law, contradicts OPCo's previous representations to the Commission, and violates state policy. As the Initial Comments note, OPCo's Application provides no legal or factual basis for its request. OPCo essentially relies on its assertions that it is entitled to recover millions of dollars from both SSO and shopping customers simply because the closure of Sporn 5 "is earlier than previously anticipated and because the costs associated with the closure were not reflected in OPCo's current ESP rate plan." Application, p. 4. As set forth in the Initial Comments, neither of these purported bases — nor anything else in OPCo's brief Application or Ohio law, justify its request for non-bypassable cost recovery or cost recovery, period. Indeed, the Commission should deny the Application for a number of independent reasons.

I. Ohio Law Does Not Authorize Any Of The Cost Recovery Requested By OPCo.

As Staff succinctly noted, "OPCo provided no statutory authority demonstrating that the company is entitled to recover these costs." Staff Comments, p. 1; *see also* OMA Comments, p. 2. For this reason alone, OPCo cannot be said to have met its burden in seeking approval for the Sporn-5 cost recovery, and the Application should be denied. Not only has OPCo not cited any Ohio law that authorizes cost recovery (nor can it), but OPCo's requested cost recovery is prohibited by at least two different statutory provisions.

A. The requested cost recovery is not authorized as transition costs under R.C. § 4928.39.

Staff confirmed that, while Ohio law authorized utilities to recover stranded costs associated with the transition to market-based generation, the time for that recovery has closed and, more importantly, OPCo "waived its recovery of those costs." Staff Comments, p. 3 (*citing In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Opinion and Order, Sept. 28, 2000, at p. 18). R.C. § 4928.39 provided OPCo with "the opportunity to receive transition revenues," but the recovery was limited in time to the market development period, which has closed. *See* R.C. §§ 4928.38, 4928.40; *see also* OCC Comments, pp. 4-5 ("R.C. § 4928.38 unequivocally states that in receiving transition revenues OP[Co] has forgone any future cost recovery of its plants after the market development period.").

Even if the cost recovery request was timely, OPCo has not established that the costs it seeks to recover — part of which, the "future costs," have not yet been determined — are: prudently incurred; legitimate, net, verifiable or directly allocable to retail electric generation service; unrecoverable in a competitive market; or that OPCo "would otherwise be entitled an

opportunity to recover the costs," as required by R.C. § 4928.39. *See, generally,* Application. In fact, Staff has concluded that these costs likely have already been recovered by OPCo: Sporn-5 costs "should have been fully depreciated in 2010" and so, "it appears that OPCo has already been compensated for the costs it now seeks to recover." Staff Comments, p. 4 *citing* Case No. 94-996-EL-AIR. OPCo's requested cost-recovery does not constitute authorized transition costs, and the Application should be denied.

B. The requested cost recovery also is not authorized as part of an ESP under R.C. § 4928.143.

OPCo states that it is coming now to the Commission to seek cost recovery for Sporn-5's closure because "the costs associated with the closure were not reflected in OPCo's current ESP rate plan." Application, p. 4. Staff, OEG and OMA correctly noted that OPCo's requested cost-recovery is not a part of the regulatory scheme established by S.B. 221. *See* Staff Comments, p. 3; OMA Comments, pp. 3-4; OEG Comments, p. 2. "Customers are no longer responsible for financing the generation owned by any utility." OPAE Comments, p. 5; *see also In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan and an Amendment to its Corporate Separation Plan,* Case No. 08-918-EL-SSO, Opinion and Order, March 18, 2009, at pp. 52-53 (rejecting OPCo's similar request in its 2008 ESP Application).

Further, the Ohio Supreme Court confirmed that the costs OPCo seeks to recover are not a proper component of an ESP: if a "given provision [of an ESP] does not fit within one of the categories listed 'following' (B)(2), it not authorized by statute" to be part of an ESP. *In re Application of Columbus Southern Power Co.*, 2011-Ohio-1788, ¶ 32 (Apr. 19, 2011); *see also* OCC Comments, pp. 2-3. As Staff concluded, the Sporn-5 closure costs are not authorized under R.C. § 4928.143(B)(2)(c) because the Sporn-5 unit: was not constructed after January 1, 2009; was not competitively bid; and was not constructed after a determination of need. Staff

Comments, p. 3. "Thus, the only provision under current law which would permit the sort of charge sought by OPCo does not apply." *Id.* Therefore, OPCo could not have included this cost recovery in its current ESP, and cannot seek this cost recovery (or cost recovery arising from the closure of other existing generating facilities) in its pending ESP. The Application should be denied.

C. At the very least, the Commission should require OPCo to offset its profits from off-system sales.

OCC's Initial Comments correctly notes that OPCo's claim of poverty associated with the Sporn 5 unit must be balanced against OPCo's profits from its generation fleet and off-system sales. *See* OCC Comments, pp. 5-7. This netting could, and likely would, reveal that OPCo has suffered no generation losses and, therefore, should not be entitled to recover any lost revenue associated with the closure of Sporn 5 from its distribution customers.

II. OPCo's Request For Non-bypassable Cost Recovery Is Improper And Violative Of State Policy.

As OEG correctly commented, the costs sought by OPCo in this Application "are pure generation costs," "[y]et Ohio Power seeks to have these costs assessed even against shoppers who are paying the generation cost to marketers." OEG Comments, p. 3; *see also* Application, p. 4. The development of competitive retail electric markets is an explicit policy goal under Ohio law. OPCo proposes that generation-related costs be recovered through a non-bypassable rider, yet these costs would need to be covered by a competitive retail supplier if that supplier acquired a customer. As a policy and legal matter, generation is a competitive service and generation-related costs should not be recovered through non-bypassable rates in a manner that harms the competitive retail market. Shopping customers do not take generation service from OPCo and, therefore, are paying the separate generation costs of CRES providers. Therefore, OPCo's request would improperly burden shopping customers, who would have to pay twice for

competitive generation costs. Cross subsidization and/or anti-competitive subsidies that would interfere with the development of competitive markets should be avoided. OPCo's request for non-bypassable cost-recovery should be denied for these reasons.

A. OPCo's requested cost recovery from all customers violates state policy.

OPCo's cost-shifting is exactly the type of practice prohibited by state policy. Indeed, OPCo's requested non-bypassable cost recovery violates several state policies. As Staff concluded, OPCo's requested relief conflicts with the State's "mandatory" policy of prohibiting the recovery of generation-related costs through distribution rates. Staff Comments, p. 3 (*citing* R.C. § 4928.02(H) and *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486 (2008)). "As no other competitive supplier can forcibly collect plant closure costs from customers, giving OPCo that ability appears to create a competitive advantage for its generation service business." *Id.* at pp. 3-4. Thus, OPCo's requested relief certainly violates "the policy of this state to . . . [e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. . . including by prohibiting the recovery of any generation-related costs through distribution or transmission rates." R.C. § 4928.02(H). OPCo's request also violates the state's policy of ensuring the availability of nondiscriminatory retail electric service (R.C. § 4928.02(A)). *See also* OCC Comments, p. 11 (urging Commission to deny OPCo's request and "instead facilitate one of the primary policy mandates . . . under R.C. 4928.02(A) – ensure the availability of reasonably priced retail electric service"). For these additional reasons, the Application either should be denied or any cost recovery authorized should be made bypassable.

B. In addition, OPCo's Application reneges on its previous agreement and representations to the Commission.

OMA and OEG recognized that OPCo stipulated in its electric transition plan that it would not impose any lost generation costs on shopping customers. OMA Comments, p. 4; OEG Comments, p. 3. OPCo's Stipulation clearly states that "[n]either Company will impose any lost revenue charges (generation transition charges (GTC)) on any switching customer." *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Stipulation and Recommendation, May 5, 2000, at p. 3. The Commission's subsequent Opinion and Order referenced and incorporated OPCo's Stipulation in this regard. *Id.*, Opinion and Order, Sept. 28, 2000, at pp. 15-18. The Commission approved the Stipulation and allowed OPCo to recover over $423 million in transition costs during the market development period ("MDP") based, in part, on OPCo's agreement to forego recovery of GTCs from shopping customers:

> [W]e believe that the stipulation provides a reasonable and equitable resolution on this [GTC] issue. AEP has agreed to forego a claim of $291.43 million. The parties to the agreement have agreed, based on all of the terms and conditions of the agreement that there is no further netting or adjustments to the transition cost recovery during the MDP. Based upon the above findings, the Commission concludes that there are no stranded generation benefits that should either offset the RTCs or further fund the shopping incentives proposed by the stipulation.

Id. at p. 18, 47. OPCo cannot be allowed to go back on its word to the parties to the Stipulation and its clear representations to the Commission. OPCo's improper request to recover Sporn-5 closure costs from all customers, including shopping customers from whom it agreed it would not seek recovery, must be denied.

CONCLUSION

OPCo's request sets a dangerous precedent that is not supported by Ohio law, is contrary to state policy, violates OPCo's previous agreements, and likely would harm shopping and the benefits bestowed on customers as a result of a competitive market for retail electric service. The Application should be denied for the numerous independent reasons set forth herein and in the Initial Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing *Reply Comments of FirstEnergy Solutions Corp.* was served via regular U.S. mail, postage-prepaid and electronic mail on this 22nd day of April, 2011, upon the parties identified below.

Laura C. McBride per email

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