

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of )  
Columbus Southern Power Company For )  
Approval of an Electric Security Plan; an ) Case No. 08-917-EL-SSO  
Amendment to its Corporate Separation )  
Plan; and the Sale or Transfer of Certain )  
Generating )  
Assets )

In the Matter of the Application of Ohio )  
Power Company for Approval of an ) Case No. 08-918-EL-SSO  
Electric Security Plan; an Amendment to )  
its Corporate Separation Plan )

**REPLY OF EXELON GENERATION COMPANY LLC TO THE MEMORANUM  
CONTRA ITS INTERVENTION IN THE REMAND HEARING  
AND REQUEST FOR APPROVAL OUT-OF-TIME IF REQUIRED**

On May 25, 2011, the Public Utilities Commission of Ohio ("Commission") issued an order in which it established a procedural schedule in the above-captioned dockets ("Remand Proceeding"), setting for hearing issues relating to the Provider of Last Resort ("POLR") charge and Environmental Investment Carry Charge Rider ("EICC") imbedded in Columbus Southern Power Company and the Ohio Power Company (collectively, "AEP Ohio")'s present Electric Security Plan ("ESP"). Specifically, the Commission's order presents AEP Ohio with the opportunity to present new evidence of actual costs sufficient to justify its current POLR, or in the alternative, develop a non-cost-based POLR authorized by specific rate provisions of Section 4928.143, Revised Code.<sup>1</sup> The hearing is also intended to provide AEP Ohio with an opportunity to make a legal argument that its EICC is a charge permitted as part of an ESP. Because the Ohio Supreme Court found that the lack of evidence of a cost basis for the POLR

<sup>1</sup> In the Matter of Columbus Southern Power, et al, Case No. 08-917-EL-SSO, Entry dated May 25, 2011, par. 11 ("May 25<sup>th</sup> Entry").

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charge in AEP Ohio's ESP amounted to reversible error and that there was no legal justification presented for the EICC charge,<sup>2</sup> the issues set for hearing in this proceeding will consist of facts and legal theories that are new and that which were not part of the original proceeding in which AEP's current ESP was first considered by this Commission. Among other things, the outcome of this Remand Proceeding will decide whether there will be a POLR charge during the last half year of the current AEP Ohio ESP and, if so, the amount of that charge and whether the charge will be bypassable.

On June 2, 2011, Exelon Generation Company, LLC ("Exelon Generation") filed a petition to intervene in this case. On June 3, 2011, AEP Ohio filed a memorandum contra to Exelon Generation's intervention raising three objections: 1) the May 25<sup>th</sup> Entry prohibited interventions; 2) Exelon Generation's intervention is out of time; and 3) Exelon Generation's interests will be adequately represented by other parties already in the proceeding. As a wholesale supplier and owner of Exelon Energy Company, a certificated competitive retail electric service ("CRES") provider in Ohio, Exelon Generation is directly affected by the outcome of this case: namely, whether AEP Ohio will have a POLR charge and the design and amount of such a charge. As such, Exelon Generation respectfully requests that the Commission permit it to intervene in this case.

In its Memorandum Contra, AEP Ohio states that the May 25<sup>th</sup> Entry "pointedly does *not* include an opportunity for further intervention" (emphasis added).<sup>3</sup> This statement is inaccurate. For the Commission Entry to "pointedly" exclude intervention, it would have had to expressly state in the Entry that additional interventions would not be permitted. A review of the May 25<sup>th</sup> Entry reveals that the Commission was silent on the subject of new interventions. Further, in

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<sup>2</sup> *In Re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-1788.

<sup>3</sup> June 2, 2011 Memorandum Contra p. 2.

paragraph 11, where the Commission discusses authorizing “intervenor” to file new testimony, the term “intervenor” was not capitalized. To be grammatically correct, if the Commission was indeed electing to close off new interventions, then the only persons who could file testimony would be the existing Intervenor. Since the existing parties granted intervention are known, a reference to the existing parties would be to the “Intervenor” and should have been capitalized.

In sum, a reasonable review of the May 25<sup>th</sup> Entry reveals no language which supports AEP Ohio’s view that the Commission affirmatively limited the hearing to the existing Intervenor only. Since the Entry is silent as to intervention, the criteria for intervention shall be determined in accordance with the Commission’s rules.

AEP Ohio’s second objection to Exelon Generation’s intervention is that it violates the Commission’s intervention rule in that the petition was filed out-of-time. The Commission’s rule on timely intervention indicates that unless otherwise provided for by order, an intervention is timely so long as it is filed more than five days before hearing.<sup>4</sup> Since the hearing is set for July 12, 2011,<sup>5</sup> a timely intervention is one that is petitioned for by July 8, 2011; this date is more than a month beyond the time that Exelon’s actual intervention petition was filed. Notwithstanding the Commission’s rule on timely interventions, AEP Ohio argues that the Attorney Examiner’s August 5, 2008 Entry set an intervention deadline of September 4, 2008 and that the Attorney Examiner’s subsequent September 4, 2008 Entry not only closed off intervention for the November 3, 2008 hearing, but barred all intervention in any subsequent hearing, even if the new hearings are instituted by a Commission order.<sup>6</sup> There is no legal precedent for the view that an Attorney Examiner’s Entry could bar intervention in future proceedings called for by the Commission. Nor does the three year old Attorney Examiner’s

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<sup>4</sup> OAC 4901-1-11.

<sup>5</sup> May 25<sup>th</sup> Entry, p. 11.

<sup>6</sup> AEP Ohio Memorandum Contra, p. 4.

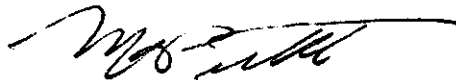
Entry contain language that anticipates any hearing subsequent to the one it set for November 3, 2008 – let alone prohibit intervention.

Finally, if the Attorney Examiner's August 5, 2008 Entry sets the limit for timely intervention on September 4, 2008, then Exelon Generation respectfully submits that a remand by the Ohio Supreme Court, which was issued in 2011 finding that POLR fees in AEP's current ESP could be non-cost-based was both unforeseen and unforeseeable in September of 2008. Thus, Exelon Generation should be excused from not filing for intervention prior to September 4, 2008 in order to participate in a Remand Proceeding occurring in 2011. Rule 4901-1-11(F) of the OAC permits an untimely intervention for extraordinary circumstances. A Supreme Court remand three years later presents such an extraordinary circumstance.

AEP Ohio also claims that other parties can and will represent Exelon Generation's interests adequately so that intervention is not required. There appears to be no basis for this claim other than there is another supplier who is a party of record. As more fully explained in its motion for intervention, each supplier has different commercial interests based on their individual business operation. In addition, the Remand Hearing has more uncertainty than a regular rate proceeding for at this time AEP Ohio is free to propose any type of POLR, in any amount, and to ask for it to be by-passable or non by-passable. Thus, while there may be other wholesale suppliers and CRES providers participating in the case, that does not mean all will be of like mind especially when the nature of the POLR charge is unknown. Finally, there is no doubt that the issues under consideration in this Remand Proceeding are inextricably interrelated to the issues to be considered in AEP's proposed ESP (Docket Nos. 11-346-EL-SSO and 11-348-EL-SSO), in which Exelon Generation is an intervenor.

WHEREFORE, Exelon Generation requests that it be permitted to intervene in the Remand Proceeding scheduled for July 12, 2011 as a party of record. Alternately, if the Commission finds that the time for intervention has passed, then Exelon Generation respectfully seeks leave to intervene out of time. Exelon Generation states that it will work in cooperation with the other intervenors to avoid duplicative arguments or pleadings.

Respectfully submitted,



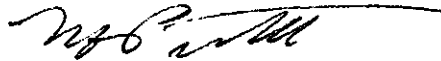
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Reply was served this 6<sup>th</sup> day of June, 2011 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.



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