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**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 Amendment to ) Case No. 08-917-EL-SSO  
its Corporate Separation Plan; and the Sale or ) (Remand)  
Transfer of Certain Generating Assets. )

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

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**FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR  
REVIEW THROUGH AN INTERLOCUTORY APPEAL  
OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY  
AND REQUEST FOR EXPEDITED CONSIDERATION**

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Pursuant to O.A.C. 4901-1-15(A), FirstEnergy Solutions Corp. ("FES") hereby files this Application for Review by the Commission of the Attorney Examiner's Entry, dated June 16, 2011, in the above-captioned matter (the "Entry").<sup>1</sup> Although FES satisfied all statutory and regulatory factors for intervention in this proceeding, which will culminate in a recently-scheduled evidentiary hearing commencing July 12, 2011, the Entry wrongfully denies FES's Motion to Intervene. A Commission decision overruling this erroneous, inappropriate, and unlawful Entry is necessary in order to prevent undue prejudice to FES. FES should not be precluded from participating in this unique proceeding on remand because FES's significant interests will be prejudiced if it is not granted intervention, FES's participation will not prejudice

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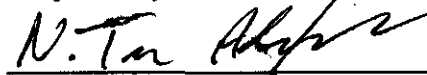
<sup>1</sup> A copy of the Entry is attached hereto as Exhibit A.

the existing parties or delay the proceeding, and FES's experience and perspectives would be an important component of the development of a full record for the Commission's decisions.

Accordingly, FES respectfully requests that the Commission review and revise the Entry so as to authorize FES's intervention. Time is of the essence, as Applicants already have denied FES the opportunity to cross-examine deposition witnesses and the deadline for filing intervenor testimony is June 23, 2011. Thus, FES requests expedited consideration of this Application so that the Commission may issue its decision on or before June 22, 2011 or otherwise permit FES to file testimony after the June 23, 2011 deadline once its intervention is granted.

The grounds for this Application are more fully set forth in the attached Memorandum in Support which is incorporated by reference herein.

Respectfully submitted,



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Mark A. Hayden (0081077)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 761-7735  
(330) 384-3875 (fax)  
haydenm@firstenergycorp.com

James F. Lang (0059668)  
Laura C. McBride (0080059)  
N. Trevor Alexander (0080713)  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
(216) 622-8200  
(216) 241-0816 (fax)  
jlang@calfee.com  
lmcbride@calfee.com  
talexander@calfee.com

*Attorneys for FirstEnergy Solutions Corp.*

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**MEMORANDUM IN SUPPORT OF  
FIRSTENERGY SOLUTIONS CORP.'S APPLICATION FOR  
REVIEW THROUGH AN INTERLOCUTORY APPEAL  
OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY  
AND REQUEST FOR EXPEDITED CONSIDERATION**

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**I. INTRODUCTION**

FirstEnergy Solutions Corp. ("FES") seeks review and reversal of the Attorney Examiner's June 16, 2011 Entry denying FES's Motion to Intervene because it significantly jeopardizes FES's real and substantial interests in the issues presented in this remand proceeding involving the POLR charges to be assessed for the remainder of 2011, and possibly beyond, by Columbus Southern Power Company and Ohio Power Company (the "Companies").<sup>2</sup> The Attorney Examiner clearly erred to FES's prejudice by carrying forward an inappropriate intervention deadline – it was established in September 2008 for a November 2008 hearing – to

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<sup>2</sup> O.A.C. 4901-1-15(A)(2) provides an automatic right to seek an interlocutory appeal with the Commission from an entry denying a motion to intervene. It provides that "[a]ny party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling" that "[d]enies a motion to intervene [or] terminates a party's right to participate in a proceeding."

bar FES from participating in the new evidentiary hearing that was only recently announced and now scheduled to commence on July 12, 2011. The Commission's May 25, 2011 Entry fixing that new hearing date did not set an intervention deadline and, thus, FES's Motion to Intervene filed only one day later was timely. While FES will be severely prejudiced by its unjustified exclusion from these proceedings, the Companies would suffer no prejudice from FES's participation at this early stage in the remand proceeding and, indeed, the Attorney Examiner's Entry does not even suggest any such prejudice. Denying FES's intervention flies in the face of the goals of developing a full and complete record for the Commission's determination and allowing parties the right to be heard. It also creates a substantial risk that the Ohio Supreme Court will be compelled to remand any future Commission decision herein for further proceedings in order to allow FES's participation, which would greatly harm all parties, including FES, who seek an efficient resolution of the issues presented in this remand proceeding. The Attorney Examiner erred in ignoring FES's numerous interests and the extraordinary circumstances surrounding FES's interests and the proceeding itself by concluding that the September 2008 deadline for intervention in the original proceeding should apply in the remand proceeding.

The remand proceeding is not simply a continuation of the 2008 hearing – the Companies have filed new testimony from witnesses who did not testify in 2008,<sup>3</sup> and that testimony will be tested in a new evidentiary hearing. Moreover, since 2008, FES has become the only CRES provider serving electric governmental aggregation customers in the Companies' service area and, thus, has a direct and unique interest in the Commission's determination in the remand

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<sup>3</sup> Companies witness Anil Makhija provided testimony in 2008, but not on the cost of being a POLR provider. Companies witness Chantalle LaCasse did not provide testimony in 2008.

proceeding of the Companies' POLR charges. The standards for intervention balance the interests of the applicant in an efficient processing of its application, the interests of other parties in being heard, and the interests of the Commission in a full and effective consideration and determination of the issues presented. Under such a balancing, there is no question – particularly in light of the Ohio Supreme Court's determination that intervention should be liberally granted – that FES's Motion to Intervene should be granted. FES must be allowed to protect its real and substantial interests and to assist the Commission in developing the record in a proceeding which doubtless will return to the Ohio Supreme Court. Accordingly, pursuant to O.A.C. 4901-1-15(A), FES respectfully requests that the Commission reverse the Attorney Examiner's Entry and grant FES's Motion to Intervene.

## **II. BACKGROUND**

The Commission is familiar with the procedural history of this proceeding. However, a brief summary highlights the extraordinary and unique circumstances surrounding FES's Motion to Intervene:

- July 31, 2008: The Companies file an Application for approval of a new standard service offer ("SSO") pursuant to R.C. § 4928.143 (the "Current ESP").<sup>4</sup> As of this date, FES had no customers in the Companies' service territories.
- August 5, 2008: The Attorney Examiner establishes a procedural schedule for the Current ESP proceeding, including a September 8, 2008 deadline for motions to intervene, deadlines for discovery and testimony, and dates for a prehearing conference and an evidentiary hearing in November 2008.
- March 18, 2009: The Commission approves the Companies' Current ESP, with modifications, for SSO service between January 1, 2009 and December 31, 2011.<sup>5</sup>

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<sup>4</sup> See *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; and Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets et al.*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Application, filed Jul. 31, 2008.

<sup>5</sup> *Id.*, Order, filed Mar. 18, 2009.

- July 2009: FES begins to serve retail customers in the Companies' service territories.
- December 2010: FES becomes the first CRES provider to serve electric governmental aggregation customers in the Companies' service territories, with service beginning June 2011.
- January 27, 2011: The Companies file an Application for approval of a new ESP for SSO service between January 1, 2012 and December 31, 2014 (the "Pending ESP").<sup>6</sup>
- March 23, 2011: FES is granted the right to intervene in the Pending ESP based on its real and substantial interests in the Companies' SSO.
- April 19, 2011: The Supreme Court issues its decision on the appeal of the Current ESP and remands two issues for further proceedings by the Commission.<sup>7</sup>
- May 25, 2011: The Commission issues a procedural schedule, setting a new discovery period, a new deadline for testimony, a new prehearing conference, and a new hearing for July 12, 2011 (the "Remand Proceeding").
- May 26, 2011: FES files its Motion to Intervene in the Remand Proceeding.
- June 16, 2011: The Attorney Examiner issues the Entry, denying FES's Motion to Intervene.
- July 12, 2011: The date for the Remand Proceeding hearing, including consideration of the Companies' POLR Charge Rider and request for recovery of environmental carrying costs.
- August 15, 2011: The date for the Pending ESP hearing, including consideration of the Companies' POLR Charge Rider and request for recovery of environmental carrying costs on a nonbypassable basis.

In this Application, FES requests that the Commission overrule the Attorney Examiner's June 16, 2011 Entry and allow FES to participate in the upcoming Remand Proceeding. The

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<sup>6</sup> See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-0346-EL-SSO and 11-0348-EL-SSO, Application, filed Jan. 27, 2011.

<sup>7</sup> *In re Application of Columbus Southern Power Co.*, No. 2009-2022, 2011-Ohio-1788 (Apr. 19, 2011).

Attorney Examiner's Entry denied FES's (and other movants') Motion to Intervene for three reasons:

- (1) The Motion was "untimely filed" after the September 4, 2008 deadline in the original proceeding.
- (2) There are no extraordinary circumstances because FES "mainly point[s]" to the Supreme Court's remand, which was not unforeseeable prior to September 4, 2008.
- (3) FES's "primary interest" is the impact of the Commission's decision on the 2012 ESP, in which it has already intervened.

See Entry, ¶ 12. None of these misguided conclusions support a denial of FES's well-supported request to intervene when its interests will be prejudiced if barred from participation in the Remand Proceeding.

### **III. LAW & ARGUMENT**

#### **A. The Attorney Examiner Erred In Denying FES Intervention.**

##### **1. The Attorney Examiner incorrectly denied FES's Motion as untimely.**

O.A.C. 4901:1-11(E) provides that a motion to intervene "will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding." The Attorney Examiner concluded that because the Motion was filed after the September 4, 2008 deadline for intervention in the original proceeding, the Motion was untimely and should be denied. Entry, ¶ 12. But, the Attorney Examiner's Entry fails to recognize that a new proceeding has been instituted (triggering a new set of deadlines) and, regardless, that it is not uncommon for the Commission to grant "untimely" requests to intervene. Indeed, the Commission has granted motions to intervene filed after a scheduled deadline and within weeks or days of the hearing – based, in part, on the fact that the Ohio Supreme Court has held that requirements for

intervention are “generally liberally construed in favor of intervention.” *See, e.g., In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, Entry, Feb. 5, 2009, at ¶ 6 (granting untimely motion to intervene because “the Supreme Court of Ohio has held that statutes and rules governing intervention should be ‘generally liberally construed in favor of intervention’” and because “no other party will be prejudiced by allowing intervention at this point”) (quoting *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006)). **In fact, in the original proceeding in this matter, the Attorney Examiner granted a motion to intervene filed after the same September 2008 deadline based on the significance of the issues presented “and that the intervention standard has been satisfied.”** Entry, dated Oct. 29, 2008, at ¶ 4.

In any event, the September 2008 deadline is not the proper deadline for intervention in the Remand Proceeding. On May 25, 2011, the Commission established an entirely new procedural schedule for the “remand proceedings” (Entry, May 25, 2011), and included no deadline for intervention “for purposes of [this] particular proceeding” (O.A.C. 4901:1-11(E)). As a new evidentiary proceeding, the use of the default deadline for intervention in O.A.C. 4901:1-11(E) is, thus, appropriate. O.A.C. 4901:1-11(E); *see also In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company*, Case Nos. 09-580-EL-POR *et al.*, Entry, Jan. 14, 2010 (granting motions to intervene after proceedings were re-opened). Indeed, use of a 2008 deadline to bar participation in a proceeding commenced in 2011, where the movant seeks to participate in an evidentiary hearing that was not contemplated in 2008, is simply absurd. Therefore, in accordance with O.A.C. 4901:1-11(E), FES timely



satisfied the applicable deadline for intervention of five days before the evidentiary hearing set for July 12, 2011.

The Commission's May 25, 2011 Entry provides the parties with approximately one month to prepare testimony and conduct discovery in preparation for the hearing commencing on July 12, 2011. FES's Motion was filed just one day after the May 25, 2011 Entry establishing the new procedural schedule, and more than one month before the hearing. FES has clearly met that deadline and its Motion is timely.<sup>8</sup> The Attorney Examiner's denial of FES's Motion to Intervene as "untimely" is plain error.

2. **Extraordinary circumstances exist for which the Commission's Rules allow for "untimely" intervention.**

Regardless of whether the Motion is deemed timely, the Commission's rules allow for intervention where, as here, "extraordinary circumstances" exist. O.A.C. 4901-1-11(F). The Attorney Examiner erroneously concludes that FES failed to establish extraordinary circumstances because FES "mainly point[s] to the remand of these cases by the Ohio Supreme Court." Entry, ¶ 12. But, that conclusion is simply false (indeed, it propagates a falsehood advanced by the Companies' in their brief opposing FES's intervention). The Attorney Examiner ignored the obviously unique circumstances regarding the timing of the Remand Proceeding as well as FES's unique interest in the Companies' SSO described in FES's briefing on the Motion. As set forth in FES's Motion, there are numerous factors that establish extraordinary circumstances justifying FES's request to intervene in the Remand Proceeding at this stage:

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<sup>8</sup> To the extent a "motion for leave" to file the Motion to Intervene is deemed necessary, this Application for Review constitutes FES's request for such leave.

- FES was not serving customers in the Companies' territory at the time of the initial proceedings in the Current ESP, but is now;
- The Commission has instituted a wholly new evidentiary proceeding for the Remand Proceeding, with new discovery deadlines, new testimony, and a new hearing;
- The issues that are the subject of the Remand Proceeding are significant issues, the resolution of which could affect FES's provision of CRES for the duration of the Current ESP, the Pending ESP, and potentially in other EDUs' proceedings;
- Because the Companies have failed in their Pending ESP to make even a *prima facie* showing that it is more favorable in the aggregate than the expected results of an MRO, the Current ESP will very likely continue well into 2012; and,
- FES has spent significant time and money in preparing an analysis of and testimony on the POLR cost issue presented in the Remand Proceeding, the outcome of which could predetermine this issue for purposes of the Pending ESP.

It is not simply that the Supreme Court has remanded an issue for the Commission's determination. The nature and timing of FES's interests as a CRES provider in the Companies' service territories, the timing and substance of the SSO provisions at issue in the Remand Proceeding, and the significance of the issues for the Commission's determination all support the granting of FES's Motion to Intervene due to extraordinary circumstances.

3. **The Attorney Examiner acknowledged only one of FES's interests, but inappropriately disregarded all of them.**

FES has real and substantial interests in the Companies' SSO that will be affected by the results of the Remand Proceeding and prejudiced by FES's inability to participate in the Remand Proceeding. The Attorney Examiner essentially recognized that FES has such real and substantial interests by noting that FES was granted the right to intervene in the Pending ESP. Entry, ¶ 12. FES's request to intervene in the Pending ESP was granted under the same standard applicable here and can only be distinguished based on timing, which, as discussed above, is an

unreasonable and inappropriate basis on which to deny FES's Motion.<sup>9</sup> The Attorney Examiner inappropriately disregarded FES's interests in the Remand Proceeding in her conclusion that FES remains able to participate in the Pending ESP hearing. Entry, ¶ 12. However, these and other of FES's interests will certainly be prejudiced if FES is unable to participate in the Remand Proceeding.

As set forth in FES's Motion, FES's real and substantial interests include that:

- FES is now serving customers as a certified CRES provider in the Companies' service territories. It cannot be disputed that the terms of the Companies' SSO, which will be determined in this Remand Proceeding, will impact FES's interests as a CRES provider. FES has a real and substantial interest in protecting effective competition in the Companies' service territories.
- FES has a direct and substantial interest in ensuring that the Companies do not inappropriately recover their competitive generation costs through an improperly designed, nonbypassable POLR charge, which would put the Companies and FES on an uneven playing field in both retail and wholesale competitive markets.
- If the Pending ESP is not approved or is withdrawn, the Current ESP will continue to serve as the Companies' SSO going forward after December 31, 2011. *See* R.C. § 4928.143(C)(2)(b). Therefore, FES has a significant interest in the outcome of this Remand Proceeding and its potential impact on the Companies' future SSO.
- The issues of the Remand Proceeding overlap significantly with those of the Pending ESP. The POLR Charge Rider at issue in the Remand Proceeding is based on the same formula and argument the Companies use to support the Rider in the Pending ESP. The Companies also seek to continue their recovery of environmental carrying costs, which will be the other focus of the Remand Proceeding, in the Pending ESP. Moreover, the pricing of the Companies' Current ESP is directly related to the statutory test for the Companies' Pending ESP. *See* R.C. §§ 4928.143(C)(1), 4928.142(D).

Each of these interests will be prejudiced if FES is denied the right to participate in the Remand Proceeding.

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<sup>9</sup> *See In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, 11-348-EL-SSO, Motion to Intervene of FirstEnergy Solutions Corp., filed Feb. 14, 2011.

Not only did the Attorney Examiner address only one of these interests in her Entry, but her decision inappropriately glosses over the prejudice to that interest that will result if FES's Motion is denied. It is naive to conclude that FES's participation in and development of the issues in the Pending ESP with regards to the POLR Charge Rider and environmental carrying costs will be unaffected by the results of the Remand Proceeding. *See* Entry, ¶ 12. Almost all of the parties to the Pending ESP will have a seat at the (new) table in the Remand Proceeding in order to submit testimony and develop arguments regarding whether the POLR Charge Rider is supported and appropriate under Ohio law and whether any provision of R.C. § 4928.143(B)(2) allows for the recovery of environmental carrying costs. The Commission will decide those issues based on the testimony and briefing compiled in the Remand Proceeding. Having been provided a record for consideration and taking the time to make a reasoned decision based on that record, there will be little to no room to affect the Commission's decision on those issues in the later Pending ESP proceeding. The Commission's decision on the record in the Remand Proceeding will necessarily shape, if not likely solidify, the Commission's position on the propriety of the POLR Charge Rider and the environmental carrying costs. Indeed, that is the stated goal of the proceeding. Therefore, it is clear that this one (of many) interest of FES will be prejudiced if FES is not granted intervention.

It is simply inappropriate and unprecedented to deny FES the right to intervene when its interests are unquestionably real and substantial, its interests will be significantly affected by the results of the proceeding, and FES's intervention will not prejudice the existing parties.

**B. FES's Motion Also Satisfies The Other Criteria For Intervention.**

Ohio law and the Commission's Rules establish that the Commission should consider a number of factors in determining a request to intervene – which, again, are “liberally construed

in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006) (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995)). See also R.C. § 4903.221; O.A.C. 4901-1-11(A) (requiring approval of a timely motion to intervene that satisfies the standards for intervention). FES’s Motion established each of those factors, as its Motion in the Pending ESP did. The factors include, and are discussed *seriatim*:<sup>10</sup>

- *The nature and extent of the intervenor’s interest.*

As set forth above, FES has numerous real and substantial interests in the Remand Proceeding. The structure and pricing of the Companies’ Current ESP will have a significant impact on FES as a recent, active CRES provider in the Companies’ service territories. The Remand Proceeding’s resolution of certain provisions of the Companies’ Current ESP will affect FES’s service as a CRES provider through the term of the Current ESP, and perhaps beyond if a new SSO is not approved. See R.C. § 4928.143(C)(2)(b) (if a new SSO is not approved or is withdrawn, the Companies’ Current ESP will continue to serve as the Companies’ SSO going forward). As a competitive wholesale and retail supplier, FES also has an interest in ensuring that the state’s policy of promoting effective competition is realized in the Companies’ service territories, where shopping is at the lowest rates of any Ohio EDU. Therefore, FES has a significant interest in providing evidence and testimony regarding the impact of nonbypassable generation-related charges on competition in the Companies’ service territories, such as the POLR Charge Rider that is the subject of the Remand Proceeding. FES also has an interest in being heard in the new Remand Proceeding – scheduled just four weeks before the same issues may be discussed in the Pending ESP – and in developing the issues for the Commission’s decision, which could effectively close the door on certain arguments regarding this provision

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<sup>10</sup> See O.A.C. 4901-1-11(B)(1)-(5); see also R.C. § 4903.221(B)(1)-(4).

and environmental cost recovery in the Pending ESP. Moreover, the Commission's decisions in the Remand Proceeding could guide subsequent interpretations of the allowable provisions in other EDUs' SSO proceedings. FES's ability to protect all of these real and substantial interests would be significantly impaired if FES was not allowed to intervene in the Remand Proceeding.

- *The legal position advanced by the intervenor and its probable relation to the merits of the case.*
- *Whether the intervenor will significantly contribute to the full development and equitable resolution of the factual issues.*

No party has questioned the relevance of FES's legal position on the issues in the Remand Proceeding or FES's ability to contribute to the resolution of those issues. FES, as a well-established wholesale and retail electric service provider, has substantial and broad experience in developing issues relating to the impact of SSO rates on competitive retail markets.<sup>11</sup> FES also has specific experience and expertise in the issues pending in the Remand Proceeding. As noted above, FES has invested significant time and resources over the past several months as an intervenor in the Companies' Pending ESP proceeding, analyzing the legal and factual issues surrounding the Companies' POLR Charge Rider and attempts to recover environmental costs, including the purported bases for the POLR Charge Rider and the Companies' use of the Black-Scholes model. Therefore, FES is well-positioned to contribute to the record for the Commission's consideration of the issues in the Remand Proceeding.

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<sup>11</sup> See, e.g., *In re Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Case No. 10-2586-EL-SSO, Mot. to Intervene of FES, filed Nov. 19, 2010; *In re Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply*, Case No. 09-906-EL-SSO, Mot. to Intervene of FES, dated Nov. 25, 2009.

- *Whether intervention will unduly prolong or delay the proceedings.*

As set forth above, FES's intervention will not prolong or delay the Remand Proceeding at all. FES's Motion was filed one day after the new procedural schedule was issued, weeks before the deadlines for discovery and testimony, and over a month before the hearing. Neither the Companies nor the Attorney Examiner have suggested (or could suggest) that FES's participation would delay the proceedings.

- *The extent to which the intervenor's interest is represented by existing parties.*

FES is uniquely situated to assist the Commission in the development of the record for its consideration of the important issues in the Remand Proceeding. FES is the largest CRES provider in Ohio and is an owner and operator of generation facilities in Ohio. FES also is the only supplier of electric governmental aggregation customers in the Companies' service area. Therefore, although the Attorney Examiner raised no issue with this factor in the Entry, it is important to note that FES stands in a different position than other CRES providers. The Companies have attempted to support their requested cost recovery in the Remand Proceeding on the need to support electric generation investments in Ohio. See J. Hamrock cover letter to the Commission, filed Jun. 6, 2011 ("The weight of the decisions pending in this case on remand by the Ohio Supreme Court are important not only for the remaining term of AEP Ohio's current ESP, but also for the future of investment in Ohio and the associated predictable electricity rates."). FES's interests, experience, and expertise as an Ohio-based generator and supplier are not represented by any of the other existing parties to the Remand Proceeding. FES is uniquely qualified to present counterarguments regarding the need for such cost recovery to stimulate generation investments in Ohio. FES respectfully submits that the denial of its right to

participate in this proceeding will leave an important hole in the development of the issues for the Commission's consideration.

#### **IV. REQUEST FOR EXPEDITED CONSIDERATION**

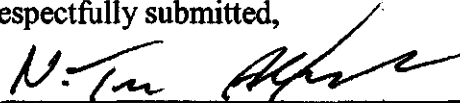
Given the compressed time frame of the Remand Proceeding, which includes a deadline for intervenor testimony of June 23, 2011, FES respectfully asks that the Commission consider this Application at its next regularly scheduled meeting on June 22, 2011. FES has filed this Application only one day after the erroneous June 16, 2011 Entry in order to provide the Companies ample time to file a brief in opposition prior to the Commission's decision on that date.

#### **V. CONCLUSION**

Ohio law allows any person who may be adversely affected by a public utilities commission proceeding to intervene in the proceeding. As set forth herein and in FES's Motion, FES has numerous real and substantial interests that would be adversely affected by the Remand Proceeding. The potential prejudice to FES, particularly when compared to the lack of prejudice to any of the existing parties in this new proceeding, necessitates that FES be granted the right to intervene. Accordingly, pursuant to Ohio Revised Code § 4903.221, O.A.C. 4901-1-11, and O.A.C 4901-1-15(A), FES respectfully requests that the Commission overrule on an expedited basis the Attorney Examiner's June 16, 2011 Entry, grant FES's Motion to Intervene and thereby allow FES to participate in the Remand Proceeding to avoid the prejudice that would otherwise result.



Respectfully submitted,



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Mark A. Hayden (0081077)  
FIRSTENERGY SERVICE COMPANY  
76 South Main Street  
Akron, OH 44308  
(330) 761-7735  
(330) 384-3875 (fax)  
haydenm@firstenergycorp.com

James F. Lang (0059668)  
Laura C. McBride (0080059)  
N. Trevor Alexander (0080713)  
CALFEE, HALTER & GRISWOLD LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
(216) 622-8200  
(216) 241-0816 (fax)  
jlang@calfee.com  
lmcbride@calfee.com  
talexander@calfee.com

*Attorneys for FirstEnergy Solutions Corp.*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011 Entry* and the *Memorandum in Support* thereof were served this 17th day of June, 2011, via e-mail upon the parties below.

/s/ Laura C. McBride

One of the Attorneys for FirstEnergy Solutions Corp.

Steven T. Nourse  
Matthew J. Satterwhite  
American Electric Power Corp.  
1 Riverside Plaza, 29th Floor  
Columbus, Ohio 43215  
stnourse@aep.com  
mjsatterwhite@aep.com

Daniel R. Conway  
Porter Wright Morris & Arthur  
41 South High Street  
Columbus, Ohio 43215  
dconway@porterwright.com

Samuel C. Randazzo  
Joseph E. Olikier  
Frank P. Darr  
McNees Wallace & Nurick  
21 East State Street, 17th Floor  
Columbus, Ohio 43215  
sam@mwncmh.com  
joliker@mwncmh.com  
fdarr@mwncmh.com

Richard L. Sites  
Ohio Hospital Association  
155 East Broad Street, 15th Floor  
Columbus, Ohio 43215-3620  
ricks@ohanet.org

Gregory H. Dunn  
Christopher L. Miller  
Schottenstein, Zox & Dunn Co., LPA  
250 West Street  
Columbus, OH 43215  
gdunn@szd.com  
cmiller@szd.com

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
dboehm@bkllawfirm.com  
mkurtz@bkllawfirm.com

Maureen R. Grady  
Terry L. Etter  
Jeffrey L. Small  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
grady@occ.state.oh.us  
etter@occ.state.oh.us  
small@occ.state.oh.us

Thomas J. O'Brien  
Bricker & Eckler  
100 South Third Street  
Columbus, Ohio 43215-4291  
tobrien@bricker.com

Colleen L. Mooney  
David C. Rinebolt  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, Ohio 45840  
cmooney2@columbus.rr.com  
drinebolt@aol.com

John W. Bentine  
Mark S. Yurick  
Chester Willcox & Saxbe, LLP  
65 East State Street, Suite 1000  
Columbus, Ohio 43215  
jbentine@cwslaw.com  
myurick@cwslaw.com

Terrence O'Donnell  
Sally Bloomfield  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
todonnell@bricker.com  
sbloomfield@bricker.com

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour and Pease LLP  
52 E. Gay Street  
Columbus, Ohio 43215  
mhpetricoff@vorys.com  
smhoward@vorys.com

Henry W. Eckhart  
2100 Chambers Road, Suite 106  
Columbus, Ohio 43212  
henryeckhart@aol.com

Steve W. Chriss  
Wal-Mart Stores, Inc.  
2001 SE 10th Street  
Bentonville, Arkansas 72716  
stephen.chriss@wal-mart.com

Michael R. Smalz  
Joseph V. Maskovyak  
Ohio Poverty Law Center  
555 Buttles Avenue  
Columbus, Ohio 43215  
msmalz@ohiopovertylaw.org  
jmaskovyak@ohiopovertylaw.org

Barth E. Royer  
Bell & Royer Co., LPA  
33 South Grant Avenue  
Columbus, Ohio 43215-3927  
barthroyer@aol.com

Langdon D. Bell  
Bell & Royer Co., LPA  
33 South Grant Ave.  
Columbus, Ohio 43215-3927  
lbell33@aol.com

Grace C. Wung  
Douglas Mancinco  
McDermott, Will & Emery  
600 Thirteenth Street, NW  
Washington, DC 20005  
gwung@mwe.com  
dmancino@mwe.com

Clinton Vince  
Emma F. Hand  
Ethan Rii  
Sonnenschein Nath & Rosenthal LLP  
1301 K Street, NW  
Suite 600 East Tower  
Washington, DC 20005  
cvince@sonnenschein.com  
ehand@sonnenschein.com  
erii@sonnenschein.com

Cynthia Fonner  
Constellation Energy Group, Inc.  
550 W. Washington St.  
Suite 300  
Chicago, IL 60661  
Cynthia.a.fonner@constellation.com

Larry Gearhardt  
280 North High St.  
P.O.Box 182383  
Columbus, OH 43218  
LGearhardt@ofbf.org

Doris McCarter  
Dan Johnson  
Tim Benedict  
Rodney Windle  
Public Utilities Commission of Ohio  
180 E. Broad St., 3rd Fl.  
Columbus, Ohio 43215  
doris.mccarter@puc.state.oh.us  
dan.johnson@puc.state.oh.us  
timothy.benedict@puc.state.oh.us  
rodney.windle@puc.state.oh.us

Jennifer Duffer  
Armstrong & Okey, Inc.  
222 East Town Street  
2nd Floor  
Columbus, OH 43215  
jduffer@ameritech.net

Stephen J. Romeo  
Smigel Anderson & Sacks  
River Chase Office Center  
4431 North Front St.  
Harrisburg, PA 17110  
sromeo@sasllp.com

Nolan Moser  
The Ohio Environmental Council  
1207 Grandview Ave.  
Columbus, OH 43212-3449  
nolan@theoec.org

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus )  
 Southern Power Company for Approval of )  
 an Electric Security Plan; an Amendment to ) Case No. 08-917-EL-SSO  
 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 its Electric ) Case No. 08-918-EL-SSO  
 Security Plan; and an Amendment to its )  
 Corporate Separation Plan. )

ENTRY

The attorney examiner finds:

- (1) On March 18, 2009, the Commission issued its opinion and order in Columbus Southern Power Company's and Ohio Power Company's (jointly, AEP-Ohio or the Companies) electric security plan (ESP) cases (ESP Order).<sup>1</sup> By entries on rehearing issued July 23, 2009 (First ESP BOR) and November 4, 2009 (Second ESP BOR), the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP Order. As ultimately modified and adopted by the Commission, AEP-Ohio's ESP directed, among other things, that AEP-Ohio be permitted to recover the incremental capital carrying costs that would be incurred after January 1, 2009, on past environmental investments (2001-2008)<sup>2</sup> and approved a provider of last resort (POLR) charge for the ESP period.
- (2) The Commission's decision in the AEP-Ohio ESP cases was appealed to the Ohio Supreme Court. The Ohio Supreme Court determined that Section 4928.143(B)(2), Revised Code, does not authorize the Commission to allow recovery of items not included in the section. The Court remanded the case to

1 *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Opinion and Order (March 18, 2009).

2 AEP-Ohio ESP Order at 24-28, 38-40; First ESP BOR at 10-13, 24-27.

the Commission for further proceedings in which "the Commission may determine whether any of the listed categories set forth in Section 4928.143(B)(2), Revised Code, authorize recovery of environmental carrying charges."<sup>3</sup> In regards to the POLR charges, the Court concluded that the Commission's decision that the POLR charge is cost-based is against the manifest weight of the evidence, an abuse of the Commission's discretion and reversible error. While the Court specifically stated that "we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful," the Court noted two other methods by which the Commission may establish the POLR charge: a non-cost-based POLR charge or evidence of AEP-Ohio's actual POLR costs.

- (3) By entry issued May 25, 2011, the Commission directed AEP-Ohio to file tariff pages that reflect that the POLR riders and environmental carrying charges included in rates are being collected subject to refund, until the Commission specifically orders otherwise on remand. Additionally, the Commission adopted a procedural schedule for the remand proceedings in order to afford AEP-Ohio and intervenors the opportunity to present testimony and additional evidence in regard to the POLR and environmental carrying charges remanded to the Commission.
- (4) Rule 4901-1-11(E), Ohio Administrative Code (O.A.C.), provides that a "motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding." Rule 4901-1-11(F), O.A.C., further provides that a "motion to intervene which is not timely will be granted only under extraordinary circumstances."
- (5) On May 26, 2011, FirstEnergy Solutions Corp. (FES) filed a motion to intervene in these cases. In support of its motion, FES states that it has a real and substantial interest in the remand due to the potential effects of the outcome of these cases on AEP-Ohio's pending ESP proceedings, Case No.

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<sup>3</sup> *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2011-Ohio-1788.

11-346-EL-SSO, *et al.* (11-346),<sup>4</sup> in addition to the effects on competition more generally. FES explains that it had no customers in the Companies' service territories at the time when the current ESP application was filed, but it has since begun to serve as a competitive retail electric service (CRES) provider to customers in those service territories. FES also notes that it is uniquely positioned to assist in a resolution of the remand as it has spent considerable time and resources in developing the legal and factual issues in 11-346, including issues related to POLR and environmental costs. Finally, FES asserts that its motion to intervene is timely because the procedural schedule for the remand proceedings was recently established. Citing Rule 4901-1-11(E), O.A.C., FES points out that its motion was filed more than five days in advance of the remand hearing date of July 12, 2011, and that the motion is thus timely. FES concludes that its participation will not unduly prejudice the existing parties or delay the remand proceedings.

- (6) On June 2, 2011, the Appalachian Peace and Justice Network (APJN) filed a motion to intervene in the remand proceedings. APJN states that it has a real and substantial interest in these cases by virtue of the direct impact on its members and other low-income rural residential consumers that are adversely affected by the Companies' rates, as well as due to the impact of the Commission's decision in these cases on 11-346. Like FES, APJN notes that its motion was filed more than five days before the remand hearing date and that its participation will not unduly prejudice the existing parties or delay the remand proceedings.
- (7) Exelon Generation Company, LLC (Exelon) also filed a motion to intervene on June 2, 2011. In support of its motion, Exelon states that it has a real and substantial interest in these proceedings, which will immediately impact the current retail and wholesale markets for power in AEP-Ohio's service area and thus affect Exelon as a regional power supplier. Exelon further notes that the Commission's decision regarding the

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<sup>4</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case No. 11-346-EL-SSO, et al.*

legality and factual basis of the POLR and environmental investment carrying charges in these cases will impact 11-346. Exelon asserts that its motion was filed in a timely fashion, given that the remand hearing is set to commence in July and that it will, therefore, not delay the proceedings.

- (8) On June 3, 2011, AEP-Ohio filed a memorandum contra the motions to intervene of FES, APJN, and Exelon (collectively, Movants). The Companies point out that the Commission's entry of May 25, 2011, does not provide an opportunity for intervention at this stage in the proceedings and that the Movants have acknowledged that their real interest is the potential outcome of the remand on 11-346. AEP-Ohio argues that the Movants have intervened in 11-346 and that they will be able to fully participate in those proceedings, regardless of the Commission's decision on remand. The Companies contend that Movants' ability to defend their interests in 11-346 will not be disadvantaged if they are denied intervention in these cases. Additionally, AEP-Ohio notes that the motions to intervene were untimely filed by nearly three years and that Movants have failed to demonstrate extraordinary circumstances as required by the Commission's rules. According to the Companies, the intervention deadline in these cases was September 4, 2008, as established by entry on August 5, 2008. AEP-Ohio asserts that it would be distracting, disruptive, and prejudicial to allow new parties at this late stage in the proceedings. Finally, the Companies note that the Movants' interests are adequately represented by other CRES providers, power marketers, and residential consumer protection advocates.
- (9) On June 6, 2011, Exelon filed a reply memorandum. In response to AEP-Ohio's memorandum contra, Exelon states that the Commission's entry of May 25, 2011, does not address the subject of intervention. Exelon maintains that its motion to intervene was timely filed and argues that there is no legal precedent in support of AEP-Ohio's contention that the attorney examiner's entry of August 5, 2008, bars intervention in future proceedings scheduled by the Commission. Should its motion to intervene be considered untimely, Exelon requests leave to intervene out of time, noting that the remand was



unforeseeable and constitutes extraordinary circumstances. Exelon states that, although the existing parties may include other wholesale suppliers, that does not mean that they will all have the same position on AEP-Ohio's proposal with respect to POLR charges. Finally, Exelon concludes that the issues under consideration in the remand proceedings are undoubtedly and inextricably interrelated to the issues in 11-346.

- (10) On June 7, 2011, FES filed a reply memorandum in response to AEP-Ohio's memorandum contra. FES states that, in addition to the impact of the outcome of these cases on 11-346, it has identified several other real and substantial interests in these proceedings, including the structure and pricing of the current ESP on FES as a CRES provider in the Companies' service territories and ensuring the state's policy of promoting effective competition is realized. Additionally, FES notes that the Commission's decision in these cases may effectively foreclose certain arguments in 11-346. FES maintains that the remand is a new evidentiary proceeding and that its motion is thus timely. Even if the motion is not timely, FES asserts that extraordinary circumstances exist in light of the remand of significant issues that will impact future proceedings and given that FES was not a CRES provider in the Companies' service territories at the time of the earlier proceedings in these cases, but is now such a provider. FES concludes that AEP-Ohio has failed to demonstrate any prejudice that would occur based on FES' intervention.
- (11) On June 9, 2011, APJN filed a reply memorandum, responding to AEP-Ohio's arguments in the same fashion as Exelon and requesting leave to intervene out of time, if necessary, on the basis that the remand establishes extraordinary circumstances.
- (12) Upon review of the motions to intervene filed by Movants, AEP-Ohio's memorandum contra, and Movants' reply memoranda, the attorney examiner finds that the motions were untimely filed, given that a specific intervention deadline of September 4, 2008, was established in these proceedings by entry issued August 5, 2008. Rule 4901-1-11(E), O.A.C. Additionally, Movants have not shown that extraordinary circumstances exist for granting their motions nearly three years past the intervention deadline, as required by Rule 4901-

1-11(F), O.A.C. Movants mainly point to the remand of these cases by the Ohio Supreme Court in support of their claim of extraordinary circumstances. A remand, however, is not an unforeseeable occurrence, as Movants contend, and does not constitute extraordinary circumstances. Any final order of the Commission may be appealed and subsequently remanded by the Ohio Supreme Court. Section 4903.13, Revised Code. Further, Movants' primary interest in the remand proceedings, as they acknowledge, is the impact of the Commission's decision in these cases on 11-346. Movants, however, were granted intervention in 11-346 by entry of March 23, 2011, and thus may fully participate in discovery, introduce evidence, and present testimony in 11-346, regardless of the outcome of the present remand proceedings. Accordingly, the motions to intervene filed by FES, APJN, and Exelon should be denied.

It is, therefore,


ORDERED, That the motions to intervene filed by FES, APJN, and Exelon be denied in accordance with finding (12). It is, further,

ORDERED, That a copy of this entry be served upon all persons of record in these cases.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By:

  
Sarah J. Parrot  
Attorney Examiner

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Entered in the Journal  
JUN 16 2011



Betty McCauley  
Secretary