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

COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM CONTRA EXELON GENERATION COMPANY, LLC'S JUNE 21, 2011, APPLICATION FOR REVIEW THROUGH AN INTERLOCUTORY APPEAL OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY

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INTRODUCTION

Columbus Southern Power Company (CSP) and Ohio Power Company (OP), referred to collectively as the "Companies," oppose Exelon Generation Company, LLC's (Exelon) Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011, Entry in this proceeding. The June 16 Entry denied the motions of three entities – FirstEnergy Solutions Corp. (FES), the Appalachian Peace and Justice Network, and Exelon – who filed motions to intervene in these proceedings after the Ohio Supreme Court issued its remand order. Attorney Examiner Sarah J. Parrot denied the motions as untimely, noting that the intervention deadline for this proceeding was September 4, 2008. *See* June 16 Entry at ¶ 12. Attorney Examiner Parrot further held that the movants had not demonstrated "extraordinary circumstances" for granting their untimely motions, as required by Rule 4901-1-11(F), Ohio Admin. Code. *See id.* Attorney Examiner Parrot noted, however, that the movants had been granted intervention in the Companies' pending ESP proceedings, Case No. 11-346-EL-SSO, *et al.*, and would have the opportunity to "fully participate in discovery, introduce evidence, and present testimony" in that proceeding. *Id.*

Exelon now asks the Commission to overrule Attorney Examiner Parrot's June 16 Entry. According to Exelon, its motion to intervene was timely; there are extraordinary circumstances that would justify an untimely intervention; and Exelon has a real and substantial interest in this proceeding that would be prejudiced if intervention were denied. Because Exelon's Application for Review "incorporates by reference" the arguments that FES made in its application for review of the June 16 Entry, filed June 17, 2011 (*see* Exelon Memorandum in Support at p. 3), the Companies' memorandum contra FES's application (filed June 22) describes the primary flaws in Exelon's arguments as well.

As explained in the Companies' memorandum contra FES's application for interlocutory appeal, Exelon's arguments fail, either as a matter of law or as applied to this case. Exelon is not trying to intervene "in a new proceeding," as Exelon argues. (Exelon Memorandum in Support at p. 7.) Exelon is trying to intervene in a proceeding that commenced in 2008, with an intervention deadline that passed almost three years ago. And even though the rules for timely intervention are liberally construed, parties seeking to intervene in an untimely fashion are required to show extraordinary circumstances. Here, Exelon has failed to show extraordinary circumstances for intervening in this proceeding at the remand stage. All that Exelon has argued is that remands from the Ohio Supreme Court are rare; that Exelon could not have foreseen that these particular issues would be remanded; and that Exelon will not seek to expand the proceeding. This is insufficient to justify a past-the-last-minute, untimely intervention, particularly when Exelon has given no reason why it could not have moved to intervene in 2008.

Nor has Exelon demonstrated that it meets the standards that apply to persons filing timely motions to intervene. Exelon states that it seeks intervention in this case to influence the Commission's decision-making on issues that will be considered in the Companies' 2011 ESP proceeding. However, wanting to help establish useful precedent for another proceeding is not a "real and substantial interest" justifying intervention here. To the extent that Exelon's interests go beyond setting precedent for the Companies' 2011 ESP proceeding, those interests are represented by existing CRES parties including Constellation NewEnergy, Inc., Dominion Retail, Inc., Direct Energy Services, LLC, and Integrys Energy Services, Inc., and there is no reason to believe that Exelon has access to facts or arguments that the other intervenors could or would not offer. As shown below, Attorney Examiner Parrot's Entry denying intervention to Exelon and the two other untimely intervenors was proper and correct and should be affirmed.

ARGUMENT

I. Because the September 4, 2008 Intervention Deadline Applies to This Entire Case, Exelon's Motion to Intervene Was Untimely.

Exelon's primary argument for overturning Attorney Examiner Parrot's June 16 Entry is that Exelon's motion to intervene was timely. The Commission's rules state 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(E), Ohio Admin. Code (emphasis added). Exelon argues that the Commission's liberal intervention policies should lead the Commission to treat the remand proceedings "as a new proceeding, with new procedural guidelines, in which Exelon Generation's intervention is still timely." (Exelon Memorandum in Support at p. 7.)

Like FES and APJN before it, Exelon cites nothing to support its interpretation of "proceeding." The only Commission decision it cites, a January 2010 entry from FirstEnergy's 2010 Energy Efficiency/Peak Demand Reduction portfolio case (*see* Exelon Memorandum in Support at p. 6), did not involve attempts to intervene in a proceeding following a remand from the Ohio Supreme Court. Instead, the Commission in *FirstEnergy* issued an order setting a deadline for intervention following the granting of an application for rehearing. *See 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, at p. 2 (Jan. 14, 2010) (*cited in* Exelon Memorandum in Support at p. 6). That entry set forth the first deadline for intervention in that case and was issued only six months after the proceeding began. *FirstEnergy* has no similarity or relevance to this case.

Exelon's position is also contrary to the Commission's regulatory treatment of the term "proceeding." In the Commission's procedural rules, "proceeding" simply means "case." The terms are used interchangeably. *See, e.g.*, Rule 4901-1-01(D), Ohio Admin. Code (defining "Emergency rate proceeding" to mean "any case involving an application for an emergency rate adjustment") (emphasis added); Rule 4901-1-01(G), Ohio Admin. Code (defining "General rate proceeding" to mean "any case involving: an application for an increase in rates . . .") (emphasis added); Rule 4901-1-09, Ohio Admin. Code (stating that, "[a]fter a case has been assigned a formal docket number, no commissioner or attorney examiner assigned to the case shall discuss the merits of the case with any party to the proceeding or a representative of a party") (emphasis added).

In this case, what Exelon calls the "Remand Proceeding" has the same case names and docket numbers as the pre-remand proceedings. *See* Rule 4901-1-03(A), Ohio Admin. Code (indicating that every "proceeding" has a "case name and docket number"). The "Remand Proceeding" and pre-remand proceedings share a single case record on the DIS system. *See* http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=08-917. They are, in short, the same "proceeding," as the Commission uses that term. Consequently, the September 4, 2008 intervention deadline applied to "[this] particular proceeding" for purposes of the Commission's intervention rules. The "Remand Proceeding" is just the final stage of the original case. Exelon's motion to intervene, filed almost three years after the intervention deadline, was untimely.

II. The Commission is Not Required to Permit Untimely Intervention Absent Extraordinary Circumstances.

Exelon's second argument for overturning the June 16 Entry is that the Commission may not interpret its intervention rules in a way that "limit[s] participation in proceedings." (Exelon

Memorandum in Support at p. 7.) Exelon points to the Ohio Supreme Court's holding that Rule 4901-1-11 "is very similar to Civ.R. 24 – the rule governing intervention in civil cases in Ohio – which 'is generally 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)). Exelon also points to two Commission opinions from the mid-1980s, neither of which is available on the Commission's DIS system or through Westlaw, for the proposition that the Commission "encourage[s] the broadest possible participation in its proceedings." (Exelon Memorandum in Support at p. 7.) What Exelon's argument boils down to is that the Commission may not deny motions to intervene even if they are untimely.

The fact that the rules governing intervention (Civ.R. 24 and Rule 4901-1-11, Ohio Admin. Code) are liberally construed, however, does not mean those rules should be ignored. Even under Civ.R. 24, untimely motions may be denied. *See generally State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 502-503, 696 N.E.2d 1058 (1998). Nor does the Commission's purported policy of encouraging broad participation in Commission proceedings mean that all motions to intervene must be granted. As the Commission has held, it is not the case that "any interested person [has] the right to intervene, conduct discovery, and present evidence in any Commission case." *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at ¶ 9 (Dec. 6, 2006). Such a policy "would eliminate the Commission's discretion to conduct its proceedings in a manner it deems appropriate and would unduly delay the outcome of many cases." *Id.*

The Commission's rules state that "[a] motion to intervene which is not timely will be granted only under extraordinary circumstances." Rule 4901-1-11(F), Ohio Admin. Code (emphasis added). The Commission chose this standard for untimely intervention, rather than a lesser "good cause" standard, because "failure to meet a deadline for intervention in a case has consequences for other parties in the case as well as for the Commission as it attempts to process its cases." *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at ¶ 30 (Dec. 6, 2006). Consequently, Exelon cannot simply point to the Commission's liberal intervention policies and insist that they require the Commission to allow intervention here. Exelon could have timely intervened in 2008 and it is simply too late to do so now. Exelon was required to demonstrate "extraordinary circumstances" to justify an untimely intervention in this case.

III. Exelon Did Not Demonstrate Extraordinary Circumstances For Intervening At This Late Date.

Exelon did not acknowledge, in its motion to intervene, that it had missed the deadline for intervention in this case. Accordingly, Exelon did not attempt in that motion to demonstrate extraordinary circumstances for allowing it to intervene. Now that Exelon's motion to intervene has been denied, however, Exelon lists three factors that it believes establish extraordinary circumstances that justify Exelon's request to intervene at this stage. Presenting additional arguments after Exelon's untimely motion to intervene has been denied is even more untimely than the original motion and, as such, these additional arguments should not even be considered by the Commission. Exelon failed to meet its burden of demonstrating that extraordinary circumstances exist to support its severely late intervention request and it cannot cure that failure by including additional reasons as part of an interlocutory appeal after a ruling on its tardy motion.

Regardless, the circumstances that Exelon submits are far from extraordinary. The first circumstance that Exelon offers is that "remand proceedings are rare occurrences and thus require extraordinary treatment." (Exelon Memorandum in Support at p. 7.) Even assuming that remand proceedings are, indeed, rare, this is simply a conclusion masquerading as an argument. Exelon fails to explain why, exactly, remand proceedings require extraordinary treatment.

The second circumstance that Exelon offers is that Exelon did not have notice that the Companies' POLR charges and environmental investment carrying cost charges would be addressed in this proceeding in a hearing on remand. (*Id.* at p. 8.) This is as obvious as it is meaningless. Although Exelon may not have been able to anticipate that there would be a remand, or "the particular issues that will be addressed on remand" (*id.*), it was able to anticipate that the propriety of the Companies' POLR and environmental investment carrying cost charges would be addressed in this proceeding. The Companies' Application in this proceeding, filed on July 31, 2008, announced the Companies' intention of collecting POLR and environmental investment carrying cost charges. (*See* Application at pp. 5 and 7.) As Exelon itself describes, these issues were debated and briefed extensively, ultimately leading to the Ohio Supreme Court appeal that is the reason for these remand proceedings. (*See* Exelon Memorandum in Support at pp. 3-4.) The propriety of the Companies' proposed POLR and environmental carrying cost charges is not a new issue arising for the first time on remand. If Exelon has a real and substantial interest in the charges that are at issue here, then it had that same interest three years ago. The fact that the Ohio Supreme Court has now remanded these issues for further consideration is not an extraordinary circumstance justifying Exelon's failure to intervene when it had an opportunity to do so in 2008.

The third circumstance that Exelon offers is that "this Commission has granted untimely intervention to parties who seek to intervene in a particular case on a limited basis." (Exelon Memorandum in Support at p. 8.) While this is true, it is also irrelevant. Exelon has not asked to intervene in this case on a limited basis. Instead, Exelon has argued that "the issues within the scope of a remand proceeding are typically limited" and then promised to litigate only those issues that the Ohio Supreme Court remanded. (*Id.*) In other words, Exelon is not seeking limited intervention in a regular Commission proceeding; Exelon is seeking regular intervention in a limited Commission proceeding. This third circumstance is just another way of repeating Exelon's initial, conclusory argument that remand proceedings deserve special treatment.

As the Companies stated in their initial memorandum contra to Exelon's motion, allowing Exelon to become a party at this juncture contradicts the very nature of remand proceedings, wherein the Commission has been directed to reconsider how two limited issues were decided back in 2009. To open the docket up to new parties at this stage would be distracting, disruptive, and prejudicial, and would create a bad precedent. Exelon has not shown that there are extraordinary circumstances that would justify its untimely intervention at this late stage.

IV. Exelon Also Has Not Justified Intervention Under The Standard For Timely Movants.

Lastly, Exelon attempts to show that it fulfills the standard requirements for intervention under Rule 4901-1-11(A)(2) and (B), Ohio Admin. Code. Under these rules, a person seeking to intervene must demonstrate that he "has a real and substantial interest in the proceeding" and that "the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." Rule 4901-1-11(A)(2), Ohio Admin. Code. Rule 4901-1-11(B), Ohio Admin. Code, sets out five

factors that the Commission must consider when deciding whether to permit intervention. These standard requirements are irrelevant here, as they apply only to persons who file "timely motion[s]" to intervene. Rule 4901-1-11(A), Ohio Admin. Code. Nonetheless, Exelon fails to demonstrate that it meets the standard requirements for intervention.

First, Exelon has not shown that it has a "real and substantial interest" in these proceedings. Rule 4901-1-11(A)(2), Ohio Admin. Code. Exelon makes clear that its primary reason for wanting to intervene in this proceeding is to ensure that the Commission's decisions here will be useful precedent for the Companies' other pending ESP proceeding. (*See* Exelon Memorandum in Support at p. 9.) A desire to help shape precedent for a future proceeding, however, is not a permissible basis for intervention. *See In the Matter of the Self-Complaint of Columbus Southern Power Company and Ohio Power Company Regarding the Implementation of Programs to Enhance Distribution Service Reliability*, Case No. 06-222-EL-SLF, Entry, at ¶ 7 (Mar. 21, 2007) (holding, "It is the Commission's long-standing policy to deny intervention to entities or persons whose only real interest in the proceeding is that legal precedent may be established which may affect the requesting entity's or person's interests in a subsequent case."). "To grant intervention on this basis would render the Commission's rule on intervention meaningless and allow almost any person intervention in any case based on the proposition that the precedent established may affect them in some future case." *In the Matter of the Applications 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, Entry, at pp. 2-3 (Mar. 23, 2000).

Second, Exelon has not shown that its interests are not "adequately represented by existing parties." Rule 4901-1-11(A)(2), Ohio Admin. Code. To the extent that Exelon seeks to

represent its interests as an owner of generating facilities and power marketer (*see* Exelon Motion to Intervene at p. 4), those interests are represented by other, existing intervenors, including the National Energy Marketers Association and Constellation Energy Commodities Group, Inc. (CCG). Like Exelon, CCG is a power marketer that is "active in the PJM Interconnection, L.L.C." (*See* Motion for Leave to Intervene of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Memorandum in Support, at p. 2.) Indeed, Exelon and CCG are represented by the same counsel in this proceeding. And to the extent that Exelon seeks to represent the interests of its subsidiary Exelon Energy Company, a CRES provider, several other CRES providers timely intervened in the 2008 ESP Cases and are actively participating in the remand proceedings. Those CRES intervenors, which include Constellation NewEnergy, Inc., Dominion Retail, Inc., Direct Energy Services, LLC, and Integrys Energy Services, Inc., are each represented by counsel well-versed in CRES-provider issues and have the experience and expertise necessary to develop the record and assist the Commission in resolving the limited issues on remand. Exelon and Constellation NewEnergy also are represented by the same counsel. It would appear that Exelon's interests and the other power marketer and CRES intervenors' interests completely overlap.

Third, Exelon has not shown that "[t]he legal position advanced by [Exelon] and its probable relation to the merits of the case" support Exelon's intervention. Rule 4901-1-11(B)(2), Ohio Admin. Code. Indeed, Exelon has not explained what its legal position in this case is. Neither its Motion to Intervene nor its Application describes Exelon's position on the questions that will be decided on remand.

Fourth, Exelon has not shown that it "will significantly contribute to [the] full development and equitable resolution of the factual issues." Rule 4901-1-11(B)(4), Ohio Admin.

Code. Exelon asserts that its participation in "the organized capacity and energy markets run by PJM Interconnection, LLC" puts Exelon "in a position to offer its expertise . . . in determining the cost to 'stand by' to provide electric capacity and energy." (Exelon Memorandum in Support at p. 10.) Exelon fails to explain, however, why participation in PJM's organized capacity and energy markets gives Exelon any particular expertise. Moreover, to the extent that such participation is indeed helpful, existing intervenor CCG has the same expertise. (*See supra.*) It is unclear what knowledge or experience Exelon could offer that the existing intervenors cannot offer. At this late stage in the case, the Commission does not need one more intervenor to come in and offer redundant arguments.

CONCLUSION

For the foregoing reasons, Columbus Southern Power Company and Ohio Power Company respectfully request that the Commission deny Exelon's June 21, 2011, Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011 Entry and Request for Expedited Consideration. Attorney Examiner Parrot was correct to deny Exelon's untimely motion to intervene, and the June 16 Entry denying that motion should be affirmed.

Respectfully Submitted,

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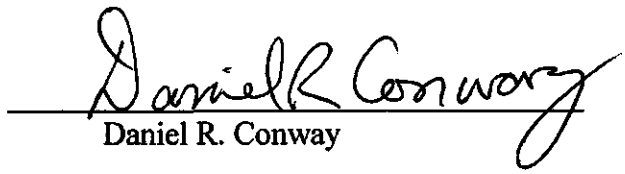
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Exelon Generation Company, LLC's June 21, 2011, Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011 Entry has been served upon the below-named counsel and Attorney Examiners via electronic mail this 24th day of June, 2011.



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