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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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 No. 11-346-EL-SSO** **Case No. 11-348-EL-SSO**
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	**Case No. 11-349-EL-AAM** **Case No. 11-350-EL-AAM**

MEMORANDUM CONTRA MOTION TO DISMISS OF FIRSTENERGY SOLUTIONS CORP. FILED BY COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

I. INTRODUCTION

FirstEnergy Solutions Corp. (FES) filed a motion to dismiss Columbus Southern Power Company's (CSP) and Ohio Power Company's (OPCo) (collectively "AEP Ohio" or the "Company") applications to establish a standard service offer in the form of an electric security plan (ESP). The motion to dismiss is without merit. FES provides two main arguments. First, FES argues that the application should be dismissed because it fails to make a showing that the ESP is more favorable in the aggregate than the expected results of a MRO. Second, FES argues that it is improper to base a portion of the testimony of Company witness Thomas' testimony on data filed in another Commission

docket. The motion ignores basic statutory construction of R.C. 4928 and provides argumentation based on its disagreement with the Company's filing versus arguments based in grounds for dismissal. FES also attempts to minimize the Commission's discretion over its dockets and operations.

The Company provides the Commission with the appropriate information to perform its statutory duty to consider the application as filed by the Company and update if or when needed. Through its March 23, 2011 Entry, the Commission reviewed the ESP application and addressed the requested waivers under applicable filing requirement rules. No party filed an opposition to the Company's waiver requests nor raised any other filing deficiency with respect to the filing requirements and the Entry effectively accepts the application and proceeded forward with publication and establishing a procedural schedule.

AEP Ohio submits that FES' motion should not be entertained to the extent it raises untimely arguments about compliance with filing requirements, since such matters have already been heard and decided in these cases. The Company has filed a proper application as allowed under R.C. 4928.143 for the Commission to consider and accept, reject or modify. The Commission has discretion and control over its dockets and should move forward with its consideration of the merits of the applications filed. The motion to dismiss should be denied.

Likewise, FES' arguments supporting its motion to strike are lacking. The Company naturally used as an input assumption in the competitive benchmark price the same cost-based capacity charge position advanced in Case No. 10-2929-EL-UNC.

Ironically, after criticizing AEP Ohio for relying on its position in 10-2929, FES suggests using the Commission's interim rate established in the same docket – even though that rate is not expected to be in effect during the proposed ESP term. These are issues that the Commission can properly weigh and consider after the evidentiary record is closed and the merit arguments are made, but it is premature to do so now and the motion to strike should be denied.

II. ARGUMENT

A. AEP Ohio's ESP Application and supporting testimony should not be dismissed because they provide information to enable the Commission to consider whether the proposed ESP is more favorable in the aggregate than the expected result under an MRO.

The statutory provision that appears at the center of the arguments provided by FES in its motion is R.C. 4928.143(C)(1). Specifically that statute states:

> The commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142.

FES does not read the Company's comparison of its ESP generation prices to the market rate offer prices or "MRO Test" as described in the testimony of Company witness Thomas as being compliant with the statute. FES asserts that the comparison should be the aggregate impact of the ESP including the provisions enumerated above, to the expected results of a MRO. FES ignores the relief requested in the Application and improperly characterizes the Company's testimony. FES' position regarding satisfaction

of the ultimate test for an ESP is best considered as part of the final decision in these cases, not as a threshold dismissal argument.

FES interprets the Ohio Supreme Court's statement in *Columbus S. Power Co. v. Pub. Util. Comm.*, 128 Ohio St.3d 402, 945 N.E.2d 501, 2011-Ohio-958, ¶ 27 (2011), regarding the "in the aggregate" test of §4928.143(C)(1) as requiring the EDU to include in its ESP non-price terms and conditions that provide a net benefit to customers, separate and apart from the benefits that the ESP's pricing provides. First of all, this is a misreading of the Court's ruling. If an EDU proposes an ESP whose pricing terms, alone, were more favorable than what an MRO would provide, and which offered no additional beneficial non-price terms and conditions or whose non-price terms and conditions provided no additional benefits, the Commission certainly could approve the proposed ESP. The Court's decision does not require a contrary result. FES's interpretation could encourage, or force, an EDU into an MRO when it was willing to adopt an ESP that would have been less expensive for customers than MRO. Second, in this case AEP Ohio's proposed ESP does include non-price terms and conditions that benefit customers. Consequently, based on the record that AEP Ohio will make, the proposed ESP is more advantageous to customers, both with regard to the prices it provides and, in the aggregate, when its non-price terms and conditions are added to the balance.

A cursory review of the Application indicates that AEP Ohio has framed up the proper standard and has put forth appropriate allegations supporting that standard. Early in the Application, AEP Ohio stated that the proposed ESP addresses a broad range of issues that will have the effect of stabilizing and providing certainty regarding retail

electric service and is "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." (Application at 3 quoting Section 4928.143(C), Revised Code) After describing all of the rate components and other features of the proposed ESP in detail, the Application requests that the Commission find that "the Company's proposed ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." (Application at 22.)

Company witness Hamrock submits in his testimony (at 24 and 26) that the proposed ESP pricing is more favorable than the expected result of an MRO, noting that Company witness Thomas supports the pricing comparison, but Mr. Hamrock also proceeds to describe the extensive benefits of the proposed ESP (at 26-40). FES claims that Company witness Hamrock "makes no effort to satisfy the "in the aggregate" test required by law" by quoting his statement that the ESP "best serves the public interest by offering a price that is more favorable in the aggregate than the expected result under an MRO." Surprisingly, FES ignores the remainder of Company witness Hamrock's answer which goes on to state (at 27) that the proposed ESP "offers aggregate benefits such as our commitment to economic development, environmental capital investments, distribution infrastructure investments, innovative mitigation of rate impacts, renewable power options, and a more stable, reasonably priced retail service offer." In complimentary fashion, the testimony of Company witness Thomas also indicates (at 3) that she is doing the pricing test aspect of the MRO test and that Mr. Hamrock addresses the "in the aggregate" factors. FES' motion focuses only on the pricing analysis offered by witness Thomas and ignores the Application and witness Hamrock's testimony. In

short, the Application's properly-framed request for relief along with the totality of the evidentiary record and briefing when completed, will support the conclusion that AEP Ohio's proposed ESP is more favorable in the aggregate than the expected results under an MRO.

FES appears to believe that the "in the aggregate test" must be purely quantitative in nature:

> "The commission has relied in the past upon such quantitative analysis in approving ESPs. *See In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison 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. 08-935-EL-SSO, Second Opinion and Order, dated Mar. 25, 2009 at pp. 19-20 (relying on testimony from the EDU applicants and Staff as to an estimated $100 million in "net benefits" of the aggregate proposed ESP as compared to the expected results of an MRO).

FES Motion at 5. FES fails to include other significant testimony that the Commission referred to in that same Opinion and Order (in fact, even in the same paragraphs). The Commission references that Staff witness "Cahaan also notes that the ESP preserves the option of establishing an ESP in the future, which would not be an option under an MRO." The Commission also references a similar statement from FirstEnergy witness Blank. This is the type of non-quantified benefit that can and should be considered in the evaluation of an ESP.

The standard of review recited in the Application and testimony is precisely the same standard emphasized in FES' motion to dismiss as being the applicable and controlling standard. There is no dispute about the applicable statutory standard; FES

merely disagrees about the extent to which AEP Ohio's pre-filed testimony conclusively establishes that the standard has been met. The assertions made by AEP Ohio witnesses pertaining to the MRO test will be subject to cross-examination and tested during briefing and, likewise, the assertions to be made by any intervenor or Staff witness on this topic (which remain to be seen) will also be subject to the same rigors. AEP Ohio submits that the Commission should reserve judgment on application of the ultimate ESP standard of review until the record and briefing are closed and the case is submitted for a decision on the merits. It would be inappropriate and premature to dismiss the Application by applying the final evidentiary test before evidence is even taken or the issues are argued.

FES' motion focuses on Company witness Thomas' testimony and largely ignores the Application and testimony of Mr. Hamrock even though pertinent allegations and claims are made in those two documents as well. In any case, Company witness Thomas' testimony (which must be assumed to be accurate for purposes of dismissal arguments) reflects cogent analysis. FES misses the mark in claiming that AEP Ohio did not explicitly rely on additional benefits to make an "in the aggregate" argument; relying on additional ESP benefits to achieve a passing result under the MRO test is only necessary if the pricing test otherwise falls short. Because Company witness Thomas' testimony demonstrates there is "headroom" resulting from a proper comparison of the proposed ESP pricing with the expected results expected under an MRO during the same time period, there is no threshold necessity of relying on additional ESP benefits to render a conclusion that the ESP is more favorable "in the aggregate" (versus being based solely on the price test analysis). Specifically, Company witness Thomas concludes that the price test alone demonstrates a net benefit of $1.41/MWh when the proposed ESP prices

are compared to the weighted average MRO annual price. (Exhibit LJT-2; Thomas testimony at 12.)

FES complains (at 3-4) that the MRO price test conducted by Company witness Thomas does not reflect a quantification of all of the riders proposed in the ESP. FES' argument in this regard even asserts (at 4) that AEP Ohio should be able to predict the outcome of the pending ESP remand proceeding and presently incorporate those results into the MRO test. Thus, what FES complains about in this regard is that AEP Ohio was not presently able to fully quantify some of the rider rates proposed in the Application. AEP Ohio is not unique is proposing riders as part of an ESP that cannot presently be determined with certainty and its MRO price test was appropriately conducted.

Initially, the sufficiency and detail of information contained in the Application is a threshold matter under the Commission's filing rules and was already considered and decided as part of the March 23, 2011 Entry regarding filing requirements and waivers. No party opposed the Company's waiver requests and the Commission made no finding of a filing deficiency in the Entry. In any case, if a particular proposed rate is found to be lacking in support after all of the evidence is presented and all of the arguments are made, the Commission can ultimately decline to adopt the particular rate or rider. But FES' present argument in this regard is not timely and, in any case, it is not an appropriate basis supporting dismissal of the Application.

The $1.41.MWh discussed above provides "headroom" for the Company's other proposed riders related to generation service to fill in and still pass the MRO price test. Moreover, if additional ESP benefits are considered (such as those discussed extensively

in Company witness Hamrock's testimony and within the testimonies of other AEP Ohio witnesses), the Commission would have additional headroom and flexibility to approve an ESP that incorporates fixed rate components with tracker mechanisms in a combination that "in the aggregate" remains more favorable than the expected results under an MRO. In other words, the Commission could approve a proposed ESP price that is higher than the projected MRO price – based on additional benefits of the proposed ESP and provided the Commission found the ESP "in the aggregate" to be more favorable.

As a related matter, to the extent that additional evidence is presented (by Staff or intervenors or even by the Company on rebuttal) supporting different MRO pricing test results than those presented in Company witness Thomas' pre-filed direct testimony, the Commission may ultimately formulate a modified ESP that incorporates yet a different combination of rate mechanisms from the menu of options proposed in the Application. In this regard, there may even have to be a compliance run of the MRO pricing test in order to gauge the status of such a modified ESP.

The benefits of the proposed ESP, which are pertinent to any "in the aggregate" analysis, were further discussed in the Company witness Hamrock testimony (at 41):

> The AEP Ohio proposed ESP offers a reasonable and prudent pricing plan that provides our customers stability and balance over the 2012-2014 timeframe as we face energy and environmental challenges together. The proposed ESP best serves the public interest by offering a price that is favorable to the comparable MRO, offers financial stability, continues the emphasis on energy efficiency and renewable supplies, and aligns to Ohio policy in Section 4928.02, Ohio Revised Code, that benefit AEP Ohio customers. The proposed ESP not only supports the provisions of S.B. 221, but provides projects and programs that benefit customers while attempting to maintain an investment climate that attracts capital to

> support the long term investment needs of the state. Perhaps most importantly, the proposed ESP promotes economic development and expands support for low income customers. AEP Ohio believes it is in our customer's best interest to accept the proposed ESP solution that offers a host of short and long-term benefits such as our substantial commitment to economic development, environmental capital investments, and a more stable, reasonably priced retail service offer. We have a vested interest in the communities and people that we are privileged to serve. Acceptance of our proposed ESP will ensure our ability to sustain important commitments to the future of Ohio.

In sum, FES' argument that the Company "may" have applied the wrong SSO price to the transitioning MRO level is speculative and should not be entertained by the Commission. (FES Motion at 4.) FES argues that if the current SSO changes on the remand that the Company has not provided a proper analysis for comparison. There are several problems with FES' argument. First, the Supreme Court of Ohio did not remand the 08-917 et. al cases until after the Company filed the ESP. Second, there is no telling whether the SSO will change in any manner on remand. Third, the Commission should avoid dismissing cases or declaring them insufficient due the fact of what might happen in another pending case due to facts raised after filings were made. The Commission has the authority to organize its proceedings as it deems necessary and to the extent updates or new data is needed due to actions subsequent to the filing of a case, the Commission has the authority to act. While AEP Ohio understands that the totality of the evidence regarding the various proposals must be considered "in the aggregate" after evidence is admitted and arguments are made on brief in order to appropriately apply the ultimate statutory standard applicable to an ESP approval, it is premature and otherwise misguided to presently conclude (as FES alone does) that the Application must be dismissed based on the statutory MRO test.

B. FES' motion to strike is without merit.

FES' next argument that AEP Ohio should somehow be barred from relying on its filed rate of capacity charges in the 10-2929-EL-UNC docket is without merit. A company filing its ESP application has the right to use whatever elements it may choose in its application. Similarly, a company – as is also the case for Staff or intervenors – can use inputs of its own choosing for purposes of sponsoring a competitive benchmark price for conducting the MRO test. It is up to the Commission to determine if the application will be accepted, the evidence it relied upon, modified or denied based upon that filing. The usage of a proposed rate from another case is not a basis to dismiss a case or strike portions of testimony.

The Commission's commitment to process cases and move "at the speed of business" finds with it the ability to incorporate results and impacts from valid cases. There is no reason to incorporate all of the 10-2929 issues into this case and litigate them in both proceedings. There are enough issues in these ESP cases already, and it is perfectly natural and legitimate for the Company to use its proposed capacity rate as a valid assumption in developing the competitive benchmark rate for the MRO test. The surprise or anomaly would be if the Company did not rely on its proposed capacity price and instead selected another rate that it does not agree with.

The Commission is interested in the efficient processing of its cases and is vested with broad discretion in the handling of its docket and cases. The Supreme Court has declared as much stating, "[i]t is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its

business, avoid undue delay and eliminate unnecessary duplication of effort." *Weiss v. Pub Util. Comm*, 90 Ohio St. 3d 15; 2000 Ohio 5; 734 N.E.2d 775; *Toledo Coalition for Safe Energy v. Pub Util. Comm.* (1982), 69 Ohio St. 2d 559, 560, 23 Ohio Op. 3d 474, 475, 433 N.E.2d 212, 214. The Commission need not litigate the same issue in multiple cases and can allow the outcome in one case to impact the issues in another.

Ironically, in the same breath it criticizes AEP Ohio for relying on the 10-2929 docket, FES (at 6) suggests that AEP Ohio should instead use the current retail price for capacity that was adopted on an interim basis in the same docket. AEP Ohio is not surprised that FES would plan to advance that position, nor would AEP Ohio plan to move to strike FES testimony that incorporates such an input into its proposed competitive benchmark price. But FES' insistence on using a temporary rate established in that docket (which as an interim rate should most certainly not be in effect in 2012 and beyond, during the term of the proposed ESP) demonstrate the disingenuous and result-oriented nature of the position being advanced by FES.

In support of its position, FES also stated (at 6) that when it asked for support for the Company-proposed capacity rates filed in 10-2929 case, Company witness Thomas responded "that she is not sponsoring the requested documents." First, it was counsel that provided the response to FES RPD-005 that is attached to FES' motion to dismiss. Further, FES fails to mention that the discovery response also incorporates the Company's extensive and detailed January 7, 2011 filing in 10-2929 which exceeds 100 pages of supporting information and detail. Being a well-documented input assumption to the competitive benchmark price, there is no basis to strike Company witness Thomas' testimony just because she does not independently sponsor every document and piece of

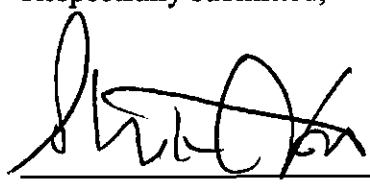
information she reasonably relies upon in developing a competitive benchmark price for use in the MRO test.

The fact that FES does not agree with AEP Ohio on the basis of costs is not a reason to dismiss a case. That is a matter regarding which the parties may provide arguments to the Commission at the appropriate time, but that time is not prior to the evidentiary hearing or prior to Staff or intervenors even filing their testimony. Likewise, it is inappropriate to strike any portion of the testimony relying on the other Commission docket. The amount is included and verifiable in that docket and an applicant can rely on whatever it chooses when filing an ESP application. FES' decision to judge what is appropriate and not appropriate in the Company's Application inappropriately places FES in the place of the Commission. The Commission can judge the sum of the parts of the Company's Application and determine what to do with the application. FES' motion to dismiss or in the alternative to strike testimony should be denied.

III. CONCLUSION

As such, and for all the reasons stated above, the Company respectfully requests that the Commission deny the motion to dismiss.

Respectfully submitted,



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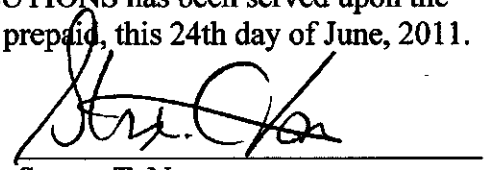
CERTIFICATE OF SERVICE

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 MOTION TO DISMISS OF FIRSTENERGY SOLUTIONS has been served upon the below-named counsel via First Class mail, postage prepaid, this 24th day of June, 2011.



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