

**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)	(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 REPLY IN SUPPORT OF ITS
APPLICATION FOR REVIEW THROUGH AN INTERLOCUTORY APPEAL
OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY**

Columbus Southern Power Company and Ohio Power Company's (the "Companies") Opposition to FirstEnergy Solutions Corp.'s ("FES") Application for Review by the Commission of the Attorney Examiner's Entry, dated June 16, 2011 (the "Entry"), falls far short of justifying a Commission decision upholding the Entry. FES demonstrated in its Application that the Attorney Examiner clearly erred by refusing to allow FES to participate in this Remand Proceeding and upcoming evidentiary hearing.¹ The Companies' strategy in response is to selectively misrepresent a few of FES's arguments while wholly ignoring FES's many other arguments supporting its intervention in this Remand Proceeding. As discussed below, FES amply demonstrated in its Application that the Commission should reverse the Entry and grant

¹ By Entry dated June 23, 2011, the Attorney Examiner continued the starting date of the evidentiary hearing until July 15, 2011, and set June 30, 2011 as the deadline for intervenor and Staff testimony. Thus, a Commission order issued at its next regular meeting on June 29, 2011, will allow FES to file testimony, participate in the upcoming evidentiary hearing, and support the Commission's review of the important issues presented in the remand proceeding.

FES's motion to intervene. FES's intervention is supported by its numerous interests in this proceeding, by the extraordinary circumstances of the Remand Proceeding, and by the lack of any undue prejudice to the proceeding or the existing parties resulting from FES's intervention.

The arguments in support of and opposition to FES's request to intervene in this Remand Proceeding have been restated repeatedly in the parties' initial briefs and now the Application for Review and Opposition thereto. However, the Companies' misstatements in their Opposition brief cannot go without correction:

- **The Companies failed to rebut FES's demonstration of extraordinary circumstances made in FES's Motion to Intervene and Reply Brief submitted to the Attorney Examiner.**

The Companies disingenuously argue that FES's explanation of the extraordinary circumstances associated with the Remand Proceeding should be disregarded because "[p]resenting additional arguments after FES' untimely motion to intervene has been denied is even more untimely than the original motion." Opposition, p. 6. However, FES's Reply, which was filed on June 7, 2011, more than a week before the Entry was issued, reiterated the same extraordinary circumstances later set forth in the Application for Review.² As FES has consistently stated, FES believes its Motion to Intervene was timely filed in connection with the new hearing in the Remand Proceeding. "But, even if the deadline for intervention in this proceeding remained tied to the original proceedings, the Commission's rules do allow for intervention that is otherwise deemed 'not timely' where 'extraordinary circumstances' exist – as the Companies themselves acknowledge." Reply, pp. 2-3 (emphasis in original). FES has repeatedly and consistently described those circumstances in its initial Motion, its Reply and its

² See FirstEnergy Solutions Corp.'s Reply in Support of Its Motion to Intervene, filed June 7, 2011, at p. 3. The factual basis for these extraordinary circumstances was set out in FES's Motion to Intervene at pp. 3-6.

Application to the Commission. Indeed, the fact that neither the Companies nor FES have been able to identify a Commission decision ever denying intervention in circumstances similar to those presented here proves that the nature and timing of FES's interests and the scope and timing of the Remand Proceeding are extraordinary.

- **The Companies' discussion of the definition of a "proceeding" ignores the value of an intervention deadline, and their Opposition notably lacks any discussion of prejudice that would result from FES's intervention.**

The Companies' Opposition defines "proceeding" overly broadly to support their position that FES's Motion was untimely because it followed the September 2008 intervention deadline established for a December 2008 hearing.³ See Opposition, p. 4. However, an intervention deadline has an obvious purpose: it serves to put the parties on notice as to who will be exchanging discovery and pre-filed testimony sufficiently in advance of a scheduled evidentiary hearing so that the parties may prepare their hearing presentations. No rational purpose is served by applying a September 2008 deadline to a July 2011 hearing that was not contemplated at the time the original deadline was established. The September 2008 deadline was established for a proceeding that concluded with the Commission's Opinion and Order and Entry on Rehearing issued in the Spring of 2009. Although this Remand Proceeding is moving forward in the same docket as that initial proceeding, it is a new proceeding that involves new discovery, new witnesses from the Companies and, possibly, from other parties, and a new evidentiary hearing. Importantly, the new testimony from Companies witness Makhija and Companies witness LaCasse, who both attempt to provide a cost basis for the Companies' POLR

³ If the Commission agrees with FES that its Motion to Intervene was timely for purposes of the Remand Proceeding because it resulted from an Ohio Supreme Court decision leading to a new evidentiary hearing with new witnesses from the Companies, then intervention should be granted and arguments regarding "extraordinary circumstances" are moot.

charge, was not submitted in the initial proceeding in 2008 and was generated by the Companies and submitted now only because the Ohio Supreme Court properly found that the Companies lacked any cost basis for the POLR charge. Thus, the September 2008 deadline should not arbitrarily prevent new parties from participating in the Remand Proceeding and responding to this new testimony.

Moreover, other than a passing, conclusory reference to FES's intervention as "distracting, disruptive and prejudicial" (*See* Opposition, p. 8), the Companies' Opposition fails to identify what prejudice would result to the Companies and existing parties if FES were allowed to intervene in the Remand Proceeding. As noted in FES's Application, FES's request to intervene was filed one day after the new schedule was issued and over a month before the new hearing. FES's Motion and Application for Review also were filed before the deadline for intervenor testimony. Indeed, in response to a request from Staff, the Attorney Examiner recently extended both the deadline for testimony and for commencing the hearing. *See* June 23, 2011 Entry. Therefore, FES's participation will neither disrupt nor prejudice the parties. Although the Companies believe that FES's opposition to their proposed cost recovery could be "disruptive," the fact that FES could show to the Commission's satisfaction that the Companies' cost recovery is unreasonable and unlawful is not a legitimate basis upon which to deny intervention. FES's intervention in the Remand Proceeding will not prejudice the Companies or any of the other parties.

- **FES has valid interests in the Remand Proceeding that will be prejudiced absent intervention. FES's interests are not limited to the precedential effect of the Remand Proceeding, and previous Commission decisions relied upon by the Companies' are completely distinguishable.**

The Companies falsely argue that FES seeks intervention for the “primary reason” of “ensur[ing] that the Commission’s decisions here will be useful precedent.” *See* Opposition, p. 9. In truth, FES’s Application describes the numerous real and substantial interests that FES has in the Remand Proceeding, specifically, and the Companies’ ESP, generally. First, as both a retail and wholesale provider of electric generation services, FES has multiple interests in the Companies’ ESP, including that of “protecting effective competition in the Companies’ service territories” and “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.” Application, p. 9. Remarkably, although the Companies now attempt to argue that FES “has not shown that it has a ‘real and substantial interest’ in these proceedings” regarding the Companies’ 2009-11 ESP, the Companies did not even bother opposing FES’s intervention on this basis in their proposed 2012-14 ESP proceeding. Regardless, FES’s Application, as well as its Motion to Intervene and Reply, set forth the numerous interests FES has in this Remand Proceeding.

FES’s interests, as stated in its Motion and again its Application for Review, 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’ current ESP, 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 ESP proposed for 2012-14 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 impact on the Companies' SSO.

Application, p. 9. While it is true that FES also is concerned that the Commission's eventual order in the Remand Proceeding could have precedential effect regarding the Companies' 2012-14 ESP,⁴ this concern is not a valid basis for denying intervention when FES has demonstrated multiple other interests in the Remand Proceeding that justify its intervention.

As a result, the Companies' reliance on two Commission decisions for the proposition that an interest in precedential impact "is not a permissible basis for intervention" is misplaced. Opposition, p. 9. Both of the decisions reflect situations in which the party seeking to intervene had no interest other than precedential impact. In the first, the movants denied the right to intervene were electric utilities seeking to intervene in the transition plan proceedings of other electric utilities.⁵ The Commission found that the movant-utilities were interested only in the impact of the other utilities' proceedings and settlement discussions on their own proceedings, and, thus, denied their requests to intervene. In the second case, the movant was a provider of

⁴ 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 2012-14 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 2012-14 ESP. Moreover, the pricing of the Companies' current ESP is directly related to the statutory test for the Companies' 2012-14 ESP. *See* R.C. §§ 4928.143(C)(1), 4928.142(D).

⁵ *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 (Mar. 23, 2000).

assistance to low-income customers who did not live in the Companies' territory.⁶ Not surprisingly, the Attorney Examiner denied the movant the right to intervene because its "only real interest" was legal precedent.⁷ Notably, neither of these decisions involved the issue here, which is the precedential effect that a decision in one utility's ESP case will have on the same utility's next, and currently-pending ESP case in which the same legal issues are presented. The outcome of this Remand Proceeding will directly affect FES's competitive interests both for the remainder of the current ESP and during the Companies' next ESP. Regardless, neither of these decisions is relevant to FES's Application here because, as noted above and in FES's Application, FES's interests in the outcome of the Remand Proceeding itself are numerous, real, and substantial.

- **The Companies' attempt to analogize FES's new customer base in the Companies' territory with residential, industrial and commercial customers moving into their territory is absurd.**

FES's recent presence as a CRES provider serving customers in the Companies' territory, in conjunction with the stand-alone nature of the Remand Proceeding and the scope of the issues addressed in the Remand Proceeding, constitute extraordinary circumstances. The Companies, however, have attempted to downplay FES's increased interest in the Companies' retail markets by analogizing FES's changed status to that of a newly-moved customer. The Companies disingenuously suggest that to allow "the hundreds of people and corporations" the right to intervene would be a "giant loophole" in the rules regarding intervention. Opposition, p. 2, 7. This analogy is ineffective, and FES respectfully suggests that the floodgates are unlikely to

⁶ *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).

⁷ *Id.* at ¶ 7.

open if FES is granted intervention. As a competitive retail electric service provider, FES stands in a markedly different position and with different interests and perspectives than retail customers. Allowing FES – as a uniquely situated CRES provider – to intervene would have no impact on individual customers’ standing to intervene. Each potential intervenor is judged on the merits of their own situation and the scope of the proceeding. Of course, many customer groups also are represented collectively in utility rate proceedings by, for example, the Ohio Consumers’ Counsel, Industrial Energy Users-Ohio, and the Ohio Manufacturers’ Association. These groups, however, do not represent FES’s interests. Thus, FES should be granted intervention.

- **The Companies’ President and Chief Operating Officer has made clear that the Remand Proceeding is about generating investment cost recovery, which directly affects FES’s competitive position in the Companies’ markets.**

The Companies do not dispute that FES is the only CRES provider that has intervened or is seeking to intervene in the Remand Proceeding that also owns generating facilities in Ohio. Therefore, the Companies attempt to downplay FES’s unique position by arguing that FES did “not point to any filing in this proceeding in which the Companies have supported their recovery of POLR charges with arguments relating to stimulating generation investments.” Opposition, p. 10. However, as cited by FES in its Application, the Companies’ President and Chief Operating Officer, Joseph Hamrock, made this connection in his June 6, 2011 letter filed in this docket. See Application, p. 13. He specifically linked the Companies’ cost recovery requests pending in the Remand Proceeding to the status and stability of Ohio-based generation investments. The Companies’ strategy is to use every approach possible to obtain a series of guaranteed revenue streams that support their generation investments in Ohio and elsewhere, and the success of this strategy will directly affect competitive retail and wholesale suppliers, such as FES, who are not

guaranteed cost recovery for their generation investments. As explained by Mr. Hamrock, both issues presented on remand directly affect the present and future status of the Companies' generating assets in Ohio, which in turn directly affects the status of competitive generation markets in Ohio. Because of FES's presence in those markets, FES is uniquely positioned to explain why the Companies' strategy is, among other things, anti-competitive.

- **The Companies' other arguments do not reflect the standard for intervention.**

The Companies suggest that the Entry should be upheld because FES "has not explained what its legal position in this case is." Opposition, p. 10 (emphasis in original). But, FES's Motion and Application explained FES's interests in challenging the Companies' purported POLR Charge calculation based on the Black-Scholes model and the impact of both the POLR Charge Rider and environmental cost recovery on the state's policy of ensuring effective competition. Nothing more is needed. It cannot be said that FES (or any movant) is required to detail its legal position in a motion to intervene filed before discovery and depositions have been conducted.

The Companies also suggest that FES should not be allowed to participate because it does not have "access to unique facts that will allow it to 'significantly contribute.'" See Opposition, p. 11 (emphasis in original). The requirement that a party come to the proceeding with "unique facts" is not reflected anywhere in the statutory or regulatory standard for intervention and is nonsensical. Again, the Companies did not oppose FES's ability to "significantly contribute to [the] full development and equitable resolution of the factual issues" – the actual standard for intervention – when FES intervened in the Companies' 2012-14 ESP proceeding. See O.A.C. 4901-1-11(B)(4). That is not surprising given that FES's Motion in the that proceeding and its Motion in this Remand Proceeding established FES's experience in prior

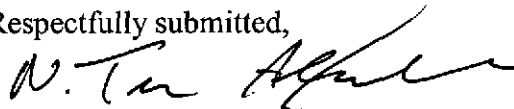
SSO proceedings. More specifically, FES has an interest in ensuring competitive markets for retail electric service, and also brings a unique perspective as a CRES supplier and owner of Ohio-based generating facilities, all of which would certainly contribute to the development and resolution of the factual issues.

The point of allowing interested parties to intervene in proceedings before the Commission is to provide the Commission with a record that incorporates the legal theories and arguments from those who will be impacted by the proceeding, so that the Commission can reach a considered and reasoned decision that best balances those various interests. FES's Motion and Application thoroughly explained why FES is well-positioned to do just that. Unless the Entry is overturned, FES's inability to participate will lead to a record lacking in the insight of an important and unique perspective.

CONCLUSION

The Commission has commenced this Remand Proceeding with new deadlines and a new evidentiary hearing. The parties have prepared new testimony and issued new discovery. FES has sought intervention because it believes that its interests as a CRES provider serving customers in the Companies' territory, and as an owner of Ohio generating facilities, will be affected – directly and substantially – by the Commission's decision in this case. The potential prejudice to FES's numerous interests and the lack of prejudice to any of the existing parties to the Remand Proceeding counsel in favor of FES's request to intervene. The Companies' Opposition does nothing to change that result. The Commission should overrule the Entry and allow FES to participate in the Remand Proceeding.

Respectfully submitted,



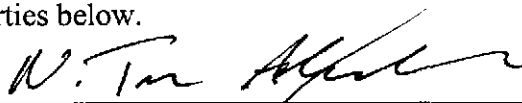
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Reply in Support of Its 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 27th day of June, 2011, via e-mail upon the parties below.



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