

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 Commission 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 EOR) and November 4, 2009, 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 enumerated in the section. The Court remanded the case to the Commission for further proceedings in which "the

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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 EOR at 10-13, 24-27.

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 was 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) On May 26, 2011, FirstEnergy Solutions Corp. (FES) filed a motion to intervene in these cases. On June 2, 2011, the Appalachian Peace and Justice Network (APJN) and Exelon Generation Company, LLC, (Exelon) filed motions to intervene. On June 3, 2011, AEP-Ohio filed a memorandum contra the motions filed by FES, APJN, and Exelon. Reply memoranda were filed by Exelon, FES, and APJN on June 6, 2011, June 7, 2011, and June 9, 2011, respectively.
- (5) By entry issued June 16, 2011, the attorney examiner denied the motions to intervene filed by FES, APJN, and Exelon, finding 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.<sup>4</sup>

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

<sup>4</sup> *In re AEP-Ohio ESP cases*, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO, Entry (August 5, 2008).

Additionally, the attorney examiner found that FES, APJN, and Exelon did not demonstrate extraordinary circumstances to warrant intervention nearly three years past the established deadline.

- (6) On June 17, 2011, FES filed an application for review for an interlocutory appeal and request for expedited consideration, appealing the attorney examiner's ruling denying its motion to intervene. On June 21, 2011, APJN and Exelon also filed applications for review of the same ruling. AEP-Ohio filed a memorandum contra FES' application for review on June 22, 2011, and memoranda contra APJN's and Exelon's applications for review on June 24, 2011.
- (7) On June 27, 2011, FES filed a reply to AEP-Ohio's memorandum contra. On June 28, 2011, AEP-Ohio filed a motion to strike FES' reply. As the Commission's rules do not provide for a reply to a memorandum contra an application for review for an interlocutory appeal, and FES did not request leave to make such a filing, FES' reply will not be considered by the Commission. Additionally, because the unauthorized reply of FES will not be considered in this matter, AEP-Ohio's motion to strike should be denied as moot.
- (8) Rule 4901-1-15(A)(2), Ohio Administrative Code (O.A.C.), provides that any party who is adversely affected may take an immediate interlocutory appeal to the Commission from a ruling denying a motion to intervene.
- (9) In their applications for review, FES, APJN, and Exelon (collectively, appellants) contend that the attorney examiner incorrectly found their motions untimely. They argue that the intervention deadline of September 4, 2008, which was established by entry issued August 5, 2008, is not the proper deadline for the remand proceedings, as the Commission has established an entirely new procedural schedule that included no intervention deadline. Appellants assert that their motions were filed more than five days in advance of the remand

hearing date of July 12, 2011,<sup>5</sup> pursuant to Rule 4901-1-11(E), O.A.C., and that the motions were thus timely filed.

- (10) In response, AEP-Ohio disagrees with appellants' argument that the intervention deadline of September 4, 2008, applies only to the "original proceeding," which occurred before the remand, and not to the "remand proceeding." The Companies contend that appellants fail to support their interpretation of "proceeding," noting that appellants cite to a single, irrelevant case<sup>6</sup> in which the Commission first established a specific intervention deadline after granting an application for rehearing, which occurred only six months after the proceeding began. AEP-Ohio further argues that, in the Commission's procedural rules, "proceeding" simply means "case" and that the two terms are used interchangeably. The Companies also note that what appellants deem the "original proceeding" and the "remand proceeding" have the same case names and docket numbers, as well as a single case record, and, therefore, they are the same proceeding. AEP-Ohio concludes that the September 4, 2008, intervention deadline applies in this situation and that appellants' motions were thus untimely filed.
- (11) The Commission finds that the motions to intervene filed by appellants, which were filed nearly three years after the September 4, 2008, deadline established by entry of August 5, 2008, were untimely filed. Section 4903.221, Revised Code, and Rule 4901-1-11(E), O.A.C., provide that motions to intervene must be filed no later than any specific deadline established by Commission order for purposes of a particular proceeding, or, if no such deadline is established, five days prior to the scheduled date of hearing. Because a specific intervention deadline was established for these cases, any motion to intervene filed after that date is untimely. Appellants characterize the remand phase of these cases as new proceedings and argue that the Commission, in setting a procedural schedule for the remand, triggered a new set of

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<sup>5</sup> By entry issued June 23, 2011, the remand hearing in these cases was continued until July 15, 2011.

<sup>6</sup> *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 09-580-EL-EEC, *et al.*, Entry (January 14, 2010) at 2.

deadlines. However, Section 4903.221, Revised Code, does not provide any support for their argument, and neither FES, APJN, nor Exelon has cited to any Commission precedent holding that a Supreme Court remand gives rise to a new opportunity for intervention. Further, although the Commission has scheduled an additional evidentiary hearing in light of the Court's remand of two issues, that hearing is a continuation of proceedings that were initiated in 2008. There is no merit in the argument that the default deadline (*i.e.*, five days in advance of the scheduled hearing date) is appropriate in a proceeding in which a specific intervention deadline has been established. Although appellants argue that it is inappropriate to carry forward an intervention deadline that they claim was set for a hearing in November 2008, we disagree. The intervention deadline is established for purposes of managing the proceedings as a whole, not just the evidentiary hearing. The scheduling of a new hearing in a proceeding does not automatically create a new deadline for intervention. The Commission accordingly finds that the attorney examiner did not err in finding that the motions were untimely filed.

- (12) Regardless of whether their motions were timely filed, appellants argue that extraordinary circumstances exist such that late intervention is warranted. As extraordinary circumstances, FES claims that it was not serving retail customers in the Companies' service territories at the time of the initial proceedings but that it does so now; a new evidentiary proceeding has been scheduled; the resolution of the remanded issues could affect FES' provision of competitive retail electric service (CRES) for the duration of AEP-Ohio's current ESP, as well as during the ESP pending in Case No. 11-346-EL-SSO, *et al.* (11-346), and in proceedings for other electric distribution utilities; AEP-Ohio's current ESP may continue into 2012; and significant resources have been spent by FES in preparing an analysis and testimony regarding the issue of POLR costs in these cases, the outcome of which could predetermine the issue in 11-346.

APJN argues that extraordinary circumstances have been shown, considering that the Commission has scheduled a new evidentiary proceeding; the resolution of the remanded issues

may affect the bills of low-income customers during the remaining term of AEP-Ohio's current ESP, as well as during the ESP pending in 11-346; and the testimony regarding POLR costs is likely to predetermine the POLR issues in 11-346.

For its part, Exelon states that remand proceedings are rare occurrences that require extraordinary treatment and that the issues in remand proceedings are limited in nature. Additionally, Exelon contends that it is not foreseeable that the Court would have issued a remand order in this case or that the issues of POLR and environmental carrying costs would be the particular issues addressed on remand. Exelon also notes that POLR costs may have an effect on the remaining term of AEP-Ohio's current ESP and that the current ESP may continue beyond 2011. Finally, Exelon states that it seeks to intervene on a limited basis, noting that it only seeks to litigate a limited issue that has been remanded to the Commission.

- (13) AEP-Ohio replies that appellants did not attempt to demonstrate extraordinary circumstances in their motions to intervene and that their efforts to do so now should be rejected by the Commission. Additionally, the Companies argue that the factors cited by appellants as extraordinary circumstances are not, in fact, extraordinary and do not justify intervention at this late stage in the proceedings.

Regarding the fact that FES entered the Companies' service territories after the September 4, 2008, intervention deadline, AEP-Ohio asserts that this is a circumstance likely shared by hundreds of other people and entities and that allowing intervention on that basis, irrespective of the deadline, would create a loophole in the requirement to demonstrate extraordinary circumstances.

With respect to FES' and APJN's concern that the resolution of the POLR and environmental carrying cost issues in these proceedings may predetermine those issues in 11-346, AEP-Ohio argues that the Commission does not grant motions

for intervention on the basis that precedent may be established that may affect the movant in a future case.<sup>7</sup>

In response to Exelon, AEP-Ohio counters that Exelon fails to explain why remand proceedings require extraordinary treatment; Exelon was able to anticipate that POLR and environmental carrying costs, which were proposed in the Companies' application, would be addressed in these cases; and Exelon is not seeking intervention on a limited basis but rather full intervention in proceedings with limited issues.

AEP-Ohio concludes that it would be distracting, disruptive, and prejudicial to allow new parties at this late date and that appellants have not shown extraordinary circumstances justifying late intervention.

- (14) Pursuant to Section 4903.221, Revised Code, the Commission may, in its discretion, grant late intervention for good cause shown. Rule 4901-1-11(F), O.A.C., further provides that an untimely motion to intervene will be granted only under extraordinary circumstances. Although appellants argue that there are several factors that constitute extraordinary circumstances, the Commission finds that none of the circumstances mentioned by appellants may be considered extraordinary justification for their failure to file timely motions to intervene.

We find no merit in Exelon's argument that the remand of these cases by the Court is an unforeseeable occurrence. Pursuant to Section 4903.13, Revised Code, any final order of the Commission may be appealed and subsequently remanded by the Court. We further disagree with Exelon's contention that it is unforeseeable that POLR and environmental carrying cost issues would be issues remanded to the Commission and that Exelon had no notice of these issues. These are not new issues. Rather, they were part of AEP-Ohio's ESP proposal from the outset, debated in testimony, thoroughly addressed in

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<sup>7</sup> *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 (March 21, 2007) at 2; *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 No. 99-1729-EL-ETP, et al., Entry (March 23, 2000) at 2-3.

the ESP Order and First ESP EOR, and appealed to the Court. That these particular issues could possibly be remanded by the Court is no matter of surprise. Further, the case<sup>8</sup> cited by Exelon in support of its argument is inapposite, as the Commission in that case found good cause for late intervention where a proposed rule included a requirement that notice of certain filings be provided to particular parties and CRES providers and notice was not provided to the entity seeking to intervene. Exelon does not allege that the Companies neglected to provide it with notice required by rule.

FES notes that it was not serving retail customers in the Companies' service territories at the time of the initial proceedings but that it began to serve such customers in July 2009. FES does not explain how its business decision to enter the Companies' service territories constitutes extraordinary circumstances justifying intervention nearly three years after the established deadline.

The remaining factors cited by Exelon and FES, as well as those enumerated by APJN, essentially relate to the Court's remand and the impact that the remand may have on 11-346. The fact that another evidentiary hearing has been scheduled in light of the remand, and that the resolution of the remanded issues may possibly impact the outcome in 11-346 or other proceedings before the Commission and thus affect the interests of low-income customers, CRES providers, and power marketers, do not constitute extraordinary circumstances. Again, a remand is a possibility in any case and, therefore, no justification for overlooking the intervention deadline for nearly three years. Additionally, the fact that AEP-Ohio's current ESP may continue beyond its current term into 2012 is not an unexpected possibility, as this contingency is specifically addressed in Section 4928.143(C)(2)(b), Revised Code.

Appellants contend that the Commission has granted motions to intervene filed after a scheduled deadline in other cases, given that the requirements for intervention are "generally

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<sup>8</sup> *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, Opinion and Order (September 2, 2003) at 9.



liberally construed in favor of intervention.”<sup>9</sup> Although we are mindful of this standard, we find that the circumstances here, where the motions were filed years past the established deadline, are too extreme, and granting intervention under these circumstances would defeat the very purpose of establishing a deadline in the first instance. Additionally, the Commission declines to establish a precedent that would, in effect, allow intervention at any point in a proceeding, regardless of the established deadline. The Commission further notes that we have, in previous cases, denied motions to intervene that were exceedingly untimely filed, as here, during the late stages of the proceedings.<sup>10</sup> For these reasons, we find that appellants have not demonstrated extraordinary circumstances.

- (15) Finally, appellants argue that they have a number of real and substantial interests in these proceedings, which will be prejudiced if intervention is denied. Appellants contend that the June 16, 2011, entry essentially recognized their interests inasmuch as it notes that they were granted intervention in 11-346. Among other interests, appellants state that the issues in these cases overlap significantly with those in 11-346 and that the Commission’s decision in these cases will shape, if not solidify, the Commission’s position on POLR and environmental carrying costs in 11-346. Appellants thus conclude that their interests will be prejudiced if they are not permitted to participate in these proceedings. Appellants also argue that they have satisfied all other criteria for intervention, as enumerated in Section 4903.221(B), Revised Code, and Rule 4901-1-11(B), O.A.C.

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<sup>9</sup> *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 387 (2006).

<sup>10</sup> See, e.g., *In the Matter of the Applications of Ohio Edison Company’s, The Toledo Edison Company’s, and The Cleveland Electric Illuminating Company’s Amendments to Their Supplier Tariffs*, Case No. 03-1966-EL-ATA, *et al.*, Entry on Rehearing (March 25, 2004) (denying motion to intervene as untimely where filed with response to application for rehearing); *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, *et al.*, Opinion and Order (July 19, 2000) (denying motion to intervene as untimely where filed with initial brief).

- (16) AEP-Ohio counters that the criteria for intervention only apply to timely motions to intervene and, regardless, that appellants do not meet the criteria for intervention. With respect to the real and substantial interests enumerated by appellants, AEP-Ohio contends that appellants' primary interest in the remand proceedings is clearly the impact of the Commission's decision on 11-346, which the Companies argue is not an accepted basis for intervention. Additionally, AEP-Ohio asserts that appellants have not shown that they satisfy any of the other criteria for intervention.
- (17) Given that their motions were untimely filed and they have not demonstrated extraordinary circumstances to justify late intervention, the Commission finds it unnecessary to determine whether appellants have otherwise satisfied the criteria for intervention.
- (18) Accordingly, the Commission concludes that the interlocutory appeals of FES, APJN, and Exelon should be denied. We note, however, that appellants were granted intervention in 11-346,<sup>11</sup> and that our decision today is not intended in any way to prevent them from presenting their arguments with respect to AEP-Ohio's proposed POLR and environmental carrying costs or from otherwise fully participating in those proceedings, regardless of the outcome of the present cases.

It is, therefore,

ORDERED, That AEP-Ohio's motion to strike FES' reply in support of its application for review be denied as moot. It is, further,

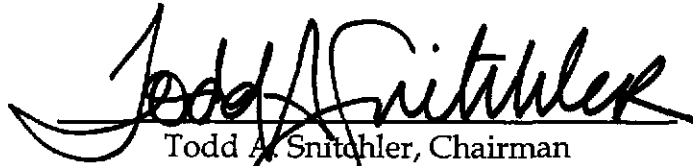
ORDERED, That the interlocutory appeals filed by FES, APJN, and Exelon be denied. It is, further,

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<sup>11</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.*, Entry (March 23, 2011).

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

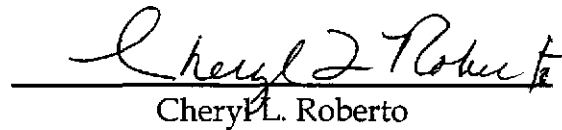
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Paul A. Centolella

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Steven D. Lesser

\_\_\_\_\_  
Andre T. Porter

  
Cheryl L. Roberto

SJP/sc

Entered in the Journal

JUN 29 2011

  
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Betty McCauley  
Secretary