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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and) Case Nos. 11-346-EL-SSO
Ohio Power Company for Authority to) 11-348-EL-SSO
Establish a Standard Service Offer)
Pursuant to § 4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case Nos. 11-349-EL-AAM
Ohio Power Company for Approval of) 11-350-EL-AAM
Certain Accounting Authority.)

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**FIRSTENERGY SOLUTIONS CORP.'S
REPLY IN SUPPORT OF MOTION TO DISMISS
OR IN THE ALTERNATIVE TO STRIKE**

The Memorandum Contra ("Memorandum") filed by Columbus Southern Power Company and Ohio Power Company (collectively, "AEP Ohio") in opposition to FirstEnergy Solutions Corp.'s ("FES") Motion to Dismiss/Strike cannot rescue AEP Ohio's ESP Application from dismissal or prevent its hearsay testimony from being stricken. In FES's Motion to Dismiss, FES demonstrated that AEP Ohio's ESP Application fails to make even a *prima facie* showing that the proposed ESP is more favorable in the aggregate than the expected results that would otherwise apply under an MRO. In FES's Motion to Strike, FES demonstrated that AEP Ohio witness Thomas is relying upon unreliable hearsay – indeed, and even more remarkably, that AEP Ohio has made the conscious choice through its legal counsel not to support this unreliable hearsay – to attempt to establish the cost of an essential input to her Competitive Benchmark Price. AEP Ohio's Memorandum fails to rebut either point but argues that the Commission should allow the hearing to go forward anyway.

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FES respectfully submits that the interests of all parties, including AEP Ohio, are best served if the Commission dismisses the Application for the proposed ESP now¹ and thereby gives AEP Ohio sufficient time prior to the end of 2011 to submit an application that at least makes a good faith effort to satisfy the statutory standard. Notably, Exelon Generation Company, LLC agrees that AEP Ohio's failure to satisfy the statutory requirement cannot be remedied through further proceedings.² The Commission should not needlessly impose substantial costs on multiple parties simply to satisfy AEP Ohio's desire to have a hearing. The Commission should grant FES's Motion.

I. The Application Fails to Make a *Prima Facie* Showing that The Proposed ESP is More Favorable in the Aggregate than the Expected Results of an MRO.

Let's assume that AEP Ohio is correct – which it is not, as discussed below – that the Commission may approve an ESP application on the sole basis that the ESP's pricing is more favorable than what an MRO would provide. Memo., p. 4. Has AEP Ohio made a *prima facie* case through the testimony of AEP Ohio witness Thomas that its proposed ESP price will be lower than the expected MRO price? As explained in FES's Motion to Dismiss, the answer clearly is no. Indeed, AEP Ohio resorts to extreme understatement by explaining that it is “not presently able to fully quantify some of the rider rates.” Memo., p. 8. A much more accurate description would be that AEP Ohio has ignored nearly all of the riders, regardless of whether they are quantifiable or not, in calculating its ESP price. There are several riders that have not

¹ AEP Ohio argues that the Commission cannot reject the Application now because it “effectively” accepted the Application in its March 23, 2011 Entry. Memo., p. 2. This is obviously and demonstrably false, as should be clear to the Attorney Examiner (not the Commission) who issued that entry. AEP Ohio did not seek a waiver of the R.C. § 4928.143(C) test, and the Attorney Examiner did not relieve AEP Ohio of the obligation to satisfy that test – nor could the Attorney Examiner do so. The use of the term “effectively” here by AEP Ohio is equivalent to saying that the Ohio Supreme Court “effectively” approved AEP Ohio's POLR charge on appeal from Case No. 08-917-EL-SSO.

² Exelon Generation Company, LLC's Reply in Support of FirstEnergy Solutions Corp.'s Motion to Dismiss or in the Alternative to Strike, filed July 1, 2011, at p. 2.

been quantified at all (as opposed to “fully” quantified), with AEP Ohio refusing to speculate as to the substantial costs, for example, of future environmental expenditures while at the same time conducting briefings regarding the substantial costs of its future environmental expenditures.³ In addition, other riders have been quantified but nevertheless completely excluded from the ESP price comparison. The obvious reason for this is because any attempt to include AEP Ohio’s actual pricing information in this comparison would have caused the ESP to fail, even if looking at price alone.

Ms. Thomas excluded the following from her analysis:

| <i>Rider</i> | <i>Estimated Cost/MWh</i> |
|---|----------------------------------|
| Provider of Last Resort Charge | \$2.84 ⁴ |
| Environmental Investment Carrying Cost Recovery Rider | \$1.52 ⁵ |
| Generation Resource Rider | \$0.18 ⁶ |

³ See <http://www.aep.com/environmental/news/?id=1697>. See also <http://www.aep.com/newsroom/resources/earnings/2011-04/1Q11EarningsReleasePresentation.pdf>; <http://www.aep.com/investors/present/documents/BMOHandoutSeptember20-2010.pdf>.

⁴ Direct Testimony of Laura J. Thomas, filed Jan. 27, 2011, at p. 20. Although AEP Ohio quantified this price element, it also explained that the POLR charge could be much higher if the Competitive Benchmark Price is lower. *Id.*, at p. 22.

⁵ This is an average across all rate classes for 2012 based on AEP Ohio’s capital expenditure estimate of \$461 million. Direct Testimony of Andrea Moore, filed Jan. 27, 2011, Exhibit AEM-1, at 2 of 2. AEP Ohio did not provide any testimony regarding 2013-14 environmental carrying costs, but increases are inevitable given AEP Ohio’s announced increases in environmental expenditures. However, Ms. Thomas includes in her calculation only \$0.90/MWh for the entire ESP period. See Thomas Direct, Exhibit LJT-2.

⁶ Supplemental Direct Testimony of David M. Roush, filed July 1, 2011, Exh. DMR-8; Supplemental Direct Testimony of Philip J. Nelson, filed July 1, 2011, Exh. PJN-4. The revenue requirement supported by AEP Ohio witness Nelson allocated across total forecasted load results in a Generation Resource Rider of \$0.18/MWh in 2013. The Generation Resource Rider would increase to approximately \$0.26/MWh in 2014, based on the revenue requirement shown in Exhibit PJN-4 at p. 2. The costs included in the forecasted Generation Resource Rider includes only the estimated cost of the Turning Point project, not any other generation resources that AEP Ohio might seek to include in this rider.

| | |
|--|---------------------|
| Facility Closure Cost Recovery Rider | unknown |
| Carbon Capture and Sequestration Rider | \$0.03 ⁷ |
| NERC Compliance Cost Recovery Rider | unknown |
| Pool Termination or Modification Provision | unknown |

Although AEP Ohio depends upon the “head room” of \$1.41/MWh over the ESP period to defend the gross inadequacy of its own price comparison (Memo., p. 8), the Commission cannot assume, given the lack of *any* evidence for multiple pricing elements, that AEP Ohio’s claimed “head room” is sufficient to hold all of the known and unknown costs of the proposed ESP. Because AEP Ohio’s own testimony requires the Commission to speculate, it necessarily prevents the Commission from having an evidentiary basis for any decision it might make. Thus, even if a review of AEP Ohio’s testimony is limited to its own ESP vs. MRO price comparison, AEP Ohio has failed to make a *prima facie* showing.⁸

Yet, as the Ohio Supreme Court recently made clear, the Commission’s review cannot be limited to an ESP vs. MRO price comparison. AEP Ohio argues that the Commission can approve an ESP without considering the ESP’s non-price terms if the average ESP price is lower than the projected, average MRO price. Memo., p. 4. This is not surprising given the focus of its pre-filed direct testimony, which relies exclusively upon this legal interpretation of R.C. §

⁷ Based on an annual revenue requirement of \$1.5 million for the FEED Study. Direct Testimony of Philip J. Nelson, filed Jan. 27, 2011, at pp. 20-21. Inclusion of the \$610 million capital cost of the CCS facility proposed for West Virginia would add approximately \$0.89/MWh. *See id.*

⁸ *See* R.C. § 4928.143(C) (“The burden of proof in the proceeding shall be on the electric distribution utility”). *See generally* Civ.R. 41(B)(2) (authorizing directed verdict if plaintiff has failed to carry burden of proof through its own testimony).

4928.143(C).⁹ This same argument was recently advanced by AEP Ohio and *expressly rejected* by the Ohio Supreme Court when it found that “the commission must consider more than price in determining whether an electric security plan should be modified.” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 945 N.E.2d 501, 2011-Ohio-958, ¶ 27 (2011). The Court explained that the Commission is obligated by R.C. § 4928.143(C) to “consider ‘pricing and all other terms and conditions.’” *Id.* (emphasis in original). Unfortunately for AEP Ohio and Ms. Thomas, the Application and her testimony were drafted to satisfy AEP Ohio’s erroneous legal interpretation of R.C. § 4928.143(C). Although AEP Ohio continues to insist that it is right and the Ohio Supreme Court is wrong, the Commission must follow Ohio Supreme Court precedent.

AEP Ohio belatedly attempts to argue for the first time in its Memorandum that it actually has attempted to make the case that its proposed ESP is more favorable in the aggregate (Memo., pp. 5-6, 9-10), but this is nothing more than an attempt to rewrite history and its testimony. AEP Ohio argues that the Application includes allegations supporting the statutory standard and, thus, it made a *prima facie* showing in support of that standard. Memo., pp. 4-5. Of course, general allegations in the Application do nothing to advance the record or to carry AEP Ohio’s burden of proof. AEP Ohio’s proof must be in its testimony and other evidence in the record, and it is the testimony and evidence that is solely focused, as a result of AEP Ohio’s legal mistake, on a price comparison. The Application fails to provide the evidence necessary for parties to question and ultimately for the Commission to conduct the review or make the finding required by R.C. § 4928.143(C).

⁹ See Thomas Direct, at p. 3 (“My testimony will address how the Company’s proposed ESP prices, supported by Company witness Roush, compare to MRO prices during the proposed ESP period.”).

The question is not whether “AEP Ohio’s pre-filed testimony conclusively establishes that the standard has been met.” Memo., p. 7. The question is whether AEP Ohio’s pre-filed testimony makes a *prima facie* showing toward satisfying the statutory standard. Put another way, did AEP Ohio submit testimony sufficient to allow the Commission to “consider ‘pricing and all other terms and conditions’” in determining whether the proposed ESP as a whole is more favorable in the aggregate than the expected results of an MRO? The answer is no. Not only is the pricing testimony wholly inadequate, but the “other terms and conditions” testimony is nothing more than a very high level discussion from AEP Ohio witness Hamrock of what he believes are *benefits of the ESP*. No effort was made to put those purported benefits, and any additional costs, in a side-by-side comparison with an MRO. For example, although Mr. Hamrock generally extols the virtues of distribution investments, these same investments are included in AEP Ohio’s distribution case filing and, thus, could occur regardless of whether the Commission approves an ESP or MRO. The same is true with AEP Ohio’s “emphasis on energy efficiency and renewable supplies,” to the extent mandated by state law. Memo., p. 9 (citing Hamrock, p. 41). AEP Ohio offers the Commission no assistance in weighing the positives and negatives of all terms and conditions of AEP Ohio’s ESP *that would be unique to that ESP*. Thus, AEP Ohio’s testimony fails to make a *prima facie* showing that would justify further review of the proposed ESP.

Because AEP Ohio surely must recognize that its pricing testimony is inadequate, it offers up an alternative legal theory for the Commission’s consideration: “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.” Memo., p. 9. This argument, however, fails for the same

reason described above – AEP Ohio has failed to make any showing that the proposed higher-priced ESP has unique, non-price benefits that will make it more favorable in the aggregate than a lower-priced MRO. The fact that the ESP will offer AEP Ohio guaranteed cost recovery of its generation costs certainly is more favorable for AEP Ohio. But AEP Ohio has not even attempted to show that a higher-priced ESP would be *more favorable for its customers* than a lower-priced MRO. A dismissal of the current Application would afford AEP Ohio the opportunity to develop that argument, should it wish to do so, in its next application.

II. Hearsay Is Not Admissible Simply Because AEP Ohio Decided to Use It In Testimony.

Ms. Thomas elected to rely on hearsay to support the second largest component of her Competitive Benchmark Price – an estimated, cost-based capacity price. She could have used the same price input as that used by her counterpart, Mr. Baker, in the first ESP case – the competitive auction results of the PJM Reliability Pricing Model.¹⁰ If so, she would not have faced a hearsay challenge because this pricing is a published record and is not in dispute.¹¹ She, however, chose to incorporate a pricing input that she herself cannot verify and, indeed, has openly declared she will not verify. *See Applicants’ Response to FES RFD-005*, attached as Exhibit A to FES’s Motion (“Company witness Thomas does not sponsor the requested documents”). AEP Ohio’s explanation? It’s OK because “[a] company filing its ESP

¹⁰ Direct Testimony of J. Craig Baker on Behalf of Columbus Southern Power Company and Ohio Power Company, Case No. 08-917-EL-SSO and 08-918-EL-SSO, filed July 31, 2008 (“Baker Testimony”), at 11.

¹¹ The value of the PJM RPM auction price for capacity is not diminished, as argued by AEP Ohio, by the Commission’s interim approval of that price in Case No. 10-2929-EL-UNC. The PJM RPM capacity price is a valid price input because it is not hearsay. Moreover, although AEP Ohio suggests that this “interim” price will “most certainly not be in effect in 2012 and beyond,” the Commission’s entry approving the use of the PJM RPM capacity price was not limited to 2011. It will remain in effect unless and until amended by a future Commission order, which may take some time given AEP Ohio’s unwillingness to identify the formulators of its alternative and supposedly cost-based price.

application has the right to use whatever elements it may choose in its application.” Memo. at p. 11. However, AEP Ohio’s witnesses do not have an unfettered right to say whatever they want in testimony.

The Commission has both the right and the duty to strike hearsay from testimony when necessary to ensure the fairness of proceedings. Ms. Thomas’s capacity price input undoubtedly is hearsay, as it is an unsworn statement, other than one made by her while testifying, offered as evidence to prove AEP Ohio’s cost of capacity. *See* Evid.R. 801(C). While she includes this statement in her testimony, AEP Ohio has made clear that she lacks personal knowledge of the data she relies upon and is not sponsoring that data in this proceeding.¹² As a result, no party to this proceeding will have the opportunity to conduct cross-examination concerning this price input or to test the accuracy of the input through Ms. Thomas. Thus, the testimony is inherently unreliable and inadmissible. *See Beaver Creek Local Schools v. Basic, Inc.*, 71 Ohio App.3d 669, 676, 595 N.E.2d 360, 365 (Greene Cty. 1991). Consistent with prior Commission practice and the Ohio rules of evidence, Ms. Thomas’s hearsay testimony must be stricken. *See In re FAF, Inc.*, Case No. 06-786-TR-CVF, 2006 WL 3932766 (Opinion and Order Nov. 21, 2006); *S.G. Foods, Inc. v. FirstEnergy Corp.*, Case No. 03-1833-EL-CSS *et al.*, 2006 WL 1234894 (Entry on Rehearing Apr. 26, 2006).

The key factor for the Commission’s consideration – the reason this hearsay can be stricken now instead of waiting until the hearing – is AEP Ohio’s conscious election not to support its purported capacity cost data in this proceeding. AEP Ohio could have rectified its hearsay problem by producing a witness who could verify this price input and also be subject to

¹² AEP Ohio suggests that its discovery responses should not be taken seriously because they were prepared by counsel. Memo., at p. 12. FES and the Commission, however, are entitled to rely upon AEP Ohio’s discovery responses as representing AEP Ohio’s position in this proceeding.

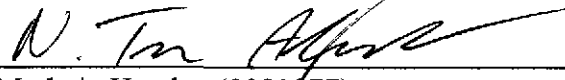
cross-examination concerning it. However, not only has AEP Ohio taken the position that any such witness is entirely irrelevant to this proceeding, but it has arrogantly claimed that the name of any such witness is both irrelevant and not reasonably calculated to lead to the discovery of relevant evidence. *See* Applicants' Response to INT-04-011, attached as Exhibit B to FES's Motion. In considering this Motion, the Commission is entitled to rely upon AEP Ohio's representation that it will not present this capacity cost data in a form that is admissible at hearing.

Instead, AEP Ohio has chosen simply to proclaim that the capacity price being used by Ms. Thomas is "well-documented" and "verifiable" in Case No. 10-2929-EL-UNC. Memo., pp. 12, 13. However, it is still the statement of a non-witness that is used by Ms. Thomas as proof of AEP Ohio's capacity price. It is hearsay. The reason hearsay testimony is not generally admissible is precisely because of its unreliability. *Beavercreek Local Schools*, 71 Ohio App.3d at 676, 595 N.E.2d at 365. The fact that Ms. Thomas is relying upon a substantial amount of hearsay does not convert it to admissible evidence. And the hearsay statement certainly is not verifiable in Case No. 10-2929-EL-UNC – it is not a fact established on the record and subject to cross-examination. Therefore, the Commission should strike the portions of Ms. Thomas's testimony as detailed on page 7 of FES's Motion.

III. Conclusion

For the forgoing reasons and the reasons set forth in FES's Motion to Dismiss, the Commission should issue an entry dismissing without prejudice AEP Ohio's Application in its entirety. In the alternative, if the Application is not dismissed in its entirety, the Commission should strike as hearsay all portions of Ms. Thomas' testimony that rely upon the unsupported cost data filed in Case No. 10-2929-EL-UNC.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Dismiss of FirstEnergy Solutions Corp.* and the *Memorandum in Support* thereof was served this 5th day of July, 2011, via e-mail upon the parties below.



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