

FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Long-Term Forecast)
Report of Ohio Power Company and) Case No. 10-501-EL-FOR
Related Matters.)

In the Matter of the Long-Term Forecast)
Report of Columbus Southern Power) Case No. 10-502-EL-FOR
Company and Related Matters.)

REPLY MEMORANDUM OF COLUMBUS SOUTHERN POWER COMPANY
AND OHIO POWER COMPANY
FOR THE ESTABLISHMENT OF A PROCEDURAL SCHEDULE AND
COMPANION STATUS AND MEMORANDUM IN SUPPORT

BACKGROUND

On July 22, 2011, Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio"), filed a motion seeking to establish a procedural schedule for the expected hearing in this proceeding and moved to have the case considered a companion case to other cases pending before the Commission. On August 8, 2011, FirstEnergy Solutions (FES) and Industrial Energy Users-Ohio (IEU) (collectively "Opposing Intervenors") filed memorandum contra AEP Ohio's motion. This filing represents AEP Ohio's reply to those memoranda contra that will show that the Opposing Intervenors arguments are without merit and ignore Commission discretion and rule promulgation authority. The Ohio Consumers' Counsel is also an intervenor in this case, but did not file a memorandum contra to AEP Ohio's proposal. Staff also did not file opposing the motion.

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AEP Ohio sought the establishment of a procedural schedule and recognition of this docket as a companion docket to the matter in the 11-346-EL-SSO and 11-348-EL-SSO (ESP II). AEP Ohio proposed the following schedule:

All Prefiled Testimony August 19, 2011

Prehearing Conference August 22, 2011

Hearing August 29, 2011

The good cause for hearing determined by the Attorney Examiner is due to the addition of solar energy resources. The Attorney Examiner issued an Entry on January 26, 2011, approving Staff's request for a hearing due to the finding the "...addition of over 49 MW of solar energy resources to be a significant addition in generating facilities sufficient to justify review of the Companies' current LTFR." (Jan 26th Entry at Para. 8).

The Opposing Intervenors mistakenly argue that this docket has no applicability to the Commission's review of the ESP II dockets and that the proposed schedule is unreasonable. FES argues that there is no authority to use the findings of the LTFR in the ESP II dockets and that the statutes being applied in the ESP II proceeding requires a showing of need for the Turning Point Solar facility in the context of the ESP II proceeding and not in the present proceeding. IEU also argues that the present proceeding is limited and that there are a limited number of proceedings that a finding in this proceeding is even allowed to be used in before the Commission or Ohio Power Siting Board.

REPLY ARGUMENT

A. The LTFR Proceeding is an Appropriate Proceeding for a Commission Determination of Need.

Opposing Intervenors mistakenly attempt to limit the authority of the Commission to manage its dockets and dictate the ability of the Commission to apply its own rules. FES and IEU correctly point out that the present proceedings are limited to issues related to forecasting. However, the Opposing Intervenors fail to take into account the rules promulgated to govern the Commission's process and the very ability of the Commission to oversee the order of its own dockets. Ultimately the Commission should deny the Opposing Intervenors arguments and move forward accordingly with this proceeding.

At the root of Opposing Intervenors' argument is application of R.C. 4935.04(H), yet they do not properly apply the statute. FES argues that there is no authority to use the determination of need in this proceeding in other Commission proceedings. Specifically, FES argues that R.C. 4935.04(H) details the statutes where the findings in this case can be used and R.C. 4928.143(B)(2)(c) is not included. IEU goes a step further to declare that the "...the hearing record may only be considered in proceedings pursuant to the following statutes Sections..." as included in R.C. 4935.04(H). (See IEU Memo at 2).

A closer look at the statute shows that it does contemplate the type of project included in the AEP Ohio filing and that even if it did not that the statute does not limit the Commission's authority to oversee and govern its dockets. Specifically, R.C. 4935.04(H) states:

The hearing record produced under this section and the determinations of the commission shall be introduced into evidence and shall be considered in determining the basis of need for power

siting board deliberations under division (A)(1) of section 4906.10 of the Revised Code. The hearing record produced under this section shall be introduced into evidence and shall be considered by the public utilities commission in its initiation of programs, examinations, and findings under section 4905.70 of the Revised Code, and shall be considered in the commission's determinations with respect to the establishment of just and reasonable rates under section 4909.15 of the Revised Code and financing utility facilities and authorizing issuance of all securities under sections 4905.40, 4905.401, 4905.41, and 4905.42 of the Revised Code. *The forecast findings also shall serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.*

Emphasis added. First, the statute does not state that the findings under this statute shall exclusively be applied to the statutes listed. In fact, the statute merely enumerates certain proceedings where it shall be used. Nowhere can a prohibition be found against usage in other Commission proceedings. The statute does not support such a narrow reading. Second, the final sentence of this section of the statute expands the applicability of the findings to “...*serve as the basis for all other energy planning and development activities of the state government where electric and gas data are required.*” The addition of an over 49 MW solar facility located in the state of Ohio is likely an energy planning and development activity important to the state of Ohio. Nothing bars the Commission from applying the findings of this proceeding to other proceedings before the Commission.

The Opposing Intervenor's memoranda also appear to challenge the Commission's very discretion to manage its own dockets. FES in particular argues that R.C. 4928.143(B)(2)(c) requires that the Commission make its need finding for new facilities “in the proceeding” that the surcharge sought is being approved. The Commission can make the finding in these dockets and reflect that finding in the ESP II dockets. FES does not appear to recognize the Commission's authority to make findings in the most efficient

manner. The Supreme Court of Ohio previously recognized the broad discretion of the Commission in managing its dockets to avoid undue delay and duplication of effort.

R.C. 4901.13 provides that the "commission may adopt and publish rules to govern its proceedings and to *regulate the mode and manner of all * * * hearings relating to parties before it.*" "Under R.C. 4901.13 the commission has *broad discretion in the conduct of its hearings.*" *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379, 10 Ohio Op. 3d 493, 500 N.E.2d 264, 273. "It 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.*" (Footnote omitted.) *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.

Weiss v. Pub. Util. Comm. (2000), 90 Ohio St. 3d 15, 2000 Ohio 5, 734 N.E.2d 775.

Emphasis Added. The Commission has the discretion pursuant to statute to organize its dockets.

As indicated above, the *Weiss* decision also discusses the Commission's ability to adopt rules governing its proceedings. The Commission promulgated certain rules to govern the consideration of need for new facilities in the context of an integrated resource plan that are FES considers invalid. FES does recognize that O.A.C. 4901:1-35-03(C)(9)(b)(i) directs that the need for a proposed facility be included in an ESP under R.C. 4928.143(B)(2)(c) "must have already been reviewed and determined by the Commission through an integrated resource planning process filed pursuant to Rule 4901:5-5-05 of the Administrative Code." (IEU Memo at FN 4 at 4). However, FES goes on in the footnote to declare that the rule is invalid, assumedly because of its argument that the finding must be made "in the proceeding" (i.e. the ESP proceeding). (Id.).

FES chooses to reject the Commission's rule out of hand rather than attempt to read the statute and rule together. As discussed above, there is a far more logical reading of the statute that allows the rule to remain in place and be read with the statute. The effort is rather simple. Even upon a cursory review, there is nothing stopping the Commission from recognizing its finding in the forecasting case again "in the proceeding" discussing the ESP. Therefore, there is no reason to invalidate a Commission rule requiring the finding to be made as part of the filing of a resource plan. FES' narrow interpretation should not be used to invalidate a Commission rule.

Ultimately, AEP Ohio followed the Commission's promulgated process and filed an integrated resource plan with the proposed addition of the facility. The Attorney Examiner then set this matter for hearing noting the addition of the facility as the reason for the proceeding. The Commission's process is being followed and its rules properly applied. The desire of the Opposing Intervenors to oppose the ultimate charge as a non-bypassable charge in the ESP II proceeding can be properly weighed in that proceeding. But seeking to invalidate the Commission's rules or discretion in this proceeding as a preemptive strike to the debate that should take place in the ESP II dockets is improper. The Commission should continue to follow its promulgated path to consider the need for the facility in the context of the hearing in this case. The Commission should make it clear to the Opposing Intervenors that the scope of this hearing is in fact limited and their arguments concerning cost recovery are not relevant to the present consideration of need. And the Commission should recognize that there is nothing preventing the Commission from applying its findings in any other dockets including the ESP II dockets.

B. The Procedural Schedule Proposed by AEP Ohio is Proper and Efficient.

Opposing Intervenor's argument that the procedural schedule proposed by AEP Ohio is unreasonable should be denied. The fact that the update to the forecast that led to the requirement for a hearing was filed in December of 2010, indicates a hearing is overdue. In addition, AEP Ohio has not tried to hide the fact that it would like to apply the finding in this case to the consideration in the ESP II case. In its initial filing in the ESP II dockets in January of this year, AEP Ohio requested certain waivers associated with the solar project and discussed the filing for the need determination in these dockets. AEP Ohio even offered to consolidate the LRFR finding for purposes of this finding at that time. (See AEP Ohio Application Vol. I at 10). Likewise, the prefiled testimony of AEP Ohio witness Philip Nelson also included an indication that these dockets would be an appropriate venue to determine the need aspect of the Turning Point project (Direct of AEP Ohio witness Nelson at 23). Rather than litigate the matter in two separate cases it appeared logical to only litigate the matter one time and this docket provides the path chosen by Commission and its rule.

Opposing Intervenor's did not challenge that the matter should move forward, but did oppose certain elements of the timing and structure proposed by AEP Ohio. FES argues that nothing should move forward until Staff says it is ready, that the filing of simultaneous testimony is improper and discovery is needed, and the timing conflicts with the ESP II proceeding. IEU argues that simultaneous testimony is improper, that discovery is needed and that the ESP II litigation is a concern because it cannot be in two places at once. Opposing Intervenor's seek a process that staggers testimony, provides discovery, and ultimately provides for a hearing on December 5, 2011.

The Commission should deny the procedural concerns raised by Opposing Intervenor and move forward to establish a hearing process to consider the 2010 filing. The Commission Staff did not file an opposition to the proposed schedule filed by AEP Ohio. Staff is represented by counsel and could have easily filed a letter or concern in the docket if it had a concern. No such filing was made by staff. There is no need to wait for further action.

The concern with simultaneous filings and the need for discovery is equally unconvincing. The updated report was filed in December of 2010. The focus is very simple and the Attorney Examiner outlined the focus of the need for the hearing in the January 2011 Entry. Opposing Intervenor had almost eight months to seek further discovery and explore issues in the filings made by the Companies. Perhaps a proper procedural schedule would have been to seek to have Intervenor file testimony first concerning the filings already made in the docket to help further define concerns with the report as opposed to simultaneous filings. However, AEP Ohio sought simultaneous filing of the testimony concerning the issues laid out in depth in the report already filed and will stick to that request. Now is not the time for Opposing Intervenor to start preparing for a case set for hearing in January. Further delay would be unfair to AEP Ohio and push an order into 2012 for a 2010 LTFR filing.

The final concern raised by the Intervenor is the scheduling of the hearing in conflict with the ESP II proceeding. To the extent that Opposing Intervenor are concerned they cannot be in two places at once, AEP Ohio can commit to have counsel in two hearing on the same day and think that each of the Opposing Intervenor have adequate staffing to appear at another hearing. Moving forward as requested is AEP

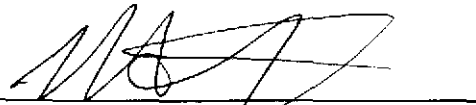
Ohio's first choice. However, respecting the fact that the Commission traditionally assigns Attorney Examiners by company, AEP Ohio is willing to move the start of the hearing to commence immediately upon the closing of the ESP II hearing or the day after if preferred by the Commission. Again, while AEP Ohio would prefer to keep the proposed schedule, to the extent a change alleviates pressure on the bench the Companies will not oppose that narrow change.

CONCLUSION

AEP Ohio is still seeking settlement of the narrow scope of this proceeding with the parties and will file a settlement with supporting testimony if a settlement can be reached. However, in the absence of a settlement AEP Ohio moved for a schedule to be established to ensure the Commission has the ability to act efficiently in both this and the ESP II proceedings.

For the reasons provided above, Columbus Southern Power Company and Ohio Power Company respectfully request the establishment of the procedural schedule and treatment of these dockets and the ESP II dockets on a companion status as outlined in this and the initial motion filed in this case.

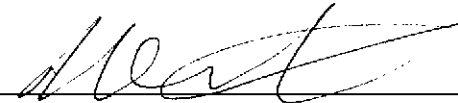
Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Matthew J. Satterwhite', is written over a horizontal line.

Matthew J. Satterwhite
Anne M. Vogel
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
mjsatterwhite@aep.com
amvogel@aep.com

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 Motion For a Procedural Schedule and Companion Treatment has been served upon the below-named counsel via traditional and electronic mail this 15th day of August, 2011.


Matthew J. Satterwhite

Thomas McNamee
Assistant Attorney General
180 East Broad Street
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us

Terry Etter
Assistant Consumers' Counsel
10 West Broad Street
Columbus, OH 43215-3485
etter@occ.state.oh.us

Joseph Olikier
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
joliker@mwncmh.com

Mark Hayden
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com