

FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Long-Term)
Forecast Report of Ohio Power)
Company and Related Matters.)

Case No. 10-501-EL-FOR

In the Matter of the Long-Term)
Forecast Report of Columbus)
Southern Power Company and)
Related Matters.)

Case No. 10-502-EL-FOR

**FIRSTENERGY SOLUTIONS' AND INDUSTRIAL ENERGY USERS-OHIO'S REPLY
TO COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER
COMPANY'S AND STAFF'S MEMORANDUM CONTRA MOTION TO STRIKE AND
MOTION *IN LIMINE***

I. INTRODUCTION

On November 21, 2011, Columbus Southern Power Company and Ohio Power Company (collectively "AEP-Ohio") and Staff entered into a Partial Stipulation and Recommendation (hereinafter "Stipulation"), requesting that the Public Utilities Commission of Ohio ("Commission") find that there is a need for the Turning Point Solar project ("Turning Point"). The Stipulation, in Paragraph 2, states that AEP-Ohio is seeking a finding of need "pursuant to R.C. 4928.143(B)(2)(c), and the provisions of 4928.64(B)(2)." Of note, Paragraph 2 does not request a finding of need pursuant to Section 4935.04, Revised Code. Because Paragraph 2 is not relevant to AEP-Ohio's long term forecast report ("LTFR"), FirstEnergy Solutions Corp. ("FES") and the Industrial Energy Users-Ohio ("IEU-Ohio") filed a Motion to Strike and Motion *in Limine*.

Section 4935.04, Revised Code, which governs LTFR proceedings, states that an LTFR hearing is "limited to issues relating to forecasting." Section 4935.04(E)(1),

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Revised Code. AEP-Ohio and Staff are improperly attempting to expand the scope of the hearing to include renewable energy benchmarks and findings that must be made in an electric security plan (“ESP”) proceeding. AEP-Ohio and Staff miss the essential distinction between forecasts, which are the appropriate subject of this proceeding and which may be used in future proceedings, and the “need” determination required by Section 4928.143(B)(2)(c), Revised Code, which is required to be made in an ESP proceeding.

The findings contained in Paragraph 2 of the Stipulation exceed the Commission’s statutory authority in this proceeding, and thus they are irrelevant. Because Paragraph 2 is not relevant to this proceeding, the Commission should grant the Motion to Strike and the Motion *In Limine* that would prohibit testimony in support of a finding of need for Turning Point.

II. LAW AND ARGUMENT

As discussed throughout the Motion to Strike and the Motion *In Limine*, the Commission has no statutory authority to find that there is a need for Turning Point in an LTFR proceeding. Section 4935.04(C) through (F), Revised Code, contain clear limitations on what matters can be addressed in an LTFR proceeding, and a finding of need for a specific facility is not one of those matters. Instead, the LTFR proceeding is limited by statute to issues related to forecasting. Thus, the improper Paragraph 2, which goes well beyond forecasting issues, should be stricken.

Staff and AEP-Ohio both recognize that the issues that can be addressed in an LTFR proceeding are limited to forecasting. AEP-Ohio Brief at 4; Staff Brief at 3-4. Staff attempts to overcome this statutory roadblock by claiming “the law is actually the

opposite.” Staff Brief at 3. AEP-Ohio admits that the hearing is limited to forecasting issues but then claims that the description of the statute shows that the hearing is not in fact limited. AEP-Ohio Brief at 4. Both Staff’s and AEP-Ohio’s arguments are based on Section 4935.04(E)(2), Revised Code, which states the hearing shall include, but not be limited to, a review of “[t]he estimated installed capacity and supplies to meet the projected load requirements.” This argument fails because there is an essential distinction between a review of forecast capacity/load and a determination that a specific facility is needed to meet that projected load. While it is appropriate to review installed capacity and projected load in this proceeding, there is nothing in Section 4935.04(E)(2), Revised Code, that states the Commission shall determine that there is a “need” for a specific facility in an LTFR proceeding. The determination of the “need” for a specific facility is statutorily required to be made in an ESP proceeding, and there is nothing in Section 4935.04(E)(2), Revised Code, which changes this statutory requirement.

Indeed, Section 4935.04(F), Revised Code, includes only seven findings that the Commission is required to make, and each of those findings focuses on whether the information contained in the LTFR has been accurately presented. Staff ignores these limitations, stating, “the statute is a floor for Commission action, not a straightjacket.” Staff Brief at 4. Staff fails to recognize that the Commission can only act pursuant to statutory authority,¹ and the determination of need for a specific facility is not legally or factually related to the findings that the Commission is required to make. Instead, the

¹ *Columbus Southern Power Company v. Pub. Util. Comm. Ohio*, 67 Ohio St. 3d 535, 537 (1993).

“need” for a specific facility is specifically required to be determined in an ESP proceeding. Section 4928.143(B)(2)(c), Revised Code.

AEP-Ohio makes the unsupported assertion that 4935.04(F)(6), Revised Code, authorizes the Commission to make a finding of need for Turning Point in the LTFR because the Commission shall determine if “the report considers plans for expansion of the regional power grid and the planned facilities of other utilities in the state.” AEP-Ohio Brief at 12. Nothing in this provision of the statute, however, authorizes the Commission to find that there is a need for a specific facility in an LTFR proceeding.

Since the relevant statutes do not provide the necessary support, AEP-Ohio seeks to expand the scope of the LTFR proceeding by incorrectly reading Rule 4901:5-5-06(B)(2), Ohio Administrative Code (“OAC”). That rule requires an electric distribution utility, in the year prior to seeking a surcharge pursuant to Section 4928.143(B)(2)(c), Revised Code, to describe the procedure followed in determining the need for additional resource options. AEP-Ohio argues that since the rule references Section 4928.143, Revised Code, the need for Turning Point should be determined in the LTFR. The rule, however, does not state that the Commission shall make a determination regarding the need for a specific facility in the LTFR proceeding. Instead, this rule simply contains requirements for the forecast report itself, which no party disputes. Once again, there is a difference between forecasts and the determination of “need” for a specific facility which is required to be made in an ESP proceeding under Section 4928.143(B)(2)(c), Revised Code.

Administrative rules must be interpreted as to not conflict with statutory enactments on the same subject matter. *Youngstown Sheet & Tube v. Lindley*, 38 Ohio St. 3d 232, 234 (1988); *State ex. Rel. Celebrezze v. National Lime & Stone Co.*, 68 Ohio St. 3d 377, 382 (1994). Rule 4901:5-5-06(B)(2), OAC, thus, must be read in light of Section 4935.04 and Section 4928.143(B)(2)(c), Revised Code. Section 4935.04, Revised Code, limits the scope of the hearing and the findings that the Commission can make. Section 4928.143(B)(2)(c), Revised Code, explicitly requires AEP-Ohio to establish the need for the facility in the ESP proceeding. Statutes must be given their plain meaning² and Section 4928.143(B)(2)(c), Revised Code, is clear: “no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility.” (emphasis added). AEP-Ohio’s assertion that the “need” for Turning Point can be conclusively determined in the LTFR proceeding is in direct conflict with the LTFR statute and the ESP statute.

In a last ditch attempt, AEP-Ohio falls back on two arguments that have no relation to the statutory provisions at issue in the Motion to Strike and the Motion *in Limine*: (1) the Commission has the discretion to manage its own docket (AEP-Ohio Brief at 11); (2) The Commission has approved language similar to that sought here in an unrelated proceeding. AEP-Ohio Brief at 7. Neither argument, however, is a basis for modifying the statutory requirements governing this LTFR proceeding.

That the Commission has some discretion in managing its docket is not responsive to whether the Commission has the authority to address Section

² *Summerville v. City of Forest Park*, 128 Ohio St. 221, (2010).

4928.143(B)(2)(c), Revised Code, “need” for a solar project in this LTFR proceeding. Thus, AEP-Ohio’s reliance on *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15 (2000), provides no support for the conclusion that the Commission may consider the necessity of Turning Point. While the Commission has discretion to establish rules for its hearings, it must establish rules that are consistent with its statutory authority.

AEP-Ohio’s reliance on the Stipulation in *In the Matter of the Long-Term Forecast Report of Dayton Power and Light Company and Related Matters*, Case No. 10-505-EL-FOR (hereinafter “*Yankee Solar*”), provides no basis for the Commission to address the necessity of Turning Point. The *Yankee Solar* Stipulation expressly states that “[e]xcept for purposes of enforcement of the terms of this Stipulation, this Stipulation, the information and data contained therein or attached and any Commission rulings adopting it, shall not be cited as precedent in any future proceeding for or against any Party or the Commission itself.”³ Thus, neither the *Yankee Solar* Stipulation nor the Opinion and Order provide any basis for the Commission to act in this proceeding.


III. CONCLUSION

Neither AEP-Ohio nor Staff provide any basis for the Commission to determine that there is a need for Turning Point in this proceeding. The scope of an LTFR proceeding is limited to issues related to forecasting. Both the ESP statute and the LTFR statute clearly indicate that this is not the appropriate proceeding to determine the need for Turning Point. Determining the need for Turning Point in this proceeding would extend the scope of the hearing far beyond the scope of the Commission’s statutory

³ *Yankee Solar*, Stipulation at 2 (January 14, 2011) (emphasis added).

authorization. Because Paragraph 2 of the Stipulation is not relevant to any issue of fact or law in this proceeding, it should be stricken from the Stipulation and the Commission should issue an order prohibiting AEP-Ohio from offering testimony regarding the need for Turning Point.

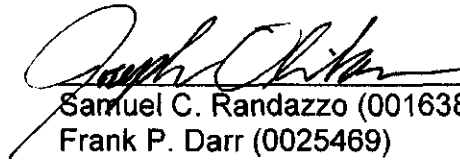
Respectfully submitted,

 / per telephone authorization

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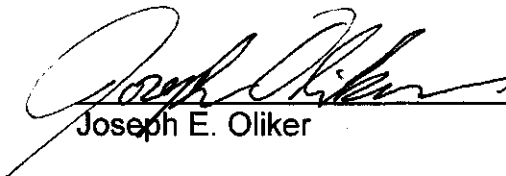
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply In Support Of Motion to Strike and Motion In Limine of FirstEnergy Solutions Corp. and Industrial Energy Users-Ohio* was served this 5th day of January, 2012, via e-mail and first-class U.S. mail, postage-prepaid, upon the parties below.



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