

BEFORE THE
THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|---|---|-------------------------|
| In the Matter of the Commission Review of |) | |
| the Capacity Charges of Ohio Power |) | Case No. 10-2929-EL-UNC |
| Company and Columbus Southern Power |) | |
| Company. |) | |

**FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM CONTRA
AEP OHIO'S THIRD MOTION TO COMPEL**

I. INTRODUCTION

As was true in its First and Second Motions to Compel, Ohio Power Company (“AEP Ohio”) does nothing more than issue conclusory assertions that it is entitled to discovery. AEP Ohio does not identify one piece of FirstEnergy Solutions Corp.’s (“FES”) testimony for which AEP Ohio requires customer-specific and competitively sensitive information to challenge. Nor does AEP Ohio respond to the majority of FES’ objections to AEP Ohio’s Third and Fourth Sets of Discovery. AEP Ohio’s Third Motion to Compel does not provide any new argument as to why -- in a proceeding in which AEP Ohio is seeking to establish a capacity price based on its own alleged costs -- AEP Ohio should be able to compel a competitor to produce: (a) copies of its contracts; (b) data on its current customers; (c) its current pricing; and (d) its future pricing strategies. AEP Ohio’s Third and Fourth Sets of Discovery reflect AEP Ohio’s continued effort to secure a broad range of the most fundamental competitive information from FES under the guise of discovery and to scare FES and other competitors from challenging its above-market capacity pricing proposal. Both the scope of discovery and Ohio law are designed to protect against such an effort to demand trade secrets.¹ There must be a need for the information and a

¹ See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604 (2009); O.A.C.

link to the issues before the Commission, neither of which exists here. All of AEP Ohio's Motions to Compel should be denied.²

II. ARGUMENT

- **Certain Of AEP Ohio's Requests Reflect That The Requested Information Is Unnecessary For Its Case.** [Interrogatory Nos. 3-1 through 3-3]

Interrogatories Nos. 3-1 through 3-3 provide further evidence that AEP Ohio's discovery strategy is designed simply to harass FES rather than identify any information relevant to this proceeding. In its Motion to Compel, AEP Ohio seeks to compel FES to simply identify "if" there is any reason it could not make offers at different capacity prices and "whether" it has analyzed headroom or profitability at different capacity prices and which prices it analyzed.³ Any responses to the Interrogatories, to the extent they could in any way be deemed relevant to this proceeding, are meaningless. What relevant information would compelling a response to those interrogatories provide to AEP Ohio? What testimony could AEP Ohio challenge if it knew only that there are reasons that FES could not make offers at different capacity prices - or that FES had or had not performed analyses of headroom? AEP Ohio fails to meet its burden of demonstrating relevance or the need for these interrogatory responses.

- **FES Explained Its Contract Provisions And There Is No Need For AEP Ohio To Have Identifying Information Regarding All Of The Competitively Sensitive Contracts That Include Those Provisions.** [Interrogatory Nos. 3-8, 3-9]

In response to AEP Ohio's First Set of Discovery, FES identified that some of its contracts contained provisions that would allow FES to terminate those contracts if AEP Ohio's

4901-1-24(A)(7); *In re: General Telephone Co.*, Case No. 81-383-TP-AIR (Entry, February 17, 1982); *Splater v. Thermal Ease Hydronic Systems, Inc.*, 169 Ohio App.3d 514, 519 (Cuyahoga Cty. 2006).

² This Third Motion to Compel should also be denied because AEP Ohio made little to no effort to resolve their dispute regarding FES' responses to the Third and Fourth Sets of Discovery.

³ But, AEP Ohio does not seek to compel FES to produce its analyses on these issues, even though it

capacity price increased and that some of its contracts contained provisions that would allow FES to pass through an increase in AEP Ohio's capacity price. AEP Ohio followed up on those responses in Interrogatory Nos. 3-8 and 3-9 in its Third Set of Discovery. In response, FES provided further explanation of those provisions in subsections (a) and (c), but properly refused to specifically "identify" each of the FES contracts that included the provisions in subsection (b). Again, why would AEP Ohio's knowledge about which customers had those contracts be relevant to AEP Ohio's arguments in this case? What testimony is AEP Ohio left unable to address without knowing which customers' contracts included those provisions? AEP Ohio does not say.

- **FES' Ability To Make Future Offers At Varying Capacity Prices Is Irrelevant And Unknowable.** [Requests for Admission 3-5 to 3-28]

Across a series of over 20 Requests for Admission, AEP Ohio seeks to compel FES to "admit [or deny] that if Ohio Power provides capacity to [FES] at [varying capacity prices] during the period from June 1, 2012, through May 31, 2015, [FES] will be able to offer contracts to Ohio Power's [] customers at a price lower than Ohio Power's price-to-compare while earning a positive return on such contracts." FES objected to these Requests on a number of bases, to which AEP Ohio responds only by stating that the objections are "boilerplate."⁴ AEP Ohio cannot compel discovery without an explanation as to why FES' objections are unjustified and therefore its request to compel responses to these Requests should be denied on its face. Further, FES' objections are substantive. The Requests -- in addition to seeking proprietary and irrelevant information -- are vague and couldn't be answered as posed. The Requests would require FES to make a number of assumptions and speculations regarding, among other things,

requested them in Request for Production Nos. 3-1 and 3-2.

what AEP Ohio's "price-to-compare" would be during this extended time period. Numerous of these Requests also seek information regarding FES' competitive positions at capacity prices not at issue in this proceeding. AEP Ohio provides no explanations as to why responses to any of these Requests are necessary for its case.

- **There Is Absolutely No Basis On Which AEP Ohio Is Entitled To Customer-Specific Contract And Pricing Information For The "Random" Group Of Customers It Selected.** [Interrogatory Nos. 4-1 to 4-10]

In its Fourth Set of Discovery, AEP Ohio went one step further in its attempt to procure competitively sensitive information from FES that is completely irrelevant to this proceeding. It took the liberty of identifying "ten customers randomly selected from a list"⁵ and proceeded to ask numerous questions about each customer -- including a copy of each customer's contract, the prices FES currently charges to each customer, the prices FES would charge each customer "in May" under different capacity prices, and the prices FES would charge each customer "in June" under different capacity prices. Again, AEP Ohio provides no explanation as to how this information is at all related to its proposed capacity pricing and it identifies no testimony to which this information would relate. Thus, not only has AEP Ohio not made any showing of the "compelling need"⁶ that would justify such a request of a competitor, it has made no showing at all.

- **The Number Of Customers Served By FES Is Irrelevant To Any Argument Raised By AEP Ohio Or FES.** [Interrogatory No. 4-11]

In supporting its request to compel FES to identify the number of contracts it has entered

⁴ Motion, p. 6.

⁵ Motion, p. 7.

⁶ See *Splater v. Thermal Ease Hydronic Systems, Inc.*, 169 Ohio App.3d 514, 519 (Cuyahoga Cty. 2006) (denying the competitor's motion to compel because the competitor "has failed to present the kind of need

into since September 7, 2011, AEP Ohio asserts that the information is relevant to “the price that customers shopping prior to that date should be required to pay for capacity.”⁷ But the request has nothing to do with customers prior to September 7th and nothing to do with AEP Ohio’s proposed cost-based capacity price. Moreover, AEP Ohio has already submitted its own testimony on the amount of shopping in its territory since September 7, 2011.⁸ The number of FES’ customers is proprietary, competitively sensitive, and irrelevant (not to mention likely already within the possession of AEP Ohio as the utility). AEP Ohio’s attempted explanation for why it needs FES to identify what number of customers it has enrolled amongst the number of customers that AEP Ohio already knows are shopping is insufficient and falls far short of the standard for such discovery.

III. CONCLUSION

As set forth herein and in FES’ Memoranda Contra AEP Ohio’s First and Second Motions to Compel, AEP Ohio’s Third Motion to Compel should be denied.

that is so compelling as to warrant the risk that [the other entity’s] trade secrets could be disseminated to a direct competitor”).

⁷ Motion, p. 7.

⁸ See Testimony of William A. Allen, filed Mar. 30, 2011, at pp. 5-6.

Respectfully submitted,

s/ Mark A. Hayden

Mark A. Hayden (0081077)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
(330) 761-7735
(330) 384-3875 (fax)
haydenm@firstenergycorp.com

James F. Lang (0059668)
Laura C. McBride (0080059)
N. Trevor Alexander (0080713)
CALFEE, HALTER & GRISWOLD LLP
1405 East Sixth Street
Cleveland, OH 44114
(216) 622-8200
(216) 241-0816 (fax)
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

David A. Kutik (0006418)
Allison E. Haedt (0082243)
JONES DAY
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939
(216) 579-0212 (fax)
dakutik@jonesday.com
aehaedt@jonesday.com

Attorneys for FirstEnergy Solutions Corp.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra AEP Ohio's Third Motion to Compel* was served this 19th day of April, 2012, via e-mail upon the parties below.

s/ Laura C. McBride
One of the Attorneys for FirstEnergy Solutions Corp.

Steven T. Nourse
Matthew J. Satterwhite
Anne M. Vogel
American Electric Power Corp.
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com
amvogel@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com

Cynthia Fonner Brady
David I. Fein
550 W. Washington Street, Suite 300
Chicago, IL 60661
cynthia.a.fonner@constellation.com
david.fein@constellation.com

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215-3620
ricks@ohanet.org

Jeanne W. Kingery
Amy Spiller
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
jeanne.kingery@duke-energy.com
amy.spiller@duke-energy.com

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Kyle L. Kern
Melissa R. Yost
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
kern@occ.state.oh.us
yost@occ.state.oh.us

Thomas J. O'Brien
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com

Shannon Fisk
2 North Riverside Plaza, Suite 2250
Chicago, IL 60606
sfisk@nrdc.org

Mark S. Yurick
Zachary D. Kravitz
Taft Stettinius & Hollister LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
myurick@taftlaw.com
zkravitz@taftlaw.com

Terrence O'Donnell
Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
todonnell@bricker.com
cmontgomcry@bricker.com

Jesse A. Rodriguez
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, Pennsylvania 19348
jesse.rodriguez@exeloncorp.com

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, Pennsylvania 19406
gthomas@gtpowergroup.com

Henry W. Eckhart
2100 Chambers Road, Suite 106
Columbus, Ohio 43212
henryeckhart@aol.com

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
jejadwin@aep.com

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, Ohio 43215
msmalz@ohiopoveritylaw.org
jmaskovyak@ohiopoveritylaw.org

Lisa G. McAlister
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
lmcaster@bricker.com
mwarnock@bricker.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Laura Chappelle
4218 Jacob Meadows
Okemos, Michigan 48864
laurac@chappelleconsulting.net

Pamela A. Fox
Law Director
The City of Hilliard, Ohio
pfox@hilliardohio.gov

C. Todd Jones
Christopher L. Miller
Gregory H. Dunn
Asim Z. Haque
Ice Miller
250 West Street
Columbus, Ohio 43215
christopher.miller@icemiller.com
asim.haque@icemiller.com
gregory.dunn@icemiller.com

Sandy Grace
Exelon Business Services Company
101 Constitution Avenue N.W., Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
kpkreider@kmklaw.com
dmeyer@kmklaw.com

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, Virginia 20115
holly@raysmithlaw.com

Gregory J. Poulos
EnerNOC, Inc.
101 Federal Street, Suite 1100
Boston, MA 02110
gpoulos@enernoc.com

M. Howard Petricoff
Stephen M. Howard
Michael J. Settineri
Lija Kaleps-Clark; Benita Kahn
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
Columbus, Ohio 43215
mhpetricoff@vorys.com
smhoward@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com
bakahn@vorys.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
gary.a.jeffries@aol.com

Steve W. Chriss
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, Arkansas 72716
stephen.chriss@wal-mart.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
barthroyer@aol.com

Werner L. Margard III
John H. Jones
William Wright
Steven Beeler
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215
werner.margard@puc.state.oh.us
john.jones@puc.state.oh.us
william.wright@puc.state.oh.us
steven.beeler@puc.state.oh.us

Philip B. Sineneng
Terrance A. Mebane
Carolyn S. Flahive
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
philip.sineneng@thompsonhine.com
carolyn.flahive@thompsonhine.com
terrance.mebane@thompsonhine.com

Samuel C. Randazzo
Joseph E. Olikier
Frank P. Darr
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com

John N. Estes III
Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., N.W.
Washington, DC 20005
jestes@skadden.com
paul.wight@skadden.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212
tsantarelli@elpc.org

Christopher J. Allwein
Williams, Allwein and Moser, LLC
1373 Grandview Avenue, Suite 212
Columbus, Ohio 43212
callwein@williamsandmoser.com

Emma F. Hand
Douglas G. Bonner
Keith C. Nusbaum
Clinton A. Vince
SNR Denton US LLP
1301 K Street, NW, Suite 600, East Tower
Washington, DC 20005-3364
emma.hand@snrdenton.com
doug.bonner@snrdenton.com
keith.nusbaum@snrdenton.com
Clinton.vince@snrdenton.com

Colleen L. Mooney
David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org

Trent A. Dougherty
Cathryn Loucas (0073533)
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
trent@theoeg.org
cathy@theoec.org

Joel Malina
Executive Director
COMPLETE Coalition
1317 F Street, NW
Suite 600
Washington, DC 20004
malina@wexlerwalker.com

David M. Stahl
Arin C. Aragona
Scott C. Solberg
Eimer Stahl Klevorn & Solberg LLP
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
dstahl@eimerstahl.com
aaragona@eimerstahl.com
ssolberg@eimerstahl.com

Jay L. Kooper
Katherine Guerry
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
jkooper@hess.com
kguerry@hess.com

Robert Korandovich
KOREnergy
P. O. Box 148
Sunbury, OH 43074
korenergy@insight.rr.com

Roger P. Sugarman
Kegler, Brown, Hill & Ritter
65 East State St., Suite 1800
Columbus, OH 43215
rsugarman@keglerbrown.com

Allen Freifeld
Samuel A. Wolfe
Viridity Energy, Inc.
100 West Elm Street, Suite 410
Conshohocken, PA 19428
afreifeld@viridityenergy.com
swolfe@viridityenergy.com

Chad A. Endsley
Ohio Farm Bureau Federation
280 North High Street
P.O. Box 182383
Columbus, OH 43218
cendsley@ofbf.org

Brian P. Barger
4052 Holland-Sylvania Road
Toledo, OH 43623
bpbarger@bcslawyers.com

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/19/2012 7:59:31 AM

in

Case No(s). 10-2929-EL-UNC

Summary: Memorandum Contra AEP Ohio's Third Motion to Compel electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.