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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 its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets.	)	**Case No. 08-917-EL-SSO**
In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan.	)	**Case No. 08-918-EL-SSO**

COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY'S MEMORANDUM CONTRA APPALACHIAN PEACE & JUSTICE NETWORK'S JUNE 21, 2011, APPLICATION FOR REVIEW THROUGH AN INTERLOCUTORY APPEAL OF THE ATTORNEY EXAMINER'S JUNE 16, 2011 ENTRY

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INTRODUCTION

Columbus Southern Power Company (CSP) and Ohio Power Company (OP), referred to collectively as the "Companies," oppose Appalachian Peace & Justice Network's (APJN) Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011, Entry in this proceeding. The June 16 Entry denied the motions of three entities – FirstEnergy Solutions Corp. (FES), the Appalachian Peace and Justice Network (APJN), and Exelon Generation Company, LLC – who filed motions to intervene in these proceedings after the Ohio Supreme Court issued its remand order. Attorney Examiner Sarah J. Parrot denied the motions as untimely, noting that the intervention deadline for this proceeding was September 4, 2008. *See* June 16 Entry at ¶ 12. Attorney Examiner Parrot further held that the movants had not demonstrated "extraordinary circumstances" for granting their untimely motions, as required by Rule 4901-1-11(F), Ohio Admin. Code. *See id.* Attorney Examiner Parrot noted, however, that the movants had been granted intervention in the Companies' pending ESP proceedings, Case No. 11-346-EL-SSO, *et al.*, and would have the opportunity to "fully participate in discovery, introduce evidence, and present testimony" in that proceeding. *Id.*

FES filed an application for review of the June 16 Entry on June 17, 2011. APJN's Application for Review (Application), which was filed four days later, in essence, reiterates many of the argument of FES's Application. Whole paragraphs of FES's Application have been copied and pasted into a new document, with only the names of the parties changed. Like FES, APJN attacks Attorney Examiner Parrot's June 16 Entry as "inappropriate" "unlawful" and "naïve." (APJN Application at p. 1 and Memorandum in Support at p. 8). Indeed, the only material difference between FES's and APJN's applications is that APJN offers even fewer arguments for allowing it to intervene almost three years past the intervention deadline.

As explained in the Companies' memorandum contra FES's application for interlocutory appeal, APJN's arguments fail, either as a matter of law or as applied to this case. APJN is not trying to intervene "in a new proceeding commenced in 2011," as APJN argues. (APJN Memorandum in Support at p. 5.) APJN is trying to intervene in a proceeding that commenced in 2008, with an intervention deadline that passed almost three years ago. And even though the rules for timely intervention are liberally construed, parties seeking to intervene in an untimely fashion are required to show extraordinary circumstances. Here, APJN has failed to show extraordinary circumstances for intervening in this proceeding at the remand stage. All that APJN has argued is that the Commission is holding a remand hearing to consider significant issues that may affect APJN in this proceeding and in other ESP proceedings. This is insufficient to justify a past-the-last-minute, untimely intervention.

Nor has APJN demonstrated that it meets the standards for intervention that apply to persons filing timely motions to intervene. APJN, like FES, states that it seeks intervention in this case in order to influence the Commission's decision-making on issues that will later be considered in the Companies' 2011 ESP proceeding. However, wanting to help establish useful precedent for another proceeding is not a "real and substantial interest" justifying intervention here. To the extent that APJN's interests go beyond setting precedent for the Companies' 2011 ESP proceeding, those interests are represented by the Office of the Ohio Consumers' Counsel, which is already a party to this case. Additionally, there is no reason to believe that APJN has access to facts or legal arguments that the other intervenors could or would not offer. As shown below, Attorney Examiner Parrot's Entry denying intervention to APJN and the two other untimely intervenors was proper and correct and should be affirmed.

ARGUMENT

I. Because the September 4, 2008 Intervention Deadline Applies to This Entire Case, APJN's Motion to Intervene Was Untimely.

APJN's primary argument for overturning Attorney Examiner Parrot's June 16 Entry is that APJN's motion to intervene was timely. The Commission's rules state that "[a] motion to intervene will not be considered timely if it is filed later than five days prior to the scheduled date of hearing or any specific deadline established by order of the commission for purposes of a particular proceeding." Rule 4901-1-11(E), Ohio Admin. Code (emphasis added). APJN argues that this case consists of two "proceedings": the "original proceeding," which occurred before the case was appealed to and then remanded by the Ohio Supreme Court, and the "Remand Proceeding," which is "a new evidentiary proceeding" that began after the remand. (APJN Memorandum in Support at pp. 4-5.) According to APJN, the September 2008 intervention deadline only applied to the "original proceeding." For the "Remand Proceeding," APJN argues, the deadline for intervention was the default deadline – five days before hearing. (*Id.* at p. 5.) Because the evidentiary hearing for the "Remand Proceeding" is set for July 12, APJN argues that its motion to intervene (filed May 26, 2011) was timely. (*See id.*)

Like FES, APJN cites nothing to support its interpretation of "proceeding." The only Commission decision it cites, a January 2010 entry from FirstEnergy's 2010 Energy Efficiency/Peak Demand Reduction portfolio case (*see* APJN Memorandum in Support at p. 6), did not involve attempts to intervene in a proceeding following a remand from the Ohio Supreme Court. Instead, the Commission in *FirstEnergy* issued an order setting a deadline for intervention – the first deadline for intervention in that case – following the granting of an application for rehearing. *See In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of The Cleveland Electric Illuminating Company, Ohio Edison*

Company, and The Toledo Edison Company, Case Nos. 09-580-EL-POR *et al.*, Entry, at p. 2 (Jan. 14, 2010) (*cited in* APJN Memorandum in Support at p. 6). *FirstEnergy* has no similarity or relevance to this case.

APJN's position is also contrary to the Commission's regulatory treatment of the term "proceeding." In the Commission's procedural rules, "proceeding" simply means "case." The terms are used interchangeably. *See, e.g.*, Rule 4901-1-01(D), Ohio Admin. Code (defining "Emergency rate proceeding" to mean "any case involving an application for an emergency rate adjustment") (emphasis added); Rule 4901-1-01(G), Ohio Admin. Code (defining "General rate proceeding" to mean "any case involving: an application for an increase in rates . . .") (emphasis added); Rule 4901-1-09, Ohio Admin. Code (stating that, "[a]fter a case has been assigned a formal docket number, no commissioner or attorney examiner assigned to the case shall discuss the merits of the case with any party to the proceeding or a representative of a party") (emphasis added).

In this case, what APJN calls the "original proceeding" and the "Remand Proceeding" share the same case names and docket numbers. *See* Rule 4901-1-03(A), Ohio Admin. Code (indicating that every "proceeding" has a "case name and docket number"). They share a single case record on the DIS system. *See* http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=08-917. They are, in short, the same "proceeding," as the Commission uses that term. Consequently, the September 4, 2008 intervention deadline applied to "[this] particular proceeding" for purposes of the Commission's intervention rules. What APJN calls the "Remand Proceeding" is just the final stage of the original case. APJN's motion to intervene, filed almost three years after the intervention deadline, was untimely.

II. The Commission is Not Required to Permit Untimely Intervention Absent Extraordinary Circumstances.

APJN's second argument for overturning the June 16 Entry is that "it is not uncommon for the Commission to grant 'untimely' requests to intervene." (APJN Memorandum in Support at p. 4.) APJN points to the Ohio Supreme Court's holding that Rule 4901-1-11 "is very similar to Civ.R. 24 – the rule governing intervention in civil cases in Ohio – which 'is generally liberally construed in favor of intervention.'" *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St. 3d 384, 387 (2006) (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144 (1995)). APJN also notes that an attorney examiner in this case granted a motion to intervene approximately two months after the intervention deadline. (*See id.* at pp. 4-5.)

The fact that the rules governing intervention (Civ.R. 24 and Rule 4901-1-11, Ohio Admin. Code) are liberally construed does not mean those rules should be ignored. Even under Civ.R. 24, untimely motions may be denied. *See generally State ex rel. First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 502-503, 696 N.E.2d 1058 (1998). Nor does the fact that the Commission has granted some untimely motions to intervene say anything about the merits of denying APJN's untimely motion. The Commission's rules state that "[a] motion to intervene which is not timely will be granted only under extraordinary circumstances." Rule 4901-1-11(F), Ohio Admin. Code (emphasis added). The Commission chose this standard for untimely intervention, rather than a lesser "good cause" standard, because "failure to meet a deadline for intervention in a case has consequences for other parties in the case as well as for the Commission as it attempts to process its cases." *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order, at ¶ 30 (Dec. 6, 2006). Consequently, APJN cannot simply complain that

other parties have been permitted to intervene in Commission proceedings past the relevant deadlines. There is no reason that APJN could not have timely intervened in 2008 and it is simply too late to do so now. APJN was required to demonstrate "extraordinary circumstances" to justify an untimely intervention in this case.

III. APJN Did Not Demonstrate Extraordinary Circumstances For Intervening At This Late Date.

APJN did not acknowledge, in its motion to intervene, that it had missed the deadline for intervention in this case. Accordingly, APJN did not attempt in that motion to demonstrate extraordinary circumstances for allowing it to intervene. Now that APJN's motion to intervene has been denied, however, APJN lists three factors that it believes "establish extraordinary circumstances that justify APJN's request to intervene . . . at this stage[.]" (APJN Memorandum in Support at p. 6.) Presenting additional arguments after APJN's untimely motion to intervene has been denied is even more untimely than the original motion and, as such, these additional arguments should not even be considered by the Commission. APJN failed to meet its burden of demonstrating that extraordinary circumstances exist to support its severely late intervention request and it cannot cure that failure by including additional reasons as part of an interlocutory appeal after a ruling on its tardy motion.

Regardless, the circumstances that APJN submits are far from extraordinary. The first factor simply states that the Commission is holding another hearing and allowing discovery. The second factor simply states that the POLR and environmental investment carrying cost charges "are significant issues." The third factor asserts that APJN's intervention is justified because the Commission's decisions in this proceeding are "likely to predetermine [the relevant] issue[s]" in the Companies' 2012 ESP proceeding. (*Id.*) However, a desire to help shape precedent for a

later proceeding has not been accepted as justification for timely intervention, however, much less an extraordinary circumstance justifying untimely intervention:

> The Commission has consistently denied intervention requests when the person's interest is that legal precedent may be established which may affect that person's interest in a subsequent case. To grant intervention on this basis would render the Commission's rule on intervention meaningless and allow almost any person intervention in any case based on the proposition that the precedent established may affect them in some future case.

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 Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, Entry, at pp. 2-3 (Mar. 23, 2000) (citations omitted).

As the Companies stated in their initial memorandum contra to APJN's motion, allowing APJN to become a party at this juncture contradicts the very nature of remand proceedings, wherein the Commission has been directed to reconsider how two limited issues were decided back in 2009. To open the docket up to new parties at this stage would be distracting, disruptive, and prejudicial, and would create a bad precedent. APJN has not shown that there are extraordinary circumstances that would justify its untimely intervention at this late stage.

IV. APJN Also Has Not Justified Intervention Under The Standard For Timely Movants.

Lastly, APJN attempts to show that it fulfills the standard requirements for intervention under Rule 4901-1-11(A)(2) and (B), Ohio Admin. Code. Under these rules, a person seeking to intervene must demonstrate that he "has a real and substantial interest in the proceeding" and that "the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties." Rule 4901-1-11(A)(2), Ohio Admin. Code. Rule 4901-1-11(B), Ohio Admin. Code, sets out five

factors that the Commission must consider when deciding whether to permit intervention. These standard requirements are irrelevant here, as they apply only to persons who file "timely motion[s]" to intervene. Rule 4901-1-11(A), Ohio Admin. Code. Nonetheless, APJN fails to demonstrate that it meets the standard requirements for intervention.

First, APJN has not shown that it has a "real and substantial interest" in these proceedings. Rule 4901-1-11(A)(2), Ohio Admin. Code. APJN makes clear that its primary reason for wanting to intervene in this proceeding is to ensure that the Commission's decisions here will be useful precedent for the Companies' other pending ESP and "in other EDUs' SSO proceedings." (APJN Memorandum in Support at pp. 8-10.) As indicated above, however, a desire to help shape precedent for a future proceeding is not a permissible basis for intervention. *See 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, at ¶ 7 (Mar. 21, 2007) (holding, "It is the Commission's long-standing policy to deny intervention to entities or persons whose only real interest in the proceeding is that legal precedent may be established which may affect the requesting entity's or person's interests in a subsequent case.").

Second, APJN has not shown that its interests are not "adequately represented by existing parties." Rule 4901-1-11(A)(2), Ohio Admin. Code. APJN suggests that OCC, an existing party to this case, will not represent APJN's interests because OCC "does not focus its attention on the protection of low-income customers," or more specifically, "low-income customers in the economically distressed counties of Appalachian Ohio." (APJN Memorandum in Support at p. 11.) APJN does not explain, however, why the interests of low-income residential customers in Appalachia would differ, for purposes of this case, from the interests of low-income residential

customers in other areas or the interests of middle- or high-income residential customers. The OCC is well-versed in the interests of residential consumers and has the experience and expertise necessary to develop the record and assist the Commission in resolving the limited issues on remand.

Third, APJN has not shown that "[t]he legal position advanced by [APJN] and its probable relation to the merits of the case" support APJN's intervention. Rule 4901-1-11(B)(2), Ohio Admin. Code. APJN asserts that "[n]o party has questioned the relevance of APJN's legal position on the issues in the Remand Proceeding[.]" (APJN Memorandum in Support at p. 10.) But, APJN has not explained what its legal position in this case is. Neither its Motion to Intervene nor its Application describes APJN's position on the questions that will be decided.

Fourth, APJN has not shown that it "will significantly contribute to [the] full development and equitable resolution of the factual issues." Rule 4901-1-11(B)(4), Ohio Admin. Code. APJN asserts that it "has invested significant time and resources over the past several months as an intervenor in the Companies' Pending ESP proceeding, analyzing the legal and factual issues surrounding the Companies' POLR Charge Rider and attempts to recover environmental costs[.]" (APJN Memorandum in Support at p. 10.) Because of this, APJN says, it is "well-positioned to contribute to the record[.]" (*Id.*) But the question is not whether APJN is positioned to contribute; the question is whether APJN is positioned to contribute "significantly." The Companies have no doubt that APJN is prepared to submit testimony and/or briefing that repeats the arguments of the other intervenors. Indeed, the fact that APJN could not be bothered to draft its own Application, and instead copied liberally from FES's application, suggests that APJN has neither the time, the resources, nor the inclination to contribute anything

new or different to these proceedings. At this late stage in the case, the Commission does not need one more intervenor to come in and offer redundant arguments.

CONCLUSION

For the foregoing reasons, Columbus Southern Power Company and Ohio Power Company respectfully request that the Commission deny APJN's June 21, 2011, Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011 Entry and Request for Expedited Consideration. Attorney Examiner Parrot was correct to deny APJN's untimely motion to intervene, and the June 16 Entry denying that motion should be affirmed.

Respectfully Submitted,

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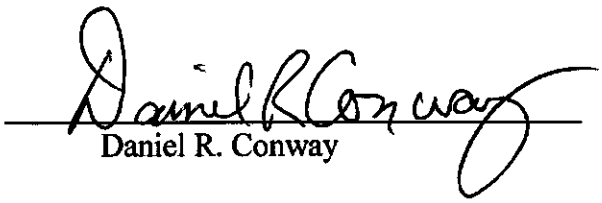
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Appalachian Peace & Justice Network's June 21, 2011, Application for Review Through an Interlocutory Appeal of the Attorney Examiner's June 16, 2011 Entry has been served upon the below-named counsel and Attorney Examiners via electronic mail this 24th day of June, 2011.



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