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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	)	Case Nos.	11-346-EL-SSO 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	)	Case Nos.	11-349-EL-AAM 11-350-EL-AAM

EXELON GENERATION COMPANY, LLC'S REPLY IN SUPPORT OF FIRSTENERGY SOLUTIONS CORP.'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO STRIKE

Exelon Generation Company, LLC ("Exelon Generation"), pursuant to Section 4901-1-12(A)(2) of the Ohio Administrative Code, hereby submits the following Reply in Support of FirstEnergy Solutions Corp.'s ("FES") Motion to Dismiss or in the Alternative to Strike.

I. INTRODUCTION

In this proceeding, AEP Ohio seeks to establish a standard service offer in the form of an electric security plan ("ESP"). FES timely moved to dismiss AEP Ohio's Application on the grounds that it fails to make even a *prima facie* showing that the proposed ESP is more favorable *in the aggregate* than the expected result under a market rate offer ("MRO"), as required by the plain language of Section 4928.143(C)(1) of the Revised Code.

In response, AEP Ohio argues that that its failure in this regard is not a "threshold dismissal argument"[1] and that the Commission should "reserve judgment [on this issue] until the record and briefing are closed and submitted for a decision on the merits" (Mem. Contra at 7.)

[1] Memorandum Contra Motion to Dismiss of FirstEnergy Solutions Corp. Filed by Columbus Southern Power Company and Ohio Power Company ("Mem. Contra") at 4.

But this misses the point: The "in the aggregate" test is a non-discretionary statutory requirement of the Application, and AEP Ohio's obvious failure to satisfy this statutory requirement in its filed case cannot be remedied through further hearings. For this and the other reasons discussed in Section II.A., below, the Application is deficient and must be dismissed.

As an alternative to dismissal, FES also moves to strike the testimony of Laura Thomas to the extent that it relies upon capacity cost data filed by AEP Ohio in another proceeding pending before this Commission, Case No. 10-2929-EL-UNC. While Ms. Thomas' testimony relies heavily on this data, she is not sponsoring it and AEP Ohio has refused to identify any other witness that will. Meanwhile, the capacity cost data at issue has not been the subject of cross examination in the other proceeding; nor has it been accepted by the Commission.

Hoping to take advantage of such unsupported, untested and unsponsored data, AEP Ohio argues that an applicant has the right to "use whatever elements it may chose in its application" and that it is up to the Commission "to determine if the application will be accepted and the evidence it relied upon modified or denied." (Mem. Contra at 11.) But this again misses the point. While the General Assembly granted the Commission broad supervisory authority over public utilities,[2] its authority does not extend to nullification of statutory requirements. The relevant law does not merely *suggest* that electric distribution utilities provide proof that overall rates for bundled generation are more favorable than they would be under the market rate option, *it requires it*. Rev. Code § 4928.143(C)(1). To the extent that it purports to rely on calculations that have neither been introduced nor sponsored by any witness in this proceeding, the Application thus fails as a matter of law. At a minimum, if AEP Ohio's petition is not dismissed in its entirety (which it should be), this speculative and unsponsored "evidence" should be stricken from the record.

Finally, while AEP Ohio would prefer to ignore its statutorily imposed burden of proof in this case to promote what it calls the "efficient process" of Commission proceedings (Mem. Contra at 11-12), judicial efficiency would in fact be better served by dismissing the current fatally flawed Application now. If the Commission waits until after the hearing to determine that the Application failed to meet the statutory requirements, then both the Commission and the parties will have needlessly squandered their time and resources. On the other hand, rejection of the application at this stage would provide AEP Ohio an opportunity to correct its failure of proof and file an application that meets statutory mandates in less time than if the hearing is conducted and it is later determined that the Application is defective.

II. APPLICABLE LAW

The parties agree that the governing law is found in Section 4928.143(C)(1) of the Revised Code (which is quoted in full in the briefs of FES and AEP Ohio). Under that Section, AEP Ohio must establish that any approved or modified ESP "including its pricing and *all other terms and conditions, including any deferrals and any future recovery of deferrals*, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142 of the Revised Code." (Emphasis added). Absent such proof, the Commission "shall disapprove the application." *Id.* As the Applicant, AEP Ohio bears the burden of proof. *Id.*

III. ARGUMENT

A. AEP Ohio Fails to Provide Sufficient Evidence to Show that the Proposed ESP is More Favorable in the Aggregate than an MRO.

In an effort to sidestep its burden of proof, AEP Ohio argues that the Commission should reserve judgment because "the Application's properly-framed request for relief along with the

[2] Rev. Code §§ 4905.04, .05, .06.

totality of the evidentiary record and briefing *when completed, will support* the conclusion that AEP Ohio's proposed ESP" meets the standards of the "in the aggregate" test. (Mem. Contra at 6 (emphasis added).) This, however, is not the law. The Commission's rules require the Application to have testimony "explaining and supporting each aspect of the ESP" and that "fully support[s] all schedules and significant issues." O.A.C. 4901:1-35-03(A), (C)(1). The Commission then applies the "in the aggregate" standard to its decision to "approve or modify and approve an *application*." Rev. Code § 4928.143(C)(1) (emphasis added). Nothing in the Commission's rules or the governing statutes allows for AEP Ohio to submit an incomplete application and rely upon further proceedings to meet its burden of proof - - and for good reason. To allow this would permit an applicant to submit a blatantly inadequate case, and then remedy the deficiencies later, when Staff and other parties would have no opportunity to respond. This manner of proceeding raises obvious fairness issues. An application at the Commission must do more than simply frame the request for relief. Because AEP Ohio fails to present even a threshold evidentiary showing, the Application is deficient and must be dismissed.[3]

As an initial matter, AEP Ohio fails to discuss the impact of numerous proposed riders included in the Application. For example, no testimony quantifies the impact of the Generation NERC Compliance Cost Recovery Rider, the Generation Resource Rider, the Carbon Capture and Sequestration Rider, the Market Transition Rider, the Facility Closure Cost Recovery Rider, or the Pool Termination or Modification Provision. All of these riders are part of the ESP but would not be part of the expected results from an MRO. Without *any* analysis concerning these significant riders – most of which are non-bypassable – the Application is incomplete and the

[3] *See* Opinion and Order issued February 23, 2011 in Case No. 10-2586-EL-SSO (In the recent MRO application by Duke Energy Ohio, the Commission rejected the application on the grounds that it failed meet the bare statutory standards of Section 4928.142 of the Revised Code.). While AEP Ohio has proposed an ESP rather than an MRO, its Application should be dismissed on the same grounds as the application of Duke Energy Ohio.

Commission cannot conclude that the proposed ESP is better than an MRO.

AEP Ohio claims that it is unable to "presently determine with certainty" the rate impact of these riders. (Mem. Contra at 8.) The difficulty of providing absolute certainty, however, does not allow AEP Ohio to fail to provide *any* estimate. For purposes of determining whether the Application "is more favorable in the aggregate" than an MRO, the Commission must have some evidence regarding the proposed riders. Otherwise, the Commission will have to assume that these riders have no impact, despite the certainty that they could have substantial, unfavorable consequences for Ohio consumers.

Further exhibiting the lack of a threshold evidentiary showing, AEP Ohio's aggregate comparison fails to address multiple anti-competitive aspects of the ESP, including, for example, the impact of the non-bypassable riders. An important policy of the Commission is to promote competition in the retail electricity market as stated in Section 4928.02 of the Revised Code. In order to determine whether the proposed ESP is more favorable than the expected results of an MRO, the ESP's effects on competition as compared to the MRO must be considered.

Recognizing the deficiencies in the Application, AEP Ohio argues that additional ESP benefits need be considered only if the comparison based on price alone does not show that the ESP is more favorable than the MRO. (Mem. Contra at 7.) AEP Ohio claims that this is precisely the situation here and that "there is no threshold necessity of relying on additional ESP benefits." (*Id.* at 8.) This interpretation misapplies the clear language of the statute, which requires the Commission to consider "pricing *and* all other terms and conditions, including any deferrals and any future recovery of deferrals." Rev. Code § 4928.143(C)(1) (emphasis added). Indeed, the Ohio Supreme Court stated that "the commission *must* consider more than price" when evaluating an ESP plan. *In re Application of Columbus S. Power Co.*, 945 N.E.2d 501, 506

(2011) (emphasis added). General references to "aggregate benefits," such as a "commitment to economic development" (Mem. Contra at 5), simply do not provide the necessary analysis needed by the Commission to determine that the ESP is more favorable in the aggregate. Indeed the mirror of AEP Ohio's argument is that even if the ESP were shown to be slightly more favorable than an MRO from a rate point of view (which it has not), the Commission could (and should) reject the ESP if the anti-competitive impacts were shown to be substantial. Because the Application wholly fails to address this important issue, it is deficient on its face.

In a final throwaway argument, AEP Ohio asserts that FES's motion is "untimely" as the Commission has already considered the filing requirements and waivers regarding this Application in a March 23, 2011 Entry. (Mem. Contra at 8.) This assertion is completely unfounded. The Administrative Rules do not limit when a motion to dismiss may be asserted. Further, AEP Ohio confuses the Commission's decision to grant a *waiver* of a filing requirement established by Commission *rule,* with the Commission's obligation to enforce the statutory standards set forth by the General Assembly. While the Entry granted AEP Ohio certain *waivers* of filing requirements set by Commission rule, the Entry in no way limits the Commission's non-discretionary duty to ensure that the Application meets statutory requirements.

For all the above reasons, AEP Ohio's Application should be dismissed.

B. FES Correctly Argues that, in the Alternative, Certain Portions of the Testimony of Laura Thomas Should be Stricken from the Record.

In the alternative, FES moves to strike the portion of the testimony of AEP Ohio witness Laura Thomas that is based on data filed in Case No. 10-2929-EL-UNC. The Commission should grant this alternative motion for the following three reasons:

First, while Ms. Thomas relies on the rates provided in AEP Ohio's Initial Comments filed on January 7, 2011 in Case No. 10-2929-EL-UNC, neither she nor any other witness is

sponsoring the related documents or data in this proceeding. Ms. Thomas did not develop those figures and the person or persons who did are unknown and unsworn. Further, the data has not been subjected to the scrutiny of cross examination and Case No. 10-2929-EL-UNC has not gone forward to hearing. In short, the capacity costs used by Ms. Thomas are unidentified and unsubstantiated hearsay which may not be used to support Ms. Thomas' conclusions here.

Second, though AEP Ohio claims that there "are enough issues in these ESP cases" and "it is perfectly natural and legitimate" to borrow unsupported data from other cases (Mem. Contra at 11), this does not change the burden of proof. Under Section 4928.143(C)(1) of the Revised Code, the burden of proof rests with AEP Ohio and it fails to meet this burden by introducing "evidence" that cannot be supported by any witness. The need to strike this testimony is made particularly clear by the fact that AEP Ohio has refused to answer discovery requests regarding the capacity calculations.[4] As a result, the parties to this case are unable to gather essential information regarding the calculation of the Competitive Benchmark price in the calculations of the expected results of an MRO.

Third, AEP Ohio's attempt to argue that it may disregard its burden of proof under the guise of promoting judicial economy has no basis in law or fact. As noted earlier, judicial economy favors dismissing the application or striking the testimony now so that the defects can be corrected before the Commission and the parties spend substantial time and effort in a hearing that will have to be redone in whole or in part. If the Commission rejects the Application or strikes the testimony, AEP Ohio can re-file a corrected application or seek leave to bring the witnesses in who can address the capacity calculations needed to support a proper MRO comparison.

IV. CONCLUSION

Wherefore, in consideration of the foregoing, Exelon Generation respectfully requests that the Commission grant FES's Motion to Dismiss or in the Alternative to Strike.

Respectfully Submitted,

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[4] FES's Motion to Dismiss or in the Alternative to Strike, Exhs. A, B.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 15th day of July, 2011 by electronic mail, upon the persons listed below.

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