

**BEFORE THE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals))))	Case No. 10-2376-EL-UNC
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 Revs. Code, in the Form of an Electric Security Plan.))))))	Case No. 11-346-EL-SSO Case No. 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 No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders))))	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders))))	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.))))	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144)))))	Case No. 11-4920-EL-RDR
In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144)))))	Case No. 11-4921-EL-RDR

**FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM CONTRA
OHIO POWER COMPANY'S MOTION AND REQUEST FOR EXPEDITED RULING**

Ohio Power Company's Motion to ignore the Commission's orders in its January 23, 2011 Entry (the "January Entry") should be denied immediately. The Motion would allow Ohio Power Company ("AEP Ohio") to violate established Ohio law. It would also set a dangerous precedent whereby an applicant could implement unapproved (and unilateral) rates and terms of service pending an appeal. AEP Ohio's Motion is based solely on its complaints that it does not like the effect of the January Entry – or the Commission's underlying December 14, 2011 Order (the "Order") – and that it believes the January Entry would cause confusion. But, those complaints are more properly resolved through the appeal process. Until the resolution of any appeals, AEP Ohio should not be allowed to disregard the Commission's directives simply because it does not want to do what the Commission ordered it to do. Moreover, the Motion would increase the cost of capacity for customers who, but for AEP Ohio's proposed delay, would be entitled to lower cost capacity. For these reasons, the Motion should be denied.

I. ARGUMENT

A. AEP Ohio must comply with the Commission's Entry clarifying its Order, which is immediately enforceable.

AEP Ohio cites no law or authority in support of its request to ignore or "defer" the Commission's January Entry. There is none. To the contrary, Ohio law mandates that the Commission's Entry is effective immediately. Pursuant to R.C. § 4903.15, "[u]nless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission." Here, the January Entry provided no "different time" and expressly "ordered" AEP Ohio to "revise the DIP [i.e., the Detailed Implementation Plan] filed December 29, 2011, to be consistent with this Entry" and to "file in final form four complete copies of the revised

DIP in Ohio Power's tariffs as clarified by this Entry."¹ Thus, by statute, AEP Ohio must do so "immediately." The January Entry is also immediately effective and enforceable given that its focus is on clarifying the Commission's Order. The January Entry only requires AEP Ohio to do what already was required of it by the Order.

Ohio law provides an avenue for a party to seek a stay of enforcement of a Commission order.² AEP Ohio has not sought such a remedy here. Thus, regardless of whether the January Entry is deemed a stand-alone order or a clarification and confirmation of the requirements set forth in the Order, AEP Ohio must immediately abide by its terms. There is no basis on which to delay AEP Ohio's compliance.

B. To allow AEP Ohio to avoid the Commission's Entry would establish a dangerous and improper precedent.

AEP Ohio's Motion essentially asks that AEP Ohio be allowed to disregard the fact that the January Entry ordered AEP Ohio to amend its DIP because the rates AEP Ohio seeks to charge under its "Compliance" DIP violate the Order.³ In fact, AEP Ohio states that it *will* disregard the January Entry (and, thus, the Order) "[a]bsent further direction from the Attorney Examiners or the Commission."⁴ If the Motion is granted (or even left pending for weeks), the door will be opened for any regulated entity to disregard a Commission order merely by filing a request for delay based solely on that entity's unhappiness. It would also allow a regulated entity

¹ January Entry, p. 9 (also noting that the Entry was entered into the journal on the same day, January 23, 2011).

² R.C. § 4903.16 (requiring an application to the Ohio Supreme Court and the posting of an appropriate bond); *see also In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 516 (2011), *quoting Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957) ("This section makes 'clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond.'").

³ For example, AEP Ohio's Motion asks that it be allowed to charge the \$255/MW-day capacity price to mercantile governmental aggregation customers even though the Order and the January Entry ordered AEP Ohio to provide RPM-priced capacity to such customers. *See, e.g.*, January Entry, p. 6.

⁴ AEP Ohio Motion, p. 9.

to implement tariffs and procedures of its own design, even when those tariffs and procedures do not comply with the Commission's orders and, thus, were not approved by the Commission.

Such a precedent would undercut the Commission's authority as well as the well-established appeal process. Ohio law allows an aggrieved party (such as AEP Ohio here) to seek clarifications or changes to a Commission order through an application for rehearing and a subsequent appeal to the Ohio Supreme Court.⁵ As AEP Ohio noted, "these matters can be sorted out on rehearing" and that is exactly the way the system is supposed to work. In the meantime, however, a Commission order must be followed. AEP Ohio should not be allowed to circumvent a Commission order simply because it does not like the effect of the order or because the order allegedly "involves significant financial cost to AEP Ohio" (an allegation for which AEP Ohio notably provides no support).⁶ If customers must bear the cost when higher rates are later found to be unlawful,⁷ so too must an EDU bear the cost if an order limiting its rates is later found to be unlawful.

C. A delay in the enforcement of the Commission's Order would prejudice customers, hinder competition and not reduce confusion.

AEP Ohio argues that requiring it to comply with the January Entry (and the Order) would create "the potential for confusion and uncertainty with regard to how the aggregation set-aside issues will be addressed."⁸ But uncertainty is inherent in both the very process that AEP Ohio created, in addition to the appeal process as AEP Ohio would like it to unfold. None of the parties know how the Commission or the Ohio Supreme Court will resolve the myriad of issues raised by the parties' applications for rehearing. Ignoring the Commission's Order does not

⁵ R.C. §§ 4903.10; 4903.13.

⁶ AEP Ohio Motion, p. 4.

⁷ See *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 516 (2011) (holding that "the law does not allow refunds in appeals from commission orders" even where a rate increase is later found unlawful).

⁸ AEP Ohio Motion, p. 8.

resolve that uncertainty. It would only allow AEP Ohio to implement unapproved rates and terms of service that prevent customers from accessing market-priced capacity.

In fact, the implementation of an unapproved DIP would heighten the inherent confusion surrounding AEP Ohio's RPM set-aside process – confusion that will hinder competition.⁹ The delay requested by AEP Ohio will negatively impact the enrollment and allotment award process as it pertains to the pre-November governmental aggregation communities, to opt-in mercantile customers, and to those impacted by the pro rata allocation issue. Each day that AEP Ohio refuses to comply with the Commission's Order is an additional day that customers, who are eligible for RPM-priced capacity under the Order, are denied from accessing that capacity (and the benefits of competition) due to AEP Ohio's unapproved DIP. Delaying the enforcement of the January Entry and the Order simply provides AEP Ohio with yet another opportunity to unilaterally control the amount of shopping in its service territory while increasing confusion in the market. Thus, granting AEP Ohio's Motion (and, thereby allowing AEP Ohio to establish charges and terms of service that do not comply with the Commission's Order) is also inconsistent with the Commission's mission to facilitate competitive markets, which mission the Commission has repeatedly affirmed throughout this proceeding.

II. CONCLUSION

For the reasons set forth above, FES respectfully requests that the Commission deny AEP Ohio's Motion.

⁹ FES Post-hearing Brief, pp. 103-109; Direct Testimony of Tony C. Banks on behalf of FirstEnergy Solutions Corp., pp. 27-29.

Respectfully submitted,

s/ Laura C. McBride

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra AEP Ohio's Motion and Request for Expedited Ruling* was served this 27th day of January, 2012, via e-mail upon the parties below.

s/ Laura C. McBride

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Summary: Memorandum Contra AEP Ohio's Motion and Request for Expedited Ruling
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