

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 SECOND MOTION TO COMPEL
AND ALTERNATIVE MOTION TO STRIKE**

I. INTRODUCTION

Ohio Power Company’s (“AEP Ohio”) Second Motion to Compel is, at its core, simply a tactic to silence FES – or any competitor – rather than a legitimate effort to seek facts to prepare a record to support its case. Most fundamentally, as was the case with its first Motion, AEP Ohio fails to identify any need for the overbroad, competitively sensitive information that it seeks to compel FirstEnergy Solutions Corp. (“FES”) to produce or any link between that information and the issues or testimony in this proceeding. Nowhere in any of the testimony identified in AEP Ohio’s lengthy tables -- or, indeed, anywhere in FES’ testimony -- are details regarding how FES structures its governmental aggregation pricing, copies of each and every opt-out notice ever issued by FES, or the amount of capacity FES has purchased from AEP Ohio relevant. AEP Ohio cannot demand such overbroad, unduly burdensome, and competitively sensitive information by glibly describing “retail competition” as the scope of information it is entitled to discover from FES and then seeking, as an alternative remedy, to strike each and every reference to “retail competition” in the FES witnesses’ testimony.

As set forth herein, a basic review of AEP Ohio’s Second Set of Discovery Requests highlights how irrelevant and inappropriately intrusive and far-ranging AEP Ohio’s requests are.

The Commission instituted this proceeding to determine whether AEP Ohio's proposed \$355/MW-day capacity price for the competitive retail electric service providers who serve shopping customers is proper. To allow AEP Ohio to compel FES to disclose numerous aspects of FES' competitive operations, as requested in AEP Ohio's First, Second (and Third) Sets of Discovery, in such a proceeding would set a dangerous precedent and have a far-reaching and chilling effect on intervenor participation -- which would jeopardize the Commission's ability to create a full and complete record for its consideration of the oversight of regulated utilities and their impact on customers. AEP Ohio's Motion must be denied.

II. ARGUMENT

A. AEP Ohio's Second Motion Again Fails To Identify Any Need For The Discovery It Seeks.

In this Second Motion, AEP Ohio seeks to compel FES to: (1) respond to a series of questions regarding whether FES' governmental aggregation customers in AEP Ohio's service territory and across all of Ohio receive guaranteed discounts;¹ (2) identify which types of charges may lead FES to use its discretion to increase its contract prices;² and (3) produce copies of all opt-out notices issued by FES in any territory.³ Not only are the Requests clearly overbroad and unduly burdensome in that they would extend to FES' customers in numerous jurisdictions outside of AEP Ohio's territory (indeed, AEP Ohio doesn't dispute this point),⁴ but AEP Ohio

¹ See Interrogatory Nos. 25-38.

² See Interrogatory No. 39 ("...[W]ould a change in the capacity rate that AEP Ohio charges FES be considered a "Pass-Through Event"?") and No. 40 ("... Please identify any capacity rate, in \$/MW-day, that AEP Ohio would charge FES that would not be considered a change" to the governmental aggregation contract attached to the requests).

³ See Requests for Production No. 6 ("Provide a copy of all opt-out notices provided to customers served by FES under a governmental aggregation program."), No. 7 ("Provide a copy of all opt-out notices provided to customers served by FES in the state of Ohio."), and No. 8 (requesting all templates).

⁴ Even if the Requests were limited to AEP Ohio's service territory, it would be overly burdensome because FES would still have to produce tens of thousands of notices.

provides no basis to establish its right to discover this information from a competitor in this proceeding. AEP Ohio provides no explanation of why FES' competitive strategies as to when it would seek (or would need) to increase contract prices is relevant to AEP Ohio's request for the recovery of full embedded costs, nor its challenge to the argument that RPM, market-based pricing is proper as proposed by all Intervenors. AEP Ohio provides no explanation of why it needs copies of each and every opt-out notice issued by FES to support its request for the recovery of full embedded costs, or to challenge the argument that RPM, market-based pricing is proper. All AEP Ohio's Motion does is reiterate its playground challenge that FES needs to "step up" to its obligations as an Intervenor in this proceeding. Becoming an intervenor in a Commission proceeding does not give license to the applicant to seek highly proprietary information that is not legitimately put in play by any witness in the case.

AEP Ohio is bound, as are all parties to Commission proceedings, to seek only that discovery that is "relevant to the subject matter of the proceeding" and is "reasonably calculated to lead to the discovery of admissible evidence."⁵ Further, because AEP Ohio continues to seek competitively sensitive information from a competitor, AEP Ohio must establish that its "need" for the information⁶ is so compelling as to outweigh the harm to FES in disclosing the information.⁷ As set forth in FES' Memorandum Contra AEP Ohio's first Motion to Compel, Ohio law protects trade secrets and the Commission has a duty to protect a competitor's ability to

⁵ O.A.C. 4901-1-16(B).

⁶ AEP Ohio also has already received portions of key FES contract language via demands on FES' customers to produce their contracts. FES maintains its objections that the contracts are not reasonably calculated to lead to the discovery of admissible evidence and that AEP Ohio should not be entitled to use these contracts. However, AEP Ohio's possession of this information further undercuts any arguments it could have otherwise made for a "need" for further information from FES.

⁷ 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

compete by protecting trade secrets and competitively sensitive information.⁸ When there is no need for the information and no link to the issues before the Commission, then it cannot outweigh the harm to FES from disclosing its information that AEP Ohio does not dispute is competitively sensitive and burdensome.

B. The Amount Of Capacity That FES Has Purchased From AEP Ohio Is Irrelevant And, In Any Event, Is Within AEP Ohio's Possession.

AEP Ohio also seeks to compel FES to identify the amount of capacity it has required in AEP Ohio's service territory for 2010, 2011, and 2012.⁹ FES made several objections to these requests because how much capacity FES has used or will use in the future is unrelated to whether AEP Ohio should be entitled to recover its "full embedded costs" through the capacity price to CRES providers. AEP Ohio's only explanation as to why FES should be compelled to provide this information is that "[t]he landscape of shopping has changed over time and a CRES provider's total capacity requirement in relation to the timeline of developments is a matter that could lead to admissible information."¹⁰ First, it is not clear what this even means: "total capacity requirement in relation to the timeline of developments?" Such a vague assertion does not establish the concrete need or relevance that AEP Ohio must establish in order to compel discovery. Moreover, AEP Ohio's Motion fails to address FES' objections that AEP Ohio, as the sole entity that provides capacity in its territory, has access to this information anyway. Indeed,

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

⁸ See FES' Combined Memorandum Contra AEP Ohio's Motion to Compel and Motion for Protective Order & Request for Expedited Treatment, filed Apr. 16, 2012.

⁹ See Interrogatory Nos. 22-24.

¹⁰ Second Motion, p. 7.

AEP Ohio is the entity that bills FES for the capacity it uses. Thus, its request to compel FES to produce information that is irrelevant and that AEP Ohio already possesses should be denied.

C. AEP Ohio Mischaracterizes The Scope Of This Proceeding And FES' Testimony - Neither Of Which Raise Any Issues Relating To The Discovery That AEP Ohio Seeks.

In support of its Motion and alternative request to strike, AEP Ohio makes much ado about FES' quotation of AEP Ohio's own language. In responding to AEP Ohio's demands that FES provide responses to AEP Ohio's *First* Set of Discovery Requests, FES pointed out the inconsistency in AEP Ohio's own attempts to limit the scope of this proceeding. In its earlier Motion to Strike, AEP Ohio argued that "The subject matter of this case is limited to one issue -- Ohio Power Company's recovery of an appropriate charge for the cost of capacity it is legally obligated to supply to [CRES] providers in the AEP Ohio Service Territory." FES pointed to AEP Ohio's own description of the proceeding as inconsistent with AEP Ohio's attempts to seek broad, competitively sensitive discovery from AEP Ohio. Not only was that language AEP Ohio's -- and not FES' -- but AEP Ohio's Motion fails to acknowledge that FES' letter continued and identified the numerous other bases on which it objected to AEP Ohio's *First* Set of Discovery -- including that those requests are (as are AEP Ohio's Second Set): not reasonably calculated to lead to the discovery of admissible evidence; unduly burdensome; improperly seek production of proprietary trade secrets; not limited in time or scope; and fail to take into account the myriad of factors that go into competitive pricing structures and contracts. AEP Ohio again addresses none of those objections and instead creates an overly simplified distinction between "wholesale" pricing and "retail" competition that appears nowhere in FES' objections.

Using this overly simplified distinction, AEP Ohio then seeks to provide an "alternative" remedy -- striking almost all of FES' testimony -- solely on the basis that the testimony relates to

the retail impacts of AEP Ohio's proposed capacity pricing. However, AEP Ohio makes no effort to link the discovery it seeks to compel with its ability to dispute or challenge FES' testimony. A comparison of the cited portions of testimony to AEP Ohio's discovery requests reveals there is no such link and, therefore, that AEP Ohio's Motion to Compel and Motion to Strike are baseless. The following are just a few examples that illustrate how AEP Ohio's requests to strike testimony are unsupported and unconnected to its discovery requests:

- Banks Testimony, p. 4:18-25: In this section of Mr. Banks' testimony, he argues that competition benefits customers because it promotes lower prices by encouraging electric suppliers to reduce their costs and he provides the Commission's statistics that reflect that over 1.7 million Ohio customers are shopping.
 - How is the amount of capacity used by FES relevant to a description of the benefits of competition or statistics on the number of shopping customers in the state?
 - What do FES' governmental aggregation contracts have to do with this basic, non-FES-specific testimony?
 - How does this testimony trigger AEP Ohio's need to review all opt-out notices provided to FES' customers across the state?
- Banks Testimony, p. 9:3-12: In this portion of his testimony, Mr. Banks argues that governmental aggregation customers will similarly experience the impact of above-market capacity prices on retail competition as do other shopping customers.
 - How is the amount of capacity used by FES relevant to whether governmental aggregation customers will be impacted just like other shopping customers?
 - What does this testimony have to do with the interpretation of all of FES' governmental aggregation contracts, when FES has already admitted that some of FES' contracts allow for a pass-through of increased costs or the termination of contracts if AEP Ohio's capacity price increases in this proceeding, and when AEP Ohio has access to the public documents relating to governmental aggregation in Ohio?
 - How does this testimony trigger AEP Ohio's need to review all opt-out notices provided to FES' customers across the state, which are publicly available on the Commission's docket?
- Lesser Testimony, pp. 7-25: In this portion of his testimony, Dr. Lesser testifies that AEP Ohio's proposed capacity charges are discriminatory and violate state policy because AEP Ohio is seeking to charge a different capacity price to non-SSO customers as it charges to SSO customers.

- How is the amount of capacity used by FES relevant to whether AEP Ohio's capacity prices for shopping and non-shopping customers are the same?
 - How does the interpretation of all of FES' governmental aggregation contracts relate to whether AEP Ohio's capacity pricing is discriminatory?
 - How does this testimony trigger AEP Ohio's need to review all opt-out notices provided to FES' customers across the state?
- Stoddard Testimony, pp. 8:3-10: In this portion of his testimony, Mr. Stoddard argues that RPM, market-based pricing is the only appropriate price for capacity and that to allow AEP Ohio to charge significantly above-market prices will distort the competitive landscape.
 - How is AEP Ohio's ability to challenge Mr. Stoddard's positions on the benefits of RPM, market-based pricing impacted by its inability to get discovery (that it already has) regarding the amount of capacity used by FES?
 - How does Mr. Stoddard's testimony at all relate to the interpretation of FES' governmental aggregation contracts?
 - How does this testimony trigger AEP Ohio's need to review all opt-out notices provided to FES' customers across the state?

Each of AEP Ohio's requests to strike the FES witnesses' testimony is similarly baseless. AEP Ohio has provided no support for its request to compel FES' responses to AEP Ohio's Second Set of Discovery Requests and no link to the testimony it seeks to strike. AEP Ohio's Motion to Compel and Motion to Strike lack any factual or legal support and, therefore, must be denied.

III. CONCLUSION

AEP Ohio remains unable to identify any real or reasonable link between the overbroad and competitively sensitive information that it seeks to require its competitor, FES, to produce and the issues in this proceeding.¹¹ As set forth herein, AEP Ohio's Motion to Compel and its alternative Motion to Strike should be denied.

¹¹ AEP Ohio's Motion also misrepresents the status of the protective agreement between AEP Ohio and FES. The only protective agreement in effect between the parties protects AEP Ohio's information, and not FES'. AEP Ohio asserts that it entered into a protective agreement with FES on April 13, 2012, and that disclosure of FES' proprietary or trade secret information is, therefore, no longer a relevant consideration for this hearing, but this is simply not true and AEP Ohio's sworn affidavit is affirmatively misleading and warrants sanctions. On April 13, 2012, counsel for FES emailed counsel for AEP Ohio to seek a protective agreement that would protect certain redacted contracts which AEP Ohio had requested

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from FES customers (as discussed in FES' Memorandum Contra AEP Ohio's first Motion to Compel). FES contacted AEP Ohio to request a protective order to protect the documents to be produced by FES customers and AEP Ohio refused to agree to a protective agreement that would cover that information. As a result, FES did not sign the protective agreement proposed by AEP Ohio. Thus, the only protective agreement in effect between the parties regarding this proceeding protects only AEP Ohio's confidential information.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra AEP Ohio's Second Motion to Compel and Alternative Motion to Strike* was served this 17th day of April, 2012, via e-mail upon the parties below.

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