

**BEFORE
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)	

**EXELON GENERATION COMPANY, LLC'S
MEMORANDUM CONTRA OHIO POWER COMPANY'S
MOTION TO COMPEL AND REQUEST FOR EXPEDITED RULING**

Exelon Generation Company, LLC, ("Exelon") hereby submits this memorandum contra Ohio Power Company's Motion to Compel and Request for Expedited Hearing ("AEP Ohio Motion"), which was filed on April 17, 2010. While Exelon does not object to the request for expedited treatment,¹ it notes that this case is already subject to a procedural schedule, which requires that motions to be answered within five business days. Under such a schedule, Exelon has until April 24, 2010 to submit its memorandum contra. As stated on the first day of hearing, however, in the spirit of expediting the resolution of the issues at hand, Exelon has voluntarily agreed to submit this memorandum contra within two business days.

ARGUMENT

The AEP Motion mirrors the motion to compel that AEP Ohio has filed with respect to FirstEnergy Solutions. Therefore, in the interests of judicial efficiency, Exelon hereby incorporates by reference the legal arguments asserted by FirstEnergy Solutions in its April

¹ On April 9, 2012, AEP Ohio served its Second Set of Discovery on Exelon Generation Company, LLC ("Exelon"). Exelon provided timely objections and responses on April 16, 2012. Counsel for AEP Ohio sent an email at 7:45 pm EST on April 16th asking Exelon to supplement its responses to discovery and to provide AEP Ohio with its initial response by 8:00 am on April 17th. Less than thirteen hours later, at approximately 8:30 am on April 17th, AEP Ohio filed a motion to compel for several of the interrogatories and requests for admission in the Second Set of Discovery served on Exelon and asked for expedited treatment to resolve this discovery dispute.

16th Memorandum Contra² as to the objections concerning relevance, ambiguity, undue burden and the damaging effect upon retail competition if competitive retail electric suppliers are compelled to produce the very type of information that is at heart of their business and protected by the trade secret laws in this state, as the price for participation in this proceeding.

In this proceeding, AEP Ohio is seeking to establish a capacity price of \$355/MW-day for capacity it provides to competitive retail electric service ("CRES") providers in AEP Ohio's service territory. In discovery served upon Exelon, AEP Ohio seeks detailed information regarding customer contracts and the competitive business activities of Exelon's two licensed CRES subsidiaries, Constellation NewEnergy, Inc. and Exelon Energy Company, Inc., including a number of interrogatories and requests for admissions asking whether these subsidiaries' contracts with customers of different classes would be profitable if the capacity price was established at \$146/MW-day, \$255/MW-day, or \$355/MW-day.³

Exelon objected to these requests on various grounds, including relevance (*see* Motion, Ex. B). Of the three capacity prices referenced in AEP Ohio's discovery, only two are at issue in this case: the \$355/MW-day price that AEP Ohio is seeking to establish and the \$146/MW-day which is the current RPM price supported by Exelon. Mr. Fein's testimony recommending rejection of the \$355 price specifies six reasons why that charge cannot be considered proper under Ohio law and should not be adopted by the

² The motion to compel was served upon FirstEnergy Solutions several days prior to the motion that was served on Exelon.

³ *See, e.g.*, Exelon Generation Company, LLC's Response to the Second Set of Interrogatories, Request for Admissions and Request to Produce Documents of Ohio Power Company (Motion, Exhibit B) at Interrogatories Nos. 2-1 through 2-8; and RFA's Nos 2-7 through 2-30 (requesting confidential cost and price structure information).

Commission. Only one of those reasons was premised upon the adverse effects on retail competition of, and the denial to customers of the benefits of a competitive market resulting from, a charge at that level. *See* Direct Testimony of David Fein at 4:21-22 and 7:14.

Furthermore, determining whether that \$355/MW-day price is “just and reasonable” from a competitive standpoint does not require *any* discovery, much less discovery into Exelon’s confidential business activities or cost and pricing structure. It is undisputed that the \$355/MW-day price that AEP Ohio wants is nearly *three times higher* than the current level of the competitive market price (RPM) that AEP Ohio has been charging to CRES providers over the past three years. The testimony of David Fein referenced in AEP Ohio’s motion simply acknowledges the fundamental and basic market reality that allowing AEP Ohio to charge CRES providers a price three times higher than the prevailing market price will have an effect on retail competition in AEP Ohio’s territory and will result in retail customers paying far higher rates than they otherwise would if the capacity price was set by the competitive marketplace. *See* Direct Testimony of David Fein at 4:17-5:5; 7:11-18. This testimony does not “open the door” to, or in any way justify, the broad discovery that AEP Ohio seeks into the company’s most sensitive competitive information. On the contrary, it simply reflects market reality based on undisputed facts in the record. Accordingly, AEP Ohio’s motion to compel should be denied at the threshold.

Specific Arguments

- AEP Ohio seeks discovery in Interrogatory No. 2-1 and 2-1 of whether Exelon would have “headroom” and the “profitability” of offers made at different strike prices. Those key terms are not defined in the interrogatories and as used by AEP

Ohio in Interrogatory No. 2-2 are vague, ambiguous and subject to inconsistent interpretation and definition. For example, in determining a response, Exelon does not know whether these profitability calculations are to be considered in the short term, whether good will be valued, or how should taxes be evaluated.

- Interrogatories 2-1 through 2-4 and 2-9 through 2-10 are overbroad as they are not limited to “offers” or sales or contracts for customers within the Ohio Power service area, but literally require a total analysis of all contracts. Even assuming that the responses were restricted to just the AEP Ohio service area, to answer the question Exelon would have to study each of its contracts and, as to each contract, AEP Ohio’s requested strike prices do an analysis. That is unduly burdensome. Furthermore, it would not be relevant in this proceeding. Exelon’s margin or lack of margin in a particular contract, or the strike price for each of the classes requested is not relevant to what the State Compensation Mechanism price should be. That price must be set at market (as advocated by Exelon) or at embedded cost (as advocated by AEP Ohio). Exelon’s business dealings simply do not impact the determination to be made. *Ferron v. 411 Web Directory*, 2010 U.S. Dist. LEXIS 10476 at *5 (S.D. Ohio 2010)(“the Court has discretion to limit or even preclude discovery which meets the general standard of relevance found in Rule 26(b)(1) if the discovery is unreasonably duplicative, or the burden of providing discovery outweighs the benefits....”).

- RFAs 2-7 through 2-30 are unduly burdensome and improper to the extent they purport to require Exelon to conduct or create any study or comparative analysis of its cost and pricing structure. AEP Ohio cannot request information that

is neither known or reasonably available to Exelon. The Rules of the Commission simply do not require a party to create work product at the request of another party. See Rule 4901-1-19 (“...interrogatories may elicit facts, data, or other information *known or readily available* to the party upon whom the interrogatories are served.”)(emphasis added).

- Virtually every Interrogatory and RFA is objectionable because the information requested—involving the company’s pricing, profitability and cost structure – is highly proprietary and competitively sensitive information that goes to the core of Exelon’s supplier/customer relationships, particularly with respect to commercial and industrial customers. AEP Ohio has failed, both in its discovery requests and its motion to compel, to demonstrate any need for this information. *Splater v. Thermal Ease Hydronic Sys., Inc.*, 169 Ohio App. 3d 514, 518 (8th Dist., Cuyahoga Cty. 2006)(upholding lower court’s denial of motion to compel the production of trade secrets where the party “failed to demonstrate a need [for the information] that overcame the potential harm that could result to [the disclosing party] as a result of disclosure....”). In short is the type of trade secret information that is not properly discoverable by a competitor or affiliate of a competitor-- particularly where, as here, no provision has been made for preservation of confidentiality.⁴

⁴ While Exelon believes that the Motion to Compel should be denied in its entirety, given the competitively sensitive nature of the information at issue and the potential for misuse of such information by AEP Ohio and/or any other competitor, if additional discovery is required any information produced should be strictly limited to AEP Ohio, and more specifically, AEP Ohio’s “outside attorneys-eyes only.”

For all of the foregoing reasons, AEP Ohio's Motion to Compel should be denied.

Dated: April 19, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served this 19th day of April, 2012 via electronic mail on the following persons.



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Summary: Memorandum Memorandum Contra Ohio Power Company's Motion to Compel and Request for Expedited Ruling electronically filed by M HOWARD PETRICOFF on behalf of Exelon Generation Company, LLC