

**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.                                  | ) |                         |

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**FIRSTENERGY SOLUTIONS CORP. MOTION TO MODIFY PROCEDURAL  
SCHEDULE**

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In response to a Motion by Staff, on May 3, 2012 the Attorney Examiner modified the procedural schedule in this proceeding (the “Entry”). AEP Ohio should not be permitted to file rebuttal testimony. AEP Ohio failed to timely file rebuttal testimony in accordance with the direction of the Attorney Examiners, and therefore waived the opportunity to file rebuttal testimony. The procedural schedule set by the Entry should therefore be modified to eliminate any reference to rebuttal testimony by AEP Ohio.

In the alternative, the Entry’s procedural schedule should be modified because it provides the intervenors with only a weekend (i.e., no business days) to review AEP Ohio’s rebuttal testimony or conduct discovery prior to the resumption of the hearing.<sup>1</sup>

**I. AEP Ohio Failed To Comply With The Attorney Examiner’s Previous Procedural Schedule And Therefore Waived The Opportunity To File Rebuttal Testimony.**

The schedule set by the Attorney Examiners required that AEP Ohio file rebuttal testimony by noon on May 2, 2012.<sup>2</sup> AEP Ohio did not file any rebuttal testimony by this deadline. The only relevant filing by that deadline was a Motion by Staff to extend the procedural schedule in this case to allow some errors in its testimony to be corrected. AEP Ohio did not file a motion seeking an extension of time for it to provide its rebuttal testimony, and the

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<sup>1</sup> Entry, ¶ 5.

<sup>2</sup> Tr. Vol. IX, p. 2103.

Attorney Examiner did not grant Staff's motion prior to this deadline. Accordingly, as of noon on May 2, 2012, AEP Ohio was still required to file its rebuttal testimony and failed to comply with this requirement.

The filing of a motion does not relieve a party of the obligation to comply with the procedural schedules set by the Attorney Examiner. Only the Attorney Examiner is vested with the power to change the date AEP Ohio's testimony must be filed.<sup>3</sup> As Staff's motion was not granted when AEP Ohio's testimony was due, AEP Ohio was required to file its rebuttal testimony by that deadline. AEP Ohio did not timely file its rebuttal testimony, and instead chose to ignore the procedural schedule set by the Attorney Examiners.

AEP Ohio's decision to ignore the Attorney Examiners' direction should have consequences. Because AEP Ohio failed to file its rebuttal testimony as directed, it should be prohibited from filing rebuttal testimony in this case. The procedural schedule established in the Entry should therefore be modified to eliminate the provisions of the Entry regarding AEP Ohio's rebuttal testimony. This will allow the parties to begin the briefing process one week sooner, and will help the Commission to issue a decision by May 31, 2012.

**II. In The Alternative, The Procedural Schedule Should Be Modified To Provide The Intervenors With A Legitimate Opportunity To Review AEP Ohio's Testimony Before The Hearing Resumes.**

The Entry requires AEP Ohio to file its rebuttal testimony by 5:30 p.m. on Friday, May 11, 2012.<sup>4</sup> The hearing then resumes on Monday, May 11, 2012 at 10:00 a.m.<sup>5</sup> This schedule provides the intervenors with only the weekend to review AEP Ohio's rebuttal testimony or conduct discovery before having to cross examine these witnesses. This is clearly inequitable,

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<sup>3</sup> O.A.C. 4901-1-27(B)(6).

<sup>4</sup> Entry, ¶ 5.

<sup>5</sup> *Id.*

violates intervenors due process rights, and should be modified in order to permit the intervenors some opportunity to effectively cross examine AEP Ohio's witnesses.

The procedural schedule for this case is complicated by the setting of the hearing in AEP Ohio's ESP proceeding.<sup>6</sup> Acknowledging this scheduling issue, FES respectfully requests that AEP Ohio be required to file its rebuttal testimony not related to the Staff's testimony by noon on May 9. AEP Ohio could then be allowed to file any supplemental rebuttal testimony relating to the Staff's testimony by Thursday, May 10, 2012. These minor modifications will still provide AEP Ohio with 3 business days to review Staff's revised workpapers and testimony, and 1 business day after Staff is cross-examined, to draft its testimony. It will also provide the intervenors with over 2 business days to review rebuttal testimony that may relate to their testimony, 1 business day to review the supplemental rebuttal testimony and provide the intervenors a fair opportunity to prepare for cross-examination of AEP Ohio's rebuttal witnesses.

This minor revision to the procedural schedule is the minimum necessary to allow the intervenors to prepare for effective cross-examination. Therefore, FES respectfully requests that the Entry be modified to require AEP Ohio to file rebuttal testimony not related to the Staff's testimony by noon on May 9, and any supplemental rebuttal testimony relating to the Staff's testimony by Thursday, May 10, 2012.

### **III. Conclusion**

For the foregoing reasons, FES requests that the procedural schedule be modified to either: (1) prohibit AEP Ohio from filing rebuttal testimony; or (2) in the alternative, provide that AEP Ohio is required to file rebuttal testimony not related to the Staff's testimony by noon on

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<sup>6</sup> *Id.*, ¶¶ 4-5.

May 9, and any supplemental rebuttal testimony relating to the Staff's testimony by Thursday, May 10, 2012.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FIRSTENERGY SOLUTIONS CORP. MOTION TO MODIFY PROCEDURAL SCHEDULE* was served this 4th day of May, 2012, via e-mail upon the parties below.

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Summary: Motion to Modify Procedural Schedule electronically filed by Mr. Nathaniel Trevor Alexander on behalf of FirstEnergy Solutions Corp.