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On behalf of Ohio Power Company

MEMORANDUM IN SUPPORT

On May 1, 2012, the Staff of the Public Utilities Commission of Ohio (“Staff”) filed an “Expedited Motion for Extension of Procedural Schedule and To Accept Testimony” in this proceeding. Staff’s Expedited Motion related to the testimony of Staff witness Ryan Harter, who testified about the development of the Energy Credit that he proposed deducting from the capacity charge. The Attorney Examiners established an April 30, 2012 deadline for Staff to produce to AEP Ohio the updated workpapers that Mr. Harter used to develop the Energy Credit. According to Staff’s Expedited Motion, however, in the process of collecting those workpapers, Staff became aware of “significant, inadvertent errors in estimating the energy credits” that was the subject of Mr. Harter testimony. (Staff’s Expedited Motion at 2.) So, Staff then asked the Commission for a modification to the schedule in this proceeding, stating:

For the Commission to have a complete record on which to act, Staff believes it is necessary that *these errors be eliminated through the presentation of testimony*. This testimony can be filed by May 7, 2012 as suggested in the proposed procedural schedule. Altering the procedural schedule as suggested should provide AEP with the ability to address its rebuttal issues both to that portion of the hearing already held and to *Staff’s additional testimony proposed herein*. Likewise the other parties to the case should have sufficient time to prepare for the cross-examination of both the AEP and Staff witnesses.

(Staff’s Expedited Motion at 2) (Emphasis added.) Notably, in its Expedited Motion, Staff did not identify any new witness(es) who would be called to testify on Staff’s behalf to “eliminate” Mr. Harter’s errors. Instead, Staff referred vaguely in the Expedited Motion to the elimination of these errors “through the presentation of testimony” or “additional testimony,” leaving the parties guessing as to whether the error-correction would be accomplished through Mr. Harter himself or some other witness.

AEP Ohio responded to Staff's Expedited Motion on the following day. AEP Ohio noted that it does not oppose a complete, *i.e.*, accurate, record for the Commission's review. (AEP Ohio May 2 Response at 1.) However, AEP Ohio did express serious concerns that, instead of merely seeking to "correct significant, inadvertent errors" in Mr. Harter's testimony, Staff was actually seeking through its Expedited Motion a "second, after-the-fact opportunity to present additional testimony" that, if granted, would "violate the due process rights" of the Company and other parties involved in the litigation. (AEP Ohio May 2 Response at 1.) Specifically, AEP Ohio noted that:

The broad language in the [Staff's] motion suggests, however, that *correction of Mr. Harter's errors may not be the full extent of the testimony to be filed*. Procedurally, a correction to exhibits or analysis upon discovery in hearing that errors have been presented to the Commission by Staff can be viewed as merely correcting the record. *But any attempt to jettison the previous position (and/or witness) in favor of a new approach under the banner of making corrections should not be permitted.*

To the extent the Staff's intention is to file a new method or supplant Mr. Harter with a different witness testifying to different issues (or answering questions that Mr. Harter was simply not able to address), then the Company's concerns increase and maintaining fairness and due process may be difficult under that approach. Staff freely chose its witness and should not be permitted to substitute for another after the hearing process is completed simply because the previous witness made significant errors. Stated differently, *it is one thing for Staff to correct previously undisclosed errors; it is quite another for Staff to be granted a "second bite at the apple" or switch out its witnesses after already being subject to extensive and revealing cross examination.*

(AEP Ohio May 2 Response at 3) (Emphasis added.) In its Response, AEP Ohio reserved all rights to review the data and workpapers associated not only with Mr. Harter's erroneous testimony, but also with any "updates" filed by Staff. (AEP Ohio May 2 Response at 4.)

Unfortunately, AEP Ohio's concerns have turned out to be well-founded. On May 3, the Commission granted Staff leave to file "additional testimony" by May 7. And on May 7, Staff filed twenty-six pages of new direct testimony and exhibits (including revised energy credits and revised capacity rates), not from Mr. Harter, but rather from a brand-new witness – a consultant from Energy Ventures Analysis named Emily Medine who has not previously testified in this proceeding or been the subject of any discovery requests. (*See* May 7, 2012 Direct Testimony of Emily S. Medine, on Behalf of the Staff of the Public Utilities Commission of Ohio.)

Ms. Medine's testimony does not merely seek to correct "significant, inadvertent errors in estimating the energy credits" in Mr. Harter's previous testimony, which was the stated basis for Staff's Expedited Motion. Indeed, making corrections to Mr. Harter's "significant, inadvertent errors" is not even the primary purpose of Ms. Medine's testimony. Instead, Ms. Medine's testimony, in the main, attempts to provide additional support and rationale for Staff witness Harter's approach, in an effort to rehabilitate that testimony. Accordingly, AEP Ohio moves to strike the portions of Ms. Medine's testimony that go beyond correcting Mr. Harter's errors and, instead, seek to provide additional support, rationale, and rehabilitation for Mr. Harter's Energy Credit methodology. Below is a chart that identifies the portions of Ms. Medine's testimony that should be stricken, along with a short explanation of the basis for striking each portion of testimony:

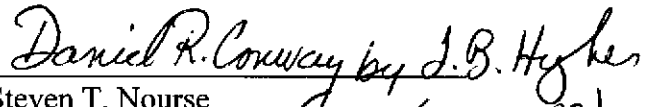
Q & A	Basis for Striking Q and A
12, 13, and 14	Do not correct errors in Mr. Harter's testimony; rather, provide improper additional information describing and supporting Staff's use of AURORAxmp, all of which was, or could have been included, in Mr. Harter's testimony.
18 and 19	Do not correct errors; instead provide further explanation and justification for continuing to use the same "delivered coal price forecasts" used in Mr. Harter's testimony.

- 21 Does not correct errors; rather, provides further explanation and support for continuing to sue the same “delivered natural gas price forecasts.”
- 22 Does not correct errors; instead provides explanation and support for the use of the same emission allowance price forecasts.
- 26-29 Do not correct errors; rather, provide additional explanation, rationale, and support for use of the same heat rate assumptions that Mr. Harter relied upon.
(including the chart on p. 12)
- 30 and 31 Do not correct errors; instead attempt to provide additional support for using the “zonal” version of the AURORAxmp model; in addition, at p. 14, lines 8-9, Ms. Medine cites “advice” from EPIS as the basis for her (and Mr. Harter’s) choice of the zonal model. The reference is hearsay presented for the truth of the matter asserted. EPIS is not subject to cross-examination. That reference should be stricken for the additional reason that it is inadmissible hearsay.
- 34-40 Do not correct errors; rather, this testimony seeks to reinforce and further support Mr. Harter’s position regarding the manner in which he proposes to use the Member Load Ratio (MLR) and the 26% shopping assumption in his approach to determining an Energy Credit.

Staff’s attempt to turn its opportunity to correct Mr. Harter’s “significant, inadvertent errors” into a procedural advantage clearly violates AEP Ohio’s due-process right to a fair hearing. It is beyond dispute that the requirements of procedural due process apply to proceedings before Ohio commissions, just as they do to proceedings in court. “Any hearing involving one’s rights of whatever nature provided by law must conform to the standards of a fair trial and are subject to the protection of the general rules of fair play which govern society and *this is true whether the hearing is before a court of law, an executive or a commission.*” *Smith v. City of Mayfield Heights*, 99 Ohio App. 501, 504, 124 N.E.2d 761 (8th Dist. 1955) (emphasis added).

For the foregoing reasons, AEP Ohio’s motion to strike should be granted.

Respectfully submitted,


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On behalf of Ohio Power Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the forgoing Motion to Strike was served this 8th day of May, 2012 by U.S. Mail and electronic mail, upon the persons listed below.

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