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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

Reg Martin, Court Appointed Receiver for
Icarus Investments, LLC

Complainant,

Case No. 11-1185-EL-CSS

vs.

American Electric Power (Columbus
Southern Power Company),

Respondent.

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Reg Martin, Court Appointed Receiver for
90 North High Partners, LLC,

Complainant,

Case No. 11-883-EL-CSS

vs.

American Electric Power (Columbus
Southern Power Company),

Respondent.

**BRIEF OF COMPLAINANT REG MARTIN, RECEIVER FOR ICARUS
INVESTMENTS, LLC AND 90 NORTH HIGH PARTNERS, LLC**

Reg Martin of Martin Management Services, as the court appointed Receiver for the property owned by Icarus Investments, LLC and 90 N. High Partners, LLC and through the undersigned counsel, hereby submits this Brief pursuant to the orders of the Commission in these cases.

I. FACTS OF THE CASE

Pursuant to a Stipulation filed on July 28, 2011 in these cases, the parties have agreed upon the facts relevant to these proceedings. In summary, and with emphasis on those facts which are critical to the proper determination of these cases, the facts are set forth below.

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Reg Martin ("Martin") of Martin Management Services was appointed receiver in two separate cases where property related to customers of two different AEP entities were involved in foreclosure proceedings. In the first case, Martin was appointed receiver for certain real estate located at 217 Larwell Avenue, Wooster, Ohio in a case known as *The Ohio State Bank v. Icarus Investments, LLC et al.* Case No.: 10-CV-470, Wayne County Court of Common Pleas. Electrical service to this real estate was provided by Ohio Power Company.

Martin was not appointed as receiver for Icarus Investments as an entity – he was appointed receiver for the Larwell property.

In addition with respect to the Larwell case, Icarus Investments was not the Ohio Power Company customer on the account. The account customer at the time that Martin was appointed as receiver was CCM. CCM is NOT in receivership and any rights that AEP may have against CCM remained in full force and effect following the appointment of the receiver. CCM is the customer of record, but it is a management company and not the property owner that Reg Martin is serving as Receiver for in the receivership proceeding. CCM has been the name on the AEP account since April 28, 2010.

Martin was also appointed as receiver for the real estate known as 90 N. High Street, Columbus, Ohio in the case known as *CF Bank v. 90 North High Partners, LLC, et al.*, Case No.: 10 CVH-010849. Columbus Southern Power provided electric service to that property. Again, Martin was not appointed as receiver for the entity but for the real estate which was the subject of the foreclosure action.

In both of the complaint cases before the Commission, AEP is owed for electric use for dates prior to the appointment of a receiver in the respective foreclosures from the active customer account. Thus, CCM, which is not in receivership and does not own the real estate in

receivership, owes AEP on the Larwell property. 90 North High Partners, which is also not in receivership as an entity but which does own the real estate known as 90 N. High Street, over which Martin was appointed as receiver, owes AEP for pre-receivership electrical use. In real estate receiverships, AEP is an unsecured entity as to the real estate in receivership. This does not affect AEP's legal remedies which may be available as to other assets of the entity.

The critical issue in this case relates to the fact that Martin asserts that AEP is an unsecured creditor for receivership purposes.

Even though Martin was appointed as receiver, AEP did not transfer the CCM account into the receiver's name as a new account and the account, both pre and post receivership, remains in the name of CCM Properties care of Reg Martin, Martin Management as court appointed receiver.

Reg Martin of Martin Management Services has been appointed a receiver by the civil courts in numerous foreclosures for a large number of properties. Until recently, the policy of AEP was that it was an unsecured creditor. It would file its proof of claim with the receiver, continue electrical service to the property during the receivership, retain the right to disconnect service for post-receivership defaults, and receive a pro-rata distribution of any proceeds of the receivership as an unsecured creditor.

In the foreclosure of the customer located at 217 Larwell Avenue, the original Order appointing Martin Management receiver was filed on August 3, 2010. That Order forbade public utilities from disconnecting the properties that were the subject of the foreclosure, and also forbade public utilities from charging a deposit. AEP intervened in that foreclosure, moved that the Order be set aside as the Court did not have subject matter jurisdiction to enjoin AEP from

following its Tariff regarding disconnect and deposit issues. The Order was amended to delete the references to regulated utilities on January 31, 2011.

AEP scheduled a disconnection of the property for non-payment and disconnected the property on March 3, 2011. As receiver, Reg Martin filed a Complaint on March 4, stating that as of March 2011, all current electric charges were paid in full through that date, and stated that there was a tenant currently in occupation at that address. Based upon these statements, the attorney examiner issued an Entry the same day the Complaint was filed, ordering that the service to the residence be reconnected and placed in the name of Reg Martin, Receiver, as long as Mr. Martin continued to make full payment of all post-receivership bills.

AEP reconnected the Larwell property and noted in its system that Reg Martin's/Martin Management's name was the entity to deal with on the account and to whom to direct the bill. However, AEP continued to charge CCM for utility services following the appointment of a receiver. The only change on its bills was the mailing address and the addition of "c/o Martin Management."

For the property located at 90 North High Street, Reg Martin of Martin Management was first appointed receiver by the Court on July 30, 2010. There were subsequent amendments to that Order. AEP billed the property a deposit, due to unpaid bills--and late charges on those bills-- from prior to the appointment of the receiver. Reg Martin as receiver disputed having to pay a deposit when the unpaid bills were incurred prior to July 30, 2010. AEP did not put the account into Reg Martin's name as a new customer as Receiver.

Reg Martin has served as a receiver in past situations involving other AEP Ohio customers and received copies of bills to pay, in his role as receiver, without a demand for

payment of pre-receivership debt. AEP changed its practices about one year ago to address this practice.

II. P.U.C.O. PROCEEDINGS

On or about February 16, 2011, the Receiver filed the instant Complaint against Columbus Southern Power Company aka American Electric Power (“AEP”). In the Complaint, Complainant requested that this Commission stay AEP and other utilities from: demanding payment of pre receivership bills; disconnecting service without proper notice; disconnecting for nonpayment of charges and late fees for pre-receivership charges; refusing to establish a new account in the Receiver’s name; and requesting security deposits unless the Receiver is deemed to be a credit risk based on prior payment history.

AEP subsequently filed its Answer to Complaint and a Motion to Dismiss, in which it claimed that it “breached no legal duty owed to Complainant, and Complainant failed to state reasonable grounds upon which relief may be granted.” *Motion to Dismiss* at ¶ 1. Complainant responded and requested that the Commission deny AEP’s Motion to Dismiss. Complainant further requested an order that AEP and other utility providers be stayed from disconnecting for nonpayment of charges and late fees for pre-receivership charges; refusing to establish a new account in the Receivers name; and requesting security deposits unless the Receiver is deemed to be a credit risk based on prior payment history.

The parties filed their Stipulations of Fact of July 28, 2011.

Prior to filing the complaints in this action, the receiver requested that AEP produce any and all rules, regulations, tariffs, statutes or case law that demonstrates, as AEP contends, that AEP has the right to demand payment of pre-receivership obligations relating to the real estate with the imminent danger of disconnection of service for non-payment. If such legal authority

had been produced the receiver may well have refrained from filing these complaints. Unfortunately, for reasons only known to AEP, such authority was not produced – and as set forth in this brief, the receiver has concluded that it was not produced because there is no such authority and therefore the orders of the court prevail.

III. LAW AND ARGUMENT

In the Stipulations the parties identified the following issues that need to be determined:

- 1. Whether Ohio Receivership law preempts the Commission's jurisdiction and orders under Title 49 of the Ohio Revised Code.*
- 2. Whether the Commission's rules and regulations preclude AEP from treating a receiver as a new customer on an account once he is appointed as receiver.*
- 3. Whether a receiver is merely an extension of an existing AEP customer or whether a receiver is a new customer who is entitled to have service transferred into his name upon his appointment and treated as a new customer.*

The issue in these and other cases is whether a receiver is a new customer and should be treated as such by AEP, and whether AEP has the right to disconnect service for pre-receivership amounts due to AEP. It is also important to the determination of these cases to note that the receiver was not appointed as the receiver for the AEP customer – he was appointed as receiver for the real estate. In the Larwell case, the AEP customer was not only NOT involved in the receivership, it was not even the owner of the real estate. CCM owed AEP for pre-receivership service, but CCM remained as a separate and distinct entity following the appointment of the receiver. AEP retained all of its legal rights to pursue CCM for the past due obligations. However, in the Larwell case AEP scheduled a disconnection of the service following the appointment of a receiver for real estate owned by a completely different entity.

AEP essentially contends that, although it is only a general creditor of 90 N. High Partners, it should be entitled to a preference over every other general creditor associated with the Property. It would be completely inequitable to give such a preference to utility companies to the detriment of all other general creditors. In receivership proceedings, “[t]he unsecured or general creditors acquire rights which the court will protect by placing them all on an equal basis as far as possible.” 80 Ohio Jur. 3d Receivers § 152, citing *State Nat. Bank v. Esterly* (1903), 69 Ohio St. 24. Once it is determined that a claimant falls within this category, it is normally clear that such a creditor must share without preference with all other such creditors.” *Id.*, citing *Steinkamp v. Channer*, 1924 WL 2201 (C.P. 1924). Accordingly, it is not as if AEP’s rights are being extinguished by the receivership process; rather, its ability to collect on the debts is simply being delayed until the Property is sold and the secured creditor’s interest is satisfied. At that point, it will be on an equal basis with all other general creditors. The appropriate process for collecting on the pre receivership debt is to file a proof of claim with the Receiver like every other general creditor is required to do. After the sale of the property has been finalized and the bank’s secured interest has been satisfied, AEP will be entitled to share whatever proceeds are left, on a pro rata basis, with the other general creditors.

Furthermore, Receivers are appointed for the benefit of all the creditors of the property subject to the receivership. *Castlebrook, Ltd. v. Dayton Properties Ltd.*, 78 Ohio App.3d 340 (Ohio App. 2 dist. 1992); *Park Natl. Bank v. Cattani*, 187 Ohio App.3d 186 (Ohio App. 12 Dist. 2010). Given the Receiver’s obligation to act for the benefit of all the creditors, he certainly cannot give a preference to AEP by paying pre-receivership debts. By threatening to disconnect electricity to the Property unless the Receiver pays the pre receivership debts, AEP is essentially forcing the Receiver to disregard his legal obligation to act for the benefit of all the creditors.

This is why the Receiver has requested that the Commission exercise its jurisdiction to stay AEP and other utility companies from demanding payment for pre receivership debts and from discontinuing service if such debts are not paid.

In previous filings in this case AEP has argued that its tariffs do not exempt properties in receiverships from the requirement of having to pay for electric service. The Receiver was provided copies of tariffs by the PUCO and his review does not disclose any statutes or rules which supports AEP's position. His research into the terms and provisions of the tariff leads him to conclude that there is no provision which gives AEP authority to demand payment of pre receivership debts and discontinue service to a property in receivership that is current on post-receivership bills. Furthermore, AEP refuses to disclose evidence of its statutory authority to terminate service for pre-receivership obligations (see AEP Answer, paragraph 7). The reason AEP has not provided such evidence is because it does not exist. In fact, its tariff and the regulations governing its service are devoid of any reference whatsoever to properties that are in receivership. Thus, this is an issue that the Commission can exercise its jurisdiction to resolve.

In its Answer, AEP admits that it will not establish a new account for the Receiver “because the Receiver is acting on behalf of the account holder as ordered by the Court, not as a new customer.” However, as an officer of the court, a Receiver is not the agent or representative of either party to the action. *Norris v. Dudley*, 2007-Ohio-6646 (Ohio App. 10 Dist. 2007), citing *Marshall v. Walter A. Caverly Co.* (1907), 18 Ohio Dec. 157, 5 Ohio N.P. (N.S.) 185. Rather, a receiver is an officer of the court and is appointed for the benefit of all the creditors of the property subject to the receivership. *Castlebrook, Ltd. v. Dayton Properties Ltd.*, 78 Ohio App.3d 340 (Ohio App. 2 dist. 1992); *Park Natl. Bank v. Cattani*, 187 Ohio App.3d 186 (Ohio App. 12 Dist. 2010). Thus, because the Receiver is not acting on behalf of Icarus Investments or

90 N. High Partners, as AEP claims, AEP's reasoning for refusing to establish a new account is flawed.

AEP has also asserted that Complainant is attempting to "close the Commission out of its jurisdiction over the provision of utility service." Answer at paragraph 10. This simply is not the case. To the contrary, the Receiver is asking this Commission to exercise its jurisdiction to stay AEP and other utility companies from discontinuing service based on failure to pay pre receivership debts. AEP should be bound by the orders of the court just as all other creditors with claims against the receivership have an obligation to follow. AEP so far in this case has not provided any statutory or regulatory evidence that it is not bound by the orders of the court in a receivership proceeding.

The issues in this case involved pre-receivership debt only. Post-receivership service is an expense of the administration of the receivership, and can be paid from receivership income as an ongoing administrative expense.

AEP previously cited four cases for the proposition that it has "prevailed in every case convincing the trial courts that they do not have jurisdiction to interfere in AEP's tariffs and that receivership law does not supersede AEP's tariff." *Answer/Motion to Dismiss, pages 5-6.* A review of those cases shows that they were all dismissed as being moot, and none of them resulted in a decision that AEP can terminate service for pre-receivership debt. See *State of Ohio ex rel. Columbus Southern Power Company v. Kimberly Cocroft*, Case No. 2010-0933; *State of Ohio ex rel. Columbus Southern Power Company v. Lee Sincliar, Judge*, Case No. 2010-1346; *State of Ohio ex rel. Columbus Southern Power Company v. John A. Bessey*, Case No. 2010-1134; *State of Ohio ex rel. Columbus Southern Power Company v. John A. Bessey*, Case No. 2010-1155.

In the 90 North High receivership, the real estate consists of an office building located near the corner of Long and High Streets (Franklin County Tax Parcel No. 010-011753-00). The office building has approximately 16,000 square feet of useable office space. During the administration of the receivership, the Receiver collected rents from tenants and monthly parking rents. If AEP is permitted to disconnect electrical service to such property for pre-receivership debt, it will place the entire receivership at risk. Tenants are typically entitled to the electrical service pursuant to their leases. In the event of an electrical disconnect, tenants may be entitled to terminate their leases, which will adversely affect the Receiver's efforts to market and sell the property, and will adversely impact the sale price, to the detriment of all creditors including AEP.

Therefore, the answers to the issues in this case are as follows:

1. Whether Ohio Receivership law preempts the Commission's jurisdiction and orders under Title 49 of the Ohio Revised Code.

ANSWER – The Commission has jurisdiction over these matters, but the AEP tariffs contain nothing which supersede Ohio receivership law and the orders of the court which emanate from a receivership.

2. Whether the Commission's rules and regulations preclude AEP from treating a receiver as a new customer on an account once he is appointed as receiver.

ANSWER – The Commission's rules do NOT preclude AEP from treating the receiver as a new customer. In fact, the AEP rules make it clear that since the receiver is a new legal entity, AEP is REQUIRED to treat him as a new customer which require that the account for the real estate is transferred into his name as receiver and continuing service to the affected property.

3. *Whether a receiver is merely an extension of an existing AEP customer or whether a receiver is a new customer who is entitled to have service transferred into his name upon his appointment and treated as a new customer.*

ANSWER – A receiver is an officer of the court and is not the agent or representative of any party to the action. *Norris v. Dudley*, 2007-Ohio-6646 (Ohio App. 10 Dist. 2007), citing *Marshall v. Walter A. Caverly Co.* (1907), 18 Ohio Dec. 157, 5 Ohio N.P. (N.S.) 185. Since the receiver is not the same entity that was involved with the real estate prior to the receivership, under its rules AEP must treat the receiver as a new entity, continue service to the property, file its proof of claim for pre-receivership obligations. If the receiver as a new AEP customer fails to pay for post-receivership electrical service, then AEP has every right to pursue its legal remedies including the disconnection of service. That is not what AEP is seeking here, however. AEP is seeking to have the Commission establish that it has rights which are not granted to it either under receivership law, Commission rules and regulations or AEP rules and regulations.

IV. CONCLUSION

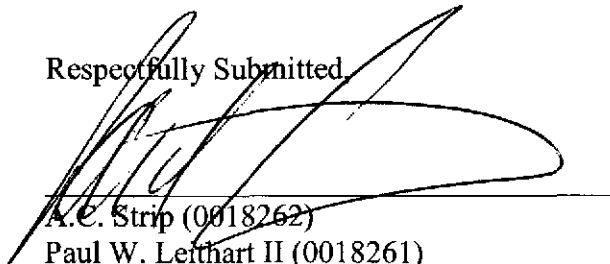
Receiver Reg Martin therefore requests the following Order from the Commission: that AEP be stayed from disconnecting for nonpayment of charges and late fees for pre-receivership charges and that AEP be enjoined from taking such action once a receiver has been appointed; that AEP is ordered to establish a new account in the Receiver's name upon his appointment; and that AEP is enjoined from requesting security deposits unless the Receiver is deemed to be a credit risk based on prior payment history.

Finally, the Commission should consider the ramifications of the position being asserted by AEP, because it is a position that extends far beyond the limited facts of these two cases. In real estate receiverships, AEP is seeking orders from the court which require the secured lender

to pay pre-receivership debt. However, Ohio statutes are devoid of any statutory authority which would require a lender to pay pre-receivership debt of any kind even if it is under the auspices of “preserving and protecting the property” as asserted by AEP in these cases. If there is no secured lender, however, AEP’s position would require a receiver to pay those funds out of pocket – and if there were insufficient funds in the receivership to give AEP a preference, then the entire business, its employees, its landlord and ALL of its creditors would be placed at risk. Business operations could not continue. All secured and unsecured (such as AEP) creditors would be left with whatever was left over following the closing of business operations and the forced liquidation of a non-operational business. This is not in anyone’s best interest, including AEP’s.

As a matter of Ohio receivership law, pursuant to AEP rules, and in the best interests of all parties involved in receivership cases, the orders requested by the receiver should be made by this Commission.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. mail, postage prepaid, this 22nd day of August, 2011 upon:

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