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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV  
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Reg Martin, Court Appointed Receiver for  
Icarus Investments, LLC

PUCO

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,

vs.

Case No. 11-883-EL-CSS

American Electric Power (Columbus  
Southern Power Company),

Respondent.

**RESPONSE OF COMPLAINANT REG MARTIN, RECEIVER FOR ICARUS  
INVESTMENTS, LLC AND 90 NORTH HIGH PARTNERS, LLC, TO  
POST HEARING BRIEF OF AMERICAN ELECTRIC POWER**

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 (the "Receiver"), by and through the undersigned counsel, hereby submits this Response to Respondent American Electric Power's (hereinafter "Respondent" or "AEP") brief filed with the Public Utilities Commission on August 22, 2011.

**I. LAW AND ARGUMENT**

**a. Whether Ohio Receivership Law Preempts the Commission's Jurisdiction  
and Orders Under Title 49 of the Ohio Revised Code.**

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In its brief, AEP points out that in the Complaint, Receiver notes that “all debt incurred post receivership also is considered to be an administrative claim and carries a payment that is senior to even secured parties, after Court approval.” AEP claims that simply because this statement of law is not contained in the statutes governing receivership, that it is “a completely false statement of a receiver’s power,” and that “[t]here is nothing in the Ohio Revised Code that grants a receiver any such authority.” AEP Brief at 7. However, AEP’s suggestion that because the power is not statutory it is not a legitimate power is misguided. In addition to the statutory provisions governing receivership law, the courts have interpreted such provisions so as to further explain a receiver’s authority and the functioning of a receivership.

For instance, in *P.M.D. Corp. v. Hyland-Helstrom Enterprises, Inc.*, 63 Ohio App.3d 681 (Ohio App. 10 Dist. 1990), a receiver was appointed to distribute proceeds of the sale of a liquor license to creditors. The court held that unpaid state sales tax was an administrative expense of receivership, and thus, the state’s claim had priority over a federal tax lien. The court noted that “administrative expenses of a receivership include the costs and expenses necessary to preserve the value of the assets held in the receivership and taxes incurred during the receivership.” *Id.* at 683. Thus, there is a distinction between pre-receivership claims and post-receivership administrative expenses. Receiver has not misstated a receiver’s power even though such power is not explicitly stated in R.C. 2735.04.

Despite AEP’s assertion otherwise, Receiver is not attempting to use state receivership law to “trump the clear authority of the Commission.” See AEP Brief at 7. In fact, Receiver is asking the Commission to exercise its jurisdiction over public utility matters to rule on an issue that is neither specifically discussed in existing receivership law, or in the AEP tariff or regulations governing its service. As noted in Receiver’s brief, his research into the terms and

provisions of the AEP tariff leads him to conclude that there is nothing giving 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 has not presented any authority for doing so.

AEP also notes in its brief that “the appointment of a receiver does not create a safe zone where a utility is guaranteed to receive payment of post-receivership debt barring any opportunity for justifiable disconnections.” AEP Brief at 12. As the case law cited above makes clear, and as Receiver has continuously pointed out, the post-receivership debt incurred by the Receiver for the continued use of electricity at the properties is given a priority as an administrative expense over not only the claims of other general unsecured creditors, but also the claims of secured creditors. Thus, the tools provided by the Commission to ensure payment for utilities are not necessary after a receiver has been appointed, and AEP’s concern is unfounded.

- b. 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; and**
- c. 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.**

AEP argues in its brief that AEP is specifically authorized under the Revised Code to refuse to provide service to a new customer if the old customer is still on the premises receiving the benefit of service and owes an arrearage to AEP. In support of this contention, AEP cites to R.C. 4933.121(B). However, this particular code section applies only to residential customers. As stated in Receiver’s brief, in the 90 North High receivership, the real estate consists of an office building with approximately 16,000 square feet of useable office space, and is not a residential building.

AEP consistently in its brief cites various statutes that are applicable to consumers and residential customers. The fact is that there are no residential receiverships because there is no income derived from a residence. This confusion appears again later in the brief when AEP contends that when AEP “explains” its position to the judges the trial judges almost universally understand the issue and amend their orders. AEP however is citing rules that apply to residential customers and AEP never provides any explanation as to where Ohio statutes provide that AEP or other utilities have priority in Ohio receiverships over other unsecured creditors. The fact is that there is no such authority and AEP is an unsecured creditor without any legal or equitable basis to contend that it has priority.

Additionally, AEP asserts that “[t]reating a receiver as a new customer also does not logically fit with what constitutes a customer and carries with it other duties a receiver would be bound to accept.” AEP Brief at 9. For instance, AEP argues that a customer is liable for the utility bills it incurs and that a receiver is not. While it is true that a receiver is not personally liable for the bills, as stated above, the debts are treated as an administrative expense of the receivership and thus all post-receivership claims are paid as an ongoing administrative expense. In the event of failure to pay post-receivership claims, AEP retains the right to terminate service or embark upon the other collection powers that are provided to it by law. Also, a receiver is no different than a corporate or LLC AEP customer. The owners of a corporation or an LLC are not personally liable to AEP, just as a receiver is not personally liable. However, the entity is liable, and in the case of a receivership AEP can pursue the receivership assets if post-receivership administrative claims are not paid during the pendency of the case.

AEP also attempts to persuade the Commission that a receiver is not a “new customer” by arguing that “[a] receiver does not own the property or the business it is appointed to

manage.” However, this argument flies in the face of the fact that AEP currently has CCM listed as the customer of record for the 217 Larwill Avenue property despite the fact that CCM is not the owner of the property, but rather is a management company. Thus, AEP cannot logically claim that it required that in order to be considered a customer the entity must own the property, when it currently has CCM listed as the customer.

It is important for the Commission to understand exactly what the receiver experienced at the Larwill property. CCM – the AEP customer – continued to collect rent following the appointment of the receiver. CCM also continued to pay utilities. However, a payment to AEP from its customer, was returned for insufficient funds. When the receiver, Reg Martin, discovered this, he immediately obtained a payoff amount and all post-receivership debt to AEP was paid.

AEP also contends that there is a significant problem because the receiver did not pay all post-receivership debt on Larwill. First, for post-receivership debt AEP as an administrative creditor is entitled to disconnect and pursue other collection action. Also, the amount that remains unpaid is \$61.80 – and when the receiver recently attempted to pay this in full AEP refused payment due to a hold on its account. AEP’s contention that the small balance due it from the Larwill property is a significant fact in this case is misplaced and merely an attempt to create a substantial issue where none exists.

This is not the only inconsistency in AEP’s argument. In its brief, AEP argues that “[a] receiver merely steps into the shoes of the entity over which it was appointed receiver,” and therefore “has no right to receive electric service under different terms than the customer it is managing.” AEP Brief at 11. First, it must be clarified that the Receiver was not appointed receiver over any entity; rather, he was appointed as the receiver for the properties involved.

Additionally, on the prior page of its brief, AEP acknowledges that a receiver is a fiduciary of the court, and is defined as “an *indifferent person between the parties* to a cause, appointed by the court to receive and preserve the property or fund in litigation...” 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). 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).

Thus, a receiver cannot be mischaracterized as the entity itself that owns the property in receivership. A receiver’s interests and duties are completely separate from the owner of the *property subject to receivership*. A receiver should be considered a “new customer” for purposes of continuing utility service at a receivership property.

Throughout its brief AEP focuses on bank foreclosures. The fact is that receiverships can involve a variety of situations – partner disputes, creditor filings, judgment enforcement or insolvency of the company. In none of these situations – including bank foreclosures – has AEP shown where in the Ohio Revised Code or the tariffs promulgated thereunder that AEP has priority over other unsecured creditors, nor does it cite to any law or rule which precludes a trial court judge from issuing orders concerning the enforcement of pre-receivership claims by unsecured creditors. AEP is attempting to transfer its credit decisions to a third party, in the case of bank foreclosures, to the bank or the receiver. The only reason this is an issue is that AEP has elected to permit service to continue to a customer who is delinquent prior to the appointment of a receiver. At any time prior to the appointment AEP could have terminated service – but it chose not to.

AEP also confuses the use of bankruptcy law with one of the purposes of a receivership. A business cannot file for bankruptcy protection for one parcel of real estate. It is an all or nothing proposition – either the entire entity files for bankruptcy protection or the company cannot avail itself of that remedy. Conversely in a receivership one of the real estate parcels can be the subject of the receivership. Clearly then there are numerous situations where bankruptcy is not an option but a receivership is a viable remedy for the protection of the creditors who have an interest in the property.

AEP claims that there are extensive write offs in receiverships. Reg Martin represents that AEP has never written off post-receiverhip debt for cases in which he was receiver. Moreover, AEP's brief is full of "facts" which were not stipulated. The allegation that there have been many receivership write offs is not supported by any facts. The claim that receivers made claims to deposits is not in the Stipulation of Facts. There is no evidence that Reg Martin ever made these claims or contributed to these write offs.

Finally, there was an oversight on the court filing in the Icarus case and the report will be amended. With respect to the Larwill property, one half was vacant but the other was rented. As mentioned previously, those rents were at first collected post-receivership by CCM, the AEP customer. When CCM bounced checks to AEP, Reg Martin paid the post-receivership debt to AEP and began to collect rents. AEP has full knowledge of the fact that with the exception of \$61.80, all of its post-receivership debt was paid and could only have been paid if the receiver had an income stream from which to pay them.

## **II. CONCLUSION**

This Commission has not been provided with any statutes, rules or tariffs which provide that AEP or other utility companies have the right to be treated any differently than other

unsecured creditors during a receivership. This Commission has not been provided with any statutes, rules or tariffs which preclude a trial court judge from issuing orders which preclude unsecured creditors from pursuing collection action for pre-receivership debt. This Commission has not been provided with any authority for the proposition that court orders are trumped by Commission rules or tariffs. Commission rules and tariffs are extensions of the authority granted by statute.

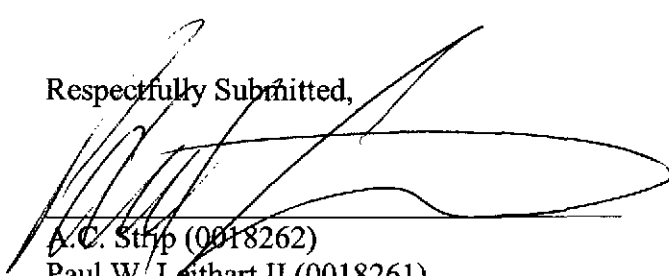
Ohio Revised Code section 2735.04 provides as follows:

*Under the control of the court which appointed him, as provided in section 2735.01 of the Revised Code, a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes.*

Ohio receivership law specifically empowers the court to issue orders which allow a receiver to “take and keep possession of property.” Nothing in this statute precludes a trial judge from issuing orders which permit the receiver to take and keep possession of real estate by staying action by AEP or other utility companies to enforce pre-receivership claims. In fact, the statute in its breadth clearly permits a trial court to do so.

For all the foregoing reasons, and those set forth in Receiver’s Brief, it is requested that the Commission issue the following order: 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 Receivers 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.

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 29th day of August, 2011 upon:

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