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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Power Company for Approval of an) Case No. 11-5333-EL-UNC
Amendment to its Corporate Separation Plan)

**FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM CONTRA
JOINT MOTION FOR WAIVER**

The Joint Motion for Waiver ("Motion") filed by AEP Ohio, Exelon and several non-parties to this proceeding is an attempt to reverse the Attorney Examiners' denial of AEP Ohio's motion to consolidate this proceeding for purposes of hearing with AEP Ohio's ESP proceeding.¹ The Motion brazenly seeks to have the ESP hearing, which was conducted October 4-27, 2011, deemed a sufficient airing of the issues raised in the complaint filed in this docket on September 30, 2011, *despite the fact that the Attorney Examiners specifically denied AEP Ohio's request to include those issues in the ESP hearing:*

At this point in time we're going to deny the motion to consolidate and the reason for that is we feel there needs to be additional review with that case before we actually address that. So, however, at this time we will take administrative notice just of the filing in Case No. 11-5333-EL-UNC, and in that docket we will establish a schedule and provide details on that accordingly.

MR. NOURSE: Thank you, your Honor.²

AEP Ohio and the other moving non-parties lack a sound basis in law or fact for their Motion, and the Commission should deny it.

¹ See Joint Motion and Memorandum in Support to Consolidate and Request for Expedited Treatment filed Sept. 30, 2011. See also FirstEnergy Solutions Corp.'s Memorandum in Opposition to Joint Movant's Motion to Consolidate filed October 3, 2011.

² Transcript of Proceedings ("Tr.") in Case Nos. 11-346-EL-SSO *et al.*, Volume V, p. 640.

FirstEnergy Solutions Corp. (“FES”) fully supports AEP Ohio’s much-delayed move to full corporate separation and believes that the Commission should require AEP Ohio to complete corporate separation consistent with and pursuant to the mandates of R.C. § 4928.17 and O.A.C. 4901:1-37. The devil, of course, is in the details, but AEP Ohio is insistent that the Commission and all interested parties should be satisfied with a hastily-prepared general description and no hearing. Remarkably, the ESP hearing did not aid in any deeper understanding of the details of AEP Ohio’s future corporate separation plans for at least two reasons: (1) many of the details have yet to be developed; and (2) AEP Ohio insisted that some of the details were outside the scope of the ESP proceeding.

FES examined witnesses in the ESP proceeding regarding the meaning of paragraph IV.1.q. of the Partial Stipulation and Recommendation filed in that proceeding, which provides that the Commission’s approval of the Partial Stipulation will “serve as the Commission’s approval of full legal corporate separation (as contemplated by R.C. 4928.17(A) and also known as structural corporate separation) such that the transmission and distribution assets of AEP Ohio will be held by the electric distribution company while any GRR assets will remain with the electric distribution company.” Importantly, the Partial Stipulation makes clear that the post-separation EDU will hold T&D assets plus generation assets approved under R.C. § 4928.143(B)(2)(c), but provides absolutely no detail regarding the transfer or sale of AEP Ohio’s generation assets. The Partial Stipulation does expressly state, however, that corporate separation (and the transfer or sale of those generation assets) will not be implemented until “after other necessary approvals are obtained,” which means Federal Energy Regulatory Commission (“FERC”) approval. Thus, the Commission’s approval of corporate separation as

provided in paragraph IV.1.q. of the Partial Stipulation is only one of several steps required to complete corporate separation.

FES and AEP Ohio do not agree on the Commission's appropriate level of involvement in those steps. AEP Ohio's position is that the Commission's approval of the Partial Stipulation will constitute approval of all aspects of corporate separation, including transfer of all generation assets to a new AEP affiliate at net book value, with only the amendments to Ohio Power's corporate separation plan filed in this docket remaining to be reviewed and approved. In AEP Ohio's view, all details regarding asset transfers will be decided in the FERC process that may be commenced in early 2012. In contrast, FES believes that the Commission should take a more active role in reviewing and approving the transfer and/or sale of AEP Ohio's generation assets. In FES's view, the Commission should approve corporate separation under R.C. § 4928.17(A) with or without the Partial Stipulation and should then review in detail the circumstances under which the generation assets will be transferred and/or sold to ensure that AEP Ohio's ratepayers and Ohio's wholesale and retail markets are not harmed by AEP Ohio's plans. That detailed review could be conducted in this docket, with the hearing required by O.A.C. 4901:1-37-09(D), so that the Commission may determine whether all asset transfers and/or sales are just, reasonable and in the public interest.

The ESP hearing has served only to outline what we do not know about AEP Ohio's plans for corporate separation. We learned that AEP GenCo is simply a placeholder name for an entity that does not yet exist, but will be incorporated in the future in an unknown state.³ We learned that AEP Ohio envisions transferring its generation assets at book value, although we

³ Tr. Vol. V, p. 696-97.

should not “get hung up too much on net book value.”⁴ Any transfers likely will occur first to the future, unnamed affiliate, with later transfers to other affiliates or sales to third parties, although it also could happen that Ohio Power transfers assets directly to other AEP affiliates such as Kentucky Power or Appalachian Power.⁵ Several of the assets to be transferred are co-owned by other utilities and will continue to be co-owned by AEP GenCo and those entities following the initial transfers, but we don’t know how capital investment decisions will be made for those assets in the future (and, thus, don’t know what steps AEP will take to prevent cross-subsidization between competitive and non-competitive entities).⁶ We also learned that AEP Ohio currently is developing market value estimates for its generating units but has no intention of providing those estimates to the Commission or any interested parties.⁷ Lastly, we learned that AEP Ohio’s goal and expectation is to implement corporate separation and pool termination together,⁸ which means that the anticipated asset transfers and/or sales will not occur until 2013 at the earliest.

Thus, not only have serious questions been raised concerning AEP Ohio’s plans, but the Commission has ample time to approve corporate separation and then seriously review the details of how corporate separation will be implemented. AEP Ohio is pushing the Commission to approve corporate separation – including approval of the amended corporate separation plan filed in this docket – by the end of this year and then yield any further review of implementation details to the FERC. Yet, while the Commission should order AEP Ohio to complete corporate separation as quickly as possible, there is no justification for relinquishing jurisdiction over the

⁴ Tr. Vol. V, pp. 697, 703.

⁵ Tr. Vol. V, pp. 697-99.

⁶ Tr. Vol. V, pp. 699-702.

⁷ Tr. Vol. V, pp. 705-07.

⁸ Tr. Vol. V, p. 696.

required asset transfers and/or sales that must occur in future years in order to implement corporate separation. The Commission has a statutory mandate to ensure that corporate separation “satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power,” and the Commission cannot satisfy that mandate by yielding to FERC any and all review of the asset transfers and/or sales.

Incredibly, AEP Ohio objected to FES cross-examining one of AEP Ohio’s witnesses during the ESP hearing regarding the potential market distorting effect of AEP Ohio’s transfer of generation assets to a competitive affiliate, which could then sell those assets for fair market value to third parties. When FES’s counsel asked AEP Ohio witness Nelson to describe the terms of sales to third parties, AEP Ohio’s counsel objected that this line of questioning was irrelevant.⁹ Indeed, AEP Ohio’s counsel suggested that this line of questioning would be irrelevant even if pursued in this 11-5333 docket, since AEP Ohio is requesting Commission approval of only the transfer to AEP GenCo and does not want the Commission giving any thought to what might happen to those assets after that transfer.¹⁰ Thus, in direct contravention of the representations made in the Motion, non-stipulating parties participating in the ESP hearing were not given a full opportunity to question AEP Ohio witness Nelson regarding the asset transfers.

This 11-5333 docket was not consolidated with the ESP proceedings for purposes of the ESP hearing, and testimony regarding corporate separation in the ESP hearing was limited to AEP Ohio’s general outline of its corporate separation plans and repeated disavowal of any detailed knowledge of how corporate separation will be implemented. Thus, as stated in FES’s

⁹ Tr. Vol. V, p. 704.

¹⁰ *Id.* The fact is that AEP GenCo’s sale of assets to third parties is a possibility at the highest sale price AEP GenCo can negotiate. Deposition of Philip Nelson, taken October 7, 2011, at p. 75 (filed October 11, 2011, in Case Nos. 11-346-EL-SSO *et al.*).

Memorandum in Opposition to Joint Movant's Motion to Consolidate filed on October 3, 2011, this 11-5333 docket should be utilized to review the details of the asset transfer and should include a reasonable period for discovery, mandate AEP Ohio's development of a fair market value for each asset and filing of that data as required by O.A.C. 4901:1-37-09(C), and provide for a hearing as required by O.A.C. 4901:1-37-09(D). Because the Motion seeks to avoid that review, it should be denied.

WHEREFORE, FES respectfully requests that the Commission deny the Joint Motion for Waiver.

Respectfully submitted,

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per consent
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Memorandum Contra Motion Joint Motion for Waiver* thereof was served this 2nd day of November, 2011, via e-mail upon the parties below.

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