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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)	

**APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT
OF INDUSTRIAL ENERGY USERS-OHIO**

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**APPLICATION FOR REHEARING OF
INDUSTRIAL ENERGY USERS-OHIO**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("OAC"), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Finding and Order issued by the Public Utilities Commission of Ohio ("Commission") on January 23, 2012. The Commission's Finding and Order is unlawful and unreasonable for the following reasons:

1. **The Commission's January 23, 2012 Finding and Order is unlawful and unreasonable because the Commission approved an application for an amendment of a corporate separation plan with a condition that permits Ohio Power Company ("OP") to retain certain contractual obligations in violation of the requirements of Section 4928.17, Revised Code, and the Commission's rules. Specifically, the Commission approved an amended corporate separation plan that does not provide that the electric utility is fully separated and in compliance with Commission rules requiring financial separation.**
2. **The Commission's January 23, 2012 Finding and Order is unlawful and unreasonable because the Commission failed to comply with the requirements of Section 4903.09, Revised Code, by failing to conduct an evidentiary hearing or make findings of fact and conclusions of law that would support a condition in OP's corporate separation plan that permits OP to retain certain contractual obligations associated with assets that OP will transfer to an affiliate.**

As discussed in greater detail in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing, find that a condition that permits OP to retain certain contractual obligations is illegal, and vacate its decision authorizing the illegal condition. Alternatively, the Commission should grant rehearing, vacate its Finding and Order approving the condition that permits OP to retain certain contractual obligations, and conduct hearings that are necessary and legally required to address the amendment of the corporate separation plan that OP requested.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Section 4928.17, Revised Code, prohibits an electric utility¹ from engaging in both competitive and noncompetitive retail electric service unless the electric utility adopts and implements a corporate separation plan approved by the Commission. The corporate separation plan must provide that the provision of competitive retail electric service will be through a fully separated affiliate of the electric utility. Further, the plan must prevent unfair competitive advantage and abuse of market power and be sufficient to ensure that the electric utility will not extend any undue preference or advantage to the affiliate engaged in a competitive service.² These statutory requirements reflect the sound public policy goal that requires financial “ring fencing” of the electric utility so that the competitive affiliate’s business and financial risks are not borne by the customers of the regulated utility business.³

OP⁴ is an electric utility subject to the requirements of Section 4928.17, Revised Code, that is seeking to transfer generation-related assets to an affiliate. AEP

¹ “Electric utility” is defined to mean “an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the business of supplying both a noncompetitive and a competitive retail electric service in this state.” Section 4928.01(A)(11), Revised Code.

² Section 4928.17(A), Revised Code.

³ See discussion below.

⁴ OP filed the Application in this case on September 30, 2011, prior to the completion of its merger with Columbus Southern Power Company. In the Application, OP indicated that OP would be the surviving entity upon the completion of the merger. Ohio Power Company’s Application for Approval of an Amendment to its Corporate Separation Plan at 1 n.2 (Sept. 30, 2011) (“Application”). American Electric Power Service Corporation (“AEPSC”) subsequently reported that the merger was consummated on

Generation Resources, Inc., ("AEP GenCo") is a new affiliate into which the generation resources of OP will be transferred. Despite the legislative direction that the affiliate be fully separated and Commission rules that require financial separation, the Commission, in the Finding and Order approving OP's amended corporate separation plan, included a condition that will permit OP to retain

contractual obligations arising before [the approval of the application] ... to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for OP if OP were to transfer such obligations to its subsidiary or affiliate and to the extent that AEP Generation be made contractually responsible to OP for all costs resulting from such generation related liabilities.⁵

In approving this condition to the amended corporate separation plan, the Commission violated the requirement of Section 4928.17, Revised Code, that requires OP and its generation affiliate, AEP GenCo, to be "fully separated" and Commission rules governing a corporate separation plan that require full financial separation.

In addition to violating the legal and financial "ring fencing" that is required by Ohio law and sound public policy, the Commission's decision also violated statutory requirements for a hearing on the contested application and further requirements that the Commission provide findings of fact and conclusions of law based on a hearing record. Had the Commission complied with these procedural requirements, the Commission would have provided the parties and itself with an opportunity to determine

December 31, 2011. *Ohio Power Company, et al.*, Case No. EC12-71, Application for Authorization to Transfer Jurisdictional Assets under Section 203 of the Federal Power Act at 6 (Feb. 10, 2012) ("FERC Application"). The FERC Application may be viewed on the AEP website: <http://www.aep.com/investors/currentRegulatoryactivity/regulatory/ferc.aspx>.

⁵ Finding and Order at 19 (Jan. 23, 2012).

the nature and scope of the contractual obligations to which OP's customers are now exposed.

Because there is no legal, policy, or factual basis for the condition the Commission added through its Finding and Order, the Commission should grant rehearing and find that OP may not be responsible for contractual liabilities associated with the generation assets transferred to AEP GenCo or alternatively vacate the Finding and Order and conduct hearings to address the terms under which OP will be financially separated from AEP GenCo.

II. BACKGROUND

On September 7, 2011, OP and several other parties ("Signatory Parties") filed a Stipulation and Recommendation ("Stipulation") that proposed the settlement of several contested cases before the Commission.⁶ In addition to recommending approval of a new electric security plan, the Stipulation also provided that approval of the Stipulation would "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 utility while any [Generation Resource Rider] assets will remain with the electric distribution utility."⁷ The Stipulation further provided that generation-related

⁶ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Ohio Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Stipulation and Recommendation (Sept. 7, 2011) ("ESP Stipulation Case").

⁷ Stipulation at 11 (Sept. 7, 2011).

costs associated with implementing corporate separation would not be recoverable from customers.⁸

On September 30, 2011, OP filed an Application for Approval of an Amendment to its Corporate Separation Plan ("Application") and requested approval to transfer its generating assets to an unregulated affiliate, AEP GenCo. As part of the Application, OP provided a red-lined version of the proposed corporate separation plan as Attachment B, and the proposed plan made several representations regarding the financial separation of OP and its affiliates. Among those representations, the proposed plan provided that "[a]ll indebtedness incurred by affiliates is currently without recourse to the Company" and "any future indebtedness incurred by an affiliate also [will] be without recourse to the Company [OP]."⁹ Additionally, the proposed plan stated that OP "currently is not under any agreement with terms under which it is obligated to commit funds to maintain the financial viability of an affiliate. It is the Company's intent not to enter into any agreement with terms under which it would be obligated to commit funds to maintain the financial viability of an affiliate."¹⁰ The proposed plan further represented that OP

currently does not have any investments in an affiliate in which it is liable for the debts and/or liabilities of an affiliate incurred as a result of actions or omissions of an affiliate. It is [OP's] intent not to make any future investments in an affiliate under any circumstances in which it would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.¹¹

⁸ *Id.*

⁹ Application, Attachment B at 7.

¹⁰ *Id.*, Attachment B at 8.

¹¹ *Id.*

Finally, the proposed plan stated that OP had not assumed any obligation or liability as a guarantor or surety and it had no intention to assume any obligation as a guarantor, endorser, surety, or otherwise with respect to any security of the affiliate.¹²

Also on September 30, 2011, OP and several other parties filed a joint motion to consolidate the Application with the proceedings addressing the Stipulation.¹³ The Commission denied the motion to consolidate because it needed additional time to review the Application.¹⁴ The Commission then requested that interested parties file comments regarding the Application.¹⁵ In response to the Commission's solicitation for comments, IEU-Ohio, FirstEnergy Solutions ("FES"), the Office of the Ohio Consumers' Counsel ("OCC"), Duke Energy Commercial Asset Management ("DECAM"), and Commission Staff ("Staff") filed comments, noting material problems with the Application. IEU-Ohio, in particular, raised concerns about OP's treatment of existing liabilities. Among other things, IEU-Ohio noted that the Application did not discuss whether AEP-Ohio has any agreements with lenders that will require modification because they cannot be assigned to AEP GenCo without lender permission.¹⁶ Further, IEU-Ohio and others requested that the Application be set for an evidentiary hearing.¹⁷

¹² *Id.*, Attachment B at 9.

¹³ Joint Motion to Consolidate and Request for Expedited Treatment (Sept. 30, 2011).

¹⁴ Finding and Order at 5 (Jan. 23, 2012) ("Finding and Order").

¹⁵ Entry at 3 (Dec. 2, 2011).

¹⁶ Initial Comments of Industrial Energy Users-Ohio at 8-9 (Dec. 15, 2011).

¹⁷ Various requests for a hearing are noted in the Commission's Finding and Order. Finding and Order at 19 (IEU-Ohio), 13 (OCC), and 14 (FES).

In response to IEU-Ohio's Initial Comments, OP used its Reply Comments to "amend" its Application. Although OP initially indicated that AEP GenCo would assume all liabilities associated with the assets transferred to it,¹⁸ OP then asked that certain contractual obligations arising before the signing of the Stipulation be permitted to remain with OP if the transfer or assumption of the obligations was prohibited by the terms of the contract or would result in substantially increased liabilities to OP if the obligations were transferred to the affiliate.¹⁹ The only support OP offered for this "amendment" was a reference to Commission approval of similar language for Duke Energy Ohio ("Duke") and FirstEnergy Corporation ("FE").²⁰

Over the objections of several intervenors and upon a determination that it was not necessary to conduct an evidentiary hearing, the Commission approved the Application subject to certain conditions on January 23, 2012.²¹ Although the Commission determined that OP cannot provide loan funds and cannot guarantee or assume any liability of AEP GenCo, that prohibition was not a complete bar to OP

¹⁸ Reply Comments of Ohio Power Company at 16 (Dec. 29, 2011) ("OP Reply Comments"). The FERC Application makes a similar representation that "AEP Generation Resources will also assume at closing the liabilities associated with transferred assets." FERC Application at 15. The assumption of liabilities would extend to those associated with retired plant. *Id.* at 15 n.21.

¹⁹ Reply Comments at 16.

²⁰ *Id.* On January 13, 2012, OCC moved to strike the portion of reply comments in which OP "amended" the Application through its reliance on the Duke stipulation. Motion to Strike Portions of Comments By Exelon Generation Company, LLC and Ohio Power Company by the Office of the Ohio Consumers' Counsel at 4 (Jan. 13, 2012). The Commission, however, did not grant the motion to strike this portion of OP's brief. The Commission did not explain the basis for rejecting this portion of OCC's motion to strike, stating only that the Commission may choose to consider stipulations in imposing provisions similar to those approved in other cases. Finding and Order at 15-16 (Jan. 23, 2012). Had the section of OP's Reply Brief been stricken because it violated the terms of the Duke stipulation, there would have been nothing in the record in this case to support OP's "amendment." OP's misuse of stipulations is part of a broader pattern. For a more recent demonstration of OP's willingness to violate the terms of a stipulation preventing its use as precedent, see ESP Stipulation Case, Ohio Power Company's Application for Rehearing at 32-35 (Feb. 10, 2012).

²¹ Finding and Order (Jan. 23, 2012).

retaining liabilities that would otherwise have to be transferred to AEP GenCo.

Additionally, the Commission approved the Application with an additional condition that

contractual obligations arising before the date of this finding and order shall be permitted to remain with OP, without prior Commission approval, for the remaining period of the contract, but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for OP if OP were to transfer such obligations to its subsidiary or affiliate and to the extent that [AEP GenCo] be made contractually responsible to OP for all costs resulting from such generation related liabilities.²²

The Commission also ordered OP to “facilitate verification” of the obligations that would remain with OP as a result of the condition by identifying such obligations by December 31, 2012.²³ Until the end of 2012, therefore, the Commission has not required OP to demonstrate the nature and scope of the obligations that will remain with OP as a result of the Commission’s addition of the condition.

In summary, OP sought through its Reply Comments an “amendment” to its Application which would permit it to retain certain contractual obligations that otherwise would be required to be transferred to AEP GenCo. Without a hearing and without any factual findings to support the “amendment,” the Commission approved a condition that adopted the “amendment,” and did so without an understanding of the nature and scope of the contractual obligations that would remain with OP. Based on these circumstances, the Commission has failed to carry out the legal requirements governing OP’s Application, as discussed below.

²² *Id.* at 19.

²³ *Id.*

III. ARGUMENT

A. Legal Requirements

Before an electric utility may engage directly or through an affiliate in competitive retail electric service, the Commission must approve a corporate separation plan that complies with three requirements set out in Section 4928.17, Revised Code. First,

[t]he plan [must provide], at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.²⁴

Second, “[t]he plan [must satisfy] the public interest in preventing unfair competitive advantage and preventing abuse of market power.”²⁵ Third, “[t]he plan [must be] sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service ... and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service.”²⁶

The Commission’s rules further detail the requirements for financial separation that must be included in the corporate separation plan. Unless the Commission determines otherwise, the plan must provide that “any indebtedness incurred by an

²⁴ Section 4928.17(A)(1), Revised Code.

²⁵ Section 4928.17(A)(2), Revised Code.

²⁶ Section 4928.17(A)(3), Revised Code.

affiliate shall be without recourse to the electric utility,” “[a]n electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate,” and “[a]n electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.”²⁷

When presented with a corporate separation plan, “[t]he Commission shall issue an order approving or modifying and approving a corporate separation plan under [Section 4928.17, Revised Code] ... only upon findings that the plan reasonably complies with the requirements [outlined above] and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.”²⁸

While there are several requirements that the Commission must find that the corporate separation plan satisfies before the Commission can approve the plan, the requirements that mandate legal and financial separation are central to furthering the policy goals set out in Section 4928.17, Revised Code, to protect customers²⁹ and prevent market abuse.³⁰ Often referred to as “ring fencing,” the requirements prohibit the electric utility from assuming the liabilities of the competitive affiliate, do not permit it

²⁷ Rule 4901:1-37-04(C), OAC.

²⁸ Section 4928.17(C), Revised Code.

²⁹ See, e.g., Section 4928.02(A) & (B), Revised Code (it is the state energy policy to ensure reasonably priced retail electric service and ensure the availability of unbundled and comparable retail electric service that provides consumers with options).

³⁰ See, e.g., Section 4928.17(A)(2), Revised Code (corporate separation plan prevents abuse of market power) and, Section 4928.02(I), Revised Code (state policy to ensure retail electric consumers protection against market power).

to encumber assets for the competitive entity, and require it to maintain separate books and separate debt³¹ so as to insulate utility customers from the business and financial risk of the competitive affiliate as well as prevent other market abuses through the exercise of market power.³²

B. The Commission's Decision Violates the Statutory Requirements for Ring Fencing

As discussed above, the legal structure governing approval of the amended corporate separation plan presented by OP requires a finding that the plan provides for full separation. The Commission, however, added a condition to the corporate separation plan that permits OP to retain contractual obligations that should be transferred to AEP GenCo. The Commission's added condition effectively reverses an elaborate set of stock transfers to "isolate" OP from AEP GenCo³³ by permitting OP to retain certain contractual obligations that should be transferred to AEP GenCo. Even though the Commission's condition also provides that OP and AEP GenCo must enter into a side agreement requiring AEP GenCo to cover any costs that OP incurs because it agrees to retain certain contractual obligations, OP will remain at risk for these contractual obligations regardless of the terms of the condition requiring the side agreement to cover costs. Because OP may retain contractual obligations, the

³¹ Brent E. Gale, Regulated Utility M&A After PUHCA Repeal (Feb. 14, 2006), viewed at http://www.narucmeetings.org/Presentations/elec_puhca_gale_w06.pdf (Feb. 18, 2012).

³² Timothy Devlin, *et al.*, Ring Fencing Mechanisms for Insulating a Utility in a Holding Company System, viewed at http://leg.mt.gov/content/committees/interim/2003_2004/energy_telecom/staff_reports/ring_fencing.pdf (Feb. 18, 2012).

³³ Finding and Order at 3.

Commission could not properly conclude that OP and AEP GenCo are “fully separated” as required by Section 4928.17, Revised Code.³⁴

The Commission's decision also allows OP to violate Commission rules requiring that OP be insulated from the financial liabilities of AEP GenCo. Under Rule 4901:1-37-04(C), OAC, AEP GenCo cannot look to the creditworthiness of OP, and OP cannot make any investment that would result in OP being liable for the debts or liabilities of AEP GenCo. By permitting OP to retain contractual obligations, however, the Commission has authorized OP to retain obligations that should be assumed by AEP GenCo. While the Commission may decide that it will excuse these requirements, there is no record in this case that supports suspension of the Commission's requirement to maintain financial separation, as discussed below.

Thus, the Commission's condition that permits OP to retain certain contractual obligations violates the requirement that the affiliate be fully separate contained in Section 4929.17, Revised Code, and the Commission's rules requiring financial separation. As a result, the Commission should grant this Application for Rehearing, find that the condition permitting OP to retain certain contractual obligations is illegal, and vacate its decision authorizing the illegal condition.

C. The Commission Failed to Comply with the Requirements of Section 4903.09, Revised Code

Additionally, the Commission should grant rehearing because it did not comply with the procedural requirements governing a contested proceeding. Under Section 4903.09, Revised Code, the Commission must develop a “complete record” and “file,

³⁴ Notably, the Commission does not make any finding that this requirement is satisfied by the corporate restructuring outlined in the Application. See Finding and Order at 20-22.

with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact” in contested cases.³⁵ If the Commission fails to comply with this requirement, the Commission’s decision is unlawful.³⁶ Because the Commission failed to conduct an evidentiary hearing and make findings of fact and conclusions of law based on a record from that hearing that would support the adoption of the condition permitting OP to retain contractual obligations that should be transferred to AEP GenCo, the Finding and Order was illegal and unreasonable.

As noted above, several of the intervenors requested that the Commission deny the Application because it was incomplete and asked that the Commission set the Application for a hearing to address the factual deficiencies evident in it.³⁷ Despite the fact that the Application was contested, the Commission refused to set the Application for hearing, concluding that the Application, OP’s supplemental statement, and OP’s Reply Comments “provide the necessary information” to support the transfer of assets.³⁸ Similarly, the Commission relied on only OP’s untested Reply Comments to address the concern raised by IEU-Ohio that the liabilities related to the generation-related assets would be properly assumed by AEP GenCo.³⁹ OP’s Reply Comments responding to the concern raised by IEU-Ohio, however, contained an inherent contradiction. Initially, OP

³⁵ Section 4903.09, Revised Code.

³⁶ *Tongren v. Pub. Util. Comm’n of Ohio*, 85 Ohio St. 3d 87 (1999).

³⁷ Various requests for a hearing are noted in the Commission’s Finding and Order. Finding and Order at 19 (IEU-Ohio), 13 (OCC), and 14 (FES).

³⁸ Finding and Order at 20.

³⁹ *Id.* at 21.

stated that AEP GenCo would assume all liabilities related to the assets to be transferred to it. It then requested a condition that would permit it to retain certain contractual obligations.⁴⁰ Despite the apparent contradiction between OP's representations concerning the treatment of existing contractual obligations, the Commission did not explain why it granted the condition, offering only the conclusion that "our conditions above resolve the intervenors' concerns with respect to the transfer of liabilities."⁴¹

The Commission's response, however, merely highlights that OP has not explained in its filings the obligations that may not be assumed by AEP GenCo. The problem IEU-Ohio raised was that the Application failed to detail whether there were liabilities that would remain with OP; OP's response was to request that it be permitted to retain certain contractual obligations without any explanation of the nature and scope of those obligations. Until OP provides the Commission the information it ordered "to facilitate verification" of the obligations that remain with OP by December 31, 2012, this information will not be available. If the Commission had conducted hearings, the parties and the Staff would have had an opportunity to determine what obligations OP was seeking to retain and whether retaining those obligations was consistent with the requirements of Section 4928.17, Revised Code, and the Commission's rules. The Commission, moreover, effectively waived its rules regarding financial separation⁴² without information that was necessary to determine if that waiver was appropriate. Thus, when the Commission refused to comply with the requirements of Section

⁴⁰ OP Reply Comments at 16.

⁴¹ Finding and Order at 21.

⁴² Rule 4901:1-37-04(C), OAC.

4903.09, Revised Code, and approved this Application without an evidentiary record, it erred. Because the Commission failed to set the Application for hearing or support its decision with findings of fact, the Commission should grant rehearing, vacate its authorization of the condition, and set a procedural schedule for hearings to determine if such a condition may be authorized under Section 4928.17, Revised Code, and the Commission's rules.

IV. CONCLUSION

For the reasons discussed above, the Commission should grant rehearing to remove the condition that permits OP to retain contractual obligations that should be assumed by AEP GenCo because the condition violates the terms of Section 4928.17, Revised Code, requiring that the corporate separation plan provide for full separation and the Commission's rules regarding financial separation. If the Commission does not remove the illegal condition, the Commission should grant rehearing and conduct an evidentiary hearing to determine whether such a condition permitting OP to retain those contractual obligations is legally permitted and in the public interest.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Application for Rehearing and Memorandum in Support of Industrial Energy Users-Ohio's* was served upon the following parties of record this 22nd day of February 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


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