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PUCO

September 24, 2001

VIA FEDERAL EXPRESS

Public Utilities Commission of Ohio
Docketing Department, 10th Floor
180 East Broad Street
Columbus, Ohio 43215

Re: *In the Matter of the Petition of Citizen Power, Inc. et al.*,
Case No. 00-2469-EL-UNC

Dear Clerk:

Enclosed for filing in the referenced proceeding are an original and fifteen copies each of:
(i) the Application of Citizen Power, Inc., *et al.* for Rehearing of September 5, 2001 Order; and
(ii) the Memorandum in Support of Application of Citizen Power, Inc., *et al.* for Rehearing of September 5, 2001 Order. Kindly date stamp the two additional enclosed copies and return them to the undersigned in the enclosed self-addressed envelope.

If there are any problems with this filing, please contact the undersigned at the number above. Thank you for your attention to this matter.

Very truly yours,

MORRISON & HECKER L.L.P.



John E. McCaffrey

Enclosures

cc: Parties of record (w/ enclosure)

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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of)
Citizen Power, Inc., *et al.* Requesting)
the Commission Assert Jurisdiction)
over the Proposed Merger of)
FirstEnergy Corp. and GPU, Inc.)

PUCO
Case No. 00-2469-EL-UNC

**APPLICATION OF CITIZEN POWER, INC., ET AL.
FOR REHEARING OF SEPTEMBER 5, 2001 ORDER**

Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35, Citizen Power, Inc., David Hughes, Kelli O'Neill, Ron O'Connell and Marguerite Schossler (collectively "Citizen Power") hereby file their application for rehearing of the September 5, 2001 Order ("September 5 Order") entered by the Public Utilities Commission of Ohio ("Commission") in the captioned proceeding.¹

In its September 5 Order, the Commission claims it has discretion whether to assert jurisdiction over FirstEnergy Corp.'s ("FE") acquisition of GPU, Inc. ("GPU"). *See* September 5 Order at 2. The Commission then declines to assert that jurisdiction, explaining only that Ohio's concerns were adequately addressed by its participation in the Federal Energy Regulatory Commission proceeding addressing the same transaction.² *Id.*

Neither argument is supportable. Even if the Commission has discretion, its reason for declining to assert jurisdiction is without merit. But the Commission has no discretion. While it may have a choice as to how to use its jurisdiction on a case by case basis, it either has the

¹ *In the Matter of the Petition of Citizen Power, Inc., et al., Requesting the Commission Assert Jurisdiction over the Proposed Merger of FirstEnergy Corp. and GPU, Inc.*, Case No. 00-2469-EL-UNC, entered September 5, 2001. Citizen Power filed a complaint that FE had failed to comply with Ohio law by entering into an agreement to acquire GPU without first seeking Commission approval. The Commission subsequently decided to treat the complaint as a petition about the Commission's jurisdiction.

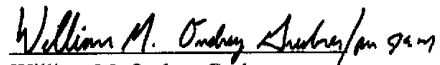
² *Ohio Edison Company, et al.*, 94 FERC ¶ 61,291 (2001).

jurisdiction to begin with or it doesn't. In this case the Commission must assert jurisdiction over FE's acquisition of GPU under Sections 4905.05, 4905.06, 4905.40, and 4905.42 of the Revised Code. By declining to assert that jurisdiction, the effects of the acquisition on Ohio and Ohio customers remain unexamined, and the public interest unprotected.

WHEREFORE, For the reasons set forth herein, as explained more fully in the accompanying memorandum, Citizen Power requests rehearing of the Commission's September 5 Order.

Respectfully submitted,

CITIZEN POWER, INC.



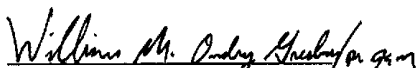
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I hereby certify that a copy of the foregoing document was sent via regular U.S. mail to
the following this 24th day of September, 2001.


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In the Matter of the Petition of)
Citizen Power, Inc., *et al.* Requesting)
the Commission Assert Jurisdiction)
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FirstEnergy Corp. and GPU, Inc.)

Case No. 00-2469-EL-UNC

MEMORANDUM IN SUPPORT OF
APPLICATION OF CITIZEN POWER, INC., *ET AL.*
FOR REHEARING OF SEPTEMBER 5, 2001 ORDER

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**MEMORANDUM IN SUPPORT OF
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Pursuant to Ohio Rev. Code § 4903.10 and Ohio Admin. Code § 4901-1-35, Citizen Power, Inc., David Hughes, Kelli O'Neill, Ron O'Connell and Marguerite Schossler (collectively "Citizen Power") hereby file their memorandum in support of their application for rehearing of the September 5, 2001 Order ("September 5 Order") entered by the Public Utilities Commission of Ohio ("Commission") in the captioned proceeding.¹ In support of its application, Citizen Power states as follows:

I. INTRODUCTION

In its September 5 Order, the Commission claims it has discretion whether to assert jurisdiction over FirstEnergy Corp.'s ("FE") acquisition of GPU, Inc. ("GPU"):

We further note that with the passage of SB 3, the legislature has made it clear that the Commission need not assert jurisdiction and review and approve mergers of electric utilities where the acquisition of control of a domestic electric utility or of a holding company controlling a domestic electric utility is not involved.

¹ *In the Matter of the Petition of Citizen Power, Inc., et al., Requesting the Commission Assert Jurisdiction over the Proposed Merger of FirstEnergy Corp. and GPU, Inc.*, Case No. 00-2469-EL-UNC, entered September 5, 2001. Citizen Power filed a complaint that FE had failed to comply with Ohio law by entering into an agreement to acquire GPU without first seeking Commission approval. The Commission subsequently decided to treat the complaint as a petition about the Commission's jurisdiction.

September 5 Order at 2. The Commission then declines to assert that jurisdiction, explaining only that Ohio's concerns were adequately addressed by its participation in the Federal Energy Regulatory Commission ("FERC") proceeding addressing the same transaction:²

Inasmuch as the Commission believes that our activities in the above-cited FERC proceeding are adequate to protect the interests of the customers of FE's Ohio operating utilities and the interest of Ohio, the Commission does not believe it is necessary to initiate its own review of the merger at this time.

Id. Neither argument is supportable. Even if the Commission has discretion, its reason for declining to assert jurisdiction is without merit. But the Commission has no discretion. While it may have a choice as to how to use its jurisdiction on a case by case basis, it either has the jurisdiction to begin with or it doesn't. In this case the Commission must assert jurisdiction over FE's acquisition of GPU under Sections 4905.05, 4905.06, 4905.40, and 4905.42 of the Revised Code. By declining to assert that jurisdiction, the effects of the acquisition on Ohio and Ohio customers remain unexamined, and the public interest unprotected.

II. ARGUMENT

1. Even If It Were True That The Commission Had Discretion As To Whether To Assert Jurisdiction Over FE's Acquisition Of GPU, The Commission Has Given No Valid Reason Why It Should Decline To Do So

As discussed below, *the Commission did not ask FERC to review anything about the acquisition*, including its impact on Ohio. FERC's policy is to *not* examine retail issues unless a relevant state commission without its own jurisdiction asks it to do so. As a result, even though Citizen Power had asked for an evaluation of retail effects, FERC did not do one. Contrary to the Commission's assertion, its "activities in the above-cited FERC proceeding" could not possibly

² *Ohio Edison Company, et al.*, 94 FERC ¶ 61,291 (2001).

have been “adequate to protect the interests of the customers of FE’s Ohio operating utilities and the interest of Ohio” because it engaged in no activities at FERC other than to tell FERC it was intervening. To use FERC’s words, the Commission “*raised no regulatory concerns in its intervention.*” *Ohio Edison Company, et al.*, 94 FERC at 62,047 (emphasis added).

The Commission filed a “Notice of Intervention” on December 15, 2000 at FERC in which it asserted: “As the application in this case may substantially influence the ability of the Public Utilities Commission of Ohio to carry out its statutory obligations, particularly with regard to the restructuring of the electric utility industry in the State of Ohio, the Commission notices its intervention herein.” *Ohio Edison Co., et al.*, “Notice of Intervention of the Public Utilities Commission of Ohio,” FERC Docket No. EC01-22 at 1-2 (December 15, 2000). It did not explain what obligations it was referring to or what effects it was concerned about. There is no shortage of concerns, however. In its filings in this docket, Citizen Power has specified many potential effects that need to be evaluated. *See, e.g.*, Memorandum Contra of Citizen Power, Inc., *et al.* to FirstEnergy Corp.’s Motion to Strike at 5-6 (February 20, 2001).

Recognizing that (1) the Commission, alone among all regulatory bodies with jurisdiction over the acquisition, had not asserted that jurisdiction, and (2) in its FERC filing FE said it did not believe the Commission had jurisdiction over its acquisition, Citizen Power asked FERC to evaluate the impacts of the acquisition on retail markets in Ohio. We did not want retail effects in Ohio to go unexamined.

In its Order approving the merger, FERC rejected Citizen Power’s request. The Commission has exclusive jurisdiction over all retail effects of FE’s acquisition of GPU. Under

its Merger Policy Statement, FERC said it would review the retail effects “only if a state commission that lacks jurisdiction over the merger raises concerns. In this case, even if the Ohio Commission does not have regulatory authority over the merger, *it raised no regulatory concerns in its intervention.*” *Ohio Edison Co., et al.*, 94 FERC at 62,047 (emphasis added).

Citizen Power asked for rehearing on this issue, arguing that in its intervention PUCO did say that it was concerned about possible effects of the acquisition on its statutory obligations. The Commission did not ask for rehearing or clarify its intervention. FERC rejected our rehearing: “even if the Ohio Commission lacks jurisdiction over this merger, we will still not set this issue for hearing because the Ohio commission has *not* raised concerns about the merger’s effect on regulation (again, consistent with the Merger Policy Statement). Contrary to Citizen’s claims, the Ohio Commission did not raise concerns about this merger; rather, it merely filed an intervention. It did not file a protest, comments or seek any relief in this proceeding.” *Ohio Edison Co., et al.*, 95 FERC ¶ 61,178 at 61,585 (2001) (italics in the original, underscore added).

In other words, the Commission did nothing at FERC that would help to meet its obligation to evaluate retail effects, let alone any action that would be an adequate substitute for asserting jurisdiction and conducting its own review of FE’s acquisition. It did not ask FERC to review retail effects, even though it knew that, under its Policy Statement, FERC would have done so if asked. Citizen Power asked, but FERC would accept the request only from the Commission because the Commission is the entity with exclusive jurisdiction over retail effects. FERC review of effects in retail markets would not have met all of the Commissions statutory obligations, but it would have been a start. Yet the Commission did not ask for even that.

The Commission's claims now that its actions at FERC were sufficient to allow it to forego its own review are simply not supportable. The Commission is left without a basis for declining to assert jurisdiction to evaluate the retail effects in Ohio of FE's acquisition of GPU. Because no one else can do such an evaluation, those effects remain unexamined, and the public interest in Ohio unprotected.

2. The Commission Erred When It Claimed It Had Discretion About Whether To Assert Jurisdiction Over FE's Acquisition Of GPU. It Must Assert Jurisdiction

2.a. As A Matter Of Law, The Commission May Not Claim Discretion To Assert Jurisdiction On A Case By Case Basis

The Commission cannot claim that its jurisdiction over FE's acquisition is discretionary. It either has jurisdiction or it doesn't; it cannot claim the right to assert jurisdiction on a case by case basis. Generally, a regulatory agency charged with administering a statute that grants jurisdiction has no discretion to decline to assert that jurisdiction. *See FPC v. Southern California Edison Co.*, 376 U.S. 205, 209 n.5 (1964). While an agency might rationally conclude that jurisdiction does not attach to a particular entity because the would-be regulated entity has only a de minimis relationship to the purpose of the regulation, *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), if the entity is subject to its regulation it cannot decline to regulate. *Southern California Edison*, *supra*, 376 U.S. at 209 n.5. Plainly, the FE companies are subject to the Commission's jurisdiction. In these circumstances, the Commission is vested with no discretion to disclaim jurisdiction over FE's acquisition of GPU.

2.b. Changes To The Revised Code Made By S.B.3 Provide No Basis For A Claim Of Discretion

In its petition and subsequent pleadings, Citizen Power argued that the Commission must assert jurisdiction over FE's acquisition under Sections 4905.05, 4905.06, 4905.40 and 4905.42 of the Revised Code. *The Commission did not respond to any of our arguments in its Order.* Instead, it merely claims that the "passage of S.B.3" somehow "has made it clear that the Commission need not assert jurisdiction." September 5 Order at 2. The Commission offers no explanation how this part of S.B.3, which *expands* the Commission's jurisdiction to cover instances in which an Ohio utility acquires an out-of-state utility, could plausibly be read as a grant of discretion.

S.B.3 added language to Section 4905.40.2(B) (which previously did not apply to electric utilities) requiring prior approval from the Commission before any utility, including an out-of-state utility, can "acquire control, directly or indirectly of . . . a domestic electric utility or a holding company controlling a domestic electric utility." Section 4905.40 had previously granted the Commission jurisdiction over all acquisitions by an Ohio utility, both in Ohio and out of state, by requiring prior approval from the Commission before stock may be issued to make the purchase: "Any public utility, subject to the jurisdiction of the commission, may when authorized by the commission, issue shares of common capital stock to acquire or pay for shares of common capital stock of a public utility *of this or an adjoining state.*" Ohio R.C. § 4905.40 (B) (emphasis added).

Read together, Section 4905.40 and the changes to Section 4905.40.2 made by S.B.3 cover all three kinds of acquisitions of one utility by another over which the Commission has

jurisdiction: (1) an Ohio utility acquires another Ohio utility, (2) an Ohio utility acquires an out of state utility, and (3) an out of state utility acquires an Ohio utility.

The Commission's citing of the change to Section 4905.40.2 is off point. Obviously that section does not apply to the case here, where FE is acquiring GPU, which has service territories in Pennsylvania and New Jersey. But that lack of applicability grants the Commission no discretion. Section 4905.40 covers FE's acquisition.

2.c. The Commission Must Assert Jurisdiction Under Sections 4905.40 And 4905.42 Of The Revised Code

If the merger is consummated, FE will issue stock to GPU shareholders to pay for part of the cost of acquiring GPU³. As such, the Commission must assert jurisdiction over FE's stock issuance and "hold such hearings, make such inquiries or investigations, and examine such witnesses, books papers, documents, and contracts as it deems proper" to determine whether the purpose for which the stock is being issued--FE's acquisition of GPU-- is in the public interest. Ohio R.C. § 4905.42.

There is no question that FE's stock issuance requires review by the Commission. The fact that the acquiring company issuing the stock, FE, is a holding company owning several Ohio utilities makes no difference. It has long been held that regulatory commissions, like the Ohio Commission, generally are empowered to disregard the corporate form of a single affiliated system where form would prevent the commission from exercising its jurisdiction over the regulated utility. *See, e.g., Columbus Gas & Fuel Co. v. Public Util. Comm'n of Ohio*, 292 U.S. 398, 400 (1934); *Dayton Power & Light Co. v. Public Util. Comm'n of Ohio*, 292 U.S. 290, 308

³ See Citizen Power Petition at 3-4.

(1934); *Pennsylvania Power & Light Co. v. Federal Power Commission*, 139 F.2d 445, 450 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 (1944); *Montana Power Co.*, 4 FPC 213, 222-23 (1945).

The FERC, in numerous cases, has explained that it has jurisdiction to review mergers of holding companies owning FERC-regulated subsidiaries unless the holding companies can rebut a stringent presumption that the merger also effectively merges subsidiaries of the holding companies. *Illinois Power Company*, 67 FERC ¶ 61,136 at 61,354-55 (1994); *Detroit Edison Company*, 71 FERC ¶ 62,064 (1995); *Southern Indiana Gas and Electric Company*, 73 FERC ¶ 62,090 (1995). In *Illinois Power*, the Commission stated:

[W]hen public utility holding companies merge, their public utility subsidiaries likely retain no real corporate independence. Rather, decision-making for the public utility subsidiaries appears to rest with the new holding company. The voting stock of the public utilities belongs to the shareholders of the new holding company; the new holding company board of directors presumably sets or can set corporate policy for all subsidiaries; and management of the public utility subsidiaries presumably gains access to proprietary financial and corporate information of the entire system of the new holding company. *For us to assume that a merger of the public utilities occurs only when the new parent proposes to combine its subsidiaries may, in most instances, elevate corporate form over economic substance.*

We therefore will presume, subject to rebuttal, that mergers between public utility holding companies also accomplish an indirect merger of their public utility subsidiaries.

Illinois Power Co., 67 FERC at 61,354 (emphasis added). The exercise of this authority has become particularly important in this era of holding companies and multiple, multi-state subsidiaries which require evaluating the economic substance of the transaction rather than the corporate form in order to protect the public interest.

When FE was created, with Commission approval, as a holding company to own CEI,

Toledo Edison, Ohio Edison, and Penn Power, the common stock in those companies was traded for shares of FE stock. Thus the shareholders who formerly owned the operating utilities became the owners of FE, and the operating utilities became fully owned subsidiaries of FE. In becoming owners of FE rather than individual operating utilities, those shareholders assumed control of the FE system as a group, including all of its operating subsidiaries.

Section 4905.40.2 (A) defines the term, control, “[a]s used in this section” as “the possession of the power to direct the management and policies of . . . a domestic electric utility or a holding company of a domestic electric utility.” Clearly the shareholders of FE, and only they, possess the power to direct FE management, and through them, the management of all of the subsidiaries owned by FE.

This control is clearly shown in this case by the fact that only common stockholders of FE had the right to approve or disapprove the acquisition of GPU and issue shares of its stock in partial payment. *See* FE-GPU “Merger Agreement” at Section H. To argue otherwise, *i.e.*, to argue that the issuance of FE stock is somehow beyond the Commission’s jurisdiction is to render Section 4905.40 meaningless and leave the Commission impotent to protect the public interest so clearly intended by that section of the statute.

When it approved the creation of FE, the Commission recognized that its public interest obligations required looking past the operating utility subsidiaries to oversee FE: “[w]e wish to make clear that the Commission will continue to require of the FE companies traditional regulatory approvals for matters including, but not limited to, security issuance applications.” *In the Matter of the Commission’s Review of the Merger of Ohio Edison Company and Centerior*

Energy Corp., Case No. 96-1322-EL-MER, Entry of November 6, 1997 at 5. To make its point more explicit, the Commission included FirstEnergy Corp., the holding company, in the list of companies it meant by “FirstEnergy companies” *Id.* at 1.

At the time it was seeking merger approval, FE acknowledged the Commission’s authority over the new holding company and the issuance of its stock. In its rate plan accepted by the Commission, FE agreed that “the Ohio Revised Code will continue to apply to each of [the parties, including FE] and to each of their affiliates or subsidiaries as otherwise applicable, to the extent that they are engaged in activities that are PUCO jurisdictional.” *FirstEnergy Corp.* 176 P.U.R. 4th 481 (January 30, 1997). Obviously the issuance of stock to acquire another utility is PUCO jurisdictional under Section 4905.40.

The companies forming FE made no arguments then, as FE has in this docket, that the Commission is powerless to review FE’s actions. Only now, after gaining approval from the Commission, does FE claim that its creation removed its stockholders from the Commission’s purview.

2.d. The Commission Must Assert Its Jurisdiction Under Sections 4905.05 And 4905.06 Of The Revised Code

Citizen Power has argued that to meet its responsibilities to supervise utility actions to insure they are in the public interest, the Commission must assert jurisdiction over FE’s acquisition under Sections 4905.05 and 4905.06 under the Revised Code. The Commission has done so in the past.

Citizen Power, for example, noted to the Commission its decision in *National Gas and Oil Company*, No. 98-1042-GA-UNC, 1998 WL 689848, *1 (Ohio PUC Sept. 10, 1998). This

was a Section 4905.06 case that involved the joint application of National Gas & Oil Company and Licking Rural Electrification, Inc. for approval of the conversion of National's public utility operations into an energy cooperative. The Commission found that it was appropriate to assert jurisdiction under sections 4905.05 and 4905.06 of the Code to ensure that the transfer of assets did not interfere with the adequate and uninterrupted service to customers. *Id.* at 5.

Similarly, in *McCaw Cellular Communications, Inc.*, No. 93-1446-TP-UNC, 1993 WL 501442, *1 (Ohio PUC September 16, 1993), another case cited by Citizen Power, the Commission asserted jurisdiction over the merger of American Telephone and Telegraph Company and McCaw Cellular Communications, Inc. on the basis that both these companies owned subsidiaries operating as public utilities in Ohio. *Id.* The Commission found that it was within its authority under Sections 4904.04 to 4905.06 of the Revised Code to determine whether the transaction was in the public interest. Specifically, the Commission asserted jurisdiction to determine whether the new owner of a utility doing business in the state of Ohio "possessed the qualifications necessary to continue to service the public convenience and necessity." *Id.*

The scope of the Commission's general supervisory powers is broad enough, in fact, that the Commission has asserted jurisdiction over utility mergers where neither merging party is incorporated in Ohio, and where only one of the merging companies provides regulated utility services within the state. See *Metromedia Communications Corporation*, No. 93-135-TP-UNC, 1993 WL 207420 (Ohio PUC April 22, 1993)(asserting jurisdiction over merger of Metromedia Communications Corporation and Resurgens Communications Group to section 4905.06 of the

Ohio Revised Code). The circumstances in *Metromedia* are strikingly similar to those here:

The proposed merger of Metromedia and Resurgens involves only one telephone company doing business in the state. Because Section 4905.49 Revised Code, which governs mergers, applies only to the merger of two or more telephone companies doing business in Ohio, the Commission finds that Section 4905.49, Revised Code is inapplicable to the proposed merger. Nevertheless, the Commission will exercise its jurisdiction under its supervisory powers pursuant to Section 4905.06, Revised Code.

Id. at * 5. *Metromedia*, thus, is consistent with the provisions of Section 4905.05 of the Ohio Revised Code, which extends Commission jurisdiction not only to public utilities located within the state but as well as to the “persons or companies owning, leasing or operating such public utilities and railroads.”

Ohio law does not limit the Commission’s supervisory powers to review mergers and acquisitions involving domestic utilities. The Commission’s decision in *Metromedia Communications Corp.*, Case No. 93-135-TP-UNC, 1993 WL 207420 (1993), demonstrates that the Commission will exercise jurisdiction under R.C. § 4905.06 to review the acquisition of a foreign entity by an Ohio utility. Moreover, the fact that the acquiring company, FE, is not an Ohio utility, but the holding company for several Ohio utilities, is, as we have explained, a distinction without consequence. As explained in Citizen Power’s Petition, the Commission has previously exercised jurisdiction under R.C. § 4905.06 to review a merger at the holding company level. See *McCaw Cellular Communications, Inc.*, Case No. 93-1446-TP-UNC, 1993 WL 501442 (1993). The Commission’s decision in *McCaw* reflects the general principle that the Commission can look at the substance of a transaction apart from the form in order to fulfill its regulatory mandate. See cases cited in section 2.b. above.

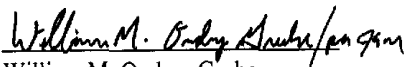
The overriding principle in all this is clear. The Commission has the authority and responsibility to review mergers and acquisitions involving Ohio utilities to ensure they are in the public interest. See *Cleveland Electric Illuminating Company*, Case No. 94-1150-EL-UNC, 1994 WL 750569 (1994). The Commission exercises this jurisdiction under its general supervisory powers, which imbue the Commission “with responsibility to remain apprised of the manner in which utilities manage and operate their properties with respect to the adequacy of service to the public.” *Id.*

The Commission has never previously asserted that it had any discretion to assert or decline jurisdiction over mergers and acquisitions. Citizen Power has pointed out in its Petition and subsequent pleadings in this docket, including this one, that the Commission has asserted jurisdiction over similar transactions under the statutes in effect before enactment of SB3. The Commission offers no explanation why it has treated this case differently than other cases in which it has asserted its supervisory powers. The Commission must assert jurisdiction

over FE's acquisition of GPU pursuant to its general supervisory powers to ensure the public interest is protected.

Respectfully submitted,

CITIZEN POWER, INC.

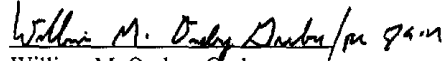

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