

approval to transfer transmission assets from the AEP EDUs to AEP Transco under R.C. 4905.48(B). OCC is filing on behalf of all the approximately 1.2 million residential utility consumers of the AEP EDUs.

On April 1, 2010, the Commission issued an Entry stating that all initial comments in these proceedings should be filed with the Commission no later than April 30, 2010.¹ OCC filed a Motion to Intervene in these cases on April 5th, 2010, and now files these Comments.

I. DISCUSSION

- A. The Commission should explicitly state that its ruling in these cases is not determinative or binding of any future requests by the AEP EDUs or AEP Transco to transfer transmission assets from one company to another.**

If the Commission approves the proposed transfer of transmission assets from the AEP EDUs to AEP Transco under R.C. 4905.48(B) in these cases, the PUCO should explicitly state in its Order that the ruling is not determinative or binding for any future requests by either the AEP EDUs or AEP Transco to transfer any other transmission assets between these entities. For example, in the future, the AEP EDUs may request to transfer assets of greater cost that have been paid for by consumers--a scenario that would involve more complex issues of consumer protection than the issues involved in the instant cases. Future requests to transfer transmission assets by either company could therefore involve other circumstances that require different or additional consideration by the Commission to protect consumers. Thus, the Commission should include the reservation in its Order here that its decisions are not determinative or binding with

¹ PUCO Entry, Case Nos. 10-245-EL-UNC, 10-246-EL-UNC, and 10-247-EL-AIS (April 1, 2010).

regard to future applications by either the AEP EDUs or AEP Transco to transfer transmission assets from one company to another.

B. The Commission should explicitly state that it is not foreclosing in future cases any consideration of issues for protecting customers of the AEP EDUs, including issues related to rates, collection of costs from customers, and reliability of service.

In its Order in these proceedings, the Commission should explicitly state that it is not foreclosing any consideration of issues for protecting customers of the AEP EDUs, including issues related to rates, collection of costs from customers, and reliability of service. For example, in later proceedings, such as transmission cost recovery rider cases, it will be appropriate to review filings to ensure that there are not any double recoveries from customers with respect to AEP Transco or the AEP EDUs for the costs of transmission assets. Because existing transmission assets, which could have been funded in part by the AEP EDUs' residential consumers, may be transferred as a result of these proceedings, there is a need to ensure that there are not double recoveries for the costs of these transmission assets by AEP through either the AEP EDUs or AEP Transco in proceedings at the Commission. Thus, the Commission should state that its rulings are not dispositive of any customer protection issues involving but not limited to ratemaking, cost collection, and reliability of service that may result as a consequence of the formation of the AEP Transco.

C. The Commission should explicitly state in its ruling in these cases that it is not giving antitrust protection to AEP Transco or the AEP EDUs under state action principles.

Under the state action doctrine, state-directed restraints on trade are exempted from antitrust liability.² To qualify for exemption, the regulatory action must be clearly articulated in the state's sovereign capacity and affirmatively expressed in state policy.³ Since the PUCO does not necessarily intend for its rulings to give companies protection from antitrust action, the Commission should explicitly state that it is not giving antitrust protection to AEP Transco or to the AEP EDUs as a result of its rulings in these cases.

In PUCO Case No. 97-733-EL-AEC, involving the Ohio Power Company, the Commission included the following language in its Order: "Our approval of these [c]ontracts does not constitute state action for the purpose of the antitrust laws. It is not our intent to insulate the [a]pplicant or any party to a contract approved by this Finding and Order from the provisions of any state or federal law which prohibit the restraint of trade."⁴ In its Order in these proceedings, the Commission should include a similar statement that the Commission is not giving antitrust protection to AEP Transco or to the AEP EDUs under state action principles by its rulings in the above-captioned cases.

² *Parker v. Brown* (1943), 317 U.S. 341 ("The Sherman Act [15 U.S.C. §1-7]... gives no hint that it was intended to restrain state action or official action directed by a state"). Id at 351.

³ *Cincinnati v. Reed* (Hamilton County 1985) 27 Ohio App. 3d 115, 500 N.E.2d 333, fn. 4 (citing *Community Communications Co., Inc. v. City of Boulder* (1982), 455 U.S. 40. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980), 445 U.S. 97; *Goldfarb v. Virginia State Bar* (1975), 421 U.S. 773; *Euster v. Eagle Downs Racing Assn.* (C.A.3, 1982), 677 F.2d 992, certiorari denied (1982), 459 U.S. 1022).


⁴ *In the Matter of the Application of Ohio Power Company for Approval of a Special Contract Arrangement With The B.O.C. Group Inc.*, Case No. 97-733-EL-AEC, Finding and Order (December 18, 1997).

II. CONCLUSION

For the reasons stated above, the Commission should reserve certain rights for future PUCO proceedings involving the AEP Transco and the AEP EDUs to maintain its ability to address issues of concern to the AEP EDUs' residential consumers, and make other rulings consistent with OCC's Comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Comments by the Office of the Ohio Consumers' Counsel* was served on the persons stated below via regular U.S. Mail Service, postage prepaid, this 30th day of April, 2010.


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