

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio)
Power Company and Columbus Southern) Case No. 10-2376-EL-UNC
Power Company for Authority to Merge)
and Related Approvals)

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Authority to) Case No. 11-346-EL-SSO
Establish a Standard Service Offer) Case No. 11-348-EL-SSO
Pursuant to §4928.143, Ohio Rev. Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 11-349-EL-AAM
Ohio Power Company for Approval of) Case No. 11-350-EL-AAM
Certain Accounting Authority)

In the Matter of the Application of)
Columbus Southern Power Company) Case No. 10-343-EL-ATA
to Amend its Emergency Curtailment)
Service Riders)

In the Matter of the Application of)
Ohio Power Company) Case No. 10-344-EL-ATA
to Amend its Emergency Curtailment)
Service Riders)

In the Matter of the Commission Review of)
the Capacity Charges of Ohio Power) Case No. 10-2929-EL-UNC
Company and Columbus Southern Power)
Company.)

In the Matter of the Application of)
Columbus Southern Power Company) Case No. 11-4920-EL-RDR
for Approval of a Mechanism to Recover)
Deferred Fuel Costs Ordered Under)
Ohio Revised Code 4928.144)

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In the Matter of the Application of)
Ohio Power Company for Approval)
of a Mechanism to Recover) Case No. 11-4921-EL-RDR
Deferred Fuel Costs Ordered Under)
Ohio Revised Code 4928.144)

In the Matter of the Application of)
Ohio Power Company for Approval)
Of An Amendment To Its Corporate) Case No. 11-5333-EL-UNC
Separation Plan)

**FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM IN OPPOSITION TO JOINT
MOVANTS' MOTION TO CONSOLIDATE**

I. Introduction

Late on Friday, September 30, 2011, the future Ohio Power Company (“OPCo”) entity that may exist after approval of the merger of Ohio Power Company and Columbus Southern Power Company (collectively “AEP Ohio”) filed a corporate separation plan in Case No. 11-5333-EL-UNC (the “Corporate Separation Compliance Filing”). The corporate separation plan is proposed to address potential interaction between that future OPCo and an affiliate – AEP GenCo – which may be created after the merger and after corporate separation is approved by both this Commission and the Federal Energy Regulatory Commission (“FERC”). Based on Appendix B of the Stipulation filed in these dockets on September 7, 2011, the corporate separation plan will not be necessary until February 2013 at the earliest.¹ Thus, the Commission has an ample amount of time to give appropriate and reasoned review to the details of the proposed corporate separation plan.

¹ Because corporate separation and the transfer of assets to AEP GenCo, and possibly other AEP affiliates or third-parties, is dependent upon the outcome of the dual-track FERC proceedings referenced in Appendix B to the Stipulation, a FERC decision might be delayed well beyond February 2013.

However, AEP Ohio and several parties (the “Joint Movants”) to the other dockets captioned above (the “Stipulation Cases”) also filed on Friday evening a joint motion to consolidate the corporate separation plan proceeding with those dockets *for purposes of the hearing set to commence on Tuesday, October 4*. The Joint Movants state that approval of full corporate separation is a necessary precondition to AEP Ohio’s transition to an auction-based SSO and that the Commission’s approval of full legal corporate separation will be obtained through the Commission’s approval of the Stipulation. The Joint Movants claim that consolidating the Corporate Separation Compliance Filing with the Stipulation Cases for purposes of the October 4, 2011 hearing is appropriate. However, the Joint Movants’ request to consolidate is too late, would significantly prejudice the ability of intervenors to fully comment on the corporate separation plan, and should be denied. While FES supports AEP Ohio’s corporate separation and does not believe there is any reason to delay a Commission order approving “full legal corporate separation” as provided in section IV.1.q. of the Stipulation, there is no need to rush through details of a corporate separation plan which are important to a fully function competitive market.

II. Discussion

A. The Corporate Separation Compliance Filing Should Not Be Consolidated With The Stipulation Cases for Purposes of Hearing Commencing October 4, 2011.

While Joint Movants request that the Corporate Separation Compliance Filing and the Stipulation Cases be consolidated for purposes of hearing, they offer no explanation for why this is anything other than a blatant attempt to deprive other parties of due process. The only grounds identified by AEP Ohio for consolidating the corporate separation docket with the Stipulation Cases a mere two business days before the October 4 hearing appears to be that questions were

posed by Commissioners on September 19, 2011, regarding corporate separation.² Joint Movants overstate the situation. The Stipulation did not include this new docket, and Staff has not joined in the Joint Motion. While corporate separation definitely should be approved as part of an ESP Order,³ there is no rush to approve a new corporate separation plan for the merged OPCo and the new affiliate AEP GenCo, because any such plan won't be required until after "FERC approves full, legal corporate separation and the AEP GenCo has been created to carry out the steps described above to transfer AEP Ohio's generation-related assets." OPCo Application at 8, Case No. 11-5333-EL-UNC. There certainly is no rush to declare that the October 4 hearing will be the one opportunity for parties to provide evidence and cross-examine witnesses concerning a corporate separation plan filed only two business days earlier.

According to Appendix B to the Stipulation, AEP Ohio hopes that FERC approval of corporate separation will be obtained by Feb. 1, 2013. As the corporate separation plan is not required until after FERC acts and the AEP GenCo has been created and begins operations, there is plenty of time for the Commission to review OPCo's new corporate separation plan between now and Feb. 1, 2013. Importantly, the change from the functional separation under which AEP Ohio has operated for the last ten years – which essentially has resulted in AEP Ohio remaining a vertically-integrated utility – to the corporate separation required by S.B. 3 will require more than a few redlines to AEP Ohio's existing corporate separation plan. AEP Ohio obviously is unaware of this, but FES can speak from first-hand experience that it is foolhardy to rush through AEP Ohio's first true corporate separation plan on a few day's notice.

² See Joint Motion at 5.

³ AEP Ohio should not be left with any basis that would excuse entry into the PJM RPM Base Residual Auction ("BRA") by not having such an order.

Indeed, rushing to hearing two business days after a docket was opened would clearly deprive interested parties of due process. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews, Sec’y of Health, Education, and Welfare v. Eldridge* (1976), 424 U.S. 319, 333 (quoting *Armstrong v. Manzo* (1965), 380 U.S. 545, 552). *See also Korn v. Ohio St. Medical Bd.* (1988), 61 Ohio App. 3d 677, 684 (due process demands “notice and hearing, that is, an opportunity to be heard. Proceedings that are conducted without timely notice and an opportunity for all parties to meaningfully participate are “fundamentally unfair.” *See Natoli v. Ohio St. Dental Bd.* (2008), 177 Ohio App. 3d 645, 653. FES and other parties with an interest in OPCo’s Corporate Separation Compliance Filing will not have a meaningful opportunity to participate in a hearing on that filing that starts tomorrow. For the Joint Movants to claim otherwise is simply absurd and fundamentally unfair.

The Joint Movants’ Motion to Consolidate seeks to unduly accelerate a process which is worthy of significant consideration by the Commission, consideration which is simply not possible on this short of notice. Indeed, the corporate separation outline hastily assembled by AEP Ohio last week and attached first to Mr. Munczcinski’s testimony and then Mr. Nelson’s testimony specifically states that the Corporate Separation Compliance Filing could be resolved after the Commission’s Order in the ESP Cases, provided that the Order gives substantive approval of corporate separation as provided in the Stipulation.⁴ FES endorses this approach. The Commission must give reasoned consideration to the specific terms of OPCo’s corporate separation plan, which will be essential if OPCo is ever to begin operating with an affiliate AEP GenCo starting sometime in 2013 or thereafter. By consolidating the Corporate Separation

⁴ See Testimony of Philip J. Nelson, Exhibit PJN-1 at p. 2, filed September 29, 2011.

Compliance Filing with the Stipulation Cases for purposes of a hearing starting October 4, 2011, the Commission and interested parties will be denied any opportunity to properly review OPCo's corporate separation plan.

B. The Automatic Sixty-Day Review Period Should Be Suspended.

An amendment to a corporate separation plan becomes effective after sixty days if no action is otherwise taken. O.A.C. 4901:1-37-06(B). This automatic sixty-day approval period does not apply if the proposal relates to a sale or transfer of assets. *Id.* Here, AEP Ohio appears to be seeking approval of the transfer of assets to AEP GenCo in the ESP case, and this new docket – Case No. 11-5333-EL-UNC – suggests that only minor changes are required to the merged OPCo's corporate separation plan to become effective in 2013 or later. Yet the details of that transfer of assets is yet to be determined by years of FERC litigation, and the details of how the future OPCo will interact with the future AEP GenCo also must be determined using an appropriately deliberate and fair process.

Among other things, the Commission must review and approve the specific steps that OPCo will take to ensure that competitive information is not shared between its employees and those of AEP GenCo. The filing made in Case No. 11-5333-EL-UNC is, charitably, the start of that review. Because AEP Ohio is attempting to obtain Commission approval of a dramatic change to its corporate structure, a full and complete review of OPCo's application should not be constrained to an artificial sixty-day deadline.

C. The Commission Should Conduct A Hearing On The Application.

Given the circumstances of the filing, the Commission should establish a reasonable schedule for intervention, discovery and hearing so that all interested parties have a fair opportunity to participate in the review process. Under Commission rules, the Commission may

conduct a hearing on an application to transfer assets if the application appears to be unjust, unreasonable, or not in the public interest. O.A.C. 4901:1-37-09(D). The Commission must conduct a hearing “with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.” OAC 4901:1-37-09(D). A hearing is required here.

AEP Ohio has failed to explain what will happen to its generating assets, other than that it is proposing to transfer them to AEP GenCo at net book value and that AEP Ohio does not intend to develop market values for the assets.⁵ AEP Ohio also admits, however, that there could be rebalancing of assets as part of the FERC process, which could result in one or more assets being transferred to another AEP pool member.⁶ Although AEP Ohio has stated that it intends to transfer all of its assets to AEP GenCo, AEP Ohio itself acknowledges that this may not occur and is dependent upon the outcome of the FERC proceedings referenced in Appendix B of the Stipulation.⁷ The end result of this process could mean that the Commission loses jurisdiction over some or all of AEP Ohio’s assets. Alternatively, AEP Ohio could transfer all of its assets first to AEP GenCo at net book value, and then sell one or more of those assets to another pool member at a higher market value, thereby benefiting shareholders but depriving Ohio ratepayers of fair compensation for the asset.

FES witness Tony Banks specifically addresses these contingencies. Mr. Banks’ testimony states: “The Commission should approve the corporate separation and also should open a docket to further define the specifics of how corporation separation will be

⁵ Id. at pp. 2-4.

⁶ Deposition of Joseph Hamrock, taken September 21, 2011 at pp. 47-48 (“Q. Is it also possible that AEP Ohio would sell some of its generating assets to other AEP operating companies? A. Yes. . . . Q. So the -- so the process that decides where those generating assets end up is -- will be the FERC process that's described in one of the appendices to the stipulation? A. That's the -- the appendix is the timeline.”)

⁷ Id.

accomplished.”⁸ FES respectfully requests that Case No. 11-5333-EL-UNC should be utilized to review the details of the asset transfer, and that this docket include a reasonable period for discovery, mandate AEP Ohio’s development of a fair market value for each asset, and provide for a hearing as required by O.A.C. 4901:1-37-09(D) given that the transfer could alter the Commission’s jurisdiction over a generation asset. That process can also determine the appropriate mechanism for sharing with ratepayers any profits from the sales of assets.

The Joint Movants incorrectly imply in their Motion that approval of this Corporate Separation Compliance Filing is necessary in order to participate in the RPM auction. As specifically provided in section IV.1.q. of the Stipulation it is not, and neither is obtaining “full legal corporate separation” as is also implied in the Motion.⁹ The Stipulation specifically obligates AEP Ohio to provide notice to PJM in March of 2012 that it intends to participate in the BRA provided the Commission approves corporate separation in its final order. Approval of this Corporate Separation Compliance Plan is not a condition precedent of AEP Ohio’s participation in the BRA auction. The Commission should order corporate separation of AEP Ohio regardless of the outcome of the Stipulation Cases, while reserving judgment on the Corporate Separation Compliance Filing until after a full record is developed.

III. Conclusion

While FES supports corporate separation as an important goal, FES respectfully requests that the Joint Movant’s Motion to Consolidate be denied, that the sixty-day automatic approval process be suspended in light of the probable asset transfers associated with the creation of AEP

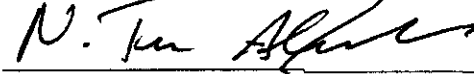
⁸ Testimony In Opposition to the Partial Stipulation of Tony C. Banks on Behalf of FirstEnergy Solutions Corp. at p. 42.

⁹ See Motion at p. 7.

GenCo, and that the Commission commence a reasoned and deliberate review of the Corporate Separation Compliance Plan and AEP Ohio's planned asset transfers and/or sales.

Dated: October 3, 2011

Respectfully submitted,



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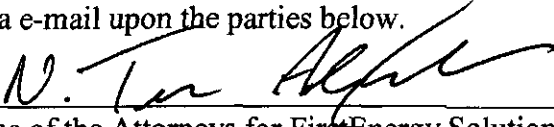
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FIRSTENERGY SOLUTIONS CORP.'S MEMORANDUM IN OPPOSITION TO JOINT MOVANTS' MOTION TO CONSOLIDATE* was served this 3rd day of October, 2011, via e-mail upon the parties below.



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