

FILE

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. )

PUCO

2011 NOV -2 PM 5: 15

RECEIVED-DOCKETING DIV

BUCKEYE POWER, INC.'S MEMORANDUM CONTRA  
JOINT MOVANTS' MOTION FOR WAIVER

**I. Background.**

On September 30, 2011, Ohio Power Company filed an Application for Approval of an Amendment to its Corporate Separation Plan ("Corporate Separation Compliance Application"), as contemplated by the revised testimony filed September 21, 2011 ("Revised Testimony") by Ohio Power Company and Columbus Southern Power Company (collectively, "AEP Ohio") in support of the Stipulation and Recommendation (the "Stipulation") filed in Case Nos. 11-346-EL-SSO, *et al.* (the "Stipulation Case") relating to AEP Ohio's electric security plans. In the Revised Testimony, which was filed in response to the Commission's request for additional information regarding the proposed corporate separation, AEP Ohio states that corporate separation would be accomplished by the transfer of AEP Ohio's generation assets to a new, wholly-owned subsidiary of American Electric Power Company, Inc. ("AEP"), and that AEP Ohio would file the Corporate Separation Compliance Application in a separate proceeding to implement the specific changes of the full, legal corporate separation provided for in its amended corporate separation plan.

In connection with the Corporate Separation Compliance Application, AEP Ohio and certain signatories to the Stipulation filed a Joint Motion to Consolidate and Request for Expedited Treatment (“Motion to Consolidate”), requesting the consolidation of the Corporate Separation Compliance Application with the Stipulation Case. The Commission denied the Motion to Consolidate.

On October 4, 2011, in order to protect its interests, Buckeye Power, Inc. (“Buckeye”) filed a Motion to Intervene and Comments in this proceeding (“Motion to Intervene”), requesting that any Order by the Commission approving the Stipulation and corporate separation plan address Buckeye’s concerns relative to various ownership and contractual arrangements Buckeye has with AEP Ohio and other AEP affiliates.<sup>1</sup> Buckeye’s Motion to Intervene and Comments is uncontested and is pending before the Commission. Accordingly, for purposes of Ohio Administrative Code § 4901-1-12, Buckeye is now a party to this case. Buckeye is not a party to the Stipulation Case.

---

<sup>1</sup> Specifically, Buckeye requested that an Order require AEP’s cooperation and agreement with Buckeye in arranging for (1) a complete inventory of the various properties and assets jointly owned by AEP Ohio and Buckeye or owned by Buckeye and affected by the proposed corporate separation (as well as the licenses, approvals, permits, contracts and agreements relating to such assets), and the various contracts and agreements to which AEP Ohio or AEP affiliates and Buckeye or its affiliates are parties and which are implicated by the proposed corporate separation, (2) the proper and timely transfer and retitling of AEP Ohio’s interests in such property and assets (including the licenses, permits, approvals, contracts and agreements relating to such property and assets) to the new AEP generating affiliate to the extent such assets relate to AEP Ohio’s electric generating facilities, and the retention of such property and assets (including the licenses, permits, approvals, contracts and agreements relating to such property and assets) to the extent such property and assets relate to AEP Ohio’s electric transmission and distribution assets, (3) the proper and timely assignment of such contracts and agreements to the new AEP generation entity to the extent such contracts and agreement relate to AEP Ohio’s electric generating facilities, and the retention of such contracts and agreements by AEP Ohio to the extent such contracts and agreements relate to AEP Ohio’s transmission and distribution assets, (4) compliance with all terms and conditions of such contracts and agreements, including any required consents by Buckeye or its affiliates to such assignments or the transfer of such property or assets (including all related permits, approvals, licenses, contracts and agreements), (5) the modification of such contracts and agreements, if necessary, to preserve the relative economic benefits and burdens of the parties under such contracts and agreements, and (6) in the event that the corporate separation negatively affects the creditworthiness of AEP Ohio and/or the new generation entity is less creditworthy than AEP Ohio, implementation of appropriate credit support for the benefit of Buckeye and its affiliates, such as a parent or AEP affiliate guaranty, in order to preserve the creditworthiness of the counterparties to Buckeye’s and its affiliates’ contracts with AEP Ohio and any other AEP affiliates affected by the proposed corporate separation.

On October 18, 2011, Ohio Power Company and various parties to the Stipulation filed a Joint Motion for Waiver, requesting the Commission's waiver of the hearing requirement of Ohio Administrative Code § 4901-1-37-09(D) (the "Joint Motion for Waiver"). For the reasons discussed herein, Buckeye respectfully moves the Commission to deny the Motion for Waiver.

On November 2, 2011, the Commission entered an Order suspending consideration of the Corporate Separation Compliance Application until the Commission specifically orders otherwise.

## **II. Argument.**

Pursuant to Ohio Administrative Code § 4901-1-37-09(D), the Commission is required to set a hearing with respect to any application for the sale or transfer of a generating asset, where the sale or transfer would alter the Commission's jurisdiction over the generating asset. The Commission should deny the Joint Motion for Waiver because any waiver of the hearing requirement of Ohio Administrative Code § 4901-1-37-09(D) would be premature at this point, potentially harmful to Buckeye's interests, and procedurally prejudicial to Buckeye and other future intervenors that are not parties to the Stipulation Case.<sup>2</sup>

As Buckeye discussed in its Motion to Intervene, Buckeye's business and legal relationship with AEP Ohio and other AEP affiliates is of significant importance to Buckeye's operations. Although Buckeye does not necessarily contest the proposed corporate separation plan or the Stipulation, until further information is known as to the impact of AEP Ohio's proposed corporate separation on Buckeye's interests, and the parties have adequately addressed and made plans to resolve the issues raised by Buckeye in this regard, Buckeye objects to waiving the hearing requirement of Ohio Administrative Code § 4901-1-37-09(D). Because

---

<sup>2</sup> Buckeye also notes that the Joint Motion for Waiver is procedurally deficient, because none of the parties thereto, other than Ohio Power Company and Exelon Generation Company, are parties to this case. The Joint Movants have no standing to move the Commission to deny the parties in this proceeding their right to a hearing.

Buckeye is not a party to the Stipulation Case, this proceeding is Buckeye's only opportunity to ensure that its interests with respect to AEP Ohio's proposed corporate separation are heard by the Commission, and protected.

Buckeye and its affiliates, and AEP Ohio and other AEP affiliates, have a unique and complex, interconnected business relationship, involving the joint ownership of major electric generation stations, Buckeye's dependence on AEP Ohio for transmission and local delivery service functions, AEP's operation of Buckeye's and its affiliates' major power generating facilities, and various other agreements and business arrangements between Buckeye and AEP which, collectively, are integral to Buckeye's operations. All of these arrangements could be significantly affected by AEP Ohio's proposed transfer of generation assets to a new generating affiliate.

AEP and Buckeye have not yet addressed the impact of AEP Ohio's proposed corporate separation on Buckeye, the material legal and mechanical issues implicated by the proposal, or how such impacts and issues will be addressed and resolved. Although Buckeye expects that AEP will cooperate willingly with Buckeye in addressing the concerns outlined in Buckeye's Motion to Intervene, without having had any discussion with AEP regarding these critical issues, it is foreseeable that a hearing may be necessary to address any problems that arise in such regard.

It is Buckeye's understanding that the Corporate Separation Compliance Application was filed in a docket separate from the Stipulation Case to specifically provide an opportunity to address the details regarding implementation of the amended corporate separation plan, such as the concerns raised by Buckeye. Furthermore, the Commission expressly denied the Motion to Consolidate in order to provide for additional review of the Corporate Separation Compliance

Application,<sup>3</sup> and subsequently issued the Order suspending consideration of the Corporate Separation Compliance Application to allow for full evaluation of AEP's proposed corporate separation.<sup>4</sup> To waive a hearing at this point would defeat the purpose of this distinct proceeding, the Commission's Order denying the Motion to Consolidate, and the Order suspending consideration— to allow for the full development of this case. Accordingly, at this point, waiver of the hearing requirement is premature.

Waiver of the hearing requirement is procedurally prejudicial to any non-parties to the Stipulation Case. The Joint Movants incorrectly argue in the Motion for Waiver that the intervenors in this case “had the opportunity to – and did – conduct discovery and cross examine AEP Ohio's witness related to corporate separation issues in [the Stipulation Case].”<sup>5</sup> But this is wholly incorrect, with respect to Buckeye. Buckeye is not a party to the Stipulation Case. As Buckeye discussed in its Motion to Intervene, Buckeye did not intervene in the Stipulation Case because the corporate separation plan was, from Buckeye's perspective, an unexpected outcome of AEP Ohio's most recent Electric Security Plan (ESP) Standard Service Offer (SSO) application. Buckeye would have had no way of knowing and no expectation that AEP Ohio's original ESP application would have a direct impact upon Buckeye, which AEP's corporate separation plan most surely does.

Buckeye's only legal involvement and opportunity to be heard by the Commission with respect to the corporate separation plan is through the instant case. Accordingly, Buckeye has not had an opportunity to conduct discovery or cross examine AEP Ohio's witnesses. Furthermore, the window for intervention in this docket remains open, and future intervenors in this proceeding may also be non-parties to the Stipulation Case. Granting the Motion for Waiver

---

<sup>3</sup> Transcript of October 11, 2011 PUCO Hearing, Case Nos. 11-346-EL-SSO, *et al.*, Volume V, pages 639- 640.

<sup>4</sup> PUCO Entry, Case No. 11-5333-EL-UNC (November 2, 2011).

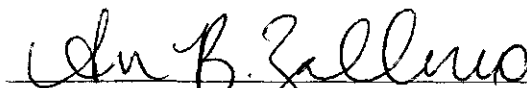
<sup>5</sup> Joint Motion for Waiver at page 1.

would be procedurally prejudicial to Buckeye as well as any future intervenor that is not a party to the Stipulation Case and has not had the opportunity to be heard or to conduct discovery or cross examination of AEP Ohio's witnesses with respect to this matter. Moreover, it is far too early in this proceeding to determine whether a hearing is necessary, much less to waive a hearing.

### **III. Conclusion.**

For the foregoing reasons, Buckeye respectfully moves that the Commission deny the Joint Motion for Waiver, and establish a procedural schedule and hearing to address the Corporate Separation Compliance Application in accordance with Ohio Administrative Code § 4901-1-37-09(D). Buckeye does not necessarily oppose Commission approval of the Stipulation nor the corporate separation provided for therein, as long as any Commission Order approving the corporate separation takes into account Buckeye's concerns as set forth above and in any further filings, testimony or participation by Buckeye in this proceeding. However, for the reasons discussed herein, Buckeye objects to any waiver of the protections afforded by a hearing under these circumstances. Accordingly, the Joint Motion for Waiver should be denied.

Respectfully submitted,



Kurt P. Helfrich (0068017)  
Ann B. Zallocco (0081435)  
Thompson Hine LLP  
41 South High Street, Suite 1700  
Columbus, Ohio 43215-6101  
Tel.: (614) 469-3200  
Fax: (614) 469-3361  
Kurt.Helfrich@ThompsonHine.com  
Ann.Zallocco@ThompsonHine.com

Attorneys for Buckeye Power, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing, Motion to Intervene of Buckeye Power, Inc., has been served by e-mail and regular U.S. mail upon the counsel for the following parties listed on the attached service list on this 2<sup>nd</sup> day of November, 2011.

  
\_\_\_\_\_  
Ann B. Zallocco



Steven T. Nourse  
Matthew J. Satterwhite  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29th Floor  
Columbus, OH 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)  
[mjsatterwhite@aep.com](mailto:mjsatterwhite@aep.com)

Thomas O'Brien  
Bricker & Eckler  
100 South Third Street  
Columbus, OH 43215-4291  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

M. Howard Petricoff  
Michael J. Settineri  
Lija Kalpes-Clark  
Vorys Sater Seymour & Pease LLP  
52 East Gay Street  
P. O. Box 1008  
Columbus, OH 43216-1008  
[mhpetricoff@Vorys.com](mailto:mhpetricoff@Vorys.com)  
[mjsettineri@Vorys.com](mailto:mjsettineri@Vorys.com)

Terrance O'Donnell  
Christopher Montgomery  
Bricker & Eckler  
100 South Third Street  
Columbus, OH 43215-4291  
[todonnell@bricker.com](mailto:todonnell@bricker.com)  
[cmontgomery@bricker.com](mailto:cmontgomery@bricker.com)

Greg Poulos  
EnerNOC Inc.  
101 Federal Street, Suite 1100  
Boston, MA 02110  
[gpoulos@enernoc.com](mailto:gpoulos@enernoc.com)

David F. Boehm  
Michael Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh St., Suite 1510  
Cincinnati, OH 45202  
[dboehm@BKLawfirm.com](mailto:dboehm@BKLawfirm.com)  
[mkurtz@BKLawfirm.com](mailto:mkurtz@BKLawfirm.com)

Tara C. Santarelli  
Environmental Law & Policy Center  
1207 Grandview Ave., Suite 201  
Columbus, OH 43212  
[tsantarelli@elpc.org](mailto:tsantarelli@elpc.org)

John Bentine  
Mark Yurick  
Zachary Kravitz  
Chester Wilcox & Saxbe  
65 E. State St., Suite 1000  
Columbus, OH 43215  
[jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)  
[myurick@cwslaw.com](mailto:myurick@cwslaw.com)  
[zkravitz@cwslaw.com](mailto:zkravitz@cwslaw.com)

Christopher L. Miller  
Gregory H. Dunn  
Asim Z. Haque  
Schottenstein Zox & Dunn Co., LPA  
240 West Street  
Columbus, OH 43215  
[cmiller@szd.com](mailto:cmiller@szd.com)  
[gdunn@szd.com](mailto:gdunn@szd.com)  
[ahaque@szd.com](mailto:ahaque@szd.com)

Samuel C. Randazzo (Counsel of  
Record)  
Frank P. Darr  
Joseph E. Oliker  
McNees Wallace & Nurick LLC  
21 East State Street, 17th Floor  
Columbus, OH 43215  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
[fdarr@mwncmh.com](mailto:fdarr@mwncmh.com)  
[joliker@mwncmh.com](mailto:joliker@mwncmh.com)

Allison E. Haedt  
Jones Day  
P.O. Box 165017  
Columbus, OH 43216-5017  
[aehaedt@jonesday.com](mailto:aehaedt@jonesday.com)

John N. Estes III  
Paul F. Wight  
Skadden, Arps, Slate, Meagher &  
Flom LLP  
1440 New York Ave., N.W.  
Washington, DC 20005  
[jestes@skadden.com](mailto:jestes@skadden.com)  
[paul.wight@skadden.com](mailto:paul.wight@skadden.com)

Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
[haydenm@firstenergycorp.com](mailto:haydenm@firstenergycorp.com)

James F. Lang  
Laura C. McBride  
N. Trevor Alexander  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Ave.  
Cleveland, OH 44114  
[jang@calfee.com](mailto:jang@calfee.com)  
[lmcbride@calfee.com](mailto:lmcbride@calfee.com)  
[talexander@calfee.com](mailto:talexander@calfee.com)

David A. Kutik  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, OH 44114  
[dakutik@jonesday.com](mailto:dakutik@jonesday.com)

Sandy Grace  
Exelon Generation Company, LLC  
101 Constitution Ave., NW  
Suite 400 East  
Washington, DC 20001  
[sandy.grace@exeloncorp.com](mailto:sandy.grace@exeloncorp.com)