

**BEFORE THE
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)	

FIRSTENERGY SOLUTIONS CORP.'S INITIAL COMMENTS

Pursuant to the Attorney Examiner's December 2, 2011 Entry, FirstEnergy Solutions Corp. ("FES") hereby submits its comments on the Application of Ohio Power Company ("AEP Ohio") to amend its existing corporate separation plan. FES continues to support AEP Ohio's overdue corporate separation of its generation services from its distribution services. FES also supports the Commission's review in this docket of the terms and conditions of AEP Ohio's corporate separation, including all terms and conditions relating to the sale and/or transfer of AEP Ohio's generation assets, separate from AEP Ohio's Stipulation and Recommendation filed in Case Nos. 11-346-EL-SSO *et al.* (the "Partial Stipulation").¹ Corporate separation is necessary to provide the benefits of Ohio's competitive market for retail electric service to customers and because AEP Ohio has exhibited an inability to operate properly under "functional" separation. As the Commission stated in the Stipulation Order, however, the Commission needs "additional time to determine and understand the terms and conditions relating to the sale and/or

¹ See Opinion and Order issued December 14, 2011 in Case Nos. 10-2376-EL-UNC, *et al.* (the "Stipulation Order") at pp. 60-61.

transfer of the generation assets” from AEP Ohio to the recently formed AEP Generation Resources, Inc. (“AEP Generation”).²

The Commission’s Rules establish a specific procedure for the review and approval of such sales and transfers. As the Commission recognized in the Stipulation Order: “Section 4928.17, Revised Code, requires due process for parties with real and substantial interests in the corporate separation plan.”³ There is no reason for the Commission to rush to “implement” the corporate separation, as requested by AEP Ohio in this Application and the Partial Stipulation without fully vetting and understanding the mechanics and implications of that implementation through a fully developed process, which must include a hearing. The Commission’s due diligence is warranted not only by the Commission’s Rules,⁴ but also by the fact that AEP Ohio seeks to transfer to a competitive entity significant generating assets that will impact the competitive market for retail electric service in Ohio. Careful oversight also is appropriate so that the Commission can continue to fulfill its mission to facilitate an environment that provides competitive choices⁵ and to implement state policy to foster competitive markets.

1. A hearing and additional information are required to approve AEP Ohio’s proposed transfer of generating assets to AEP Generation.

It appears through this Application, which requests approval of a perfunctory redlined corporate separation plan, that AEP Ohio is again attempting to push through, with no detail or oversight, the sale and transfer of its generating assets to a competitive

² Stipulation Order, p. 60.

³ Stipulation Order, pp. 60-61.

⁴ See O.A.C. 4901:1-37-09.

⁵ The Commission’s mission is as follows: “Our mission is to assure all residential and business consumers access to adequate, safe and reliable utility services at fair prices, while facilitating an environment that provides competitive choices.”

affiliate. The Commission's Rules require that an electric utility file an application for approval of any sale or transfer of generating assets owned in full or in part by the utility.⁶ The application "shall, at a minimum:"⁷

(1) Clearly set forth the object and purpose of the sale or transfer, and the terms and conditions of the same.

(2) Demonstrate how the sale or transfer will affect the current and future standard service offer established pursuant to section 4928.141 of the Revised Code.

(3) Demonstrate how the proposed sale or transfer will affect the public interest.

(4) State the fair market value and book value of all property to be transferred from the electric utility, and state how the fair market value was determined.⁸

Further, the Commission "shall fix a time and place for a hearing" if the application "proposes to alter the jurisdiction of the commission over a generation asset."⁹ The Commission may only approve the application after a hearing and the due process recognized by the Commission in the Stipulation Order, and upon a finding that "the sale or transfer is just, reasonable, and in the public interest."¹⁰ However, AEP Ohio has failed to provide the "minimum" information required for the Commission's approval and no hearing has occurred. Neither this Application nor the Partial Stipulation provided this necessary information.

⁶ O.A.C. 4901:1-37-09(A), (B).

⁷ O.A.C. 4901:1-37-09(C) (emphasis added).

⁸ O.A.C. 4901:1-37-09(C) (emphasis added).

⁹ O.A.C. 4901:1-37-09(D) (emphasis added).

¹⁰ O.A.C. 4901:1-37-09(E).

As FES noted in its Post-Hearing Briefs regarding the Partial Stipulation and in its Opposition to AEP Ohio's Motion for Waiver of a hearing in this proceeding,¹¹ further deliberation is warranted because many of the details have yet to be provided or developed. AEP Ohio has provided no detail regarding the terms and conditions of the proposed sale of its generating assets to AEP Generation, as required by the Commission's Rules. (In fact, AEP Ohio only confirmed that it had created a separate affiliate corporation and its name via its December 8, 2011 "Supplemental Statement.") Most significantly, and also in direct contravention of the Commission's rules, AEP Ohio has not demonstrated how the proposed sale or transfer will affect the public interest, as required by the Commission's Rules. And, in further violation of the Commission's rules, AEP Ohio has not provided the fair market value and book value of all property to be transferred to AEP Generation, with an explanation of how the fair market value was determined. AEP Ohio's Application provides only an amended corporate separation plan and the same insufficient information that was provided by AEP Ohio witness Nelson in the Partial Stipulation. AEP Ohio has failed to provide the necessary implementation details and cannot avoid the required hearing on the transfer of its generation assets.

The Commission must use this (or some other proceeding) to review the "minimum" details regarding the proposed asset transfer, including a reasonable period

¹¹ AEP Ohio's November 19, 2011 Joint Reply Memorandum makes the ridiculous argument that Intervenor waived their right to respond to AEP Ohio's Motion for Waiver of the requirement of a hearing, as set forth in O.A.C. 4901:1-37-09(D), by not filing an opposition within 15 days of AEP Ohio's initial Application. See Joint Reply Memorandum, at p. 3. AEP Ohio's initial Application contained no "motion" that would trigger the 15-day deadline set forth in O.A.C. 4901-1-12(B)(1). If it did, then AEP Ohio would not have seen fit to later file a "Joint Motion for Waiver" on October 18, 2011. FES and other Intervenor timely filed their opposition within 15

for discovery, before the corporate separation can be approved. Without these details and the appropriate hearing process called for by O.A.C. 4901:1-37-09(D), the Commission cannot ensure that the transfer will be in the public interest. For example, in only one sentence, AEP Ohio asserts that the transfer will be at “book value,”¹² but it has provided no information to support such a proposal. Moreover, AEP Ohio has failed to explain why a transfer at book value would be in the public interest, as opposed to a transfer at fair market value, or a transfer at the higher of book value or fair market value to better ensure that the regulated utility is not providing a subsidy to the competitive affiliate through a discounted price for the transfer of the assets. While AEP Ohio has acknowledged during the course of the Commission’s review of the Partial Stipulation that AEP Ohio is developing market values for its generating assets, those values have not been provided, and there has been no transparency into the methodology for developing those prices.

AEP Ohio’s failure to reveal or confirm the terms and conditions of the transfers is critical given that the transfers could have a significant impact on the competitive market in Ohio that has benefited over one million customers. If, for example, AEP Ohio decides to transfer some generating assets to other AEP affiliates (or AEP Generation does the same) and the affiliates were able to turn around and sell the assets at fair market value, the affiliates would enjoy subsidies that would distort the market. The Commission also should understand what structure will be replacing the AEP East pool so that the Commission can fully understand the impacts of the transfer of assets to the

days of the Joint Motion and properly objected to AEP Ohio’s request to rush its corporate separation without the transparency and review provided by a hearing.

¹² See Application, Exhibit PJN-1 at p. 4.

various pool members. These types of issues and their impact on the public interest support the requirements for the “minimum” information and hearing process established in the Commission’s Rules. Without this information, the Commission cannot approve the transfer and sale of generating assets to AEP Generation.

2. Regardless of whether such information is yet available, the Commission can and should order corporate separation here and require AEP Ohio to come back to the Commission when the necessary information is available.

AEP Ohio has acknowledged that a number of steps must occur before its generating assets could or would be transferred to AEP Generation, including: the final resolution of the Partial Stipulation (including AEP Ohio’s consent to the modifications required by the Stipulation Order) and FERC approval of the transfer of assets.¹³ Therefore, it may not be surprising that AEP Ohio has not yet provided the “minimum” information or any detail regarding the proposed transfers – and based on the proposed timeline set forth in the Partial Stipulation, that detail may not be available for several years. However, corporate separation is required by R.C. § 4928.17 and not any requirements for a standard service offer (“SSO”) or the Partial Stipulation. Therefore, the Commission can and should order AEP Ohio, in this proceeding, to separate its competitive generation assets from its non-competitive distribution assets – regardless of the final resolution of the Partial Stipulation, or whether AEP Ohio rejects any modifications imposed by the Stipulation Order. Then, when the information required for the Commission’s approval of the transfer of AEP Ohio’s generation assets is available, a proceeding and hearing can be scheduled.

¹³ See Application, pp. 2-5.

Indeed, the “redline” of AEP Ohio’s corporate separation plan filed by AEP Ohio in this proceeding is itself premature. The Commission cannot approve a plan without first knowing who the parties to that plan will be. Currently, the plan is proposed to be implemented by a merged EDU that does not yet exist and control that EDU’s relationship with the newly announced AEP Generation. When AEP Ohio actually is in a position to fulfill its corporate separation responsibilities and can provide the Commission with details of how it will do so, then it can return to the Commission for a proper review of its corporate separation plan.

3. Prior to the full structural separation required by Ohio law, the Commission must require AEP Ohio to comply with true functional separation, which AEP Ohio has failed to do.

While the Commission may have approved the structure of AEP Ohio’s “functional” separation and the language of AEP Ohio’s corporate separation plan (which plan is amended only slightly in AEP Ohio’s Application here), AEP Ohio’s recent filings with the Commission reflect that AEP Ohio continues to favor its own competitive generation services in its role as a non-competitive utility and to operate in violation of the state’s policies, as set forth in R.C. § 4928.02, including ensuring a competitive market and prohibiting the use of anti-competitive subsidies. Indeed, through the Partial Stipulation, AEP Ohio sought the Commission’s approval of a rate structure and anti-competitive policies that would continue to favor, for another three and a half years, AEP Ohio’s own generation supply for its SSO load. If AEP Ohio was truly carrying out functional separation, it would not seek to institute policies and rates that prefer its own generation service and discriminate against other available generation service providers. True functional separation would have AEP Ohio allowing all generation suppliers,

affiliated and unaffiliated, the opportunity to supply the generation service for its SSO service and selecting the supplier on a nonpreferential and nondiscriminatory basis. AEP Ohio should achieve true functional separation now, without waiting for full corporate separation.

AEP Ohio's failure to operate in the manner required by Ohio law affects both wholesale and retail competition in Ohio – and AEP Ohio's customers' ability to secure lower prices available as a result of effective competition. AEP Ohio's past practices of favoring its own generation service despite the Ohio law and corporate separation plan that prohibit such favors, reinforces the need for the Commission's thorough review of its planned transfer of generating assets to a new competitive affiliate.

4. Conclusion

AEP Ohio has waited for over ten years to complete corporate separation of its generating assets. Although corporate separation is long overdue, there is no basis on which to rush through approval of the proposed asset transfer and/or sale. (AEP Ohio only first identified its decision to pursue corporate separation when the Partial Stipulation was filed approximately 90 days ago.) The Commission can best determine whether all of AEP Ohio's proposed transfers and/or sales of generation assets are just, reasonable and in the public interest after a review of the required information and the hearing called for by O.A.C. 4901:1-37-09, and there is no reason to rush such a review. As suggested in the Commission's Stipulation Order, the Commission should carefully review the circumstances under which the generating assets will be transferred and/or sold to ensure that AEP Ohio's ratepayers and Ohio's wholesale and retail markets are not harmed by AEP Ohio's plans.

Respectfully submitted,

/s/ Laura C. McBride

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *FirstEnergy Solutions Corp.'s Initial Comments* was served this 15th day of December, 2011, via e-mail upon the parties below.

/s/ Laura C. McBride

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Summary: Comments of FirstEnergy Solutions Corp. (corrected) electronically filed by Ms. Laura C. McBride on behalf of FirstEnergy Solutions Corp.