

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to Establish)
a Standard Service Offer Pursuant to)
Section 4928.143, Revised Code, in the) Case No. 11-3549-EL-SSO
Form of an Electric Security Plan,)
Accounting Modifications, and Tariffs for)
Generation Service.)

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to Amend) Case No. 11-3550-EL-ATA
its Certified Supplier Tariff, P.U.C.O. No.)
20.)

In the Matter of Application of Duke)
Energy Ohio, Inc. for Authority to Amend) Case No. 11-3551-EL-UNC
its Corporate Separation Plan.)

ENTRY ON REHEARING

The Commission finds:

- (1) On June 20, 2011, as supplemented on June 28, 2011, Duke Energy Ohio, Inc. (Duke) filed an application in the above-captioned cases (*Duke 2011 ESP Case*) for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code, in the form of an electric security plan (ESP) in accordance with Section 4928.143, Revised Code.
- (2) By opinion and order issued November 22, 2011, in the *Duke 2011 ESP Case*, the Commission approved and adopted the stipulation submitted in those cases (Duke stipulation), as revised. The signatory parties to the Duke stipulation included all of the parties in the cases, with the exception of Columbus Southern Power and Ohio Power Company (AEP) and Dominion Retail, Inc., which signed stating that they take no position on the Duke stipulation, and Eagle Energy, LLC, which did not sign the Duke stipulation. The Duke stipulation, as approved, *inter alia*: granted Duke's request for waiver of the corporate separation rules contained in Rule 4901:1-37-09(B) through (D), Ohio Administrative Code (O.A.C.); approved Duke's Third Amended Corporate Separation Plan; and

authorized full legal corporate separation, as contemplated by Section 4928.17(A), Revised Code, such that the transmission and distribution assets of Duke will continue to be held by the distribution utility and all of Duke's generation assets shall be transferred to an affiliate.

- (3) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal. Such application for rehearing is required to set forth specifically the grounds on which the applicant considers the order to be unreasonable.
- (4) On December 22, 2011, AEP filed an application for rehearing of the Commission's November 22, 2011, order, which adopted the Duke stipulation, stating that the decision is unlawful and unreasonable based on the Commission's failure to apply consistent treatment of the factors to achieve corporate separation and the divestiture of generation assets under Section 4928.17, Revised Code, and Chapter 4901:1-37, O.A.C., as compared to the application of the same provisions in other Commission decisions, citing *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., (*AEP 2011 ESP Case*), Opinion and Order (December 14, 2011).
- (5) On December 23, 2011, Duke filed a memorandum contra AEP's application for rehearing. On that same day Duke filed a motion to strike AEP's December 22, 2011, application for rehearing and a request for expedited treatment. On December 28, 2011, AEP filed a memorandum contra Duke's motion to strike.

Background

- (6) Prior to reviewing and considering AEP's application for rehearing and Duke's motion to strike, as well as the responsive pleadings in the *Duke 2011 ESP Case*, the Commission finds it useful to set forth the applicable statutory provisions and case backgrounds surrounding the filings.

- (7) Section 4928.17(A), Revised Code, provides that a utility shall not sell or transfer any generating asset it owns or partially owns without Commission approval and sets forth the criterion required for approval of a corporate separation plan (CSP). Prior to approval of a CSP, the Commission is to provide interested persons an opportunity to file objections, in accordance with Section 4828.17(B), Revised Code.
- (8) On October 11, 2011, AEP's motion to consolidate the *AEP 2011 ESP Case* with the application filed on September 30, 2011, in *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to Its Corporate Separation Plan*, Case No. 11-5333-EL-UNC, (*AEP Corporate Separation Case*) was denied, stating that there is a need for additional review of the amendment to AEP's CSP in the *AEP Corporate Separation Case*.
- (9) In our December 14, 2011, order in the *AEP 2011 ESP Case*, the Commission approved the stipulation submitted in that case (AEP stipulation), as modified by the Commission. The AEP stipulation, which was signed by 21 of the 29 parties in those cases, recommended that the Commission approve full corporate separation of the AEP companies, stating that divestiture of generation assets will lead AEP to amend or dissolve its generation pool; thus, corporate separation is essential to begin the transition of AEP to an auction-based SSO, as contemplated in the AEP stipulation. The signatory parties to the AEP stipulation argued that the Commission had the necessary information to approve corporate separation under Section 4928.17, Revised Code. However, some of the nonsignatory parties to the AEP stipulation opposed the provision that would approve full corporate separation, stating that approval through the AEP stipulation would prevent parties of interest in the *AEP Corporate Separation Case* from filing comments or objections to the plan, as permitted by Section 4928.17(B), Revised Code.
- (10) Upon consideration of the arguments for and against approval of the corporate separation provision in the AEP stipulation, the Commission, in the *AEP 2011 ESP Case* order, in pertinent part: concluded that it needed additional time to determine and understand the terms and conditions relating to the sale and/or transfer of the generation assets from the electric distribution utility to the AEP subsidiary; and agreed that

interested parties must be given an opportunity to provide comments on the CSP, pursuant to statute. Accordingly, the Commission, *inter alia*: found that, subject to approval of the CSP, AEP should divest its competitive generation assets from its noncompetitive electric distribution utility to its separate competitive retail generation subsidiary; the Commission would continue to review the remaining issues regarding AEP's CSP in an expeditious manner in the *AEP Corporate Separation Case*; and, with these clarifications, the Commission found that the CSP proposal in the AEP stipulation did not violate any regulatory principle or practice.

Review and Consideration of Application for Rehearing

- (11) In its application for rehearing of the Commission's order in the *Duke 2011 ESP Case*, AEP alleges that it is prejudiced by the inconsistency between the Commission's analysis and justification for fully approving corporate separation in the *Duke 2011 ESP Case*, as compared to the Commission's actions in modifying similar corporate separation provisions in the *AEP 2011 ESP Case*. AEP states that it "prefers that the Commission issue rulings consistently and allow for the full approval of corporate separation as indicated in both similarly-designed stipulations." According to AEP, the Commission's inconsistent application of the statutory review and the resulting orders leaves the assets of AEP, including the assets jointly owned by AEP and Duke, exposed to different treatment without a reasonable basis. For example, AEP questions whether the Commission intended to approve the transfer of Duke's ownership interest in the Zimmer generating station at net book value, while simultaneously creating a process that could result in withholding approval for AEP to transfer its interest in the same generating unit. AEP maintains that it does not necessarily desire to alter the overall outcome of the order in the *Duke 2011 ESP Case* but merely wishes to ensure equal treatment by the Commission on key statutory matters that will affect the ongoing development of competitive markets for retail electric service in Ohio. AEP notes that it also intends to pursue its concerns in the *AEP Corporate Separation Case* and the *AEP 2011 ESP Case*. In addition, AEP asserts that the Commission's actions violate the state policy to ensure effective competition under Sections 4928.17, 4928.06, and 4928.02(H), Revised Code.

- (12) In its memorandum contra AEP's application for rehearing, Duke argues that AEP's request for rehearing of the order in the *Duke 2011 ESP Case* is improper. Duke describes AEP's filing as an "unfortunate abuse of process and a blatant misrepresentation of the record." Duke argues that, because AEP was either unable or neglected to incorporate similar terms on corporate separation into the AEP stipulation, AEP now wants to turn the focus of its own shortcomings toward the Commission and the preposterous contention that the rulings are discriminatory. Duke points out that AEP is not asking for review of the Commission's order in the *Duke 2011 ESP Case* and is not challenging the reasonableness or lawfulness of the order approving the Duke stipulation; rather AEP is seeking to pressure the Commission into prematurely and blindly forming a decision in respect to the application in the *AEP Corporate Separation Case*.

Further, Duke asserts that AEP's application for rehearing is not supported by the relevant evidentiary record and reflects a self-serving attempt to ignore the statutory requirements for rehearing. Duke notes that, despite AEP's misguided urging, the Commission's decision must be predicated on a review of the evidence in an individual case. In the *Duke 2011 ESP Case*, the Commission reviewed the completed record and issued a thorough order; however, the Commission has yet to receive all of the relevant evidence in the *AEP Corporate Separation Case*. Contrary to AEP's misleading assertions, Duke points out that this is not a situation where the Duke and AEP stipulations are mirror images of each other, and this is not a case of the Commission being inconsistent in its review of identical or even substantially similar cases, because the facts, circumstances, and terms of the two stipulations are remarkably different. In support of its contention, Duke notes that the Duke stipulation includes detailed terms and conditions regarding the asset transfer, whereas the AEP stipulation contains no substantive detail regarding asset transfer. Duke submits that the *AEP Corporate Separation Case* should run its course and, to the extent there are challenges to the Commission's order in the *AEP 2011 ESP Case*, they should be filed in that docket.

Moreover, Duke emphasizes that AEP's application for rehearing ignores the long-standing prohibition against using

one stipulation as precedent in another proceeding, as AEP attempts to have the Commission apply limited provisions of the Duke stipulation to AEP's situation. Finally, Duke asserts that AEP's contention that state policy is undermined because AEP has to prosecute its *AEP Corporate Separation Case* is illogical, because a comparison of the two stipulations reveals that the Duke stipulation contains sufficient protections to guard against any competitive advantage flowing to an affiliate, which is consistent with state policy.

- (13) Initially, the Commission emphasizes that, just because AEP is a party in the *Duke 2011 ESP Case* and may have the right to file an application for rehearing, does not mean that the subject matter of AEP's request is an appropriate matter for consideration on rehearing under Section 4903.10, Revised Code, in the *Duke 2011 ESP Case*. Upon review of the pleadings, the Commission concludes that, by AEP's own admission, AEP does not state a statutory ground for rehearing of any matter determined in the *Duke 2011 ESP Case*. Notwithstanding this fact, the Commission will address the contentions set forth in AEP's application for rehearing.
- (14) While AEP filed its application for rehearing under the guise of wanting to ensure that the Commission is equally applying the statutory requirements to the benefit of the competitive markets, it is evident that the sole reason for AEP to make such a filing in the *Duke 2011 ESP Case* is to try to inappropriately force the Commission's review and decision on AEP's CSP. In fact, AEP concedes that its objection has nothing to do with how the Commission ruled in the *Duke 2011 ESP Case*, rather AEP's concern is that the Commission has not yet approved its CSP. Trying to force the Commission's hand by filing an application for rehearing in the *Duke 2011 ESP Case* is misguided. The fact that AEP is not satisfied with the Commission's diligence in ensuring due process for the review of AEP's CSP has nothing to do with the Commission's order in the *Duke 2011 ESP Case* and is not a sufficient ground for rehearing.

Furthermore, AEP attempts to support its rehearing request under the pretext of its concern that the Commission has decided one way for Duke and another way for AEP; however, as pointed out by Duke, that logic is faulty because, in fact, the

Commission has not yet issued its final decision on the AEP's CSP. Therefore, the ultimate issue AEP is complaining about is not yet ripe for consideration and will not be ripe for rehearing until the Commission issues its order in the *AEP Corporate Separation Case*. The Commission approved AEP's divestiture of its competitive generation assets in the *AEP 2011 ESP Case*, contingent upon statutorily required due process and the Commission's final review in the *AEP Corporate Separation Case*. The Commission is expeditiously processing the *AEP Corporate Separation Case*, while ensuring that due process is afforded and, once the decision in the *AEP Corporate Separation Case* is issued, if AEP does not agree with the outcome, it can file for reconsideration in that docket. As we stated above, if AEP wishes to pursue its concerns, the *Duke 2011 ESP Case* is not the appropriate forum. Accordingly, the Commission finds that, even if AEP's application was considered to state a statutory ground for rehearing, such application lacks merit and should be denied.

Motion to Strike

- (15) As stated previously, Duke filed a motion to strike AEP's application for rehearing of the Commission's order in the *Duke 2011 ESP Case*, stating that, regardless of the substance of AEP's application for rehearing, the filing should be stricken because it is irrelevant in the *Duke 2011 ESP Case*. Duke points out that the supposed application for rehearing actually seeks a changed outcome in AEP's proceedings. Duke states that Section 4903.10, Revised Code, requires the applicant to set forth the grounds on which it considers the order unreasonable or unlawful; however, AEP admits that it does not necessarily desire to alter the outcome of the Commission's order in the *Duke 2011 ESP Case*. Duke notes that AEP's application for rehearing does not actually seek any relief; rather, the entire justification for AEP's position on rehearing is based on a comparison between the Commission's decision in the *Duke 2011 ESP Case* and the Commission's decision in a subsequent, unrelated decision in the *AEP 2011 ESP Case*, and AEP's desire to alter the outcome in the *AEP 2011 ESP Case*. Furthermore, Duke asserts that it would be procedurally improper and unprecedented for the Commission to allow AEP to compare the factual situations in the *Duke 2011 ESP Case* and the *AEP*

2011 ESP Case when no facts related to the *AEP 2011 ESP Case* are on record in the Duke case.


- (16) In its memorandum contra Duke's motion to strike, AEP maintains that it has a legal right to seek rehearing, and that Duke's motion is without any basis in statute or administrative rule. AEP explains that its rehearing application is based on the Commission's inconsistent application of the law, and its request that the Commission modify either the order in the *Duke 2011 ESP Case* or the *AEP 2011 ESP Case*. Furthermore, AEP asserts that Duke's argument that the rehearing request is procedurally inappropriate because it was not supported by the closed factual record in the *Duke 2011 ESP Case* is incorrect, pointing out that its rehearing request is based on the unlawful and unreasonable application of the law and not based on a matter of fact in other proceedings.
- (17) Since we have previously determined herein that AEP's application for rehearing is inappropriate and should be denied, we do not find it necessary to rule on the motion to strike.

It is, therefore,

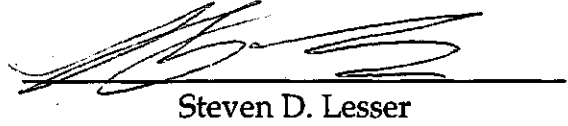
ORDERED, That the application for rehearing filed by AEP be denied in its entirety.
It is, further,

ORDERED, That a copy of this entry on rehearing be served upon each party of record.

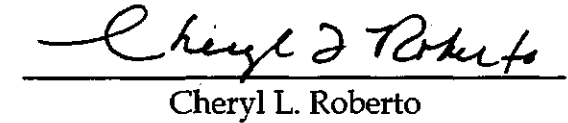
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Britchler, Chairman


Paul A. Centofola


Steven D. Lesser

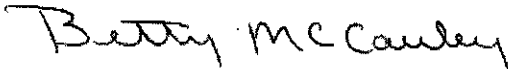

Andre T. Porter


Cheryl L. Roberto

CMTP/KLS/vrm

Entered in the Journal

JAN 18 2012


Betty McCauley
Secretary