

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company for Approval of)	Case No. 12-1126-EL-UNC
Full Legal Corporate Separation and)	
Amendment to Its Corporate Separation)	
Plan.)	

**MEMORANDUM CONTRA MOTION FOR WAIVER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC") files this Memorandum Contra Ohio Power Company's ("OP" or "the Company") request for waiver of Ohio Admin. Code Rule 4901:1-37-09(C)(4) and 4901:1-37-09(D). These waivers were sought in OP's March 30, 2012 application seeking approval of its corporate separation plan.

A. Ohio Administrative Code 4901:1-37-09(C)(4).

The first waiver pertains to Ohio Admin. Code 4901:1-37-09(C)(4). Under that rule, the utility must "[s]tate 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." Notably, this portion of the Ohio Administrative Code (4901:1-37-09(C)(4)), though absent from the Staff's proposed corporate separation rules, was incorporated by the Public Utilities Commission of Ohio ("Commission" or "PUCO") into the final rules, which rules became Chapter 4901:1-37 of the Administrative Code.¹

¹ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221, Case No. 08-777-EL-ORD, Entry on Rehearing at ¶36 (Feb. 11, 2009).*

OCEA had argued that such information was essential to determining whether the transfer is in the public interest.² The Commission found that “this additional information could be helpful in determining whether the transfer is in the public interest.”³ Thus, looking at the market value and book value of the assets to be transferred is part of the analysis that the Commission should undertake to determine whether a corporate separation plan, including the transfer of assets, should be approved under R.C. 4928.17.

R.C. 4928.17, in numerous subsections, refers to the “competitive advantage and abuse of market” that the law seeks to prevent through the filing of a corporate separation plan. In subsection (a)(2), the Commission is tasked with evaluating a corporate separation plan to determine if it “satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.” Additionally, the Commission must determine under subsection (a)(3) whether the plan is sufficient to ensure that the utility will not extend any “undue preference or advantage” to its affiliate. Section (B) of the statute requires the PUCO to adopt rules regarding corporate separation that include limitations on affiliate practices “to prevent unfair competitive advantage.”

R.C. 4928.02(H) also conveys this theme but uses slightly different terminology. It establishes, as one of the state policies, ensuring effective competition by avoiding anticompetitive subsidies flowing from a non-competitive retail service to a competitive

² *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, OCEA Comments at 76 (July 22, 2008).

³ *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD, Entry on Rehearing at ¶36 (Feb. 11, 2009).

retail service. This is one of the state policies the PUCO must ensure is effectuated under R.C. 4928.06.

When an affiliate receives property from an electric utility, the electric utility should show that it has been properly compensated for such property. If the electric utility has not been properly compensated, i.e. the compensation is too low, the affiliate receives a competitive advantage, which is unlawful under R.C. 4928.17(B) and R.C. 4928.02(H). Transfer at net value, as proposed by the Company, instead of market value, is likely to result in compensation that is too low, and in subsidies flowing from the customers of the utility to the unregulated affiliate. This is not in the public interest as it threatens the development of a competitive generation market, a key component of S.B. 221. This is contrary to the policy of the state to ensure the diversity of electricity supply and suppliers.⁴

The Commission should allow a record to be developed that includes market value of the transferred assets. Indeed it appears that the Company has either developed or is in the process of developing a market value for these transferred assets.⁵ It should present that information as part of its corporate separation filing. It should also allow discovery to go forward on this basis.

While the Company appears to argue that a waiver is “reasonable,” that is not the standard for a waiver under the Ohio Administrative Code. Notably Ohio Administrative Code 4901:1-37-02(C) allows the Commission to “waive any requirement of this chapter,

⁴ See R.C. 4928.02(C).

⁵ See *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 Nos. 11-346-EL-SSO et al., Tr. V at 705-707.

other than a requirement mandated by statute, for ‘good cause shown.’” “Good cause” is not the same as “reasonable.”

Moreover, the “reasonableness” of the waiver is tied to the fact that the PUCO allowed Duke Energy Ohio to transfer its generation assets at net book value, without producing the market value.⁶ The Company argues that the Commission determined that it was in the public interest in the Duke case to waive the rule and approve transfer at net book value. This, however, is an attempt by the Company to misuse an isolated provision in the Duke Stipulation to validate its approval of its own net book value transfer. It not only violates the terms of the Stipulation, but also is contrary to the inherent nature of a stipulation.

The terms of the Stipulation are being violated here where the Company is seeking to use the Stipulation and the Commission order adopting the stipulation as precedent. The plain words of the Duke Stipulation preclude such use:

This Stipulation is submitted for purposes of these proceedings only, and neither this Stipulation or any Commission Order considering this Stipulation shall be deemed binding in any other proceeding***.”⁷

The only permissible use of the stipulation, or an Order adopting the Stipulation, is for purposes of enforcing the Stipulation. This is seen under the following provision within the Stipulation:

“***nor shall this Stipulation or any such Order be offered or relied upon by any Party in any proceedings except as necessary to enforce the terms of this Stipulation.”⁸

⁶ Application at 7.

⁷ Stipulation at 2, 42.

⁸ Id.

Indeed the Commission duly noted in the Company's prior corporate separation case, Case No. 11-5333-EL-UNC, that these provisions in the Duke Stipulation are binding on the signatory parties.⁹ Accordingly it struck portions of the Company's reply comments where the Company overstepped the dictates of the Duke ESP stipulation. It is engaging in that very action here, as well.

Moreover, a stipulation, such as the Duke Ohio Stipulation, represents a resolution of a number of issues in a proceeding or multiple proceedings. A Stipulation is a package composed of many different provisions—provisions which may not be acceptable on a stand alone basis, but when put together with other terms, constitute an acceptable compromise. Indeed as the Duke Ohio Stipulation stated “[t]his stipulation represents an agreement by all Parties to a package of provisions rather than an agreement to each of the individual provisions included within the Stipulation.”¹⁰ It is in the words of the Signatory Parties “a comprehensive compromise of issues raised by Parties with diverse interests.”¹¹

Similarly, a Commission order adopting a stipulation is made on the basis of *inter alia*, whether the stipulation “as a package” benefits ratepayers and the public interest. While distinct provisions of the stipulation may not have passed the “public interest” standard, the Commission's Order adopting the stipulation package does not necessitate such a finding. To extricate a distinct provision of a Stipulation package (net book asset

⁹ *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, Finding and Order at ¶32 (Jan. 23, 2012).

¹⁰ Stipulation and Recommendation at 2.

¹¹ *Id.* at 3.

transfer) and use it on a stand alone basis as precedent for a different company, under a different set of facts, perverts the whole stipulation process.

The Company's misuse of the Duke Stipulation, in violation of the terms expressly agreed to, will have a chilling effect on the willingness of parties to enter into future negotiations. If parties to a settlement are not assured that the terms of the settlement agreement, agreed to and eventually approved by the PUCO, will be adhered to and not be used as precedent, parties will not be inclined to sign onto settlements. Sound regulation should not discourage dispute-resolution through settlements. Settlement may also bring about regulatory certainty that may otherwise be delayed until the termination of all litigation.

OCC, therefore, urges the Commission to disregard the arguments of the Company which rely heavily on the Duke Energy Ohio stipulation terms as a means to get approval for asset transfer in its own corporate separation filing. Accordingly, the PUCO should deny the waiver and the Company should be required to expeditiously produce information on the market value and net book value, consistent with the provisions of the Ohio Administrative Code.

B. Ohio Admin. Code 4901:1-37-09(D).

This provision of the Code states that “[t]he commission shall fix a time and place for a hearing with respect to any application that proposes to alter the jurisdiction of the commission over a generation asset.” Similarly, R.C. 4928.17(B) indicates that prior to approving a corporate separation plan, the PUCO “shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing.” Read together it is clear that the Commission, by adopting Ohio Adm. Code 4901-1-37-09(D),

has indicated that when the transfer of assets alters the jurisdiction of the PUCO, it shall reasonably require a hearing.

The Companies seek to waive this portion of the Code because they voluntarily commit to the same conditions Duke Energy Ohio agreed to in Case No. 11-3549.¹² With such commitments, there is “good cause” to waive the hearing requirements as the PUCO did for Duke Energy Ohio, the Company argues.¹³

Again, this is an attempt by the Company to misuse an isolated provision in the Duke Stipulation to allow it to forego an evidentiary hearing on its application. The Commission should resist such arguments and consider the merits of the Company’s application on its own.

The Commission must determine in this proceeding that the transfer, under the terms proposed, is in the public interest. That determination must be based on evidence in the record, and not on evidence produced in some other proceeding, under different circumstances. Under R.C. 4928.17 and Ohio Admin. Code 4901-1-37-09(D), a hearing is required. It should be held so that there is a full vetting of the corporate separation plan. Only then will it be known whether the plan meets R.C. 4928.17—that it is in the public interest and does not create a competitive advantage for the Company’s affiliate.

The Company’s request for a waiver of a hearing on this matter should be denied.

¹² Application at 7.

¹³ Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memorandum Contra Motion for Waiver* was served on the persons stated below via regular U.S. Mail, postage prepaid, this 16th day of April, 2012.

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Summary: Memorandum Memorandum Contra Motion for Waiver by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.