

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**MEMORANDUM CONTRA OHIO POWER COMPANY'S REQUEST FOR WAIVER
OF INDUSTRIAL ENERGY USERS-OHIO AND FIRSTENERGY SOLUTIONS CORP.**

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I. INTRODUCTION

On March 30, 2012, Ohio Power Company (“OP”) filed an Application for Approval of Full Legal Corporate Separation and Amendment to Its Corporate Separation Plan (“Application”). The Application requests a waiver of the hearing requirement and the requirement to state the market value and book value of all property to be transferred. The Public Utilities Commission of Ohio (“Commission”) should deny both waiver requests and set the matter for hearing because OP has failed to show good cause and has not met its burden of demonstrating that the Application is in the public interest.

II. BACKGROUND

This is not the first time that OP has tried to rush the Commission into approving the transfer of over \$6 billion of generating assets beyond the Commission’s jurisdiction. On September 7, 2011, OP and other signatory parties filed a Stipulation and Recommendation (“Stipulation”) in OP’s electric security plan (“ESP”) case, which, among other things, requested that the Commission approve full legal corporate

separation and the transfer of generating assets. The Stipulation provided little guidance or detail regarding the manner in which corporate separation would be facilitated and no safeguards for ratepayers.¹ On September 30, 2011, OP attempted to fill in the gaps by filing an application to modify its corporate separation plan and to transfer its generating assets to an unregulated affiliate ("September Application").²

The September Application, however, did not contain the information required by the Commission's rules. Instead, OP requested a waiver of the requirement to state the market value of OP's generating assets and the hearing requirement. But the Application did not provide or request a waiver of the specific terms and conditions of the transfer and failed to address whether the unregulated affiliate planned any subsequent transfers. Despite the lack of information in the Stipulation and September Application, the Commission approved the Stipulation and the September Application on December 14, 2011, and January 23, 2012, respectively.

When OP filed a corporate separation and generation transfer application at the Federal Energy Regulatory Commission ("FERC"), a portion of the missing information emerged—OP intended to transfer 2,500 megawatts ("MW") of generating assets, namely its Amos and Mitchell units, to Appalachian Power Company ("APCo") and Kentucky Power Company ("KPCo") and not bid the assets into PJM Interconnection LLC's ("PJM") base residual auction ("BRA"). In response to this new disclosure, on

¹ The Stipulation did not even specify that OP intended to transfer the assets at net book value.

² *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, Application (Sep. 30, 2011) (hereinafter "September Application").

February 23, 2012, the Commission determined that the Stipulation was not in the public interest, stating:

Based upon the contradictory testimony presented by the Signatory Parties' witnesses, AEP-Ohio's witness Nelson's claim that the ultimate disposition of AEP-Ohio's generation assets was an "open question," and the fact that AEP-Ohio's FERC filing regarding divestiture is inconsistent with the Commission's intent in approving the Stipulation, the Commission finds that there are fundamental disagreements regarding important issues allegedly resolved by the Stipulation. The resolution of these issues is critical to the underlying question of whether the Stipulation benefits ratepayers and the public interest; therefore, we find, upon review of the record of this proceeding, that the Signatory Parties have not met their burden of demonstrating that the Stipulation, as a package, benefits ratepayers and the public interest as required by the second prong of our three-part test for the consideration of stipulations. Accordingly, we must reject the Stipulation.³

The Commission rightly determined that OP had not met its burden of demonstrating that the Stipulation was in the public interest. First, the subsequent transfers of the Amos and Mitchell units may impact the results of the BRA. Because KPCo and APCo are still operating under the fixed resource requirement, the Amos and Mitchell plants would not be bid into the BRA. Basic principles of supply and demand dictate that keeping the Amos and Mitchell plants out of the auction will impact the price of capacity in PJM.

Despite the Commission's obvious concerns with OP's corporate separation intentions, OP filed an Application in this proceeding that looks very much like the September Application. Again, OP requests a waiver of the requirement to state the market value and book value of its generating assets and the hearing requirement. OP

³ *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.*, Entry on Rehearing at 8 (Feb. 23, 2012) (hereinafter "ESP II").

also requests authorization to transfer the assets at net book value. The main difference between the two applications is that OP has expressly requested approval to transfer the Amos and Mitchell plants to APCo and KPCo. OP made this request even though the Commission stated in the Entry on Rehearing rejecting the generation transfer that its "intent in approving the generation asset divestiture was based on our understanding that AEP-Ohio would place all of its current (as of September 7, 2011) generation assets into the 2015 base residual auction."⁴

Additionally, OP has further explained why it believes that the generating assets should be transferred at net book value, stating, "Under SB 3, all of these generation assets were subjected to market and EDUs therefore were given a temporary opportunity to recover stranded generation investments during a transition period. That transition period is over."⁵ OP, however, fails to mention the three different stranded cost and revenue recovery mechanisms that it has requested in its Modified ESP Application and the Capacity Case.⁶

Besides the differences mentioned above, OP has made few changes from the September Application. OP still has not provided the specific terms and conditions of the transfer of the generating assets. OP has not demonstrated how the sale will affect

⁴ In a separate filing in OP's Modified ESP Application, OP has stated that it will seek pool termination revenues if the Commission does not approve this Application without Modification. *ESP II*, Direct Testimony of Philip Nelson at 21-23 (Mar. 30, 2012). While OP has stated this intent, it has also taken the inconsistent position in this Application that the time for stranded cost recovery is over.

⁵ Application at 7.

⁶ OP has requested above-market capacity revenues, a retail stability rider to ensure that OP has at least a 10.5% return on equity, and pool termination revenues if the Application in this proceeding is not approved as filed. *ESP II*, Direct Testimony of Robert Powers at 13-19 (Mar. 30, 2012); *ESP II*, Modified Application at 10 (Mar. 30, 2012); *ESP II*, Direct Testimony of Philip Nelson at 21-23 (Mar. 30, 2012).

the future standard service offer ("SSO").⁷ OP has not demonstrated how the Application is in the public interest—rather, OP argues that because the Commission concluded that Duke Energy Ohio's⁸ ("Duke") corporate separation application was in the public interest, OP's Application must be as well. OP has not stated the market value and book value of the generating assets to be transferred. OP has not provided pre-transfer and post-transfer pro forma financial statements or described OP's projected debt to equity ratio post-transfer.⁹ OP has requested that liabilities remain with OP under certain conditions but OP has not explained the extent of the exposure associated with those liabilities. OP has also requested that pollution control revenue bonds that mature after corporate separation be retained by OP.¹⁰ Finally, OP has not provided a redlined version of its modified cost allocation manual ("CAM").¹¹

⁷ OP has proposed to set its standard service offer ("SSO") price through a competitive bidding process ("CBP") in 2015. Thus, the capacity price that emerges from the BRA will be a factor in setting the CBP price. Since OP has not demonstrated the impact that not bidding the Amos and Mitchell units into the BRA will have on the price for capacity, OP has failed to demonstrate the impact of the transfer on the future SSO.

⁸ See *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 Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, et al. Opinion and Order (Nov. 22, 2011) (hereinafter "*Duke ESP*").

⁹ OP's focus is on the transfer of assets, but it ignores the liability side of the balance sheet. For example, OP claims on page 5 of Attachment A that "The Company is financed as a vertically integrated utility....The cash proceeds from those bonds are for the use of the entire business of the Company, as necessary." OP does not appear to be keeping track of which segment of its business is responsible for various liabilities. If that is the case, OP has no way of ensuring that the appropriate liabilities are transferred to its affiliate along with OP's assets.

¹⁰ Application at 5-6.

¹¹ See Rule 4901:1-37-08, OAC; see also 4901:1-37-05, OAC.

III. ARGUMENT

Transparency and openness are fundamental cornerstones of the Commission's obligation to the public it serves.¹² Thus, it is sound regulatory policy to require OP to provide sufficient information for the Commission to obtain a complete and accurate picture of the proposal under review. The Commission need look no further than OP's September Application to see the importance of these principles—the lack of transparency and detail in OP's September Application is what ultimately led to its rejection. The Commission should not entertain OP's waiver requests for that reason alone. Regardless, OP's waiver requests are without merit.

A. OP Has Not Shown Good Cause for a Waiver of the Requirement to State the Market Value of its Generating Assets

An electric distribution utility can only transfer or sell a generating asset if the Commission approves the transaction.¹³ The Commission can only approve an application to transfer generating assets if it “is satisfied that the sale or transfer is just, reasonable, and in the public interest....”¹⁴ The Commission must also ensure that the

¹² See *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order at 26 (Nov. 5, 2008) (“The Commission believes that the proposed rules, as modified herein, provide for regulations, standards, and enforcement of those regulations and standards that will provide for a transparent and public process, which should result in more accountability as well as greater reliability of the electric utilities' distribution systems.”); Opinion and Order at 25 (Dec. 14, 2011) (enough facts existed to demonstrate settlement discussions were open and transparent, supporting a finding that the Stipulation was in the public interest); Section 4905.17, Revised Code (Commission records are open to the public), see also *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Columbia Gas of Ohio, Inc., and Related Matters*, Case Nos. 05-221-GA-GCR, et al., Opinion and Order, *Concurring Opinion of Commissioner Paul A. Centolella* at 2 (Jan. 23, 2008) (“Parties before this Commission have a responsibility to promote openness, transparency, and public confidence in the regulatory process.”); Rule 4901:1-35-08, OAC. (competitive bid solicitation process should be open, fair, and transparent).

¹³ Section 4928.17(E), Revised Code.

¹⁴ Rule 4901:1-37-09(E), OAC.

transfer furthers state policy objectives contained in Section 4928.02, Revised Code.¹⁵ Rule 4901:1-37-09, OAC, requires disclosure of both the net book value and market value of the generating assets. In the rulemaking process which led to the creation of Rule 4901:1-37-09, OAC, the Commission determined that the market value of generating assets “could be helpful in determining whether the transfer is in the public interest.”¹⁶

OP requests a waiver of the requirement to state the market value of its generating assets, despite the fact that OP is in the process of determining the market value.¹⁷ In support of its request for waiver, OP claims that it should not have to provide such information because OP is transferring its generating assets to an affiliate, it is not seeking stranded cost recovery, and the Commission granted similar relief in the *Duke ESP*.¹⁸ OP’s arguments lack merit.

Without predetermining whether OP’s generating assets should be transferred at net book value or market value, the Commission should require OP to provide both pieces of information. It does not matter that OP is selling generating assets to an affiliate that falls under the same parent corporation as OP.¹⁹ Transfers in connection

¹⁵ Rule 4901:1-37-02, OAC.

¹⁶ *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).*

¹⁷ *ESP II*, Tr. Vol. 5 at 706-707.

¹⁸ Application at 7.

¹⁹ *Id.*

with corporate separation plans are commonly made to affiliated entities.²⁰ Nevertheless, the Commission enacted a rule that any utility pursuing corporate separation 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.”²¹ OP is in the process of determining the market value of its generating assets and the Commission has determined that this information is helpful in determining whether the transfer is in the public interest. In the interest of transparency and providing the Commission with a complete record upon which to base its decision, OP should disclose the market value of its generating assets.

Additionally, OP’s waiver claim on the basis that it is not seeking transition revenues is disingenuous. First, it is clear that OP is seeking transition revenues through its Modified ESP Application and the Capacity Case, although the time for stranded cost recovery is over. OP has requested that the Commission authorize OP to collect cost-based capacity because it alleges it cannot recover its capacity costs in the market. Second, OP has requested a retail stability rider (“RSR”) to assure it can achieve certain revenue levels if it provides “discounted capacity” to competitive retail electric service (“CRES”) providers serving shopping customers. Finally, if the Commission does not approve its Application in this proceeding without modification, OP requests authority to recover the difference between its market revenues and the revenues previously obtained through the Interconnection Agreement (the AEP East Pool).

²⁰ See, e.g., *In the Matter of an Application for the Approval of a Corporate Separation Plan* Section 4928.17, Revised Code and 4901:1, *Ohio Administrative Code*, Application at 4 (June 1, 2009) (“the Companies’ Commission-regulated electric distribution services function independently from the transmission and competitive generation assets of its affiliates.”).

²¹ Rule 4901:1-37-09(E), OAC.

OP's claim that the outcome in the *Duke ESP* justifies a waiver is also without merit because the differences between the *Duke ESP* and the Application warrant different treatment. The *Duke ESP* was resolved through an uncontested stipulation and the waiver requests were expressly written into the stipulation. The Commission previously stated in Duke's market rate offer case that matters can be resolved through stipulation that would not otherwise be resolved in the same manner on a stand-alone basis.²² Accordingly, as part of an uncontested stipulation, Duke agreed to set its next SSO price through a competitive bidding process, which reduced some total bills by nearly 20%,²³ and several signatory parties agreed to waive the requirements of Rule 4901:1-37, OAC.²⁴ OP's Application, however, is heavily contested and OP seeks to raise rates through non-bypassable charges and shopping taxes. Unlike OP's Application, Duke did not request authorization to transfer 2,500 MW of generation to other states and decrease the supply that would be bid into the next BRA.

Accordingly, the Commission should deny OP's waiver request, and direct OP to provide the market value of its generating assets. OP has indicated that it is in the process of obtaining the market value of its generating assets, and the Commission has determined that the market value of the generating assets is helpful in determining

²² *In the Matter of the Application of Duke Energy Ohio for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 64 (Feb. 23, 2011).

²³ According to the Commission's monthly newsletter, Duke Energy Ohio residential customers' total bills decreased by 17% as a result of the competitive bidding process. *The Monitor* (January 2012) <http://www.puco.ohio.gov/emplibrary/files/media/Publications/Newsletters/MonitorJan2012.pdf> (last viewed on April 11, 2011).

²⁴ IEU-Ohio did not support or oppose this provision of the stipulation.

whether the transfer is in the public interest. There is no valid reason to waive this requirement given that the information is helpful and will be available.

B. The Commission Should Not Waive the Hearing Requirement

Under Rule 4901:1-37-09(D), OAC, the Commission shall hold a hearing on any application that requests authority to transfer generating assets beyond the Commission's jurisdiction.²⁵ Transfer to an unregulated affiliate would trigger the hearing requirement. OP has not and cannot show good cause to waive the hearing requirement. In the interest of transparency and providing a complete and accurate record, this requirement should not be waived.

OP claims that the Commission need not hold a hearing because it is willing to accept the "same conditions Duke Energy Ohio agreed to in Case No. 11-3549."²⁶ Corporate separation, however, is not a one size fits all approach. If it were, the legislature would have written specific terms into Section 4928.17, Revised Code, and relegated the Commission to the "ministerial"²⁷ role that OP often believes the Commission serves. In any event, the conditions are insufficient. They include: (1) an audit conducted by Staff or an independent auditor to ensure the separation is lawful and supports competition and (2) Staff access to AEP books and records.²⁸ But those

²⁵ Moreover, Section 4928.17(B), Revised Code, provides that parties have a right to file objections to OP's proposed corporate separation plan.

²⁶ Application at 7-8.

²⁷ *ESP II*, AEP Ohio Reply to the Tariff Objections Filed by Industrial Energy Users-Ohio, Ormet Primary Aluminum and Office of the Ohio Consumers' Counsel/Appalachian Peace and Justice Network at 2 (Mar. 6, 2012).

²⁸ Application 8-9.

conditions circumvent the usual comment period and hearing process,²⁹ which are necessary to ensure transparency and consumers' ability to voice concerns with OP's separation plan, given that consumers could bear the cost of an unfairly low-cost transfer of assets. An opportunity to object and participate in a hearing is also necessary to protect CRES and wholesale providers, including FirstEnergy Solutions Corp., that may be competitively harmed by the details of the separation.

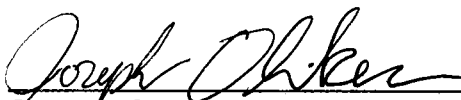
The Commission must review OP's Application and determine whether it is just, reasonable, and in the public interest and whether it furthers the policies contained in Section 4928.02, Revised Code. OP has not provided sufficient information in its Application for the Commission to make that determination. Accordingly, the Commission must deny OP's waiver request, direct OP to supplement its Application to comply with the Commission's rules, and set the matter for hearing.

IV. CONCLUSION

For the reasons stated herein, the Commission should deny OP's waiver requests, direct OP to provide the information required by the Commission's rules, and set the matter for hearing.

²⁹ See Section 4928.17(B), Revised Code; 4901:1-37-09(D), OAC.

Respectfully submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing *Memorandum Contra Ohio Power Company's Request for a Waiver of Industrial Energy Users and FirstEnergy Solutions Corp.*, was served upon the following parties of record this 26th day of April, 2012, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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