

FILE

RECEIVED-DOCKETING DIV

BEFORE

2002 JUN 21 PM 4:35 THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

In the Matter of the Application of)
Ohio Power Company and the Columbus)
Southern Power Company for Certain)
Findings Under 15 U.S.C. § 79Z and)
17CFR § 250.53)

Case No. 01-3289-EL-UNC

REPLY TO
COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S MEMORANDUM
CONTRA INDUSTRIAL ENERGY USERS-OHIO'S
MOTION TO DISMISS AND MOTION TO INTERVENE

Samuel C. Randazzo
(Trial Attorney)
Kimberly W. Bojko
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653

June 21, 2002

Attorneys for Industrial Energy Users-Ohio

{C10438:}

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business
Technician KCH Date Processed 6/21/02

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company and the Columbus)	
Southern Power Company for Certain)	Case No. 01-3289-EL-UNC
Findings Under 15 U.S.C. § 79Z and)	
17CFR § 250.53)	

**REPLY TO
COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S MEMORANDUM
CONTRA INDUSTRIAL ENERGY USERS-OHIO'S
MOTION TO DISMISS AND MOTION TO INTERVENE**

I. INTRODUCTION

Pursuant to Rules 4901-1-12(B)(2) and 4901-1-07(B), Ohio Administrative Code, the Industrial Energy Users-Ohio ("IEU-Ohio") hereby files its reply to the Columbus Southern Power Company's ("CSP") and the Ohio Power Company's ("OPCO"), subsidiaries of American Electric Power Company ("AEP"), (collectively, "Applicants") Memorandum Contra IEU-Ohio's Motion to Dismiss and Request for Other Relief and IEU-Ohio's Motion to Intervene.

On December 21, 2001, Applicants filed an Application with the Public Utilities Commission of Ohio ("Commission") seeking, among other things, certain findings required to proceed with various proposed corporate conversions and transfers, including the transformation of OPCO and CSP into one or more entities known as Exempt Wholesale Generators ("EWGs"). Application at 1-2.

In response to IEU-Ohio's Motion to Dismiss and Motion to Intervene,¹ on June 12, 2002, AEP filed a Memorandum Contra that urges the Commission to reject IEU-Ohio's requests. IEU-Ohio's response follows.

II. MOTION TO INTERVENE

Applicants assert that IEU-Ohio has erroneously associated Applicants' Application with Ohio's electric restructuring law and Applicants' Transition Plans. Memo Contra at 2. However, Applicants' own Application is the source of IEU-Ohio's linkage between Applicants' Application and Ohio law, as well as the Transition Plans.

In their Application, Applicants explained that "CSP and OPCO are required to implement a Corporate Separation Plan, the purpose of which is to fully separate the provision of noncompetitive retail electric service from the provision of services other than noncompetitive retail electric service. CSP's and OPCO's Corporate Separation Plan has been approved by Order of this Commission within the context of the overall Transition Plan." Application at 2-3. Applicants continued: "The Transition Plan approved by the Commission requires CSP and OPCO to transfer its electric transmission and distribution assets and obligations to newly formed entities which will continue to provide regulated service for distribution to retail customers and which will participate in a regional transmission operating company. CSP and OPCO will then be converted to an EWG structure to permit each to operate as electric generating companies." *Id.* at 3.

¹ IEU-Ohio's Motion to Dismiss and Request for Other Relief was filed on May 13, 2002; IEU-Ohio's Motion to Intervene and Memorandum in Support was filed on June 7, 2002.

Additionally, to support their Application to transfer the generating facilities to an EWG or to become an EWG, Applicants asserted the following:

- 1) "The transactions underlying this Application are being undertaken because of the requirements of SB 3 to separate control of the generating plants from the regulated wires businesses." *Id.* at 5-6;
- 2) "The corporate separation requirements in SB 3 help effectuate the policy set forth in Ohio Rev. Code Section 4928.02, Ohio Rev. Code, which is to create a robust competitive marketplace, which is in the public interest and will benefit consumers." *Id.* at 6;
- 3) "The conversion of these generating units to EWG status will advance the public interest by implementing the legislative initiatives adopted by Ohio." *Id.*; and
- 4) "In fact, the determination, which will facilitate the corporate separation required by SB 3, is entirely consistent with Ohio law." *Id.* at 6-7.

From all of these statements advanced by Applicants (not IEU-Ohio), it is clear that Ohio's restructuring law, Amended Substitute Senate Bill 3 ("SB 3"), and the transition plan proceedings that were required by SB 3 are implicated by the relief Applicants seek in this proceeding. IEU-Ohio and its members were active participants in the legislative process, as well as the transition plan proceedings that resulted in a stipulation. In their Transition Plans, Applicants were required to include a Corporate Separation Plan, which had to be approved by the Commission. The Corporate Separation Plan approved by the Commission did not contemplate the corporate structure proposed in this proceeding; EWG status for the Applicants' generating facilities was not included in the Corporate Separation Plan. See IEU-Ohio's Motion to Dismiss at 4-7. Any modification to the Corporate Separation Plan included with the Transition Plans approved by the Commission requires an amendment to be filed with

the Commission for approval.² Section 4928.35(E), Ohio Revised Code. Applicants have not made such a filing.

As a signatory to the Transition Plan settlement, IEU-Ohio has a direct and substantial interest in the implementation of all aspects of the stipulation or any modifications to the Transition Plans, including the Corporate Separation Plan, or the settlement. Additionally, as customers of Applicants, IEU-Ohio member companies have a direct and substantial interest in any proposed transactions that may directly or indirectly impact the provision of electric service to IEU-Ohio members' manufacturing facilities.

Contrary to Applicants' assertions, IEU-Ohio is well aware of the process that a utility must undergo to obtain EWG status. However, as discussed in IEU-Ohio's Motion to Dismiss, IEU-Ohio believes that the Commission should proceed under authority that is not dependent on the Public Utility Holding Company Act of 1935 ("PUHCA"). IEU-Ohio's Motion to Dismiss at 2-3. Regardless of the jurisdictional process utilized by the Commission to consider Applicants' request, IEU-Ohio has a direct and substantial interest in the proceeding. As a prerequisite to the Federal Energy Regulatory Commission's ("FERC") determination of EWG status, the Ohio Commission must determine whether allowing the facility to be an "eligible facility" will benefit consumers,

² In Applicants' testimony filed with its Transition Plans, AEP recognized the requirement to file an amendment for Commission approval:

Q. Is there any chance that this proposed corporate separation plan could change?

A. Yes. It is possible that there could be changes to the proposed corporate separation plan. **If there are any changes to the corporate separation plan, this testimony and Part B to the Transition Plan Filing will be amended and filed as soon as possible.**

In The Matter of the Application of Columbus Southern Power Co. for Approval of Elec. Transition Plan and Application for Receipt of Transition Revenues, et al., Direct Testimony of William R. Forrester on behalf of Applicants, Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP (December 30, 1999) (emphasis added).

is in the public interest, and does not violate state law.³ IEU-Ohio's members are consumers who purchase substantial quantities of electricity and related services from AEP's subsidiaries. IEU-Ohio has a direct and substantial interest in and can assist in the Commission's determination as to whether the proposed transactions are within the public interest. Finally, IEU-Ohio has an interest in ensuring that the proposed transactions do not violate State law, particularly the State's policy to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service" and to create a robust competitive market. Section 4928.02, Ohio Revised Code.

For the aforementioned reasons and as demonstrated in IEU-Ohio's Motion to Intervene and Memorandum in Support, IEU-Ohio has a direct, real, and substantial interest in the issues and matters involved in the above-captioned proceeding, and is so situated that the disposition of this proceeding may, as a practical matter, impair or impede its ability to protect that interest. IEU-Ohio believes that its participation in this proceeding *will not cause undue delay, will not unjustly prejudice any existing party, and will contribute to the just and expeditious resolution of the issues and concerns raised in this proceeding.* The interest of IEU-Ohio will not be adequately represented by other parties to the proceeding and, as such, IEU-Ohio is entitled to intervene in this proceeding with the full powers and rights granted, by the Commission specifically, by statute and by the provisions of the Ohio Administrative Code, to intervening parties.

³ See Section 32 of the PUHCA, 15 U.S.C. § 79z-5a (2000).

III. MOTION TO DISMISS

Contrary to Applicants' assertions, in order for the Commission to thoroughly review the proposal and determine that allowing the facilities to be eligible facilities will benefit consumers, is in the public interest, and does not violate State law, the Commission must consider the "string of issues" raised by IEU-Ohio in its Motion to Dismiss. Memo Contra at 2. These issues demonstrate that the proposed transactions may not benefit consumers, may not be in the public interest, and may violate Ohio law.

Applicants argue that the granting of EWG status will benefit customers by creating a robust competitive marketplace. Memo Contra at 3. However, Applicants concede that EWG status will not create a robust market by itself, and fail to demonstrate how and when a robust market will be created. *Id.* Given the lack of support and evidence provided by Applicants in support of their broad claims regarding public benefits, other factors related to market development must be considered by the Commission. Contrary to Applicants' arguments, other factors would include the development of fully-functioning regional transmission organizations ("RTOs") and Applicants' participation in such organizations (or lack thereof). Even Applicants recognize the importance of these other factors: "a wholesale market must exist for retail markets to flourish." Memo Contra at 3. Unfortunately, as the Commission knows well, the current state of RTOs in the Midwest does not provide comfort.

It is interesting to note that while Applicants argue in this proceeding that this Commission has no jurisdiction over its proposed conversions and transfers beyond the narrow authority explicitly delegated to it by PUHCA, in a proceeding before FERC, Applicants' parent company has filed a letter implying that State Commissions have

broad authority over RTO-related matters.⁴ In its letter, AEP argues that FERC should not require certain operating companies of AEP to join an RTO because State Commissions have not completed their analyses of AEP's RTO options.⁵ AEP stated that "AEP should not be required to join the [MISO-SPP RTO] because AEP has been directed by the Louisiana Public Service Commission ("LPSC"), in an Order in Docket No. U-25965-A, not to join any RTO until it has performed certain analyses."⁶ AEP continued: "the [FERC] should at least give AEP time to explore unanswered questions about the [MISO-SPP RTO], and should give the state commissions time to analyze AEP's options and express their opinions."⁷ As AEP has done in the past, AEP's views about the jurisdictional split between State and Federal agencies seems to be driven by the same seams vision that dominates its RTO elections (three and counting). Pursuant to Ohio and Federal law, the Commission does have jurisdiction over the proposed transactions in this proceeding and the Commission should use its Ohio authority to determine that the proposed transaction may not benefit customers, that Applicants are required to file an amendment to their Transition Plans to obtain the relief requested, and that the Application should be dismissed.

⁴ See *Midwest Independent Transmission System Operator, Inc.*, FERC Docket No. ER02-1420-000, AEP's Letter (June 17, 2002).

⁵ *Id.*

⁶ *Id.* at 1.

⁷ *Id.* at 2.

IV. CONCLUSION

The Applicants continue to display significant interest in maintaining the dysfunction that has far too long been a part of the Midwest electric scene. Instead of performance, including participation in a fully-functional RTO, Applicants offer another batch of general claims about the virtue of their requests for regulatory approvals. Experience shows that granting AEP regulatory approvals ahead of desired performance of AEP's obligations under Ohio law (including those arising from AEP's commitment in settlement agreements) is risky business that is getting riskier.

For the aforementioned reasons, IEU-Ohio respectfully requests that the Commission grant IEU-Ohio's intervention in this proceeding, determine that Applicants' Application should be dismissed, and grant other relief requested by the intervenors.

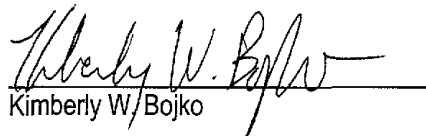
Respectfully submitted,



Samuel C. Randazzo
(Trial Attorney)
Kimberly W. Bojko
MCNEES WALLACE & NURICK LLC
Fifth Third Center
21 East State Street, 17th Floor
Columbus, OH 43215-4228
Telephone: (614) 469-8000
Telecopier: (614) 469-4653

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio Reply to Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Industrial Energy Users-Ohio's Motion to Dismiss and Motion to Intervene* was served upon the following parties of record this 21st day of June 2002, via electronic transmission, hand-delivery, or ordinary U.S. mail, postage prepaid.


Kimberly W. Bojko

Marvin Resnik, Esq.
Edward Brady, Esq.
American Electric Power Company
One Riverside Plaza
Columbus, OH 43215

Colleen L. Mooney, Esq.
Ohio Consumers' Counsel
10 West Broad Street,
Suite 1800
Columbus, OH 43215