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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)

MOTION TO DISMISS AND REQUEST FOR OTHER RELIEF
BY
INDUSTRIAL ENERGY USERS-OHIO

On December 21, 2001, Ohio Power Company ("OPCo") and Columbus Southern Power Company ("CSP") (collectively, "Applicants"), each a subsidiary of American Electric Power Company ("AEP"), filed an Application¹ with the Public Utilities Commission of Ohio ("Commission") seeking, among other things, findings required to proceed with various proposed corporate conversions and transfers. For reasons explained in the memorandum attached hereto and incorporated herein by reference, the Industrial Energy Users-Ohio ("IEU-Ohio") urge the Commission to dismiss the Application without prejudice and grant other relief.

Respectfully submitted,



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¹ The Application was not served on any interested parties or the parties to Applicants' Transition Plan proceedings.

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**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AND REQUEST FOR OTHER RELIEF**

In their Application, the Applicants propose various corporate conversions and transfers including the transformation of Applicants into one or more entities known as Exempt Wholesale Generators or "EWGs."² EWGs were created in Title VIII of the Energy Policy Act of 1992 [Pub. L. 102-486, 106 Stat. 2776 (1992)], which amended the Public Utility Holding Company Act of 1935 ("PUHCA"). Repeal of PUHCA is presently being considered by Congress in the form of S. 517 and it is unclear what effect the proposed repeal may have on Ohio's ability to address EWG-related activities. In view of the potential repeal of PUHCA, IEU-Ohio recommends that the Commission proceed in this matter under authority that is not dependent on PUHCA. As discussed below, IEU-Ohio believes that Applicants must request a modification to their Commission-

² Page 5 of the Securities and Exchange Commission ("SEC") filing provided in Exhibit 1 to the Application states that AEP will register Enterprises, Wholesale Holdco and Domestic Holdco (see definitions that follow) under the Public Utility Holding Company Act of 1935 ("PUHCA") if EWG status is not obtained within twelve months. Thus, it is not clear to what extent securing EWG status is a critical part of Applicants' plan. Application, Exhibit 1.

approved Transition Plans³ to obtain the relief they request in this proceeding. Modification of the Transition Plans is a matter squarely within the Commission's jurisdiction under Ohio law and not dependent on jurisdiction acquired through PUHCA.

Assuming PUHCA is not repealed, the proposed conversion to EWGs may require action by the Securities and Exchange Commission ("SEC").⁴ In this context, it appears that Applicants are seeking determinations from the Commission that each of the proposed conversions and transfers (as they relate to each "eligible facility"⁵): (1) will benefit consumers; (2) is in the public interest; and, (3) does not violate state law. Applicants are seeking Commission determinations for 56 generating plants, including plants not owned by the Applicants. The Applicants require the above-described declarations before the identified generating plants can become "eligible facilities" which then can be placed under the control of EWGs.

Through their filing, the Applicants have revealed plans that are related specifically to compliance with Ohio's corporate separation requirements (both statutory and rules) and more generally to Ohio's codified vision for a competitive electric market

³ Applicants' Transition Plans were filed with and approved by the Commission in Case Nos. 99-1729-EL-ETP (CSP) and 99-1730-EL-ETP (OPCo).

⁴ The Applicants included the SEC filing, or a portion thereof, as Exhibit 1. See Application, Exhibit 1. An EWG, which may be either foreign or domestic, is exempt from all provisions of the PUHCA. In amending PUHCA, to accommodate EWG investments, Congress pursued another goal -- the protection of domestic customers. In this regard, state regulators have significant responsibility for the protection of consumers of domestic utilities such as Applicants and AEP.

⁵ An "eligible facility" is a facility that is either used for the generation of electric energy exclusively for sale at wholesale or used for the generation of energy and leased to one or more public utilities where the lease is as a wholesale sale of electrical energy under Sections 205 and 206 of the Federal Power Act. An EWG is, essentially, any person determined by the Federal Energy Regulatory Commission ("FERC") to be engaged in the business of owning or operating or owning and operating "eligible facilities" and selling electricity at wholesale. See Section 32 of PUHCA, 15 U.S.C. § 79z-5a (2000).

that benefits the public interest.⁶ In both this specific and the larger context, IEU-Ohio urges the Commission to:

1. Dismiss the Application;
2. Find that Applicants must proceed, if at all, to secure the relief requested by filing an amendment to their Transition Plans;
3. Find that the relief requested by Applicants shall not be considered by the Commission without appropriate notice, opportunity to be heard and Applicants making an affirmative and specific demonstration that the relief requested promotes, among other things, the policy in Section 4928.02, Revised Code; and,
4. Find that the Commission's obligations regarding an assessment of the public interest requires that the relief requested by Applicants be considered, if at all, through a process that includes the issuance of a staff report, an opportunity for interested parties to raise issues through objections to such report and an adjudicatory process to allow the Commission to resolve issues in accordance with the public interest.

THE APPLICATION MUST BE DISMISSED

The very general information provided by the Applicants includes references to the Applicants' Transition Plans approved by the Commission in Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP. Application at 2-4. The Applicants state that the Transition Plans require Applicants to transfer their transmission and distribution assets to newly-formed entities that will provide regulated services to ultimate customers and participate in a "regional transmission operating company." *Id.* at 3. The Applicants then imply that their conversion to EWGs is part of the Transition Plans.

⁶ Exhibit 1 to the Application (the SEC filing at page 3) states:

AEP intends to continue to expand its competitive energy business by growing the trading and marketing business through expanding operations to be a leading trader in all energy commodities; optimizing the operations of its assets to yield maximum value in competitive markets; acquiring generation and natural gas assets that complement this strategy.

See Application, Exhibit 1.

However, achieving "eligible facility" status and conversion of Applicants to EWGs (as it may relate to any or all of the 56 generating plants) was not part of the Transition Plans filed by the Applicants or reviewed by the Commission. In fact, neither the Applicants' Transition Plans nor the Applicants' testimony mentioned "eligible facility" or EWG status:⁷

Q. Could you explain further how this corporate separation will meet the requirements of Am. Sub. S.B. No. 3?

A. EXHIBIT NO. _____ WRF-2 is a graphic representation of the planned corporate separation. The left side of this exhibit shows how CSP and OPCO currently are organized. The rest of this exhibit shows how the planned corporate separation will be organized. **CSP and OPCO will continue to own and operate the generation assets.** The two new subsidiaries of each Company will own and operate the transmission and distribution assets, respectively. AEP may also create a competitive retail electric supply (CRS) affiliate shown on this exhibit as AEP Competitive Retail Energy Co. The black and white single-hatched line on this exhibit shows the separation between the electric utility (i.e., the wires companies) and the unregulated generation and competitive retail electric supply affiliate.

Q. What is the timeline for the separate plan?

A. The required regulatory approvals at the FERC and the SEC to accomplish the proposed corporate separation plan will be sought during the year 2000. After receiving the required approvals, the new transmission and distribution subsidiaries for OPCO and CSP will be established.

Q. What FERC approval is required in connection with this separation plan?

A. **FERC approval is required of the generation supply agreements from OPCO and CSP to their respective distribution subsidiaries at their unbundled generation rates to enable these subsidiaries to provide default service during the Market Development Period. In addition, any other sales for resale by the AEP operating**

⁷ 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).

companies to a CRS or the distribution subsidiaries would also be subject to FERC jurisdiction.

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 its September 28, 2000 Order in Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, the Commission discussed the Applicants' corporate separation plan stating:⁸

Section 4928.17(A)(2), Revised Code, requires that all plans satisfy the public interest in preventing unfair competitive advantage and abuse of market power. The plan must also be sufficient to ensure that no undue preference or advantage is extended to or received by the competitive retail affiliate from the utility affiliate. Section 4928(A)(3), Revised Code. We find that AEP has constructed its plan in a manner that achieves, to the extent reasonably practical, the structural separation contemplated by Section 4928.17(A)(1), Revised Code, and the corresponding Commission rules. However, the Commission reserves the right to invoke its authority to preserve fair competition, for both interim and permanent arrangements.

Section 4928.34(A)(8), Revised Code, states that the corporate separation plan required under Section 4928.31(A), Revised Code, must comply with Section 4928.17, Revised Code, and any rules adopted by the Commission pursuant to Section 4928.06(A), Revised Code. We find that the proposed corporate separation plan satisfies this prerequisite, for the reasons stated in the discussion above. We reserve the right to closely monitor the implementation of the plan to avoid competitive inequality, unfair competitive advantage or abuse of market power. We believe that through the periodic Commission review (i.e., through audits of the company's books and records, including the CAM) and the complaint process, this Commission may ensure that the corporate separation plan is implemented in accordance with the policy enunciated in SB 3.

⁸ *Id.*, PUCO Order at 24-25, 35 (September 28, 2000).

Section 4928.35(E), Revised Code, states that an amendment of a corporate separation plan contained in a transition plan approved by the Commission must be filed and approved as a corporate separation plan pursuant to Section 4928.17, Revised Code. Applicants are seeking modification of the corporate separation component of their Transition Plans. They must do so by filing an amendment as required by Section 4928.35(E), Revised Code. Since the current Application does not comply with Section 4928.35(E), Revised Code, it should be dismissed as a matter of law. IEU-Ohio recommends that such dismissal be without prejudice.

AEP filed a similar application with the Virginia State Corporation Commission. It subsequently withdrew the application in favor of proceeding with a functional separation plan.⁹ Additionally, the Virginia State Corporation Commission denied a similar application filed by Virginia Electric and Power Company stating, among other things:¹⁰

As set forth at length in this Order, we find the Plan to be vague, lacking in sufficient detail and adequate explanation of many contingencies, and would leave too many critical details to be worked out in future filings. The allocation of payment on the billions of dollars of debt mentioned above is one such detail. Further, the source and cost of power needed by Virginia Power to meet its future capped rate and default service obligations on a reliable basis was not sufficiently assured.

As found herein, the Plan proposed by Virginia Power would impose unacceptable risks on the utility's customers by reducing or eliminating the effects of many consumer protection measures incorporated into the Restructuring Act. The Plan would transfer jurisdiction over critical matters from Virginia to federal authority; would remove from Virginia Power billions of dollars of assets with which its financial debts are collateralized;

⁹ See *In Re Application of Appalachian Power Co. d/b/a American Elec. Power – Virginia*, Case No. PUE010011, Order on Functional Separation, (December 18, 2001). The decision is available via the Internet at <http://www.state.va.us/scc/caseinfo/pue/case/e010011f.pdf>.

¹⁰ *In Re Application of Virginia Elec. and Power Co.*, Case No. PUE000584, Order on Functional Separation at 3-4, 35-36, (December 18, 2001). The decision is available via the Internet at <http://www.state.va.us/scc/caseinfo/pue/case/e000584t.pdf>.

would impede the development of an effectively competitive market for electric generation, as envisioned by the Restructuring Act; and fails to provide any discernible consumer benefits. Accordingly, the Plan is now rejected.

The Plan proposed by Virginia Power is not acceptable to the Commission because the contemplated transfer of the generation assets unacceptably and irrevocably deprives the Commonwealth of Virginia of authority over physical assets critical to the delivery of vital public services. It introduces unacceptable additional risks into the transition period, which will be difficult enough as is. It provides no discernable, measurable public benefits, although it may be tremendously beneficial to the Company itself, but this is by no means a certainty. Recent events in the energy markets indicate that legal separation may pose risks for shareholders of Virginia Power's parent, Dominion Resources, Inc., given the desire by the Company to exploit its generation resources to better engage in an array of trading activities. While this is a matter for which Dominion management is responsible, it is nonetheless an outcome that its Plan will facilitate and we must consider it as a potential consequence.

The Order does not foreclose, in any manner, further consideration of the corporate reorganization and asset transfers proposed by the Plan at such time that needed market structures, including regional transmission organizations, have been established and conditions in the competitive market for retail electric generation service in Virginia merit. Denial of the Plan is required at this time precisely to enable these latter developments to occur.

THE REQUESTED SUBSTANTIVE RELIEF MAY CONFLICT WITH OHIO LAW

The SEC filing included in Exhibit 1 to the Application indicates that AEP's reorganization will include the formation of:¹¹

- **CSP EDC** (an energy delivery company formed to hold the transmission and distribution assets of Columbus Southern Power Company or CSP);
- **CSO PGC** (CSP following the transfer of its transmission and distribution assets and related liabilities);

¹¹ The names of the corporate entities provided by AEP are designed to illustrate functions. The actual names of the affiliates will be determined by AEP in the future.

- **Domestic Holdco** (Domestic Generating Holding Company subsidiary or limited liability company of Wholesale Holdco);
- **Enterprises** (subsidiary or limited liability company of AEP);
- **OPCo EDC** (an energy delivery company formed to hold the transmission and distribution assets of Ohio Power Company or OPCo);
- **OPCo PGC** (OPCo following the transfer of its transmission and distribution assets and related liabilities);
- **Subsidiaries** (direct and indirect subsidiaries of CSP, OPCo and other Operating Companies);
- **Unregulated Holding Companies** (Enterprises, Wholesale Holdco and Domestic Holdco);
- **Wholesale Holdco** (subsidiary corporation or limited liability company of Enterprises); and,
- Other entities.

Application, Exhibit 1 at SEC filing (Glossary of Terms).

The SEC filing also indicates that AEPSC ("American Electric Power Service Corporation") intends to provide centralized and regionalized management and support for both regulated and unregulated generation entities and other services to direct and indirect subsidiaries. *Id.* at SEC filing (page 2). The pricing for these management and other services provided to affiliates including Applicants is also addressed in the SEC filing. As mentioned below, Applicants have previously used affiliate pricing authority secured under PUHCA to block efforts by regulators to address excessive affiliate transfer prices. *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992).

AEP's SEC filing requests permission to form and capitalize Enterprises, Wholesale Holdco, Domestic Holdco and Subsidiaries along with financing authority.

The SEC filing also seeks financing authorizations relating to:

- Issuances by AEP of guarantees of obligations of affiliated or unaffiliated persons in favor of other unaffiliated persons;

- Issuances of securities and guarantees related to "hedging transactions" (including those related to the "AEP Money Pool"); and,
- Other financing authority.

It is unclear to what extent, if any, the new corporate entities, the complex relationships between the new corporate entities or the proposed capitalization and financing arrangements may offend requirements such as those contained in Rule 4901:1-20-16, Ohio Administrative Code.

SECTIONS 4928.02 AND 4928.06 AND THE NEED FOR EVIDENCE

Section 4928.02, Revised Code, contains Ohio's electric energy policy:

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;
- (F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (G) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa;

- (H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power; and
- (I) Facilitate the state's effectiveness in the global economy.

Section 4928.06, Revised Code, codifies the Commission's duty to ensure that the above policy is effectuated. Ohio's electricity policy and the Commission's duty, pursuant to Section 4928.06, Revised Code, are particularly important during the Market Development Period ("MDP") or the time during which the work required to effectuate an efficient electric commodity market must be completed.

As noted above, the Applicants are seeking determinations from the Commission that the proposed conversions and transfers: (1) will benefit consumers; (2) are in the public interest; and, (3) do not violate state law. Applicants allege that the conversions and transfers "will benefit consumers in Ohio by permitting compliance with legislative policies,"¹² effectuate Ohio's policy "which is to create a robust competitive market place, which is in the public interest and will benefit consumers,"¹³ and benefit Ohio retail customers as a result of "greater availability of a liquid market for wholesale electricity to improve the reliability and availability of electric service."¹⁴ Applicants' conclusions are offered with no explanation as to how the proposed conversions and transfers will improve upon the outcomes to which the General Assembly has already committed Applicants and no explanation as to how the proposed conversions and transfers will ensure that these outcomes will benefit Ohio retail customers.

¹² Application at 5.

¹³ *Id.* at 6.

¹⁴ *Id.*

The creation of a liquid, robust and dynamically efficient Midwest wholesale market depends on many things, including Applicants' participation in a fully functional regional transmission organization ("RTO") as contemplated by Section 4928.12, Revised Code, and FERC's Order No. 2000.¹⁵ Because of, *inter alia*, conditions imposed on AEP by FERC in conjunction with FERC's merger authorization, AEP is presently under an obligation to transfer control of its transmission system to a fully functional RTO. This obligation was, according to FERC's directive, to be satisfied by no later than December 15, 2001.¹⁶ This obligation (which is similar to the commitment Applicants made in their Ohio Transition Plan settlement agreements¹⁷) was not satisfied as of December 15, 2001 and it is not clear when it will be satisfied.¹⁸

Exhibit 1 to the Application (the SEC filing at page 3) states:

AEP intends to continue to expand its competitive energy business by growing the trading and marketing business through expanding operations to be a leading trader in all energy commodities; optimizing the operations of its assets to yield maximum value in competitive markets; acquiring generation and natural gas assets that complement this strategy.

¹⁵ See generally *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom.*, *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, Nos. 00-1174, *et al.* (D.C. Cir. 2001).

¹⁶ See *American Elec. Power Co., et al.*, 90 FERC ¶ 61,242 (March 15, 2000).

¹⁷ Section VIII of the Stipulation and Recommendation states:

AEP shall (by no later than December 15, 2001) transfer operational control of their transmission facilities to an operating FERC-approved RTO.

Stipulation and Recommendation at 6, *In the Matter of the Applications of the Columbus Southern Power Co. and Ohio Power Co. for Approval of their Transition Plans and Receipt of Transition*, PUCO Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP (May 8, 2000), *approved, with modifications*, PUCO Opinion and Order at 7 (September 28, 2000), *order den. reh'g*, PUCO Entry on Rehearing (November 21, 2000), *orders on compliance*, PUCO Entry (December 7, 2000), PUCO Entry (December 14, 2000), PUCO Entry (January 1, 2001), and PUCO Finding and Order (May 17, 2001).

¹⁸ On May 8, 2002, AEP announced that it had executed a memorandum of understanding (MOU) with PJM Interconnection LLC ("PJM"). The MOU contains several conditions that must be satisfied before AEP will consider participating in PJM.

It is clear from the information submitted by Applicants that AEP is intent on building its trading operations and taking more value out of the market. An AEP press release issued on April 25, 2001¹⁹ highlights this intention and links AEP's wholesale trading ambitions to its corporate separation activities:

American Electric Power . . . has its wholesale-focused growth strategy firmly in place. Now a key component of that strategy - corporate separation - has taken center stage. 'Successful implementation of our corporate separation plan is a key component of our wholesale strategy,' E. Linn Draper Jr., AEP's chairman, president and chief executive officer, told shareholders attending the company's annual meeting. 'It is our single most important focus at AEP today.' AEP's corporate separation will create two wholly owned subsidiaries - one with AEP's unregulated businesses and one with regulated businesses. 'Our corporate separation will provide investors with a clearer view of the value to be unlocked in each business,' Draper said.

Separating regulated and unregulated enterprises will enable AEP's management to respond to regulatory changes and requirements, Draper said. By the end of 2001, AEP expects Ohio, Texas and Virginia will have implemented legislation that will pave the way for AEP to move its generation into an unregulated business subsidiary. 'That will make our unregulated generation portfolio one of the largest - and lowest cost - in the United States,' Draper said, noting that the generation is the core of the wholesale business that also includes marketing, trading and fuels procurement and transportation.

'We have created a unique business model that will support sustainable growth,' Draper said. 'We have integrated low-cost highly efficient assets, our operational and technical expertise and our successful trading and marketing organization to create new products and businesses that will be the growth drivers.'

'This new integration will continue to create value in the competitive and **highly volatile** new merchant energy marketplace,' Draper said.

AEP's April 25, 2001 Press Release (emphasis added). As a profit-seeking organization, these objectives derive from the duties that corporations owe to their owners. These objectives are proper in the abstract but the fragile condition of the

¹⁹ The press release is available on AEP's Internet home page <http://www.aep.com>.

emerging wholesale market requires that the pursuit of these objectives be attended to with great care. As Applicants invoke the Commission's powers to pursue these objectives, the Commission must balance these objectives against the demands of the public interest as defined by Ohio law. More bluntly put, it is the Commission's obligation to make sure that AEP's corporate separation agenda does not enable AEP's use of its incumbency, market power and other resources to promote volatility as a means of increasing the value of its generating and other assets²⁰ at a time when the market is too immature to protect the public interest. Concerns about AEP's interest in promoting price volatility (as opposed to helping to deploy dynamically efficient market) are not the product of speculation. AEP's Annual Report for 2001 clearly states that AEP is "committed to extracting value all along the 'energy chain,' which starts with procuring, storing and transporting fuel and progresses to generating power, marketing energy and managing risk" for its customers. The Annual Report identifies that AEP's primary business risks include:²¹

- *Margin erosion on electric trading as markets mature; and*
- *Diminished opportunities for significant gains as volatility declines.*

Thus, AEP has concluded and advised its owners that their business interests are better served by immature markets and maintenance of the type of price volatility that is a

²⁰ For example, AEP is the fourth largest barge operator in the United States. According to the Executive Vice President of AEP Energy Services Inc.; "We equate the barge business to the pipeline business, and feel that our trading and marketing efforts will benefit from the information flow that these assets will provide" and the barge business "acquisition is the latest example of our efforts to create additional value for AEP by identifying business opportunities that are strategically linked to our basic energy production, transportation, marketing and trading activities." AEP's press release issued November 1, 2001, available via the Internet at <http://www.aep.com>. On October 31, 2001, AEP announced that it had purchased Quaker Coal: "another illustration of our wholesale business strategy at work." AEP's press release issued November 31, 2001, available via the Internet at <http://www.aep.com>.

²¹ AEP's 2001 Annual Report to Shareholders at 16. The Annual Report is available via the Internet at <http://aep.com/investors/annrep/default.htm>.

characteristic of immature markets. These observations are not intended to be critical of AEP's objectives. These observations are offered to help make it clear that AEP's business interests will not naturally lead AEP to favor price and service outcomes that are more likely to emerge if the electric market matures and assumes its role as a suitable replacement for economic regulation. To the extent that customers and regulators do not recognize this fundamental conflict, then the opportunity for AEP's business interests to control public interest outcomes has infinite potential.

The Commission will recall that Applicants have not been bashful about asserting preemption as a barrier to action taken by regulators to protect customers from such things as excessive affiliate coal prices. *Ohio Power Co. v. FERC*, 954 F.2d 779 (D.C. Cir. 1992). It is clear that granting the relief requested by Applicants would expand the opportunity for their offensive use of preemption claims should the Commission attempt to assert its authority to address any problems that may arise in the future as a result of AEP's inappropriate emphasis on value maximization. It is also clear that AEP's market power (as assessed in its most recent FERC merger proceeding and highlighted recently in a FERC decision regarding market-based pricing authority) remains unmitigated.²² The present immaturity of the wholesale electric market, the lack of shopping in Applicants' service areas, the long standing difficulties that have denied existence to a fully functional Midwest RTO, Applicants' prior use of preemption to block state regulatory action and the expanded opportunity for Applicants to claim preemption should the Commission approve their proposals all suggest that the Commission should proceed with great caution.

²² See *American Elec. Power Co., et al.*, 90 FERC ¶ 61,242 (March 15, 2000); see also *AEP Power Marketing, Inc., et al.*, 97 FERC ¶ 61,219 (November 20, 2001).

Should the Commission consider the proposed conversions and transfers on their merits, the Applicants must be required to supply specific evidence that demonstrates that the proposed conversions and transfers shall effectuate Ohio's electric energy policy. High-level claims about the virtues of Applicants' proposals are not the same as real benefits. Difficulties that have delayed and complicated FERC's efforts to enable an effective wholesale market indicate that it would be imprudent to substitute Applicants' claims for the performance required to effectuate Ohio's policy. Absent a compelling presentation by Applicants, the Commission would do well to follow the lead of the Virginia State Corporation Commission as it rejected a proposal similar to that of the Applicants:²³

The Order does not foreclose, in any manner, further consideration of the corporate reorganization and asset transfers proposed by the Plan at such time that needed market structures, including regional transmission organizations, have been established and conditions in the competitive market for retail electric generation service in Virginia merit. Denial of the Plan is required at this time precisely to enable these latter developments to occur.

CONCLUSION

Regardless of the Commission's response to this pleading, the nature and extensive scope of AEP's integrated energy chain operations as they relate to Ohio and the Midwest region require that extra diligence be applied in this case to an assessment of the public interest. The public interest, of course, involves more than the prices and services available to ultimate customers. AEP is, for example, a very large purchaser of coal and AEP's monopsony and monopoly power could be applied to extract unfair

²³ *In Re Application of Virginia Elec. and Power Co.*, Case No. PUE000584, Order on Functional Separation (December 18, 2001). The decision is available via the Internet at <http://www.state.va.us/scc/caseinfo/pue/case/e000584t.pdf>.

value from coal producers. The coal industry has played an important part in Ohio's energy history and there is good reason to expect that it will need to continue to play an important role in the future. AEP's customers will migrate to "market prices" effective January 1, 2006 and it is unclear if the Midwest market will be mature enough to replace the regulation-oriented model or to discipline the market power resident in Applicants. AEP presently has interruptible customers that are (according to Commission-approved tariffs) subject to interruption when there is inadequate generating capacity to meet firm native load requirements. In 2001, these interruptible customers saw a record number hours of interruption even though the weather during 2001 was relatively mild, the economy was trending down (as AEP notes in its 2001 Annual Report to Shareholders) and significant amounts of generating capacity has been added in the Midwest region. These interruptions suggest that Ohio customers are being used by AEP to support its wholesale trading operations.

There are questions about the real value of any commitments that AEP may make to Ohio in exchange for favorable treatment of its requests in this proceeding. After all, the Applicants committed to transferring control of their transmission assets to a fully functional RTO by December 15, 2001 and this commitment remains unfulfilled. Since making this commitment, AEP has elected to litigate in favor of RTO-related outcomes that have been comprehensively and uniformly opposed by merchant electric plant operators, ultimate customers, marketers, transmission-dependent utilities and state regulators. As importantly, AEP's interpretation of any commitments will be subject to the constant pressure of its business preference for outcomes that promote price volatility and market immaturity.

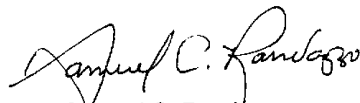
With this background, it seems clear that Ohio's interest in this matter requires that the Commission's staff, perhaps with the assistance of independent experts, conduct an investigation of the issues raised by Applicants' request. This investigation should examine the potential effects of the relief requested on suppliers and customers, AEP's and the Applicants' current behavior with regard to suppliers and customers and the potential conflict between AEP's business objectives and Ohio's policy objectives. The report should make recommendations for the Commission's consideration and the Commission should permit interested parties to file objections and comments regarding such recommendations. The report, recommendations and comments then should frame the issues that the Commission should resolve with the input and assistance of interested parties.

For the reasons explained herein, IEU-Ohio urges the Commission to:

1. Dismiss the Application;
2. Find that Applicants must proceed, if at all, to secure the relief requested by filing an amendment to their Transition Plans;
3. Find that the relief requested by Applicants shall not be considered by the Commission without appropriate notice, opportunity to be heard and Applicants making an affirmative and specific demonstration that the relief requested promotes, among other things, the policy in Section 4928.02, Revised Code; and,

4. Find that the Commission's obligations regarding an assessment of the public interest requires that the relief requested by Applicants be considered, if at all, through a process that includes the issuance of a staff report, an opportunity for interested parties to raise issues through objections to such report and an adjudicatory process to allow the Commission to resolve issues in accordance with the public interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion to Dismiss and Request for Other Relief by Industrial Energy Users-Ohio* was served via hand-delivery, express mail or regular U.S. Mail, postage prepaid, upon all parties of record to this proceeding this 13th day of May, 2002.



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