

146 FERC ¶ 61,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Ohio Power Company
AEP Generation Resources, Inc.

Docket No. EC13-26-001

ORDER GRANTING CLARIFICATION AND DISMISSING REHEARING

(Issued January 16, 2014)

1. On May 29, 2013, Industrial Energy Users-Ohio (IEU-Ohio), an association of large Ohio-based energy consumers, filed a request for clarification or, in the alternative, rehearing of the Commission's April 29, 2013 order in this proceeding.¹ As discussed below, we grant IEU-Ohio's request for clarification. Because we grant IEU-Ohio's request for clarification, its alternative request for rehearing is dismissed as moot.

I. Background

2. On October 31, 2012, American Electric Power Service Corporation (AEPSC)² on behalf of its affiliates, Ohio Power Company (Ohio Power) and AEP Generation Resources Inc. (AEP Generation) (collectively, Applicants),³ filed an application pursuant to section 203 of the Federal Power Act (FPA)⁴ requesting Commission authorization for an internal corporate reorganization that will result in the separation of Ohio Power's generation and power marketing businesses from its transmission and

¹ *Ohio Power Co.*, 143 FERC ¶ 61,075 (2013) (April 29 Order).

² AEPSC is a service company that provides management and professional services to American Electric Power Company, Inc. (AEP) and its subsidiaries.

³ Ohio Power is a wholly-owned subsidiary of AEP. AEP Generation is Ohio Power's wholly-owned direct subsidiary. April 29 Order, 143 FERC ¶ 61,075 at PP 5, 7.

⁴ 18 U.S.C. § 824b (2006).

distribution businesses (Ohio Power 203 Transaction).⁵ Pursuant to the Ohio Power 203 Transaction, Ohio Power will transfer its existing generating units, contractual entitlements, fuel-related assets and contracts, and other generation-related assets (the Generation Assets) to AEP Generation at net book value. AEP Generation will also assume the liabilities associated with the Generation Assets. Ohio Power will then distribute the shares of AEP Generation to AEP, which will contribute this stock to a wholly-owned direct subsidiary holding company. Consequently, upon the Ohio Power 203 Transaction's closing, AEP Generation will still be an indirect, wholly-owned subsidiary of AEP, but it will no longer be a direct subsidiary of Ohio Power.

3. IEU-Ohio protested the Ohio Power 203 Transaction. IEU-Ohio argued that, because the transaction is an affiliate transaction between a market-regulated generator and a franchised utility, Applicants had failed to demonstrate that the Generation Assets' transfer price is similar to competitive alternatives, as required by *Ameren Energy Generating Co.*,⁶ in this case, by showing that the transfer price (i.e., net book value) of the Generation Assets "is superior to a purchase price that reflects the full market value of the generation assets."⁷

4. In the April 29 Order, the Commission approved the Ohio Power 203 Transaction, subject to certain conditions. The Commission noted that, on October 17, 2012, in an order approving Ohio Power's corporate separation plan, the Ohio Commission expressly approved the Generation Assets' transfer at net book value.⁸

⁵ Applicants undertook this reorganization in part to comply with an Ohio state law that requires electric utilities that supply competitive and non-competitive retail electric service to implement and operate under a corporate separation plan approved by the Public Utilities Commission of Ohio (Ohio Commission). April 29 Order, 143 FERC ¶ 61,075 at P 2.

⁶ IEU-Ohio November 30, 2012 Protest at 39-42 (citing *Ameren Energy Generating Co.*, Opinion No. 473, 108 FERC ¶ 61,081 (2004) (*Ameren*)). In *Ameren*, the Commission held that in section 203 affiliate transactions, applicants must demonstrate that appropriate steps were taken to safeguard against affiliate abuse, consistent with the standards developed in *Boston Edison Company Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*). *Ameren*, 108 FERC ¶ 61,081 at P 64.

⁷ *Id.* at 3.

⁸ April 29 Order, 143 FERC ¶ 61,075 at P 3 & nn.5, 10 (citing *In the Matter of the Application of Ohio Power Company for Approval of an Amendment to its Corporate*

5. In response to IEU-Ohio's protest, the Commission acknowledged that the Commission has not required *Ameren* "showings in any section 203 case in the context of intra-corporate generation transfers at net book value to comply with state restructuring initiatives."⁹ The Commission also noted that to address "the kinds of concerns described in *Ameren*," in 2005, Congress enacted FPA section 203(a)(4) and the Commission issued Order No. 669 and the Supplemental Policy Statement, all of which focus upon whether an FPA section 203 transaction will result in inappropriate cross-subsidization. The Commission's order in *Ameren* predated these developments. Finally, the Commission noted that an applicant may make an *Ameren* showing if it chooses not to "include a traditional Exhibit M as part of [the] [a]pplication or explain why it qualifies for one of the 'safe harbors' described in the Supplemental Policy Statement."¹⁰

II. Requests for Rehearing

6. On May 29, 2012, IEU-Ohio filed a request for clarification or rehearing.¹¹ In its request, IEU-Ohio contends that the Commission "relied extensively" on the Ohio Commission's approval of the net book value transfer of the Generation Assets.¹² IEU-Ohio states that it sought rehearing of this Ohio Commission finding and that, when the Ohio Commission denied rehearing, it appealed the Corporate Separation Order to the Supreme Court of Ohio, where the appeal is pending. In the Rehearing Request, IEU-Ohio states that if the Commission is going to rely on the Corporate Separation Order "without any further analysis of its own," the Commission should clarify that the April 29 Order "is not intended to, and does not, preempt the ongoing proceedings in Ohio involving challenges to the [Ohio Commission's] net book value determination."¹³

Separation Plan, Finding and Order, Case No. 12-1126-EL-UNC at 22, 42 (Oct. 17, 2012) (Corporate Separation Order).

⁹ *Id.* P 28

¹⁰ *Id.* P 29.

¹¹ IEU-Ohio May 29, 2012 Request for Clarification or Rehearing (Rehearing Request).

¹² *Id.* at 2-3 (citing Corporate Separation Order at P 22).

¹³ *Id.* at 3-4.

7. IEU-Ohio requests rehearing in the absence of this clarification.¹⁴ If the Commission does not grant the clarification, IEU-Ohio contends that the Commission should determine that: (1) the Commission must independently evaluate the transfer price of Commission-jurisdictional assets; (2) the Commission's affiliate transaction standards, as established in *Ameren* and *Edgar*, apply to this asset transfer because Ohio Power's customers are "captive" for purposes of capacity; (3) under the Commission's affiliate transaction standards, assets may only be transferred if the transfer price is the higher of market value or net book value; and (4) because Ohio Power did not comply with the Commission's affiliate transaction standards, either Ohio Power's application must be rejected, or the asset transfer price must be adjusted to reflect the higher of net book or market value.¹⁵

8. On June 5, 2013, AEPSC filed a response to the Rehearing Request.

III. Commission Determination

A. Procedural Matters

9. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits answers to rehearing requests.¹⁶ Thus, we will reject AEPSC's answer.

B. Substantive Matters

10. We grant IEU-Ohio's request for clarification of the April 29 Order. We confirm that the approval of the Ohio Power 203 Transaction was not intended to, and does not, preempt the ongoing proceedings in Ohio involving IEU-Ohio's challenges to the Ohio Commission's net book value determination.¹⁷ However, while we grant clarification on this point, we disagree with IEU-Ohio's contention that, in the April 29 Order, the Commission relied upon the Ohio Commission's Corporate Separation Order "without any further analysis."¹⁸ In the discussion of the effects of the transaction on horizontal

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 4.

¹⁶ 18 C.F.R. § 385.713(d) (2013).

¹⁷ In light of this clarification, IEU-Ohio's request for rehearing is dismissed as moot.

¹⁸ Rehearing Request at 3.

competition in the April 29 Order, the Commission merely noted that it has not insisted upon an *Ameren/Edgar* showing to address potential adverse effects on competition in the context of asset transfers from a franchised utility to an affiliated merchant generator when undertaken to comply with state restructuring initiatives.¹⁹ Similarly, the Commission's finding that the transaction will not result in cross-subsidization for the benefit of a non-utility associate company was based on the facts presented, including, among others, the fact that the transaction is being undertaken to comply with Ohio's restructuring law and has been found to be in the public interest by the Ohio Commission.²⁰ In neither case, however, was the Commission called upon to, nor did it, affirm the Ohio Commission's determination that a transfer of the Generation Assets at net book value, rather than at some other value, is in the public interest, nor did it rely on the Ohio Commission's net book value determination in finding that the standards for approval under section 203 were satisfied.

The Commission orders:

(A) IEU-Ohio's request for clarification is hereby granted, as discussed in the body of this order.

(B) IEU-Ohio's request for rehearing is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁹ See April 29 Order, 143 FERC ¶ 61,075 at P 27.

²⁰ *Id.* PP 49-51.