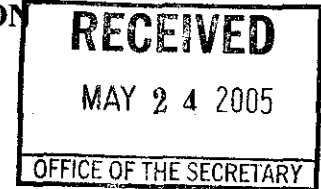


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



Administrative Proceeding No. 3-11616

_____)
In the Matter Of)

_____)
American Electric Power Company, Inc.)
_____)

DIVISION OF INVESTMENT MANAGEMENT'S PETITION FOR REVIEW

The Division of Investment Management submits this Petition for Review in accordance with Rule 410(a) of the Commission's Rules of Practice, seeking Commission review of an administrative law judge's Initial Decision in the above captioned proceeding. The specific findings and conclusions to which the Division takes exception are outlined and discussed below. While we believe that Commission review of the Initial Decision is mandatory pursuant to Rule 411(b)(1), we also believe this is clearly a matter that, in the terms of Rule 411(b)(2)(C), involves a "decision of law or policy that is important" and that the Commission should grant this petition for review, irrespective of whether Commission review is characterized as mandatory or discretionary.

Introductory Statement

This matter arises from an application-declaration filed jointly by the American Electric Power Company, Inc. ("AEP") and the Central and South West Corporation ("CSW") in 1999 (the "Application"). The Application sought the Commission's authorization pursuant to the Public Utility Holding Company Act of 1935 ("Act") for AEP to acquire CSW. At the time, AEP was a registered public utility holding company with utility operations in Ohio, Michigan, Indiana, Kentucky, Tennessee, Virginia and West Virginia; CSW was a registered public utility holding company with utility operations in Arkansas, Louisiana, Oklahoma and Texas.

Among other things, AEP and CSW argued that the utility system that would result from the acquisition (the "combined system") would be integrated, as required by sections 10 and 11 of the Act. More specifically, they argued that, in the terms of section 2(a)(29)(A), the combined system (i) would be "physically interconnected or capable of interconnection," (ii) would be capable of economic operation "as a single interconnected and coordinated system," (iii) would be "confined to a single area or region," and (iv) would be "not ... so large as to impair ... the advantages of localized management, efficient operation, and the effectiveness of regulation."

The Commission ultimately agreed, and on June 14, 2000, it issued an order ("Order") approving the merger and denying the hearing requests it had received with respect to the

Application.¹ The companies merged shortly thereafter. The National Rural Electric Cooperative Association (“NRECA”) and the American Public Power Association (“APPA”) sought review of the Commission’s decision in the D.C. Circuit. The D.C. Circuit affirmed many of the findings and conclusions in the Commission’s original order, but vacated the Order and remanded the matter to the Commission, seeking further explanation for the Commission’s conclusions that the combined system met the interconnection and the single area or region requirements.²

In response, the Commission set the matter down for an evidentiary hearing.³ The Notice and Order for a Hearing (“Notice and Order”) in this matter directed that a hearing be held:

for the purpose of determining whether the AEP and CSW systems are interconnected, through a unidirectional contract path or otherwise, and whether the resulting combined system operates in a single area or region, and hence satisfy the requirements of sections 10(c)(1) and 11(b)(1) of the [Public Utility Holding Company] Act....

Administrative Law Judge Robert Mahony conducted the evidentiary hearing on January 10, 2005, held oral argument on March 7, 2005, and issued an initial decision (“Initial Decision”) on May 3, 2005. The Division of Investment Management (“Division” or “we”) argued, as did AEP, that the record evidence supported a finding that both of these statutory requirements were met. APPA and NRECA, joined by intervenor Public Citizen, argued that neither requirement was met.

In his Initial Decision, the Law Judge concluded that, based on the record evidence, the combined system satisfied the interconnection requirement.⁴ The Division agrees with this conclusion.

However, the Initial Decision also held that the single area or region requirement is not met. The Division disagrees with this conclusion.

As discussed below, the Law Judge’s interpretation of the single area or region requirement as one that is analyzed predominately based on a so-called “geographic test”⁵ is both reductionist and incorrect. Due to this misinterpretation, after noting that parts of

¹ Holding Co. Act Release No. 27186 (June 14, 2000).

² NRECA v. SEC, 276 F.3d 609 (D.C. Cir. 2002).

³ Holding Co. Act Release No. 27886 (Aug. 30, 2004).

⁴ Initial Decision at 12.

⁵ *Id.* at 21.

the AEP system are “located in separate, disparate regions of the national map,”⁶ the Law Judge concluded that the single area or region requirement was not satisfied.⁷

Based on his determination that AEP had not satisfied the “single area or region” requirement, the Law Judge denied the Application.⁸ The Division also disagrees with this conclusion.

Exceptions to Findings and Conclusions of the Initial Decision

1. In concluding that the combined system is not “confined to a single area or region,” the Initial Decision erroneously misinterpreted and elevated the importance of a so-called “geographic test,” contrary to Commission precedent.

The Initial Decision applies a “geographic test,” utilizing a simplistic conception of “geography,” in concluding that the combined system is not “confined to a single area or region.”⁹ The Law Judge’s interpretation of “geographic” is not in accord with the statutory purpose, the Commission’s prior decisions analyzing the single area or region requirement, and the evidence in this proceeding.

Specifically, relying heavily on *CP&L Energy, Inc.*,¹⁰ the Initial Decision concludes that a utility system must be confined within a traditionally designated national region in order to pass muster under the Act, reducing Commission precedent into a “geographic test.”¹¹ Yet, nothing in the Act, and nothing in the Commission’s extensive precedent supports the Initial Decision’s crabbed reading of the single area or region test. An appropriate resolution to this matter must be based on an understanding of all the important cases that the Commission has decided in this area – many of which approve utility systems extending well beyond “traditional designations of national regions” – and not a carefully selected case or two.¹²

⁶ *Id.* at 23.

⁷ The Law Judge also equated “single region” with “homogeneity” and, apparently on that basis, rejected the substantial un rebutted evidence in the record submitted by AEP that the combined system fell within a functional region. *Id.* at 22.

⁸ *Id.*

⁹ *See Id.* at 21 (finding that the Commission predominantly relies on “geographic and traditional designations of national regions” in analyzing the “single area or region” requirement).

¹⁰ 54 S.E.C. 996 (2000).

¹¹ Initial Decision at 21.

¹² In this regard, the Initial Decision also fails to account for the Commission’s authority to refine or redefine its interpretation of the Act’s requirements in order to further the Act’s purposes and goals. Although the legislative history, statutory language, and Commission precedent support a finding that the combined system is within a single area or region, the Initial Decision erred in that it did not recognize that the Commission may, in the alternative, change

While we agree that the single area or region requirement is intended to define the geographic expanse within which a particular holding company system should be confined, the manner in which this “geographic” limitation is interpreted and administered has been and must be informed by an underlying understanding of the purpose and intent of the Act in order to give any meaningful content to the term. After all, “a continent” and “an island” are both geographic terms, but neither is obviously helpful in interpreting the “single area or region” requirement. While an approach that does little more than apply convenient geographic labels may be sufficient for certain cases – systems, such as that described in *CP&L Energy*, that involve a small number of states very close together – that approach does little to give meaningful content to the term “single area or region” as that term operates in the Act, and hence does not provide a substantive basis for deciding cases involving utility systems that cover a broader area. In cases such as this one, one must give more content to the term than simply applying an arbitrary geographic label to the system’s footprint.

Moreover, throughout its administration of the Act, the Commission has held that numerous large utility systems satisfy the “single area or region” requirement. For example, as early as 1945, in *American Gas & Electric Co.*,¹³ the Commission approved a system that included utility operations in Virginia, Tennessee, Michigan and Ohio. In recent years, the Commission has continued to approve fairly large systems. Most notably, in the case of *New Century Energies Inc.*,¹⁴ the Commission found a system that included utility operations in Colorado, Wyoming, Texas, New Mexico, Oklahoma, Kansas, Minnesota, North Dakota, South Dakota, Michigan and Wisconsin satisfied the requirement. Likewise, in *Exelon*,¹⁵ the Commission found that a utility system with utility operations in the Chicago and Philadelphia areas satisfied the statutory requirement.

The Initial Decision erred in failing to derive from these key decisions the Commission’s flexible approach to the single area or region requirement which examines numerous factors on a case by case basis. The ultimate goal of the analysis is to further the purpose and intent of the Act. To further that goal, the Commission’s decisions often consider an array of factors (including, specifically, economic and population factors) in analyzing the single area or region requirement. The approach is not rigidly prescribed by assumed concepts of geography; nor

the way it analyzes merging systems to determine if they are an integrated public-utility system and within a single area or region. As the D.C. Circuit Court order pointed out, the Commission may do so as long as it can support its policy change. The Commission should not be bound by past decisions if, as a result of changes in the industry, other approaches to interpreting statutory requirements would better achieve the Act’s goals.

¹³ 21 S.E.C. 575 (Dec. 26, 1945) and related order, Holding Co. Act Release No. 5591 (Feb. 8, 1945).

¹⁴ Holding Co. Act Release Nos. 26748 (Aug. 1, 1997) and 27212 (Aug. 16, 2000).

¹⁵ Holding Co. Act Release No. 272904 (Oct. 28, 2004).

