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*ADMITTED IN OTHER THAN THE DISTRICT OF COLUMBIA

June 3, 2005

The Honorable Jonathan G. Katz
Office of the Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: In the Matter of American Electric Power Company, Inc., Administrative Proceeding No. 3-11616

Dear Mr. Katz:

Enclosed for filing is the National Rural Electric Cooperative Association and the American Public Power Association's cross-petition for review of Initial Decision Release No. 283.

Copies of the cross-petition have been served this day on persons listed on this matter's service list. A certificate of service listing those served is attached.

Two additional copies of the cross-petition are enclosed to be file-stamped and returned to me via our courier.

Respectfully submitted,

Randolph Lee Elliott

Randolph Lee Elliott

Enclosures

cc: Administrative Law Judge Robert G. Mahoney
All Parties Identified in Attached Certificate of Service

On May 24, 2005, AEP and the Commission's Division of Investment Management each filed a petition for review of the Initial Decision. Each of them claims that Commission review of the Initial Decision is mandatory pursuant to Rule 411(b)(1),[3] and, in any event, warranted as a matter of discretion under Rule 411(b)(2).[4] If the Commission reviews the Initial Decision under either rationale, then such review should also include the issues raised in the instant cross-petition. Whether or not Commission review of the Initial Decision is mandatory, review is warranted because, as shown below, the Initial Decision embodies "clearly erroneous" findings of fact and "erroneous" conclusions of law.[5] Moreover, if the Commission concludes that the Initial Decision embodies "an exercise of discretion or decision of law or policy that is important and that the Commission should review,"[6] then it should review the issues raised in this cross-petition.

Background

This matter is before the Commission on an order from the United States Court of Appeals for the District of Columbia Circuit vacating and remanding an earlier Commission order[7] that authorized AEP to acquire CSW.[8] While the Commission's order found that the proposed acquisition satisfied PUHCA's requirement that the merged

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[3] 17 C.F.R. § 210.411(b)(1) (2004).

[4] 17 C.F.R. § 210.411(b)(2) (2004).

[5] 17 C.F.R. § 210.411(b)(2)(A) & (B).

[6] 17 C.F.R. § 210.411(b)(2)(C).

[7] *American Electric Power Co., Inc. and Central and South West Corp.*, 54 SEC 697 (2000), 2000 SEC LEXIS 1227.

[8] *Nat. Rural Elec. Coop. Ass'n v. SEC*, 276 F.3d 609 (D.C. Cir. 2002), *vacating and remanding Am. Elec. Power Co.*, 54 SEC 697, 2000 SEC LEXIS 1227 (2000).

entity operate as a "single integrated public-utility system,"[9] the court of appeals disagreed. The court found that "the Commission failed to explain its conclusions regarding the interconnection requirement" and "failed to justify its finding that the proposed acquisition will satisfy the single-area-or-region requirement."[10]

An August 30, 2004, Commission Order initiated this proceeding. That order called for an evidentiary hearing to provide the "further supplementation of the record" needed "to determine on remand whether the combined AEP and CSW systems meet the relevant standards of sections 10(c)(1) and 11(b)(1) of the Act and, in particular, what specific facts about AEP's and CSW's electric systems and the geographic area covered by their systems are relevant to the required determinations."[11] The order directed that the hearing officer conduct such a hearing and issue an initial decision. In compliance with that order, an evidentiary hearing was held and an initial decision was filed with Commission's Secretary on May 3, 2005. The Initial Decision concludes that the combined AEP/CSW system meets PUHCA's interconnection requirement but not the single-area-or-region requirement. Accordingly, the Initial Decision denies AEP's application for approval to acquire CSW.

On May 24, 2005, AEP and the Division filed petitions for review of the Initial Decision. Each of them seeks review of the Initial Decision's conclusion that the AEP/CSW system is not confined to a single area or region and the Initial Decision's

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[9] 15 U.S.C. § 79k(b)(1).

[10] 276 F.3d at 610, 619.

[11] *Am. Elec. Power Co.*, PUHCA Release No. 35-27886, slip op. 1-2 (S.E.C. Aug. 30, 2004) (citing 15 U.S.C. §§ 79i(c)(1) & 79k(b)(1) (2000)).

consequent denial of AEP's application. NRECA and APPA believe that the Initial Decision correctly decides the "single area or region" issue.

NRECA and APPA's instant cross-petition, however, requests Commission review of the Initial Decision's conclusion that the combined AEP and CSW systems satisfy PUHCA's interconnection requirement.

Exceptions to Findings and Conclusions of Initial Decision

A. The Initial Decision Embodies Errors of Fact and Law.

The evidentiary record and the applicable law do not support the Initial Decision's finding that the utility assets of AEP and CSW are "physically interconnected or capable of physical interconnection." The Initial Decision embodies clearly erroneous findings of fact and erroneous conclusions of law.

The court of appeals concluded that the Commission in its earlier order had "failed to explain its conclusions regarding the interconnection requirement."[12] In particular, the court found that "the Commission's acceptance of a unidirectional contract path to 'interconnect' AEP and CSW" was unexplained.[13] The court stated that "interconnection" of utility assets "seems, on its face, to require two-way transfers of power."[14] The court noted that "PUHCA itself requires that the interconnected system be one 'which under the normal conditions may be economically operated as a single interconnected and coordinated' whole."[15] Thus, the court concluded that "[a]bsent some explanation from the Commission, we cannot understand how a system restricted to

[12] 276 F.3d at 610.

[13] *Id.* at 615.

[14] *Id.*

[15] *Id.* (quoting 15 U.S.C. § 79b(a)(29)(A)).

unidirectional flow of power from one half to the other can be operated in such a manner."[16]

The Initial Decision concludes that the interconnection requirement is met because "energy has been consistently transferred in both directions since approval of the Merger" even though AEP has made a "business decision" not to obtain contractual rights to transmit energy from west to east because it was too costly.[17] The Initial Decision cites evidence that 98% of the energy transferred between AEP and CSW since the merger has been from east to west and only 2% from west to east but concludes that the relatively "miniscule amount" of energy transferred west to east is sufficient to establish that power is flowing bi-directionally.[18]

The Initial Decision rests on an erroneous conclusion of law. The evidence of the transfer of a "miniscule amount" of energy between CSW and AEP from west to east does not demonstrate that the AEP and CSW systems are "physically interconnected or capable of physical interconnection" so as to constitute a "single integrated public-utility system." Any two unaffiliated utilities could trade small amounts of energy over third-party transmission lines. The transfer of a miniscule amount of energy does not transform these companies into a single integrated public-utility system that can transfer power and energy as needed within the system as a matter of right and thus economically operate as a single interconnected and coordinated whole.

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[16] *Id.*

[17] Initial Decision at 12.

[18] *Id.* at 12-13.

The Initial Decision's finding that AEP's "Contract Path ... has always been bi-directional" is clearly erroneous. The Initial Decision fails to consider that these "miniscule" transfers from west to east take place over third parties' transmission lines over which AEP does not have legal rights to two-way firm transmission service. The record demonstrates that AEP has a contractual path that provides service as a matter of right in one direction only.

The Initial Decision also concludes that, in lieu of relying on its existing Contract Path, "AEP may also purchase non-firm transmission services from Ameren whenever necessary or arrange an alternative contract path with other electric providers to meet the requirements of a bi-directional electric power flow for establishing interconnection."[19] In doing so, the Initial Decision erroneously concludes that the general availability of non-firm transmission service or open-access transmission service over third parties' transmission systems can be used to satisfy PUHCA's interconnection requirement. The Initial Decision cites no valid, applicable Commission precedent for this conclusion, and there is none. Moreover, the court of appeals expressly noted and rejected AEP's planned use of non-firm transmission service as a means of meeting PUHCA's interconnection requirement.[20] Accordingly, the potential availability of open-access transmission service over third-party transmission systems, standing alone, is insufficient to establish interconnection. The Initial Decision's position, if upheld, would allow nearly any two utilities to satisfy the interconnection requirement and thus essentially negate this statutory requirement.

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[19] *Id.*

[20] 276 F.3d at 612, 615.

B. If the Commission Reverses the Initial Decision on the Single-Area-or-Region Issue, It Must Address Its Departure from Commission Precedent as the Court of Appeals Directed.

The court of appeals found that "the Commission failed to follow its own prior reasoning regarding interconnection of distant utilities"—decisions in which the Commission "has clearly indicated that a contract path cannot alone integrate distant utilities."[21] The court found the Commission's prior statements "sufficiently explicit to obligate the Commission to provide some rationale for its current contrary view."[22]

The Initial Decision concludes that "[t]his issue is better addressed" in the analysis of the single-area-or-region requirement.[23] Although NRECA and APPA have no quarrel with the Initial Decision's ultimate resolution of the single-area-or-region requirement, the Initial Decision appears to implicitly adopt the position that a lengthy contractual path can be used in lieu of a physical transmission line to meet the interconnection requirement, so long as the resulting public-utility system is confined to a single area or region.

If the Commission reviews the Initial Decision's resolution of the single-area-or-region issue, however, the Commission also should review whether the utility assets of AEP and CSW are sufficiently interconnected by means of the contract path they have identified to meet the statutory requirement. And if the Commission concludes that they can be interconnected in this way, the Commission must justify its departure from its precedent suggesting that two distant utilities cannot be integrated by means of a contract

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[21] *Id.* at 615.

[22] *Id.*

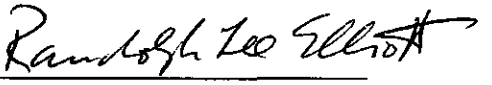
[23] Initial Decision at 6-7 n.9.

path. A long contract path—involving, as here, multiple contracts—has both economic and practical effects on the interconnection of two distant utilities, effects that can limit the ability of the applicants to operate as a single integrated public-utility system. Recognizing this, the court of appeals found the Commission's prior statements "sufficiently explicit to obligate the Commission to provide some rationale for its current contrary view."[24] Since the Commission's commitment to its prior policy view is embedded in several decisions,[25] the Commission must either follow that precedent or provide some rationale for departing from it.

Conclusion

If the Commission reviews the Initial Decision's resolution of the single-area-or-region issue, it also should review the Initial Decision's resolution of the interconnection issue, and thus set both sets of issues for concurrent briefing.

Respectfully submitted,



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[24] 276 F.3d at 615.

[25] *WPL Holdings, Inc.*, 53 SEC 501, 517 (1998), *aff'd sub nom. Madison Gas & Elec. v. S.E.C.*, 168 F.3d 1337 (D.C. Cir. 1999) ("The Commission has previously determined that combined electric properties can be interconnected, *where the utilities are not separated by significant distances*, by means of contractual rights to use the lines of a third party." (emphasis added)); *UNITIL Corp.*, 50 SEC 961, 967 n.30 (1992) ("Contract rights cannot be relied upon to integrate two distant utilities."); *Northeast Utils.*, 50 SEC 427, 449 n.75 (1990) (signaling that "the use of a third party cannot be relied upon to integrate two distant utilities.").

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