UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

AMERICAN ELECTRIC POWER COMPANY, INC. Administrative Proceeding
File No. 3-11616

BRIEF OF
AMERICAN ELECTRIC POWER COMPANY, INC.
IN RESPONSE TO THE COMMISSION'S AUGUST 9, 2005 ORDER

On August 9, 2005, the Commission issued an "Order Directing Filing Of Additional Briefs" in this proceeding in light of the passage of the Energy Policy Act of 2005 (the "Act"), which repeals the Public Utility Holding Company Act of 1935 ("PUHCA") effective six months from the date of enactment of the Act. PUHCA will therefore be repealed as of February 8, 2006. The Commission's Order directs the parties to submit briefs addressing "the implications of repeal of PUHCA for the Commission's consideration of this matter, including issues of mootness, procedure, and the Commission's authority to dispose of AEP's application."[1]

I. Introduction and Summary

The repeal of PUHCA has rendered the issues in this proceeding moot. The Commission will lose jurisdiction to take any action under PUHCA relating to the merger on February 8, 2006. At that time, American Electric Power Company Inc. ("AEP") will no longer need any approval from the Commission in order to remain lawfully merged, so any action the Commission might hypothetically take would have no substantive effect. In the interim, AEP

---

[1] *American Elec. Power Co.*, Order Directing Filing of Additional Briefs, File No. 3-11616, at 1-2 (Aug. 9, 2005).

and the former Central and South West Corporation ("CSW") are lawfully merged. Pursuant to the Commission's June 14, 2000 Order,[2] AEP and CSW consummated their merger on June 15, 2000, and the merger was lawfully effective as of that date. Although the Commission retains its jurisdiction under PUHCA for a few more months, it is unlikely that the Commission could order effective relief before PUHCA's repeal becomes effective. Further efforts in this case would be fruitless, counter-productive and a waste of Commission resources, given PUHCA's impending expiration.

Accordingly, AEP respectfully requests that the Commission suspend this proceeding without taking further action until PUHCA is repealed on February 8, 2006. On that date, the Commission should terminate this proceeding and vacate the Initial Decision. No other action by the Commission is necessary or appropriate.

II. The Commission Should Suspend This Proceeding Until PUHCA's Repeal Becomes Effective on February 8, 2006

AEP and CSW are lawfully merged pursuant to the Commission's June 14, 2000 Order approving the merger. Although the Commission's approval of the merger was appealed, no party obtained a stay of the merger pending appeal, and the Commission's approval was fully effective when AEP and CSW consummated the merger shortly after the Commission approved it. When the Court of Appeals found that the Commission's consideration of the merger under PUHCA was inadequate, the case was remanded. Presumably, at that time any interested party could have asked the Commission to take action to change the status quo in light of the Court's decision. If such a request had been made, AEP would have argued that granting the request would have been arbitrary and capricious because it would have required the merged companies

[2] *American Elec. Power Co.*, Holding Co. Act Release No. 27186, 54 S.E.C. 697 (June 14, 2000) ("2000 Order").

to "unscramble the egg" on a temporary basis pending completion of the Commission's review of the remanded issues, which would have created a legal, operational, and financial mess.[3] Of course, no party ever asked the Commission to take such a draconian step, and AEP and CSW therefore remain lawfully merged.

AEP believes that it has demonstrated on remand that its merger satisfies PUHCA's "single integrated public utility" test. Nevertheless, if the Commission found otherwise after continuing with this proceeding, it is difficult to imagine how it could responsibly order effective relief before PUHCA is repealed—at which time AEP would be free to merge without Commission approval. In order to follow such a course, the Commission would have to reschedule the filing of Opposition Briefs, await the filing of Rebuttal Briefs, and hold oral argument before deliberating on the merits. Even if the Commission could complete its deliberations and issue a ruling before February 8, 2006, and it ruled against AEP, further proceedings would be necessary to consider an appropriate remedy.[4] The Commission's rulings on the merits and on the remedy would then also be subject to appellate review.

---

[3] The courts have noted that unwinding a completed merger transaction is an extremely difficult, if not impossible, thing to do. Thus, even where a merger has been found to be unlawful after it has been consummated (which has never occurred in this case), unwinding the corporate entity is usually not an appropriate and reasonable remedy. *See*, *e.g.*, *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 846, 851 (3d Cir. 1973); *Sonesta Int'l Hotels Corp. v. Wellington Assocs.*, 483 F.2d 247 (2d Cir. 1973); *Laidlaw Acquisition Corp. v. Mayflower Group, Inc.*, 636 F. Supp. 1513 (S.D. Ind. 1986).

[4] Any order that required AEP to engage in a significant corporate transaction, such as a sale or spin-off of part of the AEP system, would take months, if not years, to implement after the Commission's action became final. Thus, even in the hypothetical situation where a Commission ruling adverse to AEP on the merits of the current dispute became final before PUHCA expires, AEP could not carry out the ruling before such expiration, at which time AEP would be able to merge without this Commission's approval. This does not even take into consideration any potential appeal AEP might make to the Court of Appeals.

Because the Commission cannot, as a practical matter, direct meaningful relief at this point in time, this proceeding has become moot as a matter of law. A case becomes moot when the outcome of the proceeding will no longer affect the parties in the real world. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Wyoming v. USDA*, 415 F.3d 1207 (10th Cir. 2005); *see also Mills v. Green*, 159 U.S. 651, 653 (1895) (court will dismiss appeal as moot when "an event occurs which renders it impossible" to grant "effectual relief"); *In re Combined Metals Reduction Co.*, 557 F.2d 179, 187 (9th Cir. 1977) ("Generally an appeal will be dismissed as moot when events occur which prevent the appellate court from granting any effective relief."). In *Arizona Electric Power Cooperative v. FERC*, 631 F.2d 802 (D.C. Cir. 1980), the court dismissed an electric cooperative's challenge to further agency action because there was not "any other relief which this court or the Commission could give to it." *Id.* at 808.

The repeal or expiration of a statute is normally sufficient to make a case moot. *Native Village of Notak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("As a general rule, if a challenged statute is repealed or expires, the case becomes moot."); *see also Lillbask ex rel. Mauclaire v. Connecticut Dep't of Educ.*, 397 F.3d 77, 91-92 (2d Cir. 2005); *C & H Nationwide v. Norwest Bank Texas N.A.*, 208 F.3d 490, 494 (5th Cir. 2000) ("When all the wrapping has been stripped away, we are being asked simply to decide what a repealed statute upon which no one, let alone the parties before us, may rely meant when it was in force."); *Camfield v. Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001).

Moreover, even if this case were not moot, it would be inappropriate for the Commission to act substantively at this time. Congress has determined that it is no longer necessary for holding companies to obtain the Commission's approval to merge, or to demonstrate that they are confined to a single integrated utility system. Although Congress chose to delay PUHCA's

repeal so that certain regulatory responsibilities unrelated to the issues in this case could be assumed by the Federal Energy Regulatory Commission, there is no reason for this Commission to believe that Congress has any interest in having the Commission exert additional efforts to enforce those aspects of PUHCA that limit the geographic scope of holding company systems over the next few months, particularly since such efforts would necessarily be undone when PUHCA is repealed. Accordingly, if the Commission were to rush to issue a decision in this proceeding, it would not be acting to uphold any remaining valid statutory objective of Congress.

For all of these reasons, the Commission should suspend this proceeding at this time and allow PUHCA to expire in accordance with the Act.

III. Once PUHCA Expires, the Commission Should Immediately Terminate This Proceeding And Vacate The Initial Decision

Once PUHCA expires on February 8, 2006, the Commission will be without authority to act and must dismiss this proceeding. As the D.C. Circuit recently explained:

> [A federal agency] is a "creature of statute," having "no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress." Thus, if there is no statute conferring authority, [the agency] has none.

Atlantic City Elec. Co. v. FERC, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis added)); *see also, e.g.*, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . . unless and until Congress confers power upon it."); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (same). Accordingly, once PUHCA expires, the Commission will no longer have authority to take any action with respect to the merger, because the statute under which Congress conferred such authority on the Commission will no longer be in effect.

The fact that this remand proceeding was pending before PUHCA's repeal is irrelevant to this outcome. When Congress changes the law to eliminate a court or agency's jurisdiction over a matter, that jurisdictional change must be given immediate and prospective effect. *Bruner v. United States*, 343 U.S. 112, 116 (1952) ("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law . . . ."). Thus, the Supreme Court has stated that its "consistent practice" is to order "an action dismissed because the jurisdictional statute under which it [has] been (properly) filed was subsequently repealed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (citing *Bruner*, 343 U.S. at 117).

This rule applies to administrative proceedings. In *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168 (5th Cir. 1976), the Fifth Circuit held that deputy commissioners of the federal Benefits Review Board no longer could hear the cases then pending before them, because the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 removed this jurisdiction, and "'[w]hen the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits . . . .'" *Id.* at 172 (quoting *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953)). Similarly, in *Salazar-Haro v. INS*, 95 F.3d 309 (3d Cir. 1996), the Third Circuit ruled that certain classes of non-citizen residents whose cases were pending before the INS no longer had appellate rights, because Congress had since withdrawn that authority: "'Jurisdiction is power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Id.* at 310 (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).[5]

---

[5] *See also, e.g.*, *Hallowell v. Commons*, 239 U.S. 506, 507 (1916) (finding that loss of appellate rights for Native American land trust claims applied to pending cases as of effective date of statutory change); *Assessor v. Osborne*, 76 U.S. (9 Wall.) 567 (1870); *Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996) (new legislation removes right to appeal from pending cases); *Scheidemann v. INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) (removal of Attorney General's

These principles control this proceeding. The only right conferred upon the SEC by PUHCA applicable in this case is the jurisdiction to "declare the law" of whether the merged AEP operates as a "single integrated public utility." 15 U.S.C. § 79k(b)(1) (2000). However, immediately upon the repeal of PUHCA, the SEC will no longer have that power, and the only thing left for it to do will be to dismiss this proceeding.

This conclusion is reinforced by the prospective nature of any relief that could be granted in this remand proceeding. Because AEP and CSW are already lawfully merged, relief associated with a finding that the merger does not meet the soon-to-be-defunct "single integrated public utility" test could be made effective on a prospective basis only. However, when Congress abrogates the possibility of prospective remedies, that abrogation applies to pending cases. *Landgraf*, 511 U.S. at 274. "Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered." *Id.* at 293 (Scalia, J., concurring); *see also Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 104 F.3d 1349, 1352 (D.C. Cir. 1997) (where continuing violations of a statute are alleged, "the law in effect at the time of decision is to govern"); *SEC v. Fehn*, 97 F.3d 1276, 1287 (9th Cir. 1996) ("Intervening statutes that grant injunctive power [are not retroactive] because '"relief by injunction operates *in futuro*."'" (citation omitted)); *Scheidemann v. INS*, 83 F.3d at 1523 (statutory changes that have "only a prospective impact" on "the power of a public agency" apply to pending cases).

There also is a practical reason why it would be inappropriate for the Commission to do anything other than dismiss this proceeding when PUHCA repeal is effective. Once PUHCA

---

discretionary authority to grant exceptions to deportation controls pending cases); *cf. Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 607-08 (1978) (enlargement of jurisdiction also applies to pending cases).

expires, AEP would be free to merge with CSW without the Commission's approval. Therefore, any remedy affecting the status of the merger that the Commission might hypothetically order at that time would be subject to immediate reversal by AEP, acting lawfully without the Commission's consent. Accordingly, the Commission's exercise of administrative power at that time, even if it were legally appropriate, would be a fruitless exercise.

IV. Conclusion

Congress' repeal of PUHCA rendered this proceeding moot. Congress has declared that public utility holding companies no longer need to satisfy PUHCA's requirements in order to merge, and as of February 8, 2006, the Commission will no longer have jurisdiction to enforce PUHCA's terms. Accordingly, AEP respectfully requests that the Commission suspend this proceeding until February 8, 2006, at which time it should vacate the Initial Decision and dismiss the case in its entirety.

Respectfully submitted,

John B. Keane
Jeffrey D. Cross
American Electric Power Company, Inc.
1 Riverside Plaza
Columbus, OH 43215
(614)223-1000
(614)223-1687 (fax)

David B. Raskin
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000
(202) 429-3902 (fax)

August 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August, 2005, I caused the foregoing document to be served via first class mail, postage prepaid, upon the persons listed below.

David B. Raskin

Paul F. Roye
David B. Smith
Catherine A. Fisher
Martha Cathey Baker
Ronald E. Alper
Catherine P. Black
Andrew P. Mosier Jr.
Division of Investment Management
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Arthur S. Lowry
Division of Enforcement
Securities and Exchange Commission
100 F Street, N.E.
Mail Stop 0911
Washington, DC 20549

Lynn N. Hargis
Tyson Slocum
Public Citizen, Inc.
215 Pennsylvania Avenue, S.E.
Washington, DC 20003

Scott Hempling
David Lapp
Law Offices of Scott Hempling
417 St. Lawrence Drive
Silver Spring, MD 20901

Wallace F. Tillman
Richard Meyer
National Rural Electric
Cooperative Association
4301 Wilson Boulevard
Arlington, VA 22203

Susan Kelly
Allan Mosher
American Public Power Assoc.
2301 M Street, N.W.
Washington, DC 20037

Randolph Lee Elliott
William Walker Benz
Miller, Balis & O'Neil, P.C.
1140 19th Street, N.W.
Suite 700
Washington, DC 20036