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
THE DIVISION OF INVESTMENT MANAGEMENT
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 ("EPA 2005"). EPA 2005 repeals the Public Utility Holding Company Act of 1935 ("Act" or "1935 Act"), effective six months from the date of enactment. Repeal will, therefore, be effective as of February 8, 2006. The Commission's Order directs the parties to submit briefs addressing "the implications of repeal of [the Act] for the Commission's consideration of this matter, including issues of mootness, procedure, and the Commission's authority to dispose of AEP's application."

I. Introduction and Summary

As we have argued before in this proceeding – both before the Administrative Law Judge and directly before the Commission – we believe that the AEP system in its current form is fully consistent with the requirements of the 1935 Act. However, for the reasons outlined below, we believe that there are substantial legal and policy reasons for the Commission to discontinue its consideration of this matter in view of the recent passage of EPA 2005 and the pending repeal of the 1935 Act. We, therefore, believe that the Commission should stay this proceeding until

February 8, 2006, the date on which the 1935 Act will cease to be in effect, and should terminate the proceeding thereafter. As part of terminating the proceeding, the Commission should vacate the Administrative Law Judge's initial decision in this matter.

From a legal standpoint, we agree with AEP's conclusion that repeal of the 1935 Act will effectively moot this matter. More specifically, we agree that on February 8, 2006, the day that repeal is effective, the Commission will lose jurisdiction to take any action under the 1935 Act relating to American Electric Power Company Inc. ("AEP") and other public-utility holding companies. In the interim, AEP and the former Central and South West Corporation ("CSW") are lawfully merged.[1]

Accordingly, largely for the reasons outlined in AEP's brief, we concur in AEP's request that the Commission suspend the proceeding without taking further action until the Act is repealed on February 8, 2006. We further agree with AEP's recommendation that, on that date, the Commission should terminate the proceeding. No other action by the Commission is necessary or appropriate.

II. There is No Good Policy Reason Not to Suspend This Proceeding Until Repeal of the Act Becomes Effective on February 8, 2006

Apart from the legal arguments advanced by AEP, there are strong policy reasons for the Commission to terminate consideration of this matter upon final repeal of the Act. First, as AEP itself notes, apart from the ability of the Commission to complete its consideration of this matter by the repeal date, assuming that the Commission were to rule against AEP, it is unlikely that the company could effectively be restructured prior to the February 8, 2006, repeal of the Act. And,

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[1] The merger was consummated on June 15, 2000, pursuant to the Commission's order in *American Electric Power Co*., Holding Co. Act Release No. 27186, 54 S.E.C. 697 (June 14, 2000) ("2000 Order").

as AEP notes, after February 8, it could undo any steps toward restructuring it had taken and reassume its existing form.[2] There is thus little reason for the Commission to devote the resources to deciding this matter during the intervening months when there is little probability that an effective remedy could be implemented.

Second, and more significantly, the repeal of the 1935 Act -- to be replaced by provisions of EPA 2005 -- represents a fundamental change in the nature of the regulation of utility holding companies in the United States. As has been detailed in the testimony, exhibits and legal arguments presented in this case, the 1935 Act placed numerous restrictions on the size, scope and activities of utility holding companies. The provisions at issue in this case – the interconnection requirement and the single area or region requirement – were two of the ways in which Congress restricted the scope of the utility activities of utility holding companies. The EPA 2005 does not retain these restrictions.

The EPA 2005 does contain provisions granting the Federal Energy Regulatory Commission ("FERC") and the state commissions additional authority to inspect the books and records of holding companies, thus demonstrating that Congress has remained concerned with certain intrasystem abuses that can be committed by holding companies.[3] However, because the other types of restrictions have been eliminated, the EPA 2005 also demonstrates that Congress

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2 *See* Brief of the American Electric Power Company, Inc. in Response to the Commission's August 9, 2005 Order, at 7-8 (Aug. 29, 2005).

3 More specifically, the EPA 2005 appears to provide both the FERC and interested state regulators with sufficient authority to protect utility consumers. The EPA 2005 gives the regulators a means to guard against cross-subsidization of nonutility activities by utility operations, insofar as the legislation provides the access to books and records that the regulators need to audit activities that are relevant to utility rates, thus allowing them to oversee affiliate transactions among system companies. Further, the EPA 2005 also authorizes the FERC to review the allocation of costs of non-power goods or administrative services provided to FERC-jurisdictional utilities by a system service company, an important consumer protection function that the Commission previously carried out under the 1935 Act. *See* EPA 2005 at section 1264.

now believes that these restrictions are no longer necessary.[4] In the end, irrespective of whether the combined utility operations of AEP and CSW were permissible under the 1935 Act, Congress now intends, based upon its passage of the EPA 2005, to permit holding companies like AEP (and, indeed, companies of much broader scope, both in terms of their geographical extent and the other activities in which they engage) to exist unless barred by some other law or by some other regulator.

In this context, both the FERC and the interested state regulators approved the merger of AEP and CSW prior to the issuance of the Commission's initial order approving the merger in 2000.[5] Since the merger, no regulator has advised the Commission of any detriment to the interests of consumers flowing from the activities of the merged company.

The Division believes that these facts further demonstrate that there is no regulatory purpose to be served by continuing the administrative proceeding. Given that Congress clearly intends for holding companies like AEP to exist on a going forward basis, no justifiable purpose would be served by now trying to restructure AEP to conform to some view of what the 1935 Act required prior to its repeal. In the event that some abuse should occur prior to repeal, of the

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In these ways, the EPA 2005 satisfies the prerequisites for repeal of the 1935 Act that the Commission has previously identified. *See infra* note 4.

4 The Commission has supported repeal of the 1935 Act since 1981, based upon its view that many provisions of the 1935 Act either duplicated laws administered by other regulators or were no longer necessary to prevent the recurrence of the abuses that led to the Act's enactment. *See, e.g.,* Public Utility Holding Company Act Amendments: Hearings on S. 1869, S.1870 and S.1871 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs, 97th Cong., 2nd Sess. 359-421 (statement of SEC), *cited in* Testimony of Commissioner Isaac C. Hunt, Jr., U.S. Securities and Exchange Commission, Before the Senate Comm. on Energy and Natural Resources Concerning S.1766 and Repeal of the Public Utility Holding Company Act of 1935, February 6, 2002, at 3. The Commission has tended to emphasize, however, that in order to protect the customers of multistate, diversified public-utility holding companies, Congress should give both the FERC and the interested state regulators authority over the books and records of companies in holding-company systems, as well as authority to oversee the affiliate transactions of these companies. While not obviously relevant to the appropriate disposition of this matter, it is notable that the EPA 2005 appears consistent with the Commission's longstanding position.

5 2000 Order at 14-18.

sort intended to be addressed by the 1935 Act, the Commission retains the necessary authority to respond. Otherwise, the EPA 2005 marks Congress' clear intent that the manner in which public-utility holding companies are regulated be changed fundamentally as of February 8, 2006.

III. Conclusion

Congress' repeal of the Act renders this proceeding effectively moot. As of February 8, 2006, when the Act's repeal becomes effective, the Commission's jurisdiction over public-utility holding companies under the Act will cease. Accordingly, the Division respectfully requests that the Commission suspend this proceeding until February 8, 2006, when the Commission should dismiss the proceeding in its entirety and vacate the Administrative Law Judge's initial decision.

Respectfully submitted,

David B. Smith, Jr.
Catherine A. Fisher
Martha Cathey Baker
Ronald E. Alper
Andrew P. Mosier, Jr.
Lore C. Steinhauser
Catherine P. Black
Arthur S. Lowry

Attorneys for
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-0503

CERTIFICATE OF SERVICE

I certify that on August 30, 2005, I caused true and correct copies of the foregoing document, captioned "Brief of the Division of Investment Management in Response to the Commission's August 9, 2005, Order," to be sent by first-class mail, postage prepaid, to the individuals at the addresses indicated below.

_____

David B. Smith Jr.
Associate Director
Division of Investment Management
Securities and Exchange Commission

John B. Keane, Esquire
Jeffrey D. Cross, Esquire
Edward J. Brady, Esquire
Thomas G. Berkemeyer, Esquire
Kevin F. Duffy, Esquire
William E. Johnson, Esquire
American Electric Power Co., Inc.
1 Riverside Plaza
Columbus, OH 43215

J.A. Bouknight, Jr., Esquire
David B. Raskin, Esquire
Steptoe & Johnson LLP
13330 Connecticut Ave., N.W.
Washington, D.C. 20036

Lynn N. Hargis, Esquire
Tyson Slocum
Public Citizen, Inc.
215 Pennsylvania Ave., N.W.
Washington, D.C. 20003

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

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

Richard Geltman
Susan Kelly, Esquire
Allan Mosher
American Public Power Association
2301 M Street N.W.
Washington, D.C. 20037