

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Jon Wellinohoff.

Midwest Independent Transmission  
System Operator, Inc. and  
American Transmission Systems, Inc.

Docket No. ER06-800-002

ORDER DENYING REHEARING

(Issued October 25, 2006)

1. American Municipal Power-Ohio, Inc. (AMP-Ohio) has requested rehearing of the Commission's May 22, 2006 Order<sup>1</sup> that conditionally accepted and suspended for a nominal period the joint proposal by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and American Transmission Systems, Inc. (American Transmission)<sup>2</sup> permitting American Transmission to recover deferred costs associated

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<sup>1</sup> Midwest Independent Transmission System Operator Inc. and American Transmission Systems, Inc., 115 FERC ¶ 61,224 (2006) (May 22 Order).

<sup>2</sup> American Transmission is a wholly-owned transmission subsidiary of FirstEnergy Corporation (FirstEnergy); other relevant FirstEnergy subsidiaries, specifically four FirstEnergy electric utility operating company subsidiaries, are identified *infra* note 31.

For simplicity, whether filings in these proceedings were actually made by American Transmission or FirstEnergy, we will consider them as filed by American Transmission.

with its Vegetation Management Enhancement Project (VMEP).<sup>3</sup> For the reasons described below, we will deny rehearing.

### **Background**

2. As described in the May 22 Order, this proceeding stems from corrective measures that this Commission and public utilities undertook in the wake of the August 14, 2003 power blackout that affected large portions of the Midwest and Northeast United States and Ontario, Canada. In March 2004, the Commission released a study that examined the utility vegetation management practices of FirstEnergy,<sup>4</sup> Cinergy Corporation (Cinergy), and American Electric Power Company (AEP).<sup>5</sup> The CNUC Report found that the vegetation management programs of these three utilities were consistent with common industry standards at the time the blackout occurred. However, the report also found that extant industry requirements and standards were inadequate to achieve the level of utility vegetation management necessary to improve reliability. The CNUC Report

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<sup>3</sup> The filing was conditionally accepted, suspended for a nominal period, and made effective subject to refund and subject to the review and acceptance of a compliance filing to revise the formula rate: (1) to recover only deferred VMEP costs properly recorded in transmission operation and maintenance expense accounts; and (2) to reflect American Transmission's agreement, in its answer to AMP-Ohio's protest, to adopt the Commission's refund interest rate to calculate carrying costs on the unamortized VMEP costs. *See* May 22 Order at P 31, 33. On June 13, 2006, Midwest ISO and American Transmission submitted the required compliance filing (Docket No. ER06-800-001). The compliance filing was not protested, and on July 14, 2006, acting under delegated authority, the Director, Division of Tariffs and Market Development – Central, Office of Energy Markets and Reliability (the successor to the Office of Markets, Tariffs and Rates) accepted the compliance filing.

<sup>4</sup> American Transmission owns the bulk transmission systems formerly owned by several FirstEnergy electric utility operating company subsidiaries located in Ohio and western Pennsylvania, and those FirstEnergy electric utility operating company subsidiaries each continue to own the lower-voltage transmission or so-called sub-transmission facilities within their service territories. These companies constitute a single control area in the East Central Area Reliability (ECAR) region.

<sup>5</sup> CN Utility Consulting, *Utility Vegetation Management Final Report* (March 2004) (CNUC Report).

recommended specific proposals to the industry, oversight agencies, and other organizations.<sup>6</sup>

3. On April 19, 2005, the Commission issued its *Policy Statement on Matters Related to Bulk Power System Reliability*,<sup>7</sup> in which, *inter alia*, it recognized that public utilities might need to expend additional amounts of money to implement measures necessary to maintain bulk electric system reliability. The Commission stated that it would approve applications to recover prudently incurred costs necessary to ensure bulk electric system reliability, including prudent expenditures for vegetation management.<sup>8</sup>

4. On March 28, 2006, American Transmission filed proposed revisions to its Attachment O transmission rate formula (Attachment O) under Midwest ISO's Open Access Transmission and Energy Markets Tariff, to amortize and recover the costs of its VMEP over a five-year period beginning June 1, 2006 (March 28 Filing). American Transmission described the costs as extraordinary costs above and beyond its baseline vegetation management program costs, and stated that the costs were for activities begun in 2004 and projected to continue through 2007. The March 28 Filing described American Transmission's former vegetation management practices as consistent with industry-wide standards at the time. It denied that the programs in the VMEP were "catch-up" activities, and stated that they represented adoption of newly-identified industry "best practices," in keeping with industry-wide changes in vegetation management standards.

5. Among the issues that AMP-Ohio raised in its protest, two are pertinent to its rehearing request. First, AMP-Ohio disputed that American Transmission's VMEP costs, a substantial portion of which were incurred in 2004 and 2005, were truly out-of-the-ordinary expenses incurred in response to the need for better vegetation control and not expenses incurred to cure imprudent failure to manage vegetation prior to the blackout. Second, asserting that American Transmission had not shown that its VMEP costs were just and reasonable, AMP-Ohio asked that if the Commission did not reject the March 28 Filing the Commission should set it for hearing.

6. The May 22 Order conditionally accepted and suspended for a nominal period the March 28 Filing. Citing long-standing Commission precedent that presumes good faith

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<sup>6</sup> *Id.* at 38-39.

<sup>7</sup> *Policy Statement on Matters Related to Bulk Power System Reliability*, 107 FERC ¶ 61,052 (2004), *supplemented*, 110 FERC ¶ 61,096 (2005) (Reliability Policy Statement).

<sup>8</sup> *Id.* at P 27.

on the part of the filing utility, the Commission disagreed that American Transmission bore the burden of affirmatively demonstrating *ab initio* that its VMEP costs were prudent. Rather, consistent with precedent, the Commission held that participants in a rate proceeding seeking to challenge an expenditure's prudence must first create a serious doubt as to the expenditure's prudence before the burden shifts to the filing utility.<sup>9</sup> The Commission observed that no party had made such a showing. While agreeing with AMP-Ohio that tree-to-conductor contact on the American Transmission system was a major cause of the blackout, the Commission also cited findings of the CNUC Report that the conditions on the American Transmission system reflected conditions found throughout the United States and Canada. The Commission could not conclude, on the basis of existing evidence, that American Transmission's pre-blackout vegetation management practices, which reflected industry-wide standards and practices, may have been imprudent.<sup>10</sup>

### **Post-May 22 Order Filings**

7. On June 21, 2006, AMP-Ohio filed a request for rehearing. American Transmission subsequently filed an answer to the rehearing request, and AMP-Ohio filed an answer to American Transmission's answer.

8. AMP-Ohio first argues that the Commission erred by imposing on AMP-Ohio, prior to discovery or a trial-type hearing, the evidentiary burden to produce evidence demonstrating that the VMEP expenditures were incurred to remedy prior imprudent practices. AMP-Ohio posits that this burden falls upon it only during and after a trial-type hearing.

9. In support of its position, that the Commission mis-applied the burden, AMP-Ohio contends that the orders upon which the Commission relied in the May 22 Order<sup>11</sup> do not support the conclusion that AMP-Ohio bore the burden, at the time of its protest, to cast doubt as to the prudence of the VMEP costs. AMP-Ohio emphasizes that all three orders

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<sup>9</sup> *Id.* at P 28.

<sup>10</sup> *Id.* at P 29.

<sup>11</sup> The May 22 Order cited *New England Power Co.*, Opinion No. 231, 31 FERC ¶ 61,047 at 61,082, *reh'g denied*, Opinion No. 231-A, 21 FERC ¶ 61,113 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986) (*New England Power*); *Minnesota Power and Light Co.*, Opinion No. 86, 11 FERC ¶ 61,312 at 61,644-45 & n.45, *reh'g denied*, Opinion No. 86-A, 12 FERC ¶ 61,264 (1980) (*Minnesota Power*); *Indiana Municipal Agency v. FERC*, 56 F.3d 247, 253 (1995) (*Indiana Municipal*). May 22 Order at P 29 nn.19-20.

were in cases where trial-type hearings had already been held and evidentiary records already created. AMP-Ohio urges that challengers of a proposed rate increase should be provided an opportunity, in a trial-type hearing, to obtain and present evidence relating to prudence.

10. AMP-Ohio next maintains that it satisfied its burden of establishing the need for further investigation of the VMEP costs. AMP-Ohio references both the report of the U.S.-Canada Power System Outage Task Force<sup>12</sup> and the CNUC Report<sup>13</sup> to demonstrate that the blackout was due to American Transmission's failure to manage tree growth in its transmission rights-of-way. AMP-Ohio adds that the rate increase proposed in the March 28 Filing will result in more than \$6 million in increased costs to its members.

11. In a footnote in its request for rehearing, AMP-Ohio criticizes the May 22 Order's reliance on the consistency of American Transmission's vegetation management practices with those of other utilities, noting simply that that fact "does not obviate the need for the Commission . . . to take a hard look at the expenses."<sup>14</sup> In further support, in another footnote in its request for rehearing, AMP-Ohio refers to data in American Transmission's earlier answer in this proceeding, showing that American Transmission's vegetation management costs were about \$4 million in 2001 and 2002, but that, in 2003, the year of the blackout, they fell to less than \$1 million, only to increase to over \$5 million in 2004,<sup>15</sup> and adds that further discovery is necessary to determine which 2004 expenses that American Transmission seeks to recover under its proposal were "catch-up" expenditures made necessary by inadequate maintenance in 2003.

## **Discussion**

### **Procedural Matters**

12. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits an answer to a request for rehearing. Accordingly, we will reject American Transmission's answer to AMP-Ohio's request for rehearing. Consistent

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<sup>12</sup> U.S.-Canada Power System Outage Task Force, Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendations (April 2004) (Blackout Report).

<sup>13</sup> *See supra* note 5.

<sup>14</sup> Rehearing Request at 14 n.12.

<sup>15</sup> *See* American Transmission's May 3, 2006 Answer at Ex. AMP-Ohio/FE-1 (Part 1 of 2).

with this determination, we also will dismiss AMP-Ohio's answer to American Transmission's answer.

### **Substantive Matters**

13. We will deny rehearing. AMP-Ohio has not persuaded us that we erred either as to the burden AMP-Ohio had or as to whether a trial-type hearing was necessary.

14. The Commission and the courts have long recognized that a protestor has a burden to do more than make mere unsubstantiated allegations.<sup>16</sup> Yet that is all that AMP-Ohio did – make unsubstantiated allegations. On rehearing, AMP-Ohio acknowledges that its protest merely “asserted” that American Transmission's VMEP costs were imprudent.<sup>17</sup> AMP-Ohio takes the view that its mere assertions and “articulat[ion] of a need for additional information”<sup>18</sup> was enough to warrant the Commission ordering a trial-type hearing “to obtain evidence to meet its burden.”<sup>19</sup> AMP-Ohio is incorrect, though. More was required of AMP-Ohio than mere allegations.<sup>20</sup>

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<sup>16</sup> *E.g.*, *PJM Interconnection, LLC*, 115 FERC ¶ 61,052 at P 12 n.10 (2006); *Duke Energy Corp.*, 87 FERC ¶ 61,249 at 61,966 & n.4 (1999); *Central Maine Power Co.*, 60 FERC ¶ 61,285 at 61,964 n.17 (1992); *Philadelphia Electric Co.*, 58 FERC ¶ 61,060 at 61,132 & n.2 (1992); *Georgia Power Co.*, 52 FERC ¶ 61,321 at 62,278 & n.5 (1990). In fact AMP-Ohio recognizes that, indeed, it did have a burden, *see* Rehearing Request at 5 (“AMP-Ohio's protest raised contentions with respect to this issue sufficient to warrant discovery and a hearing”), 6 (“the purpose of its protest was to establish the need for further inquiry”), 12 (AMP-Ohio “does accept that it must present good cause for further fact finding” and AMP-Ohio had a “burden to establish the need for the Commission. . . to engage in further investigation of [American Transmission's] VMEP costs through hearing procedures”), notwithstanding that it also claims that at the time it filed its protest it effectively had no burden and its making allegations was alone sufficient. *Id.* at 7-8, 12.

<sup>17</sup> *Id.* at 5; *accord id.* at 13 (describing protests as “alleg[ing] that VMEP costs were imprudent”).

<sup>18</sup> *Id.* at 5; *accord id.* at 6 (the purpose of AMP-Ohio's protest was merely to establish “the need for further inquiry”).

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *See supra* notes 11, 16.

15. AMP-Ohio, moreover, did not make a showing sufficient to call into question, *i.e.*, to warrant a trial-type hearing into, whether American Transmission's actions met the standard that the Commission has long used to evaluate challenges to a utility's actions and costs:

In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management . . . would have made, in good faith, under the same circumstances, and at the relevant point in time. We note that while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility's actions and the costs resulting therefrom based on the particular circumstances existing either at the time the challenged costs were actually incurred, or the time the utility became committed to incur those expenses.<sup>21</sup>

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<sup>21</sup> *New England Power Co.*, Opinion No. 231, 31 FERC ¶ 61,047 at 61,084 (*NEPCO*), *reh'g denied*, Opinion No. 231-A, 32 FERC ¶ 61,112 (1985), *aff'd sub nom. Violet v. FERC*, 800 F.2d 280 (1<sup>st</sup> Cir. 1986); *accord id.* at 61,087 (finding that the utility had "acted as any other reasonable utility in its position would have acted, given the same circumstances and the same facts known to the [utility] at the time").

While the three orders cited by the Commission in the May 22 Order (including *NEPCO*, quoted above), *see supra* note 11, happened to have been post trial-type hearing orders, the cited language in those orders does not, contrary to AMP-Ohio's suggestion, apply only in cases where trial-type hearings have already been held; the reach of that language is broader. *See Public Service Company of Colorado*, 90 FERC ¶ 61,285 at 61,960 (2000) ("costs are presumed prudent unless someone raises a reasonable doubt about them"); *ANR Pipeline Co.*, 84 FERC ¶ 61,219 at 62,055, 62,058-59 (1998) (summarily ruling on challenge to prudence of natural gas pipeline company's actions); *Columbia Gas Transmission Corp.*, 70 FERC ¶ 61,303 at 61,910-11 (1995) (summarily deciding that natural gas pipeline company's actions were prudent, and denying requests for trial-type hearing), *reh'g denied*, 75 FERC ¶ 61,017 (1996). Indeed, in *Minnesota Power*, while the cited order itself happened to follow a trial-type hearing, the Commission explained how a rate filing and protest would be viewed:

[U]tilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent unless the Commission's filing requirements, policy or precedent otherwise require. However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditures to have been prudent.

(continued...)

AMP-Ohio failed to sufficiently call into question American Transmission's actions, which AMP-Ohio concedes were consistent with industry practice.<sup>22</sup> That is, AMP-Ohio failed to make a showing sufficient to warrant the Commission inquiring further, through a trial-type hearing, into whether American Transmission's actions and costs were those of a reasonable utility facing the same circumstances and with the same knowledge at the same point in time.

16. AMP-Ohio identifies, as its “[m]ost important[.]” evidence in support of the Commission's ordering a trial-type hearing,<sup>23</sup> the Blackout Report and the CNUC Report.<sup>24</sup> However, both reports emphasized that American Transmission's tree-trimming practices were consistent with industry practice at the time.<sup>25</sup> And AMP-Ohio acknowledges that American Transmission's actions were consistent with industry practice at the time.<sup>26</sup> AMP-Ohio's only response is that that fact “does not obviate the need for the Commission . . . to take a hard look.”<sup>27</sup> AMP-Ohio's response does not, however, warrant the Commission instituting a trial-type hearing. Failure to have lived up to newer, improved practices now in place industry-wide, which is effectively the standard that AMP-Ohio would have us apply, is hardly a basis to order a trial-type hearing into American Transmission's actions. In sum, we are not persuaded to change our holding. The mere fact that tree-to-conductor contact in American Transmission's rights-of-way contributed to the blackout is by itself insufficient to doubt the prudence of

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*Minnesota Power*, 11 FERC at 61,645 (footnotes omitted); *accord id.* (noting that a state commission decision finding imprudence “constitutes more than a bare allegation of imprudence and is sufficient to draw into question the prudence” of expenditures). And, as explained below, AMP-Ohio has failed to show that further investigation is warranted in this instance.

<sup>22</sup> Rehearing Request at 14 n.12.

<sup>23</sup> *Id.* at 13.

<sup>24</sup> *See supra* notes 5, 12; *see also* May 22 Order at P 2-3, 26-27.

<sup>25</sup> *See* May 22 Order at P 3, 26 (discussing CNUC Report); Rehearing Request at 14 n.12 (discussing Blackout Report).

<sup>26</sup> Rehearing Request at 14 n.12.

<sup>27</sup> *Id.*

American Transmission's tree-trimming; American Transmission's actions were, in fact, consistent with industry practice.<sup>28</sup>

17. AMP-Ohio also argues that the data in American Transmission's earlier answer show that American Transmission's 2004 VMEP costs were essentially catch-up expenditures, made necessary by inadequate maintenance in 2003. These expenditures, taken from a table provided by American Transmission entitled "ATSI Vegetation Management 2000-2005,"<sup>29</sup> were approximately \$4 million in 2001 and again in 2002, but in 2003, the year of the blackout, they decreased to less than \$1 million, only to increase to more than \$5 million in 2004.<sup>30</sup> However, four pages later in that same document, a table entitled "Operating Company Sub-Transmission VM Expenses 2000-2005" shows vegetation management expenditures by American Transmission's four FirstEnergy electric utility operating company affiliates in ECAR for their lower-voltage transmission or so-called sub-transmission during the same years.<sup>31</sup> This table shows that there was an offsetting increase in the 2003 vegetation management expenses reported for lower voltage or sub-transmission for the four FirstEnergy electric utility operating company affiliates compared to those companies' vegetation management expenses in 2001-2002 and 2004, and both tables contain notes explaining that the expenditure patterns shown for each company for 2003 and 2004 reflect adjustments associated with a change in accounting systems. Thus, the tables together show that the combined higher voltage transmission and lower voltage transmission, or transmission and sub-transmission, vegetation management expenses of American Transmission and its electric utility operating company affiliates in ECAR remained stable during the period in question. The tables together also show that the seeming decrease in vegetation management expenditures by American Transmission for 2003 appears to reflect a change in the allocation of vegetation management expenses between American Transmission and its electric utility operating company affiliates due to a change in accounting systems – not a change in vegetation management practices.

18. This is consistent with the results of the CNUC Report conducted for the Commission, which was a comprehensive assessment of the pre-blackout vegetation

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<sup>28</sup> May 22 Order at P 29; *see supra* note 25 and accompanying text.

<sup>29</sup> *See supra* note 15.

<sup>30</sup> Rehearing Request at 13 n.11.

<sup>31</sup> *See* American Transmission's May 3, 2006 Answer at Ex. AMP-Ohio/FE-2 (Part 2 of 2). The four FirstEnergy electric utility operating company affiliates are: Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and Toledo Edison Company.

management practices of FirstEnergy, Cinergy and AEP against industry benchmarks. The CNUC Report took into consideration not just the companies' vegetation management expenditures, but a wide range of quantitative and qualitative data, gathered through field investigations and data requests, regarding these companies' vegetation management programs. It took into consideration information concerning such factors as: (1) the organizational structure, contracting practices, work management and techniques, frequency of patrols and maintenance cycles, and engineering assumptions associated with the companies' vegetation management programs; (2) historical program budgets, actual expenses, and work completed (*e.g.*, number of trees pruned and removed and acres treated or mowed); and (3) service reliability statistics.<sup>32</sup> Based on this information, the CNUC Report concluded that FirstEnergy's vegetation management practices were consistent with industry norms.

19. In sum, while AMP-Ohio claims that it has raised "substantial doubt" as to American Transmission's prudence,<sup>33</sup> that is not the case. Rather, AMP-Ohio presented only unsubstantiated allegations, and such allegations were not and are not a basis to order a trial-type hearing.

The Commission orders:

AMP-Ohio's request for rehearing is hereby denied.

By the Commission. Commission Moeller not participating.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>32</sup> See CNUC Report at 46-51, 57-66.

<sup>33</sup> Rehearing Request at 6.