

128 FERC ¶ 61,123  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

American Electric Power Service Corporation

Docket No. ER09-1279-000

ORDER ACCEPTING AND SUSPENDING PROPOSED TRANSMISSION  
AGREEMENT AND ESTABLISHING HEARING AND  
SETTLEMENT JUDGE PROCEDURES

(Issued August 3, 2009)

1. On June 5, 2009, pursuant to section 205 of the Federal Power Act (FPA),<sup>1</sup> American Electric Power Service Corporation (AEP) submitted proposed amendments to an April 1, 1984 Transmission Agreement among and on behalf of its seven AEP East operating companies: Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company (collectively, AEP East Companies).<sup>2</sup> The proposed Transmission Agreement would effect a comprehensive reallocation of transmission-related costs and revenues among the AEP East Companies. The Commission will accept the proposed Transmission Agreement for filing, suspend it for a nominal period, to become effective on the first day of the month after a final Commission order in this proceeding, as requested, subject to refund. We will also establish hearing and settlement judge procedures.

**Background**

2. The AEP East Companies provide electric service to customers in parts of seven states: Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia and West Virginia. The five largest companies operate generation, transmission and distribution facilities, while

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<sup>1</sup> 16 U.S.C. § 824d (2006).

<sup>2</sup> The unmodified version of the 1984 Transmission Agreement will be referred to as the “1984 Transmission Agreement.” The proposed amended version will be referred to as the “proposed Transmission Agreement.”

the two smaller companies, i.e., Kingsport Power Company (Kingsport) and Wheeling Power Company (Wheeling), operate only transmission and distribution facilities.

3. Per the 1984 Transmission Agreement, the cost of ownership and operation of the AEP East Companies' extra high-voltage facilities are shared on the basis of their relative peak loads.<sup>3</sup> Each AEP East Company's investment in bulk transmission facilities (138 kV and above) is compared to its Member Load Ratio (MLR) share of the total of all companies' investments, excluding Kingsport and Wheeling.<sup>4</sup> MLR is the ratio of a company's non-coincident peak load in the past 12 months to the sum of the non-coincident peak loads over the past 12 months for all AEP East Companies.<sup>5</sup> Companies whose bulk transmission investment are lower than their MLR share of the total system investment make monthly settlement payments that are distributed to companies whose investments are higher than their relative MLR share.

### **The Proposed Transmission Agreement**

4. AEP asserts that several changes in the electric utility industry require a reworking of the 1984 Transmission Agreement. These changes include open-access transmission under Order No. 888,<sup>6</sup> the Commission's espousal of regional transmission organizations

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<sup>3</sup> *American Electric Power Service Corp.*, Opinion No. 311, 44 FERC ¶ 61,206 (1987), *reh'g denied*, Opinion No. 311-A, 45 FERC ¶ 61,408 (1988).

<sup>4</sup> Kingsport Power Company's load is included in the MLR of Appalachian Power Company and Wheeling Power Company's load is included in the MLR of Ohio Power Company. See Exhibit AEP-200 at 10-11.

<sup>5</sup> A non-coincident peak occurs anytime during the month that the highest demand occurs with regard to an individual company. This is in contrast to a coincident peak load, which occurs at the time that the AEP East Zone peaks.

<sup>6</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

(RTOs), and the fact that, in 2004, AEP placed its East Zone transmission facilities under the functional control of PJM Interconnection, L.L.C. (PJM).<sup>7</sup>

5. According to AEP, the proposed Transmission Agreement recognizes that, pursuant to the PJM OATT, the AEP East Companies and other load serving entities (LSEs) in the AEP region of PJM now share the cost of all the AEP East Companies' transmission facilities, including those operated at voltages below 138 kV. AEP proposes to allocate costs and revenues associated with all of the transmission facilities (not just those operating at 138 kV and above) to all of the AEP East Companies, including Kingsport and Wheeling.<sup>8</sup> AEP states that the major proposed changes to the 1984 Transmission Agreement are found in Articles 5 (Definitions of Factors Associated With Settlements) and 6 (Settlements), which implement the MLR-based cost sharing of facilities operated at 138kV and above. More specifically, AEP proposes to move from an MLR-based cost-sharing allocation method, based on a 12-month non-coincident peak, to a 12-month coincident peak in the AEP East Zone.<sup>9</sup> In addition, AEP asserts that the proposed Transmission Agreement recognizes that, as a result of open access and RTO participation, the AEP East Companies are now obligated to provide certain transmission-related services, and to purchase such services and additional RTO-supplied services. According to AEP, the proposed Transmission Agreement addresses the allocation of OATT-based transmission and related costs and revenues among all seven of the AEP East Companies. AEP contends that the proposed Transmission Agreement will change the transmission costs and revenues allocated to each of the companies individually, but there will be no impact on wholesale transmission rates or the total costs included in the PJM OATT.

6. AEP requests that the proposed Transmission Agreement not become effective until the first day of the month after the Commission issues a "final, non-appealable

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<sup>7</sup> Since joining PJM, AEP's status has changed from being a transmission provider under its own open access transmission tariff (OATT) to being a transmission customer under PJM's OATT.

<sup>8</sup> In other words, as load serving entities in PJM, the AEP East Companies must purchase network integration transmission service from PJM to serve their native loads. The AEP East Companies receive statements from PJM for transmission and related services used and supplied. The proposed Transmission Agreement provides for an allocation of all transmission-related items on those PJM statements to the AEP East Companies.

<sup>9</sup> The items to be allocated are set forth in proposed Appendix I to the proposed Transmission Agreement.

order” accepting the agreement for filing.<sup>10</sup> AEP contends that the request is consistent with Article 9 of the 1984 Transmission Agreement, which provides that any modification to the terms and conditions shall become effective the first day of the month following authorization by the appropriate regulatory authority. If the proposed Transmission Agreement is set for hearing or settlement judge procedures, AEP requests that the effective date be delayed until resolution of such hearing or settlement. In the event such resolution occurs beyond 120 days from the date of AEP’s submission in this case, AEP seeks a waiver of the Commission’s notice requirements.<sup>11</sup>

### **Notice of the Filing and Responsive Pleadings**

7. Notice of the filing was published in the *Federal Register*, 74 Fed. Reg. 28,685 (2009), with interventions and comments due on or before June 26, 2009. The Public Utilities Commission of Ohio, the Virginia State Corporation Commission, and the Public Service Commission of West Virginia each filed a notice of intervention. West Virginia Energy Users Group, the Old Dominion Committee for Fair Utility Rates, East Tennessee Energy Consumers, and Hoosier Energy Rural Electric Cooperative each filed a timely motion to intervene. The Consumer Advocate Division of the Public Service Commission of West Virginia (West Virginia Consumer Advocate), Steel Dynamics and the Indiana Office of Utility Consumer Counselor (Indiana Consumer Counselor) each filed a timely motion to intervene and protest. The Indiana Utility Regulatory Commission (Indiana Commission) filed a notice of intervention and protest. Ohio Consumers’ Counsel filed an untimely motion to intervene. On July 13, 2009, AEP filed an answer to the protests.

8. Indiana Consumer Counselor<sup>12</sup> argues that AEP has failed to show that changes to the 1984 Transmission Agreement are appropriate or that the proposed Transmission Agreement is just and reasonable. Indiana Consumer Counselor states that, while the 1984 Transmission Agreement in effect assigns unequal transmission-related costs to the companies, the result takes into account different AEP East Companies’ investments to support the overall pool and is a reasonable and appropriate reflection of certain AEP East Companies’ greater investment in bulk transmission facilities as compared to their respective peak load ratios. Indiana Consumer Counselor further asserts that the proposed Transmission Agreement will reallocate transmission costs from other AEP

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<sup>10</sup> AEP’s June 5, 2009 Transmittal Letter at 7.

<sup>11</sup> 18 C.F.R. § 35.3 (2009).

<sup>12</sup> Indiana Consumer Counselor describes itself as an agency of the State of Indiana authorized to represent all Indiana ratepayers in state and federal proceedings.

companies to Indiana Michigan Power Company (I&M),<sup>13</sup> thereby increasing by almost 46 percent I&M's transmission cost of service from about \$59 million to \$86 million. Given the large increase, Indiana Consumer Counselor suggests setting the proposed Transmission Agreement for hearing and settlement judge procedures.

9. Indiana Consumer Counselor further insists that this proceeding should be expanded to include review of a 1951 Interconnection Agreement (Interconnection Agreement) that is on file with the Commission.<sup>14</sup> The Interconnection Agreement provides for integrated planning and operation of the generation facilities in AEP's East Zone, and allocation of the costs and benefits relating to those facilities.<sup>15</sup> Indiana Consumer Counselor contends that, just as PJM's OATT and cost-sharing rules affect transmission cost allocation, its dispatch of generation and operation of energy, ancillary services, and capacity markets affect generation resources, the sharing of which is covered by the Interconnection Agreement.

10. The Indiana Commission essentially agrees with Indiana Consumer Counselor, asserting that AEP has failed to adequately support the proposed Transmission Agreement. Like Indiana Consumer Counselor, the Indiana Commission requests that the Commission expand this proceeding to include review of the Interconnection Agreement, and establish hearing and settlement judge procedures. Opining that comprehensive reform is essential for building transmission and generation within the PJM region, the Indiana Commission contends that failure to simultaneously consider the proposed Transmission Agreement and the Interconnection Agreement would violate the FPA. The Indiana Commission asserts that: (1) use of the MLR is no longer appropriate

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<sup>13</sup> I&M provides retail electric service to approximately 454,000 customers in Indiana.

<sup>14</sup> The Interconnection Agreement is dated June 29, 1951, and became effective on August 1, 1951. It is designated as Appalachian Power Company rate schedule FPC 20. *See American Electric Power Service Corp.*, 69 FERC ¶ 61,449 (1994).

<sup>15</sup> The Interconnection Agreement provides for cost-sharing of the AEP East Companies' generating facilities, and mandates that each of their transmission facilities be made available to the others to enable system integration, including centralized dispatch and shared use of generation. The Interconnection Agreement does not, however, provide for sharing the cost of transmission facilities that are owned by the AEP East Companies. The Indiana Consumer Counselor states that it is now working with AEP, Indiana Commission staff and other parties to review the effective, relative costs, customer benefits and other aspects of the Interconnection Agreement, including whether it is a redundant mechanism now that I&M participates in PJM.

in either the proposed Transmission Agreement or the Interconnection Agreement<sup>16</sup>; (2) current provisions of the Interconnection Agreement produce significant differences in the cost of generating capacity among companies, despite the fact that generating capacity is planned and operated on a system-wide basis; (3) the Interconnection Agreement effectively requires companies with more efficient resources to subsidize companies that have less efficient resources, in a manner that is unjust, unreasonable, unduly discriminatory and preferential; (4) the effect of different state regulatory structures under the Interconnection Agreement and the proposed Transmission Agreement might allow opportunities for undue discrimination in the allocation of costs among the several states; and (5) there is a lack of transparency in the Interconnection Agreement concerning AEP's financial trading and allocation of benefits and costs, giving rise to concern that the allocations could be unjust, unreasonable, unduly discriminatory and preferential. The Indiana Commission believes its concerns regarding the Interconnection Agreement should be explored in this proceeding.

11. West Virginia Consumer Advocate<sup>17</sup> also largely agrees with Indiana Consumer Counselor, except that it does not seek review of the Interconnection Agreement as part of this proceeding. It asserts that AEP failed to show the proposed Transmission Agreement is just and reasonable, positing that the agreement would increase Appalachian Power Company's transmission cost of service from approximately \$128 million to \$160 million, an increase of about 25 percent.

12. Steel Dynamics, which owns and operates four steel mills within AEP's footprint,<sup>18</sup> urges the Commission to closely examine the proposed Transmission Agreement. Steel Dynamics believes the parties need additional opportunities to critically evaluate the modifications.

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<sup>16</sup> On this point, the Indiana Commission argues: (1) the MLR is based on the single non-coincident peak of an operating company and therefore is not the relevant peak for either resource planning or operations; (2) the MLR is inconsistent with sound rate design practices and will limit the effectiveness of demand-response; (3) the MLR may result in greater volatility in cost allocations among several operating companies, as a result of improper pricing of operating costs and capacity within AEP; and (4) now that AEP is a PJM member, allocation across AEP East Operating Companies of net revenues from off-system sales based on MLR no longer make sense.

<sup>17</sup> West Virginia Consumer Advocate is an independent division of the West Virginia Public Service Commission, authorized by West Virginia law to represent the interests of West Virginia residential utility customers in state and federal proceedings.

<sup>18</sup> The facilities are in Indiana, Virginia and West Virginia.

13. AEP counters that, while the proposed Transmission Agreement would result in annual cost increases to I&M and Appalachian Power Company of approximately \$27 million and \$32 million, respectively, the increases are offset by decreases to the other operating companies. AEP states that, put in context, the increases represent only a small percentage of I&M's Indiana jurisdictional annual operating expenses, and Appalachian Power Company's West Virginia jurisdictional operating expenses. In any case, AEP states its willingness to engage in settlement discussions concerning the resulting increases, as long as any solution allows AEP to recover its costs and is acceptable to other parties.

14. AEP further argues that reviewing the Interconnection Agreement in this proceeding would be an inappropriate, momentous undertaking in violation of the requirements of the FPA. AEP contends that the amount of money that is settled every month among members per the Interconnection Agreement dwarfs amounts settled per the 1984 Transmission Agreement and that even small changes in the Interconnection Agreement's allocation of costs and revenues could result in the reallocation of hundreds of millions of dollars annually. AEP asserts that the Indiana Commission and Indiana Consumer Counselor's call for a broad inquiry here into the appropriateness of the Interconnection Agreement constitutes an end-run around section 206 of the FPA, which requires any party seeking a change in an existing rate to file a complaint.<sup>19</sup>

### **Procedural Matters**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Ohio Consumers' Counsel has demonstrated an interest in this proceeding and its untimely motion to intervene will not delay, disrupt or otherwise prejudice any party to this proceeding.<sup>20</sup> Accordingly, we will grant Ohio Consumers' Counsel untimely motion to intervene.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009) prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept AEP's answer because it has provided information that has assisted us in our decision-making process.

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<sup>19</sup> To that end, AEP contends that the Indiana Commission is currently conducting its own inquiry into the continued relevance of the Interconnection Agreement. AEP believes the results of that inquiry should be useful to the Indiana Commission in deciding whether to pursue changes to the Interconnection Agreement.

<sup>20</sup> 18 C.F.R. § 385.214(d) (2009).

### **Substantive Determinations**

17. AEP's proposed Transmission Agreement raises issues of material fact concerning the appropriate allocation of costs and revenues, which cannot be resolved on the record before us. These issues are more appropriately addressed in the hearing and settlement judge procedures ordered below. We note that AEP and all protestors either request or are amenable to hearing and settlement judge procedures regarding the proposed Transmission Agreement.

18. Our preliminary analysis indicates that AEP's proposed Transmission Agreement has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the proposed Transmission Agreement for filing, suspend it for a nominal period, and make it effective on the first day of the month following a final Commission order in this proceeding, as requested, subject to refund. We also set it for hearing and settlement judge procedures.

19. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.<sup>21</sup> If the parties desire, they may, by mutual agreement, request a specific judge as to the settlement judge in this proceeding; otherwise, the Chief Judge will select a judge for this purpose.<sup>22</sup> The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

20. Per Article 9 of the filed 1984 Transmission Agreement, any changes to its terms and conditions are to become effective the first day of the month following authorization by the appropriate regulatory authority. Hence, the proposed Transmission Agreement will not become effective until the first day of the month following a final Commission

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<sup>21</sup> 18 C.F.R. § 385.603 (2009).

<sup>22</sup> If the parties decide to request a specific judge, they must make their joint request to the Chief Judge in writing or by telephone at (202) 502-8500 within five days of the date of this order. FERC's website contains a listing of the Commission's judges and a summary of their background and experience ([www.FERC.gov](http://www.FERC.gov) – click on Office of Administrative Law Judges).

order in this proceeding. To the extent that the effective date may occur 120 days beyond AEP's filing in this case, we will grant AEP's request for waiver of the Commission's notice requirements.<sup>23</sup> We note that no party has protested this issue. In addition, it appears that AEP erroneously designated the proposed Transmission Agreement as First Revised Rate Schedule FERC No. 34, instead of First Revised Rate Schedule FERC No. 100 (the Official Commission designation assigned to the 1984 Transmission Agreement<sup>24</sup>). When AEP resubmits the proposed Transmission Agreement following a final Commission order in this case, it should correct the tariff designations, as well as indicate the effective date, on each tariff sheet.

21. Finally, we find no basis for including the Interconnection Agreement as part of the hearing and settlement judge procedures in this case. Certain protestors contend that failing to order such a review would violate the FPA.

22. However, AEP did not include any changes to the Interconnection Agreement in this section 205 filing, and the agreement therefore is beyond the scope of this proceeding. Any change to an existing just and reasonable rate must be filed under section 206, which requires parties to challenge an existing rate by filing a complaint, "stating the change or changes to be made in the rate, charge, classification, rule, regulation, practice or contract . . . and the reasons for any proposed change or changes therein."<sup>25</sup> While the protestors make general assertions concerning the continued relevance of the Interconnection Agreement, they do not point to any specific provision viewed as problematic or identify any particular change that should be made. Moreover, we find no allegation in the pleadings upon which the Commission could properly rely in initiating a proceeding *sua sponte* under section 206. For these reasons, we will not order review of the Interconnection Agreement as part of this case.

The Commission orders:

(A) AEP's proposed Transmission Agreement is hereby accepted for filing and suspended for a nominal period, to become effective on the first day of the month after a final Commission order in this proceeding, subject to refund, as discussed in the body of this order.

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<sup>23</sup> 18 C.F.R. § 35.3 (2009).

<sup>24</sup> See *American Electric Power Service Corp.*, 28 FERC ¶ 61,228, at 61,436 (1984).

<sup>25</sup> 18 U.S.C. § 824e (2006).

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and regulations under the Federal Power Act (18 C.F.R. Chapter I), a public hearing shall be held concerning AEP's proposed Transmission Agreement. However, the hearing will be held in abeyance to give the parties time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2009), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.