OCTOBER 10, 2000

BY HAND
Mrs. Sandra Squire
Executive Secretary
Public Service Commission
201 Brooks Street
Post Office Box 812
Charleston, West Virginia 25323

Re: Reply Comments of Appalachian Power Company and Wheeling Power Company, both d/b/a American Electric Power

I enclose herewith for filing in the above-referenced docket on behalf of Appalachian Power Company and Wheeling Power Company both d/b/a American Electric Power ("the Companies") the original and twelve (12) copies of the Reply Comments.

Copies have been served by mail upon all parties to this proceeding.

Very truly yours,

Charles McElwee
Counsel for Appalachian Power Company and Wheeling Power Company both d/b/a American Electric Power

CRM:shb

Enclosures

cc w./enc.: Service list
GENERAL ORDER NUMBER 255
In the matter of a Proposed Rulemaking
Related to Restructuring the Electric Utility
Industry in West Virginia

REPLY COMMENTS OF
APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY
both d/b/a AMERICAN ELECTRIC POWER

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October 10, 2000
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In response to its promulgation of a proposed set of rules dealing with matters arising from and associated with the deregulation of power supply and the institution of customer choice in the electric industry, the Commission received a wide array of Initial Comments. The commenting parties included a number of persons and entities which have actively participated in the negotiating processes that preceded the issuance of both the Commission’s Restructuring Plan of January 28, 2000 (“Restructuring Plan” or “Plan”) and its proposed Restructuring Rules of August 28, 2000 (“Restructuring Rules” or “Rules”), as well as a number of persons and entities who previously had not participated very actively or at all.

The nature of the Initial Comments covered a broad spectrum. There were comments pointing out simple errors and suggesting “fine-tuning” of language to achieve fairly well-understood and widely accepted resolutions of various substantive issues, as well as reasoned reiterations of points that had been made previously but were not embraced by the Commission in the proposed Rules. There were also statements of very extreme positions, which appeared to ignore the tremendous progress that the parties and the Commission have achieved to date in effecting compromises and accommodations, and which seemed motivated by a desire to stake out as remote a stance as possible in the hope of skewing some future compromise toward that extreme position.

There were proposals made for additional detailed regulations that seemingly attempt to foresee every possible future event, which suggests to AEP that some parties question the Commission’s ongoing ability to oversee the development of retail competition in West Virginia in a sensitive,
responsive, and reasonable manner. Finally, there was the introduction of some completely new
matters which have not had the benefit of any prior consideration by the parties who have devoted
great time and resources to considering diverse points of view on all previously identified issues and
striving to move toward balanced resolutions of those issues.

Appalachian Power Company and Wheeling Power Company both d/b/a American Electric
Power (collectively "AEP") attempted in their Initial Comments to make suggestions that fell within
only the first bands of the spectrum discussed above. AEP pointed out some errors it had detected,
proposed the fine-tuning of language in a number of places, and reiterated some points which it had
made in the past, and which it believes should be adopted by the Commission in order to achieve the
most reasonable and balanced set of Restructuring Rules possible for guiding all interested parties
into the realms of power supply deregulation and customer choice.

AEP urges the Commission to give full consideration to those comments and to other
comments offered by other parties in a similar constructive spirit. AEP believes the Commission
should give little or no favorable consideration to the advocacy of parties who have done nothing
more than remain entrenched in extreme positions or have suggested rules that do nothing more than
circumscribe the Commission's ability to exercise its expertise when overseeing the transition to
competition under the Restructuring Plan. With regard to brand new matters, AEP suggests that it
is rather late in the process to give them proper consideration and still meet the goal of having a
balanced set of Restructuring Rules in place by the end of the year. It may be worth reflecting that
the immediate task at hand is to arrive at fair and workable rules with which to commence the
restructuring process. Those rules can certainly evolve over time, as experience may indicate is
appropriate, and can include suitable resolutions on new issues, whether they are the new issues of
September 2000, or May 2001, or even some later date. In this regard, AEP notes that experience
is often the best teacher of all in leading to effective regulatory measures. Rather than attempt to
envision theoretically all possible problems and outcomes and to address them in advance, it could
be very sensible and efficient to implement a basic and balanced regulatory structure and then study
how well it performs and what problems, if any, it may prove to be prone to.

Probably every party to this proceeding recognizes that there is a trade-off between market
efficiency and consumer protection in the regulatory process. But the ultimate beneficiary of both
efficiency and protection is the electric service customer. It is no service to fence that customer in so thoroughly with safeguards against any and all conceivable harms that no one is interested, or able, to reach through to that customer with the benefits of customer choice. Moderate regulation can always be strengthened if abuses occur at unacceptable levels. But heavy-handed regulation tends to perpetuate its oppressive sway because it never allows for the freer experience which would demonstrate that it is not necessary.

AEP does not attempt in these Reply Comments to address every point made by every initial commentator. Rather, in the constructive and accommodating spirit of its own Initial Comments, where AEP pointed out where modest changes could be made to bring the proposed Rules closer to the goal of being a fairly balanced set of rules, AEP attempts in these Reply Comments to identify changes proposed by other parties which would be obstructive to this goal. AEP hopes the Commission will stick to its course of embracing and rewarding compromise and will not, at this stage, make sweeping changes or introduce wholly new matters to its Restructuring Rules. Some changes are still needed to improve further a set of Rules that, when promulgated, embodied commendable progress from the days when the parties to the restructuring process first articulated their varied and often conflicting views. But the basic shape of a fair set of Rules has been achieved: only fine finishing work is now needed to complete the job.

With some exceptions, most notably with respect to the disclosure of environmental information (§§150-3.16.3; 150-3-16.6.a.1. and 2; 150-3-16.7.c.1.B; 150-3-16.11; and 150-3-14.b.P.) and the regulation of the non-public-service businesses of a local distribution company (“LDC”) (§§150-3-15.1.a.2. and 150-3-15.2.c.), the Commission has succeeded in its Rules in remaining faithful to the Restructuring Plan heretofore approved by both the Commission and the Legislature. It is that Plan which not only confers, but constrains, the Commission’s authority to adopt implementing rules. To a very surprising extent, many of the commentators in their Initial Comments have offered proposals for revising the Commission’s proposed Restructuring Rules as though the Restructuring Plan does not exist and the Commission were completely free to adopt any rules it chooses. That is not the case. In adopting Restructuring Rules, the Commission does not start with a blank sheet of paper and complete authorial discretion, unrestrained by anything that has gone on before.
Therefore, it is appropriate to consider the Commission’s authority to promulgate Restructuring Rules. It is also appropriate to point out the numerous proposals which are beyond the Commission’s authority to promulgate under the Restructuring Plan approved by the Legislature in its last regular session.

II. PROPOSALS WHICH ARE INCONSISTENT WITH, AND GO BEYOND IMPLEMENTATION OF, THE PLAN

A. Guiding Principles

The legislatively-approved Plan is the source of the Commission’s authority to promulgate implementing rules and it is within the Plan that the Commission must find warrant for any and all rules which are proposed to it and which it may consider adopting. Syl. pt. 3, Appalachian Reg. Health Care v. W. Va. HRC, 376 S.E.2d 317 (W.Va. 1988) (“[The] power [of administrative agencies] is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim.”) Accord, Francis O. Day Co. v. Board of Review, 424 S.E.2d 763, 765-66 (W.Va. 1992).

The Commission is thus not free to ignore the Plan and adopt rules beyond its bounds. Were it permitted to do so, the Plan would be a meaningless document, the legislative approval of it would have no significance, and the Commission’s authority would have no constraint. The Plan is the authoritative document to which the Commission’s Restructuring Rules must conform. The Plan may be modified by the Commission only in accordance with set procedures (including a hearing), as provided in Section 1(f) of the Plan and in W. Va. Code, §24-2-18(f).

Moreover, the Plan which the Commission recommended to the Legislature in its Order of January 28, 2000 in Case No. 98-0452-E-GI represents – in the very words of the Commission at page 13 of that Order – a “negotiated compromise of the many contested issues in this proceeding.” That is even more reason why the issues resolved in the formulation of the Plan should not be relitigated in the course of adopting subordinate rules.

In creating rules to implement or carry out the provisions of the Plan, the Commission cannot enlarge or modify the authority given to it by the Plan. See W. Va. Code, §24-2-18(f) and Section 1(f) of the Restructuring Plan. Note 21 to the Court’s decision in State ex rel. Mountaineer Park v. Polan, 438 S.E.2d 308, 317 (W.Va. 1993), is to the point:
An administrative agency may not, under the guise of regulation, issue a rule or regulation which enlarges its statutory authority. Ney v. State Workmen’s Compensation Comm’r, 171 W. Va. 13, 297 S.E.2d 212 (1982); Rowe v. West Virginia Dep’t of Corrections, 170 W.Va. 230, 292 S.E.2d 650 (1982); 1 Am. Jur. 2d Administrative Law § 132, p. 944 (1962) (Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which extends or enlarges the act being administered).

1 M.J., Administrative Law, § 5 cites a number of West Virginia court decisions for the proposition that an administrative body may not issue a regulation which is out of harmony with, or which alters, the statute being administered.

The Restructuring Plan cannot be regarded as a preliminary or rudimentary document which the Commission is free to modify, expand or enlarge as it sees fit. Quite to the contrary, the Restructuring Plan is the legislatively-approved, authority-giving document which the Commission can only implement.

Two examples of a rule provision, one which would implement the Plan and the other which would enlarge or modify the Plan, illustrate this point: Section 17(c) of the Plan states that electric service suppliers are to provide emission and fuel mix information “to their customers upon request.” An implementation rule may properly specify how customers are to make their request and when and how suppliers are to respond to their request. On the other hand, a rule which would require suppliers to provide emission and fuel mix information as a bill insert to all customers and in marketing materials to potential customers would modify or enlarge the Restructuring Plan and be beyond the Commission’s authority to promulgate.

The Restructuring Plan does not give to the Commission the broad authority to promulgate “rules and regulations as it may deem necessary and advisable” as was the case in the statute creating the West Virginia State Board of Health which was before the court in State v. West Virginia State Board of Health, 70 S.E.2d 903 (W.Va. 1952). Even there, the broad rule-making power given was limited to the administration of the powers granted to the Board. Section 5(b) of the Restructuring Plan, in contrast, limits the Commission’s rule-making power to rules “necessary to implement the provisions of this plan.”
B. Code of Conduct
(§150-3-15)

The following proposals to revise the Commission’s proposed Code of Conduct Rules, as advanced by one or more commentators in their Initial Comments, do not conform to the Plan. Thus, adopting those proposals would exceed the Commission’s authority:

1. Corporate Separation
(§150-3-15.1.a.1.2. and 3.)

   The proposal of NECA¹ (pp. 1-7),² WVHVACEC³ (pp. 2-3) and Weirton⁴ (pp. 11-12) that incumbent electric utilities (LDCs) be required to corporately separate all of their non-public-service businesses from their public-service businesses of transmission and distribution must be rejected as enlarging the authority of the Commission under the Restructuring Plan.

   While Section 17(a) of the Plan requires an incumbent electric utility to functionally separate its generation and its other non-regulated businesses from its transmission and distribution public-service businesses, the Plan requires an incumbent electric utility to corporately separate only its generation from its public-service businesses.

   There is in law a maxim known as “expressio unius est exclusio alterius” – the expression of one is the exclusion of another. Since the Commission in recommending, and the Legislature in approving, the Restructuring Plan have provided only for the corporate separation of generation, the inclusion of this one non-regulated business must be read as an intent to exclude others – the corporate separation of all other non-regulated businesses. The is especially true in the context of the Plan’s requirement that all non-regulated businesses be functionally separated from the public-service activities.

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¹West Virginia-Ohio Valley Chapter National Electrical Contractors Association.
²Page references in parentheses are to the Initial Comments of the identified commentator.
³West Virginia Heating, Ventilating, Air Conditioning Electrical Contractors Association.
⁴Weirton Steel Corporation.
The Commission’s authority with respect to Section 17(a) of the Plan is limited to the promulgation of “such Rules as may be necessary to implement the provisions of [Section 17(a)].” See Section 5(b) of the Plan.

It is wholly irrelevant what other states have provided with respect to corporate separation. In West Virginia, the Commission and the Legislature have resolved the issue. The Commission cannot revisit the extent to which corporate separation will be required.

2. Proposal That If an Incumbent Electric Utility Plans to Engage in a Business Activity Which is Not Subject to Commission Jurisdiction, Such Activity Must First Be Authorized By the Commission (§150-3-15.a.1.2.)

The proposal of Weirton (p. 10) that proposed (§150-3-15.1.a.2. be revised to require Commission authorization for business activities of an incumbent electric utility which are not subject to Commission jurisdiction must be rejected as being beyond the authority of the Commission to promulgate.

AEP vigorously opposes this proposal for the many reasons set forth in its Initial Comments, particularly in Appendix A thereto.

Preface to Subsequent Paragraphs Under Caption Numbers 3 Through 11 Relating to the Code of Conduct.

These paragraphs relate to Section 17(b)(1) through (12) of the Restructuring Plan. A number of commentators in their Initial Comments have made proposals which are inconsistent with, or which would enlarge the Commission’s powers under, paragraphs (1) through (12) of Section 17(b). Section 17(b) of the Restructuring Plan declares the intent of the Commission and the Legislature that the rules promulgated by the Commission “shall include” the provisions of paragraphs (1) through (12). Many commentators want the Commission to disregard those provisions. An example is the proposal that sharing of office space between an incumbent electric utility and an affiliate not be subject to a W.Va. Code, §24-2-12 proceeding, which Section 7(b)(7) of the Restructuring Plan expressly requires.
3. Accounts and Records  
(§150-3-15.1.c.1.2. and 3.)

The proposal of NECA (pp. 7-8) and Enron (p. 3) that the Commission adopt a rule authorizing itself to review the books and records of an affiliate of an LDC must be rejected because the Commission is given no authority over the non-regulated affiliates of an LDC. The Restructuring Plan in Section 17(b)(6) provides only for the review of the accounts and records of an incumbent electric utility. The Commission is given no authority over an unregulated affiliate of an LDC and it cannot expand its own powers beyond those statutorily conferred.

4. Sharing of Office Space, etc.  
(§150-3-15.1.d.)

The proposal of NECA (pp. 8-10), WVHVACEC (p. 4), the CAD5 (p. 12), and Weirton (p. 13) that the sharing of office space, equipment, services or systems by an incumbent electric utility (LDC) with its non-regulated affiliates be either prohibited or be subject to specific Code of Conduct rules rather than a W.Va. Code, §24-2-12 approval must be rejected because it would be inconsistent with Section 17(b)(7) of the Restructuring Plan, which requires that such sharing be subject to a W.Va. Code, §24-2-12 proceeding.

Section 17(b)(7) of the Restructuring Plan declares that “Sharing of office space, equipment, services and systems between an incumbent electric utility and any affiliate shall be subject to West Virginia law [W.Va. Code, §24-2-12] governing transactions between a utility and its affiliates.” Subsection (b) of Section 17 of the Restructuring Plan declares that the Code of Conduct “shall include” that provision.

The Commission in its proposed Rules (§150-3-15.1.d.) has been faithful to the mandated provision in stating that “An LDC shall not share property, equipment, computer systems, information systems, and corporate support services with its affiliates except in accordance with W.Va. Code, §24-2-12.”

While some parties may not like a §24-2-12 proceeding and want to dispose of it in this context, the Commission and the Legislature have required it and it is too late now to be objecting.

5Consumer Advocate Division.
to its inclusion. The Commission has no authority to prohibit the sharing of office space, etc. or submit the sharing to regulations other than through a §24-2-12 proceeding. Any such prohibition or change to the Commission’s proposed Rule would be inconsistent with the requirements of the Plan.

5. Sharing of Employees
   (§150-3-15.1.e.)

The proposal of NECA (pp. 10-12), WVHVACEC (pp. 4-5), and the CAD (p. 12) that the sharing of employees, or at least the sharing of operational and managerial employees, by, and the temporary or intermittent assignments of employees between, an LDC and its non-regulated affiliates be prohibited or subject to a clear and unambiguous rule should be rejected because of its inconsistency with Section 17(b)(7) of the Restructuring Plan.

The Restructuring Plan does not prohibit the sharing of employees. Rather, it declares in Section 17(b)(7) that “To the extent practicable, the employees of an incumbent electric utility and those of an affiliate shall operate independently of one another” and recognizes that the direction to operate independently to the extent practicable “shall not prevent employees from transferring from one to the other so long as the effect of such transfer is not to circumvent the requirements of this Code of Conduct or the law.”

The Restructuring Plan thus recognizes that there may be instances when it is impracticable for the employees of an incumbent electric utility and those of an affiliate to operate independently of one another. Were the Commission to ban completely the sharing of employees or make the sharing subject to an overly restrictive rule, the Commission would in effect nullify the Plan’s introductory phrase “To the extent practicable.”

The Commission’s proposed §150-3-15.1.e.1. prohibits the joint employment of an individual by an LDC and its non-regulated utilities and in a proviso allows an LDC to petition “the Commission pursuant to W.Va. Code, §24-2-12 for approval of an affiliated contract which provides for joint use of employees.” NECA (p. 11) objects to the W.Va. Code, §24-2-12 proceeding provided for in that section of the Commission’s proposed Rule. Such a proceeding is provided for in Section 17(b)(11) of the Restructuring Plan.
NECA’s proposal (p. 10) to prohibit temporary or intermittent assignments of employees between an incumbent electric and its affiliates would, if adopted, violate the proviso in the first sentence of Section 17(b)(7) of the Plan. That proviso, which Section 17(b) declares shall be included in the Commission’s Rules, allows employees to transfer between an incumbent electric utility and its affiliate “so long as the effect of such transfer is not to circumvent the requirements of this Code of Conduct or the law.”

6. Deletion of Phrases
(§150-3-15.1.e.2.)

The proposal of NECA (p. 11) and Enron (p. 4) to delete the phrases “To the extent practicable” and “to the extent necessary to fulfill the purpose of this Rule” in proposed Rule §150-3-15.1.e.2. should also be rejected. The phrase “To the extent practicable” is taken directly from Section 17(b)(7) of the Plan, and, according to the Plan, shall be included in the Commission’s regulations. The second phrase is implicit in the provisions of the Plan, namely, that the direction to “operate independently” is required only to the “extent necessary to fulfill the purposes of this Rule.”

7. Pricing of Sale of Assets Between an LDC and its Affiliate
(§150-3-15.2.)

The proposal of Weirton (pp. 13-14), NECA (p. 13), Enron (pp. 4-5), and the CAD (p. 13) that the sale or transfer of property, goods or services between and an LDC and its affiliate be asymmetrically priced, i.e., transfers from an LDC to an affiliate be at the greater of the LDC’s fully allocated cost or market price, and transfers from an affiliate to an LDC be at the lesser of the affiliate’s fully allocated cost or market price, must be rejected as being inconsistent with the provisions of the Restructuring Plan.

Section 17(b)(11) of the Plan provides that all contracts between an incumbent electric utility (LDC) and an affiliate (which would include the sale or transfer of assets) “shall be subject to the authority of the Public Service Commission of West Virginia, which has the authority to give its prior consent and approval, pursuant to the current provisions of W.Va. §24-2-12.” That section of the Code sets forth the criteria which the Commission is to employ in determining whether or not to grant its consent. Thus, according to §24-2-12, the Commission may grant its consent in advance
to, or provide an exemption from the requirements of §24-2-12, a sale of assets or property between a utility and an affiliate, “upon proper showing that the terms and conditions [of the sale] are reasonable and that neither party thereto is given an undue advantage over the other, and do not adversely affect the public in this state,” and the Commission may consent to the entering into a contract for the sale of assets “if the public will be convenienced thereby,” in which case the Commission may “enter such order as it may deem proper and as the circumstances may require, attaching thereto such conditions as it may deem proper. . . .”

The Plan thus makes a contract for the sale of assets between an LDC and its affiliate subject to §24-2-12 proceeding and that section in turn establishes the criteria whereby the Commission is to make its decision. More importantly, the Commission is to apply the criteria based upon the showing made or record developed in the §24-2-12 proceeding. If the Commission were to establish by rule the price at which all assets were to be sold in transactions between an LDC and its affiliate, the Commission would be violating not only Section 17(b)(11) of the Plan but also the provisions of §24-2-12, which state that all aspects of the Commission’s decision in a §24-2-12 proceeding (which would include the pricing of the assets to be sold) is to be based upon the showing made in the proceeding or as the circumstances involved in the particular proceeding may require.

8. **Credit Support**

(§150-3-15.2.e.)

The Commission must reject the proposal of NECA to have incorporated into the Rules those provisions set forth in paragraphs A), B), C), and D) at the bottom of page 15 and the top of page 16 of its Initial Comments. These provisions, or at least the first three of them, set forth specific requirements respecting a loan from an LDC to an affiliate or the guaranteeing of an affiliate’s debt by an LDC.

If an LDC wanted to make a loan to an affiliate or guarantee a debt of an affiliate, then that would involve a contractual relationship between an LDC and an affiliate, which, under Section 17(b)(11) of the Plan would require Commission approval in a W.Va. Code, §24-2-12 proceeding. Either would involve the “furnishing of [a] thing” under the provisions of §24-2-12. As noted above, with respect to the pricing of a sale of assets between an LDC and an affiliate, §24-2-12 contains
the criteria whereby the Commission is to make its determination based upon the “showing” or “circumstances” made or indicated in the proceeding itself.

Paragraph D) at the top of page 16 of NECA’s Comments is unclear. If the Commission is required to approve an LDC’s loans to an affiliate, as well as LDC’s guarantee of an affiliate’s debt, why should an LDC be required by rule to make annual filings with respect thereto?

9. Preferential Treatment
(§150-3-15.3.)

The proposal of NECA (pp. 11, 16-17), WVHVACEC (p. 5) and Enron (p. 5) that the words “undue” and “unduly” be deleted from §150-3-15.3.a. of the Commission’s proposed Rules must be rejected as being inconsistent with the Restructuring Plan. These words, and the sentence in which they appear, are taken verbatim from Section 17(b)(1) of the Restructuring Plan except that the Commission has substituted the word “LDC” in the Rule for “incumbent electric utility” in the Plan. According to Section 17(b) of the Plan, these words are required to be included in the Commission’s Rules.

NECA (p. 18) has also objected to limiting the scope in proposed §150-3-15.3.a. to only those instances involving the processing of customer requests for retail electric power. Again, that is the limitation set forth in Section 17(b)(1) of the Plan, and it too, must be included in the Commission’s Rules.

10. Provision of Information
(§150-3-15.4.)

NECA’s proposal (p. 18) that §150-3-15.4 of the Commission’s proposed Rules not be limited to a CES provider but be expanded to include all affiliates of an LDC should be rejected as being inconsistent with the Plan.

The Commission’s proposed Rule is entirely consistent with Section 17(b)(5) of the Restructuring Plan, which places restrictions on the sharing of market information by an LDC with an electric energy supplier.
11. Names and Logos

The proposal of the CAD (pp. 14-15), NECA (pp. 24-29), WVHVACEC (p. 6-7), WVEC \(^6\) and WV-CAG \(^7\) (p. 6) that any LDC affiliate selling products or services in the marketplace be prohibited from using the name (or closely related name) and logo of the LDC must be rejected for a number of reasons.

The Plan contains no provision prohibiting or limiting the use by an affiliate of the name and logo of an LDC; this is, therefore, not a required provision to be implemented by a rule of the Commission. Moreover, the Plan gives the Commission no authority over what a non-regulated affiliate of an LDC may call itself.

The very term “Code of Conduct” indicates that such a Code is to regulate conduct. In the case of Section 17(b) of the Restructuring Plan, the conduct to be regulated is largely in terms of what an incumbent electric utility shall not do. In Section 5(f) of the Plan, the codes of conduct which the Commission are required to adopt are limited to the conduct of incumbent electric utilities and their affiliates, but only if “such affiliates provide, or control an entity that provides, power supply, distribution or transmission services,” and, then, only “to the extent necessary to prevent market power or the impairment of competition.” Even W.Va. Code, §24-2-18(a)(6)(J) requires that the code of conduct be only “for electric service providers.”

Suppose that two corporations were formed, one an affiliate of Appalachian Power Company d/b/a American Electric Power, the other an affiliate of Union Carbide Corp. Both provide air charter service out of Yeager Airport. The first is named AEP Air Charter, the second Union Carbide Air Charter. It is the apparent intent of some commentators that the Commission should prohibit the affiliate of APCo from being called AEP Air Charter in order to guard against cross-subsidization and promote effective competition. Why shouldn’t the same guarding and the same promoting be applied to the Union Carbide affiliate? If it is not, then isn’t the APCo affiliate being denied the equal protection of the laws?

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\(^6\)West Virginia Environmental Council.

\(^7\)West Virginia Citizen Action Group.
In return for being given a monopoly status by the State, APCo gave up the right to set the prices of its service to an agency of the State which would establish those prices for it. That was the bargain. How did we ever reach the point to suppose that the bargain could be extended to give the Commission jurisdiction to tell an affiliate of APCo what it can or cannot do?

It is understandable that, with the deregulation of generation, and with a goal to promote competitiveness among electric service providers, some regulation may be necessary to encourage such competition. That is the intent expressed in W.Va. Code, §24-2-18(a)(6)(J) — that the code of conduct to be provided in the Restructuring Plan is to be “for electric service providers,” and is the intent expressed in Section 5(f) of the Plan that the code of conduct to be provided in the Commission’s Rules is to govern “the conduct of incumbent electric utilities and affiliates thereof when any such affiliates provide, or control any entity that provides, power supply, distribution or transmission services, to the extent necessary to prevent market power or impairment of competitors.”

It is, therefore, baffling how codes of conduct which were intended to regulate the conduct of electric service providers and the conduct between incumbent electric service providers and affiliates thereof which are engaged in providing electric power or transmission and distribution services got expanded in some peoples’ minds to include a policing of the corporate names of non-regulated affiliates not engaged in providing either electric power or transmission and distribution services.

However that may be, any Commission Rule that would prohibit or otherwise restrict the use of an LDC’s name and logo by its non-regulated affiliate would violate the First and Fourteenth Amendments of the United States Constitution. That too is the conclusion of Charles J. Ogletree, Jr., Jessie Climenko Professor of Law, Harvard Law School and two of his co-researchers in a paper entitled “Constitutional Grounds to Challenge State Public Utility Commission Restrictions on Affiliate Use of Utility Name and Logo” prepared for the Edison Electric Institute, October 1999. (Ogletree)

Before he sets forth his argument that the name and logo restrictions violate First Amendment protection of commercial speech, Ogletree observes at pages 1 and 2 that certain vocal constituencies have advocated that commissions adopt affiliate codes of conduct that embrace
competitive handicapping practices. One of the key provisions of these, he notes at page 2, are name and logo restrictions. "These constituencies," he says, "seek to achieve through competitive handicapping practices what the Supreme Court has consistently declined to permit under the antitrust laws; protecting competitors, rather than competition. The Supreme Court has repeatedly articulated that an underlying principle of antitrust laws is 'to protect competition, not competitors. [Citation of cases omitted].’ Note 2, p. 1."

Ogletree points out at page 7 that utility names and logos are commercial speech deserving of constitutional protection. He cites a number of cases holding that a beer bottle label, product labels, and a restaurant name all qualify as commercial speech. Note 34, p. 7. After a thorough analysis of the United States Supreme Court's four-part test to determine the constitutionality of commercial speech regulations under the First Amendment, Ogletree concludes at page 18 that "[t]he restriction or prohibition of an affiliate's use of its regulated utility's name and logo is a content-based restriction that merits full First Amendment protection."

NECA has recommended at page 26-29 that if the Commission does not prohibit the use of an LDC's name and logo by unregulated affiliates, it should impose a royalty on the use of the name and logo. Ogletree observes at Note 5, p. 2 that a royalty could likely be successfully challenged by affiliates "as an unconstitutional tax on the exercise of the affiliates' fundamental First Amendment rights."

Aside from the constitutional issues raised by a ban on the use of corporate names and logo or the imposition of a royalty on the use of a corporate name and logo, there are many other reasons why such a ban should not be included in the Commission's Rules. Customers have a right to know the identity of entities with which they are transacting business. The use of corporate names or logos, with an appropriate disclaimer as provided in the Commission's proposed §150-3-15.5.d., is

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8Dr. Kenneth Gordon in rebuttal testimony before the Illinois Commerce Commission in Consolidated Docket Nos. 98-0013 and 98-0035 stated: "In a market economy, every firm seeks to bring whatever unique advantages and resources it may have in providing services to customers. The decision to rely on competitive markets is based on the notion that whoever can produce most efficiently, whoever brings the most value to customers, should and will prevail. An economic advantage in satisfying the needs of consumers possessed by one competitor, but not by others, is not anti-competitive. It simply reflects the different skills and endowments that each and every firm brings to the market that allows it to charge lower prices or offer better service to its customers than its competitors are able to. There is nothing anti-competitive about having an ability to bring lower prices or better services to customers; on the contrary, it is what competitive markets are all about."
a fair compromise on this issue, and one that has been adopted in many states, including Virginia, Arizona, California, Connecticut, New Mexico, Ohio, Oregon, Texas and Kentucky. Accordingly, AEP urges the Commission not to modify its proposed Rule §150-3-15.5.d.

C. Environmental Information Disclosures

§§150-3-16.3; 150-3-16.6.a.1. and 2.; 150-3.16.7.c.1.B.; 150-3-16.11; 150-3-16.14.b.P.

1. Supplying of Environmental Information Other Than to Requesting Customers

The various proposals of the WVEC and WV-CAG (pp. 2, 9-12), the Concerned Citizens' Coalition (pp. 1-2), and the CAD (pp. 17-20) that electric service providers be required to disclose environmental information about the generation of electric power in their marketing materials, in service contracts, to persons inquiring about electric service, and on a regular basis to all of their customers (such as in monthly bill inserts) go well beyond the requirements and constraints of the Restructuring Plan and should be rejected.

Section 18(c) of the Plan, in clear and unmistakable terms, limits an electric service provider's obligation to “provide accurate information on emissions and fuel mix to their customers upon request, and [to] publish such information on at least an annual basis, or as frequently and in such format as the Commission determines is necessary to provide adequate public disclosure” (emphasis added). Section 2 of the Plan defines a “retail customer” as “any person that purchases retail electric energy for its own consumption at one or more metering points. . .”

Thus, under the Plan, an electric service provider is required to provide “accurate information on emissions and fuel mix” only to persons who purchase electric energy from them and then only upon their request and to “publish such information” in order to “provide adequate public disclosure.” Emphasis added. Those are the requirements of the Plan which this Commission is obligated by Section 5(b) of the Plan to implement by Rule. Any Rule of the Commission which would require electric service providers to disclose environmental information in their marketing materials, in their service contracts, to persons inquiring about electric service even though they have not requested the information, and on a regular basis to non-requesting customers would not be implementing, but would be modifying or enlarging, a provision of the Restructuring Plan and thus would be well beyond the authority of the Commission to promulgate. Any such expanded rule
would be tantamount to a modification of the Plan, which the Commission is deprived of the power to accomplish except in accordance with Section 1(f) of the Plan and W.Va Code §24-2-18(f).

The Commission will have already exceeded its authority in this regard if it promulgates proposed §§150-3-16.14.b.P., and 150-3-16.6.a.1, 2 and 4. and proposed §150-3-16.6 relating to providing a uniform disclosure page in contract disclosures and marketing materials, which uniform disclosure page under §150-3-16.3.i must include environmental information.

The CAD has recognized the limitation on the Commission’s authority to modify the Plan when, at page 20 of its Initial Comments, it argues that Section 18(c) of the Restructuring Plan controls what the Commission may provide in its implementing rules.

2. Purchase of Electricity From Unknown Sources
   (§150-3-16.11.c.3.B.3.)

The proposal of the WVEC and WV-CAG (p. 12) that “emissions from electricity purchased from ‘unknown’ sources shall be assigned the highest reported emission levels,” must be rejected as not providing accurate information on emissions. Such a proposal would violate Section 18(c) of the Restructuring Plan which requires the providing of “accurate information on emissions and fuel mix” (emphasis added). “Unknown purchased resources” is accurate; assignment of “highest reported emission levels” to unknown sources is not.

D. Definitions
   1. Affiliate
      (§150-3-1.8.a.)

The proposal of Weirton (p. 2) that, for purposes of the Code of Conduct, the definition of “Affiliate” in the proposed Rules be expanded to include “the functionally separated business activities of an electric utility” must be rejected as constituting a modification of the Plan which, according to Section 1(f) of the Plan and W.Va Code, §24-2-18(f), cannot be done except in accordance with the procedures there specified.

“Affiliate” is defined in Section 2 of the Plan as meaning “any person that controls, is controlled by, or is under common or partial control with an electric utility.” The term “person” as used in the definition of “affiliate” is defined in that same Section of the Plan as meaning “any
individual, corporation, partnership, association, company, business, trust, joint venture, or other private legal entity, and the State or any municipality." (emphasis added).

The Plan is thus quite plain in stating that only a legal entity which is under the control, etc. of an electric utility is an affiliate of the electric utility for purposes of the plan, including its code of conduct provisions. The non-public-service and non-regulated businesses of an electric utility are not themselves legal entities. If APCo itself owned and operated a coal mining operation, it is APCo which is the legal entity that would have to sue and be sued with respect to those coal mining activities. The coal mining operation itself would not be a separate legal entity and would have no legal existence separate and apart from APCo. Under the Plan, the coal mining operation would not be an affiliate of APCo.

The Commission’s authority under Section 5(b) of the Plan is to “implement” and not to enlarge or expand the Plan’s definitions of “Affiliate” and “Person.”

2. **Aggregator**

(§150-1.8.c.)

The proposal of Weirton (p. 2) that the proposed definition of “Aggregator” be modified should be rejected as being inconsistent with the Plan.

The Commission’s proposed definition of “Aggregator” is almost verbatim the definition of that term in Section 2 of the Plan. Section 5(b) of the Plan states that it is the Plan’s definition of the term which is to be implemented by the Commission.

3. **Competitive Electric Service Provider, CES Provider, or Alternative Supplier**

(§150-3-1.8.g.)

Weirton’s proposal (pp. 2-3) that the Commission proposed definition of the captioned terms be modified should be rejected as being inconsistent with the Plan. The Commission’s proposed definition of these terms is taken almost verbatim from the Plan’s definition of “Supplier,” and it is the Plan’s definition which is to be implemented by the Commission. The Commission is not free to modify the legislatively-approved Plan except in accordance with the provisions of Section 1(f) of the Plan and W.Va. Code, §24-2-18(f).
E. **SRRRS Rate Schedule**  
($§150-3-4.17.a.)

The proposal of the WVEC and WV-CAG (p. 3) that the 20% discount be retained in lieu of the $0.012 per kwh of metered energy must be rejected because it is inconsistent with the Plan. Section 20(c) of the Plan approved by the Legislature requires the replacement of the existing “special reduced rates” of 20% with a $0.012 per kilowatt hour credit. It is, therefore, too late in the day to consider the proposal of the WVEC and WV-CAG, which would, in any event produce the result of vastly increasing levels of assistance intended to be provided by all of the parties who negotiated the kwh credit as a replacement for, not as an addition to, the special reduced rate mechanism (which could not operate as intended in a restructured electric industry).

F. **Licensing; Violation of Environmental Standards, etc.**  
($§150-3-13.1.a.1.)

The proposal of the WVEC and WV-CAG (p. 4) that applicants for a license as a retail electric energy supplier be required to disclose violations of environmental standards, emission limits or permit conditions must also be rejected. A reading of Section 16 of the Restructuring Plan reveals that the application procedures for a license to sell electric energy are designed to determine the financial ability and competency of the applicant to provide electric energy to customers. The information which the WVBC and WV-CAG seek to have disclosed is not relevant to either.

G. **Licensing; Penalties**  
($§§150-3-13.1.d. and 150-3-13.4.a.10)

WVEC and WV-CAG (p. 5) propose that §§150-3-13.1.d and 150-3-13.4.b.10 be revised to provide for fines. Section 16(g) of the Plan provides only for the sanctions of suspension, revocation or refusal to renew a license.

H. **System Benefits Charge**  
($§§150-3-19.2.d. and 150-3-19.5.g)

Two proposals of the WVEC and WV-CAG (pp. 14-15) must be rejected as being inconsistent with the Plan, namely, the proposal that the effective period of the System Benefits Charge not be limited to ten years as provided in §150-3-19.2.d, and the proposal that undispersed SBC funds remaining in the trust fund account administered by the Joint Labor-Management
Council not be disbursed at the end of the tenth year following the starting date as provided in §150-3-19.5.g.

Both §150-3-19.2.d. and §150-3-19.5.g of the Commission’s proposed Rules are taken almost verbatim from Sections 19(c) and 21(c)(6) of the Plan.

III. PROPOSALS WHICH SHOULD BE REJECTED ON ADDITIONAL OR OTHER GROUNDS

A. Definition of Aggregator
   (§150-3-1.8.c.)

   Certain county commissions have requested exemption from the definition of aggregator and the inclusion of an “Opt-out” provision.

   AEP has taken no position on the requested exemption. However, AEP disagrees with the proposed "Opt-out" provision. Such a provision is contrary to the whole concept of "customer choice." Customer choice is about moving from the current system of utility monopoly service in the provision of power supply to a market driven system that allows customers to make voluntary informed choices without government intervention. The counties have proposed that government agencies be allowed, without affirmative approval of electric customers, to take ownership of the responsibility for providing power and require that county residents take the new aggregated service, unless they take the initiative to opt-out. Government agencies should have the right to aggregate customers but should have no special aggregation advantage in gathering customers over any other person or entity that wishes to perform this function.

B. Definition of Competitive Electric Service Provider, CES Provider, or Alternative Supplier
   (§150-3-1.8.g.)

   In addition to the reasons stated earlier, AEP opposes the suggested modification of the definition of the captioned terms as proposed by Weirton (pp. 2-3). Weirton has included numerous exceptions and loopholes that will allow producers of power to sell retail electric service in West Virginia without having to follow or comply with the oversight requirements painstakingly prepared and included in the Licensing Rules.
C. Definition of Transmission and Distribution

Business Activities or LDC Activities
(Proposed Addition of §150-3-1.8.yy.)

AEP opposes, as unnecessary, Weirton’s proposed addition (p. 11) of a definition of Transmission and Distribution Business Activities or LDC Activities.

D. Billing Period (§150-3-4.3.d) and Crediting of Payments (§150-3-16.15.f.)

Staff (p. 1-2) has proposed that the wording presently contained in proposed §150-3-16.15.f. be included in §150-3-4.3.d. Proposed §150-3-16.15.f. states: “If applicable, when a customer pays the bill at a payment center or to an authorized payment agent, such payment shall be credited to the customer’s account as of the day it is received by such payment center or agent.” Upon reviewing Staff’s proposal, AEP has noted problems in complying with the intent of the §150-3-16.15.f. and therefore with its application both as provided in that Section and as Staff would include the provision of that Section in §150-3-4.3.d. Because of batch processing of payments and because the electronic posting to customer accounts is done once a day, it is impossible to post a payment received late in the day as having been received that same day. For instance, if a customer pays a bill after regular business hours at a collection agency, the payment cannot be processed any earlier than the end of the next day’s business hours or, in the case of a Friday evening payment, on the following Monday. AEP would therefore propose that §150-3-16.15.f. be changed as follows and that the same language be included in 150-3-4.3.d., or, better still, added as a §150-3-4.3.e:

If applicable, when the customer pays the bill at an authorized in-person payment center or to an authorized in-person payment agent, such payment shall be credited to the customer’s account as soon as practical, but in no event shall it be later than the next regular business day after it is received by the LDC’s or ESP’s payment processing center.

E. Customer Discontinuance of Service

(§150-3-4.7.a.)

Staff (p. 2) proposes a change in §150-3-4.7.a. to require a confirmation code to be provided by an LDC when a customer voluntarily requests discontinuance of service. Staff states its belief that confirmation will reduce the potential for customer complaints that arise in this area. The
disputes noted by Staff generally involve customers who claim they called the utility to request that service be discontinued in their name but that the utility has no record that a request was made. The proposal to provide the customer with a confirmation number will only have meaning if the customer actually made the phone call, in which case the service will be terminated according to their request, and no basis will exist for a complaint. If, however, the customer did not call, the code will not exist, and the same dispute that arises today will still exist. AEP is uncertain at this point if Staff's proposal provides a material benefit and, in fact, may provide no benefit at all. Moreover, the Staff's proposal addresses an issue which is unrelated to electric restructuring. Since this proposal is new to the debate on rule changes and since AEP and other parties have not had an opportunity to consider the costs or benefits associated with this proposal, AEP does not support this change.

F. Rules Applicable to Commercial and Industrial Customers

§150-3-4.8.a.1.L.

The WVEC and WV-CAG (pp. 2-3) recommend that the Commission add the word "large" before the words "commercial and industrial" so that the provisions of paragraphs (d) and (e) of §150-3-4.8.a.1.B. will apply to small commercial and industrial customers. AEP does not agree with this recommendation.

First of all, paragraph (d) provides for notification by the customer that termination of service would be especially dangerous to the health and safety of a member of the customer's household (emphasis added). It is obvious from the wording that this provision is applicable only to residential customers, and never to commercial or industrial customers, regardless of their size.

Paragraph (e) provides for notification by the customer that the customer is able to pay for service but only in installments. Commercial and industrial customers can make this same claim about any aspect of their business. The provision of electric service to a business is no different from the provision of any other materials or supplies which it needs to continue as a going concern. Commercial and industrial customers should not be afforded special treatment with respect to electric service any more than they should be allowed to continue receiving on special terms (by mandate) any other services necessary for continued operation. Approval of such a provision is tantamount to the Commission granting a business loan from the utility and its other customers.
G. Effective Date of Customer Switching
(§§150-3-4.11.c. and 150-3-16.7.f.)

AEP opposes WVEUG's proposal (pp. 2-3) to allow customers to switch on the "earlier of" the first day of the month or the next meter reading date. The Commission's current proposed Rules were intended to recognize that the two major utilities have differences in the manner in which they propose to administer customer switching. This concept was discussed and agreed to by many of the parties, who recognized this difference and recommended the Commission's language. To accept WVEUG's proposal disrupts the whole purpose of the earlier agreed-upon language and results in confusion in the treatment of customer switching.

H. Switching Fees and Return to Default Service
(Proposed Additions to §150-3-4.11.)

The CAD (p. 7) has proposed an additional rule be added to Rule 4 that would prohibit an LDC from charging residential and small commercial customers any switching fee or other charge for either enrolling with a CES provider or moving back to default service. With regard to default service, during the transition period, AEP concurs with the CAD's position. Default service is the safe harbor provision of the Plan and it would be reasonable to not charge customers seeking to return.

However, AEP does not agree with an up front preclusion on all switching fees. It is both premature and inappropriate to seek an outright ban on switching fees at this point in the restructuring process. AEP would point out that it proposed such charges in its tariffs as a part of its unbundling filing. On the motion of other parties, the Commission struck this and other Terms and Condition aspects of the Company's unbundling filing as premature with the assurance that the Company could refile its materials at a later date. The CAD should not now be allowed through the rulemaking process to preclude the Company from making such proposal before it has had the opportunity to refile its tariff.
I. Resale of Electric Energy
(§150-3-4.15)

AEP opposes WVEUG's proposal (pp. 3-4) to add the words "or adjacent sites" at the end of proposed Rule 150-3-4.15. The Commission's existing proposed Rule provides for a total prohibition of any resale of electric energy by a customer unless the customer is a public utility. The changes included in the Commission's proposed Rule were an attempt to recognize that there may be instances where, because of the sale of existing "behind the meter" commercial or industrial assets, it would be reasonable to provide an exemption to allow a resale or sharing to occur. The addition of the words "or adjacent sites" clearly expands the exemption in a manner that could allow a customer to sell to a new entity who simply locates a facility "on adjacent sites." This allows the potential creation of the equivalent of unregulated electric distribution companies. As noted in AEP's earlier comments, this would open the door for a coal company to use its extensive mining distribution faculties to resell to a new customer who happens to be close to their lines.

J. Licensing
(§150-3-13)

AEP has repeatedly made the comment during the rulemaking process that the licensing Rules, taken as a whole, are entirely too complex and may discourage participants from entering the West Virginia market. Other commentators have voiced similar concerns such as Weirton's comment (p. 4) that "Weirton remains very concerned that the strictness of many of the individual rules acts to make the Licensing Rules, as a whole, unduly burdensome to the development of a competitive market." AEP repeats this concern and recommends the Commission reevaluate the burdensome nature of the rules taken as a whole. The Commission should make every attempt to simplify the rules and should reject any and all commentators' attempts at adding unnecessary complexity and barriers to entering the West Virginia market.

For example, the CAD (p. 9) argues that the scope of the waiver provision in the proposed §150-3-15.1.f. is unclear and that waivers should be limited to situations in which the applicant demonstrates and the Commission finds "just cause" or "sufficient cause." AEP recommends the Commission reject any changes to this provision. The Rule is clear on its face and any attempt to limit its usefulness by adding hurdles will do nothing but harm the development of a competitive
market in West Virginia. The exemption provision may prove invaluable to some competitors that wish to enter the market and the Commission should not hinder the usefulness of this provision by adding further restrictions.

Weirton (p. 5) recommends in several comments that the rules should not apply to suppliers dealing with large commercial and industrial customers. While AEP certainly agrees with Weirton that very large customers should be able to assume certain risks of dealing with a competitive market, AEP is uncertain that there should be a broad blanket exemption from licensing requirements for suppliers dealing with large commercial and industrial customers. Given the threshold definition of “large” being greater than 10 kw, such a blanket exemption is unwarranted. However, AEP believes the exemption provision in proposed §150-3-15.1.f., discussed above, can be utilized for those situations where a supplier is dealing with sophisticated, very large commercial and industrial customers.

The WVEC and WV-CAG (p. 4) recommend that the licensing rules contain a provision that requires disclosure of any violations within the last five years of environmental standards, emission limits, or permit conditions by facilities owned or operated by the licensing applicant. AEP firmly believes this should be rejected. As the Commission is fully aware, the alleged violations of environmental laws is currently being litigated and attempts at bringing this issue into the licensing process is misplaced. The consumer protection Rules address environmental disclosures and additional disclosures regarding the above issues are not needed in the license application rules.

AEP also recommends that the Commission reject proposals by Weirton (pp. 6-7) to make bonding requirements subject to Commission approval through an approved tariff. Weirton recommends that proposed §150-3-13.2.b. be modified as follows (Weirton’s proposed additions appear underlined):

The purpose of the security requirement is to ensure the licensee’s financial responsibility, the payment of applicable fees and taxes assessed on the competitive electric service provider and the protection of customer deposits and/or prepayments. The furnishing of security under the requirements of these rules does not limit in any way the responsibility of any applicant or CES provider to furnish other bonds or security which may be reasonably required by LDCs, emergency service providers or regional transmission organizations. Any bond or security requirements imposed
by LDCs or emergency service providers shall be pursuant to an approved tariff on file with the Commission.

The impact of Weirton's proposal is to negate the purpose of the language in the proposed Rule. As proposed §150-3-13.2.b. states, the "requirements of these rules does not limit in any way the responsibility of any applicant or CES provider to furnish other bonds or security which may be required by LDCs, emergency service providers or regional transmission organizations." By adding "reasonably" and requiring the bond to be provided pursuant to an approved tariff, the rule would limit the responsibility of an applicant or CES provider to provide a bond required by the LDC or RTO.

The bond must, under Weirton's proposal, be approved by the Commission. The Commission would be placed in the business of determining the reasonableness of bonding requirements and approve bonding tariffs. It is not clear to AEP just what would be required to obtain approval of such a tariff and what the tariff would contain, but it adds more complexity than is needed and eliminates the primary purpose of the rule. Any bonding requirement will be based on the risk level of the CES provider.


In addition to its discussion above about certain proposals made by other commentators being inconsistent with the Plan, AEP urges the Commission not to preclude LDCs from utilizing their equipment, office space, employees, etc. which are temporarily idled or not needed in the performance of public-service responsibilities in their own non-public-service businesses or that of their non-regulated affiliates, especially those not engaged in providing electric services. For example, utilities have for a long time so utilized their generation. Utility customers benefit from having extra revenues derived from non-public-service activities credited to the cost of providing them public service. The Commission's primary role is to protect and benefit utility customers and not to protect and benefit competitors in the non-electric-service market place.
L. Consumer Protection
(§150-3-16)

The CAD (p. 17) proposes to add additional prohibited bases for refusal of electric service in proposed §150-3-16.4.f. The CAD proposes to add “lawful source of income, level of income, disability, familial status, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services” as prohibited bases. AEP opposes these additions. The rule as written includes sufficient anti-discrimination provisions. Adding additional groups will further inhibit prospective CES providers from entering the market.

Several parties, including the CAD (p. 18) and the AARP (p. 5), commented that the outright restriction on telephone solicitation is not necessary. AEP supports these positions and urges the Commission to re-evaluate an outright ban on telephone solicitation. With adequate safeguards in place, telephone solicitation may contribute to the creation of a workable market in West Virginia.

The CAD argues (p. 20-21) that proposed §150-3-16.12 appears to prohibit the disclosure of proprietary customer information, but “does not include important details and prohibitions.” The CAD offers a proposed rewrite of the Rule that prohibits disclosure of “proprietary customer information.” AEP believes that the CAD proposal is overly broad. Further, this new rewrite of the Rule has not had the benefit of the review process that the proposed rules have been subjected to and should be rejected.

M. Emergency Service
(§150-3-17)

AEP cannot help but be struck by the asymmetry of the positions being advanced by Weirton (pp. 18-20) and WVEUG (pp. 11-16) in this proceeding. When it is to their advantage, they argue that licensing and consumer protection rules should not apply to CES providers which choose only to serve large commercial and individual customers. Yet, as evidenced by their comments on the Commission's proposed emergency Rules, they are unwilling to bear any of the risks associated with their decisions and would have the Commission impose even greater risks on default service providers than provided by the Plan.

None of the changes to the Commission’s proposed emergency Rules suggested by Weirton or WVEUG should be adopted. The Rules addressing the earliest date on which a default service
provider's customers are permitted to be returned to default service, and when such a customer's return to default service shall be considered an exercise of the customers "right to return" under proposed §150-3-17.2.b.3. and 4. are reasonable compromises crafted by the Commission and equitably apportion any risks associated with the possibility of a default by a CES provider.\(^9\)

The recommendations made by Weirton (pp. 18-19) and WVEUG (pp. 15-16) regarding bonding requirements should also be rejected by the Commission. Given the potential for vast differences in the financial conditions of CES providers,\(^{10}\) AEP cannot even fathom at this stage in the process how one would tariff bonding requirements, as suggested by Weirton. It may be that after some period of actual operation it will become more clear how that could be done, but, until that experience is gained, the Commission should not modify its proposed §150-3-17.2.b.1.

The Commission's proposed §150-3-17.2.b.1. already provides that any disputes regarding bonding requirements shall be subject to the Commission's jurisdiction. This provision provides a more than adequate remedy should disputes arise. Contrary to WVEUG's suggestion, there is simply no reason for a Rule that requires the Commission to approve each and every bonding requirement.

Finally, there is no reason for the Commission to add a new subsection to §150-3-17 as suggested by the WVEC and WV-CAG (p. 13). Not only are curtailment procedures already in place that adequately address the concern raised by the WVEC and WV-CAG about possible inadequate power suppliers, but also, to the extent that the Plan encourages the expansion of generation in the State, competition itself will ameliorate their concern.

IV. CONCLUSION

The Commission is nearing the end of a long journey in arriving at a fair and balanced set of Restructuring Rules to oversee the transition of electric utilities, utility customers, potential competitive electric service providers, and others into a new world of power supply deregulation and customer choice. At this point, final adjustments to the Rules can distinctly improve them. But sweeping or startling changes or the attempt to address new matters at this stage have the potential

\(^9\)The comment of WVEC and WV-CAG's (p. 13) about the Commission's "right to return" rule should also be rejected because it blurs emergency service, which is designed to offer protections to consumers when a CES provider defaults, with the concept of a competitive marketplace.

\(^{10}\)Tariffs are traditionally tailored to apply to similarly situated entities.
to destroy the balanced compromises which have made possible the current Rules proposed by the Commission. AEP urges the Commission to proceed cautiously and with the utmost circumspection in judging which suggestions it has received will improve the Rules and which suggestions may be their undoing. In the final stages of this rulemaking process, the Commission should approve only such modifications as are consistent with reasonableness, moderation, and the achievement of compromise.

Respectfully submitted,

APPALACHIAN POWER COMPANY and WHEELING POWER COMPANY both d/b/a AMERICAN ELECTRIC POWER

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Date: October 10, 2000
CERTIFICATE OF SERVICE

I, Charles McElwee, Counsel for Appalachian Power Company and Wheeling Power Company, both d/b/a American Electric Power, do hereby certify that I have this 10th day of October, 2000, served the REPLY COMMENTS OF APPALACHIAN POWER COMPANY AND WHEELING POWER COMPANY BOTH d/b/a AMERICAN ELECTRIC POWER on behalf of American Electric Power by having copies deposited in the U.S. Mail addressed to all of the names on the attached service list.

[Signature]
Charles McElwee