PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 10th day of July 2014.

CASE NO. 14-0546-E-PC

APPALACHIAN POWER COMPANY and
WHEELING POWER COMPANY both dba
AMERICAN ELECTRIC POWER,
Petition for acquisition of Mitchell plant by
Wheeling Power Company.

COMMISSION ORDER

This Order holds the procedural schedule in abeyance for a period of thirty days or such shorter period of time, as described herein.

BACKGROUND[1]

History of Case Nos. 11-1775-E-P and 12-1655-E-PC

On December 16, 2011, Appalachian Power Company (APCo) and Wheeling Power Company (WPCo) (collectively, Companies), filed a petition for a further evaluation of a possible merger of the two utilities. That filing was docketed as Case No. 11-1775-E-P (Merger Case).

On December 18, 2012, APCo filed a Petition for Commission consent in advance, pursuant to W.Va. Code §24-2-12, of (i) an arrangement for the transfer to APCo of 1,647 MW of generating capacity (specifically, a two-thirds interest in Unit No. 3 of the John E. Amos Plant (Amos 3) and one-half interest in the Mitchell Power Plant) owned by affiliate Ohio Power Company (OPCo) and (ii) associated affiliated agreements. The Commission docketed that filing as Case No. 12-1655-E-PC (Transfer Case).

The Commission consolidated the cases and held several days of hearing to receive evidence regarding the two petitions. Order of June 6, 2013 and hearings July 16-18, 2013.

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[1] For greater detail regarding the procedural backgrounds of these cases, please see the December 13 and 30, 2013 Commission Orders in Case Nos. 11-1775-E-P and 12-1655-E-PC.

On December 13, 2013, the Commission (i) approved acquisition by APCo of two-thirds of the Amos 3 generating unit, (ii) deferred ruling on the acquisition by APCo of one-half of the Mitchell Power Plant (Mitchell), and (iii) deferred ruling on the Merger Case pending APCo filing and receiving approval from this Commission of a capacity resource plan to include sufficient capacity to serve the WPCo load. The Commission also authorized a Base Rate Surcharge to be effective on the finalization of the transfer of the Amos capacity to APCo, subject to certain conditions. The Commission required the parties to submit Base Rate Surcharge calculations and comments. The December 13, 2013 Order closed Case No. 12-1655-E-PC but allowed Case No. 11-1775-E-P to remain open.

On December 30, 2013, after receiving filings regarding the Base Rate Surcharge from Companies, Commission Staff, and the Consumer Advocate Division (CAD), the Commission approved the Base Rate Surcharge in Case No. 12-1655-E-PC, and reclosed that docket.

Current Proceeding

On March 4, 2014, Companies filed a plan to serve the WPCo load by transferring a one-half interest in Mitchell from AEP Generation Resources Inc. (Generation Resources) to WPCo at net book value. According to the March 4, 2014 filing (i) coincident with the transfer, the WPCo supply contract with Generation Resources will terminate, (ii) substitution of the Mitchell Asset for the WPCo supply contract would move costs from Expanded Net Energy Cost (ENEC) rates to base rates and conceivably not result in an increase in excess of the ENEC decrease, (iii) the merger of APCo and WPCo should await determination of the WPCo power supply plan, and (iv) the transfer fulfills the requirements of W.Va. Code §24-2-12. Companies asserted that the sole issue in this case is the suitability of WPCo as the ultimate transferee of the Mitchell Asset. Companies requested an order by June 13, 2014.

Between March 7 and March 27, 2014, CAD, the West Virginia Energy Users Group (WVEUG), the West Virginia Citizen Action Group (WVCAG), and Companies filed pleadings outlining the substantive issues in the case and proposed procedural schedules for use by the Commission.

On April 8, 2014, the Commission (i) established a procedural schedule, (ii) created Case No. 14-0564-E-PC as the new docket for processing this request by WPCo to purchase interest in Mitchell, (iii) required the filing of a proposed notice, and (iv) addressed the use of evidence entered in Case Nos. 11-1775-E-P and 12-1655-E-PC.

On April 18, 2014, Companies filed a proposed public notice.

On April 29, 2014, the Commission issued an Order requiring Companies to provide notice of this proceeding, the pending evidentiary hearing, and the anticipated rate impact of the proposed transaction.

Pending Motion to Stay Proceedings

On June 9, 2014, WVCAG filed a motion to stay proceedings. As cause, WVCAG argued that Duke Energy (Duke) has publicized that it has power plants available for purchase and that Companies may have the opportunity to acquire capacity that is less expensive than the Mitchell Plant.

WVCAG argued that Companies had failed to adequately consider options other than purchasing the Mitchell Power Station, and that Companies had stated "WPCo Mitchell Transfer is far superior to other options that might be contemplated, such as constructing new generating capacity, acquiring existing generating capacity, or procuring long-term contracts for power." March 4, 2014 filing by Companies, updated plan at 7.

WVCAG further asserted that Dayton Power & Light (Dayton) is in talks with prospective buyers to sell its Ohio generation assets of more than 3,600 MW of capacity and that Companies also had provided no evidence that it had investigated the relative economics of the Dayton assets.

WVCAG stated that staying these proceedings would give Companies the opportunity to explore the Duke and Dayton assets before those opportunities were no longer available. WVCAG asked that the Commission stay these proceedings and that the Commission order Companies to provide evidence that it has considered the above-described options for serving the WPCo customer load, including a comparative economic analysis of purchasing the Mitchell plant versus relevant Duke and Dayton assets.

On June 13, 2014, CAD filed a response to the WVCAG motion to stay asserting that, in order to protect the interests of West Virginia ratepayers, Companies must consider all options for meeting any generation requirements it may have – not just the generation assets owned by unregulated affiliates – including the options presented by the Duke and Dayton portfolio sales.

On June 17, 2014, Staff filed (i) a response to the WVCAG motion to stay and (ii) a motion to require Companies to file additional testimony. Regarding the WVCAG motion to stay Staff agreed that Companies should be required to submit testimony that it has considered the potential of acquiring certain Duke or Dayton assets and a showing of the comparative economic analysis of purchasing the Mitchell plant as opposed to any of

the relevant Duke or Dayton assets. Staff, however, stated that it would not support an indefinite extension of the procedural schedule.

In its motion to require Companies to file additional testimony, Staff cited the June 2, 2014 notice by the United States Environmental Protection Agency (EPA) of its proposed rule "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," (EPA Proposed Rule) proposing emission guidelines for states to follow in developing plans to address greenhouse gas emissions from existing fossil fuel-fired electric generating units.

Staff asserted that the two approaches proposed by the EPA Proposed Rule – (i) reducing the carbon intensity of the electric generating unit's operations and (ii) addressing affected electric generating unit's mass emissions by varying their utilization levels – could have ramifications for WPCo customers if WPCo is to acquire Mitchell. Staff noted that potential cost and operational impacts of the EPA Proposed Rule have not been addressed by Companies in its testimony.

Staff asked the Commission to require Companies to file additional testimony and evidence to address issues raised by the EPA Proposed Rule and identify the date on which Companies will be able to make the filing.

Response of Companies to Motion to Stay

On June 19, 2014, Companies filed a response to the WVCAG motion to stay questioning the right of WVCAG to dictate the presentation of Companies' case. Companies acknowledged that it has the burden of proving that the proposed transfer of the Mitchell Asset should be approved by the Commission and that WVCAG and the other parties may (i) pursue discovery concerning Companies' proposal, (ii) offer evidence in opposition to that proposal, (iii) test by cross-examination the strength and soundness of Companies' evidence, and (iv) argue their respective positions in briefs.

Companies, however, vehemently disagreed that the Commission should modify these proceedings on the basis of the unsubstantiated filings by WVCAG, stating:

> WVCAG has identified possible evidentiary issues, but instead of allowing for the orderly development of a full evidentiary record on them, it insists that the procedural process (embodying a procedural schedule to which WVCAG expressly agreed) must be disrupted and that the Companies must be required to undertake investigations and negotiations on the basis of vagrant ideas and erroneous assumptions entertained by WVCAG. The Companies respectfully submit that this would be a bizarre way to proceed with this case.

In addition to the process argument, Companies also asserted that Duke is prepared to entertain, in addition to bids for its entire Midwest portfolio, separate bids for its entire coal-fired portfolio and its entire gas-fired portfolio, noting that each of those combinations of assets exceeds the amount of capacity suitable to meet the needs of the WPCo load. Companies stated that the evidentiary process in this case should move forward and that it would be counterproductive to stay the process on the speculative basis offered by the WVCAG.

On June 23, 2014, WVEUG filed a letter taking no position on the WVCAG motion to stay, but supporting the Staff motion to require additional testimony regarding the EPA Proposed Rule.

On June 24, 2014, Companies filed a response to the Staff motion to require additional testimony. Companies asked,

> [W]hat became of the sensible and venerable paradigm in which each party to a proceeding determined what testimony it chose to file and the Commission weighed competing testimony, judged the adequacy and persuasiveness of the evidence and the arguments submitted by all parties, and determined whether the applicable burden of proof in the proceeding had been met. WVCAG and the Staff now want to direct the Companies in what testimony they should submit.

Companies outlined the procedural milestones of the EPA Proposed Rule, concluding that it would be premature at this point to attempt to develop testimony that could meaningfully address the ultimate effects of the EPA Proposed Rule. Noting that the final version of the EPA Proposed Rule may be years in the making, Companies asserted that not addressing the power needs of the WPCo customers during that time could leave those customers exposed to the volatility of the power supply market. Companies stated that it is prepared to withstand and respond to criticism of the testimony it submits, and expects to submit appropriate rebuttal testimony with respect to any issues about the EPA Proposed Rule presented in the direct testimony of other parties. Companies asked that the Commission deny the Staff motion to require additional testimony.

On June 27, 2014, WVCAG filed a reply to the June 19 and 24, 2014 filings by Companies. WVCAG reiterated that the purpose of its motion is to require Companies to have examples of prices of comparable generation facilities, show if the facilities would be appropriate, and to defend its position. WVCAG asserted that comparisons will provide the context of the current market for generation facilities needed to determine whether transferring the Mitchell plant at the proposed price is just, reasonable, and in the public interest.

DISCUSSION

The petitioner before this Commission carries the burden, and the opportunity, of presenting the evidence that the petitioner believes is sufficient to meet that burden. In a case of this magnitude, the Commission typically requires pre-filed testimony of all parties. A petitioner's case frequently rests on the strength of its pre-filed testimony. The Commission has also, on occasion, recited our concern about "loaded" rebuttal testimony in which a petitioner or applicant, having the burden of proof, elects instead to file fairly simplistic direct testimony and await the filing of rebuttal testimony to address more fully issues that it might have raised on direct.

Companies, however, in this case argue that it is both unfair and unnecessary and a breach of its basic right to present its case in the manner that it deems best, if the Commission were to require that Companies address and file testimony on issues that Companies believes it had already adequately addressed or that in its opinion are not ripe or appropriate for argument in this case. Regarding the Duke and Dayton plants, Companies asserted that individual plants were not available for sale. Further, Companies argued that (i) Companies and its customers stand to be adversely affected by the stay that WVCAG has requested, (ii) Companies may well be put to needless and possibly uncompensated expense, (iii) the resolution of these matters would necessarily be delayed, perhaps beyond the point at which significant power expenses may be incurred next winter, and (iv) the Mitchell Asset may not remain available indefinitely.

Regarding the Staff motion to require testimony regarding the EPA Proposed Rule, Companies noted that the EPA Proposed Rule would not be final for several years undermining the benefit of the Staff-requested complex calculations regarding the cost to improve heat rate at the Mitchell Plant and co-firing the Mitchell Plant. Companies asserted that there will be little or no meaningful advance in knowledge about the final shape and ultimate impact of greenhouse gas regulation over the course of the next few months, but nevertheless had factored into its analysis of the cost of the Mitchell Plant a generous allowance for the impact of possible greenhouse gas regulation.

The parties in response to Companies' arguments assert that the EPA Proposed Rule represents a singular event in U.S. energy policy and has potentially significant implications for coal-fired plants such as Mitchell. That EPA Proposed Rule was noticed on June 2, 2014 (appearing in the Federal Register on June 18, 2014), and considering the timing of the petition and filing of direct testimony in April, and the issuance of the EPA Proposed Rule in June, Companies obviously did not have the opportunity to address the EPA Proposed Rule in its direct testimony. Companies stated, however,

> The Companies would not, at this time, on their own initiative create additional testimony of such marginal value as the Staff requests, and submit that it would not be appropriate to compel them to do so.

> [Companies] are prepared to withstand and respond to any criticism that may be offered about the testimony that they submit, including testimony responding to the testimony offered by other parties, but [Companies] respectfully insist that it should be their decision what testimony to submit.

Companies June 24, 2014 filing at 4.

Because Companies have not had the chance to address the EPA Proposed Rule (and because the EPA Proposed Rule is a little more known "at this time," although far from a definitive final rule), the Commission will suspend the current procedural schedule and allow Companies thirty days to supplement its direct testimony to address the EPA Proposed Rule. We are not ordering Companies to do so. Any decision to file supplemental testimony by Companies is voluntary on the part of Companies and is not required by the Commission in this Order. In consideration of the timing of recent events, however, it is reasonable to provide Companies an opportunity to revise or supplement its testimony if it chooses to do so.

Additionally, we note that through various motions and responses, the parties have debated the availability and suitability of the Duke and Dayton plants. Companies may also take this opportunity, at its option, to address this issue if it feels the necessity to do so.

This is not a ruling on the merits of any substantive issues that might come before the Commission in this proceeding; rather, this is a ruling only on the process argument about the Commission requiring Companies to address in its direct case any specific assertions or allegations that may have been raised by WVCAG in its motion for an extension of time or in the Staff by its motion for additional testimony.

In the event Companies desire to supplement its testimony and require additional time to do so, the Commission will entertain appropriate motions to further extend the procedural schedule. If Companies do not wish to supplement its testimony as described herein, it should notify the Commission within five calendar days and we will proceed with the current procedural schedule.

FINDINGS OF FACT

1. The EPA Proposed Rule has potentially significant implications for coal-fired plants such as Mitchell.

2. Because of the timing of the filings in this case, Companies have not had the opportunity to submit testimony regarding the EPA Proposed Rule.

CONCLUSIONS OF LAW

1. The Commission should hold the current procedural schedule in abeyance for a period of thirty days to provide Companies with the opportunity to supplement its testimony.

2. The Commission should proceed with the current procedural schedule if, within five calendar days, Companies states it does not wish to supplement its testimony.

ORDER

IT IS THEREFORE ORDERED that the current procedural schedule is held in abeyance for a period of thirty days.

IT IS FURTHER ORDERED that Companies, at its option, may file supplemental testimony in this case within thirty days of the date of this Order.

IT IS FURTHER ORDERED that if Companies do not wish to supplement its testimony, Companies should file a statement to that effect within five calendar days of the date of this Order and the Commission will proceed with the current procedural schedule.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order by electronic service on all parties of record who have filed an e-service agreement, by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Staff by hand delivery.

A True Copy, Teste,

Ingrid Ferrell

Ingrid Ferrell
Executive Secretary

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