

FEB 17 2012

Electricity Delivery and  
Energy Reliability

Electricity Delivery and  
Energy Reliability

UNITED STATES DEPARTMENT OF ENERGY

BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRIC DELIVERY AND ENERGY RELIABILITY

In the Matter of:

AEP Energy Partners, Inc.

OE Docket No. EA-318-B

**SIERRA CLUB'S OPPOSITION TO AEP-EP'S  
EMERGENCY REQUEST FOR A CONTINUANCE OR TEMPORARY  
EXTENSION OF EXISTING EXPORT AUTHORIZATION  
OR FOR A TEMPORARY EXPORT AUTHORIZATION AND  
REQUEST FOR EXPEDITED CONSIDERATION**

February 17, 2012

Gloria D. Smith, Senior Attorney  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
(415) 977-5532  
[gloria.smith@sierraclub.org](mailto:gloria.smith@sierraclub.org)

Andrea Issod, Staff Attorney  
Sierra Club  
85 Second Street, Second Floor  
San Francisco, CA 94105-3441  
(415) 977-5544  
[andrea.issod@sierraclub.org](mailto:andrea.issod@sierraclub.org)

UNITED STATES DEPARTMENT OF ENERGY  
BEFORE THE DEPARTMENT OF ENERGY  
OFFICE OF ELECTRIC DELIVERY AND ENERGY RELIABILITY

In the Matter of:

AEP Energy Partners, Inc.

OE Docket No. EA-318-B

**SIERRA CLUB'S OPPOSITION TO AEP-EP'S  
EMERGENCY REQUEST FOR A CONTINUANCE OR TEMPORARY  
EXTENSION OF EXISTING EXPORT AUTHORIZATION  
OR FOR A TEMPORARY EXPORT AUTHORIZATION AND  
REQUEST FOR EXPEDITED CONSIDERATION**

**I. Introduction**

AEP Energy Partners, Inc. ("AEP-EP") submitted an untimely request to the U.S. Department of Energy ("Department") to authorize electricity exports, as outlined below and in Sierra Club's Motion to Intervene and Protest.<sup>1</sup> Having already violated the Department's procedural rules, AEP-EP now boldly seeks an "emergency" six-month extension of its expiring authorization, or a "temporary authorization" for the same period. Granting this request would deny both the Department and interested parties an opportunity to review the application or have a meaningful adversarial process or a hearing. Sierra Club opposes this request on

---

<sup>1</sup> Sierra Club's Mot. to Intervene and Protest in OE Docket No. EA-318-B (Feb. 9, 2012); hereafter ("Mot. to Intervene").

several grounds, and asks that the Department deny the request and set the matter for a full adjudicatory hearing. Any other result would violate the Department's codified rules of procedure and basic principles of reasoned agency decision making.

**II. AEP-EP's Emergency Request is Unsupported, Nonresponsive to ERCOT Grid Concerns, and Based on Alleged Harm that is Self-Inflicted.**

AEP-EP's request suffers from multiple defects, all of them independently fatal. First, the "emergency" described by AEP-EP is one the company created itself by violating 10 C.F.R. 205.301, which expressly instructs applicants to file for exports authorization "at least" six months in advance. Instead, AEP-EP filed its application just two months before its current authorization would expire, apparently believing the renewal would be automatic.<sup>2</sup> AEP-EP oddly characterizes Sierra Club's intervention as the "unexpected" surprise that precipitated the emergency, even while tacitly acknowledging that the intervention was both permissible and timely.<sup>3</sup> DOE should not reward AEP-EP for creating its own emergency.<sup>4</sup>

---

<sup>2</sup> AEP-EP filed its Application on Dec. 16, 2011 and its authorization expires on Feb. 22, 2012.

<sup>3</sup> See AEP-EP Emergency Request for a Continuance or Temporary Extension of Existing Export Authorization or for a Temporary Export Authorization and Request for Expedited Consideration at 2 (Feb. 15, 2012); hereafter ("AEP-EP Request").

<sup>4</sup> See, e.g., *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("Because defendants have acted to permit the outcome which they find unacceptable, we must conclude that such an outcome is not an irreparable injury. If the harm complained of is self-inflicted, it does not qualify as irreparable."); *Sierra Club v. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011) (Parties that anticipate a "pro forma result" in a permitting action become "largely responsible for their own harm.").

Second, AEP-EP's emergency request, like its application, utterly fails to meet the Department's basic informational requirements. The emergency request vaguely asserts claims relating to grid reliability and stability in Texas and Mexico.<sup>5</sup> Yet, in its application, AEP-EP failed, for example, to provide the "technical discussion" of such issues mandated by 10 C.F.R. 205.302(g).<sup>6</sup> As a result, the company's assertions as to grid reliability requiring an "emergency" reauthorization are devoid of factual support in the record. Moreover, AEP-EP's *continuing* failure to supply the Department and the public with information validating its assertions about the grid and the export market also appears to violate 10 C.F.R. 205.9(d), which imposes a *continuing obligation* on applicants to provide information necessary for the agency's decision. All AEP-EP has proffered is unsubstantiated assertions that an interruption of its export authorization will disrupt the grid. The Department must base any decision on this application on current, detailed information and require AEP-EP to meet the Department's application requirements.<sup>7</sup>

Third, AEP-EP's allegations of harm make no sense. AEP-EP contradicts itself when describing its role in the export market: on the one hand arguing that an interruption of its export authority poses serious risks to the Texas and cross-border

---

<sup>5</sup> AEP-EP Request at 2.

<sup>6</sup> *See* Mot. to Intervene at p. 10.

<sup>7</sup> *Tripoli Rocketry Ass'n, Inc.*, 437 F.3d at 83 (agency must make "reasoned decision based on reasonable extrapolations from some reliable evidence").

grid, while at the same time admitting that it functions only as a power broker in a competitive, open market, and only exported 78,000 MWh of electricity to Mexico in 2011.<sup>8</sup> In fact, AEP-EP is just one of several companies who have received DOE authorization to export, and these exporters will fill any gap in the market that may be associated with an interruption to AEP-EP's authority.<sup>9</sup> Finally, AEP-EP merely speculates as to how the Comisión Federal de Electricidad ("CFE") may react to an interruption of AEP-EP's minimal export activity: such an interruption "*could* put CFE's willingness to provide comparable Emergency assistance to the U.S. at risk."<sup>10</sup> This is not a valid basis for agency decision making.<sup>11</sup>

AEP-EP's arguments concerning the role of ERCOT in this matter are likewise confusing. Sierra Club did not assert that ERCOT is unable to regulate the grid; rather, as discussed below, ERCOT and other regulatory agencies have recently

---

<sup>8</sup> AEP-EP Request at 3, 4. Note that AEP-EP did not support this claim nor is there is no information in the docket showing AEP-EP's total 2011 exports.

<sup>9</sup> For example, it appears that Morgan Stanley Capital Group, Inc, Constellation NewEnergy, Inc., and Noble Americas Energy Solutions LLC all have current export authorization to ship power to Mexico. *See*, USDOE Dept. Office of Electricity Delivery & Energy Reliability, hereafter ("USDOE"), Order Authoring Morgan Stanley Capital, Inc.'s Electricity Exports to Mexico, Docket No. EA-184-B, Order No. EA-184-B (Dec. 7, 2011), <http://energy.gov/sites/prod/files/EA-184-B%20MSCG%20MX.pdf>; USDOE Order Authorizing Constellation NewEnergy, Inc.'s Electricity Exports to Mexico, Docket No. EA-247-C, Order No. EA-247-C (Dec. 21, 2009), <http://energy.gov/sites/prod/files/EA-247-C%20Constellation.pdf>;

USDOE, Noble Americas Energy Solutions, LLC's Electricity Export Amendment Authorization Order, Docket No. EA-247-C, Order No. EA-247-C (Dec. 7, 2011), <http://energy.gov/sites/prod/files/EA-284-C%20Noble%20Americas.pdf>.

<sup>10</sup> *See* AEP-EP Request at 2.

<sup>11</sup> *See, e.g., Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) (agency action "founded on unsupported assertions or unstated inferences" does not pass muster under the Administrative Procedures Act);

raised concerns regarding grid stability in Texas, which underscores the need for sound analyses of such issues in the larger proceeding before the Department. And if, as AEP-EP suggested, ERCOT is capable of handling these issues, the exit of AEP-EP from an open, competitive export market presumably can be managed by ERCOT, with no risk to the grid. But more fundamentally, ERCOT's ability to assure grid stability in no way relieves AEP-EP of its legal obligation to provide information and analysis about grid reliability to the Department.<sup>12</sup>

AEP-EP attempts to avoid this obligation, claiming that circumstances have not changed since its previous authorization for export five years ago, and that the original analyses and decision remain current and sound. This is simply not the case. As shown in Sierra Club's intervention and protest, circumstances have changed substantially since 2007. Over the last five years, the state of Texas, ERCOT and NERC have raised concerns regarding the stability of Texas' electric generation and transmission system. As noted in Sierra Club's intervention and protest, all three agencies have claimed that the reliability of Texas' grid is in jeopardy. ERCOT and the state of Texas recently argued in federal court that enactment of a new EPA regulation, known as the cross-state air pollution rule, should be blocked because of supply issues. According to ERCOT and the State: "if the Final Rule had been in effect this year, rotating blackouts would have occurred

---

<sup>12</sup> Pursuant to 10 C.F.R. 205.302(g), DOE and its applicants are required by law to address these topics.

in August.”<sup>13</sup> AEP apparently agreed with ERCOT’s analysis because it included ERCOT’s reliability report as an exhibit to its own legal brief to the court in support of a request to stay the cross-state rule<sup>14</sup> Similarly, in its most recent annual reliability report, NERC, the agency responsible for ensuring the reliability of the North American bulk power system, also raised significant concerns about Texas. NERC projected that ERCOT will not have adequate reserve margins in 2013, which “rais[es] significant concerns of resource adequacy.”<sup>15</sup> NERC recommends that “[m]ore resources will be needed in Texas to support projected peak demand, potentially significant generator retirements, and an increased need for reserve capacity to support variable generation.”<sup>16</sup> In sum, AEP-EP has failed to provide any factual information that would support a DOE determination that circumstances in 2012 are unchanged, given the significant controversies described above.

AEP-EP’s reliance on the 2002 New York Independent Service Operator (“NYISO”) docket as precedent for an emergency extension is misplaced.<sup>17</sup> In that docket, the Department was able to cite a specific report that the applicant had

---

<sup>13</sup> Pet’r[’s] Mot. for Stay at 24, *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Sept. 22, 2011), Doc 1331220.

<sup>14</sup> AEP’s Resp. in Supp. of Pet’r[’s] Mot. for Stay, Ex. 6, *id.*, No. 11-1302 (D.C. Cir. Dec. 7, 2011), Doc 1340481.

<sup>15</sup> NERC 2011 Long Term Reliability Assessment, at 5-6, (Nov. 2011), [http://www.nerc.com/files/2011%20LTRA\\_Final.pdf](http://www.nerc.com/files/2011%20LTRA_Final.pdf).

<sup>16</sup> *Id.* at 9.

<sup>17</sup> Citing Application of New York Independent System Operator, Inc. for Modification of Authorization to Transmit Energy to Canada, for Renewal of Authorization and for Expedited Action, (Oct. 16, 2011), [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/ea-227a\\_ap.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/ea-227a_ap.pdf).

included in the record (rather than mere assertions) to support its determination that export authorization was appropriate and would not jeopardize reliability.<sup>18</sup> DOE also found a “present need for emergency electric power supplies” in Canada.<sup>19</sup> AEP-EP has made no demonstration that such a “present need” exists here. In another Order granting a request for emergency export to Mexico from El Paso Electric Company, DOE likewise relied upon actual facts and data in the record, in contrast to the generalities and unsupported assumptions AEP-EP urges DOE to rely upon here.<sup>20</sup> Where AEP-EP has not provided a factual basis for the extension, the request must be denied.

#### IV. Conclusion

For all of the reasons stated above and in Sierra Club’s Intervention and Protest, Sierra Club respectfully requests that the Department deny AEP-EP’s Emergency Request for a Continuance or Temporary Authorization in all respects.

---

<sup>18</sup> See Letter from A. Como to A. Quint (Sept. 26, 2002), *NYISO*, Docket No. EA-227-A, at 1 (citing “Load & Capacity Data, 2001 Report of the Member Electric Systems of the New York Power Pool”), [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EA-227-A\\_NYISO\\_Emergency\\_Order.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EA-227-A_NYISO_Emergency_Order.pdf).

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

<sup>20</sup> El Paso Electric Company, FE Docket No. EA-48-N, Order No. EA-48-N (Feb. 25, 1998), [http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EA-48-N\\_El\\_Paso.pdf](http://energy.gov/sites/prod/files/oeprod/DocumentsandMedia/EA-48-N_El_Paso.pdf), (“EPE performed power flow simulations that analyzed the EPE system under two scenarios where: (1) EPE provided CFE with 200 MW of a combination of firm and economy power; and (2) EPE provided CFE with the 200 MW described in the first scenario and an additional 35 MW of emergency assistance. These studies were prepared to support EPE’s assertion that it could respond to CFE’s 1996 emergency requirement of 235 MW without adversely impacting the reliability of the EPE system.”).



Dated: February 17, 2012

Respectfully Submitted,

/s/ Gloria Smith

Gloria D. Smith  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
(415) 977-5532  
[gloria.smith@sierraclub.org](mailto:gloria.smith@sierraclub.org)

Andrea Issod  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
(415) 977-5544  
[andrea.issod@sierraclub.org](mailto:andrea.issod@sierraclub.org)

Certificate of Service

I hereby certify that I have served the foregoing Objection to AEP-EP's Emergency Request for a Continuance or Temporary Extension of Existing Export Authorization or for a Temporary Export Authorization and Request for Expedited Consideration in OE Docket No. EA-318-B by next day air via Federal Express and Electronic Mail on the following parties:

Christopher Lawrence  
Office of Electricity Delivery and Energy  
Reliability, Mail Code: OE-20,  
U.S. Department of Energy,  
1000 Independence Avenue SW.,  
Washington, DC 20585-0350  
[Christopher.Lawrence@hq.doe.gov](mailto:Christopher.Lawrence@hq.doe.gov)

Jay E. Jadwin  
Chief Counsel  
American Electric Power Service  
Corporation  
155 W. Nationwide Blvd., Suite 500,  
Columbus, OH 43215  
[jejadwin@aep.com](mailto:jejadwin@aep.com)

Carolyn Y. Thompson  
Jones Day  
51 Louisiana Avenue NW.,  
Washington, DC 20001-2113  
[carolynthompson@jonesday.com](mailto:carolynthompson@jonesday.com)

Dated in San Francisco, CA, this 17th day of February, 2012.

/s/ David Abell  
David Abell  
Sierra Club  
85 Second Street, Second floor  
San Francisco, CA 94105  
(415) 977-5544  
[david.abell@sierraclub.org](mailto:david.abell@sierraclub.org)