

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

American Electric Power Company, Inc.

Docket No. EC24-60

Protest of Public Citizen, Inc.

The March 15 Section 203 application of American Electric Power, filed jointly with affiliates of the activist investor Carl C. Icahn to allow both of Icahn's representatives to AEP's board of directors the right to vote, is an application of first impression for the Commission, as it involves the first instance of an investor obtaining control over non-voting seats on the board of a public utility that played a role in forcing out the utility's chief executive prior to obtaining Commission approval for a change in control. The application's request for the right of Icahn's board members to vote is therefore a distinction without a difference for the Federal Power Act's change in control mandate: Icahn's non-voting board members have already forced a Section 203 change of control at AEP with their role in the "involuntary termination" of the utility's Chair, CEO and President. Icahn's board designees executed a change in control of AEP between February 12 (when the Icahn representatives obtained board seats) and February 20 (when the board "determined to remove" AEP's CEO)—twenty-four days before filing for permission to do so with the Commission. Icahn utilized his economic investment in AEP to secure a legal right to control two non-voting board seats, and used them to initiate a change in control of a public utility in clear violation of the Federal Power Act.

Congress instructs the Commission that any attempted "change in control" of a public utility must first secure "an order of the Commission authorizing it to do so." An investor that obtains a legal agreement with a public utility to install their chosen non-voting representatives on the board of directors, and then utilizes those board members in any way to remove the utility's chief executive officer is clearly a "change in control" subject to Section 203 of the Federal Power Act. The after-the-fact AEP/Icahn application renders the Commission's enforcement of the Federal Power Act as an

irrelevant afterthought, violating federal law and placing millions of captive customers at risk.

Given Icahn’s role in forcing a change in control at AEP’s prior to obtaining the required Commission approval to do so, the Commission must find the application to be deficient and set the matter for hearing until additional information is placed into the record, including:

- Sworn affidavits of the Icahn board appointees Hunter C. Gary and Henry “Hank” P. Linginfelter detailing—
 - All communications, meetings and discussions from February 12 through February 20 describing their actions, activities, meetings and discussions in support of removing Julia A. Sloat, from her roles as Chair, Chief Executive Officer and President of AEP.
- Sworn affidavits of all other AEP board members detailing all meetings, discussions and minutes where the board “determined to remove” Julia A. Sloat from her roles as Chair, Chief Executive Officer and President of AEP.

American Electric Power is a public utility holding company system with 5.6 million captive customers. On February 12, 2024, activist investor Carl C. Icahn and his affiliates negotiated a *Director Appointment and Nomination Agreement*¹ with American Electric Power despite Icahn owning a paltry 1% of AEP’s voting shares.² The agreement immediately installed both of Icahn’s selections to serve on the board: Hunter C. Gary, Senior Managing Director of Icahn Enterprises, and Henry “Hank” P. Linginfelter, who Icahn utilized as a board member during his hostile takeover of Southwest Gas Holdings.³ The February 12 agreement states that “[u]ntil such time as all Regulatory Approvals are obtained, no Icahn Designee (or replacement designee) serving as a member of the Board will have the right to vote at any meeting of the Board or any Board committee.”

Eight days after signing the Icahn agreement, AEP’s board of directors—including both of Icahn’s non-voting designees—“determined to remove” Julia A. Sloat from her

¹ www.sec.gov/ix?doc=/Archives/edgar/data/4904/000000490424000007/aep-20240212.htm

² *Application*, at page 11.

³ www.sec.gov/Archives/edgar/data/1692115/000119312522143983/d317609dex99a45.htm

roles as Chair, Chief Executive Officer and President of AEP, deeming her removal as an “Involuntary Termination”.⁴

Activist investor Carl C. Icahn owns only 1% of AEP’s voting shares. For typical investors, owning 1% of voting shares grants no special rights or privileges, let alone control over two seats on the board of directors. But Mr. Icahn is not a typical investor. He is an activist investor—earning the colloquial moniker “corporate raider”⁵—specializing in engaging in protracted, hostile shareholder fights to gain control of target corporations for the sole purpose of moving the company’s stock price to a pre-determined target that bestows considerable profit for Mr. Icahn. Icahn is uninterested in providing long-term capital investment to assist a public utility in ensuring the reliability of the bulk power market or delivering just and reasonable rates; rather, Mr. Icahn exploits regulatory loopholes to transform companies into mere speculative commodities to serve his short-term investment whims.

Companies are eager to avoid the tumult that accompanies such hostile takeovers, and therefore typically accommodate Icahn’s requests and hand him control over the board despite owning a trivial 1% of voting shares. But AEP is not most companies: it is a public utility governed by the strong public interest protections demanded by Congress.

Icahn knows exactly what he’s doing in seeking to effectively repeal the Federal Power Act’s strong protections: he personally served as a special adviser on regulatory reform to the last President of the United States.⁶

Congress explicitly prevents public utilities from being exploited as speculative commodities by corporate raiders like Icahn, first by determining “that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest”,⁷ and second by requiring that “[n]o public utility shall, without first having secured an order of the Commission authorizing it to do so” allow a “change in control” until “it finds that the proposed transaction will be consistent with the public interest”.⁸ The commandment from Congress is clear: public utilities must first obtain

⁴ www.sec.gov/ix?doc=/Archives/edgar/data/4904/000000490424000018/aep-20240220.htm

⁵ www.newyorker.com/magazine/2006/03/20/the-raid

⁶ www.wsj.com/articles/trump-to-name-icahn-as-adviser-on-regulatory-overhaul-1482354552

⁷ 16 USC § 824.

⁸ 16 U.S. Code § 824b(a).

permission from the Commission prior to a change in control, and such a change in control must first be found “to be consistent with the public interest.” Public utilities are therefore subjected to unique public interest regulation from most other corporations that Icahn targets. It is clear that the February 12 action placing two of Icahn’s non-voting designees on the board of directors, combined with the board’s February 20 action “to remove” AEP’s chief executive officer constituted a “change in control” subject to Section 203 of the Federal Power Act.

The Commission must deem the February 12 *Director Appointment and Nomination Agreement* and the resulting February 20 action by the board to terminate AEP’s CEO as a violation of the Federal Power Act’s “change in control” requirements, because Icahn did not first receive permission from the Commission to do so. As part of this assessment, AEP and Icahn must supplement the record with details about the roles Icahn’s two board designees played in the “involuntary termination” of AEP’s CEO.

Respectfully submitted,

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