FORM U-1/A

Application or declaration under the act 1935 [amend]

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As filed with the Securities and Exchange Commission on
May 13, 1994

File No. 70-8305

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

AMENDMENT NO. 2 (U-1/A)

to

FORM U-1

APPLICATION
UNDER
THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

Illinova Corporation
(formerly IP Holding Company)
500 South 27th Street
Decatur, Illinois 62525-1805

(Name of company filing this statement
and address of principal executive office)

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(Names and addresses of agents for service)

Illinova Corporation ("Illinova") (formerly IP Holding Company), is filing this Amendment No. 2 to its Form U-1 Application (the "Application") under the Public Utility Holding Company Act of 1935 (the "1935 Act" or the "Act") filed with the Securities and Exchange Commission ("Commission") on November 15, 1993, for the purpose of filing an additional exhibit and advising the Commission that the Federal Energy Regulatory Commission ("FERC") has approved the corporate restructuring proposed in the Application.

* * *

Item 4. REGULATORY APPROVALS.(1)

On November 15, 1993, Illinois Power filed an application requesting the FERC to approve the proposed restructuring under Section 203 of the Federal Power Act. By order dated May 3, 1994, the FERC authorized Illinois Power to create a holding company structure pursuant to which Illinois Power will become a wholly-owned subsidiary of Illinova. A certified copy of the FERC's order is attached hereto as Exhibit D-2. On November 11, 1993, Illinois Power requested that the NRC approve the DE JURE

(1) This item amends Item 4 as it appears at p. 32 of the Application.

transfer of NRC licenses pursuant to Section 184 of the Atomic Energy Act and 10 C.F.R. Section 50.80. By letter order dated January 31, 1994, the NRC consented to the proposed ownership of Illinois Power by Illinova. The NRC concluded therein that the proposed restructuring "will not affect the qualifications of [Illinois Power] as a holder of the Clinton Power Station license" and that the proposed restructuring "is otherwise consistent with applicable provisions of law, regulations, and other requirements issued by the [NRC] pursuant thereto." (Letter order at 3). A certified copy of the NRC's letter order is attached hereto as Exhibit D-7.

* * *

Item 6. EXHIBITS AND FINANCIAL STATEMENTS.

This Amendment includes the following supplemental

exhibit:

Exhibit D-2: Order of the FERC approving the proposed restructuring pursuant to Section 203 of the Federal Power Act.

SIGNATURES

Pursuant to the requirements of the Public Utility Holding Company Act of 1935, Illinova Corporation has duly caused this Amendment to be signed on its behalf by the undersigned thereunto duly authorized.

ILLINOVA CORPORATION
(formerly IP Holding Company)

By: /s/ LEAH MANNING STETZNER

Leah Manning Stetzner
Secretary and Treasurer

Dated: May 13, 1994

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

CERTIFICATION

I hereby certify that the attached 11 pages are true and correct copies of a document on file with the Commission.

May 5, 1994 /s/ARVE L. MILNER
Date Custodian

(S E A L)

I hereby certify that the Custodian, or his designee, which signature appears above, is the official custodian of the records of the Federal Energy Regulatory Commission which certification is made and was such official custodian at the time of executing the above certification.

/s/LOIS D. CASHELL
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vickey A. Bailey, James J. Hoecker,
William L. Massey,
and Donald F. Santa, Jr.

Illinois Power Company) Docket No. EC94-3-000

ORDER GRANTING AUTHORIZATION FOR PROPOSED CORPORATE RESTRUCTURING AND CLARIFYING JURISDICTION OVER INDIRECT MERGERS OF PUBLIC UTILITIES OWNED BY PUBLIC UTILITY HOLDING COMPANIES

(Issued May 3, 1994)

INTRODUCTION

This order authorizes Illinois Power Company (Illinois Power) to create a holding company, IP Holding Company (IP Holding), of which Illinois Power will become a wholly-owned subsidiary. We also take this opportunity to clarify our jurisdiction under section 203 of the Federal Power Act (FPA). While this Commission does not have jurisdiction over public utility holding company mergers or consolidations,(1) we conclude that, ordinarily, when public utility holding companies merge, an indirect merger involving their public utility subsidiaries also takes place, and that our approval under section 203 is required for the indirect merger of the public utilities.

Accordingly, in this order we establish and announce a rebuttable presumption that an indirect merger of the public utility subsidiaries occurs simultaneously with the merger of the holding company parents. Therefore, prior to public utility holding companies merging, their public utility subsidiaries must either rebut the presumption or obtain our approval under section 203 of the FPA. If applicants can show us that there will not be an indirect merger or consolidation of the facilities of the public utility subsidiaries, our jurisdiction will not apply until such

(1) Although mergers and consolidations differ in the mechanics of the combination (mergers involve one company acquiring the other, while consolidations entail forming a new entity), BLACK'S LAW DICTIONARY, at 309 (Revised Sixth Ed. 1990), for ease of presentation, we will refer to both types of combinations as mergers.

time as the public utility subsidiaries themselves seek to merge or consolidate.

BACKGROUND

On November 15, 1993, Illinois Power submitted an application pursuant to section 203 of the Federal Power Act for authority to effect a "disposition of facilities" that would be deemed to occur as a result of a proposed corporate restructuring.(2) Illinois Power states that the proposed restructuring would be accomplished through the creation of a holding company, IP Holding, of which Illinois Power would become a subsidiary.

Illinois Power states that the proposed restructuring is intended to permit the establishment of non-utility businesses that can take advantage of new business opportunities on a timely basis without the need for prior regulatory approvals, to increase financial flexibility, to enhance managerial accountability for separate business activities, and to insulate utility ratepayers and security holders from the risks of non-utility projects. Illinois Power states that the proposed restructuring will not affect its jurisdictional facilities, rates or services.

The proposed restructuring would be accomplished as follows:

1. Illinois Power has formed a subsidiary, IP Holding, under Illinois law.

2. IP Holding, in turn, has formed a subsidiary, IP Merging Corporation (IP Merging), also an Illinois corporation.

3. Following all necessary approvals, IP Merging will merge with and into Illinois Power. In the merger, all outstanding shares of Illinois Power common stock will be converted on a share-for-share basis into IP Holding common stock by operation of law, and IP Holding will become the owner of all outstanding shares of Illinois Power common stock.(3) Illinois Power

(2) In support of its application Illinois Power presents information as required by section 33.2 of the Commission's regulations.

(3) IP Holding has filed an application with the Securities and Exchange Commission (SEC) for authority to acquire Illinois Power's

common stock, pursuant to sections 9(a) (2) and 10 of the Public Utility Holding Company Act of 1935 (PUHCA).

common stock will thereafter cease to be listed and traded on the stock market, and the common shares of IP Holding will be listed and traded instead.

Notice of the application was published in the Federal Register,(4) with comments due on or before December 8, 1993. None was filed.

DISCUSSION

A. THE APPLICATION

The Commission has held that the transfer of a public utility's common stock from its existing shareholders to a holding company constitutes a transfer of the "ownership and control" of the utility's jurisdictional facilities and is thus a "disposition of facilities" subject to Commission review and approval under section 203 of the Federal Power Act. SEE CENTRAL VERMONT PUBLIC SERVICE CORP., 39 FERC Paragraph 61,295 (1987) (CENTRAL VERMONT). Because Illinois Power's proposed restructuring would entail the transfer of the ownership of its common stock from existing shareholders to IP Holding, the restructuring is subject to the requirements of section 203.

The Commission is obligated to approve a proposed "disposition of facilities" under section 203 if it would be "consistent with the public interest."(5) In making such a determination, the Commission considers, INTER ALIA: (1) the effect on utility operating costs and rate levels: (2) the contemplated accounting treatment; (3) the reasonableness of the purchase price; (4) the possibility of coercion; (5) the effect on competition; and (6) the impact on the effectiveness of regulation. COMMONWEALTH EDISON CO., 36 FPC 927, 936-42 (1966), AFF'D SUB NOM. UTILITY USERS LEAGUE V. FPC, 394 F.2d 16 (7th Cir.), CERT. DENIED, 393 U.S. 953 (1968).

The Commission finds that Illinois Power's proposed restructuring will be compatible with each of the relevant factors. First, the proposed restructuring will have no effect on either Illinois Power's operating costs or its

(4) 58 Fed. Reg. 62,649 (1993).

(5) An applicant need not show that a positive benefit to the publid

will result. SEE Pacific Power & Light Company v. PFC, 111 F.2d 1014, 1016-17 (9th Cir. 1940).

rate levels. The Applicant does not request a rate increase as part of its filing. Any future changes in Illinois Power's wholesale rates would be subject to Commission review and approval under section 205 of the FPA.

Second, the contemplated accounting treatment will be appropriate. The merger of Illinois Power and IP Merging will be accounted for on a "pooling of interests" basis under generally accepted accounting principles. Illinois Power's books and records will continue to be maintained in accordance with the Commission's Uniform System of Accounts.

Third, the proposed restructuring entails no "purchase price." The proposed restructuring involves the conversion of each share of Illinois Power common stock into a share of IP Holding common stock. Therefore, the proportion of each shareholder's ownership will be unchanged.

Fourth, because the proposed reorganization only involves Illinois Power and its affiliates, there is no possibility of coercion.

Fifth, because no facilities will be combined with those of any other public utility, the proposed restructuring will not have an adverse effect on competition.

Sixth, the proposed restructuring will not impair effective regulation of Illinois Power. Illinois Power's services, rates and facilities will be unaffected by the restructuring and will continue to be regulated by the Illinois Commerce Commission and by this Commission.

B. CLARIFICATION OF JURISDICTION OVER INDIRECT MERGERS OF PUBLIC UTILITIES OWNED BY PUBLIC UTILITY HOLDING COMPANIES

While there is no current proposal to merge IP Holding with another public utility holding company, it is possible that in the future such a merger may take place.(6) In our view, most mergers of public utility holding companies will simultaneously involve an indirect merger of the public utility subsidiaries of such holding companies. Accordingly, we take this opportunity to announce a

(6) With the recent and projected increase of competition in the

electric utility industry, mergers may become an increasingly popular tool for utilities seeking to achieve greater efficiency and become more competitive. Our decision today is necessary to ensure the continued adequacy of our merger policies in protecting the public interest.

clarification of our jurisdiction when there is a merger of public utility holding companies. To assure that the public interest is protected when public utility holding companies merge, we will establish a rebuttable presumption that an indirect merger of jurisdictional facilities of the public utility subsidiaries occurs at the time the holding company parents merge. Prior to the public utility holding companies merging, their public utility subsidiaries must file under section 203 of the FPA either sufficient information to rebut the presumption, or for Commission approval of the indirect merger of the public utilities.

The public utilities may rebut the presumption by showing that after the merger of the holding companies, the public utility subsidiaries will still effectively compete with each other. If they make such a showing, jurisdiction under 203 will not attach until such time as the public utilities themselves seek to combine.

1. THE THREE STEP PROCESS

Section 203(a) of the FPA provides that:

> No public utility shall sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person . . . without first having secured an order of the Commission authorizing it to do so.

The provision applies to any public utility, which section 201(e) of the FPA defines as "any person [with certain exceptions specified in section 201(e) which are not relevant here] who owns or operates facilities" for the sale of electric energy at wholesale or the transmission of electric energy in interstate commerce. Public utility holding companies, in contrast to public utilities, do not normally own such facilities.(7) Therefore, we have no jurisdiction over public utility holding companies that are not also public utilities and thus have no jurisdiction over most mergers of holding companies.

In recent years, however, some public utilities have followed a three-step process to reorganize. In "step one,"

(7) Certain public utility holding companies, however, are also public utilities. E.G. Cincinnati Gas and Electric Company.

a public utility forms a company and transfers ownership of all of the utility's stock to a newly created company, which becomes the parent holding company of the public utility.(8) In "step two," the public utility holding company merges with another public utility holding company. In "step three," the public utilities under the control of the single public utility holding company formally merge their facilities.

CENTRAL VERMONT AND MISSOURI BASIN MUNICIPAL POWER AGENCY V. MIDWEST ENERGY COMPANY AND IOWA RESOURCES, INC., 53 FERC Paragraph 61,368 (1990), REH'G DENIED, 55 FERC Paragraph 61,464 (1991) (MISSOURI BASIN) describe our jurisdiction (or lack thereof) at each of the three steps. In CENTRAL VERMONT, the Commission found jurisdiction under section 203 when a public utility establishes a holding company, because the shareholders of the public utility transfer ownership and control over jurisdictional facilities in the course of the transaction. In MISSOURI BASIN, the Commission found that the merger of two public utility holding companies was subject to the SEC's jurisdiction, but not to our jurisdiction. The Commission determined that neither of the holding companies in MISSOURI BASIN owned or operated FERC-jurisdictional facilities, and therefore neither holding company was a public utility under the FPA when the merger was consummated. Thus, the Commission found, the merger did not fall within the Commission's jurisdiction under section 203. The Commission stated that if, in the future, the public utility subsidiaries should merge -- a "step three" transaction -- Commission approval would be required.(9) The Commission later approved the merger of the affiliated public utilities.(10)

(8) Illinois Power seeks Commission authorization of a "step one" transaction in this docket.

(9) 53 FERC at 62,298-99.

(10) Iowa Public Service Company, Iowa Power, Inc., and Midwest Power Systems, 60 FERC Paragraph 61,048 (1992). The Commission has generally approved mergers between affiliated public utilities. SEE, E.G.,

Wisconsin Electric Power Company, 59 FPC 1196 (1977) ("while technically a merger, this action is more in the nature of an intrasystem consolidation and does not present the potential evils which are inherent in the merger of two non-affiliated systems"); Delmarva Power & Light Company, 5 FERC Paragraph 61,201 (1978) ("the transaction would only simplify the corporate structure by merging these subsidiaries into the parent"); Union Electric Company, 25 FERC Paragraph 61,394 (1983), (continued...)

2. REASONS FOR CLARIFICATION

a. THE PRESUMPTION

Our decision to adopt a presumption of indirect merger and to require the public utility subsidiaries to rebut the presumption by showing that after merger of their parents they will continue to compete with each other, is informed by the Supreme Court's decision in COPPERWELD CORP. V. INDEPENDENCE TUBE CORP. (COPPERWELD), 467 U.S. 752 (1984). The Court held that section 1 of the Sherman Antitrust Act, which outlaws conspiracies or combinations in restraint of trade, regards as one company a parent and subsidiary that maintain separate operations. The two cannot conspire because they do not compete in the economic sense. COPPERWELD holds that even if companies maintain separate corporate form, if they pursue a common economic interest, they no longer compete.

The Court explained:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousness, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests,

(10) (...continued)
REH'G DENIED, 26 FERC Paragraph 61,184 (1984) ("the nature of the

proposed transaction is essentially a consolidation of operating utilities presently under one ownership rather than the acquisition of any additional electric or gas utility"); and Kentucky Utilities Company and Old Dominion Power Company, 56 FERC Paragraph 61,184 (1991) ("because Kentucky Utilities already wholly owned Old Dominion and, in effect, controls the use of Old Dominion's system, the merger will not alter Kentucky Utilities' control").

> and there is no justification for Section 1 scrutiny.
> * * *
> [i]n reality a parent and a wholly owned subsidiary ALWAYS have a "unity of purpose or a common design" . . . . whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interest.

467 U.S. at 771-72 (emphasis in original; footnote deleted).

The courts have applied COPPERWELD to electric utilities and their affiliates. In CITY OF MOUNT PLEASANT, IOWA V. ASSOCIATED ELECTRIC CO-OP, 838 F.2d 268, 274-77 (8th Cir. 1988), for example, which involved municipal and cooperative utilities, the Eight Circuit held:

> Even though [affiliates] may quarrel among themselves on how to divide the spoils of their economic power, it cannot be reasonably said that they are independent sources of that power. Their power depends, and has always depended, on the cooperation among themselves. They are interdependent, not dependent.

838 F.2d at 277 (emphasis deleted).

While COPPERWELD applies to the Sherman Act, the rationale of the decision suggests that the common interest between members of an enterprise affects their standing as competitors for FPA purposes as well. While this Commission has no responsibility to enforce the antitrust laws,(11) it must weigh competitive considerations in its merger analyses.(12)

(11) Northern Natural Gas Co. v. FPC, 399 F.2d 953, 960 (D.C. Cir. 1968),

citing California v. FPC, 369 U.S. 482, 490 (1962).

(12) SEE E.G., Northeast Utilities Service Co. 56 FERC Paragraph 61,369 at 61,998-62,011 (1991), ORDER ON REH'G, 58 FERC Paragraph 61,070, FURTHER ORDER ON REH'G, 59 FERC Paragraph 61,042 (1992), REMANDED ON OTHER GROUNDS, 939 F.2d 937 (1st Cir. 1993) (NU).

Moreover, while CITY OF MOUNT PLEASANT involved municipal utilities suing an electric co-op (none of which were subject to our section 203 jurisdiction), at least one court has applied COPPERWELD to a jurisdictional public utility. ROSEMONT COGENERATION JOINT VENTURE V. NORTHERN STATES POWER, 91-1 Trade Cases (CCH) Paragraph 69,351 at 65,408 (D MN 1991).

The above case law supports our conclusion that when public utility holding companies merge, their public utility subsidiaries likely retain no real corporate independence. Rather, decision-making for the public utility subsidiaries appears to rest with the new holding company. The voting stock of the public utilities belongs to the shareholders of the new holding company; the new holding company board of directors presumably sets or can set corporate policy for all subsidiaries; and management of the public utility subsidiaries presumably gains access to proprietary financial and corporate information of the entire system of the new holding company. For us to assume that a merger of the public utilities occurs only when the new parent proposes to combine its subsidiaries may, in most instances, elevate corporate form over economic substance.

We therefore will presume, subject to rebuttal, that mergers between public utility holding companies also accomplish an indirect merger of their public utility subsidiaries. If the public utilities can rebut the presumption, we will find that jurisdiction will not attach until such time as the public utility subsidiaries formally merge or consolidate their facilities. If the public utilities cannot rebut the presumption, section 203 approval of the indirect merger of the public utilities will be required.(13)

b. REBUTTING THE PRESUMPTION

The Eighth Circuit in CITY OF MOUNT PLEASANT left open the possibility for courts to consider affiliates as separate enterprises for antitrust purposes. In granting summary judgment to the co-op, the panel held:

> The record bears out the defendants' claim that the cooperative organization

(13) Section 203 requires approval PRIOR to a merger. Therefore, the public utilities must file under section 203 evidence to rebut the presumption that an indirect merger of public utilities will occur when the holding companies merge, and/or alternatively an application for approval under section 203.

> is a single enterprise pursuing a common goal -- the provision of low-cost electricity . . . . The burden [falls] therefore on the City to show specific facts which present a triable issue as to whether any of the defendants has pursued interests diverse from those of the cooperative itself. By "diverse" we mean interests that show that any two of the defendants are, or have been, actual or potential competitors, . . . or at the very least, interests which are sufficiently divergent so that a reasonable juror could conclude that the entities have not always worked together for a common cause. In the language of COPPERWELD, the City must show facts that could lead a reasonable juror to find the coordination between any two defendants to be a "joining of two independent sources of economic power previously pursuing separate interests."

838 F.2d at 276 (citations omitted).

Informed by the analysis in COPPERWELD and CITY OF MOUNT PLEASANT, we will require section 203 applicants, in order to rebut the presumption, to show that the new holding company will not interfere with the independence of the public utility subsidiaries, and will allow them to operate and compete with each other in the same manner as before the merger of the holding companies. In order to rebut the presumption of an indirect merger, the public utilities must show: (1) that they will continue to exercise independent decision-making authority; (2) that their proprietary, financial and corporate information will not be available to each other, either directly or indirectly; and (3) that they will compete on price and service in the same markets to the same extent they have competed in the page.(14)

(14) We do not believe there can be competition between public utilities if they do not exercise independent decision-making or if they share information. Accordingly, elements (1) and (2) must be met. However, the fact that (1) and (2) are met in and of themselves is not sufficient to show that the affiliates will compete. Applicants therefore must submit additional evidence that they will compete with each other. For example, one indicia of competition would be that they will separately participate in competitive solicitations.

THE COMMISSION ORDERS:

(A) The disposition of the jurisdictional facilities of Illinois Power in the above-described corporate restructuring is hereby authorized subject to the following conditions:

(1) The proposed transaction is authorized upon the terms and conditions and for the purposes set forth in the application;

(2) The Commission retains authority under section 203(b) of the Federal Power Act to issue supplemental orders as appropriate;

(3) The foregoing authorization is without prejudice to the authority of this Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates, determinations of cost, or any other matter whatsoever now pending or which may come before this Commission;

(4) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted; and

(B) In the event IP Holding should seek to merge with another public utility holding company, the public utilities will be required to file under section 203 of the FPA evidence to rebut a presumption that such a merger would not also result in an indirect merger of the public utility subsidiaries, or alternatively for approval of an indirect merger of the public utilities.

By the Commission.

(S E A L)

/s/Lois D. Cashell
Lois D. Cashell,

Secretary