

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of

AMERICAN ELECTRIC POWER COMPANY, INC.

Administrative Proceeding  
File No. 3-11616

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**RESPONSE OF AMERICAN ELECTRIC POWER COMPANY, INC.  
TO REQUEST FOR INTERLOCUTORY APPEAL  
AND STAY OF THE PROCEDURAL SCHEDULE**

American Electric Power Company, Inc. (“AEP”) hereby responds to the January 6, 2004, filing of Public Citizen that is inaccurately styled as a “Petition for Review” of the Hearing Officer’s “Initial Decision” in this proceeding, and the accompanying request for a stay of the evidentiary hearing that is scheduled to commence on Monday, January 10 and request for oral argument. Public Citizen’s requests for relief should all be summarily denied.

Public Citizen’s petition does not comply with the Commission’s rules of practice. Public Citizen has filed its appeal pursuant to Rule 410 as an appeal of an initial decision. Rule 400(a) of the Commission’s rules states, however, that “[t]his section is the exclusive remedy for review of a hearing officer’s ruling prior to Commission consideration of the entire proceeding ...”. The Hearing Officer has not issued his initial decision on the merits of this case, and the matters at issue are therefore not ripe for Commission review. It is not the case that counsel for Public Citizen is unfamiliar with Rule 400, since Public Citizen

unsuccessfully sought certification of an interlocutory appeal pursuant to that Rule before the Presiding Judge. Public Citizen has simply chosen to evade the Commission's requirements.

Rule 400 provides that interlocutory review of orders of the Hearing Officer are disfavored and will be provided only in "extraordinary circumstances." The Hearing Officer's relatively routine ruling on the scope of Public Citizen's participation in this proceeding, which Public Citizen admits is a matter within the discretion of the Hearing Officer (Public Citizen Petition at 10), does not rise to the level of the "extraordinary circumstances" that would warrant interlocutory review. Indeed, it might fairly be assumed that Public Citizen chose to mischaracterize the status of this proceeding and file under Rule 410 in order to avoid having to satisfy the strict requirements of Rule 400 for interlocutory appeals.

Public Citizen's petition is also untimely and threatens the orderly conduct of the hearing. The Hearing Officer established a procedural schedule for this case by Order dated October 6, 2004, which schedule provides for the commencement of the evidentiary hearing on Monday, January 10, 2005. The Hearing Officer's order granting Public Citizen limited participation status in this proceeding was issued on October 22, 2004 (not December 10 as Public Citizen alleges). Thus, even though Public Citizen was informed that it would be granted limited participation status approximately 10 weeks ago, it has waited until just a few days before the commencement of the hearing to request Commission interlocutory review. Public Citizen did not request certification of an interlocutory appeal of the October 22 order within five days of that order, as Rule 400 of the Commission's rules of practice requires. Rather, it sat on its rights as the hearing schedule advanced toward a conclusion and then filed in December what it inaccurately characterized as a request for clarification of the

October 22 Order, in a transparent attempt to revive the issue of its participation status after it had failed to seek timely certification of the issue in accordance with Rule 400.

Accordingly, as a result of its own inaction, Public Citizen's request for interlocutory review comes before the Commission on the very eve of the hearing and Public Citizen has the gall to ask the Commission to stay the procedural schedule while the Commission considers its petition.

Public Citizen tells the Commission that there was legal error here because the Hearing Officer "misinterpreted" a recent change in the Commission's rules and that the Hearing Officer's interpretation effectively nullified the new rule. This characterization of the Hearing Officer's decision is beyond the pale. The Hearing Officer rejected Public Citizen's position regarding obtaining limited participation status because it "would effectively result in automatic admission for third parties and would abandon the permissive construction of the statute and Commission Rule - a permissive construction that did not change with the recent amendments to the Rules of Practice." (Ruling December 22, 2004, page 3). The Hearing Officer then accurately applied the current rule exercising his acknowledged discretion to consider Public Citizen's request for intervention.

To be clear, Public Citizen does not qualify for intervention as a full party as of right pursuant to Rule 210(b)(2) and has never contended otherwise. The Hearing Officer therefore had discretion to decide on the scope and manner of Public Citizen's participation. Buried in Public Citizen's petition is the recognition that "the ALJ still clearly has discretion to limit participation by a party; he simply no longer [sic] required to do so ...". (Petition at 10). The Hearing Officer, however, never suggested in any order that he was or might be "required" to limit Public Citizen's participation in this case.

Rather, the Hearing Officer reviewed Public Citizen's intervention papers and considered Public Citizen's participation in earlier phases of the Commission's merger review. He noted that Public Citizen played no substantive role when this case was before the Commission the first time, and that Public Citizen was not even a party in the Court of Appeals proceeding which resulted in this proceeding on remand. Notwithstanding its conclusory assertions, nowhere in its intervention papers did Public Citizen make the showing required under Section 210(b) for obtaining full party status. Accordingly, the Judge granted Public Citizen limited intervention rights, and stated that Public Citizen could file testimony and submit briefs.

Later, when Public Citizen requested the right to engage in cross-examination, it based this request on the assertion that the Commission's Investment Management Division did not have sufficient expertise. The Hearing Officer quite appropriately concluded that granting Public Citizen cross examination rights for this reason would not advance the public interest, and he no doubt took into consideration the fact that another party with significant expertise, the National Rural Electric Cooperation Association and American Public Power Association, will be cross examining all of AEP's witnesses. Under the Commission's rules (Rule 326), Hearing Officers have discretion to limit a party's cross-examination regardless of its intervention status, so this ruling was also within the Hearing Officer's discretion.

From AEP's perspective, the Hearing Officer should not have permitted Public Citizen to participate at all. Public Citizen's interest in this case is based on its assertion that it has "members" that live in the AEP service territory. But, Public Citizen is a wide-ranging organization with interests in many areas. Public Citizen never represented that any of its members have an interest in the instant merger transaction such that it could claim it was

representing an actual interested party. Moreover, its pleadings have made clear that its real interest in this case is not in the specific issues set for hearing but relate to more general concerns about enforcement of the Holding Company Act, which are not at issue here.

Public Citizen also contends that the Hearing Officer misconstrued its intervention request. A measured review of the record makes clear that the Presiding Judge decided the appropriate level of participation in the proceeding by Public Citizen in the first instance. Public Citizen's original motion to intervene may well have been ambiguous in its request for relief.<sup>1</sup> Any such ambiguity, however, merely confirms that the Presiding Judge properly determined that Public Citizen should be allowed to participate only on a limited basis as a non-party in this remand stage, particularly given Public Citizen's limited involvement in the initial proceeding before the Commission.

Public Citizen's request for interlocutory relief also should be denied because granting this relief will delay the completion of this proceeding in contravention of Rule 400(c), and the delay can be attributed to Public Citizen's own inaction. As noted earlier, the order granting Public Citizen limited participant status was issued on October 22, 2004. For reasons that have not been offered, Public Citizen sat on its rights for nearly two months, and thus has created the necessity for requesting a stay of the procedural schedule only days before the hearing is scheduled to commence. AEP and the other parties should not have to revise their schedules and accept a delay in the completion of this proceeding because of Public Citizen's failure to pursue its rights on a timely basis.

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<sup>1</sup> While the first sentence of this pleading indicated that Public Citizen was seeking to intervene "[p]ursuant to . . . Rule 210(b)," Public Citizen later stated that "this proceeding is a 'matter affecting [the] interests' of Public Citizen and its members within the meaning of 17 CFR §201.210(c)," Motion to Intervene at 1, 3.

For all of the above reasons, AEP respectfully urges the Presiding Judge to deny Public Citizen's request for a stay and for certification of an interlocutory appeal.

Respectfully submitted,



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Dated: January 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of January, 2005, I caused the foregoing document to be served via first class mail, postage prepaid, upon the persons listed below.

  
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