

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

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<b>In the Matter of</b>	)	<b>ADMINISTRATIVE</b>
	)	<b>PROCEEDING</b>
<b>American Electric Power Company, Inc.</b>	)	<b>FILE NO. 3-11616</b>
	)	
	)	

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**ADDITIONAL BRIEF**  
  
**OF**  
  
**PUBLIC CITIZEN, INC.**

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August 30, 2005

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**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**In the Matter of**  
**American Electric Power Company, Inc.**

**Administrative Proceeding**  
**File No. 3-11616**

**ADDITIONAL BRIEF OF PUBLIC CITIZEN, INC.**  
**REGARDING MOOTNESS, PROCEDURES**  
**AND THE COMMISSION'S AUTHORITY**  
**TO ACT IN THIS MATTER**

Pursuant to the order of the Securities and Exchange Commission (the Commission) issued August 9, 2005, Public Citizen, Inc., a limited participant in this proceeding, files this additional brief to discuss the implications of the prospective repeal of the Public Utility Holding Company Act of 1935 (“PUHCA” or “the 1935 Act”) on this merger Application, which was filed for approval under the 1935 Act and noticed for comment by the Commission on March 12, 1999 (Holding Co. Act Release No. 26989).

The Commission’s August 9, 2005, order asks, *inter alia*, whether this proceeding is moot in view of the prospective repeal of PUHCA by the Energy Policy Act of 2005 (the “New Act”). It is NOT moot. The 1935 Act was in full force and effect when the merger Application was filed in 1999, when the Commission acted on it on June 14, 2000,<sup>1</sup> when the merger was completed on June 15, 2000, when the Court of Appeals vacated and remanded the Commission’s order approving the merger in 2002,<sup>2</sup> and when—after two-and-a-half years of unexplained silence—the Commission at last set the remanded proceeding for hearing one year ago today on August 30, 2004. The 1935 Act

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<sup>1</sup> *American Electric Power Company, Inc. and Central and Southwest Corporation*, Holding Company Act Release No. 27186 (June 14, 2000).

<sup>2</sup> *National Rural Electric Cooperatives Association, et al, v. Securities and Exchange Commission*, 276 F.3d 609 (D.C. Cir. 2002).

was in effect when the hearing was held, when the Initial Decision was issued, and when appeals were filed to the Commission. Indeed, the 1935 Act is in effect as we write.

As the United States Supreme Court noted in a case decided this summer, where the underlying law had recently been changed but the new law was not retroactive (as the repeal of PUHCA is not), “the views of the 2005 Congress are not relevant to our interpretation of a text enacted by Congress in 19[35].” *Exxon Mobil Corporation v. Allapattah Services, Inc.*, 125 S.Ct. 2611 (2005). Indeed, not only is the 1935 Act still in effect, but it will continue in effect for six months after the New Act’s signing, or until February, 2006.

The New Act certainly moots any controversy over whether holding companies may merge under the PUHCA standards after February 2006, and it obviously reduces the precedential significance of any further rulings by the Commission about the meaning of the 1935 Act. But the New Act has no impact on the critical questions posed by AEP’s request for approval of its merger, which is whether the merger was lawful when it was consummated five years ago, whether it has been lawful between that time and the present, and whether it will be lawful for the next five months. This is an issue that will have continuing consequences even after the 1935 Act’s repeal becomes effective, because the 1935 Act provides that transactions committed in violation of its requirements are void. 15 U.S.C. § 79z. Nothing in the terms of the New Act purports to validate unlawful acts committed during the period when the 1935 Act was in effect.<sup>3</sup>

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<sup>3</sup> Indeed, the New Act expressly provides that it does not prohibit a person from continuing to engage in activities that were lawful or legally authorized under the 1935 Act as of the date of enactment of the New Act, but says nothing to suggest that it retroactively permits activities that were unlawful under the 1935 Act. *See* Energy Policy Act of 2005, § 1271.

Thus, the question of the lawfulness of AEP's already-consummated merger remains – and will remain – a live issue notwithstanding the prospective repeal of the 1935 Act.

In addition, the New Act provides new merger authority for the Federal Energy Regulatory Commission (FERC) intended to replace some of the existing consumer protections under PUHCA. *See* Section 1289, “Merger Review Reform.” These new authorities include the review of acquisitions of generating facilities, previously covered by PUHCA but not by the Federal Power Act. *See* Section 1289(a)(1)(D). In addition, FERC must find that an acquisition by a holding company will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless FERC determines that such transactions will be consistent with the public interest. *See* Section 1289(a)(4). Finally, FERC and State commissions are given authority to review the books and records of utility holding companies, in the absence of PUHCA, and FERC is given the authority to require holding companies to maintain certain records affecting jurisdictional rates. *See* Sections 1264 and 1265.

The New Act also provides that FERC's new merger authority, and FERC and state authority to review books and records of holding companies, will not become effective until six months after signing, at the same time as PUHCA is repealed, *see* Section 1289(b), and that the new FERC merger authority will not apply to any application under section 203 of the Federal Power Act (16 U.S.C. 832b) that was filed on or before the date of enactment of the New Act, *see* Section 1289(c). Clearly, the Congress did not intend for a pending merger application under the 1935 Act to escape review on behalf of consumers under both that act and New Act's provisions, which were

added to partially replace the consumer protections that are being repealed. Such a course would leave this particular merger, and perhaps only this merger, outside the consumer protections of either the 1935 Act or the 2005 Act.

The Commission clearly has the authority to enforce the 1935 Act as to this merger Application, submitted for approval in 1999 under that statute, and is obligated to do so since this merger will otherwise escape any consumer protection review at the holding company level under either PUHCA or the New Act.

### **CONCLUSION**

The Commission should continue with this proceeding by issuing an order setting new due dates for the remaining briefs.

Sincerely,

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August 30, 2005