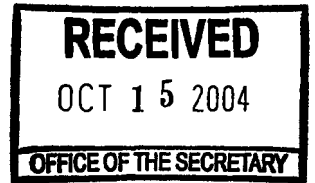


**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**



\_\_\_\_\_)  
In the Matter of )  
 )  
 )  
AMERICAN ELECTRIC POWER COMPANY, INC. ) Administrative Proceeding  
 ) File No. 3-11616  
 )  
\_\_\_\_\_)

**RESPONSE OF PUBLIC CITIZEN, INC.**  
**TO OBJECTION OF AMERICAN**  
**ELECTRIC POWER TO MOTION**  
**TO INTERVENE, AND REQUEST FOR ADMONISHMENT**  
**OF COUNSEL**

Pursuant to the ruling of Administrative Law Judge Robert Mahoney at the prehearing conference held in the above-captioned proceeding on October 4, 2004, and the SEC Rules of Practice and Procedure, 17 C.F.R. §201.210(b)(2004), Public Citizen, Inc. (“Public Citizen”), through undersigned counsel, hereby files this Response to Objection of American Electric Power to Motion to Intervene, and a Request for Admonishment of Counsel.

**I. REQUEST FOR ADMONISHMENT OF COUNSEL**

Public Citizen requests that the Presiding Administrative Law Judge (or the Commission, as appropriate) admonish counsel for American Electric Power Company (AEP) for citing precedent in its Objection to Public Citizen’s Motion to Intervene without advising the Presiding Administrative Law Judge that the Rules of Practice and Procedure on which the precedent is based have changed since the precedent was issued.

Indeed, the key provision on which Commissioner Campos relied in the *Enron* orders<sup>1</sup> cited by AEP in its objection (at pp. 3-6) has since been removed from the Commission's regulations governing interventions. (See SEC website at Rules of Practice.) Section 210(b)(1) no longer contains a proviso that "[n]o person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this rule would be inadequate for the protection of his or her interests." (see, cited *Enron* orders, p.2.)

Counsel for AEP nonetheless actually quotes the *Enron* orders on which it relies, without noting that the rules have changed, to the effect that:

"This assertion does not demonstrate, as *required by Commission Rule of Practice 210(b)(1)*, why leave to participate under Rule 210(c) would be inadequate." (emphasis supplied).

AEP Objection to Motion to Intervene of Public Citizen, Inc. at p. 4.

Obviously, the Commission would not have dropped this proviso from its Rules of Practice if it intended such a proviso to still apply. Thus it appears that counsel for AEP is either (1) playing fast and loose with precedent based on rules of practice that have changed, without so advising the Commission or the Presiding Judge, or (2) has not bothered to look at the current rules to determine that they have changed. Public Citizen believes that neither choice is acceptable legal practice before this Commission. Counsel for AEP is, at a minimum, wasting the time of the parties and the Presiding Administrative Law Judge with unsupported and frivolous objections or, at a maximum,

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<sup>1</sup> *Enron Corp., Order Denying Motions of FPL Group, Inc., Sither/Independence Power Partners, L.P., and the Electric Power Supply Association to Intervene But Authorizing Joint Participation on a Limited Basis* (Nov. 5, 2002); *Enron Corp. Order Denying Motion of Southern California Edison Company to Intervene But Authorizing Participation on a Limited Basis* (Nov. 5, 2002).

is attempting to mislead the Presiding Administrative Law Judge and wrongly prevent Public Citizen from intervening in this case.

While this behavior may not rise to the level of requiring sanctions pursuant to Rule 180, 17 C.F.R. §201.180, Public Citizen requests that the Presiding Administrative Law Judge (or the Commission, as appropriate) admonish counsel for AEP that such conduct contemptuous of the Commission's legal processes will not be tolerated in future proceedings in this matter.

## **II. RESPONSE TO OBJECTION TO MOTION TO INTERVENE**

Contrary to AEP's assertions, Public Citizen stated in its motion to intervene that it has more than 160,000 members nationwide, *including* more than 24,871 members in the states of Texas, Oklahoma, Indiana, Michigan, Ohio, Kentucky, West Virginia, Tennessee and Virginia. It is true that Public Citizen did not specifically point out that the named states are those in which AEP or CSW has operating utilities. Nonetheless, Public Citizen is happy to reiterate that it has more than 24,871 members in the above-named states, which are indeed states in which AEP or CSW has operating utilities with electric service territories, and that many of Public Citizen's members are retail electric customers of AEP or CSW and their affiliates. Although, theoretically, states such as Ohio and Texas have "retail choice," the vast majority of AEP's and CSW's retail customers are still served by AEP or CSW companies, respectively. (*See, for example, Attachment A regarding lack of customer switching in AEP company Ohio territories, and lack of competition to AEP in eastern Texas.*)

Even so, Public Citizen disagrees with AEP's characterization of the Rules of Practice as requiring that intervenors must show that they represent "actual consumers of the parties to the merger under consideration—not simply electricity consumers in general" or "actual security holders of either party to the merger under consideration—not simply security holders of utility stocks in general." AEP cites no support for such a limiting reading of the rules, which on their face contain no such limiting language, other than the precedent under the prior rules cited above. Public Citizen believes that not just its members in the AEP and CSW electric service territories, but *all* of its 160,000 members nationwide may be affected by the Commission's decision in this case. If the Commission should agree to read the geographic integration protections out of the Public Utility Holding Company Act as AEP urges it to do in this proceeding, then all of Public Citizen's members will suffer the loss of such statutory consumer and investor protections.

Dean Joel Seligman of Washington Law School, the unofficial historian of the Securities and Exchange Commission, has said that "[T]he SEC's geographic integration and simplification of the utility holding companies historically has been the agency's single most significant achievement...." Dean Seligman also concluded that "[T]he enforcement of Section 11 of the Holding Company Act was the most effective antitrust enforcement program in United States history...." Seligman, *The Transformation of Wall Street; A History of the Securities and Exchange Commission and Modern Corporate Finance*, Northeastern University Press, Boston, First Edition, p.247. Public Citizen believes that the SEC's "most significant achievement" should not be undone by the outcome of this case.

Similarly, if inadequate regulation under the Holding Company Act allows public utility holding companies to spread over the country in uneconomic and geographically widespread ways as they did prior to 1935, thereby avoiding effective state utility regulation as interstate holding companies, such companies are likely to suffer financial collapse. From 1929 to 1936 prior to PUHCA's enactment, 53 utility holding companies declared bankruptcy and 23 more defaulted on bank loans. We have already seen bankruptcies and the downgrading of credit ratings for companies owning generating plants exempted from PUHCA regulation in 1992. Indeed, large numbers of these exempt generating plants are being bought up by investment banks, an extremely ominous sign given the history that led to PUHCA's enactment. According to a July 29, 2004 Platts "Global Power Report," "financial players have come to 'dominate the space'" of the PUHCA-exempt generating business, with holdings reaching \$13 billion and 37 GW.

The harm from the Great Depression of the 1930s was both deepened and lengthened by the first collapse of utility holding companies pre-PUHCA. If there were a collapse of registered utility holding companies today similar to that in the 1930s—but resulting this time from inadequate *enforcement* of PUHCA--all of Public Citizen's members who have any investment in the stock market are likely to be seriously harmed.

### **Are Texas and Ohio in the Same Region of the Country?**

The chief subject of this hearing, in brief, is whether utilities in Texas and Ohio can be operated as a single utility system in the same "region" of the United States. Public Citizen believes that the reason the United States Court of Appeals went to the unusual (and probably expensive) length of publishing, as part of its decision remanding this case, a map of the United States on which the two utility systems are highlighted (*see*

Attachment B) is that the Court was emphasizing to the Commission that there is no commonsensical reason to claim that Texas and Ohio are in the same region of the country (since, as the court put it, “they are noncontiguous and seemingly dissimilar regions”... 276 F.2d 609 at 618.). However, as absurd as this idea is when viewed from the point of view of common sense, it is even more absurd from an electrical engineering viewpoint, since Texas is largely located within the ERCOT interconnection, which is electrically distinct from the rest of the United States, along with Alaska and Hawaii. For example, the ERCOT region is not subject to FERC’s jurisdiction under the Federal Power Act, unlike the rest of the United States, again with the exception of Alaska and Hawaii. For this reason, the testimony in this proceeding is likely to be highly technical.

**No Other Party Can Adequately Represent Retail Customers**

Unlike the Commission itself, which is on record as favoring “conditional repeal” of the Public Utility Holding Company Act of 1935--apparently in mistaken reliance on the ability of other statutes or agencies to protect electric consumers, or on a particularly naïve view of human nature<sup>2</sup>--Public Citizen believes that PUHCA remains one of the most vital and effective federal statutes in the land and continues to fight against its repeal. Certainly we believe that there is no other statute that could adequately protect electricity and retail gas consumers and investors from the abuses of utility holding

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<sup>2</sup> Chairman Levitt’s letter accompanying the Division of Investment Management’s report to Congress in June 1995, recommending conditional repeal of PUHCA, stated: “As a result of prudent administration of the Public Utility Holding Company Act, and the development of comprehensive federal securities regulation, the conduct that gave rise to [PUHCA] has all but disappeared.” This statement on June 20, 1995, preceded the fall of Enron, Arthur Anderson, WorldCom, criminal trials for Enron and Westar Energy executives, bankruptcies of Montana Power, NorthWestern Corp., Mirant, and other non-PUHCA regulated utilities, and release of trading tapes of Enron, Reliant Energy, and others gloating over electricity market manipulations. Indeed, AEP itself fired five natural-gas traders and is still contesting a proceeding before the Commodity Futures Trading Commission for allegedly attempting to manipulate natural-gas prices.

companies, including massive consolidation of utility ownership, if PUHCA is repealed either by Congress or administratively by this Commission.

Obviously, parties American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA) have both technical expertise and familiarity with the quite different merger standards of the Federal Power Act. Public Citizen is extremely grateful to them for successfully appealing the Commission's first order approving the AEP/CSW merger under PUHCA. However, the members of these two associations, while they are important wholesale electricity customers, they are also electricity sellers. In short, they are electric utilities, and their interests cannot always exactly coincide with those of retail electric consumers.

Therefore, no other party to this proceeding can adequately protect the consumer interests of Public Citizen's members, both those directly affected in AEP's and CSW's electric service territories as well as the interests of all of Public Citizen's members across the nation who will be affected by the enforcement or lack thereof of this critical consumer-protection statute.

AEP makes one final attempt to exclude Public Citizen from this proceeding by arguing that its posture in this matter is the same as that of a law firm seeking intervention in the *Enron* proceeding because it had clients that were exempt and/or registered public utility holding companies. Public Citizen believes that its role as a consumer advocacy organization representing its members as consumers under a statute designed to protect consumers bears no relation to the role of a law firm seeking intervention to further the interests of its regulated clients. AEP should be aware that the Public Utility Holding Company Act of 1935 was *not* enacted to protect utility holding

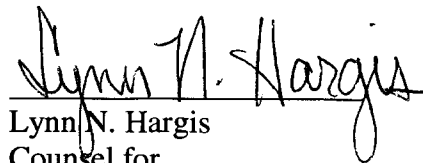
companies. It was enacted because the Federal Trade Commission found 101 volumes of abuses in its investigation of such utility holding companies, and the Congress found more abuses in its own investigations. Since we are already beginning to see such abuses reoccur where utility asset owners have been exempted from PUHCA regulation in recent years (see Footnote 2 and text above), the Holding Company Act's consumer protection provisions, including limiting the geographic spread of such holding companies, is needed now more than ever.

For the reasons discussed above, counsel for Public Citizen is happy to state specifically that Public Citizen's participation in this proceeding as a strong and interested proponent of adequate enforcement of the Public Utility Holding Company Act of 1935 will be in the public interest and for the protection of investors and consumers.

**Conclusion**

Accordingly, Public Citizen respectfully requests that the Commission, or the Presiding Administrative Law Judge, as appropriate, grant the Motion to Intervene of Public Citizen in this matter, and to admonish counsel for AEP as requested herein.

Respectfully submitted,



Lynn N. Hargis  
Counsel for  
Public Citizen, Inc.

Date: October 15, 2004

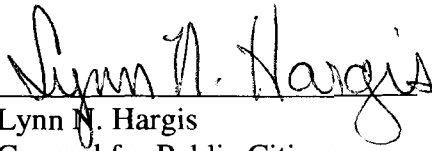
Attachments

Cc: Administrative Law Judge Robert G. Mahoney  
All Persons Identified in Attached Certificate of Service



CERTIFICATE OF SERVICE

I certify that on October 15, 2004, I caused the attached documents to be served by hand or by facsimile on the Presiding Administrative Law Judge and on the Division of Investment Management, and by facsimile and first class mail on the other addressees indicated below.

  
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Counsel for Public Citizen

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## 10-13: Officials seek to delay ET deregulation again

**Longview News Journal** By WES FERGUSON

Longview officials are leading an effort to delay electric deregulation in East Texas, warning that if it comes too soon, costs will rise and businesses will suffer.

Area cities united five years ago to push deregulation back to Jan. 1, 2007, and Longview officials recently have started meeting with their old allies in East Texas — as well as new ones in the Texas Panhandle and the South Plains — to push it back even further.

East Texas is not ready for deregulation, officials say. Besides, they add, the area already has some of the lowest electric rates in the state.

"There's no question about it in my mind that if we move toward deregulation in these regions, electric costs are going to go up, and the purpose of deregulation was to make prices more competitive so a person could shop around and get the best deal and drive the costs down," said Gilmer City Manager Ron Stephens, whose City Council voted Tuesday to participate in the effort.

"There's not but one way prices can go (with deregulation), and that's up."

Kilgore commissioners on Tuesday also rejoined the coalition, called Cities Advocating Reasonable Deregulation.

Legislators in 2003 delayed deregulation in the Panhandle and the South Plains until 2007, but they didn't include East Texas. When the CARD coalition, aided by then-Sen. Bill Ratliff, R-Mount Pleasant, and Rep. Bryan Hughes, R-Mineola, couldn't "piggyback" on that legislation, they got the Texas Public Utilities Commission to approve an administrative delay instead.

Two years earlier, a pilot program to attract competition to East Texas failed because no one filed to compete with the existing utility company, AEP/SWEPCO. Today, local officials say there's still no interest in vying for the region's electricity customers because the rates remain so low.

Longview City Attorney Jim Finley noted that Longview's electric rates are cheaper than Tyler's deregulated rates. He said deregulating would also put Longview at an economic disadvantage when competing with nearby cities in Arkansas and Louisiana, states where utilities have not been deregulated.

Longview's low rates have helped lure big manufacturers such as Dana Corp., said Hunter Hilburn, the business development director for the Longview Economic Development Corp.

"I wouldn't necessarily say that that's something companies were seeking out and they come upon us, but it's definitely a factor when they begin to compare communities one against the other," he said.

Finley, Longview City Manager Rickey Childers, and the city's outside counsel will travel to Amarillo on Nov. 19 to pitch the coalition to officials from West Texas cities. Finley said Amarillo, Canyon, Lubbock, Perryton and Seminole leaders have expressed interest in joining the coalition, and he also has sought support from Sen. Kevin Eltife, R-Tyler, and other elected officials.

"We've talked to local representatives to let them know that we're interested in keeping electricity deregulated, and they've been most helpful," Finley said.

Finley said it's too soon to know how much the efforts will cost the city of Longview. He said the coalition plans to retain Jim Boyle, the same Austin-based lobbyist and legal counsel who worked for the group in 2002 and 2003.

The Longview City Council soon will be presented a resolution formally rejoining the coalition, giving officials plenty of time to gear up for the 2005 legislative session.

"We're just beginning the process right now," Finley said.

# Attachment A, 2003

## Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales For the Month Ending June 30, 2004 (MWh)

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Monongahela Power Company	MON	30-Jun	2004	20097	17452	96201	133922
CRES Providers	MON	30-Jun	2004	0	0	0	0
Total Sales	MON	30-Jun	2004	20097	17452	96201	133922
EDU Share	MON	30-Jun	2004	100.00%	100.00%	100.00%	100.00%
<b>Electric Choice Sales Switch Rates</b>	<b>MON</b>	<b>30-Jun</b>	<b>2004</b>	<b>0.00%</b>	<b>0.00%</b>	<b>0.00%</b>	<b>0.00%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Edison Company	OEC	30-Jun	2004	458469	358035	642146	1473777
CRES Providers	OEC	30-Jun	2004	206978	267762	222268	697008
Total Sales	OEC	30-Jun	2004	665447	625797	864414	2170785
EDU Share	OEC	30-Jun	2004	68.90%	57.21%	74.29%	67.89%
<b>Electric Choice Sales Switch Rates</b>	<b>OEC</b>	<b>30-Jun</b>	<b>2004</b>	<b>31.10%</b>	<b>42.79%</b>	<b>25.71%</b>	<b>32.11%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Power Company	OP	30-Jun	2004	496109	480195	1260967	2242758
CRES Providers	OP	30-Jun	2004	0	0	0	0
Total Sales	OP	30-Jun	2004	496109	480195	1260967	2242758
EDU Share	OP	30-Jun	2004	100.00%	100.00%	100.00%	100.00%
<b>Electric Choice Sales Switch Rates</b>	<b>OP</b>	<b>30-Jun</b>	<b>2004</b>	<b>0.00%</b>	<b>0.00%</b>	<b>0.00%</b>	<b>0.00%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Toledo Edison Company	TE	30-Jun	2004	86183	109115	425289	627688
CRES Providers	TE	30-Jun	2004	79868	125113	15907	220888
Total Sales	TE	30-Jun	2004	166051	234228	441196	848576
EDU Share	TE	30-Jun	2004	51.90%	46.58%	96.39%	73.97%
<b>Electric Choice Sales Switch Rates</b>	<b>TE</b>	<b>30-Jun</b>	<b>2004</b>	<b>48.10%</b>	<b>53.42%</b>	<b>3.61%</b>	<b>26.03%</b>

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

## Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales For the Month Ending June 30, 2004 (MWh)

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Cleveland Electric Illuminating Company	CEI	30-Jun	2004	99438	191217	925689	1235879
CRES Providers	CEI	30-Jun	2004	288879	248942	134655	672476
Total Sales	CEI	30-Jun	2004	388317	440159	1060344	1908355
EDU Share	CEI	30-Jun	2004	25.61%	43.44%	87.30%	64.76%
<b>Electric Choice Sales Switch Rates</b>	<b>CEI</b>	<b>30-Jun</b>	<b>2004</b>	<b>74.39%</b>	<b>56.56%</b>	<b>12.70%</b>	<b>35.24%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Cincinnati Gas and Electric Company	CGE	30-Jun	2004	568657	391777	447034	1532782
CRES Providers	CGE	30-Jun	2004	32233	245294	84186	361713
Total Sales	CGE	30-Jun	2004	600890	637071	531220	1894495
EDU Share	CGE	30-Jun	2004	94.64%	61.50%	84.15%	80.91%
<b>Electric Choice Sales Switch Rates</b>	<b>CGE</b>	<b>30-Jun</b>	<b>2004</b>	<b>5.36%</b>	<b>38.50%</b>	<b>15.85%</b>	<b>19.09%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
→ Columbus Southern Power Company	CSP	30-Jun	2004	513696	633154	243769	1437999
CRES Providers	CSP	30-Jun	2004	0	46131	0	46131
Total Sales	CSP	30-Jun	2004	513696	679285	243769	1484130
EDU Share	CSP	30-Jun	2004	100.000%	93.209%	100.000%	96.892%
<b>Electric Choice Sales Switch Rates</b>	<b>CSP</b>	<b>30-Jun</b>	<b>2004</b>	<b>0.000%</b>	<b>6.791%</b>	<b>0.000%</b>	<b>3.108%</b>

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Dayton Power and Light Company	DPL	30-Jun	2004	396897	264417	135627	916993
CRES Providers	DPL	30-Jun	2004	0	57834	219702	283063
Total Sales	DPL	30-Jun	2004	396897	322251	355329	1200056
EDU Share	DPL	30-Jun	2004	100.00%	82.05%	38.17%	76.41%
<b>Electric Choice Sales Switch Rates</b>	<b>DPL</b>	<b>30-Jun</b>	<b>2004</b>	<b>0.00%</b>	<b>17.95%</b>	<b>61.83%</b>	<b>23.59%</b>

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio. Appropriate calculations made for other purposes may be based on different data, and may yield different results.

the same "region" as CSW's service territories in Arkansas, Louisiana, Oklahoma, and Texas, but we cannot find it in the record before us.

*Economies and Efficiencies*

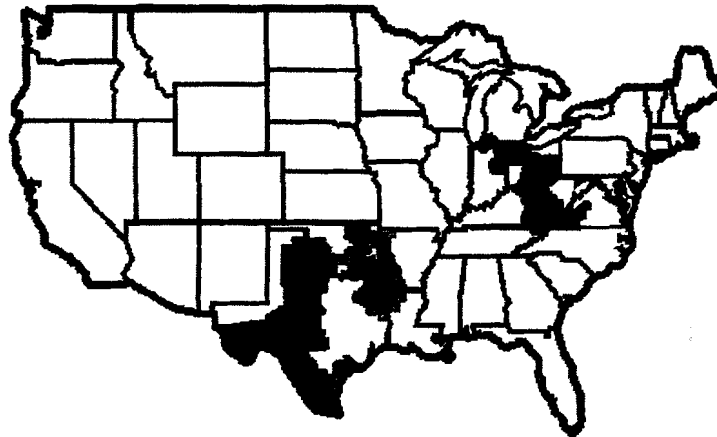
[6] This brings us finally to Petitioners' arguments regarding PUHCA's requirement that a holding company's acquisition of securities or utility assets of another holding or public utility company produce net "economies and efficiencies." According to Petitioners, the Commission erred in accepting AEP and CSW's projections that the proposed merger will produce approximately \$2.1 billion in cost savings. We disagree. We owe considerable deference to the Commission's assertion that it "reviewed the assumptions and methodologies that underlie" the projections and found them "reasonable and consistent with . . . precedent." Approval Order, 2000 SEC LEXIS 1227, at \*102. Moreover, Petitioners point to no evidence or expert testimony supporting

their assertion that the companies' calculations were flawed. Their unsupported claims that the projections are speculative and that the companies' FERC-mandated divestiture of generating capacity is neither economical nor efficient are insufficient to cast doubt on the Commission's contrary findings or even to raise a substantial question of fact warranting a hearing. *Cf. City of Holyoke Gas & Elec. Dep't v. SEC*, 972 F.2d 358, 365 (D.C. Cir. 1992) (noting that the Commission need only grant a hearing if "the ultimate decision will . . . be enhanced or assisted by the receipt of [additional] evidence," and that we review for abuse of discretion a Commission decision not to hold a hearing).

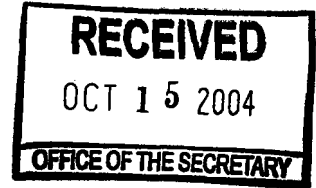
III.

The Commission's order is vacated and this matter is remanded for further proceedings consistent with this opinion.

*So ordered.*



**Appendix A:** Map of the United States showing the CSW service territories in parts of Arkansas, Louisiana, Oklahoma, and Texas, and the AEP service territories in parts of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia.



Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group  
Joan Claybrook, President

October 15, 2004

Secretary of the Commission  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

**Re: In the Matter of American Electric Power Company, Inc.,  
Administrative Proceeding No.3-11616**

Dear Secretary of the Commission:

Enclosed for filing are an original and three copies of Response of Public Citizen, Inc. to Objection of American Electric Power to Motion to Intervene, and Request for Admonishment of Counsel in the above-captioned proceeding.

Copies of this response and request have been served this day on persons listed on this matter's service list. A certificate of service listing those served is attached.

Two additional copies of the notice and motion are enclosed to be file-stamped and returned to me via our courier.

Respectfully submitted,

Lynn N. Hargis  
Counsel for Public Citizen, Inc.

Enclosures

Cc: Administrative Law Judge Robert G. Mahoney  
All Parties Identified in Attached Certificate of Service