

ACT

ADMINISTRATIVE PROCEEDING  
FILE NO. 3-11616

SECURITIES & EXCHANGE COMMISSION  
MAILED FOR SERVICE

DEC 28 2004

PERFORMANCE

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
December 22, 2004

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In the Matter of	:	
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AMERICAN ELECTRIC POWER	:	ORDER DENYING REQUEST
COMPANY, INC.	:	FOR RECONSIDERATION, FOR
	:	CERTIFICATION TO THE COMMISSION
	:	AND A STAY OF THE PROCEEDING

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On August 30, 2004, the Securities and Exchange Commission (Commission) ordered a hearing on remand in this matter (Remand Order), pursuant to Section 19 of the Public Utility Holding Company Act of 1935 (PUHCA) and in accordance with the Commission's Rules of Practice. See Am. Elec. Power Co., Holding Co. Act Release No. 27886. The hearing is scheduled to commence in Washington, D.C., on January 10, 2005. The Remand Order also provided that an initial decision be issued no later than 300 days from the date of service of the Remand Order.

**REQUEST FOR CERTIFICATION**

On October 22, 2004, Public Citizen, Inc. (Public Citizen), was granted leave to participate in this proceeding on a limited basis as a non-party participant, pursuant to Rule 210(c) of the Commission's Rules of Practice. On December 6, 2004, Public Citizen filed a Motion for Clarification or, Alternatively, Request to Intervene as Full Party (Motion for Clarification). By Order dated December 10, 2004 (December 10 Order), I denied Public Citizen's Motion for Clarification and declined to elevate its participation status in the proceeding from that of a non-party participant, under Rule 210(c), to that of a full party, under Rule 210(b). The December 10 Order also stated that cross examination of witnesses at the hearing would be reserved to the parties.

On December 14, 2004, Public Citizen filed a timely Request for Certification to Commission of Order Denying Public Citizen Full Party Status and Motion for Stay Pending Decision (Certification Request), pursuant to Rules 400 and 401 of the Commission's Rules of Practice. The Certification Request asks that I either: (i) reconsider my December 10 Order; or (ii) certify the December 10 Order to the Commission on an interlocutory basis and stay the proceeding pending the Commission's interlocutory review. On December 21, 2004, American Electric Power Company, Inc. (AEP), filed an opposition to the Certification Request (Opposition).

Petitions for interlocutory review are disfavored, and the Commission grants petitions to review an administrative law judge's ruling, prior to Commission consideration of the initial decision, only in "extraordinary circumstances." 17 C.F.R. § 201.400(a). Rule 400(c)(2) of the Commission's Rules of Practice permits an administrative law judge to certify a ruling to the Commission for interlocutory review. The administrative law judge, however, shall not certify a ruling to the Commission unless:

- (i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and
- (ii) an immediate review of the order may materially advance the completion of the proceeding.

17 C.F.R. § 201.400(c).

In applying Rule 400(c) to its Certification Request, Public Citizen states "that the denial of its rights to cross examine witnesses and to otherwise participate in this proceeding as a full party in interest, without explanation, is arbitrary and capricious, substantial and final, and that avoiding a possible court appeal regarding this controlling question of law as to Public Citizen's rights during the hearing may materially advance the completion of this proceeding." (Certification Request at 4.) It argues that interlocutory review of the December 10 Order is appropriate because the loss of its right to cross examine witnesses at the hearing "is a substantial denial of due process" and that an "appeal at the time of the initial decision will be too late." (*Id.*) Accordingly, it urges a stay of the proceeding pending Commission review.

AEP opposes the Certification Request because there is no controlling question of law and immediate review will not materially advance the completion of the proceeding. AEP asserts that Public Citizen "does not qualify for intervention as of right under Rule 210(b)(2)" of the Commission's Rules of Practice, and the undersigned "properly exercised his discretion" under Rule 210(b) to determine the scope of Public Citizen's participation in this proceeding. (Opposition at 1-2.) AEP argues that limitation of Public Citizen's participation was justified because it did not actively participate in the initial proceeding in this matter, declining to request even a hearing, and that Public Citizen has yet to offer a reason for "expanding its participation [now] in this second, narrower round of Commission Review," or even sufficiently state its interests in the matter. (Opposition at 2.) AEP, in concluding, states that granting the Certification Request and staying the proceeding will create unnecessary delay, which can only be attributed to Public Citizen's own inaction and its ambiguously drafted October 1, 2004, Notice of Appearance and Motion to Intervene.

## DISCUSSION

Public Citizen has failed to meet the basic standards set forth in Rule 400(c), as it has not convinced me that (1) the December 10 Order presents a controlling question of law as to which there is a substantial ground for a difference of opinion; and (2) immediate interlocutory review will materially advance the completion of the proceeding. Public Citizen states on

several occasions that my December 10 Order gave insufficient reasons for declining to elevate its participation status to a full party. In support of its position for full-party status under 210(b) of the Commission's Rules of Practice, Public Citizen repeatedly cites that the Commission recently changed its Rules of Practice regarding interventions, "no longer [requiring] in the rules that an applicant be denied party status unless limited party status is inadequate." (Certification Request at 3) (emphasis in original.) Public Citizen concludes that "[a]s a result of this change in the rules, precedent under the prior rules denying intervention as a party because limited participation was 'adequate' is clearly no longer relevant, and the Commission clearly intends by the change in the rules that party intervention should be ready [sic] more liberally now than under the old rules." (Motion for Clarification at 2.)

Notwithstanding the change to certain preliminary language in Rule 210, the use of the permissive auxiliary verb "may" in both Section 19 of PUHCA and current Rule 210(b)(1) grants the administrative law judge the authority to admit parties within his or her discretion:

In any proceeding before the Commission, the Commission, in accordance with such rules and regulations as it may prescribe, shall admit as party any interested State, State commission, State securities commission, municipality, or other political subdivision of a State, and may admit as a party any representative of interested consumers or security holders, or any other person whose participation in the proceedings may be in the public interest or for the protection of investors or consumers.

Section 19 of PUHCA (emphasis added).

- (i) in a proceeding under PUHCA, any representative of interested consumers or security holders, or any person whose participation in the proceeding may be in the public interest or for the protection of investors or consumers, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

17 C.F.R. § 201.210(b)(1)(i) (emphasis added).

Public Citizen has not cited to any Commission comment, interpretative release, proposed rule, opinion, or other controlling precedent that explicitly supports its position that Rule 210(b) should be more liberally construed.<sup>1</sup> As it stands, Public Citizen's interpretation would effectively make Rule 210(b), together with PUHCA Section 19, an automatic admission for third parties, and would abandon the permissive construction of the governing statute and Commission Rule -- a permissive construction that did not change with the recent amendments to the Rules of Practice. Because Public Citizen clearly falls within the latter

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<sup>1</sup> No specific reason for Rule 210(b)'s change was cited in the recent amendments to the Commission's Rules of Practice. 82 SEC Docket 1744, 1755 (Mar. 19, 2004).

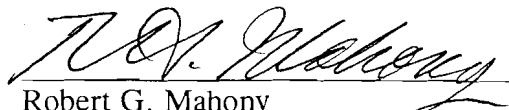
group of discretionary parties described in Section 19 of PUHCA, there is no controlling question of law that warrants certification of the December 10 Order.

Within my discretion under Rules 111 and 210(b) and PUHCA Section 19, I allowed Public Citizen on October 22 to participate in this proceeding on a limited basis as a non-party participant, as it had requested and over the objection of AEP. After the October 22 Order, Public Citizen chose to wait more than six weeks from the date of that Order to December 6 to notify this Office in a three-and-a-half page motion that its counsel had originally “intended, but apparently failed, to move [on October 22] for Public Citizen to intervene as a full party.” (Motion for Clarification at 1.) During this six-week period, a prehearing technical conference was held and several party submissions were made, including position statements, witness lists, documents to be introduced at the hearing, and information regarding persons to be called as expert witnesses. Public Citizen participated in these procedural matters as a non-party but remained silent throughout while knowing that it “intended” to intervene as a full party. Within my discretion under the applicable statutes, I then declined, under the circumstances, to elevate Public Citizen’s status to that of a full party.<sup>2</sup>

Further, I also deny the Certification Request and request for stay because it is clear that an immediate review of the December 10 Order will not materially advance the completion of this proceeding. Public Citizen is not among the compulsory parties discussed specifically in PUHCA Section 19. In the initial proceeding in this matter, its participation was on a limited basis and only consisted of joining in a submission opposing the AEP merger. See AEP, 72 SEC Docket 1931, 1941-42 & n.17 (June 14, 2000). Now on remand, Public Citizen has been admitted as a non-party participant, as of October 22. Pursuant to the October 22 Order, Public Citizen has been allowed to submit filings for my consideration and will be afforded an opportunity to participate in a limited capacity at the hearing. Such participation will include submissions of briefs and exhibits, and the proffering of testimony germane to the issues. Immediate interlocutory review by the Commission, thus, is not necessary and will not materially advance the completion of this proceeding.

### RULING

Based on the foregoing, Public Citizen’s Certification Request, including requests for reconsideration and a stay of the proceeding, is hereby DENIED.

  
Robert G. Mahony  
Administrative Law Judge

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<sup>2</sup> Additional authority that allows for limitations on party and non-party participation in cross examination may be found in Commission Rule 210(f), applying to all Rule 210 parties, and Commission Rule 326, regarding an administrative law judge’s authority to determine scope of cross examination, if any. 17 C.F.R. §§ 201.210(f), 326.