

ACS

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11616

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
December 14, 2004

In the Matter of	:	
	:	
AMERICAN ELECTRIC POWER	:	ORDER DENYING REQUEST
COMPANY, INC.	:	FOR SUBPOENAS
	:	

On August 30, 2004, the Securities and Exchange Commission (Commission) ordered a hearing on remand (Remand Order) in this matter. See Am. Elec. Power Co., Holding Co. Act Release No. 27886. 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.

Public Citizen submitted a request on December 10, 2004, for subpoenas (Subpoena Request), pursuant to Rule 232 of the Commission's Rules of Practice. Therein, Public Citizen requests the undersigned to issue two subpoenas: (1) directing the Commission's Division of Investment Management (Investment Management) to produce a witness to testify whether Investment Management has access to any in-house electrical engineering or other utility system professionals, who serve as Commission experts on matters of utility operations for purposes of evaluating proposed mergers or acquisitions under Section 11 of the Public Utility Holding Company Act of 1935 (PUHCA) and; (2) directing Investment Management to produce a witness to testify as to whether it has access to any in-house experts on actual utility practices under programs of the Federal Energy Regulatory Commission (FERC) for purposes of evaluating how FERC's programs may affect requested mergers or acquisitions under Section 11 of PUHCA. (Subpoena Request at 1-2.)

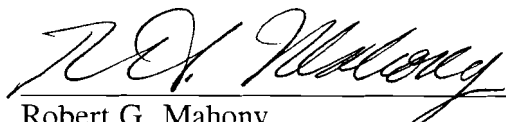
In seeking such subpoenas, Public Citizen wishes to establish for the record the basis for the recommendations of Investment Management to the Commission on matters calling for technical or utility expertise or expert knowledge of FERC programs and initiatives in this proceeding. Public Citizen suggests that one of the trial counsel, or in the alternative, "the Executive Director of the Commission" appear to testify to such matters. (Subpoena Request at 2.) According to Public Citizen, its core concern is that Investment Management "appear[s] to be giving advice to the Presiding Administrative Law Judge of an impliedly expert technical and regulatory nature regarding the operation of utility systems and of the programs of FERC." (Letter of Public Citizen, Dec. 7, 2004.)

Attached to the Subpoena Request is correspondence between Arthur S. Lowry of the Division of Enforcement, trial counsel for Investment Management, and Public Citizen, in which Investment Management sets forth the bases for its refusal to proffer the requested witnesses without a subpoena. Investment Management cites several grounds for its refusal including attorney-client privilege, governmental deliberative process privilege, work-product doctrine, and the general prohibition against deposing opposing counsel as a means of circumventing the evidentiary process. (Letter of Investment Management, Dec. 6, 2004.)

Further, in response to Public Citizen's contention that Investment Management may be unqualified to advise the Commission on certain technical matters, counsel for Investment Management states unequivocally that "the [Investment Management] and its staff will not be involved in advising the Commission as to its final decision in this matter. . . . Rather, in accordance with Rule 121 [of the Commission's Rules of Practice], [Investment Management's] involvement is limited to that of a 'witness or counsel in the proceeding.'"(Letter of Investment Management, Dec. 9, 2004.)

Pursuant to Rules 121 and 232(b) of the Commission's Rules of Practice, Public Citizen's Subpoena Request is hereby DENIED. Rule 121 of the Commission's Rules of Practice states clearly that "[a]ny Commission officer, employee, or agent engaged in the performance of investigative or prosecutorial functions for the Commission in a proceeding. . . may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Commission review of the decision." 17 C.F.R. § 201.121 (emphasis added).

SO ORDERED.


Robert G. Mahony
Administrative Law Judge