STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 13th day of May, 2008.

In the Matter of an Investigation into Whether Ratepayers are being Held Harmless from the Taum Sauk Disaster	)))	**Case No. ER-2008-0015**
In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service	)))	**Case No. ER-2008-0318** Tariff Nos. YE-2008-0605

ORDER GRANTING THE OFFICE OF THE PUBLIC COUNSEL'S MOTION TO OPEN CASE AND GRANTING THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION'S MOTION TO CONSOLIDATE

Issue Date: May 14, 2008 Effective Date: May 24, 2008

Background

On July 12, 2007,[1] the Office of the Public Counsel ("Public Counsel") filed its "Motion to Open a New Case to Investigate Whether Ratepayers are being Held Harmless from the Taum Sauk Disaster." In the motion, Public Counsel states:

> In Case No. ER-2007-0002, the recently-concluded Union Electric Company rate case, the Commission stated that it will "direct its Staff to investigate whether ratepayers are being held harmless from the Taum Sauk disaster, especially with regard to lost regulatory capacity sales." (ER-2007-0002 Report and Order, issued May 22, 2007; page 118)
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> To insure that this important issue is timely addressed, and to allow other interested entities to participate, the Commission should open a case. A

[1] All dates throughout this order refer to the year 2007 unless otherwise noted.

> formal case will allow interested entities to intervene, and will provide a forum for the parties to discuss issues and procedural matters.

Public Counsel further stated that the purpose of this case would be different in scope and purpose than the Commission's then ongoing investigation case concerning Union Electric Company d/b/a AmerenUE's ("AmerenUE") operation and management of the Taum Sauk Pumped Storage Project, Case No. ES-2007-0474. Public Counsel asserts that an additional formal case will also provide the Commission's Staff a vehicle to make the results of its current investigation public.

For clarity, Public Counsel's motion, by its own language, is not requesting an investigation into any subject matter other than the subject matter the Commission has already directed its Staff to investigate in Case No. ER-2007-0002. In fact, Public Counsel directly quotes from the Commission's May 22, 2007 order in that case to delineate the scope of the investigation it seeks. Public Counsel's motion merely requests an additional forum for the investigation already authorized by the Commission.

On July 16, the Commission observed that completion of its scheduled hearing in its Taum Sauk investigation case, ES-2007-0474, would aid the Commission in its decision as to whether it should open another case into this matter. On that date the Commission established a thirty-day deadline for all interested entities to respond to Public Counsel's motion. That deadline was August 16. The investigation case, however, exceeded its original procedural schedule and the Commission issued a second notice and extended the date for filing responses until August 31.[2] On August 31, the Staff of the Missouri Public

[2] The Commission convened an evidentiary hearing on July 24, 2007, which continued on July 25, August 1, 2, 3, 13, 14, 16, and 17. The Commission heard the testimony of 13 witnesses and received 60 exhibits into evidence. See *Staff's Initial Incident Report*, Case Number ES-2007-0474, filed October 24, 2007.

Service Commission filed a response to Public Counsel's motion, and the State of Missouri filed an application to intervene in this matter.

Staff's response primarily focused on the fact that the Commission had already authorized an investigation into this very matter and how the Commission built safeguards in its decision in AmerenUE's last rate case to ensure that the rate-payers would be held harmless. In its May 22 Report and Order in Case No. ER-2007-0002, the Commission stated:

Taum Sauk Regulatory Capacity

Discussion:
Public Counsel has attempted to raise one additional issue. In the Revised True-Up Reconciliation filed on April 19, 2007, Public Counsel for the first time proposed a $10,320,000 reduction to AmerenUE's revenue requirement for what Public Counsel called "Taum Sauk Hold Harmless – Capacity Sales. In a single paragraph at the end of its posthearing brief, Public Counsel asserted this issue arose for the first time at the hearing, when the parties allegedly learned AmerenUE's commitment to hold ratepayers harmless with respect to the failed Taum Sauk plant did not account for the potential sale of regulatory capacity associated with that plant. The brief indicates: "Public Counsel calculated a value for that capacity using UE's value for regulatory capacity of $2.00/kw month, and a capacity value for Taum Sauk of 430 MWs."

AmerenUE filed its brief the day before on April 20, so it could not respond to Public Counsel's newly raised issue in that brief, although it did manage to insert a footnote reacting to the inclusion of new adjustment in the reconciliation. No reply briefs were scheduled; so in order to allow AmerenUE and the other parties an opportunity to respond, the Commission issued an order on May 4 directing any party wishing to offer additional arguments regarding the Taum Sauk Regulatory Capacity issue do so no later than 12:00 Noon on May 9.

AmerenUE filed a response on May 9, including a motion to strike the portions of Public Counsel's brief dealing with this matter. The State also filed a response on May 9 supporting Public Counsel's position. Public Counsel did not file any further argument on May 9, but on May 17, it filed a reply to AmerenUE's response, again arguing for an adjustment relating to the capacity question. AmerenUE responded later on May 17 with a motion to

strike Public Counsel's response. Public Counsel filed a response to that motion on May 18, and AmerenUE replied to Public Counsel's response on May 18.

AmerenUE contends Public Counsel's newly proposed adjustment is far out-of-time and violates the Commission's rules and its procedural order for this case. The Commission agrees. Public Counsel's proposed adjustment regarding sales of regulatory capacity should ordinarily have been raised as part of its case in chief in its direct testimony filed in December 2006. However, Public Counsel argues that it did not learn that AmerenUE is making capacity sales until the hearing.

Commission rule 4 CSR 240-2.130((8) provides in part: "A party shall not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing." But AmerenUE disputes Public Counsel's assertion that these matters first arose during the hearing, contending Public Counsel could have been aware of the facts needed to raise this issue months before the hearing.

AmerenUE also disputes the factual basis for the numbers Public Counsel uses to support the calculation of its proposed $10 million adjustment. Public Counsel's calculation assumes regulatory capacity from the Taum Sauk plant could have been sold for $2.00 per kW month, a value appropriated from the price included in AmerenUE's proposed industrial demand response program, the Rider IDR discussed earlier in this Report and Order. It also assumes the entire capacity of the Taum Sauk plant would have been available for sale for the entire year, another fact for which there is no supporting evidence in the record.

At this point, very late in this proceeding, it is far too late for the Commission to gather the evidence needed to make any findings of fact or conclusions of law regarding these questions. If Public Counsel had actually raised this issue at the hearing when it says it first became aware of the issue, the Commission might have been willing to allow Public Counsel, AmerenUE, and the other parties a reasonable opportunity to present additional evidence on that question, as indicated in the Commission's procedural rule. It might even have been possible to schedule an additional day of hearings to consider that issue. But instead, Public Counsel waited until it filed its brief, over 20 days after hearing ended and the evidentiary record closed, to spring this issue on the Commission and the other parties.

As the Commission indicated earlier in this order when discussing the Safety Net proposal offered by the Missouri Consumers Council, any decision by this Commission must be supported by competent and substantial evidence on the record as a whole. There is insufficient competent and substantial

> evidence in this record to support Public Counsel's proposed adjustment. The Commission cannot just assume that evidence into existence without giving AmerenUE and the other parties an opportunity to rebut that evidence. To do so would deny AmerenUE, and the other parties, their constitutionally protected due process rights and would likely lead a reviewing court to reverse this Report and Order. The Commission cannot make the Taum Sauk regulatory capacity adjustment proposed by Public Counsel.
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> AmerenUE has made a commitment to hold the public harmless from the effects of the Taum Sauk disaster, and the Commission intends to hold it to that commitment. Based on Public Counsel's allegations, it appears AmerenUE could be making additional sales of regulatory capacity if not for the loss of Taum Sauk's capacity. Unfortunately there is no way, based on the record in this case, to calculate the amount of adjustment that should be made to AmerenUE's income to account for that loss of capacity.
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> **While the Commission cannot make that adjustment in this case because of insufficient evidence in the record, it will direct its Staff to investigate whether ratepayers are being held harmless from the Taum Sauk disaster, especially with regard to lost regulatory capacity sales. If Staff finds that such regulatory capacity sales have been lost, it shall propose an appropriate adjustment in AmerenUE's next rate case or other action as it believes appropriate.**[3]

On September 10, Public Counsel filed a response to Staff's August 31 response. Public Counsel, *inter alia*, seized on Staff's reference to having been engaged in other matters before the Commission to question Staff's commitment to comply with the Commission's May 22 Report and Order. Public Counsel emphasized that the reason it made its request to open this case was to ensure the investigation proceeded in a timely manner and that opening this new case would provide Public Counsel and other interested parties a vehicle in which to participate.

On September 28, after having secured an extension of time to respond, Staff filed a response to Public Counsel's September 10 response. Staff stated that it conferred with

Public Counsel and that Staff has a better understanding of Public Counsel's position and Public Counsel has a better understanding respecting the timeframe for Staff's investigation. Staff further asserts that Public Counsel is amenable to Staff's schedule for the investigation. Public Counsel did not file a responsive pleading to Staff's September 28 filing.

Staff's Incident Report in Case Number ES-2007-0474

On October 24, Staff filed its Initial Incident Report in Case Number ES-2007-0474; a docket specifically opened by the Commission when the Commission granted Staff's motion for the purpose of investigating the incident that occurred at Taum Sauk on the night of December 14-15, 2005, in Reynolds County, Missouri.[4] Staff made a number of recommendations as a result of its findings including:

> 1. That any and all costs, direct and indirect, associated with the Taum Sauk incident be excluded from rates on an ongoing basis. This includes, but is not limited to, the exclusion of rebuilding costs and treating the facility as though its capacity is available for dispatch modeling.
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> 2. That appropriate accounting treatment be given to the monies expended to rebuild the Taum Sauk plant in order to protect the interests of Missouri ratepayers.
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> 3. That UE shall submit to Staff, on an ongoing basis, its accounting treatment for all transactions relating to the reconstruction of the Taum Sauk plant.

The Commission allowed interested parties to file responses to Staff's Initial Incident Report, and on November 7, Public Counsel and AmerenUE filed responses. On

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[3] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariff Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, Case No. ER-2007-0002. The Commission notes that this is the exact language quoted by Public Counsel in its current motion.

[4] See *Order Granting Staff's Motion to Open Case but Denying Staff's Request to Open Contested Case*, Case No. ES-2007-0474, Effective June 19, 2007.

December 6, the Commission formally received Staff's report and its recommendations. In its order receiving the Incident Report the Commission observed:

> On November 7, 2007, AmerenUE filed its response to the Staff Incident Report in which it noted that it had already taken the following steps to address the issues that contributed to the Taum Sauk failure:
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> a. Established a dam safety group that has the responsibility for, among other things, design review, procedure development, training, and facility inspections. It also has the authority to shut a facility down if it believes the facility is being operated unsafely.
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> b. Developed and implemented a quality management system, which provides training on design basis and takes into account procedure development. This system applies to all of AmerenUE's fossil and hydro units.
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> c. Changed and updated its operating procedures, and issued directives that reiterate that AmerenUE's philosophy is that employees should take a conservative approach and always favor making the safe decision.
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> d. Put in place procedures and review systems to ensure that if the Taum Sauk facility is rebuilt it is done safely and pursuant to industry standards.
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> e. Cooperated fully in all investigations into the Taum Sauk breach event, and taken responsibility for the effects of the breach.
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> f. Reached settlement with the family injured during the failure in less than 90 days after the event.
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> g. Spent more than $48 million to date for restoration of Johnson's Shut-Ins State Park and the Black River.
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> h. Paid a $10 million fine to the FERC and set aside an additional $5 million for projects to enhance the area around Taum Sauk.
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> i. Voluntarily removed the effects of the Taum Sauk breach, the lack of generation from Taum Sauk, and the costs associated with the Taum Sauk investigations, clean-up, and settlements from its most recent rate case (Case No. ER-2007-0002), long before this proceeding was instituted, so that they do not impact customers.
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> j. Performed a risk analysis of all of AmerenUE's generating plants to identify potential risks. [transcript citations omitted]

With regard to Staff's three recommendations addressing the issue of holding AmerenUE's rate-payers harmless for the Taum Salk incident, AmerenUE stated:

> [1.] AmerenUE has already committed to protecting its customers from bearing the costs of the Taum Sauk failure. To that end, in its most recent rate case, AmerenUE excluded from its revenue requirement the costs of investigating the failure, the costs the Company incurred for the clean-up at Taum Sauk, the costs of compensating parties adversely affected by the failure (including, for example, compensation paid to the family that was injured during the failure and the $48 million paid—so far—to restore Johnson's Shut-Ins State Park), and the cost of the fine paid to the FERC related to the failure. In addition, in setting rates the Company modeled its system as though the Taum Sauk plant continued to operate in order to give customers the full benefit of the plant and the economic power it could generate during peak periods.
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> [2.] AmerenUE agrees that it will give appropriate accounting treatment to such monies.
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> [3.] AmerenUE agrees with this recommendation, but believes that "on an ongoing basis" is vague. The Company agrees to submit its accounting treatment to the Staff on a semi-annual basis.
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> * * *

In its order receiving the Staff's Initial Incident Report, the Commission concluded by stating:

> The Commission notes the reasonableness of most of Staff's recommendations and notes that AmerenUE has voluntarily agreed to implement almost all of them. Having served its purposes of providing a means for the Staff to conduct an investigation and submit an incident report, and for AmerenUE to provide such information as the Commission required and respond to the incident report, this docket may be closed.

December 20, 2007 Public Agenda Meeting

On December 20, the Commission held a public agenda meeting, at which Public Counsel's motion was discussed. The Commissioners decided that because Staff still had an ongoing investigation, which Staff envisioned would extend into the first quarter of 2008, and because Staff had represented that Public Counsel was amenable to Staff's time-table

for proceeding with the investigation authorized in ER-2007-0002, the Commission should direct Staff to file status reports and address Public Counsel's motion at a later date. The Commission also noted, as was noted previously in this order, that Public Counsel had not filed any pleading with the Commission contesting Staff's representation that Public Counsel was satisfied with Staff's timetable for the progression of its investigation. The Commission directed its Staff to file periodic status reports on the progress of its investigation with the final report due on April 16, 2008. After the Commission granted an extension of time, Staff filed its report on April 23, 2008.

Staff's April 23, 2008 Status Report and Motion to Consolidate

In its April 23, 2008 report, Staff noted that AmerenUE recently filed a general rate increase case, ER-2008-0318, the very vehicle for the investigation that the Commission had, in fact, originally envisioned for ensuring that AmerenUE ratepayers were being held harmless from the Taum Sauk disaster.[5] Consequently, Staff filed a Motion to Consolidate Public Counsel's request for an additional investigation with the recently filed rate case, i.e. Case No. ER-2008-0318. Staff asserts that: "The consolidation of the instant investigation with Case No. ER-2008-0318 will promote the efficient use of resources, prejudice no party, and will position both cases so that the parties and the Commission may seek to render effective and meaningful relief." On May 5, 2008, Public Counsel filed a pleading stated that it concurred with Staff's motion to consolidate.

However, the Commission notes that is has not yet granted Public Counsel's motion to open a case for an additional investigation, **and as such there is no case to be**

[5] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariff Increasing Rates for Electric Service Provide to Customers in the Company's Missouri Service Area*, Case No. ER-2007-0002.

consolidated with ER-2008-0318. Assigning a case number to a docket entry, or to a filing or pleading, is a purely ministerial act, indeed, "[a] court, [and an administrative agency], must have some mechanism to track cases for administrative purposes."[6] The assignment of Case No. ER-2008-0015 to Public Counsel's motion did not, in and of itself, open a case, but rather was a purely ministerial act of the clerk in the Commission's Data Center.[7]

A motion is not self-executing; it requires judicial action or a judicial ruling.[8] To execute the relief that is requested in a motion requires a judicial act, or in the case of the Commission a quasi-judicial act.[9] Consequently, the filing of a motion requesting that the

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[6] *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 223 (Mo. App. 2001).

[7] "A ministerial act is defined as 'one which a public officer is required to perform upon a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.'" *State ex rel. Killingsworth v. George*, 168 S.W.3d 621, 623 (Mo. App. 2005); *State ex rel. Morris Bldg. & Inv. Co. v. Brown*, 72 S.W.2d 859, 862 (Mo. App. 1934), citing to, *State ex rel. v. Meier*, 45 S. W. 306, 308 (Mo. 1898); *State ex rel. v. Cook*, 73 S. W. 489, 491-494 (Mo. 1903). In contrast, "[a] discretionary act is one requiring the exercise of reason in determining how or whether the act should be done." *Id*. And more specific to the issue in ER-2008-0015: "There is no question but that ministerial, as distinguished from judicial, acts may be performed by the clerk." *Morris Bldg.*, 72 S.W.2d at 862. See also 11 C. J. pp. 886, 887; *Carter v. Louisiana Purchase Exposition Co*., 102 S. W. 6 (Mo. App. 1907); *Cabanne v. Spaulding*, 14 Mo. App. 312, 313, 314, 1883 WL 9728 (Mo. App. 1883); *Norton v. Griffin*, 286 S. W. 144 (Mo App. 1926); *Huff v. Shepard*, 58 Mo. 242, 245, 1874 WL 8297 (Mo. 1874); *State ex rel. v. Sheppard*, 91 S. W. 477 (Mo. 1905).

Whether a certain act is ministerial or judicial depends upon the nature and character of the act itself and upon the things necessarily involved therein rather than upon what the applicant may claim for the act. *State ex rel. Howe v. Hughes*, 123 S.W.2d 105, 111-112 (Mo. 1938). Ministerial acts include the power to make records and transcripts of proceedings, and the certification of the transcripts. *State ex rel. Morris Bldg. & Inv. Co. v. Brown*, 72 S.W.2d 859, 862 (Mo. App. 1934). To further illustrate, the general rule is that "the deposit or lodgment of the instrument for filing, in the proper office and its acceptance for that purpose by the proper officer constitutes a filing within the meaning of the law." *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 54 (Mo. banc 1981). However, stamping a docket with the filing date and time is purely a ministerial act, and does not actually constitute the filing of the document, and is not even conclusive as to the actual date and time the document was filed. *Id*. File-stamping a document does not equate with making a judicial ruling on the contents of the document or the relief requested in the document.

[8] *State v. Perry,* 954 S.W.2d 554, 564 (Mo. App. 1997); *Hall v. State*, 806 S.W.2d 429, 430 -431 (Mo. App. 1991).

[9] "The rendition of a judgment is the judicial act of the court, whereas the entry of a judgment by the clerk on the records of the court is a ministerial, and not a judicial, act." *Stoddard v. Stoddard*, 549 S.W.2d 354, 355 (Mo. App. 1977); *State ex rel. M. J. Gorzik Corp. v. Mosman*, 315 S.W.2d 209, 211 (Mo. 1958). "To say

Commission open a case, and the assignment of a case number or docket number to that motion for purposes of creating a means to track associated filings, does not open a case or create a case. To hold otherwise would mean that the clerk in the Data Center, while performing the purely ministerial act of assigning a docket number to a motion, had the power to rule upon and execute the motion independently from the Commissioners. For that to be true, the Commissioners would have to concede that they delegated their quasi-judicial power to the clerks to allow them to rule on the motion.

Decision

The Commission has already established a vehicle for any interested party to pursue any appropriate remedy concerning this matter should one be required, namely AmerenUE's on-going rate case, and the Commission sees little distinction between granting the pending motions and simply addressing the issue in Case No. ER-2008-0318. However, in the event that any possibility exists that the issue involving capacity sales may, not be captured in the test year for Case No. ER-2008-0318, the Commission will grant Public Counsel's motion to open a case, and will consolidate that action, per Staff's unopposed request, with the current rate case. Should it be determined that the Commission is unable to adequately address the issue of capacity sales in the current rate

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otherwise would be to hold, in effect, that the clerk, a mere ministerial officer, by misprision or mistake, could exercise judicial functions, and thereby obstruct and pervert the proper and orderly administration of justice." *State v. Phillips*, 186 S.W. 559, 560 (Mo. App. 1916). The entry of the judgment upon the record is a mere ministerial act evidencing the judicial act, but not essential to its validity, or giving to the judgment any additional force or efficacy. *Pelz v. Bollinger*, 79 S.W. 146, 147 (Mo. 1904). "The writing up of the docket is a ministerial act, not a judicial one." *Loth v. Faconesowich*, 1886 WL 5090, *1 (Mo. App. 1886); citing to, *Morse v. Brownfield,* 27 Mo. 224; *Cabanne v. Spalding,* 14 Mo. App. 312; *Slemman v. Carey,* 57 Mo. 222; *Jones v. Hart,* 60 Mo. 351.

case, the Commission may, at a future date, sever the two cases so that capacity sales may be treated separately.

IT IS ORDERED THAT:

1. The Office of the Public Counsel's July 12, 2007, "Motion to Open a New Case to Investigate Whether Ratepayers are being held Harmless from the Taum Sauk Disaster" is granted. The docket number assigned to this motion shall be the assigned case number for this now active case, i.e. ER-2008-0015.

2. The Staff of the Missouri Public Service Commission's April 23, 2008 Motion to Consolidate Cases ER-2008-0015 and ER-2008-0318 is granted.

3. Case No. ER-2008-0318 is designated as the lead case.

4. This order shall become effective on May 24, 2008.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur

Stearley, Regulatory Law Judge