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July 26, 2001

VIA FEDERAL EXPRESS

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, MO 65101

Re: MPSC Case No. EC-2002-1

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter, please find an original and eight (8) copies of its **Response of Union Electric Company to Staff's Reply to UE's Proposed Procedural Schedule and to Public Counsel's Motion in Support of the Commission Staff's Proposed Procedural Schedule.**

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,

James J. Cook
Managing Associate General Counsel

JJC/mlh
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. EC-2002-1
	)	
Union Electric Company, d/b/a AmerenUE,	)	
	)	
Respondent.	)	

RESPONSE OF UNION ELECTRIC COMPANY TO STAFF'S REPLY TO UE'S PROPOSED PROCEDURAL SCHEDULE AND TO PUBLIC COUNSEL'S MOTION IN SUPPORT OF THE COMMISSION STAFF'S PROPOSED PROCEDURAL SCHEDULE

Union Electric Company, d/b/a AmerenUE ("UE") respectfully submits this response to the Staff's Reply to UE's Proposed Procedural Schedule and to Public Counsel's Motion in Support of the Commission Staff's Proposed Procedural Schedule ("OPC Motion"). In contrast to the many close technical questions that this Commission must consider, no unusual expertise, save a basic sense of justice untainted by a stake in these proceedings, is needed to appreciate the basic procedural fairness that we seek through our proposed procedural schedule. The key difference between UE's and the Staff's proposals is that we would have the hearing in this case approximately three months later than the Staff's proposal, due mainly to the needs of discovery. The Staff's Reply to our proposal, along with Public Counsel's support for the Staff, fall far short of explaining in practical terms why this period, for the reasons we have offered, is unreasonable or does not offer fair treatment to all the parties, as we point out below.

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1. It would seem to us that any procedural schedule for these proceedings cannot, by any measure of due process, be premised on some predetermined result of those proceedings. Nevertheless, the Staff grounds its opposition to our proposal on the notion that time is a wasting because there are "unjust and unreasonable rates currently in effect," Staff Reply at 3, and that "[c]learly UE is enjoying excess earnings." *Id.* at 10. Similarly, Public Counsel claims that "the issues in this case will focus on *how much* Company's rates should be reduced, not *if* they should be reduced at this time. OPC Motion at 1-2. Of course, *proving* that UE is receiving "excess earnings" is what these proceedings are all about, and, equally obviously, the task of proving that conclusion is the particular burden of the Complainant, and its supporters.

This burden has not been satisfied in advance, as they seem to suggest, by our view that, *if a new EARP were to come into existence*, the efficiencies achieved under the past two EARPs could in part be passed on to UE's customers through a reasonable rate reduction. Staff Reply at 10. The Staff and Public Counsel have opposed a new EARP, so our view of a rate reduction, premised on the existence of an EARP, hardly establishes excess earnings in this case. Moreover, UE disputes, as a matter of fact and of law, the broader notion that UE has been achieving excess earnings under the past EARPs.

2. A similar, and equally meritless objection, arises from Staff's apparent "cookie cutter" understanding of rate cases. Thus, the mere fact that certain past ratemakings followed certain procedural schedules, *see id.* at 6-7, does not explain anything of relevance to the needs of *this* case. For example, why the schedule of an excess earnings case filed against UE *14 years ago*, *see id.* at 6, should govern the schedule today is far from clear. Just one distinctive feature of this case, separating it from all the others noted

by the Staff, is that this case marks the first time the Staff is seeking to transition an electric utility out of a performance-based regulation plan like the EARP. Even if that were not the case, the issues raised by the Staff's complaint and testimony, and the situation of UE today, can hardly be equated with any past case, as long as the end result is not a foregone conclusion.

3. Contrary to the Staff's claims, our schedule is not premised either on some notion that we were "blind-sided," *id.* at 5, or by our failing to take advantage of some earlier discovery. *Id.* at 6. The biggest commitment of time in our proposal focuses on the need to take full and efficient depositions of the Staff's (and any other opposing party's) witnesses. Witness depositions are a well-recognized element of due process as a general matter, to be sure. More specifically, here these depositions will allow us to make our rebuttal testimony more focused, exposing for the Commission what we believe to be the flaws of the Staff's case, and thereby allowing the true issues to be clearly set out for the Commission's consideration. Some of these depositions will not be extensive, but several will exceed a full day, if not two full days. Reserving just under two months for the depositions of 15 plus witnesses (depending upon how many witnesses beyond those of the Staff will be involved) – roughly two depositions per week – does not appear to be an unduly relaxed schedule.

And of course the time needed for the actual witness depositions does not by itself describe the full time needed for the discovery that will allow those depositions to be well-prepared, efficient, and effective. Interrogatories, Requests for Production of Documents, and Requests for Admission will provide essential insight into the analysis of each witness, insight that will allow each deposition to be done efficiently, with the least

imposition on the witness' time. It takes time to prepare such written discovery if it is to cover all the topics necessary and produce helpful, clear answers. Indeed, in proceedings such as this, the issues to be addressed are often inter-related, requiring carefully crafted discovery to draw out those relationships. Most commonly, such discovery cannot be dribbled out, as the Staff suggests, *id.* at 10, but, to avoid duplication and confusion, needs to be clearly thought-out in advance, and proposed as one body of questions. Some discovery might be sought seriatim, of course, and we will endeavor to serve such discovery as best as we are able. But avoiding one large body of discovery does not ensure that the case will move any faster, since the Staff will have 30 days to respond to any discovery, and depositions cannot proceed until the answers to the last written discovery have been received. For all this – written discovery, answers to that discovery, and depositions of probably more than 15 witnesses – to take place within three months as we have proposed is, to anyone experienced in litigation of this magnitude, at best a tight, and at worst a compressed, schedule, but not by any stretch of the imagination a leisurely schedule.

It is true that UE took some general discovery in anticipation of the February 2001 filings on the future of the EARP, as the Staff points out. *Id.* at 5. However, discovery in this case will focus on the testimony and analysis of specific witnesses, none of whom offered testimony in the context of those filings in February. Hence, though some of the responses to that earlier discovery may be helpful, that discovery could not address the subjects of the discovery we will be seeking here will cover.

4. Neither the Staff nor Public Counsel address this practical basis of the time we have proposed for discovery here, suggesting instead that UE should take discovery other

than that necessary to properly cross examine the witnesses arrayed against us. Moreover, Public Counsel seems intent on impugning our motives as a way of failing to come to grips with the practical problem of how to fairly undertake the discovery this case requires.[1] Even if such tactics are ever appropriate – which they are not – they are particularly inappropriate here because they are so unsupported by the facts. Public Counsel claims that UE "obviously" has an "enormous incentive to seek to delay this case," specifically, as Public Counsel puts it, because "every month of delay allows Company to overcharge consumers by several million dollars." OPC Motion at 2. One of the maneuvers that Public Counsel cites as evidence for UE's effort to delay this ratemaking while reaping these "overcharges" is the motion we recently filed proposing an alternative process to this ratemaking. That process was designed to address all the basic issues that will now be addressed in this proceeding, but in a broader policy context. Most importantly, while the Commission was to be considering whether it wished to proceed with such an innovative process, we had proposed that the EARP's sharing credits be continued, so our customers would not be disadvantaged while the Commission addressed our proposal. *See* Emergency Motion of Union Electric Company to Temporarily Stay Expiration of the EARP and to Establish a Schedule for Further Proceedings and for Expedited Treatment, at 13 (June 23, 2001) (describing how the continued credit would be calculated). Regardless of what rhetoric one wishes to spout concerning that proposal, the notion that it represented an effort to delay consideration of

[1] The most that Public Counsel does is to argue that any discovery cutoff is unnecessary, and that discovery can proceed, being incorporated in any procedural schedule. OPC Motion at 3. Though we doubt that an orderly and fair procedure here can ignore the needs of discovery, at the very worst rebuttal testimony cannot be meaningfully prepared before discovery, including depositions, have been completed. As a result, any procedural schedule comporting with due process will in effect have to take into account the discovery process.

the issues now to be joined here so UE could retain "over-earnings" does not square with the facts.

5. At bottom, there is a disturbing "rush to judgment" quality about the Staff's and Public Counsel's position on our proposed procedural schedule. To them, it is a given that UE's customers are being overcharged hundreds of thousands of dollars per day, Staff Reply at 11, and the Staff solicitously identifies the limited scope of the information *they* believe should be of "significant interest" to UE, *id.* at 7, all so we can "as quickly as practicable, . . . relieve UE's electric ratepayers of the undue burden of unjust and unreasonable rates." *Id.* at 11. This position, we submit, smacks more of the Queen of Hearts' "verdict first, evidence second" approach from ALICE'S ADVENTURES IN WONDERLAND than any accepted view of due process, and is likely to lead the Commission into reversible error.

Indeed, both the Staff and Public Counsel appear to be very cavalier toward UE's due process rights, a clear danger sign for the Commission if it is tempted to follow their lead. Thus, the Staff claims, "Apparently, UE is requesting *excessive due process* to complement the excessive earnings the Company is enjoying." *Id.* at 11 (emphasis added). Public Counsel takes the opposite tack, apparently dismissing the witness-specific discovery needs we have outlined above with the statement, the "Company should already be *somewhat prepared* to respond to the Complaint because it had plenty of forewarning." OPC Motion at 4 (emphasis added). Why the straightforward discovery needs we have set out are, by the Staff's lights, "excessive," or why it is satisfactory, by Public Counsel's lights, for UE to be "somewhat prepared" to respond to the proposed rate reduction, neither of our adversaries make clear.

6. Given that a Notice of Complaint has been issued without any Commission action on the competing procedural proposals now before the Commission, it appears that these scheduling issues are likely to be resolved in the context of a prehearing conference, at a time to be determined. Possibly, the precise dates of neither side's proposals are, at this point, going to be the actual schedule to be followed in this case. However, for the reasons we have offered, we respectfully urge the Commission to reject the Staff's and Public Counsel's approach to the process here, and to adopt a schedule that reflects the time periods we have proposed.

Dated July 26, 2001

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 26th day of July, 2001, on the following parties of record:

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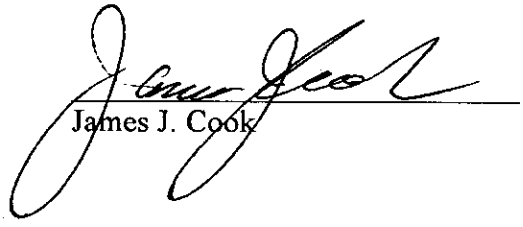

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