

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of Union Electric Company)	
d/b/a AmerenUE for Authority to File)	
Tariffs Increasing Rates for Electric)	Case No. ER-2007-0002
Service Provided to Customers in the)	
Company's Missouri Service Area.)	

**AMERENUE'S RESPONSE TO PUBLIC COUNSEL'S
MOTION FOR EXPEDITED DISCOVERY CONFERENCE**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company), and for its Response to the Office of Public Counsel's (OPC) Motion for Expedited Discovery Conference, states as follows:

1. On July 7, 2006, AmerenUE filed, in this case, its request for a general rate increase for electric service provided in its Missouri service area.
2. On September 12, 2006, the Missouri Public Service Commission (MPSC) issued its Order Adopting Procedural Schedule and Test Year. This Order scheduled this case for hearing, to begin at 8:30 a.m. on March 12, 2007.
3. Since the filing of this case, OPC has sent AmerenUE approximately 414 data requests, not counting subparts. Of that number, 23 sought information relating to Electric Energy, Inc. (EEInc.), an unregulated Illinois corporation of which AmerenUE owns 40% of the stock.
4. During the course of the discovery process, AmerenUE lodged objections to several of OPC's data requests, including 2005, 2118HC, 2119HC, 2142HC, 2170HC, 2171HC, 2181, 2184 and 2187. These objections were contained in letters emailed to Lewis Mills; these letters were dated November 9, 2006, December 21, 2006 and January 12, 2007, respectively.

5. On March 7, 2007, at 5:12 p.m., OPC filed Public Counsel's Motion for Expedited Discovery Conference (Discovery Motion). The Discovery Motion requested a discovery conference to be held less than 48 hours later, no later than the morning of March 9, 2007. The motion cited two areas of dispute. The first area concerns the appropriateness of the objections to the data requests listed in paragraph 4 above. The second area is whether or not AmerenUE appropriately redacted information provided in response to OPC data requests 2220, 2248 and 2249.

Discovery Standards

6. Throughout the Discovery Motion, OPC asserts a claim to unfettered discovery. OPC claims that AmerenUE does not have the right to object on the basis of relevance or any other objection typically available to it under the Rules of Civil Procedure. "Therefore, the Commission has determined that Public Counsel and the Staff can request records they want in their investigation without any showing that it is otherwise discoverable or is relevant to a specific case even if it is not more admissible in a hearing in their hands than in those of any other party." The Discovery Motion cites an order from a water company rate case as supporting OPC's claimed right to unfettered discovery. Public Counsel's Motion for Expedited Discovery Conference, March 7, 2007, pp. 2-3.

7. OPC cites a February 2, 2000 order from Case No. WR-2000-281, *In the Matter of Missouri-American Water Company's Tariff*, as the basis of its claim to the right of unfettered discovery (Missouri-American Water Order). AmerenUE notes that this order was issued by delegation and so it appears the full Commission has not discussed or determined the legitimacy of this claim.

8. Second, AmerenUE does not believe the Missouri-American Water Order, as issued, can properly be interpreted as broadly as OPC has done. The relevant portion of the order states that the Staff of the Commission (Staff) and OPC enjoy broader discovery powers than other litigants. WR-2000-281, *Order Concerning Motions to Compel*, February 15, 2000, p. 8. This statement, however, is discussing OPC discovery rights outside of a contested case. The Order cites Section 386.450, RSMo as authorizing the Public Counsel to examine books, accounts, papers or records of a public utility. This statute only allows Public Counsel, upon good cause shown, to request the Commission to require the utility to provide this information to Public Counsel. Its very language requires good cause to be shown by OPC and it does not grant any right of unfettered discovery.

9. The sentence of the Order quoted by OPC as demonstrating its ability to ask any question, covering any time frame and without any limitation, is based upon Section 536.073[(2)] RSMo and Commission Rule 4 CSR 240-2.090(1). Language in both of these citations is very similar. Section 536.073(2) RSMo allows that any agency authorized to hear a contested case may make rules to allow for part or all of the discovery that is provided for in civil actions heard in circuit court. 4 CSR 240-2.090(1) is the Commission's embodiment of that statute in its rules, as it provides that discovery may be obtained by the same means and under the same conditions as civil actions in the circuit court.

10. In sorting through the language of the Missouri-American Water Order, at best there appears to be different restrictions on discovery inside of a docketed proceeding than when it is occurring outside of a proceeding. In fact, language within the Missouri-American Water Order acknowledges the distinction. "...discovery under Section 386.450, RSMo, [outside a docketed, contested proceeding] differs from discovery under Rule 4 CSR 240-2.090 [within a

docketed proceeding] in two respects: it may be pursued outside of the context of a pending case and the relevance standard of Rule 56.01(b)(1), Mo. R. Civ. Pro., does not apply.” OPC is seeking this information in a docketed, contested Commission proceeding and so is bound by 4 CSR 240-2.090 and the restrictions on discovery that result from the application of the Missouri Rules of Civil Procedure.

11. Certainly, despite the issuance of the Missouri-American Water Order, the Commission has not allowed discovery by OPC without limitation. In previous orders, issued by the Commission rather than by an ALJ, and issued *after* the Missouri-American Water Order, when resolving discovery disputes over OPC issued data requests, the Commission has held that “...the scope of discovery is the same as in civil cases generally under Supreme Court Rule 56.01(b)(1)...” EO-2004-0108, *Order on Reconsideration Concerning Discovery*, February 26, 2004, p. 4. The Commission continued to determine whether a specific data request was relevant, stating in part, “Relevant evidence, in turn, is that which tends to prove or disprove a fact o[r] consequence to the pending matter...discoverable matter need not be admissible, but must always be relevant.” *Id.*, p. 5. The fact that a data request is not relevant to the issue before the Commission in this proceeding remains a valid objection, whether the data request is asked by an intervener or by OPC.

**OPC Data Requests 2005, 2118HC, 2119HC, 2142HC,
2170HC, 2171HC, 2181, 2184 and 2187**

12. OPC’s Discovery Motion summarizes AmerenUE’s objections to these data requests as limited to claims of over breadth or relevance. While these objections were made for most of the data requests, there are additional objections which OPC’s Discovery Motion failed to consider. Additionally, key facts are missing from the Discovery Motion. AmerenUE will address each data request below.

13. OPC 2005 requests access to EEInc.'s Board of Director meeting minutes, committee meeting minutes and all related reports from January 1, 2003 through June 30, 2006. AmerenUE's objection letter, dated November 9, 2006, objects because the data request seeks information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence. It also objects on the grounds that the request is overbroad in that it request materials unrelated to a contract or transaction between AmerenUE and EEInc. Subject to those objections, the letter agreed to provide copies of requested documents during the time frame requested to the extent they relate or pertain to a power contract between AmerenUE and EEInc. or to EEInc.'s decision not to contract with AmerenUE for the sale of power after December 31, 2005. OPC, in their Discovery Motion, argues that this issue is the center point of their discovery requests. AmerenUE's responses are consistent with OPC's statement. Although AmerenUE objected to the breadth of the request, it agreed to provide copies of the information requested when those records contained relevant information. This relevant information was provided to OPC on or around December 8, 2006. It is known that OPC received this answer, because future data requests referenced the answer to OPC 2005 in the question. *See* OPC 2118HC and 2119HC. Reading OPC's Discovery Motion, one is left with the impression that nothing has been provided beyond the objection letter as OPC's Discovery Motion fails to even acknowledge that information has been provided by AmerenUE to OPC in response to this data request.

14. OPC 2118HC and 2119HC requests copies of the Board minutes from the May 13, 2005 and from the October 28, 2005 Board of Directors meetings referenced in the response provided to OPC 2005. AmerenUE objected, in a letter date December 21, 2005, on the grounds of relevance and because it is not reasonably calculated to lead to admissible evidence. In its

objection, AmerenUE pointed out that it had provided all EEInc. Board minutes during the time frame requested, which would include those two dates, which contain information related or pertaining to a contract between AmerenUE and EEInc. or to EEInc.'s decision not to contract with its shareholders for the sale of power after December 31, 2005. The only reference to these specific dates in AmerenUE's response to OPC 2005 was a notice of the next scheduled Board meeting.

15. OPC 2142HC requests a copy of Ameren's quarterly Key Performance Indicator Reports for the last two years as they related to EEInc. AmerenUE objected to this data request because it seeks information relating to the business, affairs or operations of affiliates of AmerenUE rather than relating to AmerenUE, because it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Ameren Corporation is a parent to AmerenUE and AmerenUE is merely a 40% shareholder of EEInc. However, those circumstances do not make every fact about EEInc. or Ameren Corporation discoverable by OPC. The Commission may examine the dealings of regulated entities with their unregulated affiliates. Section 393.140(12), RSMo. However, this authority applies to transactions between the affiliate and the regulated entity. OPC is seeking to discover information held between the unregulated parent corporation and an unregulated affiliate. The Commission, and accordingly OPC, lacks the general authority to pry into an unregulated company merely because it is an affiliate of a regulated utility. In fact, the Commission has already ruled on the impropriety of the very same issue in a previous AmerenUE case. In that case, OPC tried to make the purchased power contract with EEInc. an issue and sought discovery in many of the same area they seek discovery today. The Commission order held, "It is true that the Commission is authorized and required to examine the dealings of regulated entities with their unregulated

affiliates. However, as Union Electric points out, that authority applies to transactions between the affiliates and the regulated entity. It does not apply to transactions between the unregulated affiliates and third parties absent a specific showing of relevancy to transactions between the affiliates and the regulated entity. The Commission lacks any general authority to pry into the affairs of unregulated companies, or the third parties that they do business with, merely because they are affiliates of regulated entities.” *Order on Reconsideration Concerning Discovery*, EO-2004-0108, February 26, 2004, p. 8.

16. OPC 2170HC and OPC 2171HC request a copy of all documents AmerenUE or its affiliates possess regarding a “team,” referenced in the minutes provided in response to OPC 2005, to address the matter of a Power Supply Agreement beginning in 2006, requests the members of the referenced “team” and asked for their relationship to the EEInc. sponsors. AmerenUE objected, in a letter dated January 12, 2007, on the grounds that the information requested is that of an affiliate of AmerenUE who is not doing business on behalf of AmerenUE. However, although OPC fails to mention it in their Discovery Motion, AmerenUE provided an answer on March 5, 2007, to both data requests. These answers named the members of the “team,” provided a short description of what the team did and stated that there were no formal reports generated. Accordingly, there were no documents to provide in response to this data request.

17. OPC 2181 requests a detailed description of the process AmerenUE has available to it to elect/appoint individuals to represent the interests of AmerenUE on the EEInc. Board of Directors. AmerenUE did not object on the grounds of relevance and the Company provided a response to the data request. Once again, OPC’s Discovery Motion fails to set forth relevant facts for consideration. The objection lodged by the Company, in its January 12, 2007 letter, was

due to the fact that the data request improperly calls for a legal conclusion. However, the objection letter went on to note that EEInc., as a corporation, would be subject to state law and by its Bylaws and Articles of Incorporation, which had already been provided to OPC.

18. OPC 2184 and OPC 2187 request a detailed description of the process available to Ameren Energy Resources and to Ameren Corporation to elect/appoint individuals to represent their respective interests on the EEInc.'s Board of Directors. AmerenUE objected, in its letter of January 12, 2007, because the data requests seek information relating to the business, affairs or operations of affiliates of AmerenUE rather than of AmerenUE. In addition, the letter stated that the data requests were irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Finally, the objection letter pointed out that Ameren Corporation owns no EEInc. stock and, consequently, does not elect or appoint EEInc. Directors. As previously stated, OPC is seeking to discover information held between the parent corporation and an unregulated affiliate and, in OPC 2187, seeking to discover information held between two unregulated affiliates. OPC lacks the general authority to examine the affairs of an unregulated company merely because it is an affiliate of a regulated utility.

Previously Provided Answers to OPC 2220, 2248 and 2249

19. OPC's Discovery Motion acknowledging receiving answers to OPC 2220, 2248 and 2249. However, it complains that pages are missing or portions of the reports are redacted. OPC also points out that AmerenUE did not object to these data requests. These statements are true. AmerenUE was not forced to object because the data requests limited their scope to AmerenUE information only. OPC asked for various information created by the Risk Management Steering Committee (RMSC) in relation to AmerenUE. That information was provided. However, the reports generated by the RMSC discuss issues related to AmerenCIPS,

AmerenCILCO and AmerenIP as well as AmerenUE. Information that pertained solely to AmerenCIPS, AmerenCILCO and AmerenIP was redacted from the documents. All information related to AmerenUE was left in the document for OPC's review. Indeed, the data request asked only for AmerenUE information and was not seeking this information about affiliates. Although multiple emails on data request issues have been exchanged between counsel for OPC and counsel for AmerenUE over the past week, this issue was not brought to the attention of AmerenUE prior to the filing of OPC's Discovery Motion. This issue might have been easily resolved by email or a telephone call, but OPC decided to instead place it in front of the Judge at the discovery conference.

Timing Issues

20. The majority of the Discovery Motion deals with objections lodged by AmerenUE as far back as November 9, 2006 but none more recent than January 12, 2007. OPC waited until 5:12 on the Wednesday before a three week hearing of this case to voice its concerns over discovery disputes. In addition, although the statements contained within the Discovery Motion are correct, OPC omitted many highly relevant facts, such as that four of the data requests have already been answered. The language in the Discovery Motion emphasizes "significant problems with Union Electric (UE) discovery responses throughout this case." Public Counsel's Motion for Expedited Discovery Conference, p. 1. Similar statements have appeared in the testimony of OPC witness Ryan Kind. However, there have been no Motions to Compel filed against AmerenUE by OPC. When counsel for AmerenUE received an email and a telephone call late last week from OPC counsel on several outstanding data requests, the Company immediately provided answers to those that it had could and continues to provide OPC with updates on its progress towards answering all data requests. The Company does not claim

to be perfect in the timing of its responses, but any allegation that it has deliberately failed to provide OPC with the requested information is untrue. It appears that OPC is less concerned with obtaining the information sought and more concerned with making it appear as if AmerenUE is unreasonable and uncooperative; an appearance that the facts do not substantiate.

WHEREFORE, AmerenUE respectfully requests that the Commission consider its Response in Addressing OPC's Motion regarding discovery issues in this case.

Respectfully submitted,

/s/ Wendy K. Tatro

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to all parties listed on the service list in Case No. ER-2007-0002 on the 8th day of March, 2007.

/s/Wendy K. Tatro
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