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June 12, 2002

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Union Electric Company,
Case No. EC-2002-1

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **OFFICE OF THE PUBLIC COUNSEL'S RESPONSE TO FILING OF COMPANY'S "PROPOSED STRUCTURE FOR THE EVIDENTIARY HEARING".** Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

/s/ Ruth O'Neal for John B. Coffman

John B. Coffman
Acting Public Counsel

JBC:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

OFFICE OF THE PUBLIC COUNSEL'S RESPONSE TO FILING OF COMPANY'S "PROPOSED STRUCTURE FOR THE EVIDENTIARY HEARING"

COMES NOW, the Office of the Public Counsel (Public Counsel), and responds to Union Electric Company, d/b/a AmerenUE's (Company's) "Proposed Structure for the Evidentiary Hearing". While Public Counsel concurs in the Company's opposition to scheduling additional hearing days during the first week of July, Public Counsel opposes the company's proposal to conduct the evidentiary hearing by artificially dividing the parties into two "sides" and suggesting that the "sides" be allocated "equal time". The Company's proposal is not supported by Commission rule, Missouri law, or past practice. Rather, the Company utilizes pretzel logic in an attempt to obfuscate the issues in this case and prevent a just resolution to the over-earnings complaint filed by the Commission staff in this case. Public Counsel strongly objects to the scheduling proposal submitted by the Company in this case.

In this filing, the Company first sets up a "straw man" with the petulant claim that the other parties are "unwilling" to allow the Company "to present some of its most important witnesses at a relatively early point" in the case. The Company then abandons this position to suggest that the parties be divided into two "sides" and each "side" be given an equal period of time in which to present its case. Remarkably, under this scenario, all of the Company's witnesses would testify after all other witnesses have testified.

Public Counsel notes that the Company's proposal rests entirely on four faulty premises.

First, the Company disingenuously categorizes this complaint case as a case with only two "sides": Parties which support the Staff's complaint and parties which oppose the complaint. This is not an accurate assessment of the positions taken by the various parties to this case. While it may be accurate to suggest that all parties, other than the Company, believe that the Company is earning excessive revenues, it is not accurate to say that the parties are aligned on other matters. Among the several distinct parties to this case, at least four parties take different positions regarding rate of return, which is a major issue in this case. At least four parties take different positions regarding rate design, which may prove contentious between those parties which believe that the Company is over-earning. The parties differ regarding the handling of a number of other issues in the case as well. To attempt to divide this case into two "sides" would violate the due process to which all of the parties are entitled. This approach is contrary to the manner in which the Commission generally conducts

hearing in cases where a utility's revenue requirement and rate design are at issue (a rate case), whether those cases are instituted by a company seeking a rate increase or by an over-earnings complaint. Neither of the cases cited by the Company to justify its party-by-party approach is a rate case.

Second, the Company has deliberately ignored the Commission's regular practice and intentionally misinterpreted Rule 4 CSR 240-2.110(5)(A). Nothing in this rule requires the Commission to take all evidence of the Staff, then all evidence of a second party, and so forth. While in non-revenue requirement cases, the parties sometimes proceed with the complainant presenting all of its testimony first, those cases generally involve fewer issues. One of the primary purposes of this case is to determine the proper revenue requirement for the Company. Revenue requirement issues are varied and many of the issues are complex. It simply makes more sense to present all testimony on each issue, or group of issues, at one time, in order for the Commission to more clearly determine the positions of the parties on those issues.

Third, the Company's suggests that since each "side" (as it previously but erroneously defined them), should have "equal time" because each has an approximately equal number of witnesses. The Company has provided no legal authority to support this suggestion. As previously noted, there are more than two "sides" in this case, at least as to a number of important issues. The Company is attempting to artificially construct a monolithic entity so that it can point out the parties' legitimate differences as "inconsistencies" in the other

"side's" position at a later date. The Commission should disregard this blatant attempt to create another straw opponent in this case.

Fourth, the Company's attempt to compare this Commission proceeding to that of "civil trials" is also misplaced. The courts have long recognized the right of parties in civil trials to invoke what is known as the rule of sequestration (or exclusion) of witnesses. Under that rule, the trier of fact has discretion, at the request of any party to a case, to exclude witnesses from the hearing room until they are called to testify. This is done to avoid giving witnesses the opportunity to craft their testimony based on what is said by prior witnesses. See, Crews v. Kansas City Public Service Co., 111 S.W.2d 54 (Mo. 1938); Riney v. Zenith Radio Corp., 668 S.W.2d 610 (Mo. App. E.D. 1984). Due to the manner in which the Commission conducts cases, this is not a reasonable option under Commission practice. Rather, witnesses appear before the Commission primarily for purposes of cross-examination, and have had access to the testimony of other witnesses long before the hearing begins.[1]

CONCLUSION

The Company's proposal is flawed for several reasons, some of which are addressed above. This case is essentially a rate case, albeit one which began as a complaint that the Company was over-earning, rather than the regular method by which a Company claims that it is under-earning. As a result, all of

[1] The Company is also incorrect in stating that plaintiffs in civil cases are "required to present all witnesses supporting his (sic) entire case first." While this is generally the case, many civil trials are bi-furcated, with liability determinations made prior to any evidence being introduced regarding damages or other remedies. Again, given the structure of the Commission's proceedings, this is not an appropriate way of conducting a Commission hearing.

the complexities of determining an appropriate revenue requirement and rate design are in issue. There are multiple parties in this case (not simplistically two "sides"), which have unique points of view on a number of issues. The Commission generally conducts rate cases on an issue by issue basis, and this method has proved workable. While the parties should be encouraged not to be duplicative in questioning, Public Counsel asks the Commission to craft any such order in a way that recognizes that each party in this case has a right to due process.

WHEREFORE, Public Counsel respectfully recommends that the Commission reject the Company's proposed structure for this evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 12th day of June 2002:

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