

**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 for Increasing Rates for Electric)	<u>Case No. ER-2007-0002</u>
Service Provided to Customers in the)	
Company's Missouri Service Area)	

**PUBLIC COUNSEL'S MOTION TO COMPEL DISCOVERY
AND REQUEST FOR EXPEDITED TREATMENT**

COMES NOW the Office of the Public Counsel and for its Motion to Compel Discovery and Request for Expedited Treatment states as follows:

Public Counsel certifies that it has complied with all requirements of 4 CSR 2.090(2). Public Counsel has faced continuing and significant problems with Union Electric (UE) providing untimely and incomplete discovery responses or failing to respond at all to proper data requests made to UE throughout this case. Public Counsel now invokes the Commission's authority to enforce discovery under the Public Service Commission (Commission) rules and seeks the Commission's intervention in these unresolved discovery matters so that Public Counsel can receive full and complete answers to its data requests and other discovery which Public Counsel has a clear and unambiguous right to receive from UE. Public Counsel asks the Commission to take and issue appropriate orders in the following discovery disputes in favor of Public Counsel and against UE on: (1) Public Counsel's challenge of UE's untimely and groundless objections to nine DRs that were related to the Electric Energy Inc. (EEInc or EEI) issue and to compel responses to those DRs; (2) Public Counsel's request to compel UE to

fully and completely respond to DR Numbers 2139, 2140, 2151, 2152, 2210, 2239, 2245, 2246, 2247, 2248, 2249, 2250, 2257, 2258, 2260, and 2265HC which are overdue; and (3) and to expedite consideration as soon as possible since the responses are overdue and the evidentiary hearing commences Monday, March 12, 2007.

(1) EEInc Related DR Objections

UE objected to Public Counsel DR Numbers 2005, 2118HC, 2119HC, 2142HC, 2170HC, 2171HC, 2181, 2184 and 2187 regarding EEInc. A power contract between UE and EEInc is one of the most important issues in the case. This power contract between UE and EEInc ended at the end of 2005 and UE chose not to attempt to renew it. This is a revenue requirement issue based on the argument that UE acted imprudently by not seeking to renew/extend the contract with EEInc for low cost power. Public Counsel has filed written responses to UE's objections and made a good faith effort to resolve the discovery dispute in an informal Discovery Conference held with Judge Woodruff via telephone on March 9, 2007. Due to the commencement of the evidentiary hearing on Monday, March 12, 2007, time is of the essence to obtain the information sought in these DRs and Public Counsel seeks expedited treatment.

All of the nine DRs objected to, except for DR 2142, seek information about the process (and the role of UE and its holding company, Ameren, in that process) that occurred during the last few years where EEInc and some of its owners decided to use the power that was formerly sold under cost plus contracts to regulated utilities (like UE) for sales in the wholesale electric market that would benefit the shareholders of EEInc (like UE and its holding company). Public Counsel DR 2142 sought information that would

show the extent to which Ameren and other owners of EEInc are involved in the operations, maintenance and planning of the Joppa plant.

UE objects to these DRs on the grounds that they seek information that is overly broad, unduly burdensome and not relevant or reasonably calculated to lead to the discovery of admissible evidence since they seek information relating to the business, affairs or operations of affiliates of AmerenUE rather than relating to AmerenUE.

Public Counsel DR 2005 requested copies of EEInc Board of Director meeting minutes and all related reports for the period covering January 1, 2003 through June 30, 2006. No copies of “related reports” were provided and meeting minutes from only 2 meetings during this time period were provided. UE asserted in its DR response that it provided “minutes pertaining to a power contract between EEInc and AmerenUE or to EEInc’s decision not to contract with AmerenUE post 2005.” Public Counsel believes that other subjects addressed by the EEInc board are relevant to this case, as is the process by which the EEInc board makes decisions about the various matters that come before it. Various UE witnesses have asserted that the interests of EEInc owners are not, and legally cannot be taken into account in the decision-making process of the EEInc board. Public Counsel’s access to the entire set of minutes would help us assess how well the testimony of UE witnesses regarding the EEInc decision-making process matches the assertions of UE witnesses.

UE’s objection implies that there are no EEInc board discussions and decisions that would be relevant to this case other than “EEInc’s decision not to contract with AmerenUE post 2005.” UE’s testimony, however, asserts that EEInc’s decision to seek market-based rate (MBR) authority from the Federal Regulatory Energy Commission

(FERC) and the granting of this authority left EEInc with no choice about where the output from the Joppa plant would be sold once MBR authority was granted to EEInc by FERC. At line 7 on page 19 of UE witness Michael Moehn's Surrebuttal testimony, he states:

If Staff was so opposed to EEInc. having the ability to sell Joppa's output at market-based rates, why didn't the Commission itself contest EEInc.'s market-based rate (MBR) filing at FERC? With MBR authority, EEInc. has both the right and fiduciary obligation to its shareholders to sell the Joppa Plant's output at market rates, as Prof. Downs has testified.

Despite UE's assertion that EEInc had no discretion to continue its cost based power agreement with UE and that EEInc had "both the right and fiduciary obligation" to sell the Joppa Plant's output at market rates once EEInc obtained MBR authority, UE has not provided the EEInc board meeting minutes where EEInc discussed and voted on seeking MBR from the FERC.

OPC DR No. 2142 sought information that would show the extent to which UE and its affiliates are involved in the operations, maintenance and planning of the Joppa plant. In UE witness Moehn's rebuttal testimony, he claims at line 9 on page 7 that "the daily operations, maintenance and planning of Joppa are the sole responsibility of the management of EEInc." UE would not have any documents that are responsive to OPC DR No. 2142 unless UE and its affiliates are truly involved in the operations, maintenance and planning of the Joppa plant. If Ameren is not assessing and overseeing the performance of EEInc then there would be no need to address EEInc in the quarterly performance review process and reports where Ameren and its affiliates might assess the extent to which EEInc is achieving performance goals set by Ameren such as: operational efficiency, performing maintenance to improve unit availability, meeting targets for sales

of output, meeting targets in the implementation of plans for capital improvements, etc.). UE should not be permitted to deny Public Counsel access to documents that may contradict the assertions made by its witnesses.

While UE provided long overdue “responses” to Public Counsel DR Nos. 2170 and 2171 earlier this week, these “responses” did not fully respond to requests for information contained in these two DRs. Public Counsel DR No. 2170 requested all documents that UE or its affiliates possess regarding a “team” referenced in the EEInc board minutes provided in response to Public Counsel DR No. 2005. UE’s response did not include any documents and stated that “there were no formal reports generated.” UE’s response did not deny that there were any documents within the scope of those requested in Public Counsel DR No. 2170, so Public Counsel has no way of knowing whether UE’s response to this DR (which UE has objected to) was complete.

Public Counsel DR No. 2171 requested UE to identify the members of the “team” referenced in the EEInc board minutes and asked for UE to specify the relationship of each team member to the EEInc sponsors. UE’s response identified the members of the “team” but it failed to provide the requested information about the relationship of each of the identified “team members to the EEInc sponsors.

Public Counsel’s right to pose data requests seeking information from any utility and the right to inspect and obtain copies of any utility’s records or documents in its possession is coequal to that of the Staff of the Missouri Public Service Commission (Staff) and is broader than the discovery authority permitted other litigants under Commission Rules.¹ This right is not conditioned on considerations of relevance under

¹ RSMo. Section 386.450 and *In the Matter of Missouri-American Water Company’s Tariff* (Case No. WR-2000-281, et al.)(2-2-2000).

MO Rule Civ. Pro. 56.01(b)(1) and PSC Rule 4 CSR 240-2.090(1). The Commission has recognized that information sought by the Public Counsel, if not relevant, may well lead to other information which is relevant.² 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 no more admissible in a hearing in their hands than in those of any other party.³

Information relating to the business, affairs or operations of affiliates is required by statute to be kept by regulated electrical corporations. 4 CSR 240-20.015 Affiliate Transactions states:

(5) Records of Affiliated Entities.

(A) Each regulated electrical corporation shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:

1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the regulated electrical corporation;

2. Documentation of the methods used to allocate and/or share costs between affiliated entities including other jurisdictions and/or corporate divisions;

3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions;

4. Descriptions of the types of services that corporate divisions and/or other centralized functions provided to any affiliated entity or division accessing the regulated electrical corporation's contracted services or facilities;

5. Names and job descriptions of the employees from the regulated electrical corporation that transferred to a nonregulated affiliated entity;

6. Evaluations of the effect on the reliability of services provided by the regulated electrical corporation resulting from the access to regulated contracts and/or facilities by affiliated entities;

7. Policies regarding the availability of customer information and the access to services available to nonregulated affiliated entities desiring use of the regulated electrical corporation's contracts and facilities; and

² *Staff of the Missouri Public Service Commission, v. Union Electric Company, doing business as AmerenUE*, Case No. EC-2002-1, 2002 Mo. PSC LEXIS 31

³ *Id.*

8. Descriptions of and supporting documentation related to any use of derivatives that may be related to the regulated electrical corporation's operation even though obtained by the parent or affiliated entity.

UE asserts that the Commission has no right to access documents of non-regulated affiliates in another state. But, state statute requires that access must be granted to the records of affiliate entities during the discovery process of a case which is pending before this Commission. 4 CSR 240-20.015 Affiliate Transactions states:

(6) Access to Records of Affiliated Entities.

(A) To the extent permitted by applicable law and pursuant to established commission discovery procedures, a regulated electrical corporation shall make available the books and records of its parent and any other affiliated entities when required in the application of this rule.

(B) The commission shall have the authority to—

1. Review, inspect and audit books, accounts and other records kept by a regulated electrical corporation or affiliated entity for the sole purpose of ensuring compliance with this rule and making findings available to the commission; and

2. Investigate the operations of a regulated electrical corporation or affiliated entity and their relationship to each other for the sole purpose of ensuring compliance with this rule.

(C) This rule does not modify existing legal standards regarding which party has the burden of proof in commission proceedings.

In a 2004 UE case before this Commission, it was determined that information requested by Public Counsel in DRs regarding EEInc was relevant because UE, owned a significant portion of EEInc and had received an equivalent portion of the Joppa plant's low cost output.⁴ The Commission stated that since the Ameren group owns 60 percent of EEI, the Ameren group can certainly ensure that Union Electric continues to receive 40 percent of the Joppa plant's output, at a reasonable price.⁵ The Commission also stated that clearly, the Joppa plant was a joint venture of several regulated electric utilities that was intended to provide a source of low cost energy proportional to the

⁴ *Opinion: Order Concerning Discovery Conference, Case No. EO-2004-0108*, 2004 Mo. PSC LEXIS 348

⁵ *Id.*

original investment.⁶ The Commission determined that the documents requested were also relevant because they would show the degree to which the Ameren group controls EEInc's decision-making and that a simple list of board members with their sponsoring corporations is not overbroad.⁷

The Affiliate Transaction state statute provisions regarding access to records of affiliates is an example showing that regulated utilities must provide access to affiliate records when they pertain to issues the before the Commission regarding affiliate dealings. UE may not refuse to provide discovery to Public Counsel based on the argument that the information is not relevant or reasonably calculated to lead to the discovery of admissible evidence since the Commission has previously determined that information regarding EEInc is relevant. Even if this information were deemed to not be relevant, relevancy and admissibility is not the test as to whether Public Counsel may obtain discovery, Therefore, Public Counsel challenges UE's objections on DR Numbers 2005, 2118HC, 2119HC, 2142HC, 2170HC, 2171HC, 2181, 2184 and 2187 and seeks an order to compel full and complete answers.

(2) Responses to DR Numbers 2139, 2140, 2151, 2152, 2210, 2239, 2245, 2246, 2247, 2248, 2249, 2250, 2257, 2258, 2260, and 2265HC.

DR Numbers 2139, 2140, 2151 and 2152 were originally objected to by UE as being too voluminous. However, UE's response did not reference the definition of voluminous material in the protective order which is that "voluminous material shall mean a single document, book, or paper which consists of more than 150 pages" so it was unclear whether the documents that UE has asserted are "voluminous in nature" meet the

⁶ *Id.*

⁷ *Id.*

criteria set forth in the protective order. These DRs were discussed during the informal call with Judge Woodruff and counsel for UE on March 5, 2007 as well as during the informal Discovery Conference held via telephone on March 9, 2007. However, no response has been received by Public Counsel regarding the status of these documents.

Public Counsel has repeatedly requested that UE respond to DR Numbers 2210, 2239, 2245, 2246, 2247, 2248, 2249, 2250, 2257, 2258, 2260, and 2265HC. These DR responses are overdue. Public Counsel fulfilled the preliminary requirement through an informal call with Judge Woodruff and counsel for UE on March 5, 2007 as well as during the informal Discovery Conference held via telephone on March 9, 2007.

To date, no responses for these DRs have been received with the exceptions of responses to DRs 2126 and 2127. UE finally sent long overdue answers to DRs 2126 and 2127 several hours ago. Public Counsel DR No. 2126 requested UE to:

Please provide a copy of all documents created by or for UE or its affiliates that contain descriptions or analysis of cost increases at the Penon Creek generating facility that were related to the efforts to get the plant in service prior to June 1, 2002.

Public Counsel DR No. 2127 requested UE to:

Please provide a copy of all documents created by or for UE or its affiliates that contain references to elevated costs at the Penon Creek generating facility that were related to the efforts to get the plant in service prior to June 1, 2002.

The responses to these DRs, which pertain to the Penon Creek disallowance issue were due over 2 months ago on January 4, 2007. The responses indicate that UE believes there may be some responsive documents but the Company has not yet been able to locate any such documents. In its responses to Public Counsel DR No. 2126, UE states:

The Penon Creek facility was constructed pursuant to an EPC (Engineer-Procure-Construct) contract where the EPC contractor agreed to provide

“turnkey” services for management of the project from initial design to the contractor to project completion. In this method, the AmerenUE agreed to pay a set fee for designing and building the power plant and the risks for cost and schedule are transferred to the contractor, Black & Veatch. There may have been a couple work change orders which were required because of the start-up date of June 1, 2002. AmerenUE continues to look for copies of relevant work orders. The dollar amounts involved with these work orders is not large in relation to the total contract amount, perhaps a few hundred thousand dollars.

UE’s response to Public Counsel DR No. 2127 referenced UE’s response to Public Counsel DR No. 2126. Public Counsel believes that UE’s answers to these two DRs demonstrate a complete failure to make a credible effort to locate responsive documents and provide them to Public Counsel. Public Counsel finds it difficult to believe that UE and its affiliates are unable to locate any budget monitoring documents that compare the projected budget for a capital project as large as the Peno Creek generating facility with the actual costs incurred. Such budget monitoring documents generally seek to determine the causes for the differences between projected capital expenditures and actual costs.

Therefore, Public Counsel requests that the Commission issue an Order to Compel Response to DR Numbers 2139, 2140, 2151, 2152, 2210, 2239, 2245, 2246, 2247, 2248, 2249, 2250, 2257, 2258, 2260, and 2265HC.

(3) Grounds for expedited treatment

Public Counsel requests expedited treatment in this motion due to the fact that the evidentiary hearing in this case begins on Monday, March 12, 2007. This motion was filed promptly on the afternoon following the Discovery Conference. Thorough discovery is necessary to Public Counsel in its efforts to present its position to this Commission. Without these documents Public Counsel will be unable to present complete and well documented testimony to the Commission.

Therefore, Public Counsel requests that the Commission act on its motion in an expedited manner so that Public Counsel may receive UE's responses to the above listed DRs by no later than 5:00 pm on Friday, March 16, 2007.

WHEREFORE, the Office of the Public Counsel respectfully requests that the Commission issue an Order to Compel Responses to Public Counsel's data requests, in full and completely, no later than 5:00 pm on Friday, March 16, 2007, and for such other and additional relief that is necessary and proper.

Respectfully submitted,

OFFICE OF THE Public Counsel

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CERTIFICATE OF SERVICE

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