BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In re: Union Electric Company's 2005 Utility Resource Filing Pursuant to 4 CSR 240 – Chapter 22.	)))	Case No. EO-2006-0240

AMERENUE'S RESPONSE TO PARTIES' REQUEST FOR HEARING

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or the Company) and for its Response to Parties' Request for Hearing, states as follows:

Background

1. The Commission issued a September 19, 2006 order requiring the parties to attend an October 10, 2006 conference to discuss whether or not a hearing should be scheduled in this Integrated Resource Plan (IRP) filing docket. The conference was held as ordered, but no agreement was reached among the parties. All parties agreed to file a recommendation no later than October 17, 2006 on whether or not the Commission should hold a hearing.

2. On October 17, 2006, OPC, DNR and the Sierra Club each filed a pleading requesting a hearing. Staff submitted a late-filed pleading, also requesting a hearing, on October 18, 2006.

3. AmerenUE also timely filed its recommendation respecting whether a hearing should be held. AmerenUE recommended that the Commission, in accordance with the IRP Rules, exercise its discretion not to hold a hearing in this docket. AmerenUE pointed out that the IRP Rules do not require that a hearing be held at all, that AmerenUE has already executed the resource plan reflected in its December 5, 2005 IRP filing, which is the subject of this docket, and that in view of the Stipulation and Agreement reached with Staff and filed with the Commission, a hearing was not warranted or necessary. Indeed, it is fully expected that

AmerenUE will be making its December 2008 IRP filing before any material resource additions would be made. In addition it is very possible that the Commission's IRP Rules will have undergone a number of changes by that time, as has been discussed in prior pleadings in this case as well as during Staff-moderated workshops occurring in 2005.

The Law Does Not Require a Hearing

4. The IRP process is a product of the Commission's IRP Rules. No statute prescribes that an IRP filing be made at all. Consequently, whether or not a hearing is required depends upon the provisions of the IRP Rules. The IRP Rules do not require the Commission to hold a hearing, as evidenced by the express terms of the Rules, which provide as follows: "The commission will issue an order which indicates on what items, **if any**, a hearing will be held…" 4 CSR 240-22.080(9) (emphasis added).

5. Indeed, as Staff pointed out in its October 18, 2006 pleading, at the time the IRP Rules were adopted, the Commission made clear that the IRP Rules did not create any requirement that a hearing be held, or any right in any party for a hearing to be held. "The commission believes that it should retain the discretion not to schedule a hearing when it believes a hearing is not warranted." Rulemaking Docket No. EX-92-299, Order of Rulemaking, December 8, 1992 (adopting the current IRP Rules).

6. No party in this case has disputed this fact, not even those parties requesting a hearing. Although several parties have requested a hearing, an examination of the pleadings shows that no party made the claim that the language of the IRP Rules **requires** the Commission to order a hearing. The pleading filed by DNR directly acknowledges that a hearing is not required by the IRP Rules. "According to the rule, if the parties are unable to reach an agreement, the Commission **may** set a hearing to address any of the unresolved deficiencies"

(emphasis added). DNR's Recommendation and Proposed Procedural Schedule, October 17, 2006.

Those Requesting a Hearing Misapply the Missouri Administrative Procedure Act

7. Administrative proceedings, including those of this Commission, are governed by the Missouri Administrative Procedure Act (MAPA), contained in Chapter 536 of the Missouri Revised Statutes.[1] *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 758 (Mo. banc 2003).

8. The MAPA creates two kinds of administrative proceedings: contested cases and non-contested cases. *Mosley v. City of Berkeley*, 23 S.W.3d 855, 859 (Mo. App. E.D. 2000). Many of the MAPA's requirements, including those that require an evidentiary record (cross-examination, sworn testimony, etc) apply only to a contested case and so any analysis of these requirements must start with the definition of a contested case. Whether or not a particular proceeding before an administrative agency is or is not a contested case turns on whether or not a hearing is **required by law** with respect to the proceeding at issue. "Contested case means a proceeding before an agency in which legal rights, duties or privileges of specific parties are **required by law** to be determined after hearing." § 536.010(4) RSMo. (emphasis added).

9. As already discussed above, there is no law that requires a hearing to be held. Consequently, an IRP docket is not a contested case as matter of law. Arguments to the effect that the contested case procedures of Chapter 536 apply are therefore simply wrong. For example, DNR alleges in its pleading that § 536.090 RSMo requires that the participants in this docket be allowed to present live testimony, to cross-examine witnesses, etc. DNR is wrong. § 536.090, by its express terms, only applies to a contested case within the meaning of the

[1] All statutory references are to the Revised Statutes of Missouri (RSMo) (2000), unless otherwise noted.

MAPA. "Every decision and order in a contested case shall…." *See also* § 536.070 RSMo, which deals with the presentation of evidence, but by its express terms only applies to contested cases.

Nor does the fact that parties are "contesting" various issues, regardless of how hotly they are contested, render a docket such as this IRP docket a contested case. As the Missouri Supreme Court has held, "In other words, 'contested case' within the meaning of the Act does not mean every case in which there may be a contest about 'rights, duties or privileges' but instead one in which the contest is required by law to be decided in a hearing before an administrative agency." *Randle v. Spradling*, 556 S.W.2d 10, 11 (Mo. banc 1977); *State ex rel. Leggett v. Jensen*, 318 S.W.2d 353, 356 (Mo. banc 1958); *Welch v. Department of Elementary and Secondary Ed.*, 731 S.W.2d 450, 453 (Mo. App. E.D. 1987). "The key to the classification of a case as 'contested' or 'noncontested' is the requirement of a hearing." *State ex rel. Reed v. County of Stone*, 2006 Mo. App. LEXIS 1303, *9 (Mo. App. S.D., September 8, 2006); *Shawnee Bend Special Rd. Dist. D v. Camden County Comm'n*, 800 S.W.2d 452, 456 (Mo. App. S.D. 1990). And no agency, including this Commission, can create a contested case where one does not otherwise exist. "The classification of case [sic] as 'contested' or 'noncontested' is not left to discretion of the agency but rather is to be determined as matter of law. *Cade v. Department of Social Services*, 990 S.W.2d 32, 36 (Mo. App. W.D. 1999); *State ex rel. Valentine v. Board of Police Comm'rs of Kansas City*, 813 S.W.2d 955, 957 (Mo. App. W.D. 1991). That determination as a matter of law is made by whether or not the law **requires** that a hearing be held. Here, it does not.

10. Some parties may argue that because the IRP Rules require the Commission to make findings or otherwise make a decision, the case is "contested." That argument fails

because as already discussed, it is the requirement that a hearing be held as a matter of law that determines whether a case is contested or non-contested. This erroneous argument apparently assumes that the phrase "contested case" means nothing more than there is at least a disputed issue between those participating in the docket. That assumption is incorrect, as the courts have consistently rejected this argument, finding that contested means something different than disputed. "The fact that there is some contest between the parties does not, in and of itself, make for a contested case." *Cade*, 990 S.W.2d at 36. The Missouri Supreme Court also rejected this argument, stating that a contested case "…does not mean every case in which there may be a contest about 'rights, duties or privileges'…" *Hagely v. Board of Ed. of Webster Groves School District*, 841 S.W.2d 663, 667 (Mo. banc 1992) (overruled on other grounds).

11. In short, the asserted "right" to have a hearing cited by other participants in this docket only exists in a contested case, which this case is not. The parties' arguments confuse contested and non-contested cases by citing requirements applicable only to contested cases as the basis for the existence of certain alleged "rights" in a non-contested case. These arguments are incorrect as a matter of law, and must be rejected by the Commission.

Staff Also Misapplies The Commission's Rules and Enabling Statutes

12. Although Staff and the Company have fully resolved Staff's concerns relating to alleged deficiencies in the Company's IRP filing (evidenced by the Stipulation and Agreement filed on August 15, 2006), Staff too is apparently operating under the mistaken belief that an IRP docket is a contested case and that because of this, a hearing is required. Indeed, Staff, reluctantly states in its October 18 filing that it "believes it **must** suggest to the Commission that a hearing should be held" (emphasis added). Staff's belief is incorrect, and results from its misapplication of the Commission's rule on non-unanimous stipulations and agreements (4 CSR

240-2.115) and its misapplication of *State ex rel. Fischer v. Pub. Serv. Comm'n*, 645 S.W.2d 39 (Mo. App. W.D. 1982).

13. In citing the Commission's rule on non-unanimous stipulations and agreements (4 CSR 240-2.115), Staff cites only a part (subsection (2)) of the rule. Staff's failure to cite subsection (1) is a critical omission. Subsection (1) makes clear that 4 CSR 240-2.115 only applies in contested cases: "(1) (A) The parties may at any time file a stipulation and agreement as a proposed resolution of all or any part of a contested case. A stipulation and agreement shall be filed as a pleading. (B) The commission may resolve all or any part of a contested case on the basis of a stipulation and agreement." Subsection (2) then addresses what happens when a stipulation and agreement, as contemplated by subsection (1), is non-unanimous; that is, a hearing is held on the entire contested case, as dictated by the Court of Appeals' decision in *Fischer*.

14. *Fischer* does not, however, stand for the proposition that a hearing must be held in every Commission docket. Instead, *Fischer* simply discusses the minimum procedural requirements and safeguards that must be afforded parties by the Commission *if and when* a hearing is held by the Commission, whether because a hearing is required by law to be held or because the Commission chooses to hold a hearing. *Fischer* was a case involving a Commission investigation of the rate design of Laclede Gas Company under § 386.420 RSMo. The Commission ordered that a hearing be held,[2] but because every party other than OPC had reached a stipulation and agreement, the Commission attempted to limit the scope of the hearing to one issue: accept the stipulation and agreement or reject it. The Court of Appeals found that since a Commission hearing was being held, § 386.420 RSMo dictated the minimal requirements of that hearing. *Fischer*, 645 S.W.2d at 42. The Company does not disagree. Where Staff

[2] Which has not occurred in this docket and, as noted above, is not required to occur as a matter of law.

makes its mistake in citing *Fischer* is to (a) assume that a hearing must be held, which has already been shown to not be true, and (b) to apply *Fischer* as if the Commission had already set an evidentiary hearing in this docket, which has not occurred. It is also true that the Court found that due process principles required allowing Public Counsel to present his case, but again, the process that was due was defined by § 386.420 RSMo, which applied because a hearing had been ordered. Had a hearing not been ordered, § 386.420 RSMo would not have applied[3], it would not have thereby created any process that was due to Public Counsel, and due process principles would not have been violated.

The Unique Circumstances of this Case Justify Not Scheduling a Hearing

15. As outlined in AmerenUE's filing of October 17, 2006, there exist unique circumstances that should lead the Commission to determine that scheduling a hearing in this docket is not appropriate. Instead of repeating those circumstances here, the Company respectfully directs the Commission to its October 17 filing for a discussion of those circumstances.

16. The Company will also briefly address OPC's October 17 filing, which continues to argue the substance of OPC's view of AmerenUE's IRP filing. In short, OPC argues that several aspects of the Company's IRP should be in effect re-done now. This is of course a totally different approach than that taken by Staff, as reflected in its Stipulation and Agreement with the Company. The bottom line is that AmerenUE's resource planning process continues, but because no generation resources are expected to be added prior to 2008 when another comprehensive IRP filing will be made under the IRP Rules as they currently exist, there simply is no good reason to further litigate this matter via a hearing. OPC apparently wants its position

[3] At the time fixed for **any hearing** before the commission . . . [all parties] shall be entitled to be heard and to introduce evidence" (emphasis added).

to be vindicated in some formal way, and desires to consume the resources of all involved in an attempt to gain that vindication, even though any such vindication, even if it could be achieved, will not change the resource planning decisions the Company has made or the Company's resource plan between now and the Company's next IRP filing in 2008.

20. Staff and AmerenUE are supporting a more measured remedy, one which begins work on the DSM portion of the Company's resource planning process in a timely manner and results in a 2008 filing that is more consistent with Staff's interpretation of the IRP Rules, while allowing for whatever modifications the Commission may find appropriate if it chooses to review the IRP Rules. That approach is fully in accordance with the IRP Rules, and adoption of it by the Commission does not require a hearing.

21. Finally, AmerenUE would point out that although OPC boldly alleges that "consumers will be harmed" absent a hearing, OPC fails to cite any specific harm that might stem from the approach taken in the Stipulation and Agreement.

Proposed Hearing Schedule

22. Several parties in this case filed a proposed procedural schedule, should the Commission decide to schedule one. AmerenUE, as stated above, opposes any hearing in this matter. However, if the Commission decides, in its discretion, to order one, AmerenUE requests that all parts of the procedural schedule start after AmerenUE's rate case hearings conclude and after all briefs in the rate cases have been filed. AmerenUE will not repeat the reasons why any hearing that is ordered should be held after that time, but respectfully directs the Commission to its October 17 filing, which discusses this issue in detail.

WHEREFORE, AmerenUE respectfully requests that the Commission exercise its discretion and order that no hearing be held in this docket, and that it approve the Stipulation and

Agreement between the Company and the Staff as a full and final resolution of this docket. In the alternative, if the Commission decides to exercise its discretion and hold a hearing, AmerenUE requests that the Commission set the procedural schedule to begin sometime after the scheduled hearings and briefing conclude in AmerenUE's pending rate cases, Case Nos. ER-2007-0002 and GR-2007-0003.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

By *Thomas M. Byrne*

Steven R. Sullivan, #33102
Sr. Vice President, General
Counsel and Secretary
Thomas M. Byrne, # 33340
Managing Assoc. General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
(314) 554-2514 (phone)
(314) 554-4014 (fax)
ssullivan@ameren.com
tbyrne@ameren.com

Dated: October 25, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 25th day of October, 2006.

Thomas M. Byrne

Thomas M. Byrne

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Lewis Mills
Office Of Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Bruce A. Morrison
Association of Community Organizations for Reform Now
705 Olive Street, Suite 614
St. Louis, MO 63101
bamorrison@greatriverslaw.org

Henry B. Robertson
Association of Community Organizations for Reform Now
705 Olive Street, Suite 614
St. Louis, MO 63101
hrobertson@greatriverslaw.org

Shelley Woods
Missouri Department of Natural Resources
P.O. Box 899
Jefferson City, MO 65102-0899
shelley.woods@ago.mo.gov

Lisa C. Langeneckert
Missouri Energy Group
911 Washington Ave., 7th Floor
St. Louis, MO 63101
llangeneckert@stolarlaw.com

Stuart Conrad
Noranda Aluminum, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Kathleen G. Henry
Association of Community Organizations for Reform Now
705 Olive Street, Suite 614
St. Louis, MO 63101
khenry@greatriverslaw.org

Steve Dottheim
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Steve.Dottheim@psc.mo.gov

Diana M. Vuylsteke
Missouri Industrial Energy Consumers
211 N. Broadway, Suite 3600
St. Louis, MO 63102
dmvuylsteke@bryancave.com