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 Service Provided to Customers in the Company's Missouri Service Area.	)))))	Case No. ER-2007-0002

UNION ELECTRIC COMPANY d/b/a AMERENUE'S
RESPONSE TO ORDER ESTABLISHING TIME TO RESPOND TO ISSUE RAISED IN PUBLIC COUNSEL'S BRIEF AND MOTION TO STRIKE

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or "Company") and, in response to the Commission's May 4, 2007 Order,[1] hereby responds to an issue raised for the first time by the Office of the Public Counsel ("OPC") in its Post-Hearing Brief, and also moves to strike the following: (a) the heading entitled "Taum Sauk Regulatory Capacity" and the paragraph appearing after that heading at page 54 of OPC's Post-Hearing Brief; and (b) the line item appearing on Staff's Revised True-up Reconciliation filed on April 19, 2007 which reads: "Taum Sauk Hold Harmless – Capacity Sales" and the associated dollar figure and note (10) appearing on that Reconciliation. In support of its Response and Motion to Strike, the Company states as follows:

1. OPC's adjustment is far out-of-time and violates the Commission's rules and its Procedural Order. Specifically, OPC has, for the first time in its Post-Hearing Brief, improperly presented a revenue requirement adjustment that if it were to be proposed at all unquestionably should have been a part of OPC's case-in-chief. OPC, weeks after the evidentiary hearings ended,[2] has now sought to enhance its already outlying revenue requirement position by an additional alleged $10.3 million to reflect OPC's speculative allegation that capacity from the

[1] *See also* 4 CSR 240-2.130 (7) & (8) and the Commission's Order Adopting Procedural Schedule and Test Year dated September 12, 2006 ("Procedural Order").
[2] Which creates the current situation, where the Commission must now deal with an out-of-time adjustment less than two weeks before its Report and Order must be issued.

Taum Sauk Plant might have been sold had the plant been in service. The "facts" OPC relies upon for its newly raised adjustment are all based upon *direct testimony* filed by the Company months before before OPC was required to file its direct case. Consequently, OPC's new adjustment violates not only the letter, but the spirit of the Commission's rules and its Procedural Order, and all references thereto should be stricken.

2. 4 CSR 240-2.130 (7) is specific: "Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." The Commission's Procedural Order is specific: "The Commission will require that testimony be prefiled …. [a]ll parties must comply with this rule." Procedural Order ¶ (A).

3. In rate case proceedings, the Company files its direct case – which consists of support for its requested revenue requirement – and all other parties file their direct cases, based upon their audits (which in this case they had more than five months to complete). Parties must, in their direct cases, present support for their recommended revenue requirement and any adjustments they propose; i.e., they must provide substantial and competent evidence to support their case-in-chief. Typically, various adjustments to the Company's direct case are proposed and supported by various parties. The Company, having then been fairly apprised of proposed adjustments, then has the opportunity to rebut the other parties' adjustments and other parties rebut the Company's position. Finally, surrebuttal testimony is filed, if indicated based upon the rebuttal testimony that is filed, and evidentiary hearings are held during which the record in the case is completed. The Commission also has rules that accommodate issues that could arise for the first time at the hearings.[3]

[3] *See, e.g.*, 4 CSR 240-2.130(8) (Providing that parties will not be precluded from having a reasonable opportunity to address matters not previously disclosed which arise at the hearing).

4. The brand new issue OPC tries to support in one paragraph stuck at the end of its Post-Hearing Brief was not proposed by OPC until nearly three weeks after the evidentiary hearings in this case concluded and, as outlined below, did not arise for the first time at the hearings. In support of its after-the-fact and improper adjustment, OPC cites to page 3902 of the hearing transcript and to AmerenUE witness Martin J. Lyons Jr.'s Direct Testimony relating to the Company's request for a fuel adjustment clause, which was filed more than *seven months ago*. OPC's citation to page 3902 of the hearing transcript appears calculated to suggest (a suggestion that is, at best, misleading) that the $2.00/kw-month figure used to underlie OPC's adjustment came up at the hearings. In fact, the transcript makes clear that the $2.00/kw-month figure came from AmerenUE witness Robert J. Mill's Direct Testimony[4] and the tariff sheets filed to initiate this case -- filed on July 7, 2006 – ten *months ago*.

5. OPC's adjustment is improper, and similar attempts to manufacture evidence for the first time in a brief have been rejected by the Commission. For example, in *In the Matter of The Empire District Electric Company's Tariff Revision*, 6 Mo. PSC 3d 17 (Feb. 13, 1997), the Commission struck portions of Empire's brief by which Empire attempted to inject a higher rate increase request ($6 million versus $4 million) into the case by virtue of a new calculation appearing for the first time in Empire's brief. In striking that portion of Empire's brief, the Commission stated that "this is a perfect illustration of the problem. In order to have a full and fair hearing, the derivation of the alleged $6 million deficiency must be contained in testimony which is subject to cross-examination. It is not sufficient for the calculation to appear for the first time in posthearing briefs or pleadings." Indeed, OPC's newly-raised adjustment would have been improper even had it attempted to do so via rebuttal testimony or surrebuttal testimony

[4] Exh. 40, pp. 11-12; *See also* Exh. 78, Sch. WLC-E1-65 to Mr. Cooper's Direct Testimony (Reflecting this $2/kw-month figure).

rather than via direct testimony. *See, e.g., In the Matter of Missouri Gas Energy's Tariffs*, 2004 Mo. PSC LEXIS 1184 (July 22, 2004) (Where the Commission found that Staff had withheld the substance of its testimony on a particular issue until surrebuttal, noting that by "concealing his methodology until filing his surrebuttal testimony, . . . [the Staff witness] deprived opposing parties of the ability to propound data requests or to seek other discovery regarding his method."). If OPC is permitted to raise this new issue in its brief there will be nothing to stop other parties from emulating this behavior in other cases, thus undermining the Commission's processes and rules.

6. As alluded to earlier, recognizing the impropriety of proposing this adjustment weeks after the evidentiary hearings concluded, perhaps OPC may claim that somehow the issue of regulatory capacity came up for the first time at the evidentiary hearings. If claimed, that would not be true. AmerenUE witness Michael Moehn was asked during his deposition (Exhibit 260 – taken on January 26, 2007) whether AmerenUE had or was making any sales of regulatory capacity.[5] Indeed, Public Counsel Mills himself cross-examined Mr. Moehn extensively during his deposition,[6] and specifically questioned Mr. Moehn *about this very issue* -- AmerenUE capacity sales.[7] Consequently, any claim that OPC had no opportunity to raise this issue well in advance of the evidentiary hearings would simply be untrue, as evidenced by the fact that OPC knew about (and questioned AmerenUE witnesses about) sales of regulatory capacity many weeks before the hearings began, and had in its possession the very figures it now relies upon from Company *direct* testimony, filed many months earlier. Simply stated, OPC cannot raise this issue now.[8] Moreover, serious Due Process concerns are also presented by OPC's out-of-

[5] Tr. p. 1207.
[6] Mr. Mills's cross-examination covered pages 51 to 102 of the 134 page deposition transcript.
[7] Exh. 260 (Moehn Deposition).
[8] 4 CSR 240-2.130 (7) & (8); Procedural Order.

time adjustment, and allowing such adjustments constitutes a direct attack on the Commission's well-established processes, which are designed to ensure that Due Process is given to all litigants in cases before it.

7. The Company, from the inception of this case, presented a revenue requirement that was based in part (indeed, in large part, given the significance of fuel and purchased power expense on the revenue requirement) on the results of its production cost modeling. Every party to the case, including OPC, had full access to the results of the Company's production cost modeling, and to the workpapers underlying that modeling, all of which were provided by Company witness Timothy Finnell. The Company's direct case explained that the production cost model was run based upon the Taum Sauk's historical operations (which did not include capacity sales from the Taum Sauk Plant) as if the Taum Sauk Plant remained in service. This is because the Company recognized that the absence of Taum Sauk would effectively increase its revenue requirement and, unless the Plant were treated as if it were in service, customers would not be held harmless from the reservoir failure in this rate case.[9] The result of treating the Taum Sauk Plant as if it were in service during the test year was that the Company's revenue requirement was adjusted downward, a fact that OPC and every other party to this case knew, or certainly had every reason to know.

8. If OPC believed that the reduction in the Company's revenue requirement reflected in the Company's case as a result of modeling the Taum Sauk Plant as if it were in service was inadequate or incomplete or calculated improperly, OPC had more than five months before its direct case was due to be filed to audit the Company's filing and to raise the issue. OPC failed to do so.

[9] *See* Exh. 1, p. 34, l. 8 to p. 35, l. 5 (Baxter Direct); Exh. 85, p. 8, l. 10-12 (Finnell Direct). Each piece of testimony explained that the Company had treated the Taum Sauk Plant as if it were in service during the test year, and thus Taum Sauk had been dispatched economically along with all other Company generating units during the test year.

9. It is not as if the Company's modeling in this case was free from scrutiny or that the Company's witnesses were unavailable. Both the Staff and the state of Missouri availed themselves of numerous opportunities to meet informally (with the Company's cooperation) with various Company experts, including Mr. Finnell, who conducted the Company's modeling. Depositions of five Company witnesses were scheduled and taken, and OPC conducted extensive questioning in each of them. The Company deposed several witnesses, including the Staff's modeling expert, Mr. Rahrer, where OPC had ample opportunity to inquire about the adequacy or appropriateness of how the Taum Sauk Plant was modeled.[10] The Company and the Staff, which both ran production cost models, agreed upon a number of modeling adjustments and corrections reflected in the Stipulation and Agreement as to Certain Issues/Items approved by the Commission. OPC was involved in the discussions leading to that Stipulation and did not object to it. Indeed, the Company's and the Staff's modeling are, based upon the evidentiary record in this case, in total agreement on all areas (including the modeling of the Taum Sauk Plant) with the exception of a disagreement on the energy price to use as an input for running the model and a very small disagreement on off-system sales volumes.[11]

10. If OPC had questions, or believed some aspect of the Taum Sauk Plant had not been properly accounted for, OPC could have deposed Mr. Finnell, or Mr. Schukar, or any other Company witness. OPC could have asked data requests or used other discovery tools[12] to attempt to develop and support its out-of-time adjustment as part of its case-in-chief where it would have belonged. OPC failed to do so, and its attempt to do so now is improper and should not be allowed.

[10] OPC was given timely and proper notice of Mr. Rahrer's deposition and chose not to participate.
[11] Tr. p. 1451.
[12] Indeed, OPC propounded over 400 data requests to the Company and, pursuant to the Procedural Order, was served with copies of (and could request copies of the responses to) the thousands of other data requests served on the Company in this case.

11. Not only is OPC's attempt improper as violative of the Commission's well-established processes and rules, but the adjustment OPC argues for rests upon its argument that capacity sales from the Taum Sauk Plant should be accounted for, even though there is no evidence in the record supporting anything more than pure speculation about whether such capacity sales in fact should have been modeled. Indeed, there is no evidence that capacity sales have ever been made from the Taum Sauk Plant. Consequently, there is of course no evidence of the price of those sales, since the sales do not exist.[13]

12. The Commission has rules for a reason – to protect its process which promotes fairness for all litigants -- and to aid the Commission in processing and deciding cases in a fair, just, and reasonable manner. OPC should not be allowed to ignore that process. OPC had a full and fair opportunity to audit the Company's filing in the more than five months preceding the due date of its direct case; had a full and fair opportunity to conduct discovery, and did so; and, indeed, asked Mr. Moehn extensive questions about capacity sales. OPC had every opportunity to timely raise this speculative adjustment, but failed to do so. OPC should not be allowed to do so now. It is simply too late to propose a brand new adjustment in this case.

WHEREFORE, for the foregoing reasons, the Company respectfully requests that the Commission enter its order striking all references to the "Taum Sauk Hold Harmless – Capacity Sales" appearing on Staff's Revised True-up Reconciliation, and striking the "Taum Sauk

[13] OPC makes a weak attempt to tie an incentive rate included in the very small, 100 MW Industrial Demand Response ("IDR") pilot program proposed by the Company in this case to price its alleged and speculative capacity sales from Taum Sauk. Reliance on this incentive rate from this small pilot program is entirely inappropriate. As AmerenUE witness Robert Mill's Direct Testimony explains, (Exh. 40, pp. 11-12) the IDR pilot would require mandatory curtailments (unlike past demand-response programs at AmerenUE). In order to attract participation in the pilot program, the Company set this figure at a generous level (Tr. p. 4283, l. 17-18). Moreover, in addition to the fact that the entire program applies to only up to 100 MW (and no more than five customers), the curtailments would total no more than 200 hours (out of 8,760 hours) per participant per year (Exh. 40; Exh. 78, Sch. WLC-E1-65).[13] Consequently, Public Counsel's use of $2 per kw-month for *all* hours in all 12 months of the year mixes apples and oranges and is, in any event, irrelevant and speculative since there is no evidence of record that capacity sales from the Taum Sauk Plant have ever occurred.

Regulatory Capacity" heading and paragraph following that heading on page 54 of OPC's Post-Hearing Brief, and that the same not be considered a part of the record in this proceeding.

Dated: May 9, 2007

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Union Electric Company d/b/a AmerenUE Motion to Strike Portions of the Office of the Public Counsel's Post-Hearing Brief and Reconciliation was served via e-mail, to the following parties on the 9th day of May, 2007.

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