

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

During the October 10, 2006, status hearing, the Commission's Regulatory Law Judge directed the parties to file their recommendation as to whether the Commission should hold a hearing in the above-styled matter or issue an order based on the record currently before it. The RLJ further directed that if a party recommended the Commission hold a hearing, that party include a suggested procedural schedule in its recommendation.

On December 5, 2005, AmerenUE filed its Integrated Resource Plan as required by 4 CSR 240-22.

On July 2, 2006, AmerenUE filed a Request for An Extension of Time for various deadlines found in 4 CSR 240-22.

On July 5, 2006, the Commission issued an order extending the deadline for the filing by AmerenUE of its comments and the filing by other parties of their responses to each other's report or comments required pursuant to 4 CSR 240-22.080(9) to September 15, 2006.

On August 4, 2006, the parties to this proceeding made a "Joint Filing of AmerenUE, Missouri Public Service Commission Staff, Office of the Public Counsel, Missouri Department of Natural Resources and Sierra Club, et al" (hereafter the "Joint Filing"). This filing identified alleged deficiencies resolved by agreement as well as deficiencies not resolved by agreement for the Office of the Public Counsel, the Department of Natural Resources and the Sierra Club. Of the 36 deficiencies listed as not resolved in the Joint Filing, 16 were related to demand-side resources.

On September 15, 2006, the Department and other parties filed their responses as directed by the Commission.

RECOMMENDATION

The Department recommends that the Commission schedule and hold a hearing in the above-styled matter as provided for by 4 CSR 240-22.080(9). As set out in the August 4, 2006 Joint Filing, the parties, other than Staff and AmerenUE, have not been able to reach agreement regarding 36 deficiencies identified by the Office of Public Counsel, the Sierra Club and the Department. Further, while Staff and AmerenUE have entered into a Stipulation and Agreement purporting to resolve the deficiencies identified by Staff, the Agreement simply puts off AmerenUE's obligation to comply with 4 CSR 240-22 until AmerenUE's next IRP filing in December 2008. While that is a possible solution for the December 2008 filing, it does not resolve the deficiencies in AmerenUE's December 2005 IRP filing.

Rule 4 CSR 240-22.080 sets out the procedures the Commission will follow in its review of a utility's IRP filing. If the parties identify deficiencies, they are to first work with the utility in an effort to resolve the alleged deficiencies. The parties in this case have done that, but have not been able to resolve all of the identified deficiencies. 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. Furthermore, 4 CSR 240-22.080(13) provides:

The commission will issue an order which contains *findings* that the electric utility's filing either does or does not demonstrate compliance with the requirements of this chapter, and that the utility's resource acquisition strategy either does or does not meet the requirements stated in 4 CSR 240-22010(2)(A)-(C), and which addresses any utility requests pursuant to section (2) for authorization or reauthorization of nontraditional accounting procedures for demand-side resource costs.

(Emphasis supplied.)

Section 536.090, RSMo requires administrative agencies, including the Public Service Commission, to set forth findings of fact to support its decisions. The law requires administrative agencies to set out the factual bases for their decisions in order that a reviewing court will be able to effectively review the decision. *State ex rel. City of Joplin v. Public Service Commission*, 186 S.W.3D 290, 293 (Mo. App. W.D. 2005)

The Commission's rule, 4 CSR 240-22.080(13) appears to recognize this mandate. It calls for the Commission to issue an order that includes findings. However, at present, there is no evidence upon which the Commission could base any findings. While the parties have filed pleadings setting out where the parties believe deficiencies with AmerenUE's IRP exist (or do not) and the reasons for those beliefs, none of the pleadings are anything more than the argument of counsel, which is not evidence. *City of St. Joseph, Missouri v. St. Joseph Riverboat Partners*, 141 S. W. 3d 513, 517 (Mo App. W.D. 2004), citing *Lester v. Sayles*, 850 S. W. 2d 858, 864 (Mo. banc 1993.) None of the parties have submitted any testimony, pre-filed or otherwise, under oath. Nor have any of the parties submitted any other evidence that would serve as a basis for this Commission to make findings of fact.

The case law is clear that a reviewing court looks at two things when assessing a Commission decision. It first looks to see whether the Commission order is lawful. *State ex rel. Sprint, Missouri, Inc. v. Public Service Commission*, 165 S.W.3d 160, 164 (Mo banc 2005). If the decision is lawful, the court next determines whether the order is supported by competent and substantial evidence upon the record as a whole, whether the decision is arbitrary, capricious or unreasonable, or whether the Commission has abused its discretion. *Id.* Without evidence upon which to base findings, this Commission's decision will not be supported by competent and substantial evidence and would thus be struck down by any reviewing court.

In order to arrive at a decision that is defensible and legal, this Commission needs to direct the parties to pre-file testimony and that a hearing be scheduled so that all witnesses may be subject to cross-examination. In light of its recommendation, the Department has joined in a pleading that proposes the following schedule:

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| December 4, 2006 | AmerenUE files direct testimony |
| January 8, 2007 | Other parties file rebuttal testimony |
| February 13, 2007 | AmerenUE files surrebuttal and all other parties file cross- surrebuttal |
| February 16, 2007 | List of Issues, Order of Witnesses Order of Cross-Examination and Position Statements Due |
| February 20-22, 2007 | Hearing |

WHEREFORE, the Department submits its recommendation that the Commission schedule an evidentiary hearing in the above-styled matter using the procedural schedule outlined above.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 17th day of October, 2006.

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