BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of an Investigation into an Incident in December 2005 at the Taum Sauk Pumped Storage Project Owned and Operated by the Union Electric Company doing business as AmerenUE.	)))))	Case No. ES-2007-0474

UNION ELECTRIC COMPANY d/b/a AMERENUE'S RESPONSE TO COMMISSION ORDER GRANTING STAFF'S MOTION TO OPEN CASE BUT DENYING STAFF'S REQUEST TO OPEN CONTESTED CASE

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or the "Company") and, hereby respectfully responds to the above-referenced Commission order, as follows:

1. On June 19, 2007, the Commission established this docket "for the purpose of conducting an investigation into the incident which occurred on the night of December 14-15, 2005 in Reynolds County, Missouri." The incident in question was of course the regrettable failure of the upper reservoir at the Company's Taum Sauk generating facility. The Commission's June 19 order also indicated that if the investigation indicated that any action was warranted, any such action would take place in a different docket, suggesting that the purpose of the investigation may be to provide information on which the Commission might later seek to impose some kind of construction, operation or maintenance parameters on a rebuilt Taum Sauk plant or seek to impose some kind of penalties arising out of the failure.

2. The Company has already addressed, in its June 12, 2007 Response to Staff's motion to create this docket, the reasons why the Commission should not pursue this investigation into the failure at the Taum Sauk plant. The Company will not repeat those reasons here. At this point, the Commission has made its decision to investigate, and while the Company

disagrees that an investigation is warranted, if this investigation is to proceed the Company will fully cooperate with the investigation, as it has done in the previous five investigations[1] that have already been conducted.

3. The Company files this response at this time not to indicate that the Commission cannot *investigate* this matter in some fashion, if that is the course of action the Commission desires to continue to pursue.[2] Rather, the Company files this response to respectfully point out that the efficacy of any such investigation is, as a matter of federal constitutional law, quite limited. Consequently, the Company would suggest that the Commission consider whether expending resources on a sixth investigation of this matter, which necessarily cannot lead to any tangible results beneficial to the ratepayers or the state as a whole,[3] remains warranted.

Any meaningful action by the Commission would be preempted as a matter of federal constitutional law.

4. The supremacy clause of the U.S. Constitution, art. VI, cl. 2, provides that federal law preempts state law where Congress so intends. To determine Congress' intent, courts look to the statutory language and federal regulations enacted pursuant to valid statutory authority.

[1] The five persons or entities that have already concluded investigations are as follows: Paul C. Rizzo, Ph.D., P.E., the Federal Energy Regulatory Commission's ("FERC") Staff, a FERC panel of independent consultants, the Missouri Department of Natural Resources, and the Missouri State Highway Patrol.

[2] Although the Company is not asserting that the Commission is precluded from investigating "the incident which occurred on the night of December 14-15, 2005 in Reynolds County, Missouri," such an argument could properly be made. Like dam safety, discussed below, the FERC has plenary authority over investigations into the operation of hydropower projects and compliance with applicable federal rules, regulations and orders. The Federal Power Act ("FPA") specifically grants the Commission the power to "make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed . . ." 16 U.S.C. § 797(a). The FPA also states that: "The Commission shall monitor and investigate compliance with each license and permit issued under this subchapter . . . [and] shall conduct such investigations as may be necessary and proper in accordance with this chapter." 16 U.S.C. 823b(a). Part 1b of the Commission's rules describe the Commission's investigation procedures. 18 C.F.R. Part 1b. At its discretion, FERC can institute investigations, or if a state wants an investigation conducted, it has the right to request that FERC conduct an investigation under 18 C.F.R. § 1b.8(a). The rules also posit that "no person may intervene or participate as a matter of right in any investigation . . ." *Id*. at § 1b.11. Thus, FERC regulations do not envision states investigating matters on their own. To the contrary, states are supposed to request that FERC conduct an investigation, which FERC has already done in this case.

[3] Indeed, as already discussed in the Company's July 12 Response and as explained in greater detail below, any ongoing investigations of the type now underway at the Commission may be harmful to the state's interests.

Fidelity Federal Savings & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 153 (1982). "An agency's statutorily authorized regulations will preempt any state or local law that conflicts with those regulations or frustrates their purpose." *The Empire District Electric Company v. Gaar*, 26 S.W.3d 370, 374 (Mo.Ct.App. 2000). As the Commission likely knows, the Federal Power Act, 16 U.S.C. §§ 791 et seq. ("FPA"), sets out a comprehensive system for regulating hydropower projects on the navigable waters of the United States. It is undisputed that the Taum Sauk plant is a federal hydropower project, which is constructed, operated and maintained pursuant to the FPA and the Company's FERC license issued thereunder.

5. Courts have consistently determined that the FPA generally occupies the field of hydropower project regulation and therefore, with certain narrowly defined exceptions not implicated here, preempts state jurisdiction over federally licensed hydropower projects.[4]

The FPA preempts all state dam regulation except as it relates to irrigation or municipal uses of water.

6. The U.S. Supreme Court has twice found that all state laws regulating dams are preempted except as they relate to proprietary water rights. *First Iowa Hydro-Elec. Co-op v. FPC*, 328 U.S. 152, 175 (1946) (holding that compliance with state dam permit requirements is not necessary under the FPA); *California v. FERC*, 495 U.S. 490, 502 (1990) (finding that states are preempted from imposing minimum stream flow requirements that conflict with federal license conditions). "In the Federal Power Act of 1935, . . . Congress clearly intended a broad federal role in the development and licensing of hydroelectric power." *California*, 495 U.S. at

[4] The states retain jurisdiction regarding issues related to proprietary water rights; *see* 16 U.S.C. § 821, however, in all other areas FERC jurisdiction generally preempts state law regardless of whether or not there is a conflict between state and federal law. *See, e.g., Board of Elec. Light Com'rs of City of Burlington v. McCarren*, 725 F.2d 176 (2d Cir. 1983); *Niagara Mohawk Power Corp. v. N.Y.D.E.C.*, 187 A.D.2d 7, 11 (S.C.N.Y. 1993), *affirmed by*, 624 N.E.2d 146 (Ct. App. N.Y. 1993); *People v. Gatski*, 677 N.W.2d 357, 362 (Mich. App. 2004); *Midwest Hydraulic Company, Inc. Order Issuing License (Major Project)*, 79 FERC P 62101, 64259 (May 8, 1997); *Commonwealth of Pennsylvania v. FERC*, 868 F.2d 592 (3d Cir. 1989), for examples of the numerous cases where it has been held that state requirements are preempted regardless of whether or not there is a conflict.

495. "Congress wanted to prevent 'a dual system of futile duplication of two authorities over the same subject matter.'" *First Iowa*, 328 U.S. at 171.

The Court in *First Iowa* held that although proprietary water rights were saved to the states, "in those fields where rights are not thus 'saved' to the states," state law is preempted. *First Iowa*, 328 U.S. at 171; *see also PacifiCorp, Order on Petition for Declaratory Order*, 115 FERC ¶61,194, *6 (May 18, 2006) ("It is well-established that the FPA preempts *all* state and local law . . . apart from those adjudicating proprietary water rights." (emphasis added)). Many years later, the Supreme Court upheld and reiterated the *First Iowa* holding in its *California* decision. *California*, 495 U.S. at 498.

FERC has plenary authority over issues of dam safety, construction, and compliance with applicable operation and maintenance rules and regulations.

7. The FPA does not allow states to retain authority over dam safety or construction. *Wisconsin Public Service Corp. Order Issuing Subsequent License (Minor Project)*, 79 FERC P 62218, *7 (June 26, 1997) ("[T]he Commission's dam safety and construction rules are preemptive at licensed projects."); *see also Niagara Mohawk Power Corp. v. N.Y.D.E.C.*, 187 A.D.2d 7, 11 (S.C.N.Y. 1993), *affirmed by*, 624 N.E.2d 146 (Ct.App.N.Y. 1993) (finding that state environmental agency cannot impose safety and construction regulations during licensing). Instead, the FPA gives FERC broad authority to prescribe rules and regulations related to dam safety and construction. Section 803(c) of the FPA specifically states that the licensee must maintain and repair a dam sufficient to maintain navigation and operation, and must "make all necessary renewals and replacements, . . . and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property." 16 U.S.C. § 803(c). Pursuant to this authority, FERC adopted Part 12, which broadly regulates dam safety. 18 C.F.R. Part 12.

8. States (whichever agency or commission may be at issue) do not have the authority to impose fines or penalties or to require injunctive relief, based on allegations of non-compliance with applicable dam safety and/or dam operation and maintenance rules and regulations. That authority is expressly reserved to the FERC under the FPA:

> Any licensee, permittee, or exemptee who violates or fails or refuses to comply with any [FERC] rule or regulation . . . [or] any term, or condition of a license, permit, or exemption . . . shall be subject to a civil penalty in an amount not to exceed $10,000 for each day that such violation or failure or refusal continues. Such penalty ***shall be assessed by the Commission*** after notice and opportunity for public hearing.

16 U.S.C. § 823b(c) (emphasis added). Based on the plain language in the FPA, only FERC can assess a civil penalty against AmerenUE for noncompliance, and indeed FERC has done so, having levied the largest fine ever issued for alleged noncompliance with the FPA's hydropower rules and orders - $15,000,000.

9. At bottom, even if this now-sixth investigation were to reveal something new[5] and if on that basis the Commission desired to take some action, applicable case law confirms that not only would the Commission be precluded from seeking the imposition of fines against the Company arising from the past construction, operation or maintenance of the plant, which are matters within the exclusive jurisdiction of the FERC, but so too would the Commission be precluded from seeking to impose additional or different construction, operation, or maintenance requirements on the Taum Sauk plant, if it is to be rebuilt. *See, e.g., Board of Elec. Light Com'rs of City of Burlington v. McCarren*, 725 F.2d 176 (2d Cir. 1983) (Holding that the Vermont Public Service Board (Vermont's corollary agency to the Missouri Commission) could not

[5] We now of course know, by the AP's own admission, that the information in the AP story that led to Staff's Motion to open this case in the first place, and which Staff thought at that time was "new" as incorrectly alleged by the AP was indeed not new, and had already been examined in the prior investigations occurring regarding this matter. Simply stated, there is nothing new that five capable investigators have not already found and thus there is no need for another investigation.

require a certificate of public good before the City of Burlington Electric Light Department could proceed in constructing a hydroelectric facility, citing *First Iowa, supra*. This case demonstrates that state utility commission action relating to a federal hydroelectric project is preempted); *Niagara Mohawk Power Corp. v. N.Y.D.E.C.*, 187 A.D.2d 7, 11 (S.C.N.Y. 1993), *affirmed by*, 624 N.E.2d 146 (Ct. App. N.Y. 1993) (Holding that a state environmental agency was preempted from imposing on licensee various state dam construction and safety regulations pursuant to section 401 of the CWA. The same principles would apply to preclude this Commission from imposing additional requirements on a rebuilt Taum Sauk Plant). *See also People v. Gatski*, 677 N.W.2d 357, 362 (Mich. App. 2004) (FERC's safety measures preempted state-level recreational trespassing regulations); *Midwest Hydraulic Company, Inc. Order Issuing License (Major Project)*, 79 FERC P 62101, 64259 (May 8, 1997) (Wherein the FERC stated: "Wisconsin DNR recommended that the Commission require MHC to comply with Wisconsin State administrative code pertaining to dam design and construction. Staff explained that the Commission's jurisdiction of project safety is preemptive, and MHC has already complied with a number of the Commission's dam safety requirements. . . . Therefore, compliance with Wisconsin administrative code pertaining to dam safety is duplicative and unnecessary."); *Commonwealth of Pennsylvania v. FERC*, 868 F.2d 592 (3d Cir. 1989) (Wherein the Third Circuit held that Pennsylvania's laws regarding pollution, flood control, aesthetics and recreation, and natural resource conservation are preempted. The court concluded that the only laws not preempted by the FPA were those relating to water use specifically outlined in § 27 of the Act. Pennsylvania had appealed FERC's license issuance for a new hydropower project, arguing that the project did not comply with Pennsylvania law).

10. The Company does not file this Response to avoid responsibility – any responsibility – for the reservoir failure at the Taum Sauk plant. The Company has taken full responsibility for the failure and based upon five now-completed investigations (including the Rizzo investigation commissioned by the Company itself, which cited fault on the part of the Company as the cause of the failure), has paid a $15 million fine to the FERC, has made a substantial adjustment to its revenue requirement in its rate case, Case No. ER-2007-0002, and is in talks with the Missouri Attorney General and the Missouri Department of Natural Resources, involving the likelihood of the payment of substantial monetary damages to the state, to resolve civil damage claims arising from the damage occasioned by the failure.

11. The Company files this Response simply to ensure that the Commission has an appreciation for what a sixth investigation by it can, and cannot, accomplish. Respectfully, the Company suggests that such an investigation cannot lead to any meaningful benefit to ratepayers or the state.

Dated June 29, 2007.

Respectfully submitted,

SMITH LEWIS, LLP

/s/ James B. Lowery
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

Attorneys for Union Electric Company d/b/a AmerenUE

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

Steven R. Sullivan, #33102
Sr. Vice President, General Counsel & Secretary
Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue, MC-1310
P.O. Box 66149, MC-131
St. Louis, Missouri 63101-6149
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
tbyrne@ameren.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response was served via e-mail, as follows, on the 29th day of June, 2007.

Office of the General Counsel
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101
gencounsel@psc.mo.gov

/s/ James B. Lowery
James B. Lowery