

May 24, 2002

VIA FEDERAL EXPRESS



Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, MO 65101

Re: MPSC Case No. EO-2002-1082

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter, please find an original and eight (8) copies of its Response to the Motion to Review of the Office of Public Counsel filed on May 17, 2002.

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Thank you.

Very truly yours,

A handwritten signature in cursive script that reads "Joseph H. Raybuck".
Joseph H. Raybuck
Associate General Counsel

JHR/vww

Enclosures

cc: M. Ruth O'Neill, Assistant Public Counsel
Dan Joyce, General Counsel, MPSC

16018

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

In the Matter of the Proposed Acquisition)
Of CILCORP by Ameren Corporation,)
Parent Company of Union Electric Company)
D/b/a AmerenUE)

Case No. *EO-2002-1082*

**RESPONSE OF UNION ELECTRIC COMPANY TO MOTION TO REVIEW OF
THE OFFICE OF THE PUBLIC COUNSEL**

COMES NOW Union Electric Company, doing business as AmerenUE
(AmerenUE or the Company), pursuant to 4 CSR 240-2.080(15), and responds as follows
to the Motion to Review Proposed Acquisition of CILCORP by Ameren Corporation
(Motion) filed on May 17 by the Office of Public Counsel (OPC).

The OPC's Motion should be denied because the Commission does not have
jurisdiction over the proposed acquisition.

I. BACKGROUND

On April 28, 2002, Ameren Corporation entered into an agreement with The AES
Corporation (AES) for the purchase of CILCORP, Inc. (CILCORP).

Ameren Corporation is the parent of AmerenUE and is a holding company under
the Public Utility Holding Company Act of 1935 (PUHCA). Although Ameren
Corporation is a Missouri corporation, it is not a public utility under Missouri law.

AmerenUE provides gas and electricity to the public in Missouri and in Illinois,
and is a public utility under the laws of those two states.

AES Corporation is a global power company whose primary lines of business are electricity generation and distribution. AES elected to sell CILCORP in order to comply with a mandate of the Securities and Exchange Commission (SEC) and PUHCA.

CILCORP is an Illinois corporation and is the parent of Central Illinois Light Company (CILCO). CILCO provides gas and electricity to the public in Illinois, and is a public utility under Illinois law.

Under the agreement, Ameren Corporation will purchase all of the stock of CILCORP and will operate CILCO as a subsidiary of Ameren Corporation, to be known as AmerenCILCO. Ameren Corporation does not intend to change any of the operations of either AmerenUE or AmerenCIPS. They will both remain as separate operating utility subsidiaries of Ameren Corporation and will maintain their existing service areas and their tariffs. A diagram showing the structure of Ameren Corporation before and after the closing of the acquisition is set forth in Appendix A, which is attached to this Response.

In its Motion, OPC requests that the Missouri Public Service Commission (Commission) open a docket to investigate whether the proposed acquisition of CILCORP by Ameren Corporation will be detrimental to the public interest of AmerenUE's regulated Missouri customers. OPC's Motion is presumably based on its contention that the Commission has jurisdiction over the proposed acquisition.

II. THE COMMISSION'S PRIOR DECISIONS MAKE IT CLEAR THAT IT DOES NOT HAVE JURISDICTION OVER THE PROPOSED ACQUISITION.

The Commission has concluded on numerous occasions that it does not have jurisdiction to examine a merger or acquisition involving two nonregulated parent corporations, even though they may own Missouri regulated utilities. So long as there

are no changes to the operations, services or tariffs of a Missouri regulated utility, the Commission has consistently declined to take jurisdiction over a merger or acquisition involving two entities not regulated by the Commission.

A close example involved the merger of Ameritech Corporation (Ameritech) and SBC Communications, Inc. (SBC) (cited below in footnote 1). Under the merger agreement, SBC Delaware, a wholly-owned subsidiary of SBC, and Ameritech would merge with Ameritech being the surviving entity. After the merger was effected, both Ameritech and Southwestern Bell Telephone Company (SWBT) would be first-tier subsidiaries of SBC. Neither Ameritech nor SBC were Missouri regulated utilities. The OPC filed a Motion with the Commission to open a docket to review the proposed

In the Matter of the Merger of SBC Communications Inc and Ameritech Corporation, Case No. TM-96-76 (Report and Order issued October 8, 1998); In the Matter of the Merger of American Water Works Company with National Enterprises Inc and the Indirect Acquisition by American Water Works Company of the Total Capital Stock of St. Louis Water Company, Case No. WM-99-224 (Report and Order issued March 23, 1999); In the Matter of the Joint Petition of Communications Central of Georgia, Inc. and Davel Communications Group Inc for Approval of Merger and Transfer of Control, Case No. TM-98-268 (Order Regarding Jurisdiction and Dismissing Application issued January 22, 1998); In the Matter of the Application of ALLTEL Communications, Inc. to Merge with Certain Wholly Owned Subsidiaries of ALLTEL Mobile Communications, Inc., Case No. TM-98-153 (Order Dismissing Application and Closing Case issued December 24, 1997); In the Matter of the Application of United Water Missouri, Inc. for Authority for Lyounnaisse American Holding, Inc. to Acquire the Common Stock of United Water Resources, Inc., Case No. WM-2000-318 (Order Closing Case issued December 7, 1999); Joint Application for Approval of a Transfer of Control of Eclipse Telecommunications, Inc. IXC Communications Services Inc and Telecom One, Inc. to Cincinnati Bell, Inc., Case No. TM-2000-85 (Order Dismissing Application for Lack of Jurisdiction issued October 28, 1999); In the Matter of the Proposed Merger between GTE Corporation and Bell Atlantic, Case No. TM-99-261 (Order Denying Motion to Reconsider Order Closing Case issued April 22, 1999); In the Matter of the Proposed Acquisition of Missouri-American Water Company and American Water Works Company by the German Corporation RWE AG, Case No. WO-2002-206 (Order Closing Case dated December 13, 2001).

merger. In response, the Commission denied the OPC's Motion. "The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri regulated telecommunications companies". As a result, the Commission concluded that it had no jurisdiction over the merger, which was consistent with its prior treatment of similar types of mergers. In the Matter of the Merger of SBC Communications Inc. and Ameritech Corporation, Case No. TM-96-76 (Report and Order issued October 8, 1998).

As another example, the Commission recently denied a very similar OPC Motion to review an acquisition by a foreign corporation of the nonregulated parent of a Missouri water utility. In denying the OPC's Motion, the Commission stated as follows:

The Commission determines that there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company. The Commission's past approach to transactions of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction, it will close the case.

In the Matter of the Proposed Acquisition of Missouri-American Water Company and American Water Works Company by the German Corporation RWE A G, Case No. WO-2002-206 (Order Closing Case dated December 13, 2001).

The same analysis and conclusion applies to the proposed acquisition by Ameren Corporation. Neither Ameren Corporation nor CILCORP are public utilities regulated by the Commission. Ameren Corporation is a holding company and as such does not have any utility operations. Ameren Corporation is the parent company of a number of subsidiaries, including AmerenUE and AmerenCIPS. CILCO is an Illinois public utility, but has no utility operations in Missouri or any other state. CILCORP has no utility

operations at all, but instead is a holding company. Therefore, it is evident that neither Ameren Corporation nor CILCORP are Missouri utilities regulated by the Commission.

Further, the acquisition will result in no changes to the operations, services or tariffs of AmerenUE. The acquisition will not change AmerenUE's legal status as a subsidiary of Ameren. After the closing of the acquisition, AmerenUE will continue to operate exactly as it did prior to the closing. In particular, after the closing AmerenUE will continue to provide gas and electric utility services to its Missouri retail customers pursuant to the same tariffs and certificates currently in existence, and in the same service areas previously authorized by the Commission. Also, the Joint Dispatch Agreement (JDA), referred to in OPC's Motion, will not be amended or otherwise affected by the Ameren-CILCORP transaction. Thus, AmerenUE will not be jointly dispatching its generating units with those of CILCO. Nor will CILCO customers have any right or entitlement to any of the generating units subject to the JDA. As a result, the acquisition will not impose any changes on the operation or dispatch of AmerenUE's generating units.

The cases cited above show that the Commission has recognized that the mergers and acquisitions of a nonregulated parent of a Missouri utility (e.g. Ameren Corporation) do not impair the Commission's ability to continue to fully regulate the rates, terms and conditions of service of the parent's regulated subsidiaries (e.g. AmerenUE). As discussed below, the Commission's recognition is fully consistent with Missouri law. Further, these cases cover a variety of industries, and the analyses and conclusions are fully applicable to the gas and electric utility industries of which AmerenUE is a member.

Finally, the Commission precedent shows that the OPC has attempted on

numerous occasions to extend the Commission's jurisdiction to mergers and acquisitions involving entities which are not regulated entities. The Commission has properly rejected those attempts in the past, and should do so again here. z Only the legislature can expand the Commission's jurisdiction.

111. **THE COMMISSION'S PRIOR DECISIONS ARE FULLY CONSISTENT WITH STATUTORY LAW AND DEMONSTRATE THAT THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE PROPOSED ACQUISITION.**

In its Motion, the OPC ignores the Commission precedent cited above and instead cites Sections 386.250 and 393.190 and one court decision in support of its contention that the Commission has jurisdiction over the proposed acquisition. Neither of these statutes supports the OPC's contention, and the court decision is not applicable. A correct reading of these statutes and relevant case law demonstrates that the Commission precedent cited above was correctly decided and is fully applicable to Ameren Corporation's proposed acquisition.

Section 386.250 generally describes the jurisdiction of the Commission over public utilities providing service in Missouri. It does not reference in any way acquisitions or mergers. Therefore, Section 386.250 provides no guidance as to whether the Commission has jurisdiction over an acquisition by a parent of a Missouri regulated utility.

More specific language is found in Section 393.190. However, the language of Section 393.190 specifically applies to gas and electric corporations and other entities which constitute public utilities under Missouri law. The Missouri Supreme Court

² See for example the SBC, American Waterworks, GTE, and Missouri-American Water Company cases cited in footnote 1.

determined many years ago that a public utility is an entity which has devoted its property for a public use. State ex rel. Danciger v. Public Service Commission, 205 S.W. 36, 38 (Mo. 1918) [*concluding* that "it is apparent that the words `for public use' are to be understood and to be read in interpreting the definition of `electrical corporation' "].

Therefore, Section 393.190 simply does not apply to the parent company of a gas or electric corporation unless that parent itself employs property for public use. That is not the case with Ameren Corporation. It simply *functions* as a holding company owning stock in AmerenUE and its other subsidiaries. Ameren Corporation does not itself own or operate any public utility property. Nor does it possess any Certificates of Convenience and Necessity, or any other authority, issued by the Commission. As a result, a holding company such as Ameren Corporation is not subject to regulation as a public utility merely because it owns a subsidiary which is a public utility. The Commission reached this same conclusion before when it determined that a company *owning* a majority of the stock of a gas corporation was not itself a gas corporation. In particular, the Commission concluded that the definition of a "gas corporation" did not include any entity which indirectly owned, operated or controlled any gas plant. Re Stems Brothers & Company, 27 Mo.P.S.C. 337, 341-342 (1946). The same analysis and *conclusion* applies to the definition of an electrical corporation.

The case of State ex rel. Martigney Creek v. PSC, 537 S.W. 2d 388 (Mo. bane 1976), cited by OPC, has no relevance. It involved an appeal of a rate case order issued by the Commission. The issues on appeal concerned whether the Commission correctly disallowed from a sewer company's rates certain expenses relating to customer

contributions and connection fees. It did not involve a merger or acquisition and thus has no bearing on the question at hand.

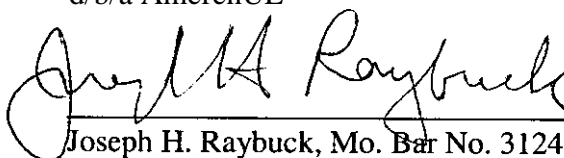
Even though the Commission has no jurisdiction to review the proposed acquisition, the Commission will still have full opportunity to consider the effects, if any, of the acquisition on the Missouri regulated gas and electric utility operations of AmerenUE. In particular, nothing about the acquisition will affect the Commission's ability to regulate the rates, terms and conditions of AmerenUE's service to the public in Missouri.

IV. **CONCLUSION**

Based on the foregoing, the Commission should deny the OPC's Motion to open a docket to review the acquisition of CILCORP by Ameren Corporation. As the Commission has concluded on many occasions before, the Commission does not have jurisdiction over an acquisition involving two nonregulated entities, such as Ameren Corporation's acquisition of CILCORP.

Respectfully submitted,

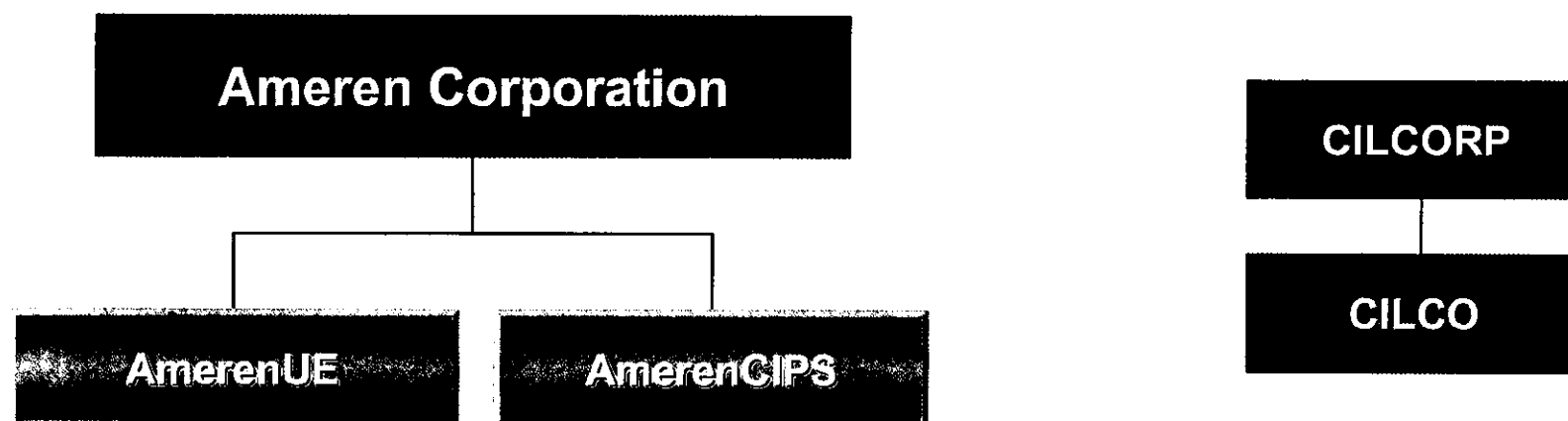
UNION ELECTRIC COMPANY
d/b/a AmerenUE

A handwritten signature in black ink, reading "Joseph H. Raybuck", is written over a horizontal line.

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Acquisition Structure - Before Closing

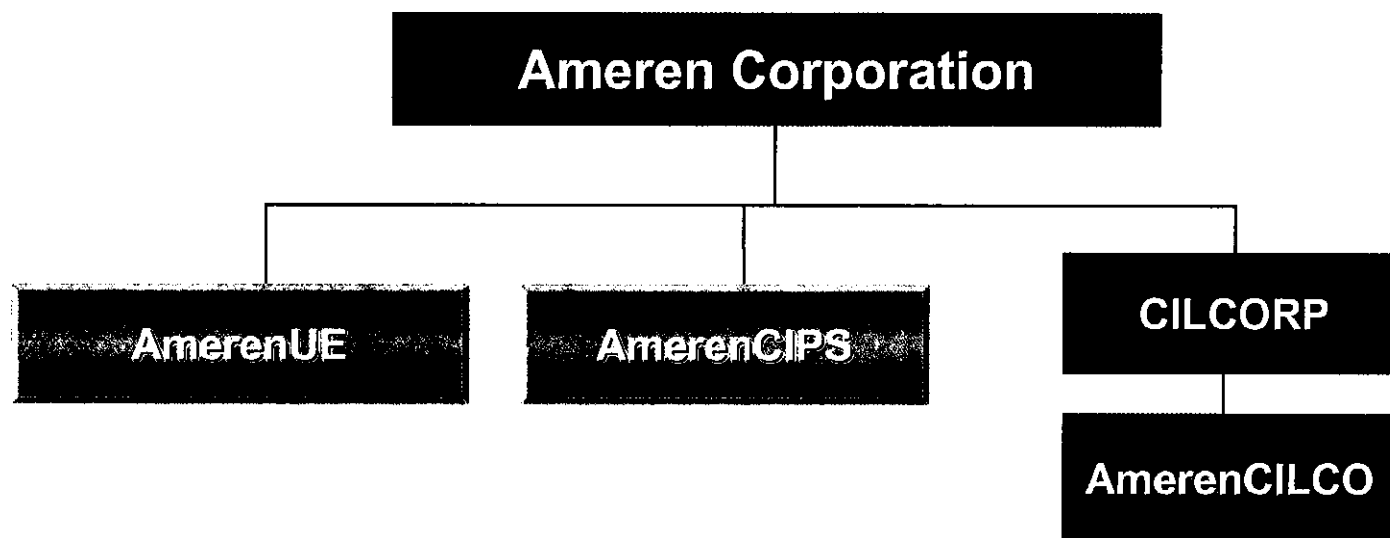
Appendix A



NOTE: To simplify matters, this shows only the operating utility subsidiaries of Ameren Corporation and CILCORP.

Acquisition Structure - After Closing

Appendix A

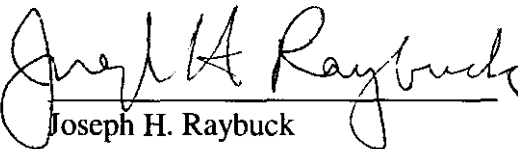


CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 24th day of May, 2002, on the following:

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