

June 16, 2000

**VIA HAND DELIVERY**

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

**FILED<sup>2</sup>**  
JUN 16 2000  
Missouri Public  
Service Commission

Re: MPSC Case No. EM-96-149

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 Staff's Proposed Procedural Schedule**.

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.

Very truly yours,



James J. Cook  
Managing Associate General Counsel

JJC/db  
Enclosures

cc: Ms. Shelly Register  
Parties on Attached Service List

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

JUN 16 2000

Missouri Public  
Service Commission

In the Matter of the Monitoring of the Application of )  
Union Electric Company for an Order Authorizing: )  
(1) Certain Merger Transactions Involving )  
Union Electric Company; (2) The Transfer of Certain )  
Assets, Real Estate, Leased Property, Easements, and )  
Contractual Agreements to Central Illinois Public )  
Service Company; and (3) In Connection Therewith, )  
Certain Other Related Transactions )

Case No. EM-96-149

**UNION ELECTRIC COMPANY'S RESPONSE  
TO THE STAFF'S PROPOSED PROCEDURAL SCHEDULE**

Union Electric Company ("UE") respectfully submits this Response to the Staff's Proposed Procedural Schedule, including an alternative procedural schedule that UE believes is required by the proceedings triggered both by the testimony filed by the Staff and the Office of Public Counsel ("OPC") and by the Complaint filed by the Staff.

1. It is the Staff's own Complaint which makes the schedule proposed by the Staff legally and practically unworkable. The Complaint claims that UE "manipulated" its operating results in violation of section 7.f.vi of the second Experimental Alternative Regulation Plan ("EARP"). See Complaint ¶ 5. This claim of "manipulation" serves as one of the bases for four of the adjustments the Staff proposes. Pursuant to 4 CSR 240-2.070(6), UE will be making a motion to dismiss this Complaint for failure to state a claim as a matter of law, reflecting the essential dispute between the parties concerning the meaning of "manipulation" under the EARP. At bottom, the Staff apparently believes that manipulation within the meaning of EARP includes any "significant variation" in an expense when, in the view of the Staff, there is "no reasonable explanation" for this variation. Under this view, manipulation does not require any deliberate wrongdoing on

the part of UE; no "cooking the books" is involved. UE, in contrast, following the express terms of the EARP, believes that a claim of manipulation *requires* proof of a deliberate, and obviously wrongful, intent "to reduce amounts to be shared with customers or to misrepresent actual earnings or expenses." EARP, § 7.f.vi.

Most important for establishing the procedural schedule, this difference between the parties concerning the meaning of "manipulation" requires the Commission to resolve this issue before the merits of any claim of manipulation can be addressed. This approach is most obviously mandated by the procedural provisions of the EARP itself. The EARP expressly provides: "The Commission will determine *in the first instance* whether a question of manipulation exists and *whether that question should be heard by it.*" EARP, § 7.f.vii (emphases added).

This provision in the EARP surely reflects common sense. A clear understanding of the correct legal standard for a claim of manipulation is obviously a prerequisite to efficiently and effectively bringing, or defending against, such a claim. Without knowing what are the elements of a legally cognizable claim of manipulation, and so what proof is needed for such a claim, how can either party fairly prepare their case? Indeed, resolution of the correct meaning of "manipulation" in this context will resolve whether the Commission has jurisdiction to hear the Staff's claim of manipulation at all. If UE's understanding of what the EARP means by "manipulation" is correct, then the Commission cannot use the Staff's theory of manipulation as a basis to order an

adjustment in the credit calculation at issue; the Commission simply has no jurisdiction over the matter.<sup>1</sup>

It is not surprising, then, that resolving the motion to dismiss the Staff's manipulation claims before addressing the merits, as provided in the EARP, reflects the Commission's common practice in adjudicating motions to dismiss under 4 CSR 240-2.070(6). A complaint which does not fairly present for determination a matter which falls within the jurisdiction of the Commission--it fails to state a claim on which relief could be granted--must be dismissed. See *Kansas City Terminal Ry. v. Public Serv. Comm'n*, 272 S. W. 957, 960 (Mo. 1925); *MCI Worldcom Communications, Inc. v. Southwestern Bell Tel. Co.*, No. TC-2000-225 and TC-2000-294, 1999 Mo. PSC LEXIS 172 at \* 10-11 (Dec. 7, 1999). Such a motion is resolved on the pleadings alone. *MCI Worldcom, Inc.*, 1999 Mo. PSC LEXIS at \*7 ("[a] motion to dismiss... must be determined solely on the adequacy of the allegation contained in the complaint, without looking beyond the 'four corners' of the complaint.") (citing Devine, *Missouri Civil Pleading & Practice*, § 20-3 (1986)). The Commission ordinarily decides motions to dismiss prior to considering the merits of the complaint. See e.g. *MCI Worldcom, Inc.*, 1999 Mo. PSC LEXIS 172; *McCullough v. Associated Nat. Gas Co.*, No. GC-2000-197, 1999 Mo. PSC LEXIS 164 (December 7, 1999); *MCI Telecommunications Corp. v. Southwestern Bell Tel. Co.* No. TC-81-25, 1982 Mo. PSC LEXIS 18 (September 20, 1982). The Commission has rightly concluded that it would be wasteful of judicial resources to hear the substantive issues raised in a complaint prior to making a

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<sup>1</sup>Because the Commission does not have the power to create an EARP in its own right, it is the terms of the EARP itself that give the Commission any authority to resolve disputes between the parties to that agreement.

determination whether the complaint had raised issues that were appropriate for the Commission to consider at all. *MCI Telecommunications, Inc.*, 1997 Mo. PSC LEXIS at \*6-7.


2. Accordingly, UE proposes the following schedule for these proceedings:

UE Files Motion to Dismiss Complaint	July 18, 2000
Staff and Public Counsel File Oppositions to Motion to Dismiss	August 1, 2000
UE Files Reply in Support of Motion to Dismiss	August 11, 2000
Hearing on Motion to Dismiss	August 18, 2000
UE Files Rebuttal	3 weeks after ruling on Motion to Dismiss
Staff and Public Counsel File Surrebuttal	2 weeks after UE Rebuttal filed
Prehearing Conference	1 week after Surrebuttal filed
Depositions	Within 1 week after Prehearing Conference, subject to the availability of the witnesses
Lists of Issues to be Heard, Order of Witnesses, Order of Cross-Examination, and Statements of Positions	1 week after conclusion of depositions
Evidentiary Hearing	3 weeks after conclusion of depositions

For the reasons set out above, UE respectfully requests that the Commission order that this schedule will govern further proceedings in this case.

Respectfully submitted,

UNION ELECTRIC COMPANY  
d/b/a AmerenUE

By:   
James J. Cook, MBE #22697  
Managing Associate General Counsel  
Ameren Services Company  
One Ameren Plaza  
1901 Chouteau Avenue  
P.O. Box 66149 (MC 1310)  
St. Louis, MO 63166-6149  
314-554-2237  
314-554-4014 (fax)  
jjcook@ameren.com

OF COUNSEL:

Robert J. Cynkar  
Douglas Tucker  
Cooper, Carvin & Rosenthal  
1500 K Street, N.W.  
Suite 200  
Washington, D.C. 20005  
202-220-9600  
202-220-6901 (fax)

Dated: June 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 16th day of June, 2000, on the following parties of record:

Mr. Steve Dottheim  
General Counsel  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

Mr. Michael C. Pendergast  
Laclede Gas Company  
720 Olive Street  
Room 1530  
St. Louis, MO 63101

Mr. Robert C. Johnson  
720 Olive Street  
27<sup>th</sup> Floor  
St. Louis, MO 63101

Ms. Diana Schmidt  
Bryan, Cave  
One Metropolitan Square  
211 North Broadway  
Suite 3600  
St. Louis, MO 63102

Mr. Jeremiah W. Nixon  
Mr. Ronald Molteni  
Attorney General's Office  
221 W. High Street  
P.O. Box 899  
Jefferson City, MO 65102

Mr. William Riggins  
Kansas City Power & Light Co.  
1201 Walnut Street  
P.O. Box 418679  
Kansas City, MO 64141-9679

Mr. John B. Coffman  
Office of the Public Counsel  
P. O. Box 7800  
Jefferson City, MO 65102

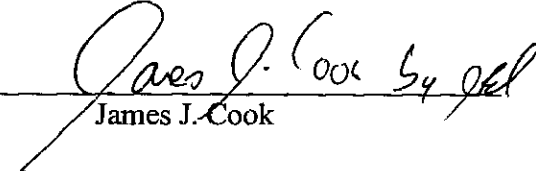
Mr. James C. Swearngen  
Brydon, Swearngen & England  
312 E. Capitol  
P.O. Box 456  
Jefferson City, MO 65102

Ms. Marilyn S. Teitelbaum  
Schuchat, Cook & Werner  
1221 locust Street  
2<sup>nd</sup> Floor  
St. Louis, MO 63103

Mr. Gary W. Duffy  
Brydon, Swearngen & England  
312 E. Capitol  
P.O. Box 456 Jefferson City, MO 65102

Mr. Paul S. DeFord  
Lathrop & Norquist, L.C.  
2345 Grand Blvd.  
Suite 2500  
Kansas City, MO 64108

Mr. James M. Fischer  
1001 W. McCarty  
Suite 215  
Jefferson City, MO 65101

  
James J. Cook