BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions.	)	Case No. EO-2004-0108

PUBLIC COUNSEL'S RESPONSE TO AMERENUE'S APPLICATION FOR REHEARING

COMES now the Office of the Public Counsel (Public Counsel) and for its Response to AmerenUE's Application for Rehearing states as follows:

1. On October 6, 2004, the Public Service Commission (Commission) issued its Report and Order in this case, approving the proposed transfer of AmerenUE's Metro East service area, over the objections of Public Counsel, the Staff of the Commission, and other parties that believe that the transfer is not the least cost resource planning option available to Union Electric Company d/b/a AmerenUE ("AmerenUE" or "Company"). The Commission properly notes that the proposed transfer would be detrimental to Missouri ratepayers without conditions that eliminate the detriments.

2. Public Counsel still believes that the transfer would be detrimental to the public as it is likely to increase future electric rates. Although the conditions approved by the Commission would help mitigate the detriments of the proposed transfer, Public Counsel does not believe that these conditions go far enough in protecting the public from the likely detriments of this transaction.

Public Counsel's October 15, 2004 Application for Rehearing identifies certain issues that it believes that the Commission unlawfully and unreasonably failed to address adequately in order to protect the ratepaying public from the impacts of this transaction.

3. However, despite having won Commission approval for the controversial transfer, AmerenUE filed its own Application for Rehearing and Alternative Motion for Clarification (AmerenUE's Application for Rehearing) on October 15, 2004, lodging numerous faulty legal arguments and complaints against the conditions ordered by the Commission. With regard to the issue of the "pro-close generation-related liabilities" condition, AmerenUE asks the Commission to abdicate its responsibilities to Missouri, and to defer to the Illinois Commerce Commission (ICC). Ibid., pp. 4-5. With regard to the "second JDA amendment" condition, AmerenUE throws out several red herrings to confuse the matter, improperly changing the focus of this issue from energy to capacity. Ibid., pp. 5, 14, 16-20.

AmerenUE's application then proceeds to attempt a *re-negotiation* with the Commission, actually asking it to remove the conditions that would provide Missouri ratepayers with the most protection against a detriment. AmerenUE's Application for Rehearing, pp. 6-7. AmerenUE asks the Commission to remove the conditions contained in Ordered Paragraph 4 ("second JDA amendment") and in Ordered Paragraph 6 ("pre-close generation-related liabilities") and to replace these detriment-mitigating conditions with promises to show that the transfer is beneficial in future rate proceedings. Ironically, AmerenUE calls this

new proposal a “win-win” and “A Possible Solution for Missouri Ratepayers”. Clearly, this new proposal (*which has no basis for support in the record*) is an attempt to secure even greater profits for Ameren Corporation (at the expense of Missouri ratepayers) than it would already stand to gain as a result of the transfer as approved.

4. In Paragraphs 2 and 6 of its Application for Rehearing, the Company implies a threat that is contradicted by its sworn testimony in the record. Ibid., pp. 1, 3-4. AmerenUE now suddenly asserts that a connection exists between this case and the transfer of the Pinckneyville and Kinmundy plants from Ameren Energy Generating (AEG) to AmerenUE. It is asserted that “unless the Company were to accept these conditions, it is unlikely that transfer of the Pinckneyville and Kinmundy CTGs to AmerenUE will take place.” These statements represent a complete turn-around by Company in this case in which its witnesses asserted that the Pinckneyville and Kinmundy transfers should NOT be an issue in this case.

In his prepared surrebuttal testimony, Ameren witness Nelson stated, “I not only prefer that those transfers [Pinckneyville and Kinmundy] not be an issue, but I would submit that they in fact are not an issue because they do not bear on whether or not the Metro East Transfer is detrimental.” (Exh. 6, p. 22).

Moreover, AmerenUE witnesses Nelson and Voytas both made statements about the lack of a connection between the outcome of this case and the Pinckneyville and Kinmundy transfers during the evidentiary hearing. Mr. Nelson stated that the Pinckneyville and Kinmundy units could be transferred to

AmerenUE without the Metro East Transfer being approved by the Missouri Commission. (Tr. p. 364, lns. 15 – 19). Similarly, Mr. Voytas stated that AmerenUE can complete the proposed Pinckneyville and Kinmundy transfer without approval of this application because Mr. Sullivan (Ameren's Senior Vice President Regulatory Policy and General Counsel) "has developed other options." Mr. Voytas stated further "I know there are other options." (Tr. p. 1673, ln. 23; p. 1674, ln. 10).

5. AmerenUE makes several incorrect statements of law. In Paragraphs 20-23, AmerenUE argues that other parties failed to meet their burden of proof related to detriments asserted in this case. Ibid., pp. 9-11. However, the Commission has correctly noted that, in a Section 393.190.1 application, the burden never shifts from the applicant. Report and Order, p. 43. In Paragraphs 24-27, AmerenUE makes several legal arguments that indicates a pre-AG Processing v. PSC[1] view of the law. Despite AmerenUE's interpretation, the Missouri Supreme Court has made it clear that the Commission must weigh the probabilities of future rate impacts when determining whether or not a proposed transaction is detrimental to the public. Id.

6. AmerenUE argues that the Commission does not even have the right to order ANY conditions designed to mitigate or eliminate detriment. AmerenUE's Application for Rehearing, p. 21. This is an extreme argument, inconsistent with decades of precedent. Even if Section 393.190 RSMo. 2000

[1] 120 S.W.3d 732 (Mo. banc 2003).

appears silent on this matter, the Commission has the inherent right to issue conditions to the approval of an otherwise detrimental transfer, based upon the explicit jurisdiction and authority granted to the Commission to perform all "necessary and proper" actions needed to carry out its other statutory responsibilities. Sections 386.040 and 386.250 (7) RSMo. 2000.

7. Furthermore, if AmerenUE is correct that certain detriment-mitigating conditions which the Commission has ordered are unlawful, then the transfer simply cannot meet the standard for approval under any circumstance. Any objective and reasonable weighing of the evidence in this case leads to the conclusion that, absent counterbalancing conditions, the transfer would be detrimental to the ratepaying public in Missouri. Section 393.190(1) makes it clear that no such detrimental transaction can be approved and is void if it is not made "in accordance with the order authorizing it to do so." Therefore, if the Commission is not legally permitted to order conditions that would necessarily eliminate the associated detriments to the public, then this transaction may not lawful occur. Surely, this is not AmerenUE's desired goal.

8. AmerenUE's new proposed alternative conditions, entitled "A Possible Solution for Missouri Ratepayers", is wholly without support based upon the competent and substantial record in this case. AmerenUE's Application for Rehearing, p. 6. AmerenUE had ample opportunity to propose conditions of its own (in its Application, in testimony and in briefs) and to attempt to support such conditions during the litigation of this case. It is entirely inappropriate for AmerenUE to now raise these new conditions without supporting testimony on

the record and expect the Commission to re-negotiate its Report and Order on matters which cannot lawfully be supported by the evidence. It is furthermore questionable, from a due process perspective, to initiate bilateral **negotiations** without the full participation of the other parties to this case.

9. In Paragraph 8, AmerenUE argues that the Missouri Commission should follow the lead of the ICC on the matter of who bears the risk of pre-closing generation-related liabilities. AmerenUE's Application for Rehearing, PP. 4-5. The Missouri Commission is asked to simply defer to the ICC's position, regardless of the impact on Missouri ratepayers. AmerenUE is apparently more concerned about pleasing the ICC (and the opportunities it sees in a restructured Illinois electric market) than it is concerned about protecting Missouri ratepayers. It appears that Ameren Corporation is becoming more and more fixated on matters other than the business of serving the captive, regulated customers of AmerenUE.

10. With regard to the "second JDA adjustment" condition, AmerenUE makes a variety of arguments which deserve a response. Paragraphs 35-40 of its Application for Rehearing, AmerenUE argues that it needs the Metro East transfer generation for its Missouri retail customers before the EC-2002-1 rate freeze ends, so this generation will not be available at all to AmerenCIPS (i.e., AmerenUE's former Illinois retail customers). Ibid., pp. 17-19. AmerenUE argues that the Commission's determination that the Metro East load will continue to be served by the AmerenUE generation that served it before the Metro East service area was transferred to AmerenCIPS "is simply wrong." In

paragraph 35, AmerenUE further asserts that "while clearly a part of the record, this was not discussed in detail at the evidentiary hearing or in the briefs." Ibid. at p. 17. However, the second JDA adjustment condition was fully developed by the Commission's Staff in its List of Conditions (Ex. 68, pp. 3-5) and in the testimony of Staff witness Proctor. The condition at issue was specifically described in the rebuttal testimony of Staff witness Proctor, states as follows:

> Q. What is your recommendation regarding the JDA with respect to the Metro East transfer?
>
> A. As a condition for approving the Metro East transfer the Commission should require that energy transfers between the two entities take place at market prices and that profits from off-system sales be distributed to the entity whose generation supplied the energy for the sale.
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> (Ex. 14, p. 17).

AmerenUE in its Application for Rehearing is now attempting to change the focus of the analysis energy to capacity. However, the JDA addresses how the transfer of energy, not capacity, is treated. Even if after the proposed transfer would occur, and before the EC-2002-1 rate freeze ends, AmerenUE needs the generation made available from the Metro East transfer to serve its Missouri retail customers, it will not need all of the energy (associated with this generation) to serve its Missouri retail customers all of the time. Under the JDA, AmerenUE must provide energy to the former AmerenUE Illinois retail customers, after the proposed Metro East transfer, during hours when the generation is not needed to meet AmerenUE's Missouri retail load requirements.

The Commission has apparently rejected the Public Counsel's position that the Metro East transfer and the termination of the EEInc. contract are linked,

and has accepted instead the Staff's position that the addition of 330 MWs of CTGs at Venice, Illinois and the termination of the EEInc. contract are linked. AmerenUE's discussion of the JDA and future energy transfers in its Application for Rehearing gives no recognition (as the Commission has) to the new capacity (and associated energy) being brought into service at Venice, Illinois.

At page 20 of its Application for Rehearing, AmerenUE shows its version of the table that appears at pages 50 and 58 of the Commission's October 6, 2004 Report and Order. AmerenUE has placed a "0" [zero] in the vertical column "Detriments" for the horizontal line item "JDA requirement that surplus UE power be available to CIPS at incremental cost". There is absolutely no support in the record for such a zero. For clarification, here are numbers in the record that describe the quantification of this JDA detriment:

- If (a) the proposed Metro East transfer is authorized, (b) the difference between market price and incremental cost is assumed to be only $2.50 per MWH, and (c) the approximately 4.0 million MWHs of Illinois retail AmerenUE load previously served by AmerenUE at incremental cost is served by AmerenUE at market price, **an additional $10 million of revenue is available to AmerenUE.** (Proctor Rebuttal, p. 15, 16, Tr. 1279 – 1283).

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- In Case No. EC-2002-1, the Staff's earnings complaint case against AmerenUE, witness Proctor submitted testimony to the effect that reforming the JDA to effectuate transfers of energy between AmerenUE and Ameren Energy Marketing (AEM) at market price instead of at incremental cost would result in AmerenUE's revenue requirement decreasing by $100 million. (Tr. 1236, 1288).

Further explanation and citation to the record with regard to the second JDA adjustment condition can be found in the "Initial Brief of the Staff," pp. 62, 64 HC, 67 and 71.

11. In opposing the Commission's ordered condition that Ameren make the "second JDA adjustment" as recommended by Staff, AmerenUE also seeks to invent an issue that does not exist. AmerenUE refers to Midwest ISO Day 2 Markets that have not yet begun to operate and tries to concoct a relationship between (1) delayed MISO markets and (2) modifying the JDA so that energy transfers occur at market price instead of incremental cost. AmerenUE's Application for Rehearing, pp. 5, 28. AmerenUE implies that the Commission has ordered these energy transfers to be priced at the hourly prices occurring in MISO Day 2 Markets. However, no references to MISO Day 2 markets can be found in those portions of the Commission's order pertaining to the second JDA adjustment. Nor does the Staff's Recommended List of Conditions (Ex. 68) specify that energy transfers between UE and AEG must, or should be, priced at market prices from MISO Day 2 Markets.

The second JDA adjustment is clearly not dependent on the existence of MISO Day 2 Markets. On cross-examination, Staff witness Proctor stated that there are alternatives to pricing system energy transfers other than using a Day 2

Market. (Tr. 932, 936-937). Even Company's witness Voytas recognized that there are alternative pricing methods. (Ex. 10, p. 5). The reference to Day 2 Markets is just a red herring that AmerenUE has raised in order to distort the issue by creating an impression that the ordered second JDA adjustment is somehow unachievable until the start of MISO Day 2 Markets. AmerenUE argument on this point is simply another excuse to attempt to get a better deal for itself by removing a condition that would protect Missouri ratepayers.

WHEREFORE, Public Counsel respectfully requests that the Commission deny AmerenUE's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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