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June 12, 2002

VIA HAND DELIVERY

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. EC-2002-1

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 **Union Electric Company's Proposed Structure For The Evidentiary Hearing**.

Very truly yours,

James J. Cook
Managing Associate General Counsel

JJC/vww

Enclosures

16063

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. EC-2002-1
Union Electric Company, d/b/a AmerenUE,	)	
Respondent.	)	

UNION ELECTRIC COMPANY'S
PROPOSED STRUCTURE FOR THE EVIDENTIARY HEARING

COMES NOW Union Electric Company, d/b/a AmerenUE ("Company" or "UE"), and submits this Proposed Structure for the Evidentiary Hearing in this case.

BACKGROUND

After much good faith discussion and exchanging of proposals, it is clear that the parties are unable to settle on a mutually agreeable order for the witnesses in this case. This matter is further complicated by the Staff's perceived need for more than the 14 days of hearings presently allotted to this case. The proposal we offer here grows out of our recognition of the following facts:

1. The direct and rebuttal testimony of 59 witnesses has been filed in this case, nearly equally divided between the Staff and other supporters of the Complaint on the one hand (25 witnesses), and those who oppose the Staff's Complaint on the other (34 witnesses). And, as of this writing, we are advised that the Staff and the Office of Public Counsel may offer the

testimony of nine additional witnesses on surrebuttal, while UE will offer the testimony of one more surrebuttal witness.

2. Though up to 69 witnesses (34 witnesses supporting the Complaint and 35 opposing it) at first blush would seem to pose a serious problem for the timely completion of this case, at this point it is extremely hard to evaluate how much of a problem such a large number of witnesses would actually create at the hearing. Not only does the length of the witnesses' testimonies vary greatly, but exactly who really needs to be cross-examined, and for how long, are unknown tactical questions within the control of the parties. And, in fairness, the parties may not know the answers to these questions until the hearing unfolds, the parties see what questions individual Commissioners ask, and so on.

3. Nevertheless, the Staff has at this point concluded that more than 14 hearing days will be needed for this case. The Staff apparently believes that five more hearing days will be required. Though UE does not share the Staff's concern that more hearing days are needed (and we frankly doubt such additional days would solve the Staff's problem[1]), we would not by ourselves stand in the way of more hearing days being added to the schedule, as long as those additional days are chosen fairly. "Fairness" here really involves two important considerations.

First, the present schedule for this case has been known for months, and the parties and their witnesses have relied on this long-standing schedule to plan other professional and personal activities. It simply is not fair, and in many instances simply is not possible, to dictate that additional hearing dates will occur on such-and-such days, irrespective of these other commitments of people involved in this case. Moreover, it is not fair, or wise, to assign as

[1] For example, the Staff strongly prefers that evidence here be presented issue-by-issue, which would often require a witness to return to the witness stand repeatedly. Such repeated appearances on the stand effectively inflates the number of witnesses to 150.

additional hearing dates days that the parties expected to be able to prepare for the hearing as originally scheduled.[2] Handicapping the quality of the parties' presentation to the Commission in this way, just to secure more days of presentation, seems completely counterproductive.

Thus, the scheduling of additional hearing days for the first week in July, as has been suggested, is completely unworkable, and ultimately unfair. Not only was the present schedule agreed to with the understanding that the time between June 24 (when surrebuttal testimony is due) and July 11 was to be devoted to preparing for the hearing, but there now would be conflicting commitments that would keep key individuals out of any hearing that began in the first week of July. For example, on July 1-2, UE's chief outside lawyer is required to be in federal district court in New York to argue a motion for class certification in a major lawsuit against the tobacco companies seeking recovery of the money Medicare spent for the health care expenses of smokers. We understand that counsel for other parties also have professional commitments that conflict with the scheduling of additional hearing days during the first week of July. And all this is to not even mention that approximately 12 depositions of various witnesses are being scheduled by the parties between now and the time the hearing is scheduled to begin.

A second, but perhaps less obvious fairness concern in extending the hearing schedule of this case, relates to the assurance that any schedule change sensibly addresses a *real* problem of too little time. Lawyers would always love to have more time to examine witnesses, to argue their case, and so on. Important as this case is, like all of us, this Commission only has a finite amount of time to do its job. Reasonable time deadlines can act as a healthy discipline requiring

[2] Saying that the Staff only became aware of the extent of UE's case after our rebuttal testimony was filed, and so could conclude that more hearing time was needed only at that rather late point, does not excuse constraining hearing preparation time in this way. As we pointed out above, there are approximately an equal number of witnesses testifying in support of the Complaint as against it. Given that the Staff is seeking the largest rate cut in UE's history, with tremendous implications for the future of the Company and for the availability of reasonably-

lawyers to choose who they will cross-examine wisely, ask questions succinctly, and otherwise use their time efficiently. Indeed, as Judge Mills has pointed out, submitting deposition transcripts into the record can serve as a practical substitute, in whole or in part, for live cross-examination. Moreover, we should remember that post-hearing briefs and proposed findings of fact and conclusions of law can more helpfully address many of the issues that the Commission must consider in this case than can oral presentations.[3] An extension of time that simply removes the discipline of a reasonable deadline for this hearing serves no real purpose, unnecessarily burdens the Commission, and unfairly prejudices the parties who can efficiently present their case.

4. A related issue that has arisen also directly bears on this hearing schedule problem and its resolution. The parties have been unable to reach agreement on a schedule for the presentation of the witnesses in this case in large measure because of an unwillingness to allow UE to present some of its most important witnesses at a relatively early point in the proceedings. These witnesses are "policy" or "context" witnesses who not only make the detailed, relatively technical, testimony of later UE witnesses intelligible, but who also discuss some of the profound underlying issues that the Commission is being called upon to address in this case. These witnesses include not only internal UE witnesses, such as Gary Rainwater, President and COO of Ameren, and Warner Baxter, Senior Vice President of Ameren, but outside experts that UE has engaged who we believe will contribute valuable insights to aid the Commission's deliberations

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priced electricity in this State, it would have been unreasonable for the Staff to assume that UE would respond in a manner any less vigorous than the way the Staff presented its case.

[3] Again, the decision to forego live cross-examination of a witness often cannot be made until much closer to the hearing. Moreover, it has been suggested that the parties might try to agree in advance that whole issues should just be submitted to the Commission through written testimony and post-hearing briefing. However, as the parties' inability to agree on a procedural schedule illustrates, given the size of this case and the number of witnesses such a proposal, practically speaking, amounts to a prescription for an unwieldy and ultimately unrealistic and unsuccessful undertaking.

in this case. These include Peter Fox-Penner, currently Chairman of the Brattle Group, and formerly Senior Energy Adviser to President Clinton's Office of Science and Technology Policy and Special Assistant to the Deputy Secretary of Energy; Suedeen Kelly, professor of law at the University of New Mexico School of Law, formerly Chair of the New Mexico Public Service Commission, and now a designee for a Democratic seat on the FERC; and Dennis Weisman, professor of economics at Kansas State, a well-recognized expert on incentive regulation, and a presenter at the Commission's recent roundtable discussion on electric utility incentive regulation.

To relegate these witnesses -- who we anticipate may be some of the more important witnesses Commissioners may want to extensively question -- to the tail end of the hearing, when time is running out and the energies of all the participants are otherwise flagging, is not only unfair to UE, but would deprive the hearing in this case of some of its real value. We certainly recognize, as a matter of fairness and of the most elementary principles of due process, that the Staff, and the other supporters of the Complaint, have a right to present their case, and their witnesses, as they conclude might be most persuasive. But UE has a similar right that, so far, the other parties have been unwilling to accommodate.

PROPOSAL FOR HEARING SCHEDULE

In light of all of the above, we offer the following proposal for the evidentiary hearing for this case:

- The 14 days allotted for the evidentiary hearing would be divided equally between the witnesses supporting the Complaint and those opposing it. That is, the Staff, the Office of Pubic Counsel, the Missouri Industrial Energy Consumers, the Missouri Energy Group and the State of Missouri would have 7 days to give their

opening statements and to present their witnesses in whatever order they deem appropriate. UE would have the remaining 7 days in which to give its opening statement and present its witnesses.[4]

- A week before the start of the hearing the parties would file a list setting out the order in which their witnesses will testify.
- If the Commission is at this point persuaded to add hearing days, of course it can do so (as we understand it, probably in September), but those additional days would simply add to the total of hearing days to be divided equally between each side, as set out above.

We believe this approach has several important features to recommend it:

1. Instead of trying to micromanage each party's case, the Commission makes each party responsible for its own presentation, as each party sees fit, thereby respecting the due process rights of the participants.

2. Each party is given a fair amount of hearing time, but is also given responsibility for the judicious use of that time. Each party can decide how much time to consume in its opening statement and how much time to expend in the cross-examination of each witness. Importantly, parties on the same side are given an incentive to coordinate their examinations to avoid duplication and impermissible "friendly cross."

[4] We realize that, though the witnesses are evenly divided between the complaining and responding sides of this case, there are far more lawyers involved here for parties supporting the Complaint. It may be that the Commission would therefore adopt not a strictly even division of the time, but, say, assign 6 days to the complainants' witnesses and 8 to UE's to ensure that all these lawyers have a fair chance to participate in cross-examination. Such modest adjustments to our proposal are certainly understandable, with two cautions: the time allotted to each side's witnesses should be certain and set a real deadline, and the allocation of time should not be adjusted in a way that simply allows lawyers to duplicate each others' efforts and so undermine the discipline for efficient presentations that is the real virtue of the assignment of definite time periods in the first place.

3. To provide the parties with a practical option to help them use their allotted time efficiently, the transcripts of depositions may be introduced into the record as a substitute, in whole or in part, for the cross-examination of any witness.

4. This structure -- the complainant presenting its case, followed by the respondent presenting its case -- is consistent with the Commission's rules, and with the practice commonly followed by most triers of fact in Missouri and elsewhere. Unless otherwise ordered, the Commission rules prescribe the following order of procedure for hearings in cases where the parties are unable to agree:

> In all cases except investigation cases, the applicant or complainant shall open and close, with intervenors following the general counsel and public counsel in introducing evidence.

4 CSR 240-2.110(5)(A)

This rule clearly contemplates that each party should sequentially introduce all of its evidence, with the complainant (in this case the Staff) at the beginning of the case, and intervenors following the general counsel and public counsel in presenting their evidence. This rule does not contemplate an issue-by-issue presentation of the case at hearing, but rather a party-by-party presentation. This rule is entirely consistent with civil practice followed in Missouri and other states. In civil trials, including extremely complicated proceedings involving dozens of expert witnesses and months-long trials, the plaintiff is required to present all of the witnesses supporting his entire case first, and then the defendant is permitted to present all of the witnesses supporting his defense. (And, given the fact that these other tribunals have no more time than this Commission has, it is increasingly common for judges to allocate a time certain in which each side must present its case.) This format permits each side to organize its case in the manner that it believes is most logical. Although in some rate proceedings, based on an agreement of the

parties, the Commission has permitted the parties to try cases on an issue-by-issue basis, the Commission has also heard complicated cases presented on the more typical party-by-party basis. *See, e.g., In the Matter of Laclede Gas Company's Tariff Filing to Implement an Experimental Fixed Price Plan and Other Modifications to its Gas Supply Incentive Plan*, Case No. GT-2001-329 and *In the Matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and Missouri Pipeline Company and the Acquisition by Gateway Pipeline Company of the Outstanding Shares of UtiliCorp Pipeline Systems, Inc.*, Case No. GM-200-585.

In this case, because there is no agreement among the parties, because the more typical party-by-party method of presentation would permit each party to organize its case in the manner it believes to be best, and because this method of presentation would encourage the parties to efficiently present their cases over the time period scheduled for this proceeding, the Commission should order a party-by-party presentation of the evidence, as contemplated by 4 CSR 240-2.110(5)(A).

CONCLUSION

We respectfully submit that the approach we have outlined above is fair, practical, and the most likely structure to allow the Commission to truly benefit from the time consumed by the hearing. Moreover, it avoids embroiling the Commission in subsidiary procedural issues that can only encumber its consideration of the far more important substantive matters at stake in this case.

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

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DATED: June 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via hand delivery, Federal Express or U.S. Mail on this 12th day of June, 2002, on the following parties of record:

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