

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Application of Union Electric Company d/b/a)
AmerenUE for an Order Authorizing Applicant)
(If and to the Extent the Transaction Described)
Herein Would Constitute the Issuance of an)
Evidence of Indebtedness by Applicant under)
Sections 393.180 and 393.200 RSMo) to)
Execute, Deliver and Perform the Agreements)
and Instruments Necessary to Assume a Lease)
and Related Documents Pertaining to the NRG)
Audrain Combustion Turbine Generator)
Facility Owned By Audrain County, Missouri)
Which Was Constructed as Part of a Revenue)
Bond Project under Chapter 100, RSMo.)

Case No. EF-2006-0278

STAFF’S RESPONSE TO ORDER

Comes now the Staff of the Missouri Public Service Commission (Staff) and for its response to the Missouri Public Service Commission’s (Commission) January 31, 2006 Order Directing Filing, in which the Commission directed the Staff to file its position on the Missouri Joint Municipal Electric Utility Commission’s (MJMEUC) Application For Intervention by 9:00 a.m. Thursday, February 2, 2006, respectfully states:

1. As explained below, the Staff advises that MJMEUC’s Application For Intervention does not meet the requirements of 4 CSR 240-2.075(4)(A) or (B), and the Staff requests that if the Commission issues an Order denying MJMEUC’s Application For Intervention that the Commission’s Order not contain any statement that may be construed as this Commission concurring with AmerenUE’s statements in its Response In Opposition To Application For Intervention respecting the Commission’s jurisdiction concerning transmission issues.

Background

2. On December 28, 2005, the day after it filed its Application in the instant case, Union Electric Company, d/b/a AmerenUE (AmerenUE) and NRG Audrain Generating, LLC (NRG Audrain) filed a Joint Application at the Federal Energy Regulatory Commission (FERC) pursuant to Section 203 of the Federal Power Act (FPA) and Part 33 of the regulations of the FERC requesting the FERC to issue an Order no later than February 27, 2006 approving, without condition, the sale by NRG Audrain to AmerenUE of NRG Audrain's interest in a 640 MW (summer capacity) simple-cycle, natural gas-fired peaking power generation facility and associated interconnection facilities located in Audrain County Missouri. AmerenUE stated the transaction fully satisfies the requirements of the FERC's Merger Policy Statement and Order No. 642, which provide that transactions subject to FERC jurisdiction must have no adverse effect on competition, rates, or regulation. The FERC Docket No. for the pending AmerenUE and NRG Audrain filing is EC06-55-000.

3. On December 28, 2005 AmerenUE and Aquila, Inc. filed a similar application at the FERC regarding AmerenUE's proposed acquisition from Aquila Piatt County Power, L.L.C., MEP Flora Power, L.L.C. and Aquila Merchant Services, Inc. of the gas-fired, six-unit, 510 MW Goose Creek generating facility and the gas-fired, four-unit, 340 MW Racoon Creek generating facility, both located in Southern Illinois.

4. On January 30, 2006, MJMEUC filed in the aforementioned FERC Docket No. EC06-55-000 a Motion To Intervene And Protest. In this filing MJMEUC stated at pages 1-2, in part, as follows:

. . . MJMEUC protests Ameren's acquisition from NRG (and protested the Aquila plant acquisitions) not because it necessarily opposes Ameren's acquisition of generation that it says it needs. Rather, MJMEUC protests because the Applicants' Appendix A analysis ignores transmission constraints in the Ameren

region that are harming the ability of utilities such as MJMEUC to utilize economic long-term power supply and that, if properly accounted for, would cause Ameren to fail the Commission's [FERC's] competitive screens, indicating competitive harms that the Commission [FERC] is obligated to remedy.² MJMEUC wants to see these transmission problems fixed and offers its assistance in making that happen. Therefore, MJMEUC urges the Commission [FERC] to convene a technical conference to address these issues.

² Applicants have submitted virtually identical Appendix A analyses for the Aquila and NRG transactions.

5. MJMEUC repeated in its filing in FERC Docket No. EC06-55-000, at page 14, that it "is not interested in preventing Ameren from acquiring generation that it says it needs, assuming the acquisitions are properly conditioned." Regarding the technical conference that MJMEUC urged the FERC to hold, MJMEUC, at page 15 of its pending FERC filing, stated that the goal is not the rejection of Ameren's proposed acquisition:

. . . the goal of the technical conference should not be rejection of Ameren's acquisitions but instead addressing the transmission constraints that adversely impact competitive conditions. Such an outcome would be consistent with prior cases where the Commission [FERC] has accepted transmission expansion as a remedy to increases in concentration associated with generation acquisitions. [Footnote omitted.]

6. At pages 9-10 of its January 30, 2006 filing at the FERC in Docket No. EC06-55-000, MJMEUC related AmerenUE's position in an earlier AmerenUE filing, in FERC Docket No. EC03-53-000, that the NRG Audrain facility would be unable to function as a capacity resource until transmission constraints limiting its usefulness were relieved:

In Docket No. EC03-53, where AmerenUE sought authorization to purchase generation assets of its unregulated affiliate, Ameren Energy Generating Company, AmerenUE claimed that the affiliate purchase was necessitated by transmission constraints within and outside of the Ameren control area that precluded AmerenUE's purchase of cheaper alternatives. Specifically, AmerenUE claimed that it could not depend on deliveries of power from the NRG Audrain facility (ironically, the same plant it now seeks to acquire in the instant proceeding) within the Ameren control area due to constraints on Ameren's Bland-Franks line, a facility that Ameren described as "one of the most prominent constraints in the Midwest." The transmission constraints apparently remain

relevant. In his Appendix A analysis in this case, Dr. Frame states that while the summer capacity of the Audrain facility is 640 MW, “only 578 MW has been determined by the Midwest Independent Transmission System Operator, Inc. (MISO) to be deliverable to load.” Frame Affidavit at 2 n.1.

Regarding the prior FERC docket, EC03-53-000, the Staff notes the Response Of Ameren Energy Generating Company And Union Electric Company d/b/a AmerenUE To Answer Of NRG Companies filed on April 14, 2003 in FERC Docket No. EC03-53-000:

AmerenUE, in January 2002, submitted an application in Case No. EO-2002-351 to the MoPSC to construct the 345 kV Callaway-Franks line the addition of which would resolve the loading issues associated with the Bland-Franks line that limit the Audrain County Facility’s usefulness. However, this application has been strenuously opposed by local property owners and is still pending before the MoPSC, where the timing and nature of the MoPSC action is uncertain.

Moreover, even if the application were approved by the MoPSC today, and was not the subject to any further challenge, it is unlikely that the Callaway-Franks line could be constructed and placed in service before sometime in 2005 or 2006. Thus, while the Audrain County Facility could conceivably acquire value for AmerenUE in the future, it clearly cannot be counted on to meet AmerenUE’s capacity needs before then, and certainly not by summer of 2003, as NRG seeks to imply.

This Commission issued a Report And Order in Case No. EO-2002-351, on August 1, 2003, granting AmerenUE a certificate of convenience and necessity, with conditions, respecting the Callaway-Franks transmission line.

Analysis

7. AmerenUE asserted in its January 23, 2006 pleading, Response In Opposition To Application For Intervention Of Missouri Joint Municipal Electric Utility Commission, MJMEUC’s Application For Intervention does not comply with the Commission’s rule governing intervention.

8. The Commission’s rule on intervention, 4 CSR 240-2.075, provides, in relevant part:

(1) An application to intervene shall comply with these rules and shall be filed within thirty (30) days after the commission issues its order giving notice of the case, unless otherwise ordered by the commission.

(2) An application to intervene shall state the proposed intervenor's interest in the case and reasons for seeking intervention, and shall state whether the proposed intervenor supports or opposes the relief sought or that the proposed intervenor is unsure of the position it will take.

(3) An association filing an application to intervene shall list all of its members.

(4) The commission may on application permit any person to intervene on a showing that—

(A) The proposed intervenor has an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case; or

(B) Granting the proposed intervention would serve the public interest.

(5) Applications to intervene filed after the intervention date may be granted upon a showing of good cause.

• • • •

9. MJMEUC filed its Application For Intervention on January 12, 2006; therefore, the application to intervene was timely filed under Rule 4 CSR 240-2.075(1) and the Commission's December 30, 2005 Order. AmerenUE does not dispute otherwise.

10. AmerenUE asserts at pages 9-10 of its responsive pleading in paragraph 15 that MJMEUC's Application For Intervention is deficient for not stating whether MJMEUC supports, opposes or is unsure of its position on the relief AmerenUE is seeking. In its Application For Intervention, MJMEUC states: "At this stage, the MJMEUC is unsure of the position it will take on the various issues that may arise in the instant proceeding." The Staff disagrees with AmerenUE's narrow construction of both the Commission's rule and MJMEUC's foregoing statement and, instead, is of the opinion the statement meets the requirements of 4 CSR 240-2.075(2), which are set out above in the preceding paragraph of this pleading.

11. AmerenUE also challenges whether MJMEUC has shown MJMEUC has an interest that could be adversely affected by a final Commission order in this case or that it would

be in the public interest to allow MJMEUC to intervene. With the affidavit attached to its responsive pleading, AmerenUE attempts to eliminate from this case MJMEUC's stated concern with transmission adequacy. The Staff believes that, even if accepted as true, the affidavit does not establish AmerenUE's acquisition of the NRG Audrain facility would not affect the adequacy of transmission within the MISO footprint to MJMEUC members. Nonetheless, the scope of this case is limited and the Staff does not believe MJMEUC has yet made a proper showing under 4 CSR 240-2.075(4)(A) or (B).¹

12. Generally, the Staff agrees with the statements AmerenUE makes regarding the nature of its Application in its recently filed Response In Opposition To Application For Intervention Of Missouri Joint Municipal Electric Utility Commission. The Staff agrees AmerenUE has limited its request to Commission approval under Sections 393.180 and 393.200 RSMo of the financing aspects of AmerenUE's acquisition of an existing generating facility sited and operating in Audrain County, Missouri, if the Commission does not decline jurisdiction of the same transactions. The Staff agrees the facts in this case are very different from those in Case No. EO-2005-0156 since AmerenUE is acquiring an existing generating facility and seeking to assume an existing Chapter 100 arrangement whereas, in Case No. EO-2005-0156 Aquila, Inc. owned all of the assets before it sought to engage in a Chapter 100 financing with the City of Peculiar, Missouri, and a part of that financing arrangement included transfer of

¹ At the same time, the Staff desires to make clear it does not agree, in particular, with AmerenUE's statement at page 6, paragraph 10 of AmerenUE's pleading that "the proper forum to address issues relating to the overall adequacy of Missouri's transmission system . . . is at the Federal Energy Regulatory Commission ('FERC') or at the MISO itself." The Staff believes the Missouri Public Service Commission is a proper forum to address issues relating to the overall adequacy of Missouri's transmission system. For example, in the Stipulation And Agreement resolving the Staff's excess earnings/revenues complaint case against AmerenUE, Case No. EC-2002-1, 11 Mo.P.S.C.3d 411 (2002), AmerenUE agreed to undertake commercially reasonable efforts to make infrastructure investments totaling \$2.25 billion to \$2.75 billion from January 1, 2002 through June 30, 2006, including the completion or substantial completion of new transmission lines and transmission upgrades that will increase transmission import capability by 1,300 MWs.

ownership of those assets to the City of Peculiar. The focus of the Staff's position in Case No. EO-2005-0156 was on the transfer of ownership which involves Section 393.190 RSMo and the Staff did not address in that case the applicability of Sections 393.180 and 393.200 RSMo, the statutes that are the focus of the application in this case.

13. In its Response In Opposition To Application For Intervention Of Missouri Joint Municipal Electric Utility Commission, AmerenUE states the following in footnote 1 on page 1:

Because no new debt is being issued there is a question about whether or not AmerenUE's assumption of the lease requires Commission approval under either or both of Sections 393.180 or 393.200, RSMo. AmerenUE is not creating any liens that would require approval under Section 393.180, and is not itself issuing any debt, but as discussed below, the lease will be treated as a capital lease on AmerenUE's books and will have a minor effect on AmerenUE's capital structure. Indeed, it slightly increases the ratio of debt to equity on AmerenUE's books and consequently results in the use by AmerenUE of slightly more, low cost debt financing, which would tend to lower rates. Because of the capital nature of the lease, AmerenUE has filed the instant Application.

14. Sections 393.180 and 303.200 RSMo both speak of a utility's issuance of "stocks, bonds, notes or *other evidences of indebtedness*." (Emphasis added.) The Staff has endeavored to research the question of whether the lease involved in the instant transaction is an evidence of indebtedness within the meaning of that language in the Missouri Public Service Commission Law and, in the short time available, found no controlling authority or clear guidance that it is not. In the absence of such authority or guidance and in light of Sections 386.250 and 393.140 RSMo which confers broad jurisdiction on the Commission, the Staff interprets the foregoing statutory language to confer Commission jurisdiction over AmerenUE's assumption of the lease.

15. The Staff notes AmerenUE neither seeks in its Application, nor is entitled to, any ratemaking determinations in this case. The Staff presently believes it will be able to comply with the Commission's Order directing the Staff to file a recommendation on AmerenUE's Application by February 17, 2006.

WHEREFORE, the Staff respectfully advises the Commission (1) it is the Staff's position the Missouri Joint Municipal Electric Utility Commission's Application For Intervention does not meet the requirements of 4 CSR 240-2.075(4)(A) or (B), and (2) if the Commission issues an Order denying MJMEUC's Application For Intervention, the Commission should avoid including any statement in its Order that might be construed as this Commission concurring with AmerenUE's statements in its Response In Opposition To Application For Intervention respecting the Commission's jurisdiction concerning transmission issues.

Respectfully submitted,

/s/ Nathan Williams

Nathan Williams

Senior Counsel

Missouri Bar No. 35512

Attorney for the Staff of the
Missouri Public Service Commission

P. O. Box 360

Jefferson City, MO 65102

(573) 751-8702 (Telephone)

(573) 751-9285 (Fax)

nathan.williams@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record this 2nd day of February 2006.

/s/ Nathan Williams