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

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| In the Matter of Union Electric Company d/b/a | ) | |
| AmerenUE for Authority to File Tariffs Increasing | ) | **Case No. ER-2007-0002** |
| Rates for Electric Service Provided to Customers | ) | Tariff No. YE-2007-0007 |
| in the Company's Missouri Service Area. | ) | |

**PUBLIC COUNSEL'S REPLY TO AMERENUE'S RESPONSE TO MOTION TO DISMISS**

COMES NOW The Office of the Public Counsel and for its Reply to AmerenUE's Response to Public Counsel's Motion to Dismiss states as follows:

1. On January 12, 2007, Public Counsel filed a motion to dismiss pursuant to 4 CSR 240-2.116(3). Union Electric Company d/b/a AmerenUE filed a response on January 16.

2. In its response, AmerenUE raises only two real defenses. First, it argues that the rule does not mean what it says, which is that "A party may be dismissed from a case for … failure to appear at … a public hearing." Second, it argues that it had been excused from appearing pursuant to a series of *ex parte* conversations with the presiding officer. This reply will address these defenses and then address other issues raised in AmerenUE's Response.

3. For its first defense, AmerenUE states:

> This rule [4 CSR 240-2.116(3)], by its terms, does not apply unless a party fails to comply with an order issued by the Commission, including any order that might require an attorney to appear at any of the enumerated proceedings. In this case, the Commission did not issue an order requiring attorneys representing each of the parties to appear at the scheduled local public hearings.

Commission practice, as well as the explicit wording of the rule, belie this argument. The Commission does not routinely (in fact it rarely, if ever, does) issue orders that explicitly require a party to appear at proceedings, especially at hearings that are scheduled as a result of a rate case or other filing by that party. Rather, it is the order setting an official proceeding that requires a party's appearance in the same manner that the scheduling of the client's trial logically and as a matter of professional responsibility requires attorneys to appear without an explicit command to appear. Every attorney understands that he must show up at a hearing or other official proceeding to represent his client. AmerenUE's argument that it need not appear at the public hearings specifically held to take the testimony and evidence of customers regarding its own proposed rate increase unless the Commission explicitly issues "an order requiring attorneys … to appear" is without merit. Furthermore, the Commission attaches such importance and responsibility for parties' counsel make an appearance that it has a rule of general applicability that makes dismissal – the ultimate sanction – a possible consequence of failure to appear. AmerenUE also seems to suggest, without actually advancing it as an argument, that the presence of non-attorney employees of the corporation constitutes an appearance. While the presence of knowledgeable AmerenUE personnel at local public hearings is very helpful, it does not constitute an appearance. AmerenUE is a corporation, not a natural person, and as such **cannot** appear at an official proceeding except through an attorney licensed to practice in Missouri. 4 CSR 240-040 (5) Practice by Nonattorneys. "A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf and shall not be made for any other person or entity." In addition, counsel of all parties

in a case are called upon to make a formal entry of appearance either written, oral or both, at any hearing, whether a prehearing, evidentiary hearing, or a public hearing. The Commission does not indulge in this practice without reason. The record is to reflect that all parties to any hearing are represented so that the client's interest can be protected.

4. AmerenUE's second argument is that it had *ex parte* telephone contacts with Judge Voss on January 4 and January 10, and the presiding officer excused – apparently both retroactively and prospectively[1] – AmerenUE's failures to appear. Of course, since these conversations were *ex parte*, Public Counsel has no way of knowing whether AmerenUE's Response accurately reflects their substance. However, at least up until the last two years, it was the practice of Commission Regulatory Law Judges to excuse a party from appearing only if that party had a conflict or a very compelling reason for being unable to attend. If a party contacted an RLJ and asked to be excused from appearing at a hearing because the party was just monitoring the case, or because the party did not want to incur the expense of attending, the RLJ would **not** excuse the party from appearing. For the RLJ to excuse AmerenUE, the moving party in this rate case, from appearing at a number of hearings (absent some iron-clad conflict that affected all the attorneys representing the moving party) would be inconsistent with Commission practice. On those rare occasions when an RLJ finds good cause to excuse a party from appearing at a proceeding, it has always been the Commission's practice to note on the record that the party has been excused. None of the RLJs that presided over the various public hearings in this case ever excused AmerenUE on the record. Moreover, AmerenUE does not argue that it was unable to appear at any of the hearings that it

[1] AmerenUE's first failure to appear was at the very first hearing on January 2, and the last (so far) was at the January 10 hearing in Wentzville.

missed, that there was a compelling reason for its attorney not to appear, or that there was any sort of good cause that would excuse its repeated failures to appear.

5. AmerenUE does not, in its Response, dispute the criteria that Public Counsel suggests that the Commission use in exercising its discretion under 4 CSR 240-2.116(3) to impose the sanction for nonappearance. Rather, it turns to two old and tired debate tactics: the "stretch your opponent's argument until it breaks" approach and the personal attack.

AmerenUE ignores Public Counsel's point that AmerenUE, as the moving party, should be held to a higher standard than less involved parties. Instead it suggests that, if the Commission does not exercise its discretion under 4 CSR 240-2.116(3), "it will have to dismiss a lot of parties from a lot of cases." This is stretching Public Counsel's argument to the point of absurdity. The specific issue is AmerenUE's conduct in this case and in these public hearings. Public Counsel never argued that the Commission should not use its discretion or that every party in every case should be dismissed if it misses a prehearing conference. Public Counsel directed its motion to the facts now before the Commission and asked that the Commission dismiss AmerenUE, the moving party, from this case because it has repeatedly failed to appear at scheduled hearings.

Because neither the law nor the facts are not on its side, AmerenUE turns to personal attacks. AmerenUE's personal attacks in its Response are not only unwarranted and unprofessional, but in fact support Public Counsel's argument. If Public Counsel can appear "front and center" at each and every one of the public hearings in this case, certainly AmerenUE can assign one of its counsel to make an appearance. AmerenUE has budgeted a mind-boggling **$4.6 million** for this rate case alone (see the direct

testimony of AmerenUE witness Weiss, page 22). Public Counsel's annual budget is a million dollars to defend against **all** the cases (rate cases and myriads of other filings) of **all** the utilities. AmerenUE hired outside counsel to observe the recent Kansas City Power & Light Company rate case evidentiary hearings – a case in which AmerenUE was not even a party. AmerenUE's outside counsel sat through most, if not all, of the entire KCPL evidentiary hearing. If AmerenUE will pay outside counsel to sit and watch another company's rate case, it should be required to send counsel to hearings in its own rate case.

WHEREFORE Public Counsel respectfully requests that the Commission dismiss AmerenUE as a party pursuant to 4 CSR 240-2.116(3), and close this case.

Respectfully submitted,

OFFICE OF THE Public Counsel

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all parties this 18th day of January 2007.

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