STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 19th day of February, 2009.

In Re: Union Electric Company's 2008 Utility Resource Filing Pursuant to 4 CSR 240- Chapter 22	)))	**Case No. EO-2007-0409**

FINAL ORDER REGARDING AMERENUE'S 2008 INTEGRATED RESOURCE PLAN

Issue Date: February 19, 2009 Effective Date: March 1, 2009

On February 5, 2008, Union Electric Company, d/b/a AmerenUE, filed its 2008 Integrated Resource Planning filing (IRP), as it was required to do by the Commission's Integrated Resource Planning Rule, 4 CSR 240-22.080(1). The IRP rule requires investor-owned electric utilities, such as AmerenUE, to engage in a resource planning process that considers all options, including demand side efficiency and energy management measures, to provide safe, reliable, and efficient electric service to the public at reasonable rates, in a manner that serves the public interest. The purpose of the IRP filing is to demonstrate that AmerenUE has engaged in a planning process that complies with the requirements of the rule.

As required by the IRP rule, the Commission gave notice of AmerenUE's IRP filing and invited interested parties to intervene. The Commission allowed the following parties to intervene: the Missouri Department of Natural Resources (DNR); the Missouri Industrial Energy Consumers (MIEC); the Sierra Club, Missouri Coalition for the Environment, Mid-

Missouri Peaceworks, and the Association of Community Organizations for Reform Now (Sierra Club); the Missouri Energy Group (MEG); Noranda Aluminum; Aquila, Inc.; and the Missouri Joint Municipal Electrical Utility Commission (MJMEUC).

The IRP rule establishes a process by which the Commission gathers information to allow it to determine whether the electric utility's IRP filing complies with the requirements of the IRP rule. The first step in that process requires the Commission's Staff to review the utility's IRP compliance filing and to file a report describing any deficiencies in the utility's compliance with the IRP rule. Staff filed its report, in which it identified several deficiencies in AmerenUE's IRP filing, on June 19, 2008. The IRP rule also allows the Office of the Public Counsel and any intervenors to file their own reports describing deficiencies in the utility's IRP filing. Public Counsel, DNR, the Sierra Club, and MIEC filed such reports on June 18 or 19, 2008.

The Partial Stipulation and Agreement

On August 12, 2008, AmerenUE, Staff, Public Counsel, DNR, MIEC, MEG, and the Sierra Club jointly filed a partial stipulation and agreement. That partial stipulation and agreement indicates the agreement of the signatory parties to take certain steps to resolve all the deficiencies identified by Staff and some of the deficiencies identified by the other parties. The partial stipulation and agreement, however, specifically provides that certain deficiencies identified by Public Counsel, DNR, and the Sierra Club remain unresolved.

Not all parties signed the partial stipulation and agreement. However, Commission Rule 4 CSR 240-2.115(2) allows the parties seven days in which to file an objection to the nonunanimous stipulation and agreement. If no party raises a timely objection, the Commission may treat the nonunanimous stipulation and agreement as unanimous.

Noranda filed a response to the nonunanimous stipulation and agreement on August 20, 2008. Noranda voiced concerns about remaining deficiencies in AmerenUE's IRP filing and specifically about AmerenUE's preferred resource plan. Noranda did not, however, object to the nonunanimous partial stipulation and agreement. No other party filed a response or objection to the nonunanimous partial stipulation and agreement. Therefore, the Commission will treat the partial stipulation and agreement as unanimous, and will accept it as a resolution of the deficiencies identified in that document.

The Remaining Deficiencies

On September 12, 2008, AmerenUE filed a detailed response to the alleged deficiencies that were not resolved by the partial stipulation and agreement. On the same date, Staff, Public Counsel, and Noranda filed responses to the deficiencies identified by other parties. The filing of those responses is the last procedural step mandated by the Commission's IRP rule. Thereafter, Commission Rule 4 CSR 240-22.080(9) states: "[t]he commission will issue an order which indicates on what items, if any, a hearing will be held and which establishes a procedural schedule." The first question the Commission must then resolve is whether a hearing should be held regarding any of the alleged deficiencies.

Public Counsel, DNR, Noranda, and the Sierra Club, the entities that allege unresolved deficiencies, urge the Commission to schedule a hearing to take factual evidence regarding those deficiencies. AmerenUE denies any facts are in dispute and contends no hearing is needed. To address the question of whether an evidentiary hearing should be held, as well as to consider the partial stipulation and agreement and the remaining deficiencies, the Commission ordered the parties to appear for an on-the-record conference. That conference was held on October 7, 2008.

After considering the written arguments of the parties, as well as the oral argument and testimony offered at the on-the-record presentation, the Commission concludes this is not a contested case and no evidentiary hearing is needed to resolve the remaining disagreements regarding AmerenUE's IRP filing.

Section 536.010(4), RSMo (Supp. 2008) defines "contested case" as meaning "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Chapter 536 of the Missouri statutes, which establishes administrative procedures for this state, does not determine whether a hearing is required in a particular case. Rather, that determination must be based on the controlling substantive law.[1] The substantive law that requires a hearing may be "any statute or ordinance or any state or federal constitutional provision."[2]

The integrated resource planning process at issue in this case is entirely a creation of the Commission's IRP rule. Therefore, for this case, the controlling substantive law is the Commission's IRP rule. The applicable section of that rule, 4 CSR 240-22,080(9), gives the Commission discretion to decide whether to hold a hearing regarding any alleged deficiencies upon which the parties are unable to reach agreement.

The Commission's intent to retain discretion about holding a hearing when it promulgated the rule is clearly established in the Order of Rulemaking by which the IRP Rule was created. In rejecting Public Counsel's recommendation that the proposed rule be modified to require the Commission to convene a hearing whenever a party requests a

[1] *Wooldridge v. Greene County*, 198 S.W.3d 676, 683 (Mo. App. S.D. 2006).
[2] *Cade v. State*, 990 S.W.2d 32, 36 (Mo. App. W.D. 1999).

hearing, the Commission said: "The commission believes that it should retain the discretion not to schedule a hearing when it believes a hearing is not warranted."[3]

Of course, the fact that the controlling regulation does not require a hearing does not eliminate the need for a hearing if some other constitutional right, such as the right to due process, would require a hearing before "legal rights, duties or privileges of specific parties" can be determined. However, when an agency action is merely a general fact-finding investigation and the agency proceeding does not adjudicate or make binding determinations; there is no due process right to a hearing.[4]

The Commission will not make any binding adjudications in this case. The rule emphatically indicates that in finding compliance with the requirements of the rule, the Commission is not preapproving the utility's "resource plans, resource acquisition strategies or investment decisions."[5] Instead, as the Commission indicated in its Order of Rulemaking, "the focus of the rules should appropriately be on the planning process itself rather than on the particular plans or decisions that result from the process."[6] Therefore, this order will not determine the legal rights, duties, or privileges of any specific party and no due process rights are implicated.

The parties who advocate for an evidentiary hearing point to a provision of the rule that requires the Commission to "issue an order which contains findings that the electric utility's filing pursuant to this rule either does or does not demonstrate compliance with the requirements of this chapter …."[7] They contend that any findings of fact the Commission

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[3] Missouri Register, Vol. 18, No. 1, Page 94 (January 4, 1993).
[4] *Vacca v. Admin. Law Judge Review Committee*, 945 S.W.2d 50 (1997).
[5] Commission Rule 4 CSR 240-22.010(1).
[6] Missouri Register, Vol. 18, No. 1, Page 91 (January 4, 1993).
[7] Commission Rule 4 CSR 240-22.080(13).

makes must be supported by competent and substantial evidence and the only way to obtain competent and substantial evidence is by holding an evidentiary hearing.

However, Missouri's administrative procedure law requires an agency to make formal findings of fact only in a contested case.[8] Since this is not a contested case, the requirement to make findings of fact does not apply and does not create the need to conduct a hearing. Having found that the Commission has the discretion to conduct or not conduct a hearing, the Commission must decide whether a hearing is appropriate in the circumstances of this case.

The remaining issues before the Commission are not based on any factual disputes. AmerenUE's IRP filing is what it is, and the parties who allege portions of that filing are deficient compare particular portions of the filing to the requirements of the rule and claim the requirements of the rule have not been satisfied. On the other side, AmerenUE contends the requirements of the rule have been satisfied. The Commission can examine and compare the IRP filing and requirements of the rule based on the extensive arguments already submitted by the parties. There is no need for additional testimony that could only attempt to further explain what the Commission can already read for itself.

The Particular Deficiencies

4 CSR 240-22.050(4)

This section of the Demand-Side Resources provisions of the IRP regulation simply requires AmerenUE to "estimate the technical potential of each end-use measure that passes the screening test." No party contends that AmerenUE has failed to meet that requirement. Instead, the deficiency alleged by both DNR and the Sierra Club goes

[8] Section 536.090, RSMo (2000).

beyond the requirements of the regulation, and is based on the stipulation and agreement by which alleged deficiencies in AmerenUE's 2005 IRP filing were resolved.

That stipulation and agreement required AmerenUE to prepare an estimate of achievable potential for multiple portfolios of programs where at least one portfolio represents a very aggressive approach to encouraging participation in demand-side management programs. DNR and the Sierra Club, supported by Public Counsel, contend AmerenUE's "aggressive" approach is not aggressive enough compared to demand-side efforts that are being made in other states. The remedy suggested by DNR is that the Commission direct AmerenUE to model a more aggressive approach in its next IRP filing.

AmerenUE contends it has already modeled a very aggressive approach in this IRP filing, however, the Commission agrees that demand-side management is vitally important and may be effective enough to reduce the need for development of costly supply-side alternatives. Therefore, the Commission directs AmerenUE to model an even more aggressive approach to encourage participation in demand-side management programs in its next IRP filing.

4 CSR 240-22.030(7)

This section of the Load Analysis and Forecasting provisions of the Commission's IRP rule requires AmerenUE to produce a high-growth forecast and a low-growth forecast to bracket its base-case load forecast. These forecasts are to be used as inputs to the strategic risk analysis required by another section of the regulation.

AmerenUE acknowledges it did not prepare a high-growth forecast to accompany its low-growth and base-case forecasts. That deficiency was also identified by Staff and in the

partial stipulation and agreement, AmerenUE agreed to either provide a high-load growth forecast, or request a waiver of that requirement in its next IRP filing.

The Sierra Club contends AmerenUE's failure to develop a high-growth forecast and its use of its base-load forecast as an alternative would artificially maximize load growth in AmerenUE's risk analysis. The Sierra Club does not propose any remedy other than a suggestion that reliability be factored into low, base, and high scenarios in AmerenUE's next IRP filing.

AmerenUE has already agreed in the partial stipulation and agreement that it will deal with a high-growth forecast in its next IRP filing. Sierra Club has not demonstrated any need for an additional remedy and none will be required.

4 CSR 240-22.040(1)(K)

This section of the Supply-Side Resource Analysis provisions of the IRP rule requires AmerenUE to evaluate the environmental impacts of the various supply-side resource options. The Sierra Club alleges this portion of the IRP filing is deficient because it fails to evaluate the environmental impacts associated with the release of radioactive tritium and noble gases (krypton and xenon) from the Callaway I nuclear plant. The Sierra Club agrees with AmerenUE that the company is not currently required to take any action regarding the release of these materials. However, the Sierra Club speculates the NRC may at some time in the future require AmerenUE to take steps to process and isolate these materials, potentially at a significant cost.

The Sierra Club has identified an area of concern that could affect the cost of operating the Callaway Nuclear Plant as a supply-side resource in the future. The Commission directs AmerenUE to consider these potential costs in its next IRP filing.

4 CSR 240-22.070(5)

This section of the Risk Analysis and Strategy Selection provisions of the IRP rule requires AmerenUE to compute the cumulative probability distribution of the values of each performance measure specified in another section of the rule. The Sierra Club points out that AmerenUE performs the required calculation for only one of the five specified performance measures. In reply, AmerenUE explained it did not perform the computations for the other performance measures because those analyses were not needed for purposes of this IRP filing. The Sierra Club does not offer any explanation of why these additional analyses should have been performed, but simply states "It is for the Commission to decide whether the requirements of the rule should be retrospectively waived."

The IRP rule does not require an electric utility to perform useless calculations simply to satisfy the letter of the regulation. AmerenUE adequately explained why it did not perform the additional calculations and no party has disputed that explanation. There is no deficiency with regard to this section of the regulation.

4 CSR 240-22.050(7)(A)1

This section of the Demand-Side Resource Analysis portion of the IRP rule requires AmerenUE to base its initial estimates of demand-side program load impacts on "the best available information from in-house research groups, national laboratories or other credible sources." Public Counsel contends AmerenUE failed to meet this requirement because the load impacts of demand-side management programs the company modeled in its integrated analysis should have been time-differentiated based on the specific load altering characteristics of each program. In response, AmerenUE denies that the analysis in its IRP

filing is deficient, but indicates its willingness to further assess the benefit or detriment associated with introducing more detailed demand-side management impact information in its next IRP filing.

The Commission directs AmerenUE to further assess the benefit or detriment associated with introducing more detailed demand-side management impact information in its next IRP filing.

4 CSR 240-22.050(6)

This section of the Demand-Side Resource Analysis portion of the IRP rule requires AmerenUE to "develop a set of potential demand-side programs that are designed to deliver an appropriate selection of end-use measures to each market segment." Public Counsel contends AmerenUE's modeled assumptions about the impact of its Industrial Demand Response (IDR) programs are unrealistic in that they stay constant for the entire duration of the planning horizon, without taking into account possibly greater impacts over time as the market price of capacity rises and capacity and ancillary services markets develop. AmerenUE denies its response to this portion of the rule is deficient, but agrees that over time, the participation levels in the IDR program may change in the manner described by Public Counsel.

The Commission agrees with Public Counsel. The Commission directs AmerenUE to more realistically evaluate its IDR programs in its next IRP filing.

The Callaway 2 Allegations

4 CSR 240-22.010(2) (Public Counsel contends AmerenUE was unable to analyze demand-side and supply-side resources on an equivalent basis due to its lack of experience in implementing large-scale demand-side management programs.)

4 CSR 240-22.060(2) and 4 CSR 240-22.010(2)(A) and (2)(C) (Public Counsel contends AmerenUE should have done more to evaluate the financial metrics associated with construction of a Callaway 2 plant.)

4 CSR 240-22.060(3) and 4 CSR 240-22.010(2)(A) (Public Counsel contends AmerenUE should have looked at more alternatives for finding partners to share the cost of building a Callaway 2 plant.)

4 CSR 240-22.070(2) (Public Counsel contends AmerenUE should have identified its ability to recover the costs of Construction Work in Progress (CWIP) as a critical uncertain factor.)

4 CSR 240-22.040(8)(B) and (C) (Sierra Club contends AmerenUE has underestimated the overnight costs of constructing the US-EPR reactor it is considering building at Callaway 2.)

The remaining identified deficiencies all relate to concerns about planning for AmerenUE's possible construction of a second nuclear reactor at the Callaway Plant. The Commission will deal these alleged deficiencies together.

The parties asserting AmerenUE's IRP filing is deficient are concerned AmerenUE has not done sufficient planning to ensure its decision to build Callaway 2 is the best choice for the company and its ratepayers. In particular, they contend AmerenUE has not sufficiently analyzed the need to build a new 1600 MW base load plant, including the need to perform a retirement or life-extension analysis for the 800 MW Meramec coal-fired plant, which would be retired when the new nuclear plant comes on line. They are also concerned AmerenUE has not sufficiently analyzed all financing alternatives in its rush to have Missouri's anti-CWIP statute overturned by the legislature.

AmerenUE concedes further study is needed before it makes a final decision on whether to build Callaway 2. To that end, it has committed to completing and filing its next IRP at least six months before making a final decision to build, or not build the new nuclear plant. The company also promises to informally cooperate with all interested parties in the months leading up to the filing of the formal IRP plan. However, as illustrated by the fact that this case is still pending and hotly contested more than a year after AmerenUE filed its 2008 IRP, six months does not allow the Commission and the other parties a sufficient time to review and contest AmerenUE's next IRP filing.

Because of the uncertainty in the 2008 IRP's treatment of the decision whether to build Callaway 2, the Commission finds that AmerenUE's 2008 IRP does not demonstrate compliance with the requirements of the Commission's IRP rule. Furthermore, for the same reason, the Commission finds that AmerenUE's resource acquisition strategy does not meet the requirements stated in 4 CSR 240-22.010(2)(A)-(C).

Despite the deficiencies in AmerenUE's 2008 IRP filing, it would be a waste of resources to require AmerenUE to look backward to revise that filing. Instead, the Commission will direct AmerenUE and the other interested parties to look forward to AmerenUE's next IRP filing. The rule requires AmerenUE to make that next IRP filing in April 2011. In its application to the Nuclear Regulatory Commission, AmerenUE indicated if it decides to proceed with Callaway 2, it would like to start construction in April 2012. The Commission will order AmerenUE to file its next IRP in April 2010.

THE COMMISSION ORDERS THAT:

1. The partial stipulation and agreement filed on August 12, 2008, is accepted by the Commission as a resolution of the deficiencies identified in that document. The

signatory parties are ordered to comply with the terms of that partial stipulation and agreement.

2. Union Electric Company, d/b/a AmerenUE, shall file its next Integrated Resource Plan no later than April 1, 2010.

3. This order shall become effective on March 1, 2009.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Murray, Davis, and Jarrett, CC., concur;
Clayton, Chm., with separate dissenting
opinion to follow, and Gunn, C., dissent.

Woodruff, Deputy Chief Regulatory Law Judge