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MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. ER-2007-0002

REBUTTAL TESTIMONY

OF

DAVID A. SVANDA

ON

BEHALF OF

UNION ELECTRIC COMPANY
d/b/a AmerenUE

St. Louis, Missouri
January, 2007

AmerenUE Exhibit No. 5
Case No(s). ER-2007-0002
Date 3/20/07 Rptr MW

REBUTTAL TESTIMONY

OF

DAVID A. SVANDA

CASE NO. ER-2007-0002

I. INTRODUCTION AND SUMMARY

Q. Please state your name and business address.

A. My name is David A. Svanda. My business address is 6464 Lounsbury Rd., Williamston, Michigan, 48895.

Q. Are you the same David A. Svanda who submitted Direct Testimony in this Case on July 6, 2006?

A. Yes. My qualifications were described in that previous submission, which discussed key regulatory, and public policy considerations and principles that should help guide the Missouri Public Service Commission ("Commission") in this case.

Q. What is the purpose of your rebuttal testimony?

A. Testimony sponsored by witnesses from the Staff (Greg Myer), the Office of Public Counsel (Ryan Kind), the State of Missouri (Michael Brosch), and the Commercial Group (Kevin Higgins) propose that 40 percent of the output of the Joppa coal-fired generating plant owned by Electric Energy, Inc. ("EEInc."), an Illinois corporation and an exempt wholesale generator ("EWG"), be "imputed" in calculating the jurisdictional retail rates for Missouri. There are many reasons why this proposal is utterly unfair, unreasonable and unfounded in regulatory principles. The rebuttal testimonies of Mr. Mochn and Prof. Downs address some of these reasons. The aspects of this proposal I address here are even more fundamental.

As a former Commissioner, a career public servant, and now a consultant, I have devoted much of my professional life to this regulatory process. It is a vitally important activity for many reasons, not the least of which is ensuring the ready availability of power at a fair price. For most industries, of course, the market determines what price is fair for any commodity. For an electric utility, where most aspects of the business do not operate in an unregulated market, determining what is a "fair" price is a complicated endeavor. That is the critical burden of this Commission.

Important ratemaking regulatory principles and rules have been developed over generations of experience that govern the process, aid the Commission in fulfilling its responsibilities, and ensure all participants, as much as is humanly possible, that this process will be fair and a reasonable, principled result will be reached. The premises of this imputation proposal concerning EEInc. are not only preposterous; they are profoundly unfair and dangerous, for they strike at some of the most basic rules at the foundation of the regulatory process. The purpose of this rebuttal is to bring to the Commission's attention these deeply troubling aspects of this proposal, which would run rough-shod over well-established principles of ratemaking and the sanctity of contracts simply for short-term gain in this rate case.

Q. Please summarize your principal conclusions.

A. They are:

- AmerenUE's investment in EEInc. was made by its shareholders and has, accordingly, always been treated as below-the-line. Any risk of loss or imprudent costs was borne by AmerenUE's shareholders, not by its ratepayers.

- EEInc. and AmerenUE are distinct corporations. The Board of Directors of EEInc. has a fiduciary duty to run their company profitably. As an exempt wholesale generator ("EWG"), EEInc. has no duty sell power to AmerenUE at below market prices.
- AmerenUE's ratepayers do not own EEInc. nor do they have any right to the profits earned by EEInc. through its FERC-approved sales of power in the wholesale market.
- AmerenUE has no power to compel EEInc. to act contrary to its economic interests. AmerenUE cannot be found to have acted imprudently for failing to take an act it had no power to take.
- The other parties urge the Commission to undertake a frontal assault on the commonly held understanding of a contract by effectively overriding the clear terms under which the 1987 contract between EEInc. and AmerenUE has expired.
- The price of any commodity includes all the costs incurred to produce that commodity, including a return on the capital investment for the plant and equipment needed to produce the product. This is true whether the product is a car or electricity.
- AmerenUE's purchases of power from EEInc. were appropriately included in its cost of service over the years, and no suggestion has ever been made that these costs were imprudent.
- The other parties now, years later, effectively want to go back, reopen the regulatory books, and impose negative regulatory and economic

consequences on AmerenUE as a result of those same transactions. That is simply not fair and would set a dangerous precedent.

- EEInc. is an Illinois company, is a below-the-line investment of AmerenUE's shareholders, is regulated by FERC, and is not within this Commission's jurisdiction. Consistent with EEInc.'s status as an unregulated investment of AmerenUE's shareholders, this Commission did not object when EEInc. in 2000 applied for, and received, FERC's permission to become an EWG or when EEInc. in 2005 applied for, and received, FERC's permission to sell the output of its Joppa plant at market-based rates. The other parties' proposal to "impute" revenue from EEInc. to AmerenUE would effectively countermand FERC's approval allowing EEInc. to sell power in the wholesale market.
- The other parties' proposal concerning the "imputation" of revenue from EEInc. is an invitation for this Commission to step far beyond its jurisdiction to effectively confiscate the property of the shareholders of EEInc.
- The other parties' proposal invites the Commission to undermine the long standing, practically important distinction between "above-the-line" and "below-the-line" investments for their short-term gain in this rate case.
- The other parties' proposal would effectively punish AmerenUE for doing a great job in getting cheap power for its ratepayers from EEInc. when the wholesale market did not exist. Now that it does exist, AmerenUE has no way to recreate that arrangement.

Q. To your mind, what are the key facts concerning EEInc. and its relationship to AmerenUE?

A. This is an important question because the other parties' testimony does not really dispute any facts, which are straightforward. The problem with the other parties' position is the unprecedented legal and regulatory consequences they propose to give to these facts.

EEInc. was a groundbreaking step, taken in 1950 – in the shadow of World War II, the beginning of the Cold War, and at the dawn of the nuclear age – by which private industry cooperated with the federal government in an important national security initiative. The Atomic Energy Commission (now the Nuclear Regulatory Commission), needed a reliable source of electric power for the heavy demands of its new uranium enrichment plant at Paducah, Kentucky. Through "enrichment," the concentration of U-235 in the uranium is increased, making uranium useful for producing the energy needed for nuclear weapons. EEInc. was formed to provide the electrical power for running the Paducah facility.

EEInc. was formed by Union Electric Company ("UE"), Central Illinois Public Service Company, Illinois Power Company, Kentucky Utilities Company and Middle South Utilities, Inc., called the "Sponsoring Companies." Each purchased stock in the newly formed company. It is easy to forget now, 50 years later, that it was not a foregone conclusion back then that the private sector could step up to the plate in this way. Many thought that only the Government could command the resources needed for such a massive undertaking. The Sponsoring Companies of EEInc. proved those doubters wrong.

But the doubters were not wrong in viewing this enterprise as a novel and risky move for these private companies. Certainly more debt was involved in capitalizing

EEInc. than the Security and Exchange Commission would normally accept in the financing of public utilities. But one of the reasons the SEC did approve the financing of EEInc. was "the importance of the proposed generating facilities to the national defense."[1] The critically important point for this rate case, though, is that AmerenUE put only shareholder dollars on the line in its investment in EEInc. Not one penny of ratepayer money was put at risk. In classic regulatory terms, UE's investment in EEInc. was, and always has been, "below-the-line." Today, AmerenUE's shareholders own 40% of the outstanding shares of EEInc. stock. Several Ameren employees sit on EEInc.'s Board of Directors.

EEInc. built its power plant to serve Paducah's operations nine miles away, in Joppa, Illinois. Over the years of the Joppa plant's operations, the Sponsoring Companies, including AmerenUE, entered into power purchase agreements with EEInc for the purchase of any excess power produced by the Joppa plant beyond that required by the Government. In recent years, as operations at the Paducah facility slowed, the Government's power needs from Joppa declined and the Sponsoring Companies were able to buy more power.

AmerenUE's most recent power purchase agreement with EEInc was executed in September 1987 and expired on December 31, 2005. In 2000, the Federal Energy Regulatory Commission ("FERC") approved EWG status for the Joppa plant, and in 2005 gave EEInc. permission to sell power from Joppa on the wholesale market, which EEInc. has been doing since January 1, 2006.

Q. What is the reason for the other parties' proposal?

A. The 1987 power supply agreement between UE and EEInc. was a contract that set the price of the energy and capacity to be sold to UE according to a cost-based formula, when no wholesale market for power existed that could be used to set a market-based rate.

[1] *32 SEC 498 (1951).*

As we know, in that context the regulatory process is a surrogate for the market as a mechanism to set fair prices. The development of regional markets for power (such as today's Midwest ISO energy market) would occur years later, spurred by the Energy Policy Act of 1992 and several critical initiatives taken by FERC, such as Order No. 888, which mandated the filing of open-access transmission tariffs and the functional unbundling of transmission from power supply, and Order No. 2000, which advanced the formation of Regional Transmission Organizations ("RTOs") in the early 2000s. Basically, the 1987 contract provided low-cost power to AmerenUE; it was a very good deal. Now EEInc. as an EWG has, not surprisingly, decided to sell the Joppa plant's power at market prices, which are higher than the old cost based prices. The other parties, also not surprisingly, would like to turn back the clock and get electricity from EEInc. under the terms of the old, expired contract. Their proposal is based on the notion that they are somehow entitled to do just that.

Q. How do the other parties justify their proposal?

A. Under the terms of the 1987 contract, the Sponsoring Companies had the right to purchase a percentage of the power in proportion to their ownership of EEInc. These witnesses contend that AmerenUE's customers have an ongoing entitlement to the Company's 40 percent share of EEInc. As a result, they assert that EEInc. should have renewed its power sales agreement with AmerenUE on similar terms and conditions to those found in the 1987 agreement. That is, EEInc should have agreed to continue to sell 40 percent of the Joppa plant's output to AmerenUE at a rate equal to the Joppa plant's cost of service, which apparently is significantly below the market price.

Failure to execute such a contract extension, in the view of these witnesses, has caused an unnecessary increase in AmerenUE's energy costs and therefore was imprudent.[2]

They also recognize that the investment of AmerenUE's shareholders in EEInc. has always been considered to be a below-the-line investment, and EEInc. has never been treated as a regulatory asset subject to the Commission's jurisdiction. So they have set out to blur the line to achieve their ends. They argue that, because UE purchased power from EEInc. under long-term contracts that included recovery of a 15% return on equity, and the costs of these power purchase contracts was included in calculating AmerenUE's revenue requirement, that the ratepayers have financially supported the Joppa plant through full payment of UE's share of all Joppa's capital costs on a front-loaded basis over they life of the plant and through payment for pollution control and other modernization investments.[3] According to the other parties, because the power purchase agreements covered the Joppa plant's costs to produce power, the ratepayers have actually borne the risk of the Joppa plant.[4] In addition, during a period in the 1970s, AmerenUE guaranteed certain EEInc. bonds (with the permission of this Commission). All of this leads to their conclusion that AmerenUE still had some way of getting 40% of the Joppa plant's power at cost even after the termination of their power contract, and had a duty to their ratepayers to do so.

Q. What is wrong with the other parties' position?

A. Let's start with the most obvious. AmerenUE and EEInc. are distinct corporations. As Professor Downs has testified in direct and on rebuttal, AmerenUE cannot

[2] Deposition of Greg Meyer, at 31:15-19 (Jan. 11, 2007)("Meyer Dep.")("The premise of the Staff's testimony today is that when this contract expired, AmerenUE made an imprudent decision to discontinue including its share, 40 percent share of the Joppa plant in calculating the jurisdictional retail rates for Missouri.").

[3] Direct Testimony of Ryan Kind, at 25:16-26:4 (Dec. 15, 2006)

[4] Deposition of Michael L. Brosch, at 23:1-6 (Jan. 11, 2007).

control EEInc. or make it act for the benefit of AmerenUE's ratepayers, nor should it. EEInc.'s Directors have a fiduciary duty to EEInc., not to AmerenUE.[5] As I understand Prof. Downs' testimony, that means that these Directors' duty runs to the shareholders of EEInc., not the ratepayers of AmerenUE.

AmerenUE had a contract with EEInc. which, by its terms, expired at the end of 2005. No provision in the contract provided for its extension. AmerenUE's ownership of 40% of the stock of EEInc. did not give it some power to revive or renew this contract nor to demand a specific below-market price for EEInc.'s power. The other parties are suggesting that the Commission undertake a frontal assault on the commonly held understanding of contracts. Moreover, it is an alarming distortion of the familiar concept of prudence that the failure of a utility to take an act it had no power to take can be called "imprudent." Even if one construes AmerenUE's ownership interest as providing some kind of continuing first call on a percentage of the Joppa plant's power, nothing gives AmerenUE the right to buy that power at any specific price, much less one that is below market. Not one of these witnesses pointed to any legal authority AmerenUE had to compel EEInc. to extend the cost-plus contract even for 40% of Joppa's power. They simply do not grasp that EEInc. is really a separate legal entity with interests and powers distinct from those of AmerenUE. An exchange with one witness is illustrative:

Q. What if AmerenUE requested to continue the contract but EEInc. decided not to?

A. I can't – I can't fathom that situation.[6]

[5] Deposition of Charles D. Naslund, at 103:20 – 106:2 (Jan. 23, 2007).
[6] Meyer Dep., at 50:17-19.

And the reasoning of these witnesses has no time limit as long as pricing Joppa's power at cost ends up below the market price. They say that prudence demands that AmerenUE compel – with some nonexistent legal power – a separate, unregulated corporation to sell it power at a below market price.[7] If they are right, then it would seem that this arrangement must continue until EEInc.'s costs are no longer below the market price for power (at which time I suppose EEInc. will be out of business, since it would be better off shutting the plant down than selling power at a loss). This is an astounding use of prudence utterly divorced from a traditional understanding of the concept. If successful here, would they next suggest that other Illinois generating plants be forced to sell power to AmerenUE at prices they determine prudent?

Q. But don't the other parties point to aspects of the long term cost-plus contract between AmerenUE and EEInc. as the basis for their position?

A. That is the most striking feature of their testimony -- to support their proposal the other parties' mischaracterize commonplace aspects of cost-plus contracts (in some cases, aspects of *any* contract), and then try to give them extraordinary legal consequences. According to the other parties, aspects of this contract that justify their proposal is the fact that the pricing mechanism included a 15% return on equity, that the contract was concluded in a noncompetitive environment, and that the Government and the Sponsoring Companies agreed to purchase all of the Joppa plant's power.

Let's start with some basics. The price of any product must logically include all the costs that went into making that product. Labor and materials obviously are costs included in a price. In addition, the costs of the machinery and plant used to make the product, along with the cost of money borrowed to finance that plant and machinery, are all

[7] *Id.*, at 34:1-9, 44:13-24.

included in the price of a product. In regulatory terms, a return on and return of the capital investment of the company that makes a product is part of the price of that product. That's why, in regulatory terms, we refer to the "cost of capital" in rate cases – that cost, the ROE component and debt component, is just as much a cost as are the wages paid to employees. When I buy a car or anything really, the price includes these costs. But paying those costs when I buy a Mustang does not mean I am buying Ford Motor Company or am acquiring any special rights regarding the operations of Ford. I got what I paid for and paid for what I got. That's the deal. Period.

This basic and indisputable proposition equally applies to the purchase of electric power. AmerenUE bought power under the terms of its contract with EEInc., just like it pays for power from other generators and just like it buys and pays for vehicles and other equipment needed to do its business. These are legitimate costs of service that, with Commission approval, are included in rates, but no one has ever suggested that ratepayers "own" or otherwise have some special rights regarding these vendors, whether they are selling trucks or power.

The other parties point to the return on equity component of the price and the noncompetitive context in which the contract was concluded as if there was something sinister in this contract that resulted in some unique burden or risk for AmerenUE's ratepayers. This kind of argument is particularly stunning coming from people who have long participated in the regulatory process. *Of course* the contract was concluded in a noncompetitive context. At the time (five years before the Energy Policy Act of 1992) there was no other context or market pricing mechanism by which to negotiate the terms of this purchase power arrangement; there was no market for power, as we understand the term

"market" to mean today. In that environment, it is the Commission and the regulatory process that stands in the place of the market to ensure fair and reasonable prices for power. The expenses AmerenUE incurred in purchasing power under this contract were appropriately part of AmerenUE's cost of service, and no one ever raised an objection over all the years of this contract that its terms (including the provision that the contract terminated at the end of 2005 with no provision for extension of the term) were unfair or imprudent. A return on and of equity is always one element of the price of any good, whether or not it is spelled out. Having such a component in the price formula for the Joppa plant's power was normal and unobjectionable, as the fact that no one ever raised a concern about it to this Commission, or to anyone. No one objected to the 15% figure, either. As Mr. Moehn's rebuttal points out, this is not surprising, as 15% was comfortably in the range of returns on equity at the time.

Finally, the "guarantee" that the Government or the Sponsoring Companies would purchase all of Joppa's power cannot support the other parties' position. No one has ever claimed that the purchase of power from EEInc. was ever uneconomic. Indeed, the other parties' proposal here is driven by their recognition that purchasing power from EEInc. at cost was a great deal. Even if one speculates, and asks what if the facts were different, and Joppa power was uneconomic, and the Sponsoring Companies still had to make good on their commitment to buy that power, what then? Then AmerenUE's shareholders would have had to eat whatever amount of the Joppa power costs that would be considered excessive. Again, EEInc. was a below-the-line investment of AmerenUE's shareholders, and was always treated as such by AmerenUE and by this Commission. Consistent with that treatment, I would expect that AmerenUE would not have asked for, and I am sure this Commission

would not have approved, the costs of an uneconomic EEInc. power contract to be included in AmerenUE's cost of service. The risk of this hypothetical result was always on the shareholders, not the ratepayers, of AmerenUE. Even from this perspective, nothing about this contract justifies the result for which the other parties argue.

Q. What about those bonds in the 1970s?

A. Those bonds were used to finance the purchase of pollution control equipment ("three 550 feet chimneys, coal handling equipment and an air quality monitor").[8] While the Commission concluded that "the possibility of any liability occurring is very remote,"[9] the same point I made with respect to the commitment to purchase EEInc.'s power is true here. If catastrophe happened, this was a below-the-line investment, and AmerenUE's shareholders would have borne the consequences, not the ratepayers.

To put it another way, consider this example. Let's say you plan to add a chimney to your house, and your father-in-law co-signs the loan you take out to pay for the improvement. All proceeds smoothly, and you pay off the loan without any problem or recourse to your father-in-law. When all is done, could your father-in-law then claim he owns your house simply because he co-signed that loan? The answer, of course, is no, and this Commission should similarly say no to the other parties' proposal to impute income to AmerenUE from EEInc.'s Joppa operations. It is also somewhat unseemly for the other parties to attack AmerenUE for its attempts to contribute to achieving a worthwhile national goal of environmental enhancement, on a plant contributing to national defense and security objectives.

[8] *In re Union Electric Co.*, Case No. EF-77-197, 21 Mo. P.S.C. (N.S.) 425, 426 (June 24, 1977).
[9] *Id.*, at 427.

Q. Does the other parties' proposal raise any troubling implications concerning the jurisdiction of the Commission?

A. Most assuredly it does. EEInc. is an Illinois company, and is not within this Commission's jurisdiction. EEInc was granted EWG status by FERC in 2000. Notably, neither the Missouri Commission nor any other party filed a protest when EEInc. sought (and received) EWG status. An EWG, under federal law, is a non-utility generator that sells power exclusively in the wholesale market. Moreover, EWG's are FERC-jurisdictional entities; their rates and charges are subject to FERC review and approval. This means that EEInc.'s status as an EWG is another reason why EEInc. is not subject to the Commission's jurisdiction.

Moreover, in 2005 EEInc. received the FERC's approval to sell the output of the Joppa plant at market-based rates ("MBR").[10] Generally speaking, FERC permits a generator to sell power at market rates if the generator demonstrates that it lacks market power in both generation and transmission and cannot erect barriers to entry. FERC concluded, after reviewing the analyses submitted by EEInc., that EEInc. did not have market power and thus should be granted authority to sell at market rates.

The Commission did not protest EEInc.'s application requesting MBR authority, which strongly suggests that it was not opposed to EEInc. receiving authorization to sell the Joppa plant's output at market rates. The Commission would have recognized that EEInc. would be unlikely to sell power at cost-based rates if it received FERC approval to sell power at market rates. While a generator with MBR authority is not precluded from selling power at cost-based rates, it would not be economically rational or fiduciarily

[10] *Electric Energy, Inc.*, 113 FERC ¶61,245.

responsible for a generator with MBR authority to willingly sell its output at below-market rates.

The Missouri Office of Public Counsel ("OPC"), however, did protest EEInc's application requesting MBR authority, raising arguments similar to those that they have raised in this proceeding. FERC rejected the OPC's concerns, finding them irrelevant to the determination of whether EEInc met the FERC's standards for MBR authority.[11]

Thus, EEInc. has a clear and unequivocal right to sell the Joppa plant's output at market rates. "Imputing" the output of the Joppa plant to AmerenUE at a cost-of-service rate would effectively negate or rescind EEInc.'s MBR authority and overstep the Commission's regulatory authority.

Q. Why would the adjustment to AmerenUE's revenue requirement have that result?

A. Since EEInc has MBR authority, it cannot be prevented from selling the Joppa plant's output at market rates. The other parties seem to (at least implicitly) recognize this. However, the proposed "imputation" of the 40 percent share of Joppa's output to AmerenUE at cost-based rates effectively would allow AmerenUE ratepayers to capture the market value of this share of the Joppa plant's output (*i.e.*, the difference between revenues earned from market-based sales and those earned from cost-based sales). This transfer of benefits from EEInc to AmerenUE's ratepayers would be problematic for at least three reasons. First, as both Mr. Moehn and Prof. Downs explain in their direct and rebuttal testimony, AmerenUE ratepayers do not "own" the Joppa plant. Thus, AmerenUE's ratepayers have no right or entitlement to the profits earned by EEInc. through its market-based power sales. The other parties' proposal concerning the "imputation" of revenue from EEInc. is an invitation for this

Commission to step far beyond its jurisdiction to effectively confiscate the property of the shareholders of EEInc.

Second, in effect, the other parties seek to allocate a portion of the output of an Illinois incorporated and Illinois located, a FERC-jurisdictional entity, EEInc., to AmerenUE, a Missouri state-jurisdictional entity, in the absence of a power sales agreement between these two entities and at a rate not approved by FERC. Such an action is in conflict with FERC's exclusive jurisdiction over EWGs, and the common sense of most people.

Third, the "imputation" of Joppa's output to AmerenUE at a cost-based rate likely would be viewed as an attempted "end run" around FERC's ratemaking jurisdiction under the Federal Power Act. Under what has come to be known as the "filed rate doctrine", state regulators cannot prevent a utility from recovering the cost associated with a FERC-approved charge or rate. Of course, EEInc is no longer selling power directly to AmerenUE but is instead selling power into the wholesale market at market rates. Nonetheless, the other parties' proposal would be equivalent to the Commission preventing AmerenUE from recovering the full cost of a market-based power purchase from EEInc., on the basis that the purchase should have been made at a (lower) cost-based rate. Such an action would be a very questionable (and probably illegal) attempt to override FERC's exclusive authority over the rates and charges for wholesale power transactions. Moreover, AmerenUE and other utilities in Missouri participate in the Midwest ISO to create a robust regional wholesale power market in the Midwest. Taking a portion of the Joppa plant "off the market" would work against these efforts. Burdening the full participation of the Joppa plant in that market by visiting negative economic consequences on one shareholder of EEInc. simply because

[11] *Id.*, p. 34.

Joppa is participating in that market is equally at war with this national and regional direction.

Q. Are there any other broad implications of the other parties' proposal that concern you?

A. I have several other concerns relating to the practical and principled implications of the other parties' proposal for how this Commission does its work. As I testified earlier, the price paid by AmerenUE for the power purchased from EEInc. under its long-term contract was included in AmerenUE's cost of service over the years without any objection or qualification by this Commission. There never was any implication in all that time that there was anything peculiar or imprudent about the terms of this power purchase agreement. The other parties now, years later, effectively want to go back, reopen the regulatory books, and impose negative regulatory and economic consequences on AmerenUE as a result of those same transactions. That is simply not fair and would set a dangerous precedent. The regulatory books do not stay open forever. The facts were not concealed by anyone. Imposing an economic price on AmerenUE for costs prudently incurred and approved years ago is offensive to the most basic notions of fair play and due process, not to mention fundamental regulatory principles, such as the rules against retroactive ratemaking.

Second, the other parties essentially want to have EEInc. discriminate in favor of an affiliate, AmerenUE, by selling it power at a significant discount from the market price. Such discrimination is a perverse form of affiliate abuse.

Third, maintaining distinct lines in the exercise of the Commission's jurisdiction and in the analysis that informs ratemaking is vitally important for all parties, but can be difficult to maintain for all issues that the Commission must consider. The question

of what is in rate base is surely one of the most basic and defining questions in regulatory practice. And the traditional concepts of "above-the-line" and "below-the-line" investments, with those above in rate base and those below not, are not in principle unclear and are not unclear in their application here. No one disputes that EEInc. was a below-the-line investment of AmerenUE's shareholders. Yet the other parties' proposal seeks to blur that well-understood line, and treat a below-the-line entity as if it were above-the-line, for their short-term gain. That is wrong for this particular case, and would set a precedent having a corrosive impact on future applications for this threshold for what is or is not in rate base. What is now a useful bright line would become unclear either as a guide to the actions of regulated companies and the companies that do business with them or as a regulatory standard in proceedings before this Commission.

Finally, I find troubling the aspect of the other parties' position that effectively wants to punish a regulated entity for having done a good job in the past. By any measure, the power purchase contract between AmerenUE and EEInc. was a great deal for AmerenUE's ratepayers, giving them access to power at fabulously low rates. That, of course, is the reason the other parties have concocted their proposal in the first place. In the spirit of "no good deed goes unpunished," that proposal is profoundly unfair. What we have here is a first-rate job done by a utility in one regulatory world according to the rules of that world. With the creation of a wholesale power market, that world no longer exists, and the rules of this new world do not allow the utility to act in the same way. Yet the other parties' proposal is premised on the idea that the utility should do what the new rules make impossible, and recreate what the utility was able to do in the past. Effectively, the other

parties want to re-establish the old regulatory world in the new one. No principle of fairness or law allows what is really such a completely lawless step.

Q. Do you have any examples from the past in which the Commission had to confront a similar issue?

A. Yes. In the 2004 *Aquila* case,[12] the Staff requested that it be directed to investigate whether the Commission had jurisdiction over the sale by Aquila, a regulated utility, of its remaining interest in an unregulated generation subsidiary. In *Aquila,* the Staff, like the other parties here, strained to fashion Commission jurisdiction based on what they perceived to be the good policy reasons for such a result. As the Commission said then:

> Staff's suggestions as to how the Commission *might* have jurisdiction over the proposed transaction are extremely tenuous. Neither Staff nor Public Counsel were able to clearly articulate any statutory authority under which the Commission could assert jurisdiction over the proposed transaction. Instead, Staff largely focuses on the potential harm that could result if the Commission does not have jurisdiction.[13]

The Commission went on to point out, again as is the case here, that there were several prior transactions involving Aquila and this subsidiary, including the formation of these entities, over which the Staff did not seek jurisdiction.[14] The Commission unhesitatingly rejected the Staff's effort to extend its jurisdiction. While expressing some sympathy with the Staff's policy concerns, the Commission pointed out that it was the law, and not policy judgment, that governs the Commission's jurisdiction, and the law did not give the Commission jurisdiction over the Aquila transaction.[15] (See the Report and Order attached hereto as Schedule DAS-2).

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[12] *In the Matter of an Investigation into a Pending Sale of Assets of Aquila, Inc.,* Case No. EO-2004-0224, 2004 Mo. PSC LEXIS 231 (Feb. 26, 2004).
[13] *Id.* at *5-6.
[14] *Id.*, at *6.
[15] *Id.*, at *7.

The same is true here. EEInc. is an unregulated Illinois affiliate of AmerenUE. The law does not give this Commission (a) jurisdiction over the authority of EEInc. to sell power in the wholesale market or (b) power to authorize AmerenUE to somehow compel EEInc. to do its bidding. The other parties' proposal to impute earnings from EEInc. to AmerenUE is wrong, unfair, and unlawful. It should be rejected.

Q. Does this conclude your rebuttal testimony?

A. Yes it does.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of an Investigation into a Pending Sale of Assets of Aquila, Inc.) **Case No. EO-2004-0224**

REPORT AND ORDER

Issue Date: **February 26, 2004**

Effective Date: **March 7, 2004**

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of an Investigation into a Pending Sale of Assets of Aquila, Inc.	))	**Case No. EO-2004-0224**

APPEARANCES

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Steven Dottheim, Chief Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Vicky Ruth, Senior Regulatory Law Judge.

REPORT AND ORDER

Syllabus

This order denies Staff's request that the Commission order Staff to investigate whether the Commission has jurisdiction regarding a proposed sale by Aquila Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation, of Aquila's remaining interest in Merchant Energy Partners Pleasant Hill, LLC (MEPPH), an unregulated subsidiary of Aquila, Inc. MEPPH is the lessee/operator of a gas-fired electrical generating facility in Pleasant Hill, Missouri, known as the Aries Power Project (Aries).

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Staff of the Missouri Public Service Commission filed a Motion to Open Case on November 14, 2003. Staff requested that it be directed to investigate whether the Commission has jurisdiction with respect to the anticipated sale by Aquila, Inc., d/b/a Aquila Networks – MPS, to Calpine Corporation of Aquila's remaining 50 percent ownership interest in Merchant Energy Partners Pleasant Hill, LLC (hereinafter, the "transaction").

Aquila objects to Staff's motion, arguing that the Commission does not have jurisdiction over the proposed transaction. Aquila notes that MEPPH is an unregulated subsidiary of the company; MEPPH is also the lessee/operator of the gas-fired electrical generating facility in Pleasant Hill, Missouri, known as the Aries Power Project. Aquila has entered into a Power Sales Agreement (PSA) with MEPPH. The PSA is not part of the contemplated sale. Aries is an exempt wholesale generator (EWG). The power generated by Aries is sold exclusively in transactions at the wholesale level. Aries is not in the regulated rate base of a utility subject to Missouri regulation.

The parties subsequently filed several rounds of pleadings regarding the Commission's jurisdiction in this matter.[1] On February 20, 2004, Aquila filed a Motion for Expedited Treatment, requesting that the Commission resolve this matter as soon as possible. Aquila states that it filed the motion as soon as it could, given that the informal negotiations between Staff and Aquila concerning a possible settlement of this matter have just concluded without a mutually satisfactory resolution. Aquila also indicates that the regulatory uncertainty created by Staff's motion is preventing Aquila from accomplishing the proposed transaction and that this is harmful to the company's efforts to obtain financial security by exiting the merchant energy business. Aquila requests that if the Commission is going to schedule an on-the-record presentation, that it be scheduled for February 24 or February 25, 2004, during the time currently set aside for Aquila's pending rate case in Case No. ER-2004-0034. The Commission finds that Aquila's motion for expedited treatment should be granted.

On February 23, 2004, the Commission issued an order scheduling an on-the-record presentation for February 24, 2004. The Commission conducted the on-the-record presentation on that date as scheduled. Staff, Aquila, and the Office of the Public Counsel participated in the proceeding. Due to the highly confidential nature of the matters discussed, much of the proceeding was conducted during in camera, or closed, sessions. During the proceeding, Aquila agreed to expeditiously

[1] The pleadings and the transcript contain much information that the parties have designated as "highly confidential." This order, however, includes only public information.

review the transcript and file a notice regarding which parts of the transcript designated as highly confidential could be made public.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Aquila is an electrical corporation as defined in Section 386.020(15), RSMo 2000, and, as such, is a public utility subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo. Aquila provides electric service in and about Kansas City and St. Joseph, Missouri.

Aquila currently owns a 50 percent interest in MEPPH, the lessee and operator of the Aries Power Project. MEPPH is an unregulated subsidiary of Aquila. Aries is an exempt wholesale generator.

Calpine Corporation owns the remaining 50 percent interest in MEPPH. Calpine is not an entity regulated by the Missouri Public Service Commission. Aquila contemplates selling its 50 percent interest in MEPPH to Calpine.

Staff's suggestions as to how the Commission *might* have jurisdiction over the proposed transaction are extremely tenuous. Neither Staff nor Public Counsel were able to clearly articulate any statutory authority under which the Commission could assert jurisdiction over the proposed transaction. Instead, Staff largely focuses on the potential harm that could result if the Commission does not have jurisdiction. The potential harm includes, but is not limited to, concerns regarding future access to certain books and records, along with concerns over resource planning and cost issues.

This proposed transaction is but part of a larger history involving the Aries facility. Staff did not seek a determination that the Commission had jurisdiction when MEPPH and Aries were created. Staff did not seek jurisdiction to approve the PSA between Aquila and MEPPH.[2] Furthermore, Staff did not seek jurisdiction over the earlier transfer of 50 percent of Aquila's interest in MEPPH to Calpine. Thus, Staff has not sought to be, nor has the Commission been, involved with this series of transactions at any stage, other than the Commission's limited involvement under Section 32(k) of the PUHCA. The applicable law has not changed during this series of transactions, and there is no legal basis upon which to find jurisdiction now.

The Commission is an administrative body of limited powers, and created by statute. As such, the Commission has only those powers as are expressly conferred upon it by the statutes and are reasonably incidental thereto. *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044, 1046 (1943); *State ex rel. City of West Plains. v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958). Although the Public Service Commission law is remedial in nature, and should be construed liberally, neither convenience, expediency nor necessity are proper matters for consideration in the determination of whether an act of the Commission is authorized by law. *State ex. rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979).

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[2] The Commission did make certain determinations regarding the PSA pursuant to Section 32(k) of the Federal Public Utility Holding Company Act.

The Commission has reviewed the arguments of the parties, the relevant case law, and the statutes, along with the proposed transaction. The Commission shares Staff's concerns that resource planning be adequate. Nonetheless, the Commission finds that there is nothing in the statutes or case law that confers jurisdiction over the proposed transaction. The Commission emphasizes that this decision is one based on the law, not upon policy considerations. In making this determination, the Commission is not sanctioning or approving the proposed transaction. The Commission recognizes that resource adequacy considerations are addressed in other forums, and the Commission reaches no conclusions regarding resource adequacy here. As noted by Staff, there may be questions regarding resource adequacy that Aquila will have to answer in some other proceeding in the future. Since it has no jurisdiction over the proposed transaction, the Commission will deny Staff's motion and will close this case.

IT IS THEREFORE ORDERED:

1. That the Motion for Expedited Treatment, filed by Aquila Inc., d/b/a Aquila Networks - MPS, on February 20, 2004, is granted.

2. That no later than March 1, 2004, Aquila Inc., d/b/a Aquila Networks - MPS, is directed to file either (1) a notice regarding which portions of the transcript currently designated as highly confidential may be made public; or (2) a statement indicating when Aquila expects to file the required notice.

3. That Staff's Motion to Open Case is denied and this case is dismissed.

4. That this Report and Order shall become effective on March 7, 2004.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Murray and Clayton, CC., concur.
Gaw, Ch., dissents, with separate dissenting opinion to follow.

Dated at Jefferson City, Missouri,
on this 26th day of February, 2004.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AFFIDAVIT OF David A. Svanda

STATE OF MISSOURI)
) **ss**
CITY OF ST. LOUIS)

David A. Svanda, being first duly sworn on his oath, states:

1. My name is David A. Svanda. I work in Williamston, MI and I am employed by Ameren Services Company as a consultant.

2. Attached hereto and made a part hereof for all purposes is my rebuttal Testimony on behalf of Union Electric Company d/b/a AmerenUE consisting of 20 and Schedule DAS-2, pages, which has been prepared in written form for introduction into evidence in the above-referenced docket.

3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct.

Subscribed and sworn to before me this 29 day of January, 2007.

Notary Public

My commission expires:

MEGHAN E LIGGETT
Notary Public - Michigan
Ingham County
My Commission Expires Apr 8, 2013
Acting in the County of