

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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In the Matter of)	
)	
Union Electric Company)	Docket No. 52-037
dba AmerenUE)	
)	
(Callaway Plant Unit 2))	
)	

PUBLIC COUNSEL’S REPLY TO ANSWERS

Comes now the Missouri Office of the Public Counsel ("Public Counsel") and submits this reply to the answers filed by applicant AmerenUE and the NRC Staff on May 1, 2009.

Discretionary Intervention

1. Public Counsel’s petition to intervene is based on 10 CFR 2.309(e), which provides for discretionary intervention. This rule sets out the factors which weigh for and against discretionary intervention. Both AmerenUE and the NRC staff argue that Public Counsel’s request to intervene should be denied based upon their analysis of these factors. Public Counsel disagrees, and will focus on one particular factor in this reply.

2. AmerenUE and the NRC staff assert that Public Counsel’s knowledge of and expertise in Missouri regulatory law will be of little use to the Commission in this case. Note that they do not question or dispute this expertise; they simply argue that it is not germane to the issues to be addressed by the Commission. In many cases this might be a valid point, but given the unsettled question of AmerenUE’s method of financing its proposed plant, such expertise will be critical in this case.

3. Intervenor Missourians Against Higher Electric Rates (MAHUR) has raised this issue of financing as its sole contention in this case, and the NRC staff has suggested it is a validly-framed contention.¹ In its answer to MAHUR, AmerenUE asserts that it will no longer rely on CWIP funds and acknowledges that it will need to develop other financing mechanisms. AmerenUE concedes, in its answer to MAHUR, that “it will need to identify an appropriate financing mechanism and amend the Application to describe that plan.” It is with respect to such other “appropriate financing mechanism” that Public Counsel’s expertise will prove beneficial to the Commission.

4. In its petition to intervene, Public Counsel stated:

Public Counsel also seeks to ensure that the NRC adequately investigates the viability of AmerenUE's plans for financing the Callaway 2 plant. A financial plan that is poorly conceived or inadequate can lead to problems during construction and operation of the plant, which can in turn lead to health and safety concerns.

The question of financing is an integral part of the licensing process; it cannot be ignored or assumed away. 10 C.F.R. 50.33(f) requires:

If the application is for a construction permit, the applicant shall submit information that demonstrates that the applicant possesses or has **reasonable assurance of obtaining the funds necessary** to cover estimated construction costs and related fuel cycle costs. The applicant shall submit estimates of total construction costs of the facility and related fuel cycle costs, and shall indicate the source(s) of funds to cover these costs. [Emphasis added.]

“Reasonable assurance” requires a financing plan that is not only lawful in the jurisdiction where the plant is to be built, but also a plan that has a reasonable prospect of support by stakeholders (including Public Counsel). AmerenUE’s representations in its application about CWIP financing were woefully misguided; the Commission should not continue to rely on AmerenUE’s representations about what financing schemes have a reasonable assurance of providing necessary funds. Public Counsel’s participation under 10 C.F.R. 2.309(e) will provide the Commission with the ability to develop a sound record, and the Commission should allow such participation.

¹ AmerenUE, perhaps not surprisingly, refused to recognize any proposed contentions as valid.

Standing

5. AmerenUE arguments with regard to organizational standing are based on a flawed and narrow reading of Public Counsel's authority under Missouri law to represent the public. AmerenUE asserts that Public Counsel's "authority is only to represent the public in proceedings before the MoPSC." Section 386.710.1(2) RSMo 2000 states that Public Counsel "**may** represent and protect the public interest in any proceeding before or appeal from the [Missouri] public service commission." Section 386.710.1(3) RSMo 2000 states that Public Counsel "**shall** have discretion to represent the public or refrain from representing the public **in any proceeding.**" [Emphasis added.] And Section 386.710.4 RSMo 2000 grants Public Counsel "all powers necessary or proper to carry out the duties specified in this section."

6. Missouri courts have declined to take the narrow view put forward by AmerenUE. The Missouri Supreme Court (the highest court in the state) and Missouri District Courts of Appeal have entertained actions brought by Public Counsel that are not appeals from the Missouri public service commission. For example, the Missouri Supreme Court has entertained – and granted – Public Counsel's petitions for extraordinary writs.² And the Missouri state Western District Court of Appeals has similarly entertained petitions for extraordinary writs brought by Public Counsel. Notably, AmerenUE does not cite **any** cases in which Missouri courts have interpreted Public Counsel's authority as narrowly as AmerenUE would have this Commission do. Other federal agencies have recognized Public Counsel's authority to represent the public in matters that affect Missouri customers of regulated utilities and have not adopted the narrow interpretation now urged

² See, e.g., State ex rel. Office of the Pub. Counsel v. PSC, 236 S.W.3d 632 (Mo. banc 2007). In that case, the Missouri Supreme Court stated that it was not considering the petition for a writ of mandamus as an appeal of the underlying Commission order and would not review the lawfulness and reasonableness of the Commission order as it would in an appeal.

by AmerenUE.³ Public Counsel's whole purpose is to represent the public generally in public utility matters, and its authority has never been held to be as constrained as AmerenUE asserts. The Commission should find that Public Counsel does have organizational standing to intervene in this matter.

State Representation

7. In its answer, the NRC staff requests that the State of Missouri designate a single representative for participation in this proceeding. Public Counsel consents to the request of the Missouri Public Service Commission to be designated as the representative of the state of Missouri.

Respectfully submitted,

This 15th day of May 2009

_____ signed electronically by _____

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³ See, e.g., Federal Energy Regulatory Commission Docket No. EC04-81-000.