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-2008-0318

STAFF'S RESPONSE IN OPPOSITION TO AMERENUE'S APPLICATION FOR REHEARING AND REQUEST FOR LEAVE TO LATE-FILE

Comes now the Staff of the Missouri Public Service Commission (Staff), through the General Counsel's Office of the Missouri Public Service Commission (Commission), and files its response in opposition to AmerenUE's Application For Rehearing and in addition requests leave to late-file its response. In support thereof, the Staff states as follows:

1. On February 5, 2009, Union Electric Company, d/b/a AmerenUE (AmerenUE) filed its Application For Rehearing And Motion For Expedited Treatment. On February 6, 2009, the Missouri Public Service Commission (Commission) issued its Order Establishing Time To Respond To Applications For Rehearing And Motion For Stay, And Directing Staff To File Recommendation Regarding Tariff.

2 From the start, let it be understood that AmerenUE's request is made by AmerenUE to benefit AmerenUE, not AmerenUE's ratepayers. Also, from the beginning regarding the question of AmerenUE's foresight in the design of its Fuel Adjustment Clause (FAC) tariff, there has always been the possibility that the Noranda Aluminum Holding Corporation would "curtail" or otherwise conclude all operations at its New Madrid, Missouri facility, as will be addressed further below. Additionally at the outset, the Staff notes that although AmerenUE acknowledges in footnotes 11 and 13 of its February 5, 2009 Application For Rehearing And Motion For Expedited Treatment that good cause is required for the Commission to approve AmerenUE's

Modified FAC Tariff/tariff sheets because they were filed with less than 30 days' notice, AmerenUE's Modified FAC Tariff/tariff sheets filed on February 5, 2009, incorrectly show an issue date of January 30, 2009, and not February 5, 2009 when they were actually filed.

3. AmerenUE now wants to abrogate a Stipulation And Agreement approved by the Commission, engage in single-issue ratemaking for an event outside the test year and true-up period, does not want to give parties an opportunity to truly inquire into the Noranda situation, and does not want to reconsider any of the alternative FAC proposals or consider withdrawing its FAC tariff. As AmerenUE well knows, single issue ratemaking is unlawful and looking at all relevant factors is even required by Senate Bill 179 when a FAC is initially to be considered and authorized by the Commission (Section 386.266.4 RSMo Cum. Supp. 2008). (*State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo. banc 1979) notes that statute requires that the Commission must consider all relevant factors.)

4. Of course, what AmerenUE is proposing is in violation of the Stipulation And Agreement As To All FAC Tariff Rate Design Issues entered into by AmerenUE and filed with the Commission on December 12, 2008. Attached to the Stipulation And Agreement as Appendix A are specimen tariff sheets. The last paragraph on page 1 continuing onto the top of page 2 of the Stipulation And Agreement states:

> Issues Settled. If, but only if, the Commission determines that the Company should be permitted to use an FAC, this Stipulation and Agreement settles all known rate design issues relating to the Company's request to implement an FAC and the terms and conditions of the FAC tariff (except that the sharing percentage to be inserted into the $FPA_{(RP)}$ formula in the revised FAC tariff attached hereto and incorporated herein by this reference as Appendix A will depend on whether an FAC is approved and what sharing percentage is approved by the Commission and with the exceptions stated in paragraph 8).

Paragraph 8 deals with rights reserved by Public Counsel. The Commission on December 30, 2008 issued an Order Approving Stipulation And Agreement As To All FAC Tariff Rate Design

Issues. AmerenUE requests relief from what it calls in its Application For Rehearing And Motion For Expedited Treatment as "an act of God." There is no provision in the Stipulation And Agreement As To All FAC Tariff Rate Design Issues for relief from the Stipulation And Agreement for an "an act of God."

5. The law provides AmerenUE a remedy. But that remedy is not convenient to AmerenUE's plans, so AmerenUE is proposing to ignore the law and is offering a jerrybuilt resolution which no one is to question. The correct remedy is actually identified, in part, in AmerenUE's February 5, 2009 filing. The remedy for AmerenUE's consideration is to:

(a) After March 1, 2009, file a new permanent rate case with the Modified FAC Tariff/tariff sheets previously filed on February 5, 2009, or with whatever Modified FAC Tariff/tariff sheets AmerenUE deems appropriate, and request an expedited schedule. Also, file an interim rate case and request an expedited schedule. There must be a permanent rate case filed in order for there to be an interim rate case because an interim rate case is ancillary to a permanent rate case.[1]

(b) Alternatively or additionally, even before March 1, 2009, negotiate with the parties to Case No. ER-2008-0318, about amending the Stipulation And Agreement As To All FAC Tariff Rate Design Issues to permit withdrawing the tariff sheets filed on January 30, 2009 which effectuate the FAC authorized by the Commission, replacing the FAC tariff sheets with non-FAC tariff sheets that collect the increased revenue requirement authorized by the Commission in Case No. ER-2008-0318.

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[1] The Western District Court of Appeals held:

> The *Laclede* court [*State ex rel. Laclede Gas Co. v. Public Serv. Comm'n,* 535 S.W.2d 561 (Mo.App. K.C.Dist. 1976)] discussed the relationship between an interim rate request and a permanent rate request. This court stated that in its "very nature, an interim rate request is merely ancillary to a permanent rate request." 535 S.W.2d at 565[1]. As the court in *Laclede* found, there is no express statutory provision for an interim rate increase. Such an increase was sought in this case as part of a permanent rate increase. It is clear that the request for an interim rate increase did not stand on its own as an entirely separate and distinct proceeding. Thus, the interim rate case in issue, although assigned a number different from that assigned the permanent case by the Commission, has no independent status but is simply a part of the company's permanent rate request.

State ex rel. Fischer v. Public Service Comm'n, 670 S.W.2d 24, 26-27 (Mo.App. W.D. 1984). *See Re Kansas City Power & Light Co*., Case No. ER-81-42, Order Dismissing Motion For Interim Rate Relief, 24 Mo.P.S.C.(N.S.) 50 (1980).

Of course, there are no guarantees, but that is the process that AmerenUE wants and seeks to provide itself.

6. The Staff did not analyze, as part of its audit for Case No. ER-2008-0318, the revenue requirement impact on AmerenUE of Noranda operating at approximately 25% of its capacity. This significant change in load affects major components of the revenue requirement calculation: Missouri jurisdictional revenues, off-system sales and fuel expense. Given the current status of Noranda's operations, there is the question at what level should Noranda's sales be annualized? The Staff's calculation of off-system sales and fuel expense involves the use of the RealTime production cost model and significant inputs and analyses by Staff members and its production cost model consultant, including but not limited to hourly loads, market energy prices, and fuel prices. In its discussion of its Modified FAC Tariff/tariff sheets at page 4 of its Application For Rehearing And Motion For Expedited Treatment, AmerenUE appears to indicate that the Noranda load affects the level of off-system sales during every hour of the year. With significantly reduced sales to Noranda or without sales to Noranda, there is the question of what margin might AmerenUE make on annual off-system sales? AmerenUE's quantification that under its proposed Modified FAC Tariff/tariff sheets customers will receive a $31.4 million windfall benefit is premised upon market energy prices and fuel prices examined through September 30, 2008, and AmerenUE's estimate of the reduction in Noranda's load. AmerenUE's proposal that the Commission rush headlong to adopt its February 5, 2009 Modified FAC Tariff/tariff sheets does not allow sufficient time for discovery, analysis, testimony, and hearings regarding these matters.

7. There is not adequate time before the operation-of-law date respecting AmerenUE's new FAC proposal to provide due process to parties, even if it were not an abrogation of the

Stipulation And Agreement As To All FAC Tariff Rate Design Issues. AmerenUE has implicitly recognized that there is not adequate time for due process to be provided before the March 1, 2009 operation-of-law date. AmerenUE has materially changed the FAC rate design, which parties agreed to and the Commission adopted, and AmerenUE seeks that the Commission adopt its new proposal without discovery, the taking of testimony and the holding of a hearing before the operation-of-law date, because due process does not accommodate its plan. It should also be noted that one or more of the alternative FAC plans rejected by the Commission may warrant reconsideration under the changed circumstances that AmerenUE contends warrants its February 5, 2009 FAC proposal and tariff sheets. Furthermore, the last second Modified FAC Tariff/tariff sheets issue of AmerenUE has similarities to the last minute Taum Sauk regulatory capacity sale issue raised by the Office of the Public Counsel (Public Counsel), righteously opposed by AmerenUE, and rejected by the Commission in AmerenUE's last rate case, Case No. ER-2007-0002.

8. The Commission's rejection of Public Counsel's Taum Sauk regulatory capacity sales issue was recently affirmed by the Western District Court of Appeals in *State ex rel. Public Counsel v. Public Serv. Comm'n*, WD 69259 et al. (January 13, 2009), which decision is now final, no motions for rehearing and no applications for transfer having been filed with the Court, and the Court having sent its Opinion and Mandate on February 4, 2009. The first time the Public Counsel raised the Taum Sauk Regulatory capacity sale issue was in the Staff's filing of the Revised True-Up Reconciliation, one day before the deadline for the filing of post-hearing briefs in the case and twenty-one days after the last day of evidentiary hearings in the case. At page 20 of its Opinion, the Western District Court of Appeals states, in part, as follows:

> Nevertheless, Public Counsel and the State claim that their failure to raise the issue in a timely fashion should not matter because the record contained sufficient

> evidence for the commission to decide the issue. Public Counsel and the State, however, apparently, miss the point of the commission's order: to force the parties to outline the issues in advance so all parties would have time to file testimony to rebut their opponent's positions. Hence, even if the record does contain sufficient evidence, UE did not have an opportunity to present rebuttal testimony on the issue. The commission did not err in refusing to consider the issue.

9. Since there is not adequate time, AmerenUE requests that the Commission "take administrative notice of the facts of record in Case No. EA-2005-0180 (which is the Commission case in which AmerenUE was authorized to serve Noranda) . . ." (AmerenUE Application For Rehearing And Motion For Expedited Treatment, p. 3 n. 2). Maybe the Commission should take administrative notice of a December 5, 2008 article in the Southeast Missourian that Noranda was in the process of cutting a total of 228 jobs by the end of March 2009:

> **Noranda Announces More Layoffs At New Madrid Plant**
> Southeast Missourian - Friday, December 5, 2008
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> NEW MADRID, Mo. — Fifty salaried employees at Noranda Aluminum learned Thursday their jobs were being eliminated, effective immediately.
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> And another 54 hourly workers will lose their jobs at the plant by the first quarter of 2009, said Keith Gregston, president and general manager of the New Madrid plant.
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> Gregston said the move is due to economic challenges affecting the aluminum industry.
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> "Nobody likes to deliver those messages," Gregston said. "We worked together a long time with these people.
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> "The economic conditions dictate what we do," he said. "This will keep our company sustainable."
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> Gregston said all salaried employees will receive severance packages.
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> This is the third round of layoffs since early November.
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> Earlier this week management announced that 89 employees would be losing their jobs at the New Madrid facility by the end of the day Wednesday. Thirty-five employees at the facility were laid off Nov. 1.

Thursday's announcement brings the total number who will lose their jobs by early next year to 228.

Gregston didn't speculate on if any of the employees could be rehired at a later date.

"We are sensitive to the impact this will have on affected employees, their families and the communities in which they live and work," said Layle K. Smith, chief executive officer and president of Noranda Holding Corp., in a written statement.

"As hard as these decisions were to make, it is critical that we react to the current economic environment and control our costs, improve our productivity and continue to provide quality products at a competitive value.

"We remain committed to our customers, communities, co-workers and investors, striving to build sustainable relationships that will endure for years to come," the statement said. "We must, therefore, achieve success in the short-term to build towards our long-term future."

The cutbacks are part of a companywide restructuring plan that involves a reduction of employees and contract workers. In addition to the employees at the New Madrid plant, 96 workers at facilities in Huntingdon, Tenn., Salisbury, N.C., and Newport, Ark., are expected to lose their jobs by the end of the year.

The move is expected to generate cash cost savings and operating efficiencies of about $23 million.

Maybe the Commission should take administrative notice of the February 4, 2009 Century Aluminum Company News Release regarding the closing of Century's Ravenswood, West Virginia facility as of February 20, 2009, which states as follows:

Century Announces the Curtailment of Ravenswood, WV Smelter

MONTEREY, CA, Feb 04, 2009 (MARKET WIRE via COMTEX News Network) -- Century Aluminum of West Virginia, a wholly owned subsidiary of Century Aluminum Company (NASDAQ: CENX), today announced its intention to conclude the orderly curtailment of the remaining plant operations at its Ravenswood, WV aluminum smelter by February 20. On December 17, pursuant to the Federal Worker Adjustment and Retraining Notification Act (WARN), the company informed employees of the possibility of curtailment of the entire plant at the end of a 60 day period; it also began the immediate, orderly curtailment of one of the plant's four potlines.

> The WARN notice specified that plant operations would be curtailed unless the selling price for aluminum stabilized and the company was able to reduce costs materially and thus reduce the monthly cash losses it has been experiencing.
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> The Ravenswood smelter, which was constructed in 1957, employs 679 men and women and produces 170,000 tonnes annually at full capacity. The orderly curtailment of the plant's remaining three potlines will begin immediately and will be completed by February 20. The plant will be carefully maintained to allow for the possibility of reopening, if justified by market conditions. Layoffs for the majority of the plant's remaining 651 employees are expected to be completed by February 20.
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> "We deeply regret the impact of this action on our loyal employees and on the surrounding communities," said Ravenswood plant manager Jim Chapman. "The Ravenswood smelter has been an integral part of western West Virginia's economy and culture for over 50 years. This action, while unfortunate, was not taken lightly."
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> Century president and chief executive officer Logan Kruger added, "We would like to express our sincere appreciation for the extraordinary efforts of Governor Joe Manchin, Senator Robert Byrd and Senator Jay Rockefeller, who did everything in their power to assist. In addition, our employees, the Union, U.S. Representative Shelley Moore Capito, Mayors Harbert and Rader, our suppliers, customers and the entire community took significant steps on our behalf. All of our constituents have worked tirelessly over the past several weeks to find a solution to this global and local economic crisis. Regrettably, these discussions were overcome by the continuing deterioration of the aluminum market and the uncertain business environment."
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> Century Aluminum Company, the parent of Century Aluminum of West Virginia, owns primary aluminum capacity in the United States and Iceland, as well as an interest in alumina and bauxite assets in the United States and Jamaica. Century's corporate offices are located in Monterey, California.

There is no assurance that Noranda will not meet the same fate in the next twelve months or so as has the Century Aluminum Company facility in Ravenswood, West Virginia. If rather than an ice storm on January 28, 2009, Noranda after the last day of hearings on December 12, 2008 had issued a WARN notice of the possibility of the curtailment of the entire plant and in early February 2009 had announced the curtailment of the entire plant, would AmerenUE have invoked the name of God and filed a Modified FAC Tariff/tariff sheets as it did on February 5,

2009? If AmerenUE's proposal were not an abrogation of a Stipulation And Agreement, the Commission would need discovery, testimony and a hearing regarding AmerenUE's proposed Modified FAC Tariff/tariff sheets, not just a one paragraph Noranda press release and AmerenUE's February 5, 2009 filing.

10. There is a case which the Staff will note that is related to Case No. EA-2005-0180, the case that AmerenUE has asked the Commission to take administrative notice of. The Commission granted Applications For Rehearing in Case No. EO-2004-0108, In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in connection therewith, Certain Other Related Transactions, which three of the present Commissioners are likely to remember as the "Metro-East Transfer Case." Case No. EO-2004-0108 was not a rate case, but the Commission issued a Report And Order on October 6, 2004, and granted AmerenUE's and Public Counsel's Applications For Rehearing on December 30, 2004. Also on December 30, 2004 in Case No. EO-2004-0108, the Commission issued an Order Directing Filing requiring AmerenUE to provide certain additional analyses reflecting scenarios that would take into account the possible later addition of the load of Noranda Aluminum, Inc., which was the subject of the separate docket pending at the Commission, Case No. EA-2005-0180. The Staff filed the testimony of Michael S. Proctor in the form of an affidavit and AmerenUE filed the testimony of Richard A. Voytas in the form of an affidavit. The Commission issued a Report And Order On Rehearing on February 10, 2005, 127 days after its initial Report And Order. For comparison purposes, 127 days from January 27, 2009 the date of the issuance of the Case No. ER-2008-0318 Report And Order, is June 3, 2009.

11. AmerenUE's February 5, 2009 filing occurs at an inopportune time for the Staff. Although the Auditing Department Staff that performed the AmerenUE audit is not performing the Kansas City Power & Light Company / KCP&L Greater Missouri Operations Company audit, the principal Staff Auditor was recently out of the office for several days until February 10, 2009. The Energy Department Staff that worked the still open AmerenUE rate case is also working the Kansas City Power & Light Company / KCP&L Greater Missouri Operations Company rate cases which have imminent multiple filing dates for the Staff's Revenue Requirement and Rate Design Reports. This is not a situation where there is Staff assigned solely to process AmerenUE filings, waiting in the Commission's offices for AmerenUE filings or submittals to be received no matter when, primed to leap into action and work around the clock until the work is done, no matter what that work may involve. This of course does not address the matter of due process for other parties, who either perform an independent review of AmerenUE's case or who may rely on the work of the Staff, but at the same time perform their own review of the work of the Staff.

12. Undersigned counsel for the Staff requests leave to late-file the Staff's response, one day out-of-time. Undersigned counsel apologizes for the inconvenience to the Commissioners, Regulatory Law Judge and parties, but was unable to timely file the Staff's response due to the demands of other Commission cases and other Commission business.

Wherefore the Staff files its response in opposition to AmerenUE's Application For Rehearing and requests leave to late-file its response.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 11th day of February, 2009.

/s/ Steven Dottheim