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

RESPONSE TO PLEADINGS FILED ON AUGUST 31, 2006 RESPECTING AMERENUE'S MOTION TO ADOPT PROCEDURES FOR IMPLEMENTING AMERENUE'S REQUESTED FUEL ADJUSTMENT CLAUSE

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company) and, pursuant to 4 CSR 240-2.080(15), hereby responds to pleadings filed by the State of Missouri (State), the Office of the Public Counsel (Public Counsel), the AARP and the Consumers Council of Missouri (CCM), the Missouri Industrial Energy Consumers (MIEC) and the Missouri Public Service Commission Staff (Staff) regarding AmerenUE's Motion to adopt procedures for implementing AmerenUE's requested fuel adjustment clause (FAC). In this regard, AmerenUE states as follows:

I. BACKGROUND

Senate Bill 179 (SB 179) creates a somewhat unique circumstance where an administrative agency cannot utilize a tool given to it by a statute until after the administrative agency (the Commission) has promulgated rules respecting that statute. §386.266.12 RSMo.[1] In most cases, administrative agencies are vested with the ability, but not the requirement, to promulgate rules based upon statutory authority if the agency believes rules are warranted. In the case of SB 179, although rules must be promulgated before the Commission can *approve* a rate adjustment mechanism under SB 179, SB 179 specifically provides that "[a]ny electrical,

[1] All statutory references are to the Revised Statutes of Missouri (Cum. Supp. 2005), unless otherwise noted.

gas or water corporation may *apply* for any adjustment mechanism under this section whether or not the commission has promulgated any such rules" (emphasis added). §386.266.9 RSMo.

On July 7, 2006, AmerenUE did what SB 179 explicitly permits it to do – it applied for an FAC. At that time, AmerenUE filed a Motion to Adopt Procedures for Implementing AmerenUE's Requested Fuel Adjustment Clause ("Motion to Adopt") in which it indicated it was asking for an FAC in this case, and AmerenUE included its specific request to establish an FAC in the prefiled direct testimony of AmerenUE witness Warner L. Baxter. As others suggest, it is correct that Mr. Baxter's request did not detail the "structure, content and operation" of the FAC, which is not surprising given that no rules governing the "structure, content or operation" (*See Section 386.266.9)* of an FAC had yet been promulgated, and indeed even the proposed rules had only been available for three weeks as of the time of AmerenUE's rate case filing.

On July 11, 2006, the Commission, as it customarily has done (although as discussed below as it is not required by Due Process or any other law to have done), suspended the operation of the tariff sheets AmerenUE filed which would have otherwise increased AmerenUE's rates effective August 6, 2006, and set a contested hearing regarding AmerenUE's rate increase request. The evidentiary hearings will not commence until more than nine months after the case was filed, on March 12, 2007.

As alluded to earlier, currently before the Commission, in a separate rulemaking docket (Docket No. EX-2006-0472) are proposed rules that, if approved as proposed or with revisions as determined by the Commission, would become the rules the Commission must promulgate before it could approve AmerenUE's or any other utility's request for an FAC. Those proposed rules were not even published in the *Missouri Register* as required by law until July 17, 2007, ten days after the rate case was filed. As of the date of this Response, final rules have not been promulgated and consequently no party knows, with any level of certainty, what details an FAC

tariff would ultimately have to contain, or what minimum filing requirements may ultimately be required by the rules. Under SB 179, that information must be known by November 13, 2006, but may not be known until then.[2]

Because only proposed rules existed, AmerenUE did not file all of the detailed pieces of information the proposed rules would have required. This was both because it was not practical to do so[3] and because until rules were final, there was no way to determine with any level of certainty exactly what the "structure, content and operation" of an FAC night ultimately have to be. § 386.266.9 RSMo.

Because SB 179 contemplates an FAC request may be submitted before the existence of rules defining what that FAC request can or should contain, the Commission Staff developed a process, reflected in the "transition provisions" of the proposed rules (subsection (16) of proposed rule 4 CSR 240-20.090). As AmerenUE already addressed in its August 8, 2006 Reply to Staff's Response to AmerenUE's Motion to Adopt, AmerenUE, lacking any other meaningful guidance in SB 179 or from the Commission, followed proposed subsection (16) by requesting an FAC when it filed its rate case with the intent of then filing whatever the final FAC rules would require within fifteen (15) days after final rules were issued. This was in keeping with the precise terms of proposed subsection (16), as explained in detail in AmerenUE's August 8 Reply (in particular, in ¶ 6 thereof).

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[2] SB 179 requires that rules be promulgated within 150 days after the rulemaking process begins. §386.266.9. The rulemaking process began on June 15, 2006.

[3] It was not practical to do so for a number of reasons. First, AmerenUE had made a commitment to the Commission and its Staff to file a rate case on or before July 10, 2006 because of the clear desire of a number of stakeholders and the Commission to engage in a comprehensive review of AmerenUE's cost of service. AmerenUE's commitment obviated the need for the Commission Staff to engage in a many months-long audit for the purpose of determining if an over-earnings complaint case would be, in Staff's view, warranted. The Company therefore did not have sufficient time to properly develop the 19 detailed items that would be required to "comply" with the proposed rules. In any event, as discussed below, neither SB 179 nor any other law requires extensive filings regarding an FAC at the inception of the rate case in the absence of FAC rules, particularly where, as here, the Company will file full details based as best it can on the proposed rules 10 weeks before direct testimony in the case is due and five and a half months before hearings would commence.

AmerenUE certainly recognized, as evidenced by its Motion to Adopt, that proposed subsection (16) did not and does not have the force and effect of law. Indeed, as discussed earlier, AmerenUE need not have filed its Motion to Adopt or indicated that it intended to follow the only guidance that existed (subsection (16)). Based on SB 179, all AmerenUE had to do was request an FAC. §386.266.9 RSMo. In an effort to be upfront, above-board, and fair by giving notice of its request (an effort that others who simply oppose SB 179 and any rules thereunder now seek to opportunistically use to prevent the Commission from considering the FAC on the merits), AmerenUE filed its Motion to Adopt and asked the Commission to enter an order, applicable only in AmerenUE's rate case, that would provide a roadmap for all parties respecting how and when AmerenUE's FAC request would be processed. AmerenUE's request was made in part because of suggestions made by members of this Commission during Agenda discussions respecting proposing rules under SB 179. These suggestions were to the effect that the way to handle the "transition" issue was for the Commission to enter an order in the individual rate cases relating to how filings would work in each rate case pending the finalization of rules. That is precisely what AmerenUE's Motion to Adopt requests, and it certainly was reasonable for AmerenUE to ask the Commission to enter such an order based upon the transition provisions this Commission itself proposed (by a 4-1 vote) three weeks before AmerenUE filed its rate case.

On July 31, 2006, Staff filed a Response to AmerenUE's Motion to Adopt. Staff's principal concern was that if AmerenUE waits until after the full 150 day period within which rules must be promulgated (until as late as November 28) to file detailed tariff sheets and testimony respecting its FAC request, Staff and presumably other parties might be prejudiced in preparing their direct cases because the direct cases would be due just a couple of weeks later. *Staff Response, ¶ 8.* Indeed, counsel for AmerenUE discussed Staff's concern with Staff's counsel shortly before Staff filed its Response, and as indicated in the Company's Reply to

Staff's Response filed on August 8, 2006, the Company told Staff it was agreeable to addressing Staff's concern by filing details much sooner (by September 29, 2006).[4] In other words, the Company was agreeable to disregarding the transition provisions contained in the proposed rules presented by the Staff to the Commission by filing additional details on its FAC request approximately two months before those transition provisions would have otherwise required those details to be filed. The Company was willing to do so, again, because it did not and does not intend to prejudice any party's ability to fairly analyze, conduct discovery on, and respond to its FAC request in this rate case. A September 29 filing creates no such prejudice.[5]

At the early prehearing conference held on August 17, 2006, for the first time, certain parties (principally and indeed perhaps exclusively those who have opposed SB 179 and the adoption of fuel adjustment clauses generally – *see* Docket No. EX-2006-0472) indicated that they would be opposing consideration of AmerenUE's FAC request on the merits, including AmerenUE's ability to make additional filings respecting its FAC on September 29, 2006 or indeed at any point in the case after the case's inception. Two of the three principal opponents, the State of Missouri and the Office of the Public Counsel, had actually been parties to the case for 17 days and 41 days respectively when they first raised their opposition, and the other principal opponent (AARP/CCM) had sought intervention 19 days earlier. Yet, none of them made any attempt to respond to AmerenUE's Motion to Adopt within the 10 days prescribed by Commission Rules.[6]

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[4] The Company's Reply provided for filing on September 30, but since the 30th falls on a Saturday, the Company would make its filing on September 29.

[5] As discussed below, Staff's August 31 pleading expresses no opposition to AmerenUE's planned September 29 filing.

[6] *See* 4 CSR 240-2.080(15). The Company did not raise the technical objection it could have raised based upon their failure to do so at the early prehearing conference. The Company points out their failure to adhere to the Commission's rules at this time only because these same parties seek to utilize other procedural rules of the Commission to themselves create a technical bar to any consideration of an FAC for the Company in this rate case, despite their own failure to follow the Commission's rules with respect to the same subject.

As noted, on August 31, 2006, three principal parties,[7] Public Counsel, the State of Missouri and AARP/CCM, filed pleadings in which they in essence ask this Commission to disregard the provisions of SB 179 that allow an electric utility to request an FAC before rules are issued. Moreover, they ask the Commission to bar any consideration of the merits of the Company's FAC request in this rate case. They do not allege they cannot prepare their direct cases (not due until December 15) if they do not receive a detailed FAC tariff and other materials until September 29, nor do they allege any prejudice at all. They do not allege that they were unaware that AmerenUE requested an FAC when it filed its case on July 7.[8] They do not allege they could not have responded to AmerenUE's Motion to Adopt within 10 days of when it was filed. The Company addresses each of their contentions, below.

II. ARGUMENT

Governing Principles of Law.

Section 393.150 RSMo. allows utilities to file tariffs increasing their rates and allows those tariffs to take effect without the receipt of any approval or order from the Commission 30 days later. *State ex rel. Jackson County, Missouri v. Pub. Serv. Comm'n*, 532 S.W.2d 20 (Mo. banc 1975). Section 393.150 also allows, but does not require, the Commission to suspend those tariffs for *up to* 120 days and then for *up to* an additional six months. As the courts have recognized, "[t]he 'file and suspend' provisions [Section 393.150] . . . lead inexorably to the conclusion that the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing." *State ex rel.*

[7] MIEC also filed a late pleading which basically endorses AARP/CCM's arguments. MIEC's pleading was late because it was filed in the very early morning hours of September 1, after the Commission's August 31 deadline established by the Regulatory Law Judge.

[8] Indeed, they either were aware, or should have been, given AmerenUE's request both in direct testimony and in its Motion to Adopt, particularly given that these parties are all represented by experienced counsel who are well familiar with the Commission's filing systems and procedures.

Laclede Gas Co. v. Pub. Serv. Comm'n, 535 S.W.2d 561, 566 (Mo. App. W.D. 1976). Moreover, whether or not to suspend a tariff at all or for how long "necessarily rests in its [the Commission's] sound discretion." *Id.*

Indeed, because the Commission has no duty to suspend a tariff and hold a hearing at all, Due Process is not violated even if a rate increase goes into effect without notice or a hearing. *Jackson County*, 532 S.W.2d at 31. This is because no one has a property interest in the present level of utility rates. *Id.*

It is against a backdrop where no suspension at all is required as a matter of law, and where the Commission if it chooses to suspend can do so for much less than eleven months or can lift the suspension, that the Commission must consider the numerous arguments of those who now allege that they had to have had every detail about the FAC eight months before hearings are to commence. It is against this backdrop that these FAC opponents complain (but without claiming any actual prejudice, which they cannot credibly claim would exist) that 10 weeks to review the details of AmerenUE's FAC proposal before they must even file their direct cases is inexplicably "not fair." AmerenUE respectfully submits that the only possible unfairness raised by their responses to AmerenUE's Motion to Adopt would be to allow these parties who oppose FACs in the first place to opportunistically deprive this Commission of full and fair opportunity to consider the Company's FAC request.

State of Missouri

The State makes several different arguments in opposition to AmerenUE's FAC.[9] The Company addresses each of them in turn.

[9] These arguments appear principally in the State's Response in Opposition to Union Electric's Moton to Adopt Procedures for Implementing UE's Request Fuel Adjustment Clause, but some of the same points appear in the State's Motion to Strike Portions of the Direct Testimony of Union Electric Witness Warner Baxter. The Company's Response herein addresses both of the State's pleadings.

Neither AmerenUE's Motion to Adopt Nor its Planned September 29 Filing Violates Any Rulemaking Principle or Statute.

First, the State argues that the Commission is powerless to enter an order specifying procedures for processing AmerenUE's FAC request because to do so would be to adopt a rule without following rulemaking procedures. They make this argument despite the fact that such an order would bind only the parties before the Commission in this case. This argument either misapprehends, or seeks to obscure, the very essence of what is and is not a "rule" according to the provisions of the Missouri Administrative Procedure Act, Chapter 536, RSMo. (2000 and Cum. Supp. 2005).

A "rule" is defined as an "agency statement of general applicability." Section 536.010(6). A rule is not an "interpretation issued by an agency with respect to a specific set of facts and intended to apply only to that specific set of facts." *Id.* Nor is a rule an "order in a contested case." *Id.*

AmerenUE's Motion to Adopt does not ask the Commission to apply a rule or to adopt a rule. Rather, AmerenUE's Motion to Adopt asks the Commission to enter an *order* applicable only to the litigants in AmerenUE's rate case. The order sought would simply use the same language as contained in the "transition" provisions of the FAC rules that are at this point nothing more than proposed rules. As AmerenUE's August 8 Reply indicated, the Commission is simply being asked to "cut and paste" the words that appear in the transition provisions into a Commission order entered *only in AmerenUE's rate case.* The Company could have cut and pasted that same language itself into its Motion to Adopt and asked that it be ordered, without reference to the proposed rule, but the result would be precisely the same – an order, not a rule, entered in this rate case. Such an order would not apply generally statewide and consequently is not a "rule" subject to rulemaking procedures.

The State glosses over the stark difference between adopting a rule and entering an order in a specific rate case by alleging that the entry of an order in a rate case would somehow improperly prejudge the proposed rules. In support of this proposition the State cites *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. App.W.D. 1982). *St. Louis Christian Home* provides absolutely no support for the State's position.

In that case, the court was reviewing an Administrative Hearing Commission (AHC) determination that the Home was exempt from certain non-discrimination provisions of the Missouri Discriminatory Employment Practices Act because, according to the AHC's decision, the Home was operated by a religious group. The Circuit Court, agreeing with the AHC, had issued a writ of prohibition against the Missouri Commission on Human Rights (MCHR) prohibiting it from exercising jurisdiction over the Home. During the Circuit Court review proceeding, the MCHR had argued, after the trial had occurred, that a rule that would arguably reverse that result but which was not yet effective should in effect be applied by the court. The Court of Appeals not surprisingly rejected this contention. In doing so, the Court made note of the purpose of the notice and comment provisions of Chapter 536, RSMo and observed that those procedures must be followed when dealing *with a rule*. The Court of Appeals did not rule, purport to rule, or suggest in any way that a state agency with adjudicative powers, like this Commission, cannot enter an order in a pending case that applies to the parties to that case.

The state also cites *NME Hospitals, Inc. v. Dept. of Soc. Services*, 850 S.W.2d 71 (Mo. banc 1993). In *NME*, the Department of Social Services applied a provision of a "Medicaid bulletin" that it used statewide to NME, and based upon its application of that provision, the Department reduced Medicaid payments to NME. NME filed a complaint with the AHC alleging that the Department cannot change its statewide reimbursement policies via a "bulletin," but rather, must adopt a rule using the notice and comment rulemaking procedures under

Missouri law. The Court agreed, stating that "changes in statewide policy are rules." *Id.* at 74. Again, NME does not suggest in any way that a state agency with adjudicative powers, like this Commission, is prohibited from entering an order in a pending case that applies to the parties to that case.

Neither Section 393.150 nor any other law prohibits filing additional FAC details just 84 days into a 335 day long rate case.

The State next argues that an FAC tariff filed just 84 days into a rate case that will likely span approximately 335 days violates the "regulatory scheme" reflected in Section 393.150. The crux of the State's argument is that in a file and suspend rate increase case, such as here, a utility must file every tariff that might be at issue on Day One; otherwise, the State argues that a "third" and purportedly unauthorized manner of setting rates will be created.

This argument rests on a crumbling foundation. The foundation of the argument is that because the Commission *may choose* to suspend a tariff for up to 120 days, plus for up to an additional six months, it must do so, and if it fails to do so then somehow the tariff would be invalid if it went into effect in a shorter time frame. That argument is patently not true. As discussed above, the Commission need not suspend any tariff *at all* or for any particular period of time and is not required to order any hearing at all. Filing an FAC tariff after the case was initially filed does not create a third way of setting rates. The FAC tariff can and presumably will be suspended for the remaining suspension period applicable to the other filed tariffs, the other parties' direct testimony will be filed about 10 weeks later, and the Commission will hold a hearing on the entire case in March.

The Commission has addressed a similar situation at least once previously. In Case No. GT-2001-662, the Commission consolidated Laclede Gas Company's tariff filing requesting the establishment of a weather mitigation tariff into its then-pending rate proceeding (Case No. GR-

2001-662). Even though at the time of the consolidation Laclede's rate case had been pending for several months, the Commission consolidated the weather mitigation issue into the rate proceeding (over the objection of Staff), and suspended the weather mitigation tariff to match the operation of law date for the rate case. The Commission's decision to consolidate Laclede's weather mitigation issue into the rate case after it had begun did not create a third method of setting rates, and it was fully consistent with the Missouri statutes governing the file and suspend method of setting rates.

The State's argument in this case also ignores the specific process created by the statute under which the FAC will be considered. As discussed earlier, Section 386.266 not only contemplates, but provides in express terms, that a utility can request an FAC before rules of any kind exist. The statute also provides that before the Commission can approve an FAC (which in AmerenUE's case would not take place until next spring after the rate case hearings are over), the Commission would have to have rules in place. Yet if the State's argument were accepted, a utility could not effectively ask for an FAC before rules were issued, because there would be no rules in place that govern the structure, content, and operation of the FAC and that would govern the very tariff the state says the utility should have filed *before it even had rules in place upon which to base such a filing.* The State's position ignores subsections 12 and 9 of Section 396.266, and if accepted would create a catch-22 that would achieve the State's obvious goal – to stop the utilization of FACs in Missouri.[10]

Commission Orders in this Case Have no Effect on the Pending FAC Rulemaking Docket.

[10] The State made its position in this regard abundantly clear in its comments before the Commission in the FAC rulemaking docket on September 7, 2006, in Docket No. EX-2006-0472. AmerenUE requests the Commission take administrative notice of the transcript of the September 7 hearing and of the comments filed in that docket by the parties to whom the Company's Response herein is directed.

The State next alleges that entering an order that adopts transition procedures in this case would render the comment period for the rules under consideration in Docket No. EX-2006-0472 useless. That is also incorrect, as already discussed, because entering an order in this rate case is not the adoption of a statement of general applicability – i.e., it is not a rule. Whatever rules are ultimately adopted, however similar or dissimilar to the proposed rules, they will have been adopted in full compliance with Chapter 536 RSMo. and will then and only then become generally applicable.

The State Chooses to Ignore Section 386.266.9.

The State next alludes to what is apparently another of its bottom-line positions (in addition to its contention that SB 179 is bad and that rules should never be adopted under it), and says that "UE and UE alone" chose the timing of its rate case filing. The State's apparent implication is that utilities should be forced to wait until final rules are issued before a utility can ask for an FAC. Indeed, the State admits as much by arguing that the "appropriate action" for the Commission is to deny a utility an FAC until rules indeed are in place.

The Company again directs the Commission to Section 386.266.9, RSMo: "Any electrical . . . corporation may apply for any adjustment mechanism . . . whether or not the commission has promulgated any such rules."[11]

Commission Filing Requirements Did Not Require Filing an FAC Tariff on the First Day of this Rate Case.

The State also argues that the Company did not comply with the Commission's minimum filing requirements set forth in 4 CSR 240-3.030(2)(B)(1) – (7). Nothing in items (1) – (7) requires details on an FAC request. In fact, those items are almost entirely focused on

[11] The State's contention that AmerenUE unilaterally chose the timing of its rate case does not tell the full story. In fact AmerenUE agreed to file its rate case on or before July 10, 2006 as part of its discussions with Staff and other parties. AmerenUE's commitment to this filing date prevented Staff and the Commission from having to devote limited resources to actively pursuing an overearnings investigation.

information relating to the revenue or rate impact on particular customer classes and other information calculated to aid the Commission in providing notice of the filing to affected persons and areas.

An FAC Tariff does not Propose a General Rate Increase.

The State argues that AmerenUE has failed to comply with 4 CSR 250-2.065(1). That rule, which pre-dates the enactment of SB 179 and in any event could not trump SB 179, is directed toward a "tariff filed which proposes a general rate increase . . ." 4 CSR 240-2.065(1). An FAC tariff creates a mechanism by which later rate *changes* (which might be increases, or might be decreases) may occur. An FAC tariff is not a tariff which proposes a general rate increase. Indeed, this rule states that it does not apply to "requests for changes in rates made pursuant to an adjustment clause . . ." Moreover, as already discussed in detail, the Company can request an FAC before rules are in place, and rules were not (and are not) in place governing the content of any such tariff.

Consequently, an FAC tariff was not required to be filed by 4 CSR 240-2.065(1) when the rate case was filed. It follows then that direct testimony respecting an FAC tariff was also not required to be filed at that time. Indeed, the Company believes that given SB 179's allowance for requesting an FAC before rules are in place, the only "time limit" on when an FAC tariff or testimony or whatever supporting information is necessary are found in Due Process principles that, the Company would agree, could at *some* point at a time approaching the hearing dates in a rate case render a request too late, depending on circumstances that would have to be decided on a case-by-case basis. Exactly when that point is could be the subject of reasonable

debate, but that point is certainly not within sight at this early stage of this rate case. For the same reasons, 4 CSR 240-2.130(7)(A) does not apply.[12]

Due Process is Clearly Not Violated by the Company's Planned September 29 Filing.

The State's final discrete argument apparently rests on its views of Due Process.

Certainly the Commission will hold a contested hearing on the Company's rate increase request and the Company makes no suggestion that it need not do so. However, as noted earlier, Due Process does not require that a hearing be held. *Laclede*, 535 S.W.2d at 566. Since a hearing will be held, AmerenUE agrees with one thing in the State's pleading, that Due Process requires "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection." *Division of Employment Security v. Smith*, 615 S.W.2d 66, 68 (Mo. banc 1981).[13] Indeed, Section 536.067(1), RSMo. (part of the Missouri Administrative Procedure Act, which is supplementary to the Commission's enabling statute in matters of administrative procedure), requires notice of the instigation of a case including a brief statement describing the matters involved in the case. If the Commission accepts the Company's request to include mention of its FAC request in the

[12] Even if the Commission believed this rule did apply, the Commission is free to waive its own rules (4 CSR 240-2.015) based upon good cause. The Commission has noted that although "good cause" eludes a precise definition, it refers to a remedial purpose that is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one. *In the Matter of the Application of Missouri Gas Energy*, Case No. GO-2005-0273, 2005 Mo. PSC LEXIS 683 (*Order Approving Tariff in Compliance with Commission Order*, May 11, 2005) (*citing Bennett v. Bennett*, 938 S.W.2d 952, 957 (Mo. App. S.D. 1997)). Given Section 386.266.9, the substantial time left before direct testimony is due or a hearing is to be held, the practical considerations surrounding the Company's July 7 filing just three weeks after rules were even proposed, and the clear injustice that would occur if FAC opponents were allowed to stop this Commission from even considering an FAC request, good cause for a waiver, if the Commission determines one is needed, exists. The Company hereby requests that a waiver be granted if the Commission believes a waiver is required.

[13] Due Process was violated in this case because the Division garnished the funds of the defendant without having given the defendant *any* notice nor any opportunity for a hearing. Neither this case, nor any other case, stands for the proposition that receiving full details on a rate case issue 10 weeks before direct testimony is due and five and a half months before hearing violates Due Process.

Commission-approved notice of the local public hearings that are to be held,[14] all of AmerenUE's customers will receive a specific notice respecting AmerenUE's request for an FAC.

The Company's request for an FAC, coupled with its complete filing of an FAC tariff and full details nearly five and a half months before hearings will commence, gives notice and a full and fair opportunity for the State or anyone else to present whatever objection they desire to make.

No Party Has Sought Any Data, Despite an Ability to Have Done So.

It is noteworthy that none of the parties who are loudly complaining about not having full details on the FAC request until 18 days from now have made any attempt whatsoever to seek discovery respecting the Company's FAC request. Indeed, the three principal objectors have propounded not a single discovery request on any issue, and MIEC has propounded just a few data requests directed entirely to other issues. This is not at all surprising given that their direct cases are not due until months from now.

Public Counsel

Public Counsel's pleading contains some overlap with the arguments made by the State, including Public Counsel's apparent agreement with the argument that adopting a specific order in this rate case would somehow violate rulemaking procedures (citing *NME Hospitals*).[15] AmerenUE will not repeat its response to these arguments here – simply stated, AmerenUE is not requesting that a rule be adopted, but rather, it is requesting that an order specifying procedures for this rate case only, be entered.

[14] *See* AmerenUE's Response to Public Counsel's Recommendations for Notice and Public Hearings. Public Counsel desires that the Company provide notice of the local public hearings between approximately November 15 and December 15. At that time, full details of the FAC request would have been on file from between 6 and 10 weeks, and those receiving notice of the local public hearings would have been given specific notice of the request from approximately 12-16 weeks before the local public hearings are expected to occur.

[15] *See generally* ¶¶ 2 – 4 of Public Counsel's Response.

Public Counsel makes one additional argument, that is, that because no testimony was filed in support of the FAC request on Day One of the rate case, the Commission can and should "direct a verdict" now – six months before the hearings commence and before a single piece of evidence has been admitted, or even offered, into the record of this case.

Direct Testimony Relating to the FAC was not Earlier Required, but in Any Event, Supplementation is Proper.

As discussed earlier, the Company believes that Section 386.266.9 contemplates that indeed a utility will supplement its initial rate case filing once rules have been adopted, if the utility asks for an FAC before rules are in place. Consequently, the Company does not believe that 4 CSR 240-2.130(7)(A) applies at all. First, SB 179 was enacted after the regulation was adopted, and consequently it provides a statutory process not contemplated by that rule. Regardless, it is axiomatic that a rule cannot trump a statute, and therefore the rule, to the extent inconsistent with the statute, is invalid as applied to an FAC request made before rules are in place.

Even if the rule did apply, the rule should be waived, as discussed earlier, and the Company should be allowed to supplement its direct testimony under 4 CSR 240-2.130(8), if indeed supplementation is even what is at issue given the unique provisions of SB 179. In *In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Gas Service*, 2000 Mo. PSC LEXIS 1247 (Case No. GR-2000-512) (Sept. 5, 2000), a unanimous Commission allowed (over the objection of Staff and Public Counsel) the filing of supplemental direct testimony five and a half months (approximately 160 days) after the rate case was filed (and just 13 days before the other parties' direct cases were due). In doing so, the

Commission specifically noted that in "complex rate cases such as this one, the more evidence the Commission has, the more informed its decision will be."[16]

The facts of that case are instructive. AmerenUE's supplemental filing in that case included results of an individual site inventory that AmerenUE was unable to complete by the time the rate case was filed. The site inventory required an updated cost of service study and an updated calculation of rates. Public Counsel argued, similar to its argument in this case, that AmerenUE should in effect be required to start its rate case over rather than to simply supplement its case. Staff principally expressed concerns about the "severe disadvantage" the timing of the supplemental filing placed on the other parties, given its proximity to the due date of their direct cases.

The Commission, as noted above expressed a desire to receive pertinent information to inform its decision, *on the merits*, and allowed the supplementation and simply adjusted the procedural schedule by a few weeks to allow others to themselves supplement their direct cases. Such an adjustment is not required in the present case given that there will be more than enough time for all parties to analyze, conduct discovery, and respond to the details of AmerenUE's FAC request to be filed on September 29.

A "Directed Verdict" is Not Authorized and is Improper in Any Event.

Public Counsel's lone support for its proposal that the Commission enter a "directed verdict" is a 2003 Osage Water Company order, (Case No. ST-2003-0562) entered approximately three weeks before evidentiary hearings were to commence in Osage Water Company's rate case. That decision effectively amounted to a dismissal (although it was called a "directed verdict") of Osage Water Company's rate case because seven months into their rate

[16] By contrast, AmerenUE's September 29 filing will occur just 84 days into the case, and 10 weeks before direct testimony from others is due.

case, on the eve of hearings, Osage Water Company had not filed a cost of service study or any revenue requirement analysis that would, if accepted, show that any increase in rates was warranted.

The Company has already explained above why its filing does not fun afoul of 4 CSR 240-2.130(7) or (8), and why, at a minimum, any necessary leave to file supplemental testimony should be granted. But even assuming, *arguendo*, that the Company's points in that regard were deemed invalid, a "directed verdict" is not proper on these facts, nor is the Commission permitted to "direct a verdict" without considering evidence.

As the Commission is well aware, filings made in a rate case or any other case are just that – filings. The "file" in a Commission case is akin to the file at the Circuit Clerk's office in a civil case. There is no *evidence* in the case file; rather, there are various pleadings or other items, including in Commission cases pre-filed testimony that may later be offered and received into evidence. However, until that testimony is offered, subject to proper evidentiary objections, and received, it is not evidence. *Cf.*, Section 536.070, RSMo., prescribing the right to call witnesses, introduce evidence, and recognizing the applicability of the rules of evidence to contested hearings. "Verdicts" are directed based upon a determination by the tribunal that the facts in evidence together with the legitimate inferences from those facts--viewed in the light most favorable to the plaintiff [here, the Company]--are so strongly against plaintiff [the Company] as to leave no room for reasonable minds to differ as to the result. *Friend v. Holman*, 888 S.W.2d 369, 372 (Mo. App. W.D. 1994). A tribunal's direction of a verdict in favor of a party is a drastic measure. ***Id.*** at 371.

It appears quite clear that the Commission's decision in *Osage Water* was likely a reasonable and correct result based on the facts of the case, and apparently Osage Water did not challenge the decision. Even if Osage Water had somehow cobbled together a cost of service

study in the three weeks remaining until the hearings would be held, it would probably have been the case that Due Process considerations would have prevented the Commission's consideration of it since other parties would have had insufficient time to respond to it before the hearing would have commenced. Moreover, given that the end of the suspension period in that case was approaching, there likely was no time to move the hearings back enough to accommodate a new cost of service study.

The Company respectfully submits, however, that the Commission's basis – its directed verdict – in that case was incorrect as a matter of law because prior to the hearing there was no *evidence* to consider against Osage Water on which a directed verdict could be based. The Commission could have simply based its dismissal on its own rule, to wit: "A case may be dismissed for good cause found by the commission after a minimum of ten (10) days notice to all parties involved." 4 CSR 240-2.116(4). Consequently, the result of the Commission's order was valid, but it provides no basis for a directed verdict in that case nor, certainly, in this case.

Whether or not the Company sustains its burden of proof – an *evidentiary* burden -- will only be determined when the hearings are held and evidence is submitted. By then, the full details of the FAC request will have been on file for five and a half months, and the testimony and other evidence in relation to the FAC request will be offered into evidence. That has not occurred, nor could it occur at this time, and a directed verdict is consequently improper.

The Amendment of AmerenUE's Motion to Adopt is Appropriate.

Public Counsel's final attempt to preclude the Commission from considering the adoption of an FAC in this case is to attempt to bar AmerenUE from advancing the time by which AmerenUE would file additional details on its FAC request (thus giving all parties more, not less time to consider it) by relying upon the Commission's rule on the amendment of pleadings (4 CSR 240-2.080(20)). Although Public Counsel is technically correct that leave of the

Commission is required (just as the Company is technically correct that Public Counsel failed to adhere to the Commission's 10 day time limit for responding to pleadings[17] when it waited until 40 days after the Company's Motion to Adopt to express any opposition to that Motion), leave to amend should be granted.

The Commission's rule on amendment of pleadings contains no particular standard for when amendments are appropriate, but the Commission should and has in the past looked to Missouri Rule of Civil Procedure 55.33(a) for guidance.[18] Rule 55.33(a) provides that "leave shall be freely given when justice so requires." Indeed, the courts recognize that leave is to be liberally granted. Leave should be granted when the amendment promotes the merits of the presentation of the case and the objecting party will not be prejudiced in presentation of its case. *See, e.g., Evinger v. McDaniel Title Co.,* 726 S.W.2d 468 (Mo. App. W.D. 1997).

Undoubtedly, amending its Motion to Adopt to accelerate the time from within 15 days after final rules are issued (perhaps as late as November 28) to September 29, 2006 for the date of its additional filings respecting its FAC request promotes the presentation of the *merits* of the case, including the FAC request made on July 7. Moreover, for reasons already discussed in detail, neither Public Counsel nor any other party would be prejudiced by allowing the amendment.[19]

AARP/CCM

The arguments of these parties essentially mirror several of the State's arguments, and the Company will not repeat its responses to those arguments here. One slightly different argument

[17] 4 CSR 240-2.080(15).
[18] *See, e.g. In the Matter of the Application of Union Electric Company d/b/a AmerenUE for a Metering Variance to Serve Crestview Senior Living*, Case No. EE-2006-0524 (*Order Granting Leave to Amend and Directing Filing* issued July 28, 2006).
[19] Moreover, as noted earlier, SB 179 did not require the Company to file its Motion to Adopt. The Company did so based upon Commissioner suggestions and because it certainly appears reasonable to provide the parties to this case guidance on how the FAC request will be processed in this case. Allowing an amendment to a motion that was not required giving parties more time to consider the information is patently reasonable.

made by these parties involves their misstatement of the provisions of Section 386.266.12, or at least their noticeable failure to acknowledge Section 386.266.9 in connection with their citation of subsection 12. In ¶ 4 of their Response, these parties quote subsection 12 and its provisions that require the Commission to have issued rules before the Commission may enter an order approving an FAC. The Company pointed out this very same provision in the first paragraph of this Response. These parties choose to ignore the fact that subsection 9, which has already discussed, expressly allows utilities to request an FAC before rules are issued. Consequently, these parties are simply wrong when they allege, based upon subsection 12 but ignoring subsection 9, that the Company is asking this Commission to "act unlawfully."

MIEC

MIEC's Response also mirrors, in part, the State's response and expresses support for AARP/CCM's response. No new arguments are raised here and the Company will not repeat its responses provided above.

Staff

Staff does not make any arguments in opposition to the Company's request to make additional filings on September 29, including the 19 items (which would include an FAC tariff) that would be required as minimum filing requirements if the proposed rules were in effect. Staff's Response simply expresses its opposition to "granting to AmerenUE a waiver from the final transition provisions of the fuel adjustment clause (FAC) rules" if those final rules vary from the proposed rules, and expresses its opposition to granting AmerenUE a waiver from "any of the items proposed in 4 CSR 240-3.161(2) without AmerenUE identifying now what items it seeks a waiver from . . .." The Company addresses each of these two objections below.

First, if the Commission enters an order that sets the terms and conditions upon which the Company's FAC request will be processed – by cutting and pasting the words found in proposed

rule 4 CSR 240-2.090(16), as requested – or otherwise, surely the Commission is not going to then in effect change those terms in this rate case later, or at least not in a way that is inconsistent with its order. That is the only reason the Company requested a waiver from any final "transition rules" if they differ from the terms *ordered* in the Company's rate case so that once the Commission enters an order, all parties could rely upon it.

With respect to the Staff's second "objection," the Company has not requested a waiver from any proposed requirement appearing in proposed rule 4 CSR 240-3.161(2). Consequently, there is nothing to which Staff could or needs to object. A waiver request, if any, would be considered at the time it is made.

III CONCLUSION

As explained in detail above, the arguments of the State, the Public Counsel, AARP/CCM and MIEC that the Commission cannot or should not consider the merits of AmerenUE's FAC request in this proceeding are not supported by Missouri law or principles of fairness. They are simply attempts by parties who are in principle opposed to FACs to prevent AmerenUE from proposing an FAC as contemplated by SB 179.

WHEREFORE, for the reasons set forth herein, AmerenUE respectfully requests that the Commission grant its Motion to Adopt Procedures for Implementing AmerenUE's Requested

Fuel Adjustment Clause, grant any waivers of Commission rules that the Commission may deem necessary, and provide such other relief as the Commission may deem proper.

Respectfully submitted,

Dated: September 11, 2006

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 11th day of September, 2006.

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