# BEFORE THE PUBLIC SERVICE COMMISSION
# OF THE STATE OF MISSOURI

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

## Dissenting Opinion of Commissioner Steve Gaw

For the reasons that follow, this Commissioner in good conscious must dissent from the Order in hope that those voices that have tried so hard to be heard will not feel that their efforts were completely in vain. It is my belief that the record supports a different conclusion than reached in the Majority Order. The difference in that result is significant. The bottom line is that the Commission's Order is millions of dollars over the amount which would have resulted from a decision following the rationale in this dissent. Instead of a $42 million increase in rates, ratepayers should have received a decrease of approximately $60 million.

### Return On Equity (ROE)

There is some relatively positive news in this Order. After watching the Commission pushing the Return of Equity (ROE) numbers to the highest in the nation in recent cases, the recommendation in this case appears more reasonable in comparison. Nevertheless, the Commission seems more driven to justify a particular ROE result than to accept and follow a particular analysis. This Commissioner believes the more credible evidence supports a ROE of approximately 9.8% determined through a Discounted Cash Flow (DCF) analysis. Prior to a change in policy in the last two years, the Commission placed significant reliance on the DCF model as the principle method of determining the ROE range. The more recent decisions of the Commission have given substantial weight to the ROE awards generated by other states for other companies, without a thorough analysis of the methodologies used in the cases in those states, or a studied comparison of the other companies. The Majority of the Commission in cases within

the last two years, has used different mechanisms including Capital Asset Pricing Model (CAPM) to justify its result – leaving parties in future rate cases to speculate on which analysis would be used in the next rate case.

**Adjustment Factors**

In this matter before the Commission, it is appropriate to consider whether the calculation of ROE accepted by the Commission should have been adjusted to take into account the absence of a fuel adjustment clause (FAC). If the calculation does not take additional risk of the absence of a FAC into account, then it is appropriate to adjust the ROE slightly upward.

On the other hand, the Commission has the authority to adjust the ROE downward for poor performance based upon the actions and inactions of AmerenUE. Hundreds of thousands of customers were out of electricity for days, and in some cases for weeks, on multiple occasions, causing significant financial losses to customers, diminished quality of life at home, and in some cases life threatening consequences. There was evidence that some of these outages were due not just to storms but to inadequate tree trimming and inadequate infrastructure inspection and replacement. Testimony indicated that there are areas of AmerenUE territory that have experienced frequent outages not related to storms that in some cases significantly impaired the ability of businesses to function. There was substantial testimony indicating that there are areas in AmerenUE's territory where sub-standard service exists. Testimony from cotton gin operators in Southeast Missouri, that went without refute, made it clear that the unreliability of the circuits serving the cotton gins has caused significant additional expenses to those businesses during the time of highest activity. Additionally, in some residential areas there were reports of multiple outages over the years outside of those outages attributable to storms.

This is a partial list of the complaints of hundreds of Missourian's – customers of AmerenUE – that were voiced to the Commissioners at the 16 public hearings held in this case. Yet despite having taken time from work, caring for children and other duties that AmerenUE

customers contend with in their lives in order that they could ask the Public Service Commission to address their concerns, there is not one repercussion to AmerenUE expressed in the Majority Order unless it has already been conceded by AmerenUE.

This Commissioner was struck with the consistency of the testimony from residential and business customers, and municipal and county officials complaining about the quality of service received and the apparent lack of interest by AmerenUE's management in the problems being faced by them. This Commissioner notes that in the 16 public hearings held, not once did an AmerenUE senior official come to hear in person the concerns of AmerenUE customers. This Commissioner recognizes that coming to these meetings may not have been a positive personal experience. But it would have demonstrated a willingness to listen and provide an opportunity to express empathy for the hundreds of thousands of people who suffered through the major power outages in 2006.[1] AmerenUE's actions at the public hearings may not be a reason to lower the ROE**,** but poor performance is. While AmerenUE presented evidence that overall the system reliability does not appear substandard, the total system picture is of little comfort to those served by poor performing circuits. The evaluation of performance at the circuit level is one of the important proposals in the new reliability rules that Commissioner Clayton and I have proposed. However, it would not be necessary to have such oversight of a utility if adequate management of the system was done by utilities in the first place. Further, the facts consistently show that AmerenUE has done a poor job of vegetation management in much of its system. Many pictures of trees and vines intertwining power lines are in the record.

Then, there was a horrific disaster on a mountain top in southern Missouri that seriously injured a family and destroyed areas of one of Missouri's scenic parks. The collapse of Taum Sauk is admitted by Ameren to have been its responsibility. The Company has stated it takes responsibility for the incident. While all of the details are not available in this record, there is

[1] It is worth noting that nearly all of the comments received about the line workers were positive, in contrast to the criticism levied against the company itself.

significant information known, including the payment by AmerenUE of a multi-million dollar fine levied by the FERC. Evidence suggests that the failure of the reservoir and the subsequent injuries, damage of property, and loss of income was due to multiple failures in AmerenUE's management of the plant that were known to the Company prior to the dam collapse.

The evidence in this case provided an opportunity for the Commission to send a message to AmerenUE that poor performance will not be tolerated and would have consequences to its bottom line. Such a message should have been sent in this case with a specific reduction in ROE due to the Company's performance. Instead the Commission found such a reduction inappropriate.

**Electric Energy, Inc. (EEInc.)**

AmerenUE began a partnership with certain Illinois utilities and the predecessors to Kentucky Utilities about a half century ago. The purpose of the partnership, structured through a jointly owned corporation, EEInc., was to serve a federal facility built to enhance uranium and to use the remaining energy to serve customers of the partners. UE clearly believed its activities in this partnership required Commission approval, as it requested permission from the Commission on its initial investment. Subsequently, for nearly 50 years, customers of UE paid not just for the incremental cost of energy, but also a 15% return on equity. One of AmerenUE's arguments, which fortunately appears to not have been accepted by the Majority, was essentially that the contract which had been regularly renewed by the partners had expired and there was nothing that AmerenUE could have done to continue to access this power. This argument ignores the controlling interest of Kentucky Utilities and AmerenUE in the partnership and the fact that Kentucky Utilities, the only non-Ameren owner, wanted the arrangement to continue. AmerenUE further argued that the Board of Directors of EEInc., which included the "AmerenUE" directors, was legally required to change the purpose of EEInc. from one of providing excess capacity and energy to the partners' customers, to becoming a part of the

generation portfolio of Ameren's unregulated energy marketing affiliate; in order to maximize profits. Ameren's arguments on this issue are disingenuous and ignore an important part of the requirements governing the arrangement of EEInc's owners.

AmerenUE offered multiple witnesses who testified that it was their opinion that the members of the Board of Directors of the company were bound by ethics to vote for the best interests of EEInc., even though they represented AmerenUE on the Board, and in fact were in the management of UE**,** these votes were to be made even if the vote was contrary to the interests of UE itself. Ameren's witnesses asserted that Kentucky Utilities had violated their ethical duties when they voted for EEInc. to continue to provide power from the Joppa Plant at a cost based price. Curiously, AmerenUE seemed to find little inconsistency in its position in this case and the fact that AmerenUE's Board of Directors had allowed AmerenUE to enter into a Joint Dispatch Agreement (JDA) with affiliates, a contract that continued to exist until recently. The JDA, as staff has maintained for several years, cost AmerenUE millions of dollars a year while benefiting Ameren's unregulated affiliates. The JDA required generation transactions between Ameren affiliates to be at incremental cost (not cost plus a ROE as with EEInc.). This harmed AmerenUE's bottom line because AmerenUE held more low cost generation than it needed and Ameren affiliates found it a ready source of low cost energy. Under the JDA, AmerenUE was required to sell excess capacity on the AmerenUE system to Ameren affiliates rather than sell that power on a bilateral basis to non-affiliates, or into the organized markets such as MISO, at a higher price. The affiliates had access to AmerenUE's capacity and energy at a price that would normally be less than the price of power available from non-affiliates. In effect, the profits were shifted from AmerenUE to affiliates, some of which were not regulated. The bottom line is that the Ameren companies in total would not be harmed and could be more profitable. However, AmerenUE itself lost opportunities for significant additional revenues. AmerenUE, despite significant opposition to the JDA from Staff, the Office of Public Counsel (OPC), and others

refused to terminate the JDA in the Ameren MetroEast transfer case. AmerenUE's position finally changed just before the filing of this case.

Clearly, AmerenUE's position that EEInc. board members were required to discontinue use of the Joppa Plant to provide excess power as a shared asset of the owners of EEInc. because it was detrimental to the bottom line of EEInc. contradicts its support of the JDA which hurt AmerenUE's profitability.

Furthermore, AmerenUE totally ignores the Articles of Incorporation of EEInc. While the Majority Order cites the important provisions in the Articles, it fails to discuss the most important provision, Article II, Section 6 Voting, which states in part:

> In the event that any holder of voting capital stock of EEInc. (including, for these purposes, such holder's Affiliates) owns in excess of 50% of the voting capital stock of EEInc., then all corporate restructuring transactions and other major corporate actions shall be decided by the vote of the holders of 75% or more of the outstanding shares of the Corporation entitled to vote. Corporate restructuring transactions and other major corporate actions shall include: (a) … (f) a material change in the business purpose or objectives of EEInc. (emphasis added)

It seems clear that the purpose of EEInc. changed significantly as a result of the Board of Directors decision to offer the Joppa Plant into the wholesale market, rather than using excess energy for the load of the partners. Such a change required a shareholder vote. Yet no such vote occurred. AmerenUE's failure to enforce its rights did not protect the interests of its customers. As a result, AmerenUE ratepayers are being asked to pay much more for energy from other higher cost sources. The OPC, Staff, the State, and others calculate the EEInc. issue to be worth $65 to $75 million in annual revenue requirement. Meanwhile AmerenUE treats its new revenues from its share of EEInc. off-system sales as though it were from a non-regulated source, dramatically increasing its overall profits without any benefit to ratepayers**.** At the same time, AmerenUE argues ratepayers should pay millions more in rates because of its decision. Ameren is a public utility company granted monopoly status by the State. Its duties and responsibilities are not the same as a private competitive business. This Commission has the

responsibility to ensure that the "public" part of its function remains an important factor in the decisions of the company. AmerenUE's failure to enforce its legal rights in order to continue providing AmerenUE customers access to lower cost power and, instead, utilizing higher cost generation for which it asks its customers to pay, should be seen as imprudent by this Commission and the rates should reflect an appropriate adjustment.

**$SO_2$ Allowances**

The $SO_2$ analysis by the Majority in this case does not appear to be based on any position taken by a party in the record. The most reasonable approach based on the evidence would seem to be the position of the State, based upon historic sales.

**MetroEast Transfer**

The MetroEast transfer issue in this case is not very significant in terms of amount. However, the principle is important for purposes of setting precedent in future cases where the amount may be substantially greater. In the MetroEast case the Commission found there should be monitoring in rate cases to ensure that added environmental liability of plants, which would have been borne in part by the Illinois customers without the transfer, do not as a result of the transfer cause a detriment to Missouri ratepayers. It was determined that the Commission should analyze the net benefits to Missouri customers of the transfer of MetroEast and hold Missourians harmless if the liability exceeded the cost. The analysis of the Commission in this case sets the hurdle so low that it puts Missouri customers at significant risk of future liability that they did not cause and should not bear. The Commission limits its inquiry as to benefits of the transfer to the amount of avoided fuel costs for generation that would have been avoided by not serving the MetroEast load. It does nothing to net the revenues from Illinois that were lost with the transfer. Obviously the revenues from serving the Illinois customers would have exceeded fuel costs. As a result no real analysis of net benefit / net cost has been conducted.

While the consequence in this case in dollars of liability may seem to make this issue of little importance, repeating this analysis in the future could have significant and detrimental impact on consumers if AmerenUE is liable for much more expensive cleanups.

**Pinckneyville Kinmundy**

The transfers of the units at Pinckneyville and Kinmundy to AmerenUE from its affiliate deserved more scrutiny**.** AmerenUE's argument that the Commission should not examine the amount of money involved in the transfer because FERC had approved the transfers flies in the face of assurances given in the past by Ameren and this Commission that a thorough prudence review would occur by the PSC. The difficulty in this case involves the evidence that would allow a determination of the correct value to be provided for ratemaking purposes – the lower of fair market value or book value. At the time of the transfer, gas combustion turbines were in high supply and low demand after a period of overbuilding. It seems clear that these gas turbines should have been transferred at a price less than that which was paid. However, Staff provided little assistance on this issue and while the analysis done by the Office of Public Counsel and the State was helpful, it needed expert testimony from a witness with experience in valuing these units. The lack of evidence is unfortunate for all hearing the case – but particularly for consumers who will be forced to pay higher rates as a result.[2]

Respectfully submitted,

Steve Gaw
Commissioner

Dated at Jefferson City, Missouri,
on this 18th day of September, 2007.

[2] There were other matters in the majority's opinion with which this Commissioner did not concur, including certain depreciation matters. However, they will not be expounded in this opinion.