BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff Filing to Implement Changes to Its Electric Energy Efficiency Programs	))))	**Case No. ET-2012-0156**

PUBLIC COUNSEL'S MOTION TO REJECT TARIFFS

COMES NOW the Office of the Public Counsel and for its Motion to Reject Tariffs states as follows:

1. On November 18, 2011, Union Electric Company, d/b/a Ameren Missouri, filed tariffs ("the proposed tariffs") designed to implement changes to its business energy efficiency programs. The tariffs carry a December 18, 2011 effective date. In its filing, Ameren Missouri claimed that the proposed tariffs will "bridge the gap" between the expiration of its recently-defunct energy efficiency programs, which Ameren Missouri allowed to expire on September 30, 2011, and the Commission's issuance of an order regarding Ameren Missouri's upcoming Missouri Energy Efficiency Investment Act (MEEIA) filing.

2. As Public Counsel noted in its Motion to Reject Tariffs filed in Case No. ET-2012-0011 on November 14, 2011, the timing of the filing and the end dates of the programs prevent the proposed tariffs from being a very effective bridge. But even more than the botched and careless timing of the tariffs, the Commission should be concerned about and deeply disappointed with the **content** of the tariffs. The Commission's standard for whether it should approve or reject the tariffs[1] is whether the tariffs are in the public interest. The public interest is

[1] The Commission could suspend the tariffs if the Commission believed that further investigation would reveal additional information that would inform its decision. The tariff filing in this instance, however, presents such a starkly pro-shareholder and anti-ratepayer intent that it is hard to imagine that further investigation would reveal anything that could convince the Commission that it is in the public interest.

determined by examining whether the tariffs would enhance or detract from Ameren Missouri's duty to provide safe and reliable service at just and reasonable rates while having an opportunity to earn a fair return on its investment. The Commission's primary duty, of course, is to protect the ratepayer. Any benefit to the shareholders beyond the simple opportunity to earn a fair return is merely incidental. The tariffs at issue here patently favor shareholder returns, and almost entirely ignore the duty to provide safe and adequate service in the most cost-effective manner.

3. Ameren Missouri's approach to energy efficiency, first revealed in its recent rate case (ER-2011-0028), flagrantly reiterated in its IRP filing and subsequent notice to the Commission of the change in the Company's preferred resource plan in its current Integrated Resource Planning case (EO-2011-0271), and hammered home with the token energy efficiency spending in these proposed energy efficiency tariffs, is to ignore the ratepayers' interests and only attend to the shareholders' interests. Having convinced the Commission to (1) lose focus on its duty to protect ratepayers when the Commission decided energy efficiency issues in ER-2011-0028 and (2) instead worry about Ameren Missouri's ability to maximize shareholder profits; Ameren Missouri with this tariff filing tries to build on that success and present the Commission with barely a token amount of energy efficiency programs. The small $5 million budget for the energy efficiency programs in this tariff is only about 15% of the $33 million in expenditures over the last year. Unfortunately, the smaller size and range of program offerings in the tariff means that the kWh reduction per dollar spent will less than it was for last year's programs so that while Ameren Missouri's budget is about 15% of the former budget, the actual kWh impacts of the proposed programs will only be about 10% of the kWh reductions from last year. With programs that are expected to only achieve about one-tenth of the load reductions achieved last year, the argument that these programs should be approved to permit the

resumption of at least some minimal program is simply not credible. Ameren Missouri's IRP analysis indicates it should be moving towards doubling its DSM programs rather than slashing expenditures and reducing impacts by 90%.

4. The policy that governs the Commission's regulation of an electric utility like Ameren Missouri is based upon what is commonly known as the regulatory compact. Pursuant to this compact, Ameren Missouri is given a monopoly service territory and a guaranteed opportunity to earn a fair return on investment. In exchange, Ameren Missouri submits to price regulation, in which the Commission can examine every aspect of Ameren Missouri's business to ensure that it is providing service in the most efficient manner possible. This regulation is grounded upon the police power of the state. If the Commission determines that Ameren Missouri is operating inefficiently by overbuilding physical plant[2], overcompensating employees, or paying too much for coal or other fuel sources, the Commission can exercise its police power and require Ameren Missouri to file tariffs that reflect an efficient operating cost.

5. The exercise of this police power is not limited to just ratemaking. If the Commission determines that a certain minimum level of tree-trimming along transmission and distribution lines is necessary, it can require utilities to undertake that level, either through rules of general applicability or in specific cases pertaining to specific utilities. And if a utility's own analysis shows that the utility can reduce the long-run cost of providing service to its ratepayers

[2] The apocryphal example of overbuilding is gold-plating a piece of equipment. The gold-plated piece provides exactly the same level of service to ratepayers as an equivalent un-plated piece, but provides a markedly greater return to the shareholders because the return is calculated upon the higher cost of the gold-plated piece. The effect on ratepayers is exactly the same if the Commission allows Ameren Missouri to ignore cost-effective energy efficiency programs. Whether it gold-plates equipment or refuses to invest in cost-effective energy efficiency programs, the end result is the same: in the long run, shareholders are earning more and ratepayers are paying more for the same level of service. Preventing this result is exactly why utility regulatory commissions were created a hundred years ago.

by billions of dollars by pursuing energy efficiency, it is **incumbent** on the Commission to require the utility to do so. If the Commission fails to require the utility to act in the best interests of its ratepayers, the Commission is ignoring its primary purpose and abdicating its primary duty.

6. The Commission appeared to remember and obey this duty in a pair of Commission rate case decisions issued just two months before the Ameren Missouri rate case decision. In the recent Kansas City Power & Light Company and KCP&L Greater Missouri Operations company rate cases, the Commission ordered those companies to continue existing DSM programs. The Commission stated:

> The over-arching DSM issue is whether the Commission should order the continuance of a DSM program at all. Because of the gap between the MEEIA rules being implemented and the end of the Regulatory Plan, there is a need for the Commission to set out guidance for KCP&L and GMO with regard to the continuance or implementation of DSM programs and cost recovery for those programs. Despite the success and forward momentum created by the implementation of their existing DSM programs and the fact that the programs are currently continuing, both KCP&L and GMO have expressed a position to slow spending for the programs. This decision comes even though both companies realize that they, as well as the ratepayers, stand to benefit from continuing efforts to achieve more DSM programs and improved DSM penetration.
>
> The Companies have argued that the Commission should reject Staff's and MDNR's recommendations to direct the Companies to invest in DSM programs without any assurance that the full costs and lost revenues associated with these programs will be recognized in rates. Instead, the Companies urge the Commission to implement the cost recovery issue expeditiously, including the recovery of lost revenues associated with the specific DSM programs. While the Companies express a need to have an appropriate cost recovery mechanism, they did not recommend a new recovery mechanism in this case except to propose in their briefs that the mechanism be consistent with that recently ordered for Ameren.
>
> The Commission concludes that the continuance of the DSM programs is in the public interest as shown by the customer participation and clear policies of this state to encourage DSM programs. In the absence of a clear proposal for a cost recovery mechanism and during the gap between the end of the true-up for this case and the implementation of a program under MEEIA, the Commission concludes that the Companies should continue to fund and promote or implement, the DSM programs in the 2005 Agreement (KCP&L only), and in its last adopted

> preferred resource plan (both KCP&L and GMO). In addition, the Commission directs that those costs be placed in a regulatory asset account and be given the treatment as further described below. (ER-2010-0355 Report and Order, issued May 4, 2011, pages 116-117)

Nowhere did the Commission mention any question about its authority to order KCP&L and KCP&L-GMO to continue DSM programs that are clearly in the public interest.

7. In its Report and Order in Case No. ER-2011-0028, the Commission cited Harline[3] in defense of its deferral to the interests of Ameren Missouri shareholders over the interests of ratepayers. But Harline does not limit the Commission's police power to that extent. Indeed, the import of Harline has much more to do with a utility's authority than it does with the Commission's. The Court itself stated issue in the case as follows:

> The basic issue for decision is: Must a public utility obtain an additional certificate of convenience and necessity from the Commission to construct each extension or addition to its existing transmission lines and facilities within a territory already allocated to it under a determination of public convenience and necessity?[4]

Although Harline is frequently cited as holding that the Commission's powers with respect to regulating utilities are quite limited, the case does not stand for such a proposition. The limitation in Harline has to do with the exercise of property rights:

> The dominating purpose in the creation of the Public Service Commission was to promote the public welfare. To that end the statutes provided regulation which seeks to correct the abuse of any property right of a public utility, not to direct its use. Exercise of the latter function would involve a property right in the utility. The law has conferred no such power upon the Commission.[5]

Thus all Harline really tells us is that the Commission's authority does not extend to dictating to a utility how to exercise its property rights. The oft-quoted line about the Commission not

[3] State ex rel. Harline v. Public Serv. Com'n, 343 S.W.2d 177 (Mo. App. 1960)

[4] *Ibid*., at 180.

[5] *Ibid*., at 181.

having "the general power of management incident to ownership" must be viewed in that limited context.

8. In fact, were the Commission's powers so limited, under what authority does the Commission require specific intervals of tree-trimming or infrastructure inspections? It is hard to imagine a more intrusive assertion of power over a utility's management than a rule that requires someone to go look at every single pole at certain specified intervals, or trim trees along every single foot of distribution lines at specific intervals. And yet the Commission appears to be of the opinion that it can impose such requirements, but at the same time is powerless to require the same utility to take steps that would lower costs by billions of dollars over the next twenty years. The Commission must not lose sight of its true purpose, which is to use the police power of the state to prevent monopoly utilities from passing inflated costs on to captive customers. That police power invests the Commission with great authority, and it cannot be abridged: "The exercise of the police power of the state shall never be surrendered, abridged, or construed to permit corporations to infringe … the general well-being of the state."[6]

9. The exercise of this police power is conferred upon the Commission's by the Public Service Commission Law.[7] With respect to electric utilities, the Commission's powers are pervasive. Section 393.190(1) RSMo 2000 provides that: "The commission shall … [h]ave general supervision of all … electrical corporations." Section 393.190(2) RSMo provides that:

> The commission shall … examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying … electricity for light, heat or power … [and] have power to order such reasonable improvements as will best promote the public interest … and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines,

[6] Mo. Const. Art. XI, § 3

[7] The Public Service Commission Law includes all of Chapter 386, and has included all or parts of Chapters 387, 389, 390, 391, 392, and 393.

> conduits, ducts and other reasonable devices, apparatus and property of … electrical corporations….

This statutory authority has always been viewed to be extremely broad:

> State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the State, and to be effective must possess **the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service.**[8]

10. Indeed, even before May Department Stores, Missouri Courts recognized that the Commission's authority over utilities was vast and pervasive. In one of the earliest cases interpreting the Public Service Commission Law, the Missouri Supreme Court elaborated on the purpose and the breadth of the Public Service Commission Law:

> That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surety is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust *willy nilly*.
>
> That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at -- all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it "shall be liberally construed with a

[8] May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 316 (Mo. 1937); emphasis added.

> view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."[9]

11. Shortly after Barker, the Missouri Supreme Court emphasized that the Public Service Commission Law (referred to as "the act" in the following passage) confers great power and great responsibility on the Commission:

> Now the act in question comes up to those judicial expectations. Recognizing that a negligently wasteful corporate life, a diseased or dishonest corporate life, or a slovenly lack of care in safety and adequacy of service are matters of public concern, are necessarily reflected in rates and income, and that regulation lies within the police power, the Legislature, as seen in paragraph two, charged the commission with the duty of supervision over corporate bookkeeping, stock issues, bond issues and creation of other indebtedness, sales of franchises as well as in matters of safety and adequacy in service. **In fine it gave the commission plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it.** On the other hand, the act does not contemplate a confiscation of corporate property, and we include in the term "property" the right to earn a reasonable return on its investment.[10]

12. More recently, the Missouri Supreme Court has held that, although the Commission's powers are limited to those conferred by statute, its statutory authority includes powers that are only <u>implied</u> by the statutes. In a case involving the capital structure of a street railroad company regulated under Chapter 387, the Court held that the Commission, despite the lack of <u>explicit</u> statutory authority, could restrict distributions to shareholders:

> We start with the premise that the Commission "is an administrative body of limited jurisdiction, created by statute. It has only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. Accordingly, we must find the power conferred by statute if it exists at all. In such search, however, we must recognize that the Commission has not only the powers and duties expressly specified but "also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." Section 386.040. We have concluded, and hold, that the Commission did have statutory authority to make the order in question. Various sections of the statutes indicate a clear

[9] <u>State ex rel. Barker v. Kansas City Gas Co.</u>, 254 Mo. 515, 534-535 (Mo. 1914)

[10] <u>State ex rel. Missouri S. R. Co. v. Public Service Com.</u>, 259 Mo. 704, 724 (Mo. 1914)

> intention of the Legislature that the Commission should exercise supervision and control over the capital structure of street railway corporations and other common carriers within its jurisdiction.
> …
> [T]he Commission does have implied authority under Chapters 386 and 387 to require that reductions in the capital structure of a street railway company, including paid-in surplus, be made only with Commission approval.[11]

13. In a recent case involving Ameren Missouri's gas energy efficiency tariffs, the Commission appeared to recognize its authority and its duty to act proactively to protect the public interest. In the Report and Order issued in that case on November 2, 2011, the Commission stated:

> Finally, the Commission must act in the public interest. The Commission has found the following: that many of the measures Ameren proposes to eliminate are labeled Energy Star, which is a way for customers to determine whether a product is energy efficient; Ameren proposes to eliminate 68% of the residential and 25% of the general service measures; Ameren sent rebates totaling $39,734 to customers who took advantage of measures the company now seeks to remove; Ameren proposes to retain measures that require an expensive home energy audit yet provide minimal rebates to the customers; and, most telling is that as of August 2011, there were 486 residential reservation or rebates paid for measures that Ameren proposes to eliminate and no reservations or rebates for measures that will remain under the proposed tariff. In light of all of these factors, the Commission concludes that the proposed tariff would not serve the public interest.
> **Decision**
> The Commission will reject the proposed tariff sheets because they are not in the public interest. The Commission also concludes that approval of the proposed tariff sheets would be contrary to the parties' intent when entering into the Stipulation and Agreement. (Page 8; footnote omitted)

In reaching its decision, the Commission relied upon Gulf Transport Co. v. Public Service Com'n, 658 S.W.2d 448 (Mo. App. 1983). That case stands not only for the proposition that the

[11] State ex rel. Kansas City Transit, Inc. v. Public Service Com., 406 S.W.2d 5, 8-9, 11 (Mo. 1966); case citations omitted.

Commission must act in the public interest, as noted by the Commission in its Report and Order, but also for the proposition that the Commission "must consider the future" in doing so.[12]

14. In this case, it is undisputed that a more aggressive pursuit of energy efficiency than the approach embodied in the proposed tariffs would lower Ameren Missouri's long-run cost of providing service to its customers.[13] In both its most recent rate case (ER-2011-0028) and its current resource planning case (EO-2011-0271), Ameren Missouri has conceded that it could lower costs to its customers by **billions of dollars** over the next twenty years by aggressively pursuing energy efficiency. The Company's own IRP analysis indicates that alternative resource plans with realistically achievable (RAP) levels of DSM can reduce PVRR by roughly $1.5 to $2.5 billion present value dollars relative to the Low-Risk DSM resource plans. It refuses to aggressively pursue energy efficiency because shareholder earnings might be lower by a small fraction of this amount over the same period.

15. When faced with a very similar situation in Case No. ET-2012-0011, the Commission decided to allow the residential tariffs to take effect. In that case, the Commission stated that: "an inadequate energy efficiency tariff is better than no tariff at all" and noted its hope that some future Commission might take some future action based on Ameren's decisions to "obtain additional energy supplies that might not be needed if energy efficiency programs were appropriately implemented." But Commission actions in a future ratemaking proceeding, in addition to being uncertain, can only address a very limited range of the entire actual and

[12] "[T] future must be considered in determining whether the public convenience and necessity would be served by new entry." *Ibid*., at 457.

[13] In the parlance of integrated resource planning, keeping long-run costs low is called minimizing the present value of revenue requirement (PVRR). This is the most important goal of resource planning, and the Commission, through its resource planning rules, requires utilities to select resource plans using minimization of PVRR as the primary selection criteria.

potential harm caused by a utility's decision to offer an inadequate level of energy efficiency services to its customers. When a utility offers inadequate levels of energy efficiency services to its customers, the harmful impacts on its customers and the public are not limited to potential adverse ratemaking consequences. As Public Counsel noted in its Response in Case No. EO-2012-0127, these harmful impacts include: (1) increased average customer bills during the time period when inadequate levels of energy efficiency are offered and prior to the first cost recovery proceeding where adverse ratemaking consequences might be addressed; (2) decreased flexibility with respect to future additions and retirements of coal-fired generation due to time lost in acquiring demand-side resources; (3) increased exposure to risk of higher utility costs from future regulation of greenhouse gas emissions due to increased reliance on fossil fuel generation; (4) increased risk of higher utility costs from current and future EPA regulation of SO2, NOX, mercury, and particulate emissions due to increased reliance on fossil fuel generation; (5) forgone economic development benefits from increases in local energy efficiency-related jobs and decreased average bills that would be associated with higher levels of energy efficiency services; (6) risks from increased reliance on fossil fuels largely imported from outside Missouri related to availability, price level, and price volatility of coal and natural gas supplies and associated transportation; and (7) increased harmful emissions associated with the generation of electricity from fossil fuel generation required to serve native load customers and the adverse public health impacts (increased health care cost, disease, and premature death) associated with higher levels of those emissions.

16. In light of its "principle purpose … to serve and protect ratepayers,"[14] one would expect the Commission to view its authority as broad enough to accomplish that end, rather than simply assuming that its authority is too limited to take any proactive steps. There is no reason for the Commission to believe that its authority is strictly limited to reactive, hindsight regulation. Moreover, the Commission's refusal to act proactively to protect the public interest will force the parties to bear the burden in a future case of proving not only that Ameren Missouri's actions in almost eliminating energy efficiency efforts are imprudent, but also of quantifying the impact of that imprudence. This puts a hugely unreasonable burden on parties who frequently have inadequate access to information and inadequate resources to put on an effective prudence challenge. Neither Ameren Missouri nor the Commission itself has referred to any legal authority – specific or otherwise – to support the notion that it cannot require a utility to make investments necessary to "best promote the public interest."[15]

17. In fulfilling its statutory responsibility to protect the public interest with respect to the proposed tariffs in this case, the Commission should recognize that the proposed tariffs are not in the public interest because they will, by Ameren Missouri's own admission, cause rates to be billions of dollars higher than they could be. As recently as September 30, 2011, Ameren Missouri was offering a suite of cost-effective energy efficiency programs that, if continued, would lower long-run costs to Missouri ratepayers by billions of dollars over a twenty-year

[14] State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993), citing State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (1944).

[15] Section 393.190(2) RSMo

planning horizon.[16] The Commission should reject the proposed tariffs as not being in the public interest, and order Ameren Missouri to immediately file new tariffs that would re-institute the residential and business programs that Ameren Missouri allowed to lapse on September 30, 2011. The Commission should also order Ameren Missouri to file a MEEIA application no later than March 31, 2012, because the recently-lapsed tariffs (while better than the proposed tariffs) do not capture all cost-effective energy efficiency.

WHEREFORE, Public Counsel respectfully requests that the Commission reject Ameren Missouri's proposed tariffs and order the immediate filing of tariffs that would re-establish the programs that Ameren Missouri allowed to lapse on September 30, 2011, and order Ameren Missouri to make a filing under MEEIA no later than March 31, 2012.

Respectfully submitted,

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[16] This suite of programs, while much better than the proposed tariffs, does not approach the level of energy efficiency expenditures that Ameren Missouri's resource plan indicates should be implemented to minimize PVRR, but because Ameren Missouri has experience with this suite of programs, it could quickly re-start them if ordered expeditiously to do so since the duration of the current program interruption is still relatively short at this point in time.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been transmitted by e-mail this 8th day of December 2011, to all parties on the Commission's service list in this case.

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