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 APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing 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. On December 8, in response to a Commission order, Public Counsel, the Missouri Department of Natural Resources (MDNR), and the Staff of the Commission filed recommendations regarding the tariffs. Of the three parties filing, only the Staff recommended that the Commission approve the tariffs, and even the Staff did so with significant reservations. MDNR, noting that the tariffs "propose woefully inadequate energy efficiency savings and support a limited portfolio of programs," recommended neither approval nor suspension. Public Counsel asked the Commission to reject the tariffs because they are not in the public interest and to order Ameren Missouri to file other tariffs that are in the public interest.

3. Anticipating that the Commission might take the same inexplicably limited view of its authority to order a utility such as Ameren Missouri to fulfill its obligation to provide safe and adequate service at just and reasonable rates as the Commission did in Ameren Missouri's recent rate case and in Case No. ET-2012-0011,[1] Public Counsel in its motion to reject the tariffs

[1] This limited view is confounding because it flies in the face of the very purpose of regulation, and because it is directly counter to a pair of Commission decisions issued just two months before the Ameren Missouri 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.
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> 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.
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> 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)

explained the basis for the Commission's authority to reject tariffs that it finds to not be in the public interest and order the filing of new tariffs.

4. On December 14, the Commission issued a "Notice Regarding Tariffs." In that notice, the Commission acknowledged that the tariffs it was approving[2] were "inadequate" to serve the public interest. The Commission approved the tariffs not because they were **in** the public interest, but because some other course of action would have been **more detrimental** to the public interest. If the Commission's authority truly is limited to simply rubber-stamping utility actions that are not as bad as they could conceivably be, then there is little public protection in having a public service commission. But of course, the Commission's authority is not so limited. The real question here is the Commission's willingness to exercise its authority.

5. In its Notice Regarding Tariff, the Commission declined to reject the tariffs as urged by Public Counsel because – according to the Commission – "Public Counsel cites no legal authority that would allow the Commission to order Ameren Missouri to spend additional money on energy efficiency without a means by which the company can recover those costs." The Commission also claims, again in error, that: "Such a means of recovery will not be available until Ameren Missouri submits and the Commission approves a cost recovery plan under MEEIA." Although Ameren Missouri has become disenchanted with the cost recovery mechanism to which it recently agreed, and which the Commission even more recently ordered KCPL and KCPL-GMO to continue using, that does not mean that Ameren Missouri has no

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Nowhere did the Commission mention any question about its authority to order KCP&L and KCP&L-GMO to continue DEM programs that are clearly in the public interest. Apparently the Commission has only very recently become doubtful about its authority, or fearful of exercising it. Nothing in the record in this case or in Case No. ER-2011-0028 explains this doubt or fear.

[2] Although the Commission did not use the word "approve," it made an explicit affirmative decision to allow them to become effective on November 25, and took a formal vote on that decision.

means by which it can recover those costs. Ameren Missouri operated for years with a cost recovery mechanism that allowed for deferral and **recovery of all costs plus a return** on the unamortized balance of the deferrals. Indeed, Ameren Missouri customers are being charged today – through a line item on their bills – for these costs. The Commission is just wrong when it says that Ameren Missouri has no means by which it can recover the costs of energy efficiency programs.

6. The real issue here is not cost recovery but profit levels. The Commission is under no obligation to continue a particular level of profits for the utilities it regulates. In a case involving the Commission's adoption of changes to the Cold Weather Rule, the Western District Court of Appeals soundly rejected the notion that the Commission must protect and preserve a particular level of profits:

> The Utilities argue that "revenue neutrality" is required by the law of Missouri. We find no statute, rule, or case supporting the utilities assertion of revenue neutrality, i.e., that they have a property right to a defined level of revenue. . . .
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> . . . .
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> **[A] Commission decision may permissibly affect revenue negatively** because there is no requirement to provide a particular return on rates. Lightfoot [v. City of Springfield], 361 Mo. 659, 236 S.W.2d [348,] 352 [(Mo. 1951)]. It is only required that the rate provides "a just and reasonable return." State ex rel. Midwest Gas Users' Ass'n. v. Pub. Serv. Comm'n, 976 S.W.2d 470, 480 (Mo.App. W.D.1998). In this case, the rate has not changed. The only result of this rule is the deferred collection of portions of the bill; the rate itself was not changed.[3]

[3] State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n, 210 S.W.3d 330, 334-35 (Mo. App. 2006); emphasis added.

7. In defense of its refusal to take any action to protect customers, the Commission cites Southwestern Bell.[4] In citing this case, it appears that the Commission has – as it has so often done in citing Harline[5] – simply picked one sentence out of a decision without any consideration of its context in terms of the overall decision and the actual matters at issue. The principal issue in Southwestern Bell was the proper method of determining the value of property devoted to the public service. If the case is notable at all, it is only for the prescience of dissenting Justices Brandeis and Holmes in predicting the collapse of the use of "reproduction value" as a method of determining rate base. The sentence fragment cited by the Commission in its Notice has nothing to do with the principal issue; rather it pertains to a very simple issue concerning the Commission's arbitrary disallowance of 55% of an apparently reasonable and prudent expense. The entire discussion of that simple issue is as follows:

> After disallowing an actual expenditure of $174,048.60 for rentals and services by the American Telephone & Telegraph Company and some other items not presently important, the Commission estimated the annual net profits on operations available for depreciation and return as $2,828,617.60 -- approximately 11 1/3% of $25,000,000. That 6% should be allowed for depreciation appears to be accepted by the Commission. Deducting this would leave a possible 5 1/3% return upon the minimum value of the property, which is wholly inadequate considering the character of the investment and interest rates then prevailing.
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> The important item of expense disallowed by the Commission -- $174,048.60 -- is 55% of the 4 1/2% of gross revenues paid by plaintiff in error to the American Telephone & Telegraph Company as rents for receivers, transmitters, induction coils, etc., and for licenses and services under the customary form of contract between the latter Company and its subsidiaries. Four and one-half per cent. is the ordinary charge paid voluntarily by local companies of the general system. There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the

[4] Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Com., 262 U.S. 276 (U.S. 1923).

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

> owner of the property of public utility companies and is not clothed with the general power of management incident to ownership.[6]

Thus when the Southwestern Bell court stated the Commission is not clothed with the general power of management, it was referring to the Commission's disallowance of actual expenditures, not the Commission's general authority to require a utility to provide service in a safe and efficient manner.

8. Neither the Commission nor Ameren Missouri has cited in this case (or in Case No. ET-2012-0011) any authority for the proposition that the Commission is powerless to stop a utility from taking a course of action that is admittedly harmful to customers. The Commission is not confronted here with a question of disallowing actual costs as was the case in Southwestern Bell; until it allowed the programs to abruptly stop, Ameren Missouri had a mechanism to recover 100% of the costs of its energy efficiency programs, plus a return on the unamortized balance. Instead, the Commission is confronted with the question of its authority over a utility that has simply decided to provide service in a more expensive manner because that manner allows greater profits. There is no question that the Commission has authority to reject tariffs that are not in the public interest and order the filing of tariffs that are in the public interest.

9. The primary source of the Commission's authority is statutory. 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

[6] Southwestern Bell, *supra.*, at 288-289.

> improvements as will best promote the public interest … and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, 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.**[7]

10. In light of its "principle purpose … to serve and protect ratepayers,"[8] the Commission should view its authority as broad enough to accomplish that end, rather than simply assuming that its authority is too limited. 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 expenditures necessary to "best promote the public interest."[9]

11. On December 23, 2011, Public Counsel filed a motion for reconsideration asking the Commission to reconsider its affirmative vote to allow the tariffs to become effective on their stated effective date. That motion raised the same arguments set forth in paragraphs 1-10 herein. On January 4, 2012, the Commission denied Public Counsel's motion for reconsideration. The Commission should grant rehearing of its Order Denying Reconsideration for the reasons stated herein, because the Commission erred in holding that it is without authority to reject tariffs that are not in the public interest and without authority to order a utility to file tariffs that are in the

[7] May Dep't Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 316 (Mo. 1937); emphasis added.

[8] 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).

[9] Section 393.190(2) RSMo

public interest, and because the Commission erred in finding that Ameren Missouri currently has no mechanism to recover the costs of energy efficiency expenditures.

WHEREFORE Public Counsel respectfully requests that the Commission rehear its Order Denying Reconsideration and overturn its Notice Regarding Tariff issued December 14, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 13th day of January 2012.

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