ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

JAY NIXON
ATTORNEY GENERAL

P.O.Box 899
(573) 751-3321

September 20, 2006

Ms. Colleen Dale
Secretary and Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Re: ER-2007-0002

Dear Ms. Dale:

Accompanying this letter for filing is the original and eight copies of the State of Missouri's Reply to Union Electric's Response.

Thank you for your assistance with this filing. If you have any questions please do not hesitate to contact me.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

Douglas E. Micheel
Assistant Attorney General

Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Amurense 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

State of Missouri's Reply to Union Electric's Response

Comes Now the State of Missouri and, hereby responds to Union Electric's (UE) Response to the State's objections to UE's Motion to adopt procedures for implementing UE's requested fuel adjustment clause. (FAC). The State of Missouri states as follows:

The Commission "Suggested" that UE Proceed In This Manner.

UE at page 4 of its Response attempts to justify its failure to file FAC tariffs and to comply with Commission rules regarding rate case filing based "in part" on "suggestions" made by this Commission. According to UE this Commission "suggested" that UE comply with the "transition provisions" proposed in subsection (16) of proposed rule 4 CSR 240-20.090 during a Commission Agenda session. UE fails to attribute which Commissioner(s) made this "suggestion" but does note that four of the five Commissioners voted to approve the "transition provisions" for publication with the Secretary of State. This claim by UE raises troubling issues as to whether or not this Commission has prejudged this issue or whether or not certain Commissioners have prejudged this issue. UE states: "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 filing would work in each rate case pending finalization of rules. That is precisely what AmerenUE's Motion To Adopt requests..."

According to UE it failed to file tariffs, testimony and supporting documents for its proposed FAC in part because members of the Commission suggested that UE proceed in this manner. Does this mean that the Commission suggested that UE could ignore its rate case filing rules? Does this mean that the Commission suggested that UE had the ability to dictate to this Commission the amount of time its proposed FAC tariffs can be suspended? Does this mean that members of the Commission had decided before the fact that they would grant UE's Motion?

The implication of UE's statements contained in its Response and its initial Motion at paragraph 6 is that this Commission was not and is not going to require UE to comply with its long standing rules respecting rate case filings. If its request is granted, UE will be allowed to file new tariffs, new testimony and supporting documents regarding its proposed FAC thus circumventing the suspension period ordered by the Commission. As a result UE will dictate to this Commission the suspension period for the proposed FAC tariffs. If UE's Motion is granted, this Commission will be ignoring its long standing rules respecting rate case filings and will violate both the letter and spirit of Sections 393.150 and 393.140(11).

This is just the first of many arguments that UE makes in its Response wherein it attempts to shift the blame from itself for failing to file its tariffs, testimony and supporting information delineating its requested FAC to other entities. UE and UE alone determined the timing and the content of its rate case filing. This Commission should not let UE extricate itself from its failure to follow the law and Commission rules by allowing UE to file **new** tariffs that create an entirely new and different rate case.

The State Filed Its Objections In A Timely Manner.

UE asserts at page 5 its Response that the State failed to file its objections to UE's Motion within the 10 days prescribed by Commission rule 4 CSR 240-2.080(15). UE's attempt to paint the State as failing to comply with Commission rules is simply wrong. A simple review of the case time line will demonstrate that the State made its opposition to UE's request known in a timely manner.

UE filed its Motion on July 7, 2006. Commission rule would have required a response by no later than July 17, 2006. The State of Missouri sought intervention as a party on July, 10, 2006. The Commission issued its Suspension Order on July 11, 2006, and set an intervention deadline of July 31, 2006. The Commission on August 1, 2006 entered its Order granting the State party status. By that time the ten day period for filing a response pursuant to Commission was long passed.

The State was going to raise this issue at the Early Prehearing Conference and point out that its due process rights would be violated if it were not allowed to respond to UE's Motion given the nature and magnitude of the issues raised by UE's Motion. Before the State could raise this issue at the Early Prehearing Regulatory Law Judge Voss stated: "There are a couple of motions filed in this case which have not been ruled on because they involve issues that could be of interest to parties that have not yet been granted intervention. And I wanted to make sure that all parties and prospective parties have an opportunity to respond...First, regarding Ameren's motion to adopt procedures for implementing its requested fuel adjustment clause and its motion to consolidate to allow recent intervenors and prospective intervenors that may be later granted intervention an opportunity to respond, I'm going to order any party wishing to address either

motion to file a pleading with the Commission on or before Monday, August 31st." Transcript pages 18-19. As ordered by the Commission, the State of Missouri filed its objections to UE's Motion on August 31, 2006. By doing so the State complied in a timely manner with the Commission's order. The Commission recognized the important nature of allowing parties to respond to UE's unprecedented request to file **new** tariffs after its initial proposed rate case tariffs had been filed and suspended by the Commission.

Granting UE's Request Violates Commission Rules and the Letter and Spirit of Sections 393.150 and Section 393.140 (11).

The State does not deny that the Commission had the option under Section 393.150 to let UE's proposed tariffs go into effect or to suspend those tariffs for up to 120 days, plus six months, or some other shorter time period if it so desired. In this case, the Commission on its own motion has made the determination that UE's proposed tariffs should be suspended for the statutorily allowed maximum time period. The proposed FAC tariffs, testimony and supporting documentation were not part of that package of tariffs that UE and UE alone made the decision to file. While UE's discussion is an interesting primer in the governing principles of law, its discussion fails to recognize the fact that the Commission had already determined to suspend UE's proposed tariffs for the maximum statutory suspension period.

What UE requests this Commission do via its Motion is to take the unprecedented step of allowing UE to file **new** tariffs that will fundamentally alter the proposed tariffs UE filed on July 7, 2006 after one quarter of the suspension period ordered by the Commission has passed. By granting UE's motion the Commission would be fundamentally altering the "file and suspend"

method of ratemaking allowed in Section 393.150 and replacing it with a "moving target" form of ratemaking. Such a result would be contrary to Section 393.150 and Section 393.140 (11) that required UE when it filed its proposed tariffs on July 7, 2006 to "...plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect."

Moreover, allowing UE to file new tariffs that fundamentally alter the initial proposed tariffs would directly nullify the Commission's expressed Order that the proposed tariffs be suspended for the maximum statutory time period. SB 179 did not give UE the ability to dictate to this Commission the amount of time its proposed tariffs can be suspended in a rate case. If the Commission accepts UE's argument that is in fact what will happen.

In its Response at page 10 UE characterizes its proposed September 30, 2006, filing as providing "additional FAC details just 84 days into a 335 day long rate case." What a gross mischaracterization. UE has not filed any information or details regarding its proposed FAC. The only brief mention of UE's intention is contained in the direct testimony of UE witness Baxter. This testimony contains one small bullet point noting that UE "requests the ability to implement an appropriate FAC, subject to promulgation of satisfactory rules and a satisfactory FAC mechanism." There is no further or more detailed description or discussion of UE's proposal in any of UE's other testimony and there are no proposed FAC tariff sheets in UE's filing. The parties to this rate case will see UE's FAC proposal for the first time on September 30, 2006. Simply put, UE will for all intents and purposes have a new and different rate case on file if its Motion is granted.

The State Seeks To Make UE Comply With The Explicit Requirements of Section 386.266.

UE's assertion at page 11 of its Response that the State has ignored the specific process created by statute under which the FAC will be considered is just plain wrong. The State seeks to hold UE accountable to the explicit requirements of Section 386.266 *et seq.*. Nothing in Section 386.266 alters the way in which this Commission has set rates and in fact Subsection 4 of Section 386.266 requires that the Commission only approve a FAC in a "general rate proceeding." The State is arguing that UE has failed to follow the Commission's duly promulgated rules regarding filing a rate case. Certainly, UE was entitled to seek a FAC in its pending rate case. To receive that right UE was required to follow Commission rules. Specifically Commission rule 4 CSR 240-2.065(1) states in pertinent part "any public utility which submits a general rate increase request shall simultaneous (sic) submit its direct testimony with the tariff." Rule 4 CSR 240-2.130 (7)(A) states: "direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." UE by its own admission has failed to follow these rules.

These rules are not merely "technical" objections as UE attempts to characterize them in its sixth footnote. These objection go to the very heart of the rate making procedures established by the legislature in Section 393.150 and the notice provisions provided for in Section 393.140 (11). The requirements of Section 386.266 must be read in harmony with the requirements of Sections 393.150 and 393.140 (11) and the Commission rules.

In apparent recognition that it failed to comply with this Commission's rules when it filed its proposed tariffs that initiated this rate case UE in footnote twelve requests that the Commission waive its rules based on good cause shown pursuant to 4 CSR 240-2.015. UE

alleges three "reasons" why good cause exists to waive compliance with Commission rules: 1. Substantial time left before direct testimony is due or a hearing is to be held; 2. The practical considerations surrounding the Company's July 7 filing just three weeks after rules were even proposed; and 3. The clear injustice that would occur if FAC opponents were allowed to stop this Commission from even considering an FAC request. As UE notes "good cause" refers to a remedial purpose to prevent a manifest injustice or to avoid a threatened one. None of the "reasons" put forth by UE demonstrate good cause for UE to be allowed to file **new** tariffs that would essentially create a new rate case that was not part of the initial notice UE provided to consumers.

First, the State disagrees with UE's assertion that "substantial time exists before direct testimony is due or a hearing is to be held." At the time of UE's proposed filing one quarter of the suspension period order by the Commission will have passed. Second, UE could have filed the required tariffs and information needed to satisfy Subsection (16) of the proposed rule but it just choose not to do so. UE's decision not to follow Commission rules should not constitute good cause.

UE next cites the "practical considerations" surrounding filing just three week after the FAC rules were even purposed. UE fails to list what those "practical considerations" were and why they could not have complied or waited to file the proposed rate increase. UE was under absolutely no statutory obligation to file its rate case when it did. The fact that UE could not or did not dedicate appropriate resources to its rate case filing does not create good cause to allow this Commission to ignore its own rules.

The State assumes that the "practical" considerations that UE lists in its footnote three are the same ones that UE infers in footnote twelve. The first "practical consideration" is, that UE 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 UE's cost of service. The second "practical consideration" is, that UE did not have "sufficient time to properly develop the 19 detailed items that would be required to 'comply' with the proposed rules." Finally, UE claims that "SB 179 does not require extensive filing regarding an FAC at the inception of the rate case in the absence of FAC rules." None of these "practical considerations" demonstrate good cause.

UE has obviously failed in its commitment to this Commission and its Staff to file its rate case on or before July 10, 2006. It is clear from UE's Motion that its actual rate case will **not** be on file with the Commission until September 30, 2006. Also, the State believes that in making its "commitment" UE committed to complying with all of the Commission's duly promulgated rules respecting the filing of a general rate case. In its apparent rush to attempt to meet one commitment, UE has failed to live up to its legal obligation to file its entire direct case when it filed its tariffs. Moreover, the alleged "commitment" was not something that the Commission or its Staff required UE to meet. Instead it was a commitment made by UE solely for the benefit of UE. The fact that UE failed to live up to its own commitment does not create good cause for waiving important Commission rules.

In footnote eleven UE notes that its commitment to the Commission and the Staff to file its rate case by on or before July 10, 2006 prevented the Staff and the Commission from having to devote limited resources to actively pursuing an over earnings investigation. To avert an

investigation into whether or not UE is overearning and may be subject to a complaint case that would reduce its rates UE commits to filing a rate increase case that turns out to be the largest rate increase request in history. Because UE could not get all of the information it needed in time to meet its self-imposed rate case deadline UE simply ignores the long standing Commission rules and seeks to alter the way rates are set in Missouri. UE's failure to properly prepare and file its own rate case is not good cause to waive the Commission's rules as requested by UE.

The fact that UE did not have "sufficient time to develop the 19 detailed items" to comply with the proposed rule flies in the face of UE's assertion that other parties will have more than enough time to review UE's proposed FAC if UE is allowed to file that FAC nearly three months after it filed its initial case. Because UE was unable or unwilling to direct the appropriate resources for preparing its proposed rate case should not allow UE to ignore Commission rules and violate the regulatory scheme developed by the legislature.

UE is correct that SB 179 does not require extensive filings regarding a FAC. However, SB 179 does not in anyway change or nullify any laws or Commission rules related to what is required when an electric utility is filing a general rate case. In fact, the legislature specifically required that a FAC be authorized in a "general rate case proceeding." UE does not because it can not point to any part of SB 179 that in anyway alters or amends Commission rules regarding how rate cases are initiated and what information is **required** to be filed when an electric utility files a general rate case. At a minimum SB 179 appears to require, consistent with Commission rule, that an electric utility file its rate schedules when it files its general rate case as required in subsection (4) of Section 386.266.

Finally, UE asserts that a "clear injustice" would occur if UE is not allowed to seek a

FAC. The State does not believe any "injustice" would occur if the Commission denies UE's request. First, UE will be allowed to seek recovery of all of its prudent fuel costs in base rates. This method has been used by UE for well over twenty-five years and apparently has worked extremely well given the fact that this is UE's first rate case in twenty years. Second, if UE is so intent on seeking a FAC it can dismiss this case and immediately file a new case that complies with the law and Commission rules. Third, SB 179 is only an enabling statute it does not require the Commission to grant UE its requested FAC. Finally, if the Commission takes the appropriate action and denies UE's request, the only party to blame is UE itself for failing to follow long established Commission rules.

Contrary to UE's assertion at page 11 of its Response, the State has not ignored subsections 9 and 12 of Section 386.266. The State has pointed out that these subsections of Section 386.266 in no way alter or relieve UE of complying with Sections 393.150 and 393.140(11) and the duly promulgated rate case filing rules contained in Chapter 2 of the Commission rules. In fact, subsection 9 and 12 of Section 386.266 imply that UE is required to follow the above referenced statutes and rules.

Nor has the State attempted to create a catch-22 situation. The Legislature is the one who required UE to file a rate case to get a FAC. The Legislature is the one that allowed an electric utility to file a request for a FAC prior to the promulgation of rules regarding the FAC but conditioned implementation of the FAC only after the rules had been adopted. UE's complaint is not with the State but the Legislature. UE itself notes this fact in its Response at page 1 when it states: "Senate Bill 179 (SB179) 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." The State's suggestion that the Commission not consider a FAC until it has promulgated valid rules respecting the same is consistent with the legislative mandate expressed in SB 179.

Lack of Discovery Requests Does Not Justify UE's Ability To File FAC Tariffs.

UE also criticizes the fact that the State has yet to seek any data despite its ability to do so. The State has not sought discovery as of yet because it is in the process of reviewing UE massive filing. This claim does not excuse the fact that UE is seeking to make yet another large filing in late September that will significantly alter its case making much of the work already done by the State of little value. Moreover, the State cannot seek any information regarding UE's proposed FAC because as UE's own papers point out, UE itself does not have and will not have the FAC information until late September or early October.

WHEREFORE, the State of Missouri requests that the Commission deny Union Electric's request to Adopt Procedures For Implementing UE's Requested Fuel Adjustment Clause and any other relief the Commission deems appropriate.

Respectfully Submitted,

JEREMIAH W. (JAY) NIXON

Douglas E. Micheel Mo Bar 38371
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

Attorneys for the State of Missouri

The undersigned hereby certifies that on the 20th day of September, 2006, a copy of the original of the foregoing was hand delivered or sent via 1st class, postage paid, U.S. Mail to:

Steven Sullivan
Thomas Byrne
Ameren Services Company
P.O. Box 66149 (MC1310)
St. Luois, Mo. 63166-6149

Attorneys for Union Electric

James Lowery
Smith Lewis, LLP
P.O. Box 918
Columbia, Mo. 65205

Lewis R. Mills, Jr.
P.O. Box 2230
Jefferson City, Mo. 65102-2230

Attorney for Public Counsel

Steve Dottheim
P.O. Box 360
Jefferson City, Mo. 65102-0360

Attorney for Staff

Lisa Langenenckert
The Stolar Group
211 North Broadway Suite 3600
St. Louis, Mo 63101-1290

Attorney for MEG

Diana Vulsteke
Bryan Cave,LLP
911 Washington Ave.
63102-2750

Attoreny for MIEC

Stuart W. Conrad
3100 Broadway
Kansas City, Mo. 64111

Attorney for Noranda

John B. Coffman
871 Tuxedo Blvd.
St. Louis, Mo 63119-2044

Attorney for AARP/Consumers

Michael C. Pendergast
Laclede Gas Company
720 Olive, Rm 1520
St. Louis, Mo. 63101

Attorney For Laclede

L. Russ Mitten
Brydon Swearengen et al
P.O. Box 456
Jefferson City, Mo. 65102

Attorney for Aquila

Gaylin Rich Carver
P.O. Box 6670
Jefferson City, Mo. 65102

Attorney for MASW

Joe Bindbeutel
Missouri Attorney General
P.O. Box 899
Jefferson City, Mo. 65102

Attorney for DNR

The Commercial Group
Koiambanya Carew
2400 Pershing Road Suite 500
Kansas City, Missouri 64108

Attorneys for the Commercial Group

Lyell Champagne
906 Olive, Suite 1110
St. Louis, Missouri 63101

Attorney for MOKAN, CCAC