BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service	)))	Case No. ER-2010-0036

JOINT RESPONSE OF AARP, MISSOURI INDUSTRIAL ENERGY CONSUMERS, OFFICE OF PUBLIC COUNSEL, CONSUMERS COUNCIL OF MISSOURI, MISSOURI ENERGY USERS ASSOCIATION AND MISSOURI RETAILER'S ASSOCIATION TO AMERENUE'S REQUEST FOR CLARIFICATION RESPECTING APPLICATION OF THE COMMISSION'S STATUTES AND STANDARD OF CONDUCT RULES

Comes now AARP, Missouri Industrial Energy Consumers ("MIEC"), Office of Public Counsel ("OPC"), Consumers Council of Missouri ("CCM"), Missouri Energy Users' Association ("MEUA") and the Missouri Retailer's Association (collectively, the "Consumer Parties") and, pursuant to 4 CSR 240-2.080(15), file their Response to Union Electric Company d/b/a AmerenUE's ("AmerenUE") Request for Clarification Respecting Application of the Commission's Statutes and Standard of Conduct Rules. For their response, the Consumer Parties state as follows:

1. On December 18, 2009, AmerenUE filed a request for "clarification" of 4 CSR 240-4.020(4), even though the Missouri Public Service Commission ("PSC" or "Commission") has no authority to issue an order of general applicability regarding the regulation or to issue declaratory judgments. AmerenUE has argued that neither the Commission nor the Missouri courts have provided meaningful guidance respecting the application of this provision. *See* AmerenUE's Request for Clarification Respecting Application of the Commission's Statutes and Standard of Conduct Rules ("Motion"), at p. 2. AmerenUE has suggested that it would serve the public interest for the PSC to provide guidance whether particular activities are permissible (e.g., whether parties may engage in a public relations or an advertising campaign designed to address matters in the rate case). *Id.* at 3.

2. AmerenUE's request is framed as a request for a Commission order regarding the meaning of the Commission's rules. Any abstract interpretation of the regulation by the

Commission without formal rulemaking procedures would be an unlawful rulemaking, and thus would have no effect. Similarly, attorney speech is regulated by the Missouri Supreme Court as set forth in the Rules of Professional Responsibility, and so, to the extent the Regulation is inconsistent with the Rules of Professional Responsibility, it is ineffectual. The request by AmerenUE appears to be an invitation to the Commission to limit the constitutional free speech rights of the parties to this case. While AmerenUE's request appears aimed at the Consumer Parties, AmerenUE has been engaging in its own active (and likewise, constitutionally-protected) public relations campaign regarding this case, as it has with virtually every other rate case it has ever filed with this Commission. AmerenUE's request for "clarification" of a rule has no valid legal basis, and is not authorized under the Commission's regulations. Therefore, the Commission should refrain from issuing any interpretation, much less one that chills or limits the fundamental constitutional rights of the parties.

I. The Commission Has No Authority to Issue the Interpretation Requested by AmerenUE's Motion Because Any Such Interpretation Would be Subject to Missouri Administrative Procedures Act Rulemaking Requirements

3. The "clarification" sought by AmerenUE's Motion amounts to a generally applicable Commission statement interpreting 4 CSR 240-4.020 and therefore is a rulemaking requiring strict compliance with the Missouri Administrative Procedure Act ("MAPA") rulemaking procedures.

4. MAPA is codified in Chapter 536 and sets procedures for promulgating rules. *See* Mo. Rev. Stat. §§ 536.021 and 536.025. If the procedures are not followed, the agency's statement is void and the agency can be subject to payment of attorneys' fees. *See* Mo. Rev. Stat. §§ 536.021.7 and 536.021.9. Section 386.250(6) provides that MAPA rulemaking requirements apply to the Commission. A "rule" is any "agency statement of general applicability that implements, interprets, or prescribes law or policy…. The term includes the amendment or repeal of an existing rule…."

Mo. Rev. Stat. § 536.010(4). A "rule" does not include "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." Mo. Rev. Stat. § 536.010(4)(b).

5. Here, AmerenUE seeks "guidance on whether and to what extent the following activities (***or similar activities***) are permissible under the statutes and rules governing Commission proceedings, including subsection (4) [of 4 CSR 240-4.020]:"

> a. May a rate case party or an association of rate case parties (or their agents, representatives, consultants, or contractors) engage (directly or indirectly) in a public relations or advertising campaign designed to address matters at issue or that are reasonably expected to be at issue in a pending rate case or form or encourage the formation of a group (whether formal or informal, including a not-for-profit corporation or other juristic entity) that engages (directly or indirectly) in such a public relations or advertising campaign?
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> b. May a rate case party or association of rate case parties (or their agents, representatives, consultants, or contractors) fund (directly or indirectly) such a group that engages (directly or indirectly) in a public relations or advertising designed to address matters at issue or that are reasonably expected to be at issue in a pending rate case?
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> c. May such a group formed or funded (directly or indirectly) by a party or association of rate case parties (or their agents, representatives, consultants, or contractors), or a party or association of parties, engage in a public relations or advertising campaign (such as by use of personal or automated phone calls, e-mails, print mailings, and television or radio advertising) designed to address matters at issue or that are reasonably expected to be at issue in a pending rate case?

(emphasis added) AmerenUE Motion, at 3.

6. AmerenUE is ***not*** seeking an interpretation as to a specific set of facts, but instead seeks statements of general applicability from the PSC with respect to its regulation 4 CSR 240-4.020(4) which provides:

> [i]t is improper for any person interested in a case before the commission to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission, its staff or the presiding officer.

7. The "clarification" that Ameren seeks is a PSC statement of general applicability that is not intended to apply, nor would it apply, to only a specific set of facts. Thus, any interpretation by the PSC would be a rule that must comply with MAPA. The clarification sought would amount to "a substantive rule establishing a standard of conduct which has the force of law." As such, it is not merely a general statement of policy that fails to rise to the level of a rule. "[I]mplicit in the concept of the word 'rule' is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public. Rulemaking, by its nature, involves an agency statement that affects the rights of individuals in the abstract." Missouri Soybean Assoc. v. Mo. Clean Water Comm., 102 S.W.3d 10, 23 (Mo. banc 2003); *See also* NME Hospitals, Inc. v. Department of Social Services, Division of Medical Services, 850 S.W.2d 71,74 (Mo. banc 1993) (standards of general applicability are rules that require adherence to rulemaking procedures).[1]

8. The "clarification" requested by AmerenUE would set standards of general application for what type of communications (advertising, public relations, or "similar activities") constitute conduct "bring[ing] pressure or influence to bear upon the commission, its staff or the presiding officer." The clarification would apply in the instant rate case and ***potentially all other rate cases*** and matters before the PSC. Therefore, if the PSC does desire to issue its general interpretation of the regulation, it must follow the MAPA rulemaking procedures before promulgating any such standards. For that reason, the Commission should deny AmerenUE's clarification Motion and refrain from issuing interpretations of the regulation.

[1] State ex rel. City of Springfield v. Public Service Commission, 812 S.W. 2d 827, 833 (Mo. App. 1991) deserves mention. There, the Court of Appeals sustained the PSC's rulemaking, which followed Chapter 536's rulemaking requirements. Notwithstanding that compliance, certain parties argued that the PSC's Order of Rulemaking violated Chapter 536 in that it contained answers to questions raised by commenters. The Court rejected that argument on the ground that those answers were not viewed as part of the rules there under challenge.

II. Any Interpretation of 4 CSR 240-4.020 that Creates Standards for Attorney Conduct that Conflict with the Missouri Supreme Court Rules of Professional Conduct Would Be Ineffectual[2]

9. Any interpretation of the Commission's rule that purports to create standards governing attorney conduct that differ from and are inconsistent with the Missouri Rules of Professional Conduct ("MRPC") would exceed the Commission's legal authority.[3] An administrative agency does not have the jurisdiction to set limits on attorney ethics that are contrary to the MRPC. MRPC 4-3.6 states:

> **Rule 3.6 Trial Publicity**
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> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a **substantial likelihood of materially prejudicing** an adjudicative proceeding in the matter.
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> (b) **Notwithstanding Rule 4-3.6(a), a lawyer may state:**
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> (1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
> (2) **information contained in a public record**;
> (3) that an investigation of a matter is in progress;
> (4) **the scheduling or result of any step in litigation;**
> (5) **a request for assistance in obtaining evidence and information necessary thereto; . . .**

MRPC 4-3.6 (emphasis added). Any interpretation preventing attorneys from disseminating information contained in a public record directly contradicts the MRPC by limiting attorney public

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[2] It is important to note that nothing in Commission Rule 4 CSR 240-4.020 applies to the public communications of a party itself, apart from the ethical rules applicable to its attorneys.

[3] Subsection (1) of 4 CSR 240-4.020 reminds attorneys to comply with the MRPC, and then purports to restate portions of it, although this restatement is inconsistent with the MRPC. 4 CSR 240-4.020(1) appears to be referencing the predecessor to the MRPC, which were adopted on July 1, 1995. In any event, the rules governing an attorney's conduct are not even applicable to public communications being made by parties to an administrative proceeding, which are the basis for the "clarification" sought by AmerenUE.

comments. Furthermore, an interpretation of the Commission rule contradicting the MRPC 4-3.6 standard of "substantial likelihood of materially prejudicing an adjudicative proceeding" for extrajudicial statements would also exceed Commission authority. Comment [6] to MRPC 4-3.6 states:

> Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. Rule 4-3.6 will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Commission rate cases are administrative, non-jury hearings. The Commissioners are sophisticated triers of fact keenly aware of the difference between evidence on the record in a rate case and extrajudicial speech made off the record.

10. Missouri attorneys also have duties to keep clients reasonably informed of the status of matters and promptly comply with requests for information. MRPC 4-1.4. In the case of OPC, media contact is the only reasonable means to keep the millions of ratepayers informed and the public interest effectively represented in a proceeding with widely-felt repercussions. Media reports also serve the essential purpose of informing the public regarding Commission matters of vital interest to them. Consequently, any interpretation of the Commission's rule that contradicts the duty of the Public Counsel to keep his clients reasonably informed of the status of matters in this rate case and blocks the public's access to crucial information would be beyond the Commission's authority.

11. In addition, one of the underlying principles of the MRPC is that an attorney must "zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system." Preamble to MRPC at [9]. In order to do so, an attorney must have the option of

providing information to and communicating with the media provided that it is done so in a manner consistent with prevailing legal ethics.

III. The Hypothetical Activities for which AmerenUE Requests Clarification from the Commission are Not Matters that Would Invoke 4 CSR 240-4.020

12. None of the hypothetical activities described in sub-paragraphs a, b, and c on page 3 of AmerenUE's Motion violate 4 CSR 240-4.020, and all of these activities are constitutionally-protected activities that are beyond the Commission's regulatory authority. Moreover, AmerenUE makes no suggestion that any of the hypothetical activities described in its Motion would prevent Commissioners from fairly adjudicating the facts of a utility rate case.

13. Furthermore, none of the public statements for which the Consumer Parties have been responsible regarding this rate case have been anything but "professional, courteous, and civil," as dictated by Preamble Item [9] to the MRPC. If anything, the public statements for which the signatory Consumer Parties have been responsible regarding this rate case have simply urged public discourse and proper participation in the rate case, and have certainly not been aimed at improperly influencing the Commissioners.

14. A logical reading of 4 CSR 240-4.020(4) is that it is designed to do what it says and no more. One of the first principles of statutory or rule construction is that words are to be given their ordinary meaning. Undefined words are given their plain and ordinary meaning, which is found in the dictionary. Section 1.090, RSMo 2000; Cook Tractor Co., Inc. v. Dir. of Revenue, 187 S.W.3d 870, 873 (Mo. banc 2006). "Pressure" is defined as "to force, as by overpowering influence or persuasion."[4] Bringing pressure to bear on a Commissioner "directly" means threatening something or promising something. Bringing pressure "indirectly" means asking or inciting

[4] American Heritage Dictionary, Second College Edition, 1985.

someone else to do the same. If the Commission had meant to create a rule that restricted the ability of parties (or non-party associations) to perform media outreach activities, it would have done so.[5]

15. The activities which AmerenUE references in its motion ("public relations" and "advertising campaigns") have nothing to do with influencing the Commission. *See* Exhibits to AmerenUE Motion. These communications are solely educational and directed at the public, not the Commission. Encouraging the public to participate in the "upcoming Ameren rate hike hearing" cannot be construed as improperly influencing the Commission. *Id.* The authors of 4 CSR 240-4.020(4) obviously recognized that they could not legally restrict public communication, as the regulation does not mention public communications **at all**. The language of 4 CSR 240-4.020(4) is plain and clear—it does not encompass public communications directed at ratepayers. The rule only refers to private contacts with the Commission and its staff ("it is improper to sway the judgment of the commission by undertaking, directly or indirectly, outside of the hearing process…"). Contacts "outside of the hearing process" cannot rationally be construed to mean anything other than contacts to the Commission or its advisory and adjudicative staff.

16. This provision must be read in the context of other portions of this rule. For example, 4 CSR 240-4.020(2) specifically restricts *ex parte* contacts with the Commission or examiner. The concluding subsection, subsection (8), again emphasizes the importance of avoiding *ex parte* communications. There is no mention of contacts or communications with the public or with members of an interested organization, such as AARP or the CCM. The only mention of public communications in the full rule relates only to an attorney's obligations under rules governing an attorney's professional conduct, which do not apply to interested parties to an administrative

[5] Of course, as discussed in greater detail above, such a rule would likely be unconstitutional.

proceeding. To the extent that these types of public communications would be construed as being prohibited under this provision, the provision would be patently unconstitutional.

17. Moreover, although it may be presumed that Commissioners read newspapers and trade journals, it is an enormous leap to insinuate, as AmerenUE does, that the Commission might base its decisions on media reports, web sites, or other means of public information. The Commission is required to decide contested cases only on the record evidence, to comply with the limitations established by the Missouri General Assembly to ensure that they do so, and to faithfully execute their offices. *See* 4 CSR 240-2.150(1) ("The record of a case shall stand submitted for consideration by the commission after the recording of all evidence…"); *See also* Mo. Exec. Order 92-04(1)(C) ("[e]mployees shall not allow political participation or affiliation to improperly influence the performance of their duties to the public"). Much of what AmerenUE cites in its Motion is the posting of material on websites, but it is difficult to envision how posting material on a website could violate 4 CSR 240-4.020(4) in a Commission case. If the Commissioners do not affirmatively take steps to visit the website, they cannot be influenced. If the Commissioners read an account of a website in a newspaper article, it is no more proscribed than their reading of any other media report on subjects that may touch on pending contested cases.

IV. To the Extent that the Commission Believes it is Lawful to Interpret 4 CSR 240-4.020, the Commission Should Hold That the Activities Listed in AmerenUE's Motion Cannot be Limited Due to First and Fourteenth Amendment Protections of Freedom of Political Speech

A. First and Fourteenth Amendment Protections for Freedom of Political Speech Extend to Individuals and Associations Regulated by the Commission

18. The First and Fourteenth Amendments guarantee that no state shall abridge the freedom of speech.[6] The U.S. Supreme Court has "emphasized that the First Amendment 'embraces at least the liberty to discuss publicly and truthfully all matters of public concern.'" Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 534 (1980) (hereinafter "Con Edison"). "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also the prohibition of public discussion of an entire topic." *Id.* at 538. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, **association**, union, or individual." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) (emphasis added).

19. In Con Edison, a utility enclosed inserts into its utility bills touting the benefits of nuclear energy. Con Edison at 532. The New York Public Service Commission issued a "Statement of Policy on Advertising and Promotional Practices of Public Utilities," where it forbid bill inserts to discuss political matters. *Id.* The Court ruled that the New York PSC did not have the right to limit the utility's speech on political matters via either a time, place, or manner restriction, or by way of the very strict scrutiny that applies to restricting the speech of a private person: "the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Id.* at 540. Thus, the Commission has neither the right nor the ability to control the speech of an entity explicitly regulated by the Commission, let alone other parties before it, and especially not an association of consumers outside of the Commission's purview.

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[6] Article I, Section 8 of the Missouri Constitution also protects free speech, stating, "That no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject."

B. The First Amendment Protects the Free Speech of the Consumer Parties, as well as any Association that includes a Consumer Party, Regarding Any Topic Addressed by AmerenUE's Rate Increase Request

20. AmerenUE's Motion cites public relations materials that have been circulated by a variety of parties and non-parties to the case, and requests that the Commission issue an order regarding whether organizations comprised of parties to a rate case are prohibited from engaging in the public discussion of issues by 4 CSR 240-4.020(4). *See* AmerenUE's Motion, pp. 2-3. All of the promotional materials cited by AmerenUE only reference information included in the public record, such as statements, facts, and proposals set forth in the parties' filed testimony and pleadings. Additionally, both parties and non-parties to this case are engaged in public education and outreach regarding legislative proposals, opportunities for public participation at local hearings, and other issues impacting energy costs. Some of the Consumer Parties have engaged in constitutionally-protected public discussion of this case as individuals, as associations, and through their attorneys. Some have not engaged in such public discussion, but may do so in the future.

21. All speech regarding matters of general public interest is constitutionally-protected free speech, which cannot be infringed without withstanding the most demanding scrutiny by a reviewing court. The establishment of regulated monopoly utility rates is a necessarily governmental matter that affects all utility users, which are the overwhelming majority of citizens. As noted in Con Edison, the government must meet an extremely high bar to chill or ban such speech. Any interpretation of 4 CSR 240-4.020(4) must properly take such constitutional constraints into account.

22. It is proper and lawful for all persons, including the Consumer Parties, to increase awareness of the current case among interested stakeholders in the time, place, and manner of their choice and without fear of reproach or the burden of responding to utility pleadings seeking to force parties to explain or justify their speech. It is proper and lawful for all persons to notify the public

regarding opportunities for public comment in this case. It is proper and lawful for all persons to increase discussion of a public matter in public places, including at the times and places designated for such a discourse by the Commission. Thus, the Commission should not interpret its rule to allow unlawful restrictions on free speech.

C. The First Amendment Protects the Free Speech of Attorney Communications in the Media Regarding AmerenUE's Rate Increase

23. The U.S. Supreme Court has previously ruled that "in some circumstances press comment [by an attorney involved in a case] is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that [the attorney's] conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1058 (1991). Consequently, as long as an attorney's comments do not threaten the legal process, the comments should generally enjoy First Amendment protection.

24. Public comment by an attorney to an ongoing case is often important to ***preserving*** the legal process. For example, the Public Counsel is charged with protecting the interests of the public. It would be extraordinarily cost-prohibitive, if not impossible, for Public Counsel to perform his function of representing the general public without being able to disseminate the issues and OPC's position on them through the media to the thousands of ratepayers represented by OPC. The same is true for other parties, which deserve equal treatment under the law regarding the ability to openly discuss matters of serious public importance and far-reaching economic implications.

D. There is no Compelling State Interest for the Commission to Limit Free Speech

25. Utility rate cases are essentially public matters, as demonstrated by the Commission's public hearing procedure. Citizens are sworn in, and their testimony is taken on the record as evidence in the rate case. Co-signatories to this pleading have been urged by the Commission to

encourage citizen participation at these local public hearings. The Commission's own website encourages such public participation and comment in this particular rate case.[7] This is exactly what several interested parties to the case have been doing: communicating to citizens regarding legal means of participation in the rate case, which is a governmental matter of broad and deep public significance.

26. There is no compelling state interest served by limiting communications by the Consumer Parties or by other persons. The Commissioners are **sophisticated triers of fact** who know the difference between evidence in a rate case and promotional materials directed to the public.[8] The Commission is a sophisticated government agency assigned the task of regulating investor-owned electric, steam, natural gas, water and sewer and telephone companies. As part of its mission statement, the Commissioners are charged with "provid[ing] an efficient regulatory process that is responsive to all parties, and perform[ing their] duties ethically and professionally."[9] All five of the current Commissioners on the Board are licensed attorneys, and have served as legislators, legislative advisors, counsel to government agencies, or in private practice. The implication that the Commissioners would be unable to separate facts on the record from advertising campaigns aimed at the general public is refuted by their significant combined legal experience and proficiency. Protecting sophisticated triers of fact from items in the media is far from a compelling enough interest to warrant limitation of speech in this case. All courts and administrative agencies are frequently the subject of attorney comment, public and media discussion and public campaigns. A

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[7] *See* http://psc.mo.gov/ (stating in a heading that "Customers Invited to Comment on AmerenUE Request").

[8] The courts in this state have held officials occupying quasi-judicial positions to the same high standard as apply to judicial officers. Union Elec. Co. v. Pub. Serv. Comm'n**,** 591 S.W.2d 134, 137 (Mo.App. W.D. 1979). As such, the Commissioners are aware of and understand their responsibility under the Code of Judicial Conduct that they "shall not be swayed by partisan interests, public clamor or fear of criticism." Canon 3-2.03(B)(2).

[9] *See* http://www.psc.mo.gov/about-the-psc.

campaign to educate and inform the public will not create any likelihood of "bringing pressure or influence to bear upon the commission" pursuant to the language of 4 CSR 240-4.020(4).

27. Similarly, no compelling government interest is served by limiting the attorneys' speech in rate cases. In Gentile, the compelling governmental interest was concern over how statements by an attorney may taint the decision-making ability of the jury in a criminal case. Even in a jury-tried criminal case, the Supreme Court noted, "[O]nly the occasional case presents a danger of prejudice from pre-trial publicity." *See* Gentile at 1054-5. A matter of government regulation that economically impacts the overwhelming majority of the public heard by a panel of sophisticated triers of fact is no such "occasional case." Because of the public nature of PSC rate cases, the standard regarding attorney speech should not be restricted except in highly unusual and compelling circumstances where the public speech involved is materially likely to prejudice the quasi-judicial proceeding. And in such extraordinary cases, the Commission should explain specifically how the public speech involved was "bringing pressure or influence to bear" upon the Commission. In the present case, there is no basis to suggest that the Commission would be prejudiced by public discussion and presents no unusual or compelling circumstances that would justify restrictions on attorney speech.

E. AmerenUE Has Itself Engaged in Constitutionally-Protected Free Speech in Numerous Rate Cases, Including the Current Rate Case

28. Indeed, AmerenUE's own actions show that rate cases like this one do not have the necessary unusual and compelling circumstances necessary to limit free speech. In addition to creating its own website designed to present information about the recent rate request,[10] AmerenUE has used the media on numerous occasions to articulate its reasons as to why its request for a $402 million rate increase (an increase of eighteen percent) is justified. For example, on July 24, 2009,

[10] *See* http://www.ameren.com/UEPrice/.

AmerenUE published a news release entitled "AmerenUE Requests Increase in Electric Rates to Continue Providing Reliable Power to Customers."[11] *See* Exhibit 1 ("News Release"). In the News Release, AmerenUE claims its electric rates are below the national average and below the approved electric rates of other investor-owned utilities in Missouri. *See* Exhibit 1, p. 1.

29. AmerenUE did not stop its media coverage with the initial news release. In periodicals such as *The St. Louis Post Dispatch*,[12] *Electric Power Daily,*[13] *Datamonitor Wires,*[14] and *Electric Utility Week*,[15] AmerenUE took the opportunity to present favorable information regarding its rate proposals. In one article, Mr. Warner Baxter, President and CEO of AmerenUE, cited higher fuel costs and a drop in wholesale power prices as the culprits for the rate increase.[16] Richard Mark, the senior vice-president of Missouri Customer Operations, discussed how 60,000 customers have benefitted because AmerenUE has buried more power lines and has coordinated additional tree trimming efforts.[17]

30. According to recently filed testimony by Gary S. Weiss, AmerenUE's Manager of Regulatory Accounting, AmerenUE has increased its advertising expenses since the last rate case. *See* Case No. ER-2010-0036, Tr. 450, ln. 4-7. With an expanded budget, AmerenUE is enjoying the benefits of self-promotion through increased media exposure. Consumer Parties have not asked the

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[11] *See* http://www.ameren.com/UEPrice/ADC_RateRequestNewsRelease.pdf.

[12] *See* 2009 WLNR 14322564, *St. Louis Post Dispatch*, "AmerenUE seeks rate hike of 18 pct: If utility gets all of what it wants, the average residential bill would rise about $15 a month" (July 25, 2009); *see also* 2009 WLNR 14425432, *St. Louis Post Dispatch,* "Energy costs are climbing again: AmerenUE warned of rate-hike requests, and it's following through" (July 26, 2009).

[13] *See* 2009 WLNR 15448848, *Electric Power Daily*, "AmerenUE seeks $402 million Missouri rate hike" (July 27, 2009).

[14] *See* 2009 WLNR 14483567, *Datamonitor Wires*, "AmerenUE files request for electricity rate increase" (July 28, 2009).

[15] *See* 2009 WLNR 16006982, *Electric Utility Week,* "AmerenUE seeks $402 million Missouri rate hike to cover fuel costs, sales decline" (Aug. 3, 2009).

[16] *See* 2009 WLNR 14322564, *St. Louis Post Dispatch*, "AmerenUE seeks rate hike of 18 pct: If utility gets all of what it wants, the average residential bill would rise about $15 a month" (July 25, 2009).

[17] *Id.*

Commission to issue a similar "clarification" regarding the legality of AmerenUE's advertising and public and media comment supporting its rate increase.

31. This is not the first rate case where AmerenUE engaged in public relations and media commentary to support its proposals For example, on January 28, 2009, AmerenUE published a media release entitled "AmerenUE Responds to Coming Rate Increase with Reminders of Help for Customers in Need."[18] In this media release, AmerenUE reassured customers with the claim that while their bills will increase due to the January 27, 2009 electric rate case ruling, customers would pay rates that are below the national average. AmerenUE spent the bulk of the release discussing how customers can use a variety of methods and payment plans to make prompt payments. In short, AmerenUE has consistently engaged in media comment and public relations efforts to present its reasons for increasing rates and to try to increase public acceptance of the financial burden of rate increases on its customers. The timing of AmerenUE's Motion is curious, given that 4 CSR 240-4.020(4) has been in place for decades. Until now, AmerenUE never expressed concern regarding the "clarity" of this rule, yet has engaged in extensive public campaigns to promote its rate increases in this and in every rate case it has filed with the Commission. Consumer Parties do not contend, and have never contended, that AmerenUE's media efforts constituted an attempt to bring pressure to bear on the Commissioners.

32. AmerenUE has used public relations and media comment to explain its current rate increase request, as it has regularly done in past cases. Ratepayers should be afforded the same freedom of speech and expression, and the Commission should do nothing to limit, discourage or chill that freedom which is so essential to the public interest.

WHEREFORE, for the foregoing reasons, the Consumer Parties request that: (1) the Commission deny AmerenUE's Request For Clarification Respecting Application of the

[18] *See* http://ameren.mediaroom.com/index.php?s=43&item=593.

Commission's Statutes and Standard of Conduct Rules; or (2) if the Commission does attempt to interpret the regulation at issue, that the Commission not issue a "clarification" that limits the free speech of parties and their attorneys.

Dated: December 30th, 2009.

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 30th day of December, 2009, to all parties on the Commission's service list in this case.

/s/ Diana Vuylsteke