BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

AMERENUE'S MOTION FOR ANY NECESSARY LEAVE TO FILE ADDITIONAL TESTIMONY, FOR ANY NECESSARY WAIVERS, AND TO DENY PENDING MOTIONS

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company) and, pursuant to 4 CSR 240-2.130(8) and 4 CSR 240-2.015,[1] and SB 179 (codified at Section 386.266, RSMo[2]), hereby requests any necessary leave to file additional testimony submitted concurrently with the filing of this Motion, for any necessary waivers, as discussed herein, and to deny certain pending motions relating to its filing made concurrently herewith, as discussed herein. In this regard, AmerenUE states as follows:

1. Filed concurrently with this Motion are supplemental direct testimonies of eight AmerenUE witnesses. These testimonies "update [AmerenUE's] Direct Case, i.e., [AmerenUE's] forecasted data for April to June 2006, to actual data, including limited Supplemental Direct Testimony." *Commission's Order Adopting Procedural Schedule and Test Year*, September 12, 2006. In the case of Mr. Zdeller, his supplemental direct testimony relates to the impacts of the July, 2006 storms in AmerenUE's service territory. *Id.* n.*. While the Commission's above-referenced order authorizes the filing of this supplemental direct testimony, if and to the extent the Commission believes it is required, the Company requests leave to file this supplemental direct testimony pursuant to 4 CSR 240-2.130(8). Leave, if the Commission believes it is required, should be granted because granting leave is entirely consistent with the

[1] To the extent applicable, if any.
[2] All statutory references are to the Revised Statutes of Missouri (Cum. Supp. 2005), unless otherwise noted.

purpose of requiring the pre-filing of testimony in the first place. That is, as the Commission recognizes, to give parties "notice of the claims, contentions, and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise *at the hearing*" (emphasis added). *See, e.g., In the Matter of Laclede Gas Company*, 202 Mo. PSC LEXIS 1199, Case No. GT-2003-0032 (Aug. 29, 2002). Given that hearings in this case are more than five and a half months away, supplementation serves those purposes and is proper.

2. Also filed concurrently with this Motion is the direct testimony of Martin J. Lyons, Jr., together with a tariff relating to the rate adjustment mechanism (RAM) which was requested in the Company's original July 7, 2006 rate case filing, subject to the promulgation of satisfactory SB 179 rules. Mr. Lyons' direct testimony is filed pursuant to the provisions of Section 386.266, RSMo (codifying SB 179, as noted above), and as contemplated by the SB 179 rules promulgated by the Commission just eight days ago. *See Final Orders of Rulemaking* issued September 21, 2006, respecting SB 179 rules, to be codified as 4 CSR 240-20.090 and 4 CSR 240-3.161. While even today those rules are not binding as a matter of law (*see* Section 536.021.8, providing that rules become effective after the thirtieth day of publication in the *Code of State Regulations*), the content of those rules became known when the Commission issued its *Final Orders of Rulemaking*. Because those rules "implement the application process," Mr. Lyons' direct testimony and schedules reflect compliance with those rules.

3. Some parties that have made no secret of the fact that they oppose FACs generally have argued that Mr. Lyons cannot file his testimony, nor can AmerenUE file its FAC tariff, except, apparently, on day one of the rate case.[3] Indeed, some parties argue that the Commission is powerless to accept Mr. Lyons' testimony, the FAC tariff, and to consider AmerenUE's FAC

[3] These arguments have already been addressed in detail in the Company's Response to Pleadings Filed on August 31, 2006 Respecting AmerenUE's Motion to Adopt Procedures for Implementing AmerenUE's Requested Fuel Adjustment Clause (the Company's "Response"), which is incorporated herein by this reference.

request on the merits. AmerenUE's Response demonstrates, in detail, that these contentions fail as a matter of law, but AmerenUE will address some of the issues that have been raised below.

4. Aside from the fact that this Commission has wide discretion to waive any of the procedural rules that others have argued prevent the Company's filing, the rules cited by these parties (4 CSR 240-2.065(1) and 4 CSR 240-2.130(7)(A)) simply do not apply to AmerenUE's filing.

5. 4 CSR 240-2.065(1), which pre-dates the enactment of SB 179 and in any event could not trump or control the Legislature's enactment of SB 179 (including specifically Section 386.266.9), is directed toward a "tariff filed which proposes a general rate increase . . .." 4 CSR 240-2.065(1). Under this procedural rule, a "tariff filed which proposes a general rate increase" is to be filed when the general rate increase is proposed, i.e., at the inception of the rate case, unless, again, the Commission chooses to waive the rule. *See* 4 CSR 2.015, which authorizes the Commission to waive any of its procedural rules for good cause.[4] An FAC tariff does not propose a general rate increase. Indeed, the FAC tariff filed by the Company today makes no change in rates, even as of the effective date of a Commission order in this rate case. Rather, the FAC tariff establishes a *mechanism* by which *later* rate changes (which might be increases, or might be decreases) may occur. Indeed, the rule states that it does not apply to "requests for changes in rates made pursuant to an adjustment clause . . .." The FAC tariff is an adjustment clause – i.e., the rule does not apply by its very terms. Moreover, as discussed in the Company's Response, the Company can request an FAC before rules are in place, and rules were not in place

[4] These same parties who oppose SB 179 and FACs generally have argued that this cannot be allowed, or else a tariff filed after day one in the rate case would not be suspended for the "full 11 months." As AmerenUE's Response addresses in detail, the Commission does not have to suspend any tariff *at all*, or could suspend a later filed tariff for *up to* 120 days or *up to* an additional six months. Section 393.150, RSMo. It has never been the law that the Commission must suspend any tariff for 11 months, or even one day, although in general, tariffs cannot become effective until 30 days after they are filed. Section 393.140(11), RSMo.

governing the content of any such tariff until eight days ago. It is therefore obvious to anyone who desires to address an FAC request, *on the merits*, that SB 179 contemplated that FAC tariffs would and could be filed at some point within a rate case after rules that "implement the application process" were known.[5] Section 386.266, RSMo. Consequently, not only does 4 CSR 240-2.065(1) not apply by its terms, but if it did apply, it would be inconsistent with Section 386.266, RSMo, and therefore invalid, if it were applied in a way that precludes the very filing contemplated by SB 179.

6. It follows then that direct testimony respecting an FAC tariff was not required to be filed until after the rules were known. Indeed, the Company believes that given SB 179's allowance for requesting an FAC before rules are in place, the only possible "time limit" on when an FAC tariff and detailed supporting information is necessary might arguably be found in Due Process principles. Consider, however, the fact that in virtually every civil and criminal proceeding in every court of law, the parties, even a criminal defendant, don't hear the testimony to be offered by the other side until *at the hearing*. In this rate case, Mr. Lyons' direct testimony is being provided five and a half months *before* the hearing.

7. For the same reasons, 4 CSR 240-2.130(7)(A) does not apply. Even if the above-discussed rules did apply, the rules should be waived,[6] as discussed earlier, and the Company

[5] It is noteworthy that those who have argued that AmerenUE cannot make any filings at this time relating to the FAC are the very same parties who, quite publicly, on the record before this Commission and otherwise, have expressed almost universal condemnation of SB 179, FACs, and the Commission's rules adopted on September 21, 2006. Their "arguments" must be viewed in that context.

[6] Even if the Commission believed it did apply, as noted, the Commission is free to waive its own rules (4 CSR 240-2.015) based upon good cause. The Commission has noted that although "good cause" eludes a precise definition, it refers to a remedial purpose that is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one. *In the Matter of the Application of Missouri Gas Energy*, Case No. GO-2005-0273, Mo. PSC LEXIS 683 (*Order Approving Tariff in Compliance with Commission Order*, May 11, 2005) (*citing Bennett v. Bennett*, 938 S.W.2d 952, 957 (Mo. App. S.D. 1997)). Moreover, Missouri courts also recognize that good cause *should be interpreted liberally* to avoid manifest injustice. *See, e.g., Stroup v. Leipard*, 981 S.W.2d 600, 603 (Mo. Ct. App. 1998). Given Section 386.266.9, the substantial time left before direct testimony is due or a hearing is to be held, a clear injustice would occur if FAC opponents were allowed to stop this Commission from considering an

should be allowed to supplement its direct testimony under 4 CSR 240-2.130(8). The Company does not believe that Mr. Lyons' testimony is supplemental testimony, given the unique provisions of SB 179, but if the Commission views it as such, supplementation is appropriate.

8. This is appropriate because, for the reasons already discussed, how the application process would be implemented and the "structure, content and operation"[7] of an FAC was not known until the Commission issued its rules eight days ago. It is axiomatic that a tariff and supporting testimony that presumably would address the details of applying for an FAC and the structure, content and operation of the FAC was not required to be filed before the very rules that prescribe those details and that provide for that structure, content and operation were promulgated.

9. Moreover, the Commission has previously allowed supplementation (if that is at issue here at all) much deeper into a rate proceeding. For example, in *In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Gas Service*, 2000 Mo. PSC LEXIS 1247 (Case No. GR-2000-512) (Sept. 5, 2000), a unanimous Commission allowed (over the objection of Staff and Public Counsel) the filing of supplemental direct testimony five and a half months (approximately 160 days) after the rate case was filed (and *just 13 days* before the other parties' direct cases were due). In doing so, the Commission specifically noted that in "complex rate cases such as this one, the more evidence the Commission has, the more informed its decision will be."[8]

10. The facts of that case are instructive. AmerenUE's supplemental filing in that case included results of an individual site inventory that AmerenUE was unable to complete by

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FAC request. Good cause for a waiver, if the Commission determines one is needed, exists, and if deemed necessary by the Commission, the Company hereby requests that a waiver be granted.

[7] Section 386.266.9, RSMo.

[8] By contrast, AmerenUE's September 29 filing will occur just 84 days into the case, and 10 weeks before direct testimony from others is due.

the time the rate case was filed. The site inventory required an updated cost of service study and an updated calculation of rates – both items go to the heart of the general rate increase request, as opposed to a rate adjustment mechanism that itself produces no increase or decrease in rates. Public Counsel argued, similar to its argument in this case, that AmerenUE should in effect be required to start its rate case over (i.e., that one must file every single thing on day one) rather than to simply supplement its case. This would of course delay a full examination of AmerenUE's rates on the timetable contemplated when AmerenUE committed to file a rate case by July 10.[9] Staff principally expressed concerns about the "severe disadvantage" the timing of the supplemental filing placed on the other parties, given its proximity to the due date of their direct cases.

11. The Commission, as noted above, expressed a desire to receive pertinent information to inform its decision, *on the merits*, allowed the supplementation and simply adjusted the procedural schedule by a few weeks to allow others to supplement their direct cases. Such an adjustment is not required in the present case given that there will be more than enough time for all parties to analyze the Company's filing, conduct discovery, and respond to the details of AmerenUE's FAC request.

12. The Commission has also previously rejected the idea that every tariff must be filed in the rate case on day one. For example, in Case No. GT-2001-662, the Commission consolidated Laclede Gas Company's tariff filing requesting the establishment of a weather mitigation tariff (itself a kind of adjustment clause) into Laclede's then-pending rate proceeding (Case No. GR-2001-662). Even though at the time of the consolidation Laclede's rate case had

[9] As the Commission will recall, at its May 8, 2006 Agenda, the Staff recommended that the Staff not pursue a many month's-long formal investigation of the Company's earnings which might or might not lead to an over-earnings complaint against the Company if the Company was willing to commit to file a rate case on or before July 10, 2006, which would allow a comprehensive examination of the Company's earnings and rates. The Company made that commitment at that time, and met that commitment with its filing on July 7, 2006.

been pending for several months (far longer than the pendency of the present rate case), the Commission consolidated the weather mitigation tariff issue into the rate proceeding (over Staff's objection), and suspended the weather mitigation tariff to match the operation of law date for the rate case.

13. At bottom, every party to this case was informed when this rate case was filed that the Company was requesting to implement an FAC as part of this rate case, subject to the promulgation of the necessary rules required by SB 179. At that time, neither rules implementing the application process nor rules governing the content, operation or structure of an FAC existed. Today, eight days after rules were promulgated, the Company is filing everything required by those rules, and every party to this case will have approximately 10 weeks to do what they believe is necessary to file whatever direct testimony they may wish to file respecting the Company's FAC request. There will be additional opportunities to address this issue in rebuttal and surrebuttal testimony, and hearings on this and every other issue in this case will not occur until more than five and a half months from now.

WHEREFORE, if and to the extent the Commission believes it is required, the Company hereby requests leave to file the supplemental direct testimony submitted on this date in this case by Gary S. Weiss, Timothy D. Finnell, Shawn E. Schukar, James R. Pozzo, Lee R. Nickloy, Richard A. Voytas, C. Kenneth Vogl, and Ronald C. Zdeller, requests leave to file the direct testimony submitted on this date in this case by Martin J. Lyons, Jr., as well as the tariff denominated as Rider A – Fuel and Purchased Power Adjustment Clause, also submitted this date, if and to the extent required, requests a waiver of Commission Rules 4 CSR 240-2.065(1), 4 CSR 240-2.130(7)(A), or any other waivers the Commission deems necessary related to the Company's filing, requests that the Commission deny the State of Missouri's Motion to Strike

Portions of the Testimony of Union Electric Witness Warner L. Baxter and Public Counsel's Motion for a Directed Verdict,[10] and for such other and further relief the Commission deems proper under the circumstances.

Respectfully submitted,

Dated: September 29, 2006

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[10] The State's and Public Counsel's Motions are premised upon the alleged impropriety of the Company's filing made this date and, concurrently with granting the Company's Motion herein, the State's and Public Counsel's Motions should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 29th day of September, 2006.

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