BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Consideration and Implementation of Section 393.1075, the Missouri Energy Efficiency Investment Act.	)))	Case No. EX-2010-0368

AMERENUE RESPONSE TO ORDER DIRECTING BRIEFING

COMES NOW, Union Electric Company d/b/a AmerenUE (AmerenUE), and in response to the Missouri Public Service Commission's (Commission) *Order Directing Filing* issued in this docket on August 25, 2010, provides the following legal briefing[1] of certain issues in relation to the proposed rules for implementing the Missouri Energy Efficiency Investment Act (MEEIA)[2]:

1. On September 7, 2010, AmerenUE filed a pleading which identified three legal concerns with the current draft of proposed rules implementing MEEIA. Two of the issues identified dealt with areas where the proposed rules went beyond the statutory authority delegated to it by MEEIA and one issue identified an area where the proposed rules did not go far enough to accomplish a specific directive provided in MEEIA.

2. Reviewing first the two areas where the proposed rules[3] go beyond the authority delegated to the Commission (the incremental/cumulative goals found in 4 CSR 240-20.094(2)(A) and (B) and the criteria to be used when the Commission is considering whether or not to establish, modify or continue a cost recovery mechanism found in 4 CSR 240-20.093(2)(E)), the legal basis for both arguments is essentially the same. The

[1] By providing this pleading, AmerenUE does not waive its right to file comments or other appropriate filings or to provide testimony, including its right to raise additional legal concerns and/or reasoning, in the rulemaking process provided for under Chapter 536, RSMo.
[2] MEEIA can be found at § 393.1075, RSMo.
[3] It should be noted that these are not in fact "proposed rules." Only the Commission can "propose" rules, and must do so in accordance with Section 536.021, RSMo. These are more properly characterized as a "Staff draft" of a proposed rule, but for convenience will be referred to as proposed rules herein.

Commission is a creature of statute and its authority is limited to that delegated to it by the Missouri Legislature. The courts have held, that as a creature of statute, the Commission's "powers are limited to those conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted." *Utilicorp United Inc. v. Platte-Clay Elec. Co-op., Inc.*, 799 S.W.2d 108, 109 (Mo. App. W.D. 1990). Accordingly, whether the Commission's actions are lawful "depends directly on whether it has statutory power and authority to act." *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n of State*, 658 S.W.2d 448, 452 (Mo. App. W.D. 1983). Neither convenience, nor expediency, nor necessity is a proper matter to consider in determining whether the Commission's actions are authorized by statute. *State ex rel. Mo. Cable Telecomms. Ass'n v. Mo. Pub. Serv. Comm'n*, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996).

3. The proposed rule sets forth incremental and cumulative demand and energy savings goals for utility energy efficiency programs. First, it is undisputed that MEEIA contains no specific level of energy efficiency savings which must be attained by Missouri utilities other than setting a **goal** (the statute's language) of achieving "all cost effective demand-side savings." If the legislature had desired to require a certain level of demand-side management (DSM) savings (i.e., to prescribe a specific level of kilowatt or megawatt hours savings), it would have set forth specific levels to be achieved by Missouri utilities. It did not do so and the Commission may not amend the statute by including such a requirement on its own.

Second, even if the Commission could set goals under MEEIA, the proposed goals have no evidentiary basis which would allow the Commission to adopt them.

There has been no information upon which the Commission could find that the proposed goals represent "cost effective demand-side savings" levels. The record, such that it is, is void of any factual evidence that the goals set forth in the proposed rules are achievable or that they are cost effective. In fact, there is no evidence that the goals are based upon any Missouri specific information, much less information relevant to utilities based in completely different (rural or urban, Eastern or Western) areas of the state. Based upon the information AmerenUE has obtained through its own DSM Potential Study, these goals represent savings levels which go far beyond even the potential savings that could be achieved in a cost effective manner. Accordingly, the goals go beyond the authority granted to the Commission in MEEIA and should be rejected.

Finally, AmerenUE believes that setting goals for energy efficiency savings levels places the Commission in the role that is, by law, left to utility management. The Commission's authority to regulate certain aspects of an electric utility's operations and practices does not include the right to dictate the manner in which the Company conducts its business. *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930). Accordingly, the Commission may regulate a utility's operations as the law expressly permits, but it may not substitute its business judgment for that of the utility's management so long as safe and adequate service is being provided. Setting a minimum level of DSM savings is treading upon ground reserved to the utility and, exceeds the Commission's authority.

AmerenUE does recognize that the proposed rules labels these incremental and cumulative savings levels as "goals" rather than as hard targets and, further, that the rule states the goals aren't set to harm a utility which does not achieve them. However, that

does not mean there is not a negative consequence for failing to meet these goals. 4 CSR 240-20.094(2) states "The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may impact the utility's [demand-side program investment mechanism (DSIM)] DSIM revenue requirement…" The rule is not explicit in how that impact is to occur, but it certainly does not hold the utility harmless if it is possible for the utility's DSIM revenue requirement to be negatively impacted because the utility failed to achieve these proposed goals, which as noted, in some cases exceed even the potential suggested by AmerenUE's company-specific DSM Potential Study. This language thus apparently allows for the possibility that a utility would not be allowed to recover prudently incurred costs for its DSM programs for no other reason than the utility failed to achieve a level of savings (for which there is no basis in the first place). Accordingly, even as goals, these incremental and cumulative annual demand-side savings levels go beyond the Commission's authority as set forth in MEEIA.

4. The second area where the proposed rules go beyond the authority granted in MEEIA is the list of items the Commission must take into consideration before approving, modifying or continuing a DSIM. 4 CSR 240-20.093(2)(E) states, "In determining to approve, modify, or continue a DSIM, the commission shall consider, but is not limited to only considering, the expected magnitude of the impact of the utility's approved demand-side programs on the utility's costs, revenues and earnings, the ability of the utility to manage all aspects of the approved demand-side programs, the ability to measure and verify the approved program's impacts, any interaction among the various components of the DSIM that the utility may propose, and the incentives or disincentives

provided to the utility as a result of the inclusion or exclusion of cost recovery component, utility lost revenue component and/or utility incentive component in the DSIM."

MEEIA is very clear and sets forth explicit criteria for the Commission to consider when it is determining whether or not to establish, modify or continue the cost recovery mechanism for a utility's DSIM. MEEIA states that the Commission "shall" provide timely cost recovery for DSM programs that are (1) approved by the Commission, (2) result in energy or demand savings and are (3) beneficial for all customers in the customer class. As long as a utility meets the three requirements listed above – those listed in the *statute* -- the Commission is required by the MEEIA to provide timely cost recovery. MEEIA does not grant the Commission the discretion to do otherwise. Requiring any other test (for example, requiring expenditures involved be of a certain magnitude) for the establishment or retention of the DSIM is tantamount to amending the statute, which the Commission has no power to do.

5. The third concern set forth in AmerenUE's previous pleading was that the proposed rules do not go far enough to ensure full and timely cost recovery. MEEIA is very clear. It states the Commission shall provide timely cost recovery for utilities. A cost of energy efficiency programs is the loss of the fixed cost portion of a utility's volumetric rate related to the energy consumption that is reduced. If a utility's energy efficiency programs are successful, the utility will achieve energy savings and will not recover some portion of its fixed costs. The proposed rules do provide for the recovery of these costs. However, this section (4 CSR 240-20.093(2)(G)(4)) states that any recovery of these fixed costs "shall be implemented on a retrospective basis and all

energy and demand savings for claimed lost revenues must be measured and verified through EM&V prior to recovery." This thwarts the explicit language of MEEIA, as it does not ensure timely cost recovery. MEEIA does not require full evaluations prior to cost recovery. The proposed rules modify the tense of the statutory requirements. MEEIA requires the programs to **result** in energy or demand savings, but it does not require that the programs **have resulted** in energy or demand savings. MEEIA does not require an historical look back prior to allowing for recovery and to impose this requirement goes beyond the statutory authority granted in MEEIA and renders a important phrase contained within MEEIA (timely cost recovery) meaningless. This violates one of the most basic principles of statutory construction, that is, that every word, phrase and provision of a statute be given effect. *Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007). MEEIA demands that the Commission provides for timely cost recovery. This portion of the proposed rule perverts that aspect of the statute and renders it meaningless.

WHEREFORE, AmerenUE asks the Missouri Public Service Commission to accept this pleading in response to its August 25, 2010 *Order Directing Filing*.

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

By: **/s/ Wendy K. Tatro**
Wendy K. Tatro, #60261
Associate General Counsel
Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue, MC-1310
P.O. Box 66149, MC-131
St. Louis, MO 63101-6149
(314) 554-3484 (Telephone)
(314) 554-4014 (Facsimile)
AmerenUEService@ameren.com

CERTIFICATE OF SERVICE

I hereby certify that the above pleading was emailed to the parties of record on September 14, 2010.

/s/ Wendy K. Tatro
Wendy K. Tatro