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FILED
MAR 9 2000
Missouri Public
Service Commission

March 9, 2000

VIA HAND DELIVERY

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: MPSC Case Nos. EO-96-14, EO-96-15 and EM-96-149

Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in each of the above matters, please find an original and fourteen (14) copies of its **Application for Rehearing and for Stay of Commission's Order of February 29, 2000.**

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,

James J. Cook /sh

James J. Cook
Managing Associate General Counsel

JJC/db
Enclosures

cc: Ms. Shelly Register
Parties on Attached Service List

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via Federal Express on this 9th day of March, 2000, on the following parties of record:

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FILED
MAR 9 2000
Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Monitoring of the	)	Case No. EO-96-14
Experimental Alternative Regulation Plan of	)	Case No. EO-96-15
Union Electric Company	)	Case No. EM-96-149

UNION ELECTRIC COMPANY'S APPLICATION FOR REHEARING AND FOR STAY OF COMMISSION'S ORDERS OF FEBRUARY 29, 2000 DIRECTING RATE REDUCTION AND CREDIT SHARING

Comes now Union Electric Company ("Union Electric," "UE" or "the Company") pursuant to 4 CSR-2.160 and § 386.500.1, RSMo. to respectfully apply for a rehearing of the Missouri Public Service Commission's ("Commission") Orders of February 29, 2000, directing UE to issue a rate reduction and a sharing credit, on the grounds that those Orders are unlawful, unjust, unreasonable, and/or are not grounded on competent and substantial evidence. Moreover, because payment of a sharing credit and issuance of the rate reductions pursuant to the Orders, while those Orders are on appeal or otherwise subject to judicial review, would work an irreparable injury on the Company and is inconsistent with the governing Stipulations and Agreements, Docket No. ER-95-411 and EM-96-149 (the "Agreements"), those Orders should be stayed pending completion of that judicial review.

In the Order Directing Credit Sharing, the Commission ordered the Company to issue a sharing credit in the amount of $28,375,000 effective April 1, 2000 and to file a notice of compliance. The $28,375,000 figure is the result of the Commission's calculation of the appropriate sharing credit for the Third Sharing Period of the First EARP, as set forth to the Commission's Order of December 23, 1999. The Company sought rehearing of certain portions of that Order on December 29, 1999, which the

Commission denied. (The Application for Rehearing is attached hereto, (Attachment 1) and the arguments set forth therein are incorporated by reference.) The Company hereby requests that the Commission reconsider its Order Directing Credit Sharing. For the reasons set forth in the Application for Rehearing, the Commission's calculation of a $28,375,000 sharing credit for the Third Sharing Period of the First EARP: (1) failed to set forth findings of fact and conclusions of law on key issues, Application for Rehearing at 4-6; (2) violated the binding obligations of the Agreement and exceeded the Commission's statutory and constitutional authority, *id.* at 6-7; (3) adopted Staff adjustments that were not supported by substantial evidence and were therefore arbitrary, capricious and an abuse of discretion, *id.* at 7-14; (4) violated the due process clauses of both the Missouri and United States Constitutions, *id.* at 15-15; (5) impaired the obligation of contract, in violation of the Missouri and United States Constitutions, *id.* at 15-16; (6) effected an uncompensated taking of UE's property, in violation of the Missouri and United States Constitutions, *id.* at 16; (7) interfered with UE's reasonable and investment-backed expectations, in violation of the Missouri and United States Constitutions, *id.* at 16-17; and (8) constituted retroactive lawmaking, in violation of the Missouri and United States Constitutions, *id.* at 17-18.

In the Orders Directing Rate Reduction, the Commission ordered the Company (1) to file tariff sheets, effective date of April 1, 2000, with the Commission implementing a permanent rate reduction in the amount of $16,321,000 no later than March 27, 2000, (2) to issue credits on customer's bills for the excess revenues billed between September 1, 1998 and the effective date of the rate reduction, or April 1, 2000, beginning on May 1, 2000, and (3) to file a notice of compliance. The $16,321,000

calculation of the appropriate permanent rate reduction is a result of the Commission calculation of a $28,375,000 credit sharing for the Third Sharing Period of the First EARP. For the reasons set forth above and in the Company's Application for Rehearing, the $28,375,000 figure is incorrect, and, accordingly, so too is the $16,321,000 figure. The Company thereby asks this Commission to reconsider its Orders Directing Rate Reduction.

For the reasons set forth in the Application for Rehearing (pp. 19-22), the Commission should stay the Credit Sharing Order and the Rate Reduction Orders pending appeal. Compelling UE to issue a sharing credit in the amount of $28,375,000 and to institute a permanent rate reduction in the amount of $16,321,000 would work great and irreparable damage on the Company.

Date: March 9, 2000

Respectfully submitted,

AmerenUE

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BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Monitoring of the Experimental Alternative Regulation Plan of Union Electric Company	)))	Case No. EO-96-14

UNION ELECTRIC COMPANY'S APPLICATION FOR REHEARING OF COMMISSION'S ORDER OF DECEMBER 23, 1999 AND FOR A STAY

Comes now Union Electric Company ("Union Electric," "UE" or "the Company") pursuant to 4 CSR-2.160 and § 386.500.1, RSMo. to respectfully apply for a rehearing of the Missouri Public Service Commission's ("Commission") Report and Order herein dated December 23, 1999 ("Order"), on the grounds that certain decisions therein are unlawful, unjust, unreasonable, and/or are not grounded on competent and substantial evidence.[1] Moreover, because payment of a sharing credit pursuant to this Order while the disputed provisions of the Order are on appeal or otherwise subject to judicial review would work an irreparable injury on the Company and is inconsistent with the governing Stipulation and Agreement, Docket No. ER-95-411 (the "Agreement"), the Order should be stayed pending completion of that judicial review.

INTRODUCTION

The Company submits this Application to bring to the attention of the Commission several rulings in the Order that we believe warrant the reconsideration of the Commission because they are unlawful, unsupported by substantial evidence, or are so conclusory as to provide no insight into the legal reasoning on which particular rulings rest. Before setting out those matters, however, we believe it important to briefly address

[1] The Company herein incorporates by reference the initial and reply briefs that were filed in this case.

a concern expressed by the Commission regarding the merits of the experimental alternative regulation plan ("EARP") established by the Agreement.

Specifically, in the Order the Commission notes:

> One of the major failures of this EARP is that significant time was required for litigation of the issue of whether or not Staff or Public Counsel could even ask the Commission to review issues that caused Staff or Public Counsel significant concern.

Order at 36. We would respectfully suggest that this statement unrealistically amplifies the time taken to litigate novel questions of first impression raised here, while failing to recognize the counterbalancing benefits the EARP has brought to Missouri.

Indeed, the Commission can recall that the dispute over whether certain issues were properly before the Commission arose because Staff originally couched all the adjustments they were going to propose in terms of an accusation that UE had "manipulated" the calculation of its equity in violation of Section 3.f.vi of the Agreement. Though the Commission has not ruled on the meaning of this term, we believe that, as a matter of common sense and of construction of the Agreement, "manipulation" can only mean an act of deliberate wrongdoing, not an honest disagreement over the meaning of provisions of the EARP. Reflecting the seriousness of such a charge, section 3.f.vi requires a claim of manipulation to be initiated by a "complaint." As a result, UE asked for the Commission's interpretation of this provision, and argued that Staff had not complied with the proper procedure to bring such a charge before the Commission. As the Commission has pointed out, the controversy was essentially diffused by the Staff deciding to proceed on a less inflammatory basis, and the Commission ruling that the issue was moot because no complaint of manipulation had been filed. *See* Order at 34.

Whether disputes concerning the operation of the EARP, other than claims of manipulation, can be brought to the Commission – that is, whether the Commission has *jurisdiction* over such disputes – is not itself a matter of controversy. Clearly, section 3.f.vii provides such jurisdiction. As we explained in our opening brief, "the signatories have largely given the Commission a role akin to that of a reviewing court, a forum to decide disputes over whether a signatory is complying with the Agreement." Post-Hearing Brief of Union Electric Company ("UE Brief") at 18. The key issues here have focused on a different question: in exercising this jurisdiction, what is the rule the Commission is to apply? The Company contends that the terms of the Agreement create the law governing the operation of the EARP, while Staff and OPC believe that the Commission can order changes in that operation as it deems appropriate.

Notwithstanding the seriousness of the actual issues here, this litigation – once past the "manipulation" fracas -- has been remarkably efficient, and, again given the novelty of those issues, not overly long. It should not be forgotten also that many issues were settled by the parties as a result of the illumination of strengths and weaknesses produced by this litigation, one such sizeable issue being the complicated dispute over weather normalization.

Not only has this litigation not been unusually burdensome, but the countervailing benefits of the EARP, which the Commission did not even mention in its Order, surely belies the notion -- at least insofar as Missouri consumers are concerned – that the EARP was a failure. As we pointed out earlier, as a result of the EARP:

> with almost startling speed, customers of Union Electric realized $182 million in rate reductions and credits in the first two years of the EARP, with, by UE's calculation, another $26 million in credits coming to them for the third, and final, year. $208 million for consumers over three

> years is no mean feat, and these benefits do not begin to describe the other fruits of the EARP, such as helping Union Electric become a more competitive, market-oriented company.

UE Brief at 1.

We recognize that the Commission has expressed some frustration over the fact that what it considers to be the "uncontested" amount of the credit for the Third Sharing Period was not paid by UE while this litigation was proceeding. Nevertheless, it is unfair to simply state that "AmerenUE chose to hold all uncontested funds subject to credit sharing as leverage." Order at 37. Certainly Mr. Brandt testified that protecting the Company and its stockholders from being shaken down for sums not worth the cost of litigation was a concern of his. But much more fundamentally, as we will discuss more fully below, the mechanics of actually calculating and paying a sharing credit under the Agreement, combined with the fact of customer turnover, make payment of any credit in stages a legal and practical impossibility.

In short, whatever frustrations the Commission or the parties have experienced in the context of these proceedings should not cloud the real promise of the EARP regime. As the saying goes, the Commission should not snatch failure from the jaws of success.

ARGUMENT

I. The Commission Should Grant Rehearing to Remedy the Errors and Omissions in its Order.

A. The Commission Failed to Set Out Its Findings of Fact and Conclusions of Law on Key Issues.

It is indisputable under Missouri law that the absence of sufficient findings of fact and conclusions of law in a Commission order render it unlawful. *See Friendship Village v. Public Serv. Comm'n,* 907 S.W.2d 339, 344 (Mo. App. 1995). In its "Conclusions of Law," the Commission has simply stated that it has statutory authority to "ensure that

AmerenUE's rates are just and reasonable," and that it "applied the terms of the Stipulation and Agreement . . . in light of this responsibility in addition to its general responsibility to protect the public interest." Order at 44. In light of the specific issues raised in this proceeding, and the detailed testimony and briefing submitted by the parties, such vague generalities fall far short of the Commission's duty to make the findings of fact and conclusions of law required here.

1. The Commission's statutory authority to ensure just and reasonable rates does not include the power to order a utility to participate in an earnings sharing plan like the EARP. *See* UE Brief at 40. Moreover, as the Commission has also recognized, "alternative rate regulation does not set rates. No rate is charged as a result of the plan and no determination as to the overall level of rates is made. The sharing that would occur under the plan is done through credits to a customer's bill each year. Those credits are based on [the utility's return on equity] but the credits do not result in a rate reduction, nor will the rate increases result if [the utility] fails to earn at a certain level." *Staff of the Missouri Public Service Commission v. Southwestern Bell Telephone Co.*, 1993 Mo. PSC Lexis 62 (1993). Nevertheless, the Order does not explain how the authority of the Commission to ensure just and reasonable rates can possibly give it the power to order the adjustments its has ordered here, adjustments that even Staff concedes are not to be found in the terms of the Agreement.

2. The Order does not explain how section 3.f.vii can give the Commission the power to effectively order changes in the methodology for calculating UE's return on equity. *Compare* Order at 37, 41, 42, *with* UE Brief at 22-39.

3. The Order does not explain how the Agreement supports the extreme scope it apparently gives to section 3.f.viii. Indeed, the Order makes no effort to explain exactly what the parties to the Agreement intended section 3.f.viii to mean, or what limits there may be to the power it believes resides in that provision. *See, e.g.*, UE Brief at 53-58. In addition, the Order simply offers conclusions that certain costs represent "new categories of costs," without setting out findings that explain how such conclusions can be faithful to the record which overwhelmingly establishes the contrary. *Compare* Order at 38, 39 *with* UE Proposed Finding of Fact ("PFOF") Nos. 43, 86, 87.

4. The Order does not explain how section 3.g has any continued legal force or effect with respect to consideration of whether the EARP should be continued when the first EARP has been concluded and the parties have already agreed to establish a second EARP, which, having been approved by the Commission, is now in its second year of operation. Further, the Order does not explain how section 3.g of the Agreement to establish the first EARP could establish any authority with respect to the continuation of the second EARP.

B. By Adopting Several of the Adjustments Proposed by Staff and the OPC, the Order Violates the Binding Legal Obligations of the Agreement Establishing the EARP, and Exceeds the Commission's Statutory and Constitutional Authority.

The Agreement that gave rise to the EARP created legally binding obligations. *See* UE Brief at 15-37; UE Post Hearing Reply Brief ("UE Reply Brief") at 18-25. An integral part of the Agreement was Attachment C, the Reconciliation Procedure, which set forth the procedures that would govern the calculation of UE's return on equity ("ROE"). By requiring the Company to use accounting methodologies that add to or conflict with the Reconciliation Procedure, the Order under review violates the binding

legal obligations created by the Agreement and exceeds the lawful reach of the Commission. Since, as we noted above, the Commission cannot order UE to enter an arrangement like the EARP, or to pay a credit in the first instance, it has no power, once UE has voluntarily entered the EARP, to order UE to pay a sharing credit different from the one that would result from application of the methodology to which UE had agreed.

Furthermore, the Order appears fatally confused about the Commission's role under the EARP. As the Order puts it: "Only if the proposed adjustment is permissible under the EARP Stipulation and Agreement will the Commission consider whether there is any basis in fact or law for the proposed adjustment." Order at 9. But the Reconciliation Procedure of the Agreement sets out precisely the methodology for calculating UE's ROE; it does not simply list "permissible" options. If Staff proved that UE did not perform some step of that methodology correctly, an adjustment would be *required*. It would be required because Staff was entitled to have UE live up to the terms of the Agreement, not because the Commission had some general discretion – relying on "any basis in fact or law" – to order an adjustment as it sees fit.

C. Staff's and OPC's Proposed Adjustments Were Not Supported by Substantial Evidence, and Therefore the Order Is Arbitrary, Capricious and an Abuse of Discretion.

The Commission erred in adopting several of the Staff and OPC's adjustments because those adjustments were unsupported by competent and substantial evidence. *See Re Missouri Pub. Serv.*, 152 PUR 4th 333, 339, 343 (Mo. P.S.C. 1994) (where OPC had nominally contested two issues, but had "offered no evidence . . . to support any particular finding" as to those issues, the Commission had "no basis on which to find in favor of OPC"); *Re Union Electric Co.*, 25 Mo. P.S.C. (N.S.) 194, 1982 Mo. PSC LEXIS

34, at *92 (accepting the utility's position because no other party had introduced contrary evidence).

In the instant case, even where Staff and OPC introduced some evidence, it fell far short of *substantial* evidence. The proponents' failure to meet this essential evidentiary threshold was sometimes a function of the small quantum of evidence they have offered, *see Staff v. Union Elec. Co.*, *supra*; *Re Kansas City Power & Light Co.*, 21 Mo. P.S.C. (N.S.) 543, 1977 Mo. PSC LEXIS 9, at *127 (direct conflicts in the record left the Commission "without clear and convincing evidence"), and sometimes a function of internal inconsistencies and ambiguities in the testimony of their witnesses, *see Re Terre Du Lac Utils. Corp.*, 26 Mo. P.S.C. (N.S.) 165, 1983 Mo. PSC LEXIS 44, at *26 (The Commission will "rule against the party which has the burden of proof" in cases where the evidentiary record is so "confused" that it cannot discern the true facts.).

Thus, as set forth below, the Commission erred in adopting adjustments that were not supported by substantial and credible evidence.

1. Year 2000 Costs

The Order rests its adjustment with respect to Y2K costs on its conclusion that these costs are of an "unusual and non-recurring nature." Order at 39. Yet the overwhelming evidence in the record established that the activities undertaken by UE to ensure that its computer systems will be Year 2000 compliant are not different in kind or cost from other computer maintenance activities UE has undertaken over the years, and certainly are not "extraordinary." UE PFOF No. 43. The little that was offered to the contrary was Ms. Westerfield's completely unsupported claim that these costs were unusual and extraordinary. *See* UE PFOF at 34-35.

2. Decommissioning Fund Deposits (Cash Working Capital Benefit)

The Order is contrary to the evidence with respect to the cash working capital benefit resulting from the use of the decommissioning fund deposits. The Order's conclusion that the adjustment is warranted under Section 3.f.vii and viii fails to acknowledge that there is a *specific term* in the Reconciliation Procedure accounting for the Company's cash working capital benefit. Thus, in adopting this adjustment, the Order re-writes the agreed-upon terms of the Reconciliation Procedure.

In addition, the Commission has specifically addressed the issue of late decommissioning fund deposits, and held that it "does not oppose the use of the [decommissioning] funds by UE between each payment if IRS regulations permit." *In the Matter of the Determination of In-Service Criteria for the Union Electric Company's Callaway Nuclear Power Plant and Callaway Rate-Base and Related Issues*, Case EO-85-17 & Case ER-85-160, at 111, *quoted in* UE Brief at 87; Reply at 40.

Any conflicting interpretation of the Agreement offered by Staff is simply not credible. The Staff witness who sponsored the adjustment acknowledged that she was not involved in the drafting of the Reconciliation Procedure, Tr. (Westerfield), at 887 (lines 3-6), nor did she know how the persons who negotiated the Agreement arrived at the $24 million figure, *id.*, at 888-89 (lines 20-2). Evidence, not the bald claims of Staff, must be the basis for a Commission Order, and it is notably lacking here. *See, e.g., Re Missouri Public Service*, Case No. ER-97-394, *et al.*, 1998 Mo. PSC LEXIS 21 at *18-19 (Staff failed to meet its burden of producing evidence to support its adjustment).[2]

[2] The Staff's failure to supply any evidence on this point should not be surprising, for no such evidence exists. To the contrary, the persons who drafted the Agreement recognized that in any given year, the Company's total cash working capital benefit might be in excess of $24 million, or less than $24 million. It was even possible that the Company might experience a cash working capital detriment in a given year.

3. Territorial Agreements

As the Commission correctly notes, with respect to the Macon agreement, "AmerenUE specifically agreed that Staff has the right to re-examine the financial impacts of the territorial agreement." Order at 41. However, "there was no similar express order concerning Black River territorial agreements." *Id.* At the very least, then, there is no contractual basis for an adjustment to reflect any loss in revenue that allegedly resulted from the Black River territorial agreement. As Staff has forthrightly conceded, the phrase "territorial agreement" does not appear anywhere in the Reconciliation Procedure. *See* Tr. (Rackers), at 574-575 (lines 23-7), at 577 (lines 3-8). There is no claim that the Company manipulated earnings, *see* Section 3.f.vii of the Agreement, nor can it be said that such a territorial agreement reflects a new category of cost, *see* section 3.f.viii; after all, the Commission has approved other territorial agreements in the years immediately prior to the adoption of the Agreement.

Even if there were no contractual bar, furthermore, the Commission erred in adopting the adjustments for both the Black River and Macon agreements.

(a) Black River

With regard to the Black River Agreement, the Commission stated that "Ameren initially experienced a loss of nearly 6,000,000kWh of load and the loss of more than $400,000 in revenues." Order at 41. These figures are drawn, however, from outdated

(This might occur if the Company's cash flows were such that it did *not*, in total, have the use of monies over the course of a year.) The only way to know, with precision, the amount, if any, of the Company's total cash working capital benefit would be to conduct a lead-lag study -- that is, an analysis of UE's panoply of cash flows -- each year. Such an analysis, by the admission of the Staff's own witness, is extraordinarily time-consuming and complex. Tr. (Westerfield), at 889 (lines 3-15). It was in lieu of annual lead-lag studies that the drafters of the Reconciliation Procedure settled upon the figure of $24 million as an annual rate base offset.

Staff *projections*, and the Order makes no attempt to grapple with the *actual results* reported by the Company. *See* UE Brief at 91-93; Reply at 42-47.

Specifically, the conclusion that UE actually experienced a loss of more than $400,000 in revenue is apparently drawn from Mr. Rackers' work paper (Exh. 27). That work paper reflects that he compared "Ameren UE revenue prior to the exchange," or $3,035,384, and "Black River revenue prior to the exchange," or $2,600,463; and he then computed a decline in revenue in the amount of $434,921. The figures from Mr. Rackers work paper are, in turn, drawn from a schedule attached to testimony filed in the Black River proceeding in 1995 by the Company witness. *See* Schedule 2 to Exhibit 23 (Testimony of Kenneth Schmidt, dated June 30, 1995). A footnote to that schedule states that "revenue totals are based on one year ending in 1994." The upshot was made clear during the cross examination of Mr. Rackers at the hearing:

> Q. So turning to your work papers again, that $3 million figure, that's based on 1994 data. Correct?
>
> A. Yes.
>
> Q. Okay. And the $2.6 million figure, that's based on 1994 data. Correct?
>
> A. Yes.
>
> Q. Okay. And the $434,000 figure, that's the result of 1994 data. Right?
>
> A. Yes.

Tr. (Rackers), at 594 (lines 4-13). In other words, the Commission has embraced an adjustment -- purportedly designed to reflect a comparison of revenue between the year 1995-1996 (pre-exchange) and the year 1997-1998 (post-exchange), and the sole factual predicate for the adjustment is revenue from *a wholly different year, 1994*. Clearly, such

evidence is not sufficiently competent and substantial to warrant a decision in the Staff's favor.

The Commission's conclusion that there is "no substantial change or customer growth" with regard to the Black River agreement is also off the mark. UE witness Weiss compared the service areas in which customers were exchanged, and he demonstrated that a comparison pre- and post-territorial agreement reveals an *increase* in customers, sales, and revenues. Specifically, customers increased from 10,891 to 11,394 (a net gain of 503), and revenue increased from $23,533,998.06 to $24,002.294 (a net gain of $468,296.18). Exh. No. 29 (revised schedule prepared by Gary Weiss).[3]

(b) Macon

The Commission found that the territorial exchange between AmerenUE and Macon Cooperative Agreement resulted in a net loss of customers and revenues. However, the Commission's focus should have been on the net effect of the agreement on UE's *income*. UE witness Weiss demonstrated that as a result of decreased customer demand, the Macon agreement resulted in the following undisputed savings for the Company: $262,438 (energy savings); $200,000 (reduction of employees); $60,000 (reduced tree-trimming costs); $33,000 (lower polemile maintenance); $6,400 (reduced substation maintenance); and $12,000 (miscellaneous other savings).

[3] The Staff objected that the exchanged customers were only "subsets" of that total service areas in which customers were exchanged, and that therefore the Company's calculations are "not based on knowing" figures for the precise customers exchanged. Staff Br. at 71. However, the Staff's objections were ill-founded. It bore the burden of proof; the question is whether *the Staff's adjustment* is "based on knowing" that the Company suffered a net loss of income as a result of the exchange of customers with the Black River Cooperative. The answer, as the Staff witness candidly admits, is no. See Tr. (Rackers), at 597 (line 4-8); *accord* Tr. (Weiss), at 632-33 (lines 16-1). This admission should end all further consideration of the adjustment, for the Staff has plainly failed to satisfy its burden of proof.

Most importantly, the Macon agreement resulted in additional cost savings through the use of excess energy capacity. *See* UE Brief at 93-94; 47-50. Excess energy capacity is the quantity of energy that the Agreement freed up, because the areas received pursuant to the agreement have fewer customers and demand less energy than the areas traded away. As a result, the Company can either sell that energy on the interchange market or use the energy to avoid purchases on the interchange market.

The Order fails to acknowledge the effect of this excess energy capacity. It is undisputed, however, that as a result of the Macon territorial agreement the Company has had to supply energy to fewer customers. Tr. (Rackers), at 602 (lines 8-10). The Staff acknowledged at the hearing that the Company's capacity to generate energy has been unaffected by the Macon agreement. Tr. (Rackers), at 602 (lines 11-16). The Staff further conceded that it is "possible" that the Company would sell that excess energy on the interchange market or avoid purchases (otherwise necessary to service core customers) on the interchange market. Tr. (Rackers), at 601-602 (lines 19-7).

Yet despite this admission, the Staff did nothing to calculate the amount of the benefit that the Company reaped, which is, after all, *their* burden as the proponent of this adjustment. The Order is apparently premised on the belief, shared by the Staff, that the Company had excess energy capacity last year -- that is, it had the ability to sell energy on the interchange market for $7,000 a megawatt – but nevertheless simply did nothing with that energy. Such a scenario is so implausible that it cannot be given any credence.[4]

4. Merger Costs

[4] Instead of offering any affirmative proof as to the existence or value of the excess energy, the Staff contented itself with cursory criticisms of the Company's effort to quantify the benefits. The Company demonstrated that these objection were incorrect. See UE Brief at 93-94; UE Reply at 47-50.

The Order is contrary to the evidence introduced at the hearing with respect to the adjustment for merger costs. The Order states that "AmerenUE's argument ignores the . . . first part of the second sentence in paragraph four of the Stipulation and Agreement." Order at 41. This is incorrect. In its reply brief the Company stated: "[T]he Company -- unlike the Staff and OPC -- invites the Commission to consider *both* sentences" in paragraph four of the Agreement. UE Reply at 51. When the two sentences are considered in tandem, the Company's interpretation is more sensible than Staff's and OPC's, both as a matter of common sense, and as a matter of law. *See* UE Brief at 94-97; UE Reply at 51-54.

The Order further states that "AmerenUE's interpretation would render the calculation unnecessary because *the amortized amount in the estimated section would always be lesser than an amortized amount of the actual costs*." Order at 41 (emphasis added). This too is incorrect. As the Company demonstrated, "applying UE's methodology, in year 10 the total unamortized amount of merger costs will be $1.2 million, which is, of course, less than the 7.2 million." UE Reply at 53.[5]

D. The Order Violates The Due Process Clauses Of Both The Missouri And United States Constitutions Because The Commission Improperly Shifted The Burden Of Proof After The Hearing.

As the Company showed, *see* UE Reply Brief at 4-9, allocating the burden of proof to Union Electric would conflict with a prior Commission order in this case. The hearing itself -- and the Company's preparation for the hearing -- was designed to reflect this allocation of the burdens. As Union Electric explained, the Commission could not consistent with the Due Process protections of the United States and Missouri

[5] The Commission is invited to re-consider the table on page 53 of the Company's reply brief; that table demonstrates that the Commission's criticism of UE's interpretation on this point is incorrect.

Constitutions announce *after the hearing* that the Company in fact bore the burden of proof.

The Order under review runs afoul of these protections. As is clear from several of the adjustments adopted in the Order (including those to account for territorial agreements and the cash working capital benefit), the Commission failed to recognize that Staff bore the burden of proof. For example, with respect to the territorial agreements, the Company proved that, contrary to Staff's allegations, it has realized an increase in net income as a result of the exchanges of customers. If, however, the Company had been informed prior to the hearing that it bore the burden of proof, it might have taken additional measures to further demonstrate the soundness of its calculations. To prove that the Black River agreement was an immediate success (as reflected by an increase in net income), the Company might have subpoenaed records from the Black River cooperative relating to customers the cooperative received from UE. But the Company did not seek to track down such evidence for the simple reason that it did not have the burden of doing so. The Staff did. The Commission cannot, after the fact, fault the Company for not being able to "track the individual customers involved in the territorial exchange." Order at 14. If the Staff sought to propose an adjustment to reflect any alleged loss in income resulting from the territorial agreements, it had the burden of proving such an adjustment. To force the Company to disprove this adjustment violates the law of this case, and the United States and Missouri Constitutions.

E. The Order Violates Both The Missouri And United States Constitutions Because It Impairs The Obligation of Contract.

As the Company has shown, *see* UE Brief at 41-47, the Agreement created legally binding obligations, and therefore is protected by both the United States and Missouri

constitutions, which prohibit the State from impairing the obligation of contract. Express provisions in the Agreement provide that the Company must use the methodology agreed to in the Reconciliation Procedure to calculate its ROE for the three-year term of the EARP. Therefore, the Company had a contractual right to have the sharing of its earnings calculated according to the methodology set out in the Reconciliation Procedure, and only *that* methodology.

The adjustments adopted by the Commission embrace methodologies that were not agreed to by the Company, and are nowhere to be found in the Reconciliation Procedure. Because the Commission has ordered these adjustments that impair UE's contract rights, and has done so with no justification based in overarching concerns of public health, safety, or welfare, that Order violates the protections of the Contract Clauses of both the United States and the Missouri Constitutions. U.S. Const. art. I, § 10, cl. 1; Mo. Const. art. 1, § 13.

F. The Order Violates Both The Missouri And United States Constitutions Because It Effects An Uncompensated Taking Of The Company's Property

Similarly, by in effect breaching the terms of the Agreement, and depriving UE of its rights under it, the Order deprives UE of its property without just compensation in violation of the Takings Clauses of the United States and Missouri Constitutions. *See* UE Brief at 47-49; UE Reply Brief at 16.

G. The Order Violates Both The Missouri And United States Constitutions Because It Interferes With Reasonable Investment-Backed Expectations.

As the Company has shown, *see* UE Brief at 49-52, its reliance on the Agreement was manifest in the millions of dollars in rate reductions and credits which it paid, and

the alternative business opportunities that it declined to pursue. As UE further demonstrated, such expectations were unquestionably reasonable in light of the detailed provisions of the Agreement, the establishment of a second EARP, and the absence of any expression from the Commission or Staff, until these proceedings, that Staff could propose, and the Commission order, adjustments in the calculation of UE's return on equity that were not agreed-upon terms of the Reconciliation Procedure of the Agreement. Such reasonable investment-backed expectations are protected under the Takings Clause of the United States Constitution and Missouri Constitutions regardless of whether the Agreement constitutes a legally binding contract; by upsetting those expectations, the Order under review is unconstitutional. *See* UE Brief at 49-52.

H. The Order Violates The Due Process Clauses Of Both The Missouri And United States Constitutions Because Key Parts of the Order Rest on No Legal Standard or Constitute Retroactive Lawmaking.

Both the United States and Missouri Constitutions prohibit retroactive lawmaking. UE Brief at 68 n. 9. The provisions of the Order with respect to Y2K costs constitutes such retroactive lawmaking because it rests on some new concept of "unusual" or extraordinary" costs far removed from the standard of the Uniform System of Accounts ("USOA"). *See* Order at 39, 18-19. Indeed, the Order rests on the claim of Staff "that the USOA provides for the deferral of extraordinary costs and Staff believes that material Year 2000 costs constitute an extraordinary item." *Id.* at 18. Nevertheless, the record is clear that, on cross-examination, Staff's witness admitted she had not undertaken any of the analysis required under the USOA to make the judgment that a cost was extraordinary, and ultimately retreated to resting their proposed adjustment concerning Y2K costs on the notion that even if it had not been shown that UE's Y2K costs were

extraordinary under the USOA, the Commission could still call these costs "extraordinary." *See* UE Brief at 67-68.

By accepting Staff's proposed adjustment with respect to Y2k costs, the Commission has accepted this invitation to call these costs extraordinary simply because the Commission has called them extraordinary. At best, this ruling represents the adoption of some new standard for extraordinary costs – a clear departure from the USOA – and the application of that new standard retroactively, and so unlawfully, to these past expenses. At worst, this ruling represents the most blatant form of lawlessness, resting on no rule or standard except the Commission's unanchored discretion.

I. The Provisions of the Order Directing the Submission of "Memoranda With Recommendations in Compliance With Section 3.g" of the Agreement Is Unlawful.

The Commission has ordered the parties "to file their memoranda with recommendations in compliance with Section 3.g" of the Agreement. Order at 46. The "recommendations" mandated under section 3.g are directed solely at three options explicitly set out in section 3.g: "whether the Plan should be continued as is, continue with changes (including new rates, if recommended) or discontinued." Order at 44-45 (quoting section 3.g). Consistent with this focus on what the future of the first EARP should be, these recommendations were to filed in the last year of the first EARP, with a deadline of February 1, 1998.

The Commission's Order here continues with the observation that "[t]he Commission received no memoranda," as if this filing was a requirement mysteriously overlooked by all concerned, and the failure to make such filings comes now as something of a surprise. Of course, all this is far from the truth. On July 12, 1996, the

signatories to the Agreement that established the first EARP executed a new Stipulation and Agreement that established a second EARP, which the Commission approved by a Report and Order on February 21, 1997. Thus the question of whether, and in what form, the first EARP should be "continued," was definitively answered by agreement of the parties and the order of this Commission. Moreover, even if such an agreement superseding section 3.g had not been entered, the first EARP has long since ended, and any question of whether *it* should be continued is literally nonsense. In short, section 3.g no longer has any legal force or authority, and cannot give the Commission any authority by which to make the Order respecting "recommendations" that it has now made.

Furthermore, section 3.g. plainly does not address the second EARP. Indeed, the second EARP has its own section 3.g, which mandates the submission of recommendations concerning the future of the second EARP by February 1, 2001. Consequently, the second EARP provides no basis either for the present Order of the Commission.[6]

II. The Commission Should Stay Its Order Pending Appeal.

It is well-established under Missouri law that the threat of irreparable damage by a Commission order justifies a stay pending its appeal. *See State ex rel. Midwest Gas User's Ass'n v. Public Serv. Comm'n*, 996 S.W.2d 608, 1999 Mo. App. Lexis 612 at *9 (approving a stay where the circuit court rested its findings of "great and irreparable damage" on the fact that, absent the stay, "Relators [would] be compelled to pay said rates that may be unreasonable and unlawful. . . ."). In *Midwest Gas*, for example, the

[6] At the same time, there is nothing objectionable about the Commission seeking information concerning how the EARP has worked. Such general information-gathering is, however, quite different from the specific provisions of each section 3.g, which focus specifically on the continuation of the EARPs in which they appear.

prospective monetary damage was irreparable because the gas ratepayers, even after a favorable decision from the courts, would never be able to recover the allegedly excessive amounts they would pay while the Commission's contested order was in effect.

The posture of this case is quite similar to that of *Midwest Gas*. As the attached Affidavit of Ronald Zdellar explains, each year approximately 14% of UE's customers leave its service area and so are no longer its customers. Zdellar Aff. ¶ 2. UE does not maintain records on these former customers, and has no way of efficiently contacting them, much less compelling them to reimburse UE for a credit it has erroneously paid. *Id.* at ¶ 3. Thus, should UE be compelled to pay a sharing credit according to the terms of the Commission's Order, and that Order be overturned on appeal, UE would have no way of getting its money back, unless, of course, the Treasury of the State of Missouri would stand in their place and reimburse UE for that improper credit.

Staying only the "contested" portion of the credit does not solve this dilemma. In fact, it makes it worse, for it would not only threaten UE with an irreparable injury for that, albeit smaller, amount, it would also violate the terms of the Agreement and injure the very customers such a partial payment was designed to benefit.

In this case to this point, the parties have focussed on the Reconciliation Procedure by which UE's ROE is calculated. However, though that methodology determines whether earnings sharing should occur, and at what overall percentage, that methodology does not determine who actually gets the credit, or how much that individual credit actually will be. That determination is governed by the wholly distinct "Procedures for Implementing the One-Time Credit and Sharing Credits From the Three-Year Experimental Alternative Regulation Plan." Agreement at 22-23.

Those procedures begin by determining the "credit application period," which is simply the monthly billing period in which the credit will appear on customers' bills. Agreement at 22. Active customers as of the credit application period are eligible for the credit even if they were not customers during the sharing period that gave rise to the credit. This is an unavoidable consequence of the natural turnover in UE's customers. The actual calculation of the credit is based on the "credit calculation period," which is the 12 months prior to the month before the credit will appear on customers' bills. *Id.* The credit per kilowatt-hour is calculated by dividing the total dollar amount of the credit by the total kilowatt-hours billed to eligible customers during the credit calculation period. *Id.* Each eligible customer's credit is then computed by multiplying that per-kilowatt-hour credit times that customer's total kilowatt-hours for the credit calculation period. *Id.* at 22-23.

Clearly, this procedure for paying a sharing credit is designed to be calculated and paid as a unit at one time, and simply could not work if paid in stages, whether or not UE ultimately prevails on appeal. Assume, for example, that a stay is only granted for the contested portion of the credit, with the uncontested portion to be paid within the next 30 days. The credit application period obviously follows from that timeframe, the calculations are made based on the kilowatt-hour usage of the preceding 12 months, and UE's current customers, as of *that* credit application period, receive the credit on their bills. Meanwhile, this litigation continues for another 18 months, at the least. Assume further that the final ruling results in an additional amount that should be included in the sharing credit at issue. How shall that addition to the first partial payment of the credit be made? By this time, a year and a half after that first payment was made, the population

of UE's customers has changed significantly, with a turnover of approximately 21 % (that is, 14% for the first 12 months plus 7 % for next six) of that population no longer UE's customers. *See* Zdellar Aff. ¶ 2. UE no longer even knows where that 21 percent is, much less have the efficient mechanism of transmitting the credit directly on a bill. Is UE then supposed to make the extraordinary commitment of time and resources to try to track down these former customers, wherever they may be, and, in the hardly likely event it is successful, then get a check into their hands? UE never agreed to play such a role or incur such costs in entering the EARP, and certainly nothing in the EARP authorizes anyone else to impose such duties on UE.

On the other hand, simply paying the additional credit amount to UE's customers as of the time the litigation has ended is equally unacceptable under the EARP, for under that approach, the credit from one Sharing Period would be paid to two different groups of customers. Such a result is obviously unfair to the customers involved and indisputably has no basis whatsoever in the EARP.

In sum, under the terms of the Agreement, and by any measure of fairness, this Order should be stayed pending the outcome of its review by the courts.

CONCLUSION

For all of the foregoing reasons, and those stated in the Company's post-trial opening brief and reply brief, the Commission should grant this application, reconsider the Order and reject all of the adjustments proposed by the Staff and the OPC. The Commission should also stay the Order pending its review by the courts.

Date: December 29, 1999

Respectfully submitted,

AmerenUE

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Monitoring of the Experimental Alternative Regulation Plan of Union Electric Company	)))	Case No. EO-96-14

AFFIDAVIT OF RONALD ZDELLAR

RONALD ZDELLAR, being duly sworn, upon his oath deposes and says:

1. I am currently employed by Ameren Services Company in the position of Vice President of Customer Services – Division Support. By virtue of my duties in this position, I have become familiar with the facts set out below, which are accurate to the best of my knowledge and information.

2. Each year, approximately 14% of AmerenUE's customers leave the Company's service area and so no longer are AmerenUE customers. Approximately 10% of these departing customers notify the Company beforehand, while approximately 4% do not.

3. After AmerenUE's customers leave its service area, and so no longer are AmerenUE customers, AmerenUE does not maintain records of the new location of those individuals and has no cost-efficient way to contact them. In today's highly mobile society, departing customers can be moving to any part of the United States, or even of the world. Even if AmerenUE committed extraordinary resources to try to track down such former customers, there is simply no reliable way to ensure that it could contact even a majority of former customers. Moreover, that task becomes significantly harder with each passing year.

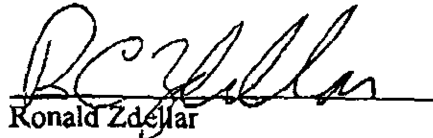
4. For example, for the year 1998, 169,477, or 14.8%, of AmerenUE's customers were new to the Company's service area that year, and were not customers of the Company in

the preceding twelve months. For the year 1999 approximately 169,465, or 14.7%, of AmerenUE's customers were new to the Company's service area that year, and were not customers of the Company in the preceding twelve months. Since, at that same time, AmerenUE experienced annual growth in its Missouri jurisdictional customers of on average 0.79%, or 8,491customers, per year, approximately 14% of those new customers were in fact replacing old customers who had left.

5. As another example, in 1999 approximately 107,311, or 9.8% of the Company's Missouri jurisdictional residential and small commercial customers notified the Company that they were leaving AmerenUE's service area.

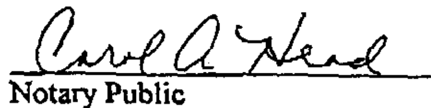
I hereby certify that the foregoing statements are true and correct, to the best of my knowledge and belief.

Dated this 28 day of December, 1999



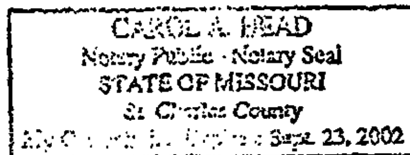
Ronald Zdellar

Subscribed and sworn to before me this 28 day of December, 1999.



Notary Public

My Commission expires: 9-23-2002



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