

**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-2010-0036

**PUBLIC COUNSEL’S RESPONSE IN OPPOSITION
TO AMERENUE’S MOTION TO STRIKE**

COMES NOW the Office of the Public Counsel (“Public Counsel”) and for its Response in Opposition to AmerenUE’s Motion to Strike states as follows:

1. On May 28, 2010, the Commission issued its Report and Order with an effective date of June 7, 2010. On June 6, the Missouri Industrial Energy Consumers filed an Application for rehearing of that Report and Order. On June 7, AmerenUE filed a motion to strike the MIEC’s application for rehearing, alleging it to be untimely.

2. AmerenUE argues that the Commission must strike an application for rehearing filed after the effective date of the Report and Order.¹ Pursuant to Section 386.500.2, an application for rehearing must be filed before the effective date of the Report and Order to preserve the right to appeal. AmerenUE cites the seminal case of Alton Railway² for the proposition that failure to file an application for rehearing before the effective date of an order

¹ Technically, it appears that nothing in Section 386.500.1 prevents the filing of an application for rehearing after the effective date of an order; pursuant to that paragraph, such an application may be filed after the issuance of an order – without any limitation – and the Commission presumably may consider and act on such an application. However, Section 386.500.2 provides that no cause of action **in court** would be allowed if the application for rehearing was filed after the effective date. With respect to the MIEC’s application for rehearing, which was timely filed, this point is moot.

precludes a party from pursuing an appeal of that order. Public Counsel agrees with AmerenUE up to this point.

3. But Public Counsel disagrees with AmerenUE's analysis of why the MIEC application for rehearing should not be considered to have been filed before the effective date. AmerenUE cites the Suburban Water case, but fails to discuss that case's subsequent actions – and it is those subsequent actions that are most pertinent to the issue before the Commission, and most harmful to AmerenUE's position.³ The Commission issued its Report and Order in Case No. WC-2007-0452 with an effective date of September 7, 2007, and Suburban filed its application for rehearing at 5:52 p.m. on September 6, 2007. After the Commission denied Suburban's application for rehearing, Suburban filed a petition for writ of review in the Cole County Circuit Court. The Commission moved to quash the writ on the ground that the application for rehearing had been untimely filed under Section 386.500.2. The circuit court denied the motion to quash, holding that:

The Commission has acknowledged such receipt of the application for rehearing on September 6, 2007. Section 386.500.2 RSMo provides that no cause or action arising out of any order of the Commission shall accrue in any court unless the party aggrieved by that order files "before the effective date of such order" an application to the Commission for a rehearing. The Court finds that Petitioner did file its application for rehearing with the Commission before the effective date of the order that Petitioner wants this Court to review. The Court finds that Commission rule 4 CSR 240-2.045(2) unlawfully shortens the statutory time allowed under section 386.500.2 for a party to file an application for rehearing, and therefore unlawfully modifies a statute. This Court finds that the language in section 386.500.2 "before the effective date" means that Petitioner had until 11:59 p.m. on September 6, 2007, to file Petitioner's application for rehearing.

² *State ex rel. Alton R. Co. v. Pub. Serv. Comm'n*, 155 S.W.2d 149, 154 (Mo. 1941)

³ PSC Case No. WC-2007-0452; Circuit Court Case No. 07AC-CC00926; and Supreme Court Case No. SC89164.

4. The Commission sought review of the circuit court's holding by filing a petition for a writ of prohibition with the Missouri Supreme Court. The Commission urged the Supreme Court to prohibit the circuit court from proceeding, asserting in the petition that:

24. A Writ of Prohibition is proper in this case because the Cole County Circuit Court lacks subject matter jurisdiction over Suburban's Petition for Writ of Review in that Suburban's application for rehearing was not filed "before the effective date" of the Commission's order as required by 386.500.2 RSMo., and a timely application for rehearing is a mandatory prerequisite to judicial review of Commission orders.

25. A Writ of Prohibition is proper in this case because Respondent's Order erred in ignoring 386.120.5 RSMo. that requires the Commission to operate during business hours, defined by the Commission as 8:00 a.m. to 5:00 p.m. by policy and reiterated in rule 4 CSR 240-2.045(2) applying to electronic filings, and therefore did not unlawfully shorten the statutory time for filing applications for rehearing under 386.500.2 RSMo.

26. A Writ of Prohibition is proper in this case because the Respondent's ruling that the Commission, a state administrative agency, must be open to accept and file documents 24 hours a day, as the Courts of Missouri are deemed open 24 hours a day, was not intended by the Legislature.

The Supreme Court, on April 15, 2008, denied the petition for a writ of prohibition, thus endorsing the holding of the Cole County Circuit Court.

5. The MIEC's application for rehearing in this case, like Suburban's in Case No. WC-2007-0452, was filed after 5:00 p.m. on the business day before the effective date, but before midnight on the day before the effective date. Under the holding of the Cole County Circuit Court as endorsed by the Missouri Supreme Court, the MIEC application for rehearing was filed before the effective date of the Report and Order.

WHEREFORE Public Counsel respectfully requests that the Commission deny AmerenUE's motion to strike the MIEC's application for rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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