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August 31, 1999

BY HAND DELIVERY

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Missouri Public
Service Commission

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
Truman Building
301 West High Street
Jefferson City, MO 65101

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

Dear Mr. Roberts:

Enclosed for filing are an original and fourteen copies of the reply post trial brief of the Missouri Industrial Energy Consumers and the Doe Run Company.

Thank you for bringing this file to the attention of the Commission.

Very truly yours,

Diana M. Schmidt/mb

Diana M. Schmidt

cc: All parties

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
In the Matter of the Application of Union Electric Company for an Order Authorizing (1) Certain Merger Transactions Involving Union Electric Company; (2) The Transfer of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company; and (3) In Connection Therewith, Certain Other Related Transactions.	)))))))	Case No. EM-96-149

REPLY POST-TRIAL BRIEF OF THE
MISSOURI INDUSTRIAL ENERGY CONSUMERS AND THE DOE RUN COMPANY

Pursuant to the briefing schedule established by the Commission's July 19, 1999 order in this case, Adam's Mark Hotel, Alcoa Foil Products (Alumax, Inc.), Anheuser-Busch, Inc., The Boeing Company, Ford Motor Company, General Motors Corporation, Holnam, Inc., Hussmann Refrigeration, ISP Minerals, MEMC Electronic Materials, Inc., Mallinckrodt, Inc., Monsanto Company, Procter & Gamble Manufacturing Company and Ralston Purina Company, collectively referred to as the "Missouri Industrial Energy Consumers" or "MIEC", and the Doe Run Company, hereafter referred to as Doe Run, hereby submit their Reply Post-Trial Brief.

Doe Run and MIEC have carefully reviewed all initial briefs filed herein by the other parties to this case.

Ameren ("UE"), Staff and OPC have all drawn lines in the sand in this case. UE asserts, in essence, that this Commission lacks the ability, under constitutional law (both Federal and State) to consider the adjustments to the income reports submitted by UE to determine the actual income for purposes of the "sharing credits" to the customers, either for the yearly period or for the reduction

176

in rates (other than for mistakes or "manipulation"). UE baldly proclaims that if this Commission alters its final income report, the Commission will violate its rights, rendering both the Commission and the State of Missouri susceptible to injunctive relief and to liability for damages.

Both Staff and OPC, on the other hand, assert that the Commission has the authority to consider their proposed alterations to UE's final income numbers based upon two (2) factors: First, the Commission has inherent authority to do so; and second, because the language of the Stipulation and Agreement permits such adjustments.

Doe Run and MIEC take the position that all three (3) of these parties ignore the true issue herein: IS THE STIPULATION AMBIGUOUS (either patently or latently). If the contract is unambiguous in toto, then in Doe Run's and MIEC's opinion, the Commission, by approving the Stipulation and Agreement, may not adopt the adjustments preferred by the Staff and OPC (except as specifically allowed by the contract or by subsequent agreement). If, on the other hand, it is ambiguous in any respect, (or subsequently modified) the Commission may exercise its inherent authority to consider the modifications urged by the Staff and OPC.

Thus, this case turns not on the Commission's inherent authority, or estoppel, but rather, on the law of contracts. Under contract law, a contract must be enforced as entered into. If the contract is clear and unambiguous, it must be enforced as written, even if it was a "bad" contract. "Freedom of contract includes the freedom to make a bad bargain" Sauger v. Yellow Cab Co., Inc., 486 S.W. 2d 477 (Mo. 1972).

On the other hand, if a contract is ambiguous, either patently or latently, the finder of fact may resort to rules of construction to determine the true "intent" of the parties. See, 17A Am. Jur. 2d, Contracts, § 337 (1991). This is true only if there is no ambiguity, for then, the judicial authority

may not consider each party's intent, but rather, must enforce the contract as written. Id. "A court is not permitted to create an ambiguity in order . . . to enforce a particular construction which it might feel is more appropriate." Rodriguez v. General Acc. Ins. Co., 808 S.W. 2d 379 (Mo. 1991).

A contract may be ambiguous in two separate respects. If a contract is patently ambiguous, it is susceptible of two separate interpretations from a mere reading of the contract. See, Jake C. Byers, Inc. v. J.B.C. Investments, 834 S.W. 2d 806 (Mo. App. 1992). A latent ambiguity, on the other hand, is one that arises if particular words of the document apply equally well to two different objects or if some external circumstances make the meaning of the terms uncertain. Id.; See also, Alack v. Vic Tanny Intern," 923 S.W. 2d 330, 337 (Mo. Banc. 1996). It must be noted, however, that an ambiguity does come into being merely because the parties disagree about its meaning; rather the court must consider all relevant evidence to determine if an ambiguity exists. CIT Group/Sales Financing, Inc. v. Lark, 906 S.W. 2d 865 (Mo. App. 1995).

Is the first EARP ambiguous? These Intervenors do not take a position on this. Intervenors do note however, that this "ambiguous" determination is vitally important as to whether the Commission can consider the adjustments proposed by the Staff or the OPC on the following issues, based on the Commission's interpretations of the words "extraordinary", "new" or "manipulation" and whether or not these words create ambiguities:

1. Adjustments for Y2K;
2. Computer software expenses;
3. Injury and Damages;
4. Decommissioning funds; and
5. Merger amortization costs.

Only if the Commission finds that there is an ambiguity as to each separate issue may the Commission consider the Staff and OPC's adjustments and the merits thereof. If the Commission

finds that EARP's clear and unambiguous language does not allow such adjustments, and that there is no latent or patent ambiguity in the language of the contract, then the Commission cannot even consider those adjustments.

A second rule of contract law that is important to the instant case is that a contract can be modified by a subsequent agreement between the parties. Rice v. Provident Life & Acc. Ins. Co., 102 S.W. 2d 147 (Mo. App. 1937). In this case, there was evidence that after entering into the instant EARP, the Staff and UE (as well as other signatories) entered into territorial agreements, subsequently approved by the Commission, wherein the Staff reserved the right to present to the Commission any "concerns" over costs in any "ratemaking proceeding" or present the issue in any "future sharing credit calculations." (Staff Brief pp. 68, 69). UE was a signatory to both Territorial Agreements which were approved by the Commission.

Accordingly, UE and Staff, regarding the Territorial Agreement issue, modified the original EARP to permit consideration of adjustments by the Staff as to the impact of these territorial agreements. Accordingly, UE's objections to these adjustments, or even Commission consideration of such adjustments, is not well founded; and must be overruled.

As to whether or not the adjustments proposed by the Staff are well founded, these Intervenors take no position, and leave such determination to the Commission.

CONCLUSION

Both Doe Run and MIEC urge this Commission to make the initial determination as to ambiguities as set forth above. In the event that the Commission determines that there are ambiguities and/or subsequent modifying agreements in the EARP, then the Commission should consider the merits of the adjustments submitted by the Staff and OPC.

Doe Run and MIEC both request that the Commission act expeditiously on this matter in order to insure that the ratepayers are protected against additional delays in receiving refunds and having their rates permanently reduced.

Respectfully Submitted,

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& REID, L.L.C.

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ENERGY CONSUMERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the copies of this Reply Post-Trial Brief of the Missouri Industrial Energy Consumers and The Doe Run Company have been served via first-class, U.S. Mail, postage prepaid on this 31st day of August, 1999, to all parties of record.

Diana Schmidt