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January 8, 1987

Mr. Dan Redel, Acting Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case Nos. ER-85-265 and AO-87-48

Dear Mr. Redel:

Enclosed for filing in the above-referenced proceedings is an original and fourteen (14) copies of the Arkansas Power & Light Company's Response to Motion filed by Intervenors.

Thank you for your attention to this matter.

Sincerely,

HAWKINS, BRYDON & SWEARENGEN, P.C.

By: James C. Swearengen

James C. Swearengen

JCS:kh
cc: All Attorneys of Record in
Case Nos. ER-85-265 and
AO-87-48

H.D.

FILED

JAN - 8 1987

PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Arkansas Power & Light Company of Little Rock, Arkansas, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company.	)	Case No. ER-85-265
In the matter of the investigation of the revenue effects upon Missouri utilities of the Tax Reform Act of 1986.	)	Case No. AO-87-48

RESPONSE TO MOTION

Comes now Arkansas Power & Light Company (hereinafter "AP&L"), by counsel, in response to the "Motion to Reduce Tariffs of Arkansas Power & Light Company Effective January 1, 1987, To Reflect Decreased Federal Income Tax Rates," (hereinafter "the Motion") filed in the above-captioned dockets on December 29, 1986, by ASARCO, Inc. and Doe Run Company, (hereinafter "Interveners"), and respectfully states as follows:

1. The Motion seeks an order of the Commission requiring AP&L to reduce its Missouri retail electric rates on January 1, 1987, due to changes in the federal income tax law. As the basis for such an assertion, Interveners state that the "tax adjustment clauses" contained in AP&L's tariffs require such a reduction. AP&L has used the same caption on this responsive pleading as appears on the Motion, but by doing so does not consent that either of the dockets listed are the appropriate forum for the Motion, or that the Motion is otherwise proper.

2. Interveners incorrectly assume that the taxes referred to in the tax adjustment clauses in AP&L's tariffs are income taxes. AP&L has never used that tariff provision to seek or effect changes in its electric rates, or to vary the charges to its customers due to changes in federal or state income taxes applicable to AP&L. Although at least one situation in the past would have arguably allowed AP&L to increase its rates because of an increase in income tax, AP&L has never utilized the provisions in the manner advocated by Interveners. The provisions have only been applied to gross receipts taxes such as sales and franchise taxes which are calculated directly by reference to the amount of a particular customer's bill. Further, Interveners have alleged in a subsequent pleading entitled "Intervenors' Response to Arkansas Power & Light Company's Response to Objection" filed on or about January 5, 1987, in Case No. ER-85-265, that AP&L "apparently utilized" the same tax adjustment clause to reduce AP&L tariffs in Arkansas a total of $60,000.00". In reality, AP&L reduced rates in Arkansas by approximately $58,000,000 on an annual basis after filing a rider tariff to accomplish that, such rider tariff having been approved by the Arkansas Public Service Commission. Therefore, Interveners' assertions that the tax adjustment clauses under discussion here have ever been used to effect changes in rates due to changes in income taxes are factually incorrect.

3. An interpretation of the tax adjustment clause to the effect argued by Interveners is in conflict with the announced law in Missouri. Interveners note the case of State ex rel.

Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960), in which the Supreme Court determined as lawful a tax adjustment clause identical in effect to the provisions in AP&L's tariffs. The Court, mindful of the difference between gross receipts taxes and income taxes, was careful to point out in its discussion that

> "the amount of an expense item represented by the amount of a valid [gross receipts] tax is not affected by economy of operation in other respects or by greater volume of sales or by variations in the amounts of any other expense items. The company must pay the tax, whatever the total amount thereof, and that total is a fixed and unchangeable (unless the city changes the tax rate) operating expense. Id. at 82.

This distinction between gross receipts taxes and other expense items was further explained in State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979). In rejecting the argument by utilities that the fuel adjustment clause was similar to the tax adjustment, the Supreme Court noted that the tax adjustment provided a "direct" charge, "exactly proportioned to the customer's bill, the amount of which was directly determined by the amount of that bill." Id. at 52. That analysis cannot be applied to income taxes. In fact, paragraphs 13 and 14 of the Motion demonstrate the complications which arise in such a purported comparison where factual disputes about allocations and the amount of tax savings allegedly attributable to Grand Gulf would have to be determined prior to any change.

What Interveners suggest is therefore not as simple as applying a tax percentage stated in a city ordinance or state statute to the amount stated on an individual customer's bill.

The Court in UCCM, supra, made clear that it would not allow a fuel adjustment clause on the same philosophical or legal basis as a tax adjustment clause because it would permit one factor to be considered to the exclusion of all other factors in determining whether or not a rate is to be increased. The Court thus prohibited "one element ratemaking" in this state. Id. at 56-57. Therefore, the argument posed by Interveners is impermissible under the holding in Hotel Continental because an income tax is significantly different from a gross receipts tax. Further, the position advocated by Interveners is directly prohibited by the holding in UCCM because to adjust rates for one unregulated element in a total cost of service is unlawful. In other words, the effect of the tax adjustment clause advocated by Interveners is illegal. If AP&L were attempting to use it in the fashion advocated by Interveners to increase rates, Interveners would no doubt share that opinion.

4. AP&L denies that Case No. ER-85-265 is "still open inasmuch as AP&L has filed numerous motions therein" as Interveners allege in paragraph 1 of the Motion. The filing of motions by any party, or the issuance of orders by the Commission in a docket after the record has been certified to a court on appeal, does not serve to divest the appellate court of jurisdiction. Case No. ER-85-265 is presently on appeal and jurisdiction over the subject matter of that case presently rests in the Missouri Court of Appeals, Western District. AP&L has filed responsive pleadings under the caption of Case No. ER-85-265 because the Commission's order of July 11, 1986,

rejecting AP&L's proffered phase-in tariffs, was issued under that caption instead of being issued in a new docket in response to the tariffs which were submitted for filing to "phase in" the rate increase authorized in Case No. ER-85-265.

5. AP&L denies the allegations of paragraphs 5 and 7 of the Motion for the reasons stated previously, and denies any other allegations in the Motion not specifically admitted herein.

6. The alleged "admissions" of AP&L with regard to changes in costs which would affect the "tax savings" do not equate, except apparently in the minds of the Interveners, to overall changes in costs which would affect rates for electric service. Tax savings is just one of many elements of the cost of service. The UCCM case, supra, held that one-element ratemaking was prohibited. AP&L has made no statements that all other elements of its cost of service are unchanged. Mr. Teed's statements explicitly refer to changes in "tax savings". He made no representation about the level of AP&L's current revenue requirements. It is in fact clear from the workpapers accompanying AP&L's filing in Case No. AO-87-48 on December 15, 1986, that a 27.9 percent rate increase is shown to be necessary on a per book basis and that even at a 34 percent federal tax rate, AP&L's current rates are grossly inadequate. Therefore, contrary to the mischaracterization of Mr Teed's statements by the Interveners, the statements do not remove the "bar" presented by UCCM to changing rates based upon only one unregulated element of cost of service.

7. Because the legal theory upon which the Interveners' Motion is based has been shown to be erroneous, it serves no purpose to respond to the allegations about how much of a reduction is required. AP&L does not by this pleading admit the accuracy of any of the allegations or calculations in the Motion with regard to tax savings attributable to Grand Gulf.

8. Interveners Motion is improper because its stated purpose is to seek a change in electric rates. As such, the Motion does not comply with the provisions of §393.260 RSMo (1978).

WHEREFORE, for the above-stated reasons, the Motion should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served on counsel for all parties to the above-referenced dockets by depositing a copy of same with the United States Postal Service this 8th day of January, 1987, at Jefferson City, Missouri.

Gary W. Duffy