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

APPLICATION FOR REHEARING

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or the "Company") and, pursuant to § 386.500.1, RSMo.[1] and 4 CSR 240-2.160, respectfully applies for rehearing of the Commission's Report and Order in the above-captioned proceeding which was issued May 28, 2010 ("Report and Order"). In support of its Application, the Company states as follows:

1. Commission decisions must be lawful (i.e., the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003); *State ex rel. Alma Tele. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). The decision is reasonable only if supported by competent and substantial evidence of record. *Alma*, 40 S.W.3d at 387. Moreover, Commission decisions must not be arbitrary, capricious, or unreasonable. § 536.140.1(6), RSMo. The Commission is a creature of statute and it has only the powers conferred on it by the Legislature. *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 73 S.W.2d 393, 399 (Mo. banc 1934).

2. Under Missouri law, the absence of sufficient findings of fact and conclusions of law also render a Commission order unlawful. *See, e.g., Friendship Village v. Pub. Serv.*

[1] Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

Comm'n, 907 S.W.2d 339, 344 (Mo. App. W.D. 1995). Section 386.420, RSMo. requires findings of fact that are not completely conclusory. *State of Missouri ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. W.D. 2003). Section 536.090, RSMo. supplements § 386.420, and requires that the Commission's findings provide insight into how controlling issues were resolved. *Id*. The findings must be sufficiently definite and certain so that a reviewing court can review the decision intelligently to ascertain if the facts afford a reasonable basis for the decision without resorting to the evidence. *Id*.

3. A review of the evidentiary record in this case and applicable law demonstrates that the Report and Order fails to comply with the above-referenced principles respecting the Commission's determination of an appropriate return on equity ("ROE") and that therefore, rehearing should be granted as to the ROE issue.

4. Specifically, the Report and Order is unjust, unreasonable, arbitrary, capricious, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law with respect to the unreasonably low ROE established by the Commission.

5. The uncontested evidence shows that the 10.1% ROE authorized by the Commission for AmerenUE is materially below the 10.59% national average of ROEs approved by commissions across the country for integrated electric utilities. Indeed, the nearly 50 basis point difference equates to a very significant reduction in AmerenUE's revenue requirement in excess of $23 million. Consequently, the Commission's conclusion that this was just a "slight reduction" is arbitrary, capricious, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law.

6. In a number of recent cases, the Commission has recognized that the national average ROE is an important indicator of the ROE necessary to attract capital and to comply with the requirement of the *Bluefield* and *Hope* cases[2] that the Commission authorize an ROE that is commensurate with returns on other investments of corresponding risks. *See*, *e.g.*, Case Nos. ER-2004-0570 (the Commission authorized an ROE for *The Empire District Electric Company* that matched the national average); ER-2009-0318 (the ROE authorized for the Company was within just 15 basis points of the national average); and ER-2009-0355 (the authorized ROE for *Missouri Gas Energy* was within just 11 basis points of the national average, and the Commission substantially reduced MGE's risk by approving straight-fixed variable rate design). In the recent MGE case, in approving an ROE just 11 basis points from the national average, the Commission stated:

> Investor expectations of MGE are not the sole determiners of ROE under *Hope* and *Bluefield;* we must also look to the performance of other companies that are similar to MGE in terms of risk. *Hope* and *Bluefield* also expressly refer to objective measures…
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> The Commission cannot simply find a rate of return on equity that is "correct"; a "correct" rate does not exist. However there are some numbers that the Commission can use as guideposts in establishing an appropriate return on equity. In a recent Report and Order concerning MGE itself, the Commission stated that it does not believe that its return on equity finding should "unthinkingly mirror the national average." [footnote omitted.] Nevertheless, the national average is an indicator of the capital market in which MGE will have to compete for necessary capital
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> *Re: Missouri Gas Energy,* Case No. GR-2009-0355, *Report and Order* (February 10, 2010), p. 36.

However, in this case, there is nothing in the Report and Order that indicates that the Commission viewed the national average ROE as an important guidepost, or a significant objective measure in determining an ROE for AmerenUE, including in considering whether the

[2] *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923). *Federal Power Commission v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944).

ROE it is authorizing was commensurate with returns for other enterprises of corresponding risks, as required by *Bluefield* and *Hope*.

Given the foregoing, including the fact that this Commission has found that AmerenUE is an average utility with average risks, and the uncontested evidence presented by Mr. Gorman (MIEC) and Mr. Murray (Staff) in this case is that this continues to be true[3], the Commission's significant and unexplained departure from the national average ROE to such a degree is unjust, unreasonable, arbitrary, capricious, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law

7. Moreover, the Commission has failed to adequately justify and explain its apparent lack of reliance on the national average in arriving at its ROE decision in this case. Although the 10.59% national average ROE for integrated electric utilities was briefly mentioned in the Report and Order, the Report and Order suggests that the Commission did not seriously consider this point of reference (or the evidence relating to it) in establishing an ROE for AmerenUE. To AmerenUE's knowledge, the 10.59% national average ROE was not even mentioned in the Commission's recorded deliberations of the case, and it did not figure in the Commission's calculation of the 10.1% ROE authorized for AmerenUE. The Commission's minimal findings of fact relating to the national average reflects that the Commission was attempting to justify its very significant departure from the national average on the theory that allowed ROEs were declining. In fact, the record (*see* page 9 of Exhibit 112 (Morin rebuttal)) shows that allowed ROEs were trending up at the end of 2009. Moreover, the 10.1% ROE for AmerenUE is lower than *any* ROE determination during 2009 for any integrated electric utility.

[3] "AmerenUE is an average company with average risk." *Re: Union Electric Company d/b/a AmerenUE*, Case No. ER-2007-0002, *Report and Order* (May 22, 2007 p. 41; Gorman: "Q: And you would agree with me that AmerenUE has about average risk for an integrated electric utility? A: I agree with that, yes." Tr. 1960. Murray: "Q: Let me,--taking a step back, it's my understanding that your opinion is that the overall risk AmerenUE faes is about average for comparable companies; is that correct? A: Yes." Tr. 2030.

These facts of record demonstrate that the Commission's ROE decision is unjust, unreasonable, arbitrary, capricious, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law

8. The Commission's authorized return of 10.1% is also unjust, unreasonable and not supported by adequate findings of fact and conclusions of law because it is based on the midpoint ROE recommendations of the consumer advocate witnesses, Messrs. Gorman and Lawton, and apparently did not consider the fact that those consumer advocate witnesses recommended ROE ranges as high as 10.5% (Gorman) and 10.9% (Lawton).

9. The Commission's authorized return of 10.1% is unjust, unreasonable, arbitrary, capricious, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law because the midpoint ROEs of the witnesses upon whom the Commission apparently relied the most were based on giving their risk-based methods (CAPM and risk premium analyses) 50% weight, which the uncontested evidence shows is not reliable given the capital market conditions that underlie the periods examined in determining a fair ROE for AmerenUE in this case. Indeed, the record reflects that the DCF analysis is the most reliable of the analyses, yet these witnesses weight it equally with the admittedly flawed risk-based analyses. For example, Mr. Lawton testified about the DCF method compared to risk premium methods, concluding that the DCF was the "best analytic technique" and about the "problems and drawbacks" with the CAPM. In fact, Mr. Lawton testified that "risk premium methods should be viewed with considerable caution," yet the Commission adopted an ROE that matched the midpoint of Mr. Lawton's recommendation, which as noted was influenced very heavily by these methods which, by his own admission, were problematic.

Like Mr. Lawton, Mr. Gorman also expressed some concerns about the CAPM, as did Dr. Morin, and even Mr. Murray, who indicated that his CAPM results "should not be given much consideration in this case**."** Notwithstanding this evidence about the relative unreliability of the CAPM method, the Commission approved an ROE for AmerenUE that was heavily influenced by the CAPM analyses. For this reason as well the Commission's decision is arbitrary, capricious, unreasonable and unsupported by sufficient findings of fact and conclusions of law.

10. The Commission also ignored specific issues AmerenUE pointed out with regard to Mr. Gorman's and Mr. Lawton's analyses. For example, Mr. Lawton acknowledged that his CAPM, if updated, would result in a 20-30 basis point increase, but the Commission never addressed how that update might impact Mr. Lawton's recommendation. Tr. 2197. Mr. Gorman artificially lowered his ROE by ignoring one of his proxy groups in estimating his sustainable constant growth ROE, and opportunistically switched to using median results rather than averages, as used in the last case. Moreover Mr. Gorman admitted that Dr. Morin's 6.5% risk premium appeared to be in line with a normalized risk premium. Ex. 409, p. 5, l. 18-19 (Gorman rebuttal.) If Mr. Gorman's analysis had been revised to reflect just this one adjustment, his midpoint ROE would have increased to 10.15%. (See AmerenUE's reply brief, footnote 45.) The Commission's total failure to address these and other specific deficiencies in the consumer advocates' midpoint ROEs, which were pointed out by AmerenUE, is unreasonable, arbitrary, capricious, and results in an ROE determination that is not supported by adequate findings of fact and conclusions of law.

WHEREFORE, the Company hereby respectfully requests that the Commission grant rehearing of its Report and Order with respect to the ROE allowed for the Company.

Dated June 4, 2010.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing of Union Electric Company d/b/a AmerenUE was served via e-mail, to the following parties on the 4th day of June, 2010.

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