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September 20, 2002

Via Federal Express

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

Re: MPSC Case No. EC-2002-112

Dear Judge Roberts:

Enclosed you will find an original and nine copies of the Reply Brief of Respondents Union Electric Company d/b/a AmerenUE, et al. Please file the original and eight copies with the Commission and return the extra copy file-stamped to me in the enclosed self-addressed stamped envelope.

If anything further is needed to file this pleading, please let me know.

Yours very truly,

HERZOG, CREBS & McGHEE, LLP

Michael A. Vitale

MAV/mh
Enclosures
cc: Freeman Bosley, Jr. (w/encs)
Michael Dandino (w/encs)
Victori Kizito (w/encs)

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

STERLING MOODY, STERLING'S MARKET PLACE AND STERLING'S PLACE, I,	)	
Complainants,	)	
v.	)	Case No. EC-2002-112
AMERENUE, UNION ELECTRIC CO. d/b/a AMERENUE, and MIKE FOY, LEROY ETTLING, and SHERRY MOSCHNER, as employees of AmerenUE,	)	
Respondents.	)	

REPLY BRIEF OF RESPONDENTS
UNION ELECTRIC COMPANY d/b/a AMERENUE, ET AL.

I. REPLY TO STAFF'S INITIAL BRIEF

A. Introduction

Aside from the issue of whether the April 10 notices were actually delivered to complainants (which respondents believe they have established), the essential facts of this case are undisputed. After several years of bounced checks, broken promises of payment and unpaid bills, the balance owed by Sterling's Marketplace[1] to AmerenUE for electric service had grown well into six figures by April 2001. Complainants themselves do not make any argument that the bills were not in arrears. The Staff's technical argument about the form of the notices notwithstanding, if the disconnection notices were delivered on April 10, complainants had seven days notice before service was actually disconnected.

[1] In this Reply Brief, respondents incorporate by reference the abbreviations and references used in their Initial Brief.

Thereafter, at the importuning of complainants, their banker and their landlord, AmerenUE agreed to restore service to Sterling's Marketplace, accepting only a minimal payment against the admittedly large outstanding balance and further agreeing to forgive $135,000 in unpaid bills. As it turned out, the agreement made by complainants and their landlord as to the payment of past and future bills proved to be a sham and the bills again began to go unpaid soon after service was restored. Ultimately, complainants voluntarily terminated service, adding thousands of additional dollars that would never be paid to the $135,000 already written off by AmerenUE plus the $89,000 balance Sterling's Marketplace promised in the May Agreement it would pay but never will.

In the face of these facts, the Staff has chosen to rely on a technical argument that the form of notice given for the April 17 disconnection was improper, no matter how much actual notice complainants actually had of the disconnection. This is an inappropriate attempt to elevate form over substance. Given that the intent and purpose of the Commission's rules and AmerenUE's tariff were clearly met in this case, fairness dictates that the Commission, understanding the realities of what occurred, reject the Staff's argument and find in respondents' favor.

B. Notice of the April 17, 2001 Disconnection

In the Staff Position Statement filed before the hearing on July 1, 2002 but after the parties had submitted direct and rebuttal testimony, the Staff took the position that AmerenUE had provided proper notice for the April 17 disconnection. (Issue No. 6). However, in its Initial Brief, the Staff has reversed itself, claiming it did not have "full

clarity" of the facts following the investigation it conducted in the fall of 2001.[2] (Staff Initial Brief 12). The record will show, however, that the facts which purportedly have "clarified" the issues for the Staff were known well before the filing of the Staff Position Statement. Thus, the Staff has failed to show good cause why it is now taking a position which is contrary to the one it took in its Position Statement.

The Staff argues for the first time in its Initial Brief that the notices relied upon by AmerenUE for the April 17 disconnection were technically deficient because of the date they were served and the date set out in the notices. (Staff Initial Brief 6-7). The Staff has had copies of the actual notices in its possession ever since its investigation in November 2001. (Ketter R.T. App. A, Attachment C). Further, the Staff received the rebuttal testimony of Judy Rowe, which identified April 10 as the actual delivery date of the notices, on May 31, 2002. Thus, the Staff's explanation for the total reversal of its position on this issue is specious. The Commission should disregard the Staff's effort to pursue a new, technical and inconsistent argument at this late date, which would effectively penalize respondents for their reliance on the original Staff Position Statement.

The Staff's technical attack on AmerenUE's notices focuses on an academic point and ignores the fact that the actual service of the notices complied with the spirit and purpose of the notice provisions in the rules and tariff. The clear intent of these provisions is to ensure that a non-residential customer receive at least 48 hours notice before a disconnection occurs in order to allow the customer time to remedy the

[2] Not only is this a newly raised issue by the Staff, it is also one about which Moody and Sterling's Marketplace have not complained and the Staff has raised it in such a way that respondents were unable to address the issue at the hearing.

circumstances that prompted the notice and to avoid the disconnection. This purpose was clearly accomplished by the notices AmerenUE served on Moody at the store on April 10, 2001. In fact, rather than allow Sterling's Marketplace just 48 hours to remedy its overdue accounts, which is all the tariff requires, AmerenUE allowed seven days before the disconnection on April 17. During that period of time, no payments were made on the accounts. To find that the notices were deficient because they were served on April 10 but stated service **might be** disconnected after April 11, rather than April 12, is a distinction of form over substance. The Commission has rightly rejected such an approach in prior cases. See In the Matter of a Special Contract Filed by Kansas City Power & Light Co., 26 MO PSC 3rd 396 (1995); In the Matter of Valley Sewage Company of St. Louis, 22 MO PSC 268 (1978); In the Matter of AT&T Communications, 6 MO PSC 3rd 562 (1997).

The academic nature of the Staff's argument on this issue is also apparent from the fact that its objection to the notices would be moot if they had been mailed early on the morning of April 9, rather than having been hand-delivered the next day – regardless of when they actually reached the customer. AmerenUE's tariff on the hours of disconnection provides that disconnection may only occur between the hours of 8:00 a.m. and 4:00 p.m. (Sheet 182, Section VII.E). Viewing a day as beginning at 8:00 a.m. for disconnection purposes, a notice put in the mail prior to 8:00 a.m. on April 9 would mean it had been mailed more than 48 hours (April 9 and 10) before the date specified in AmerenUE's notices to Sterling's Marketplace – April 11. This would comply with the Staff's technical reading of the tariff. However, if the notices had in fact been mailed on April 9, they would not have been received until April 10 at the earliest, the same date

they were served. They would more likely have been received on April 11, the date set out in the notice, or even later. Yet under these scenarios, the Staff would have no problem with the form of the notices – even though they may have been received by Sterling's Marketplace **after** service had been disconnected. Pursuant to the Staff's reasoning, AmerenUE should be penalized in this case for having made certain the notices actually reached Sterling's Marketplace before the date set out in the notices. Surely, the Commission will not endorse such an interpretation of the notice provisions.[3]

The Staff's argument also points out a potential inconsistency in the rules and tariff on disconnection. The tariff provides that the notice is to be mailed to or served on a non-residential customer not less than 48 hours prior to the date specified in the notice **after which** disconnection may occur. (Sheet 182, Section VII.D). However, the tariff dealing with the hours of disconnection provides that service may be disconnected between certain hours "**on the date** specified on the notice of disconnection." (Sheet 182, Section VII.E) (emphasis added). In the case of the notices before the Commission here, the date specified as to when disconnection might occur was April 12, 2001. Is "the date specified on the notice" then April 11 or April 12? The inconsistency in the tariff provisions is clear. The Commission should not find the notices given here to have been deficient, especially where it was seven days after notice before service was actually disconnected.

[3] Given the fact that hand-delivery on a specific day may be difficult to achieve for any number of reasons, the Staff's interpretation would cause utilities to favor mailed notices, which are more likely to not reach customers on a timely basis and which are more difficult to document, thus potentially giving rise to more disputes between customers and utilities about service issues.

Given the above analysis, respondents ask the Commission to find that the disconnect notices delivered on April 10 substantially satisfied the notice rule and AmerenUE's tariff and that complainants were provided with sufficient notice of the April 17 disconnection of service. While the Staff's academic point might reveal a need to review the exact wording of the notice provisions in the rules and tariff, and to consider a change to them if necessary, the Commission should reject application of such a technical and narrow reading in this case.

C. Issues Relating to the $45,000

Citing what it calls "new issues...raised and developed during the course of the hearing," the Staff has raised questions concerning AmerenUE's handling of the $45,000 it received on May 14, 2001. (Staff Initial Brief 2). The Staff questions "whether it was appropriate for UE to "request a deposit, but then hold the checks without restoring electrical service to the Marketplace the next day as promised." (Staff Initial Brief 13). In doing so, the Staff notes that it has raised these issues for discussion purposes only and that it is not asking the Commission to make any findings of non-compliance with the Commission's rules or AmerenUE's tariffs nor is it asking the Commission to seek penalties with regard to these issues.

Contrary to the Staff's contention that this issue was "developed during the course of the hearing," the facts surrounding the calculation of the $45,000 deposit amount and the delivery of the three checks were fully established in both the direct testimony filed by complainants on April 25, 2002 (Moody D.T. 9-10) and the rebuttal testimony filed by respondents on May 31, 2002. (Foy R.T. 19-20). Yet the Staff did not raise this as an issue in its July 1 Position Statement nor did it contend in that

Statement that AmerenUE had done anything improper or unreasonable in how the $45,000 was handled. More importantly, the record is clear that the $45,000 deposit amount was calculated and requested for the store's landlord, P & B, in response to a successor request Foy received from the landlord on April 26, 2001. (Foy R.T. 14-15; Foy R.T. Schedule 7; Tr. 371-72). The Staff admits as much in its Initial Brief: "Charles Foy of UE, requested a sum of $44,000 or $45,000 **from P & B** as a deposit to become a successor to accounts for electrical service." (Staff Initial Brief 8) (emphasis added).[4] The record is also clear that Foy did not ask Sterling's Marketplace or Moody for a deposit but instead told Moody that service would not be restored in the store's name until a significant payment was made toward the past due balances. (Tr. 340, 372; Foy R.T. 12-15).

Thus, the Staff's question as to whether it was "appropriate" for AmerenUE not to restore service to the store once the $45,000 was delivered on May 14, 2001 is not before the Commission in this case. The landlord is the only party with standing to dispute the appropriateness of AmerenUE's refusal to restore service to the store in P & B's name when the $45,000 was delivered to AmerenUE. In fact, P & B filed a complaint regarding this issue with the Commission on May 15, 2001. (Tr. 347-48, 372). However, that complaint was withdrawn by the landlord in conjunction with the execution of the May Agreement. (Ex. 21).

Even if one assumes, for the sake of argument, that this issue is properly before the Commission, the record shows that AmerenUE's actions were appropriate and did not violate any tariff or rule. AmerenUE admits that it advised the landlord that it would

[4] The Staff also concludes that AmerenUE's tariff regarding "initial service" applied to the request for a deposit from P & B. (Staff Initial Brief 8-9).

restore service **in the landlord's name** upon receipt of a deposit when the landlord indicated it wished to successor both accounts in late April 2001. However, AmerenUE questioned whether the landlord was acting as a legitimate successor since two of the checks which made up the $45,000 delivered on May 14 identified Sterling's Marketplace on their remittance lines. (Foy R.T. 19; Ex. 27). The telephone conversation Foy had with the landlord just hours before these checks were delivered, in which P & B advised that a group of investors were going to provide funding to Moody and allow the store to continue to operate, also called into question whether the delivery of the $45,000 represented a bona fide successor attempt by the landlord. (Foy R.T. 18-19; Foy R.T. Schedule 14). As was stated at the hearing, AmerenUE had received a number of calls from other people claiming they wanted to successor the store accounts but those calls turned out to be nothing more than efforts by people sympathetic to Moody to get AmerenUE to restore service so the store could resume operations without addressing the account arrearages. (Foy R.T. 13; Moschner R.T. Schedule 3; Tr. 392-93).

The Staff admits that no Commission rule or AmerenUE tariff specifically addresses AmerenUE's refusal to restore service upon receipt of the $45,000 under these circumstances. (Staff Initial Brief 14). The one tariff it does cite for "guidance," Sheet 135, Section I.F provides only that AmerenUE is to provide service "within a reasonable length of time." (Staff Initial Brief 14). The $45,000 was delivered to AmerenUE without prior notice sometime on May 14. Under the circumstances, Foy raised legitimate questions about the source of the money and whether P & B was a legitimate successor on the accounts. A meeting subsequently took place less than two

days later and McNamara proposed that the $45,000, none of which had actually come from P & B, be applied to Sterling's Marketplace's past due bills. The parties all agreed to the proposal.

AmerenUE's concerns about the legitimacy of the P & B successor attempt proved valid given Moody's testimony at the hearing and in his deposition that the $45,000 was his rather than the landlord's. (Tr. 116; Moody PSC Depo 113). Further evidence that the landlord never intended to act as a legitimate successor and fulfill the duties of a new customer is its repudiation of the May Agreement almost immediately after service was restored to the store as well as Moody's admission that P & B's participation in the May Agreement was a sham designed simply to get the power back on.[5] (Lefler R.T. 11; Ex. 21; Lefler R.T. Schedule 10; Tr. 132-36). This subsequent conduct by the landlord is significant proof that the landlord was not acting as a legitimate potential successor when the $45,000 was delivered but rather was simply taking advantage of its position as Sterling's Marketplace's landlord in attempting to persuade AmerenUE to restore service without requiring Sterling's Marketplace to address the large arrearage.

Given these facts, AmerenUE's actions with respect to the $45,000 were reasonable.

In addition to questioning AmerenUE's refusal to restore service upon delivery of the $45,000, the Staff claims in its Initial Brief that AmerenUE "required" the landlord to

[5] Surprisingly, the Staff contends "it...cannot be argued that P & B was 'acting for' Complainants by becoming a successor to account 47300-01916." (Staff Initial Brief 18). Yet the evidence showed clearly that this is exactly what was happening. (Respondents' Initial Brief 18).

pay a portion of the balance on one of the Sterling's Marketplace accounts as a condition for restoring service and allowing P & B to become a successor on one of the two accounts. (Staff Initial Brief 14-15). AmerenUE assumes the Staff is referring to the application of the $45,000 to Sterling's Marketplace's arrearage pursuant to the May Agreement. This conclusion is in error, however, since the money did not come from P & B. Thus, the only obligation of the landlord under the May Agreement was to become a legitimate successor on the single meter account for future service only, something P & B almost immediately disclaimed after service was restored. (Ex. 21). Furthermore, the record shows that it was McNamara, not AmerenUE, who suggested using the $45,000 from Sterling's Marketplace to pay off some of Sterling's Marketplace's arrears, which Sterling's Marketplace subsequently agreed to do. (Tr. 373; Ex. 21). Thus, it appears that the Staff has simply failed to understand the dynamics of this portion of the May Agreement.

C. "Account Responsibility and Billing Practices"

Despite the fact that neither the Staff nor complainants raised this issue in their position statements or at the hearing, the Staff has chosen to devote a portion of its Initial Brief to a discussion of what it terms "account responsibility and billing practices." (14-20). As this is another purportedly "new" issue raised for the first time in the Staff's Initial Brief,[6] respondents were unable to address the issue in its evidence or at the hearing. While the Staff's discussion regarding this issue raises some interesting questions, none of those questions are pertinent to this case. To the extent the Staff

[6] AmerenUE does not agree that the facts giving rise to this so-called "new" issue were not known before the hearing as a result of the Staff's November 2001 investigation and the pre-filed testimony of the parties. The Staff simply failed to make this an issue in their July 1 Position Statement.

raises these issues due to its misunderstanding of the source and application of the $45,000 under the May Agreement (for example, the Staff's questions here whether it was "lawful" for AmerenUE to require P & B to pay Sterling's Marketplace's arrears), respondents have shown the discussion to be inaccurate and not supported by the record. Further, to the extent the Commission wishes to address these issues as a matter of future practice and what the Staff calls their "implications for all ratepayers" (Staff Initial Brief 15), this case is not the proper forum for that discussion.

D. The May 18, 2001 Agreement

Notably, the Staff all but ignores the execution of the May Agreement by AmerenUE, Sterling's Marketplace and P & B. As noted in respondents' Initial Brief (15-17), the May Agreement came about following a meeting between representatives of AmerenUE and representatives of Sterling's Marketplace, including Moody and McNamara of Gateway Bank, Sterling's Marketplace's banker. Following that meeting, the parties, including the landlord for Sterling's Marketplace, agreed to resolve the various disputes and issues which existed concerning AmerenUE's bills. Sterling's Marketplace agreed to pay down a portion of its outstanding balance and to pay the remaining amount due over time, P & B agreed to accept responsibility for one of the accounts for which Sterling's Marketplace had been previously responsible and AmerenUE wrote off a significant portion of the amount it was owed for electric service to Sterling's Marketplace. As a result, complainants here waived any claims they might have had for all matters which existed prior to the date of the May Agreement, i.e., essentially all of the matters about which they complain in their Complaint.

Following the May Agreement, of course, only AmerenUE lived up to its obligations. P & B almost immediately repudiated its acceptance of responsibility for one of the accounts and thereafter failed to make any payments towards the bills on that account. Sterling's Marketplace made a few payments due under the May Agreement, including at least one that P & B was supposed to make, but thereafter stopped paying any bills although it continued to receive service until November 2001. On the other hand, AmerenUE re-established service as it had agreed to do and wrote off a significant portion of the amount it was owed on the promise that the lower, compromised amount would eventually be paid. It never was.

II. REPLY TO COMPLAINANTS' INITIAL BRIEF

A. Introduction

The primary position taken by complainants in their Initial Brief is that the notices of disconnection which respondents maintain were delivered on April 10 were in fact never delivered and that no notice of disconnection was ever delivered to Sterling's Marketplace prior to the disconnection which occurred on April 17, 2001. As was demonstrated in respondents' Initial Brief, the credible evidence introduced at the hearing is that the notices were delivered on April 10 as respondents contend. Even if the Commission is unable to find that the notices were delivered because of the "he said, she said" nature of the testimony, complainants' claims necessarily fail as they were unable to carry their burden of proving the notices were **not** delivered.

The remainder of complainants' Initial Brief consists of misstatements of the testimony, both pre-filed and at the hearing, and arguments made without the benefit of support in the law. The plain fact is that the testimony adduced in this matter does not

support the version of events complainants have attempted to portray nor do they support a finding of wrongdoing on the part of respondents.

Finally, throughout their Initial Brief, complainants rely on "testimony" from the depositions of AmerenUE employees, which depositions were never introduced into evidence at trial and which have not been submitted by complainants as part of their Initial Brief. Thus, the Commission is unable to even read the deposition testimony which complainants purport to cite. As the depositions are not part of the record, the Commission must completely disregard all deposition references in complainants' Initial Brief.

B. Notice

In their Initial Brief, complainants stand by their contention that AmerenUE did not deliver any disconnection notices on April 10. Unfortunately, the only evidence they have to support such a claim is Moody's testimony, whose credibility pales in comparison to Rowe's. In apparent recognition of this fact, complainants contend that AmerenUE could not have delivered effective disconnection notices because the power was already off. Complainants characterize AmerenUE's April 10 notices for the April 17 disconnection as "[a]nticipatory...notice[s] of disconnection." (Complainants' Initial Brief 5). Not surprisingly, complainants provide no legal authority for this argument and can point to no rule or tariff which lends support to such a distinction – a notice is a notice. In fact, AmerenUE's tariff specifically provides that it may disconnect service on the date specified in the notice or within 11 business days thereafter. (Sheet 132, Section VII. E). The notices delivered on April 10 thus were effective for the April 17 disconnection.

Some of complainants' arguments with respect to the issue of notice are curious. After citing the relevant tariffs, complainants first cite the testimony of Rowe, an AmerenUE employee, as support for Moody's position that she "did not hand him any letter or notice of disconnection." (Complainants' Initial Brief 4). In fact, Rowe's testimony on this issue, which is cited by complainants, is as follows:

"Q. And what did you do at that point?
A. I asked him if he was Sterling Moody, he said, Yes, and I gave him the letters.
Q. Now, according to your testimony on page 3, line 6, you say that he opened the envelopes and read the two notices?
A. Yes.
Q. So did he read them in the dark?
A. No. He had the flashlight.
Q. How did he read them?
A. He had the light. It was light at his desk.
Q. Okay. So he picked the light up and read the notes?
A. I don't remember. I just know that he read the letters. He read them because he asked me to verify that I delivered the letters and that the lights were off. He asked me that."

(Tr. 210). The fact is that no matter how "confusing" the testimony may have been to complainants (see, e.g., Complainants' Initial Brief 6), Rowe testified unequivocally in both her direct testimony and at the hearing that she delivered the notices to Moody on April 10. As she told the Commission, why would she leave the store without delivering the notices? "Because that's all I'm there to do was to deliver the letters...I left the letters there." (Tr. 223-24).

Complainants also seem to argue that Moody and Sterling's Marketplace did not understand that the April 10 disconnection notices remained in effect even after the short term disconnection on April 10 was remedied. However, there is no testimony in the record to support this contention and both Foy and Ettling testified that they warned Moody the notices remained in effect when they spoke to him on April 10. (Ettling R.T.

19-20; Foy R.T. 11). Complainants also state: "Complainant Moody contends that an employee delivered a notice to himself on April 10, 2001, after the electricity had already been disconnected, and that this would qualify as notice." (Complainants' Initial Brief 4) (emphasis in brief). Moreover, to the extent complainants raise an issue about having somehow misunderstood the notices because the power was already off, that argument lends support to the conclusion that the notices were actually delivered as respondents contend.

The rest of complainants' argument on the notice issue addresses the possible re-delivery of the April 10 notices by AmerenUE at some point after April 10 and before the April 17 disconnection. As they do on other occasions in their Initial Brief, complainants cite to deposition testimony which was not admitted into evidence. Thus, complainants' attempt to utilize this testimony is improper. Moreover, the "re-delivery" issue is irrelevant. The April 10 delivery of two disconnection notices constituted adequate notice for the April 17 disconnection under the notice provisions of the Commission's rules and AmerenUE's tariff.

Finally, complainants' reference to the fact that AmerenUE has begun requiring customers to sign for hand-delivered disconnection notices is disingenuous. If anything, the Commission should view this as an improper attempt to introduce "subsequent remedial measures" to show that AmerenUE violated its tariff. Such subsequent measures are inadmissible to establish culpability on the part of a defendant for past actions. See, e.g., Loyd v. Ozark Electric Cooperative, Inc., 4 S.W.3d 579, 588 (Mo.App. 1999). It is clear that this change in procedure addresses not the effectiveness of the notices but rather the possibility that a customer will claim that a

delivered notice was not really received, such as is the case here. The issue is whether AmerenUE complied with the Commission's rules and its tariff and gave the required notice – it did. Whether AmerenUE now does something more, and which is beyond what the law requires, is irrelevant.[7]

C. Disputed Bills

Complainants argue that the disconnection of service by AmerenUE violated its tariff on the theory that Sterling's Marketplace disputed how much the store's accounts were in arrears as of April 17, 2001. However, as the Staff properly concluded in its Initial Brief, the complainants' improper wiring argument does not translate into a bona fide billing dispute because AmerenUE's responsibility for wiring problems ends at the meters. That dispute was between Sterling's Marketplace and its landlord, not with AmerenUE. Moody also admitted at the hearing that he was not disputing the actual meter readings. (Tr. 87).

Furthermore, the record is devoid of evidence that any other disputes relating to the bills were communicated by complainants to AmerenUE before the April 17, 2001 disconnection. While McNamara testified that he brought up the issue of the Broadway Supermarkets bills after the disconnection, complainants presented no evidence that this issue was raised with AmerenUE prior to the disconnection. In addition, as noted in respondents' Initial Brief, complainants failed to demonstrate that the Broadway Supermarkets bills were not legitimately owed by Sterling's Marketplace. Furthermore, it is clear that the store was significantly in arrears even if the initial

[7] The same argument holds with respect to complainants' reference to the fact that no receipt for the notices was obtained by Rowe. (Complainants' Initial Brief 4). Neither the Commission's rules nor AmerenUE's tariff requires a receipt.

Broadway Supermarkets' usage is excluded from the calculation.[8] (Ex. 21; Foy R.T. Schedule 16).

Complainants also attempt to characterize the so-called constructive payment arrangement as somehow precluding AmerenUE from disconnecting service. Again, no legal support is provided for this theory. Significantly, Moody admitted that no one from AmerenUE ever told him service would not be disconnected as long as partial payments were made. (Tr. 93). Moreover, the undisputed evidence is that complainants never complied with whatever "arrangement" they may have had. Multiple bounced checks, failure to at least keep up with current bills and broken promises of payments with state money and grants demonstrate that complainants did not keep up their end of the bargain they claimed they had with AmerenUE.

D. Application of $45,000 to Arrearage

Complainants claim that AmerenUE promised service would be reconnected if complainants provided a deposit of $25,000 or $45,000. Complainants again improperly cite deposition testimony which is not in the record to support their claims. In addition, complainants misquote the deposition testimony of Foy which does not indicate that AmerenUE ever promised to restore service in the name of complainants upon payment of a deposit. Unfortunately, this erroneous interpretation of Foy's deposition testimony by complainants is not readily apparent to the Commission given the absence of his deposition from the record. What is clear from the record is that AmerenUE consistently told complainants service would not be restored in Sterling

[8] Complainants' own brief essentially concedes this issue: "Complainant Sterling's Marketplace began using electric service by Respondent AmerenUE sometime in July of 1998." (Complainants' Initial Brief 2). A similar admission was made in their original Complaint filed in August 2001.

Moody's name until the store made a significant payment towards the past due balances. (Tr. 340, 372; Foy R.T. 13). The issue of the deposit related solely to the possibility of another party, P & B, becoming a successor to the store's accounts, and Moody admitted as much in his deposition. (Moody PSC Depo. 112-13).

Finally, complainants erroneously contend AmerenUE insisted on P & B's involvement in this dispute as a guarantor of Sterling's Marketplace's accounts. (Complainants' Initial Brief 7-8). P & B was not a guarantor but approached AmerenUE as a potential successor. This is apparent from the same testimony of Lefler cited by complainants in their Initial Brief:

> "Q. All right. And Mr. Schoenlau agreed to be a signatore and a guarantor of sorts on the account?
> A. He agreed to be responsible for one of the accounts."

(Tr. 263).

E. <u>The May 18, 2001 Agreement</u>

Not surprisingly, complainants' Initial Brief fails to address the fact that complainants and AmerenUE, along with P & B, the landlord for Sterling's Marketplace, entered into an agreement on May 18, 2001 which compromised all claims and disputes then existing concerning AmerenUE's bills. As a result, complainants have waived all of the claims set out in their Complaint. Rather than restate their argument here, respondents incorporate by reference the discussion contained in their Initial Brief concerning the May Agreement. (Respondents Initial Brief 15-18, 29-30).

There was a hint in the testimony of complainants (Moody D.T. 10-11; Tr. 118-19, 127-28) that they had no choice but to enter into the May Agreement and that it is somehow void or of no effect due to duress. If made, such a claim of duress would fail, both factually and as a matter of law. To begin with, complainants did have other

options besides blindly (as they claim) entering into the May Agreement. Complainants could have asked counsel to review the document or have their banker, McNamara, review it. They could have asked for different terms. If they felt they had been wronged by the disconnection, they could have filed a lawsuit seeking injunctive relief requiring AmerenUE to restore power immediately or could have filed a complaint with the Commission. Finally, they could have paid the bills, which even complainants admit were in arrears. (Complainants' Initial Brief 8). Instead, Moody went ahead and signed the May Agreement, hoping he could comply with its terms.

As a result of these facts, complainants are precluded from asserting duress as a way to avoid the impact of the May Agreement. To begin with, the existence of duress is a question of law. See, e.g., Slone v. Purina Mills, Inc., 927 S.W.2d 358, 370 (Mo.App. 1996). A claim of duress can not be sustained where there is "knowledge of the facts and opportunity for investigation, deliberation and reflection," as there undisputedly was here. The Aurora Bank v. Hamlin, 609 S.W.2d 486, 488 (Mo. App. 1980).

A case with somewhat similar facts is Schmalz v. Hardy Salt Co., 739 S.W.2d 765 (Mo.App. 1987). Schmalz was an employee who had released certain claims against his employer in connection with the termination of his employment. The court found that Schmalz was faced with a legitimate choice whether or not to execute the release and that he was an experienced businessman who had sought the advice of counsel and understood what he was signing. Here, complainants had the opportunity for deliberation and reflection and could have sought the advice of counsel had they so desired. Significantly, the court in Schmalz found that duress could not be claimed

where the employee had accepted the benefits of what he had signed. "Silence and acquiescence for a considerable period thereafter, action in accord with it, and acceptance of the benefits under it, amount to a ratification." Schmalz, 739 S.W.2d at 768.

Here, complainants accepted the benefits of the May 18 Agreement. Power was restored to the store almost immediately after it was signed and complainants continued to operate the store under the May Agreement until they voluntarily requested the termination of service in November 2001. Even if the filing of the Complaint with the Commission on August 21, 2001 is somehow viewed as some sort of repudiation of the May Agreement, the fact that complainants waited three months to determine if they could live with the May Agreement, and their continued acceptance of the restored electric service without payment until November 2001, bars any claim of duress or coercion.

F. Complainants' Proposed Findings of Fact

Several of complainants' proposed findings of fact contain misstatements of the evidence in the record, as follows[9]:

3. Moody testified at the hearing that ownership of the store was acquired from Broadway Supermarkets in September 1999. (Tr. 88-89). Respondents assume that complainants' reference to September 2000 in their brief is simply an error. Also, as noted in Respondents' Motion to Dismiss Complainant, filed October 16, 2001, the accounts at issue herein

[9] The numbers correspond to the specific proposed finding of fact contained in complainants' Initial Brief.

were corporate accounts and the store was owned by, and AmerenUE's customer was, a corporation – Sterling's Marketplace I, Inc. Complainant Moody was only a shareholder and director of AmerenUE's corporate customer, as complainants admitted in their November 2, 2001 Response to the Commission Order for a More Definite Statement.

5. Moody admitted at the hearing that no one from AmerenUE ever told him service would not be disconnected as long as Sterling's Marketplace made partial payments on its accounts. (Tr. 93). Thus, this proposed finding of fact, to the extent it implies AmerenUE agreed service would not be disconnected while these payments were being made, contradicts the testimony of complainants' chief witness.

8. For the reasons stated herein and in Respondents' Initial Brief, respondents believe the evidence establishes that proper notice was delivered to Sterling's Marketplace for the April 17, 2001 disconnection of service.

10. This proposed finding of fact is not supported by the evidence. The record is devoid of any testimony that AmerenUE ever agreed to restore service to complainants in exchange for the payment of a $25,000 "deposit" or, for that matter, upon payment of any "deposit." Foy specifically testified at the hearing that he never requested a deposit from Sterling Moody or Sterling's Marketplace. He stated in his testimony that the only reason to request a deposit was for the purpose of successoring an account to another customer, in this case P & B. (Tr. 372).

11. This proposed finding of fact erroneously states that AmerenUE requested a $45,000 deposit from complainants. Moody himself admitted in his deposition that he knew the $45,000 deposit request was directed to P & B as a potential successor for both store accounts. (Moody PSC Depo. 112-13).

12. This proposed finding of fact conflicts with the undisputed evidence that AmerenUE sought a deposit from P & B as a successor to the store's accounts, not as a guarantor of Sterling's Marketplace.

13. Again, there is no evidence AmerenUE sought a guarantor on Sterling's Marketplace's accounts nor is there any evidence that Sterling's Marketplace or Moody ever "obtained" a guarantor on the accounts.

14. This proposed finding of fact conflicts with the evidence and with the terms of the May Agreement, to which Sterling's Marketplace was a party, that the full $45,000 AmerenUE received from Sterling's Marketplace on May 14, 2001 was applied to the arrearages on Sterling's Marketplace's accounts.

G. Complainants' Proposed Conclusions of Law

Given the findings of fact supported by the evidence in the record, there can be no conclusion of law that AmerenUE or its employees violated the Commission's rules or AmerenUE's tariff, except with respect to the inadvertent disconnection that occurred on April 10, 2001. Nonetheless, as noted herein, complainants waived any claim concerning that disconnection by entering into the May Agreement.

As noted by both respondents and the Staff in their Initial Briefs, the Commission is without jurisdiction to award damages against respondents or order the entry of any fines. Moreover, complainants have produced no evidence justifying even a recommendation that a proceeding be commenced against any respondent for the entry of a fine pursuant to R.S.Mo. 386.600.

III. CONCLUSION

For the reasons stated herein, and in respondents' Initial Brief, respondents request the Commission enter an appropriate order denying any relief to complainants and finding all issues in favor of respondents.

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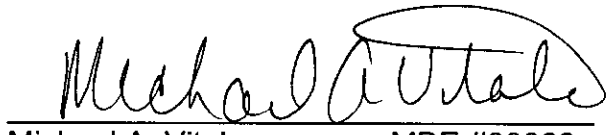
By: 

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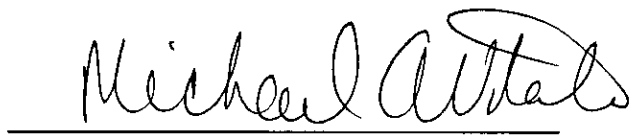
Certificate of Service

The undersigned hereby certifies that a copy of the Reply Brief of Respondents Union Electric Company d/b/a AmerenUE et al. was sent first class mail, postage prepaid this 23rd day of September 2002 to Michael F. Dandino, Office of Public Counsel, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102, Victoria Kizito, Office of General Counsel, Missouri Public Service Commission, 260 Madison Street, Jefferson City, Missouri 65102 and Freeman Bosley, Jr., 1601 Olive Street, First Floor, St. Louis, Missouri 63103-2344, attorney for complainants.



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