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 AO-87-48

RESPONSE TO OBJECTION

Comes now Arkansas Power & Light Company (hereinafter "AP&L"), by counsel, and in response to the "Objection to Motion" filed in the above-captioned docket on or about December 19, 1986, by ASARCO, Inc., Doe Run Company, and AMAX Lead Company of Missouri, Inc. (hereinafter "Interveners"), respectfully states as follows:

1. The thrust of paragraph 1 of the Objection is the contention by Interveners that the Commission lacks authority to "modify" its Report and Order of April 24, 1986 ("the Report and Order"), by "moving the anniversary phase-in dates" because the Report and Order is final and therefore not subject to modification. The argument is without merit, as will be established herein after a review of the facts, because the Motion and phase-in tariff sheets filed by AP&L do not in fact seek to modify the Report and Order.

2. The Report and Order was issued on April 24, 1986, with an effective date of May 4, 1986. It established a phase-in of the authorized increase of gross revenues and directed that tariffs for "years two through five shall be filed within thirty

(30) days of the effective date of this Report and Order." On May 2, 1986, AP&L timely filed an Application for Rehearing of the Report and Order. On the same date, it filed an Application for Partial Stay. On May 27, Staff and AP&L filed a Joint Motion for Correction of Order, asserting that certain of the amounts in the Report and Order should be changed due to mathematical errors. Those changes did not affect the tariffs for "year one" of the phase-in which had already been filed and allowed to become effective.

3. On June 3, 1986, the Commission issued an Order which denied the Application for Rehearing and the Application for Partial Stay filed by AP&L, but granted an additional ten days for the filing of the phase-in tariffs for years two and beyond. That Order also corrected mathematical errors in the Report and Order pointed out in the Joint Motion of May 27. Certain of the Interveners objected to the correction of mathematical errors in a pleading filed on or about June 5, 1986.

4. On June 3, 1986, AP&L filed its Application for Writ of Review in the Circuit Court of Cole County, Missouri, and the Writ was issued that same day.

5. On June 16, 1986, AP&L filed tariffs for "years two through six" to comply with the Report and Order. Interveners filed objections to the proposed tariffs on or about July 3, 1986. On July 11, 1986, the Commission issued an order, designated as being in Case No. ER-85-265, rejecting those tariffs. That order was made effective on the date thereof.

6. On July 21, 1986, the Commission made its return to the Writ of Review which had been issued by the Circuit Court of Cole County, Missouri on June 3, 1986.

7. On August 7, 1986, AP&L filed an "Application for Rescission of Prior Order and for Order Approving Tariffs or, Alternatively for Rehearing". The Commission has yet to rule on that Application.

8. AP&L considers that the Interveners are making their argument because the Commission issued its Order of July 11 rejecting the phase-in tariffs in the context of Case No. ER-85-265, even though it was under a Writ of Review to certify its record in Case No. ER-85-265 to the Circuit Court at that time.

9. The argument in paragraph 1(a) of the Objection that AP&L's Motion seeks to modify the Report and Order is without factual basis once the Report and Order and the Motion are scrutinized. Ordered 8: simply directs that phase-in tariffs be filed. It does not specify any "anniversary date" or effective date for those tariffs which could in turn be "modified" by AP&L's Motion. On its face, the Motion seeks no modification of the Report and Order. It is correct that AP&L has not briefed in the appellate process the question of whether it was lawful for the Commission to order the filing of phase-in tariffs, but that has no bearing on the fact whether any "anniversary date" exists in the first place. The lack of any "anniversary date" in the Report and Order means there is no factual basis for Intervener's Objection that AP&L seeks to modify such a date.

10. The filing of a tariff for "year two" with an effective date of March 21, 1987, does not in any way operate in a retroactive fashion as alleged by Interveners in paragraph 1(b). March 21, 1987, has not yet occurred, so by definition rates collected after that date cannot be retroactive. However, to the extent that any phase-in tariffs collect any "deferred expenses", and to the extent those deferred expenses might be characterized as "retroactive" in some strained sense of the word, such is expressly permitted by §393.155.2 RSMo (effective May 1, 1986) because of the nature of the phase-in itself. The statute provides that the electrical corporation is allowed to "recover the revenues which would have been allowed in the absence of a phase-in" and directs the Commission to "make a just and reasonable adjustment thereto to reflect the fact that recovery of a part of such revenue is deferred to future years."

11. The assertions of paragraph 1(c) of the Objection are unclear. AP&L cannot discern the point of Interveners' argument therein. The first three sentences are factual assertions. The last two sentences are conclusions, but AP&L is unable to discern how they follow logically from the factual premises.

12. In paragraph 2, Interveners allege that AP&L has violated Ordered 8: of the Report and Order. Apparently, Interveners object on the basis that the tariffs AP&L has submitted for the years 1988 through 1991 were filed for informational purposes only. Interveners do not state with any particularity why that filing by AP&L allegedly violates Ordered 8, or why AP&L's previous assertions regarding the "pancaking"

problem are without merit. Ordered 8: requires the filing of the tariffs, and that is what AP&L has done. Ordered 8: does not specify anything as to the effective date of those tariffs. Further, any "policy" which may have been established in other cases is not binding in this instance, nor does a "policy" have any legal effect whatsoever.

13. With regard to paragraph 3, Interveners incorrectly assume that the taxes referred to in the Tax Adjustment Clause in AP&L's existing tariffs are income taxes. AP&L has never used that tariff provision to effect changes in its rates, or to vary the charges to its customers, due to changes in federal or state income taxes applicable to AP&L. The provisions are intended to apply and have only been applied to gross receipts taxes such as sales and franchise taxes which are calculated by refcrence to a particular customer's bill.

14. An interpretation of the tax adjustment clause to the effect argued by Interveners is in conflict with the announced law in Missouri. Interveners are apparently unaware that in State ex rel. Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960), the Supreme Court allowed a tax adjustment clause identical in effect to AP&L's tax adjustment clause. The Court, mindful of the difference between gross receipts taxes and income taxes, was careful to note 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 reasoning 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). The Supreme Court noted there 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. Interveners fail to show in their Objection how an income tax, determined by the taxable income of a corporation, is in any way analogous to a sales or franchise tax, determined by the amount of a particular customer's bill. The Court in UCCM went on to state 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 not only not permitted by virtue of the holding in Hotel Continental, it is directly prohibited by the holding in UCCM.

WHEREFORE, the Objection of Interveners should be held for naught.

Respectfully submitted,

James C. Swearengen
Gary W. Duffy
HAWKINS, BRYDON & SWEARENGEN P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, Missouri 65102
(314) 635-7166

Attorneys for Arkansas Power & Light Company

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that a copy of the foregoing instrument was served upon counsel of record of all parties of the above proceeding by enclosing the same in a envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein with postage fully paid, and by depositing said envelopes in the United States mails at Jefferson City Missouri This 29th day of Dec. 1986