BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs to Increase its Annual Revenues for Electric Service.	)))	Case No. ER-2010-0036

AMERENUE'S RESPONSE TO THE OFFICE OF THE PUBLIC COUNSEL'S MOTION FOR SUMMARY DETERMINATION AND ALTERNATIVE MOTION FOR DIRECTED VERDICT

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or "Company"), by and through counsel, and hereby files this Response to the above-cited Motion and Alternative Motion (collectively, the "Motion") filed by the Office of the Public Counsel ("OPC") on October 28, 2009.

I. INTRODUCTION

1. OPC's Motion rests upon an incorrect premise. The incorrect premise is that there exists a prescriptive "standard" that governs, as a matter of law, every Commission decision respecting whether or not to approve interim rates. But there is no such standard in Missouri law that governs the Commission's decision on an interim rate request, unlike many situations in which the law *does* prescribe a standard that governs the tribunal's decision. *See, e.g.*, Section 393.170.3, which requires an applicant for a certificate of convenience and necessity to establish that it is "necessary or convenient for the public service," or else the Commission cannot grant the certificate; and Section 393.106.2, which requires an applicant who wishes to change suppliers to show that the change is "in the public interest for a reason other than a rate differential," or else the Commission cannot allow the change. In both instances, if the proof doesn't meet the statutory standard, the Commission is prohibited by law from granting the requested relief.

2. Unlike the two examples cited above, the authority to grant an interim rate request is not expressed in any Missouri statute, and the statutes that create the Commission and govern its actions prescribe no standards respecting when the Commission can exercise its authority to approve interim rates.[1] Rather, the authority is *implied* from the file and suspend provisions of Sections 393.140(11) and 393.150, *and* from the "practical requirements of utility regulation." ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 535 S.W.2d 561, 565 (Mo. App. W.D. 1976) ("We hold that the Commission has power in a proper case to grant interim rate increases within the *broad discretion implied* from the Missouri file and suspend statutes and from the practical requirements of utility regulation" (emphasis supplied)). Moreover, the ***Laclede*** opinion instructs that the basis for exercising that discretion exists "wholly apart" from Section 393.150. ***Laclede***, 535 S.W.2d at 568. In other words, while the *authority* to allow interim rates is implied, in part, from two statutes, neither of those statutes dictate when or under what circumstances the Commission may exercise its broad discretion to use its implied interim rates authority.[2] This makes sense in view of the fact that this implied authority does not arise solely from those statutes, but also arises from the "practical requirements of utility regulation." *Id.*

3. Because OPC's basic premise – that an "emergency"[3] must be found as a matter of law, and that since AmerenUE does not claim emergency AmerenUE's request must fail – is incorrect, OPC is consequently not "entitled to relief [dismissal of the Company's interim rate

[1] The Commission is a creature of statute, possessing only those powers expressed in the Public Service Commission Law or necessarily implied therefrom. ***State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 49 (Mo. banc 1979) ("*UCCM*").

[2] We thus respectfully disagree with Commissioner Davis's October 19, 2009 Concurrence, because it suggests, we believe incorrectly as discussed below, that the statutory standard found in Section 393.150.2 ("just and reasonable") must be applied to an interim rate request.

[3] While past Commission cases and discussions sometimes refer to an "emergency" or a "near-emergency," for ease of reference, we will use to term "emergency" to refer to both an "emergency" and a "near-emergency."

request] as a matter of law."[4] Thus, summary determination is clearly improper. Nor is OPC entitled to a directed verdict, because AmerenUE neither needs to allege nor prove the existence of an emergency in order to invoke the Commission's discretionary authority to grant interim rates.[5] AmerenUE needs only to show that this is a proper case for the Commission to exercise its broad discretion to approve interim rates.[6]

II. ARGUMENT

A. *An Emergency Need Not Be Found In Order for the Commission to Exercise Its Discretion to Allow Interim Rates.*

4. OPC's basic argument is that proof of an emergency is required as a matter of law and that no other standard can or should be applied to interim rate requests (including a "good cause" standard). Therefore, goes OPC's argument, since AmerenUE does not allege the existence of an emergency, the Company's interim rate request must be denied as a matter of law.

5. Before addressing the "emergency standard" issue in more detail, as a preliminary matter, it must be pointed out that OPC's focus on defeating the adoption of a good cause standard entirely misses the point. The Company does not argue that a good cause standard must be applied, or that it is the "right" standard per se. As noted earlier, the only applicable legal standard is whether the Commission, in its discretion, finds that interim rates should be approved. The good cause discussion has come up in this case because in some previous cases

[4] *See* 4 CSR 240-2.117(1)(E), which only allows a summary determination if the movant is "entitled to relief as a matter of law."

[5] OPC may contend that meeting the emergency standard is not the only premise which underlies its Motion. However, OPC's second arguable premise, that if an emergency is not shown AmerenUE must "provide a basis" for establishing a "new standard" (Motion ¶ 53) also fails to provide OPC with an entitlement to relief as a matter of law. As discussed herein, the standard for allowing interim rates is discussed in detail in ***Laclede***: i.e., the standard is whether the Commission believes it should exercise its "broad discretion" to allow interim rates. AmerenUE is not asking the Commission to adopt a new standard and therefore need not provide any basis for a new standard.

[6] The hearing scheduled by the Commission will provide the Commission with additional information upon which it can make its decision respecting whether to exercise its discretion to allow interim rates in this case.

the Commission has chosen to exercise its discretion to allow interim rates based upon good cause shown.[7] That the Commission has at times chosen to exercise its discretion by reference to good cause shown makes sense given the meaning of good cause. As we have previously pointed out, the Commission has recognized a finding of good cause "'lies largely in the discretion of the officer or court to which the decision is committed' and 'depends upon the circumstances of the individual.'"[8] This is, in fact, the "standard" – i.e., whether, in the Commission's discretion, the Commission believes that interim rates should be allowed, which is precisely what the ***Laclede*** opinion holds. Whether we call it "good cause" or not makes no difference. The Commission could say "we find, in the exercise of our sound discretion, that the interim rate request should be approved," and never mention good cause, or the Commission could say "we find that the circumstances constitute good cause to exercise our discretion and to approve the interim rate request." Both findings would mean the same thing, and both would be lawful. Neither finding depends upon, or requires, that the Commission first find that an emergency exists.

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[7] *See, e.g., Order Rejecting Tariff and Granting Motion to Dismiss*, In Re: The Empire District Electric Co., 2002 WL 1587076 (Mo.P.S.C.) (May 9, 2002) ("The Commission has, however, granted interim rate relief on a non-emergency basis where the Commission found that the particular circumstances necessitated such relief. The Western District Court of appeals has also held that it is possible to grant interim rate relief on a nonemergency basis. The Commission has traditionally, however, followed the emergency standard."); *see also Order Approving Small Company Rate Increase on an Interim Basis Subject to Refund, and Approving Tariff*, In Re: Timber Creek Sewer Co., Inc., 2007 WL 3243348 (Mo. P.S.C.) (Oct. 30, 2007) ("The Commission has the authority to grant nonemergency relief by applying a case-by-case standard."); *Order Approving Stipulation and Agreement*, In Re: Citizens Electric, 2001 WL 18404788 (Mo.P.S.C.) (Dec. 26, 2001); *Report and Order*, In Re: The Empire District Electric Co., 1997 WL 280093 (Mo.P.S.C.) (Feb. 13, 1997) ("Since no standard is specified in statute to control the Commission as to whether to order suspension of a proposed rate schedule, the result is within the sound discretion of the Commission and an emergency situation need not necessarily be established * * * [t]he standard for allowing interim rate relief is . . . good cause shown by the company, and determination of good cause is at the Commission's discretion.")

[8] *Report and Order*, ***In Re: Aquila Inc*, Case No. ER-2007-0004 (2007)** (*citing* ***Wilson v. Morris***, 369 S.W.2d 402, 407 (Mo. 1963) and ***Matter of Seiser***, 604 S.W.2d 644, 646 (Mo. App. E.D. 1980)). We made this very same point in ¶ 16 of our September 8, 2009 Reply to Responses and Suggestions in Opposition to AmerenUE's Implementation of Interim Rates. Consequently, OPC's claim (Motion, ¶ 51) that AmerenUE has not "enunciated" the parameters of a good cause standing is, at best, incomplete, and at worst, misleading. OPC may not like the fact that good cause essentially means a sufficient justification for the action, *in the Commission's discretion*, but the courts have so defined it, and AmerenUE has enunciated those parameters.

6. That an emergency "standard" is not required as a matter of law is demonstrated by the facts and holding in ***Laclede***. The issue on appeal in ***Laclede*** was whether the Commission's exercise of its discretion to deny Laclede's request to implement a part of its permanent rate increase request on an interim basis was lawful. Laclede claimed failure to allow interim rates would amount to "confiscation" of Laclede's property without due process of law. As current Laclede counsel Mike Pendergast pointed out during the September 14, 2009, oral argument, Laclede made this argument despite the fact that its earned returns for the prior period were only approximately 16 to 56 basis points below its previously authorized return. ***Laclede***, 535 S.W.2d at 570.

7. The first substantive issue disposed of by the Court was whether the Commission has the power to grant interim rate relief. As noted earlier, in answering that question the Court stated as follows:

> We hold that the Commission has the power in a proper case to grant interim rate increases *within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.* 535 S.W.2d at 567 (emphasis supplied).

Note that the Court focuses on the Commission's "broad discretion." Note also that this holding does not limit the exercise of that discretion to circumstances when an emergency exists.

8. Not only did Laclede base its appeal on confiscation, but Laclede actually argued *against* the discretionary nature of the Commission's interim rates authority, in effect claiming that since it was not earning its authorized return on equity ("ROE") the Commission *must* allow interim rates; i.e., that the Commission was without discretion to deny its interim rate request. In rejecting this contention, the Court again affirmed the Commission's authority to grant interim rate relief and noted that the basis for its discretion in relation to interim rates "exists wholly apart from s. 393.150." *Id.* at 568.

9. After: (a) finding the existence of Commission authority to grant interim rates; and (b) finding that when and under what circumstances to exercise that power was a matter committed to the Commission's broad discretion, the Court turned to the facts of the case. The Court first noted that a "majority of the Commission follows the principle that the purpose of a special hearing concerning interim rates is to ascertain whether emergency conditions exist . . .." *Id.* Note that the Court did not say "an emergency *must* exist as a matter of law" or that the "law requires the Commission to find an emergency." Rather, the Court merely noted that the Commission's *practice* has been to determine if an emergency exists and to only exercise its discretion to grant interim rates if that finding is made. The Court stated that Laclede did not contend that the Commission erred if this test – the emergency test – is a proper test. *Id.* at 569. However, Laclede argued that the law created a different test (a standard) – that if a utility was earning less than its authorized rate of return (or at least something below a narrow range around its authorized rate of return) then interim relief was *required by law*. In response to that argument, the Court spent nearly four pages recounting mostly contrary authority and then pointed out that Laclede in any event essentially surrendered its argument (and thus gave up its appeal) in its Reply Brief when Laclede stated that it "would not take issue with a decision that proof of a lower rate of return, without more, would not automatically entitle it" to relief. *Id.* at 573. Given that Laclede's earnings were just 16 to 56 basis points below the allowed return from its most recent rate case, once Laclede made that concession, it was very easy for the Court to conclude that Laclede failed in its burden to establish that the Commission's order denying its interim rate request was unlawful or unreasonable.

10. The Court's holding on the ultimate issue in the case – Did the Commission err in denying Laclede's request to implement interim rates? – was simply that Laclede "clearly failed

to carry the heavy burden of proof imposed upon it by s. 386.430 'to show by clear and satisfactory evidence that the determination * * * or order of the commission complained of [the order denying interim rates] is unreasonable or unlawful . . ..' *See also* the authorities cited under Section III of this opinion pertaining to the wide discretion of the Commission, to which the courts will defer."[9] *Id.* at 573.74. Stated another way, the Court held that the Commission properly exercised its discretionary power – it acted lawfully – in denying the request to implement interim rates and that Laclede did not sustain its burden to invalidate the Commission's decision to deny it interim rates. The Court decided nothing more and nothing less; it never once said that the Commission is precluded from applying a different standard in deciding when or under what circumstances that discretion should be exercised. In short, properly read, the holding in the *Laclede* case is simply that the Commission has broad discretion to approve or disapprove interim rates, and Laclede did not meet the heavy burden required for a court to reverse its exercise of this discretion.

11. Those who suggest that Laclede mandates the existence of an emergency to support the approval of interim rates seize on the last paragraph of the opinion, which is pure *dicta*,[10] and which in any event supports the conclusion that an emergency standard is not required as a matter of law. The paragraph at issue reads:

> It may be theoretically possible even in a purposefully shortened interim rate hearing for the evidence to show beyond reasonable debate that the applicant's rate structure has become unjustly low, without any emergency as defined by the Commission having yet resulted. Although some future applicant on some extraordinary fact situation may be able to succeed in so proving, Laclede has

[9] Section 386.430 places the burden on the party "seeking to set aside any determination, requirement, direction, or order of . . . the commission," to show ". . . that the order is unreasonable or unlawful . . .."

[10] *Dicta* is a gratuitous opinion that is not essential to the decision before the court. ***Husch & Eppenberger, LLC v. Eisenberg***, 213 S.W.3d 124 (Mo. App. E.D. 2006). *Dicta* has no precedential value, and is not binding in subsequent cases. ***Black's Law Dictionary*** (5th Ed. 1979).

> singularly failed in this case to carry the very heavy burden of proof necessary to do so. *Id.*

What the Court said is that interim relief could be granted "without any emergency *as defined by the Commission* having as yet resulted" (emphasis supplied). All this statement says is that *if* the Commission decides to limit the exercise of its broad discretion to approve interim rates to only circumstances where an emergency is shown, perhaps in theory some utility might be able to convince a court to reverse a Commission decision to reject interim rates even in the absence of an emergency. What that statement does not say is that the Commission *must* require an emergency before it exercises its discretion to allow interim rates. Nor does this dicta eviscerate the *holding* of the case, which as quoted above points to the Commission's "broad discretion" in deciding interim rate questions. Indeed, to read this passage as mandating an emergency standard as a matter of law would amount to a ruling by the court that *takes away* the Commission's discretion to rule on interim rates, a result that clearly was not contemplated by the Court.

12. Both the Commission and the Staff have consistently and properly read ***Laclede*** as not mandating an emergency standard as a matter of law. As pointed out in the Company's Suggestions filed on July 24, 2009, in support of the interim rate tariff, although it is true that the Commission has not often permitted the use of interim rates in non-emergency situations,[11] it is also true that the Commission has consistently recognized that ***Laclede*** does not require an emergency.[12] The Staff has also consistently taken the position that an emergency is not required. *See, e.g., Staff's Response to Interim Filing,* Case No. ER-2002-425 (involving The Empire District Electric Company), at p. 7 ("While not disputing that the Commission has the

[11] Although the Commission's use of interim rates in non-emergency situations has been rare, it has occurred on occasion. In addition, interim rate adjustments are the vehicle that is regularly used by the Commission, under non-emergency circumstances, to reflect PGA adjustments.

[12] *See* footnote 7, *supra.*

authority, under section 393.140(11), to grant relief for reasons *other than the existence of an emergency* situation, the Staff continues to believe …. [that the Commission should require an emergency]" (emphasis supplied)).[13]

B. *The Commission Need Not Find that Interim Rates that Are Subject to Refund are "Just and Reasonable."*

13. As outlined above, the Commission's decision on interim rates that are subject to refund is a matter committed to the sound discretion of the Commission and does not require an "emergency" finding. Nor must the Commission determine that an interim rate that is subject to refund is "just and reasonable," as a careful examination of ***Laclede*** demonstrates.

14. As earlier discussed, the "file and suspend" method of setting rates arises under Sections 393.140(11) and 393.150. ***Laclede***, 535 S.W.2d at 567. In the ***Laclede*** case, Laclede denied that its interim rate request was made under the file and suspend procedure, arguing instead that it did not "file" an interim rate schedule. *Id.* The Commission and the trial court, however, treated Laclede's request as if it had been made under the file and suspend process, and the Court of Appeals noted that this treatment was favorable to Laclede because otherwise "its entire proceeding for interim rate increase in this case would have been of very doubtful effectiveness." *Id*. at 568. Indeed, Laclede filed rate increase tariffs, which were suspended, and then filed a motion to implement a part of the suspended rates – effectively a motion to partially lift the suspension. In any event, the fact that the Court of Appeals also assumed arguendo that Laclede's request was not under the file and suspend process is important, in that the Court noted

[13] More recently, Staff Counsel Thompson appeared to agree that ***Laclede*** does not require an emergency: "COMMISSIONER JARRETT: Doesn't the Laclede case basically broaden -- and maybe the question is how much broaden, but doesn't it -- doesn't it at least acknowledge that there may be situations where an interim -- interim rate relief is appropriate even in the absence of any emergency? MR. THOMPSON: It does suggest that, yes, sir." Tr. (Oral Argument) p. 96, lines 11-18.

that "the Commission need not look to s. 393.150 as a source for discretion [to grant interim rates]. Rather it relied on that section as the source of its authority to grant interim relief. Once that authority was found, ample basis for discretion in the exercise thereof exists wholly apart from s. 393.150." *Id.*

15. In other words, the analysis in ***Laclede*** would have been the same whether or not authority for interim rates was implied from Section 393.150. Thus, the "just and reasonable" standard that undoubtedly applies to permanent rates which have the force and effect of law and *cannot be retroactively changed*[14] does not apply to interim rates that by their very nature *are subject to change* once the permanent rate proceeding is concluded. Indeed, interim rates are fully refundable if the result of the permanent rate case is that retention of some or all of the dollars collected through interim rates would result in customers having *ultimately* paid rates that were not just and reasonable.

16. After the ***Laclede*** case was decided, the Supreme Court also discussed the Commission's ratemaking authority. In doing so, the Supreme Court: (a) pointed to Section 393.150 as governing permanent rate increases initiated by the utility; (b) pointed to Sections 393.260 and 386.390, as governing permanent rate decreases initiated by complaint, and (c) pointed to the *Laclede* decision with respect to interim rate requests. *See* ***Utility Consumers Council***, 585 S.W.2d at 48. We emphasize – Supreme Court, in discussing these *three separate ways* that rates could change (two permanent, one interim), cited a specific statute(s) for each permanent rate change mechanism – separately – but did not cite Section 393.150 in connection

[14] That they cannot be retroactively changed is what distinguishes a permanent rate from an interim rate; i.e., once the rate is charged, the utility is permanently entitled to retain the revenues based on the rate, and the customer permanently pays the rate. By contrast, when an interim rate is charged, the entitlement to the revenues and the customer's obligation is temporary and does not become permanent until the Commission ultimately determines the permanent just and reasonable rates that will be set in the rate case at issue.

with the Court's mention of interim rates. This makes sense given that while Section 393.150 (and Section 393.140(11)) does provide, in part, implied *authority* for interim rate relief (as do the practical requirements of utility regulation), they don't dictate or govern the Commission's exercise of its discretion respecting interim rates.

17. Indeed, the Court of Appeals expressly rejected the idea that the Commission's implied power to grant interim rates is conditioned on a just and reasonable finding made after consideration of all relevant factors in a full evidentiary hearing:

> It would be unreasonable to construe this statutory section as imposing a duty upon the Commission to set "just and reasonable rates" in a special hearing for the limited purposes of considering an interim increase, since the setting of fair rates is the purpose and subject of the *full* rate hearing. To construe s. 393.140(5) as applicable here *would make the hearing on interim rates coextensive with that on the permanent rates* and would *therefore in practical effect make accelerated action on interim rates impossible* (emphasis supplied).[15]

It is true that the foregoing statement was in reference to Section 393.140(5), not 393.150. However, both Sections 393.140(5) and 393.150 reference the justness and reasonableness of rates; i.e., the statement in *Laclede* quoted immediately above applies just as strongly to the "just and reasonable" language in Section 393.150.2 as it does to the "unjust" and "unreasonable" language in Section 393.150.

18. At bottom, a conclusion that a just and reasonable finding is necessary before approving interim rates that are subject to refund is incorrect in view of the following conclusions stated by the Court in the ***Laclede*** opinion: (a) that the Commission has broad discretion to grant interim rates apart from Section 393.150; (b) that requiring a "coextensive" hearing on interim rates, like a full hearing on permanent rates, would render ever exercising its

[15] ***Laclede***, 535 S.W.2d at 569. If accelerated action becomes impossible, then interim rates become largely moot and ineffective because by the time a protracted hearing is concluded, the rate case may be over or almost over, which effectively would mean that there will have been little or no interim relief.

interim rate authority "impossible"; and (c) that requiring a duty to set "just and reasonable" rates in relation to an interim rate request would be "unreasonable."[16]

19. An argument that applies the "just and reasonable" concept before the Commission is called upon to decide the permanent revenue requirement in the case is inappropriate for another reason; i.e., it misconstrues the meaning of setting "just and reasonable" rates in the context of utility regulation. Case law makes clear that "just and reasonable" rates mean rates that meet the *Hope* and *Bluefield* standard "determined by the exercise of fair and enlightened judgment, having regard to all relevant facts."[17] ***State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n***, 186 S.W.3d 376, 384 (Mo. App. W.D. 2006) (quoting *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed 1176 (1923)). Approving interim rates is a matter within the

[16] Similarly, to the extent Commissioner Jarrett suggested during the September 14, 2009, oral argument that existing rates must be found to be unjust before interim rates can be implemented, we respectfully suggest that such conclusion is also incorrect for the same reasons, again in view of the following conclusions stated by the Court: (a) that the Commission has broad discretion to grant interim rates apart from Section 393.150 [where the just and reasonable standard is found]; (b) that requiring a "coextensive" hearing on interim rates, like a full hearing on permanent rates, would render ever exercising its interim rate authority "impossible"; and (c) that requiring a duty to set "just and reasonable" rates (or to determine if existing rates are unjust) in connection with deciding an interim rate request early in a rate case would be "unreasonable." By allowing interim rates the Commission makes no finding about the justness or reasonableness of the existing permanent rates, which remain in effect, nor can it, for the reasons discussed herein. Those existing rates will continue to be charged and collected, and neither a ratepayer nor the utility will later have any right to a refund (if a permanent rate decrease occurs) or a surcharge (if a permanent rate increase occurs). Those existing rates will continue to have the force and effect of law. ***Midland Realty Co. v. Kansas City Power & Light Co.*** , 300 U.S. 109, 114 (1937), *aff'g* 93 S.W.2d 954 (Mo. 1936). But the same is not true of the interim rates. The interim rates are subject to refund for the very reason that the Commission does not, as of the time it allows interim rates, know if the existing permanent rates remain just or perhaps have become unjust, and does not know at that time what the ultimate just and reasonable rates should be. Nothing in ***Laclede*** or in Section 386.430 suggests otherwise. Missouri courts have uniformly and exclusively applied Section 386.430 in connection with judicial review of Commission orders or decisions. When a utility files a new rate case the utility is not "seeking to set aside" the report and order from its prior rate case and is not seeking to have the report and order declared "unreasonable or unlawful." Thus, Section 386.430 does not and cannot apply to a new rate increase case filed *at the Commission*. Indeed, AmerenUE makes no challenge to the prior report and order, and in point of fact, both the Commission itself and AmerenUE are currently defending it against an attempt by OPC and Noranda in their pending writ of review proceedings in Pemiscot County to have it set aside as being unreasonable or unlawful. If the Commission approves a rate increase for AmerenUE on or before the operation of law date in this case, the Commission's prior determinations in the report and order issued in January will not be set aside, and its order will not, by virtue of new rates, become unreasonable or unlawful.

[17] This is the familiar "all relevant factors" requirement.

Commission's discretion, implied from the fact that the Commission can allow interim rates to take effect on an accelerated basis without a full hearing of the type that occurs when permanent rates are set. ***Laclede***, 535 S.W.2d at 569. Indeed, as earlier noted and as made clear by ***Laclede***, it is *impossible* to have considered all relevant facts and to also grant interim rates early in a rate case on an accelerated basis. Moreover, it is *unreasonable* (***Id.***) to apply the just and reasonable standard to interim rates because at the time an accelerated interim rate decision has to be made there will have been no determination on a myriad of factors that ultimately must be decided in order to set permanent just and reasonable rates. For example, there will have been no determination of what the then-cost of capital is (including the then-fair ROE is) early in a case when interim rates are being considered, and there will have been no determination regarding many other relevant facts, including current weather normalized sales, depreciation rates, tax expense, current capital structure, etc. Consequently, the very nature of an accelerated determination on an interim rate request precludes a consideration of all relevant factors and is not a determination that the interim rates are "just and reasonable," nor does it need be, given that the interim rates are subject to refund and that ultimately just and reasonable permanent rates will be applied to all customers.[18] This is the very point the *Laclede* court made. *See* ¶ 17, *supra.*

[18] Commissioner Gunn made this very point through his questions to Staff Counsel Thompson during the September 14, 2009 oral argument: "COMMISSIONER GUNN: But ultimately the rates that go into effect . MR. THOMPSON: Yes, sir. COMMISSIONER GUNN: … would take into account all relevant factors … because it would be … almost a retroactive determination … that it was correct or the money would be given back. MR. THOMPSON: Yes, sir. COMMISSIONER GUNN: So at the end of the case, these interim rates would either be justified or not justified? MR. THOMPSON: Yes, sir. COMMISSIONER GUNN: And if they were not justified, they would be ended? MR. THOMPSON: Yes, sir." Oral Argument Tr., p. 100, lines 5-20. The point is that ultimately, when the rate case is resolved and permanent rates are ultimately determined, ratepayers will only ultimately have paid "just and reasonable rates."

20. The simple fact is that if the Commission must find that existing rates are "unjust and unreasonable" or that interim rates are "just and reasonable" after considering "all relevant factors" no interim rates could ever be approved. As a consequence this cannot be the standard.

C. The Commission's Duty is to Balance Ratepayer and Shareholder Interests.

21. One other substantive issue raised by OPC in its Memorandum in support of its Motion bears a response. In paragraph 8 thereof, OPC states that the "Commission's primary role is protecting consumers. The Commission's principal purpose is to serve and protect ratepayers."

22. In support of its statement OPC cites two Court of Appeals decisions,[19] but OPC ignores controlling decisions of the Missouri Supreme Court arising in the context of a rate case which make absolutely clear that in setting rates, the Commission must fairly balance the interests of both the ratepayer and the utility. For example, in ***State ex rel. Washington University v. Public Service Commission***, 272 S.W. 971, 973 (Mo. banc 1925), the Missouri Supreme Court stated as follows:

> The enactment of the Public Service Act marks a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but to further insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guarantee of fair returns for capital invested. . . . These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say 'fair', we mean fair to the public, and fair to the investors.

23. The gratuitous statement made by the Court of Appeals in ***Capital City Water*** was part of the Court's discussion of the water company's contention that the Commission was equitably estopped from considering certain issues in the rate case because of letters the water

[19] ***State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n***, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993) (*citing* ***State ex rel. Crown Coach Co. v. Pub. Serv. Comm'n***, 179 123, 127 (Mo. App. 1944)).

company had previously sent to the Commission. The Court of Appeals found that equitable estoppel did not apply, and cited to a number of prior statements (including the statement that originated in the ***Crown Coach*** case) in the case law respecting the Commission's duties. This *dicta* cannot possibly override the Commission's duty to be "fair to the public, and fair to the investors." ***Washington University***, 272 S.W.2d at 973.[20]

III. CONCLUSION

24. Summary determination is only proper if the movant is "entitled to relief as a matter of law." 4 CSR 240-2.117(1)(E). OPC claims that because AmerenUE has "failed to prove (or even allege)" that an emergency exists, or that a standard other than the emergency standard applies, OPC is entitled to relief as a matter of law.[21] The fatal flaw in OPC's Motion is that the Commission is not required as a matter of law to limit the exercise of its discretion to allow interim rates to cases where an emergency has been shown. Moreover, the "standard" for allowing or not allowing interim rates is not something that the Commission must "establish" or that AmerenUE must convince the Commission to establish, but rather, the standard already exists: Does the Commission, in its discretion, believe interim rates should be approved? OPC has entirely failed to demonstrate that it is entitled to relief as a matter of law, making summary determination (and for the same reason, a directed verdict) unauthorized by the Commission's rules and otherwise improper.

Nor must AmerenUE establish that the interim rates, that are temporary and subject to refund, meet a "just and reasonable" standard. As ***Laclede*** instructs, while the Commission will have to make a just and reasonable finding in relation to the permanent rates to be set in this case

[20] The ***Crown Coach***, where the statement upon which OPC relies originated, is even more far afield with respect to the Commission's duty to be fair to both customers and investors in setting rates in that it dealt with certificates of necessity for a motor carrier, and had nothing whatsoever to do with the Commission's ratemaking function.
[21] Motion, ¶ 53.

(after a full hearing and a consideration of all relevant factors), to conclude that a just and reasonable standard applies in connection with an interim rate request would be unreasonable and would effectively make the utilization of interim rate relief impossible.

WHEREFORE, the Commission should:

a. Deny OPC's Motion;

b. Proceed with the hearing set for December 7, 2009;

c. Recognize that its decision on the Company's interim rate request is a matter committed to its sound discretion;

d. Not condition the exercise of its discretion on proof of the existence of an emergency, or on a finding that the interim rates that are subject to refund are just and reasonable; and

e. Approve AmerenUE's interim rate request as quickly as possible.

Dated: November 10, 2009.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 10th day of November, 2009:

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