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

UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI'S RESPONSE TO PUBLIC COUNSEL'S MOTION TO CONFORM TARIFFS WITH SUSPENSION AND MOTION FOR EXPEDITED TREATMENT, AND REPLY TO THE MISSOURI INDUSTRIAL ENERGY CONSUMERS' RESPONSE TO PUBLIC COUNSEL'S MOTION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), by and through counsel, and hereby responds to the above-cited Motions filed by Public Counsel on February 16, 2011, and replies to the above-cited Response filed by the Missouri Industrial Energy Consumers ("MIEC") late in the evening on the same date.[1] In this regard, Ameren Missouri states as follows:

INTRODUCTION

Public Counsel, with the support of MIEC, has asked the Commission to take extraordinary and unprecedented actions that are not only beyond the jurisdiction and authority of the Commission but are also based on a misstatement of the legal effect of the December 20, 2010 Order Granting Stay Pursuant to Section 386.520 (the "Order"), entered by then Cole County Circuit Judge Paul C. Wilson.

In a barely five-page filing containing no citation of authority for the Commission to do what is sought,[2] Public Counsel seeks to deprive Ameren Missouri of approximately $230

[1] AARP and CCM have also filed responses to Public Counsel's motions. The Company asks that the Commission consider this Response and Reply as the Company's Reply to AARP's and CCM's responses.

[2] MIEC cites just two cases in its Response, both of which deal solely with the need for a bond before any stay can take effect, and neither of which speak to the extraordinary and unprecedented relief sought by Public Counsel's Motion. The ***Midwest Gas Users*** case they cite involved a stay that applied to *just the transportation customers who*

million of annual revenue it is collecting under approved tariffs that Missouri's statutes and all Missouri precedents recognize as valid. Missouri law is clear that the Commission has no jurisdiction to provide the relief Public Counsel seeks from the Commission, or indeed to provide any relief in the case in which the motion was filed, until completion of judicial review. The motion even sought to deprive Ameren Missouri of a meaningful opportunity to respond, and to deprive the Commission of a meaningful opportunity to deliberate, after the benefit of full briefing and hearing, on such a dramatic and unprecedented step.[3] Ameren Missouri's position is that the motion itself threatens to disrupt and undermine the entire system of public utility regulation in Missouri and also threatens the safety and effectiveness of the service provided to Missouri citizens by Ameren Missouri,[4] both by depriving it of large amounts of necessary cash flows and by doing so in a way that would leave it with no apparent remedy for recovering from its approximately 1.2 million customers the revenue lost upon final judicial resolution of the case involving the same subject matter now pending in the Cole County Circuit Court.

Furthermore, to the Company's knowledge, the Commission has never taken similar actions during the pendency of a writ of review case, and indeed, it has expressly – and rightly – noted in prior orders that it lacks jurisdiction over matters that are undergoing judicial review. The Commission should be extremely wary of taking at face value Public Counsel's and MIEC's assertions, which seek to pressure the Commission into premature action which we believe would result in unconstitutional, confiscatory results. Those assertions, and they are nothing

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had sought the stay. Consequently, that case provides no authority for the relief sought by Public Counsel and MIEC and indeed contradicts the suggestion that a stay applies beyond the customers who asked for it. The ***AG Processing*** case they cite did not involve a stay at all, and also provides no authority in support of their requests.

[3] Public Counsel asks for "expedited treatment" of his Motion, and seeks an expedited grant of the extraordinary relief he seeks, suggesting (incorrectly, as we will discuss further below) that his Motion was filed as soon as it could have been under the circumstances. The Commission has already recognized the unreasonableness of Public Counsel's expedited treatment request. Order Establishing Date to Respond to Public Counsel's Motion to Conform Tariffs With Suspension (Feb. 18, 2011).

[4] *See* Section F of this pleading, *infra.*

more than that – assertions – are similar to the extreme position taken by MIEC before the circuit courts; that is, that MIEC can agree that a rate increase amounting to hundreds of millions of dollars annually is warranted, lose a few issues that they did not agree upon during the Commission proceeding, appeal those few issues and, if they win even $1 of one issue on appeal, avoid entirely the 2009 and 2010 rate increases the Commission found to be just and reasonable. Perhaps even more absurd is their allegation that even parties who did not appeal the 2009 rate order (Movants Anheuser-Busch, Doe Run and Enbridge) can somehow have their rates rolled-back to 2007 levels.

Aside from the Commission's lack of jurisdiction to grant the relief Public Counsel and MIEC seek is the fact that the Order does not order that Ameren Missouri stop charging the rates and charges reflected in its currently on-file and presumptively lawful rate schedules. Rather, the Order simply grants the request of the Movants to divert a portion of the rates being charged to *them* to the circuit court's registry upon their posting of the prescribed bond, the amount of which was determined by reference to that portion of their charges, and their charges alone.

ARGUMENT

A. The Commission lacks jurisdiction to grant Public Counsel's Motion because exclusive jurisdiction was transferred from the Commission to the circuit court after the writ of review was granted.

It is settled law that when Commission orders, and rates and charges authorized thereunder, are challenged in circuit court, the Commission loses jurisdiction with respect to the orders and their subject matter. ***State ex rel. Missouri Cable Telecommunications Ass'n v. Pub. Serv. Comm'n***, 929 S.W.2d 768, 772 (Mo. App. W.D. 1996), *citing* ***State ex rel. Campbell Iron Co., et. al v. Pub. Serv. Comm'n***, 296 S.W. 998 (Mo. banc 1927). The Commission does not regain its jurisdiction until after receipt of the court's mandate following the conclusion of final

judicial review. ***State ex rel. City of Joplin v. Pub. Serv. Comm'n***, 186 S.W.3d 290, 293 (Mo. App. S.D. 2005) (Only after the Commission received the court's mandate did the Commission "regain . . . jurisdiction over the matter.").

Yet Public Counsel asks for its relief in Case No. ER-2010-0036, the case involving the Commission's approval of an approximately $230 million annual rate increase for Ameren Missouri, including approval of the rate schedules filed by Ameren Missouri in conformance with the Commission's Report and Order entered in that case, which was closed on June 22, 2010. The Commission lost jurisdiction over the subject matter of Case No. ER-2010-0036 when it was appealed to the Cole County Circuit Court. The Commission has not regained jurisdiction over the case; indeed, exclusive jurisdiction respecting the subject matter of that case remains with the Cole County Circuit Court pursuant to the Circuit Court's ongoing review of the issues raised in MIEC's Petition for Writ of Review.[5]

The Commission itself has recognized and applied this rule of law relating to its lack of jurisdiction over matters under review by the courts. For example, in ***In re: Atmos Energy Corporation***, Notice and Order Finding Atmos Energy Corporation's Annual Report to be in Compliance, and Denying Public Counsel's Requests for Clarification and to Open an Investigation, 2009 WL 362181 (Mo.P.S.C.) (Feb. 11, 2009), the Commission noted that it "lost jurisdiction to amend, clarify, or take any other action with regard to the Order when the appeal started." The order at issue was the Commission's underlying rate order in the Atmos Energy rate case that was at that time on review in the courts.

[5] The fact that Public Counsel (and others) have made submissions of documents in the Commission's Electronic Filing and Information System ("EFIS") does not resurrect the case or otherwise create Commission jurisdiction over the rates set in this "case." That jurisdiction lies solely in Cole County (for the 2010 rate order) and the Court of Appeals for the Southern District of Missouri (for the 2009 rate order).

The Commission also recognized that even if it had jurisdiction, it would have been "unwise" for it to take action "without knowing what the courts will ultimately do – premature action may merely result in addressing issues that do not require revision and result in a subsequent appeal." ***Id.*** As discussed below, similar considerations apply to the matter before the Commission now.

In addition, the Commission is purely a creature of statute and its powers are limited to only those that have been expressly granted to it by the Legislature or that exist by clear implication as necessary to carry out the powers specifically granted to it. ***State ex rel. Utility Consumers Council of Mo. v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 49 (Mo. banc. 1979). Neither Public Counsel nor MIEC point to any statutory provision stating that the Commission has concurrent jurisdiction with the courts respecting a rate order under review by the courts. Indeed, there is none.

B. Granting Public Counsel's request would not make sense as a matter of law or policy.

It would be illogical and lead to absurd results if the Commission exercised concurrent jurisdiction with the circuit court with respect to rate orders that are undergoing judicial review. Confusion, and the risk of multiple appeals and inconsistent and fundamentally unfair results, would follow. For example, what if the Commission could and did act as Public Counsel requests? In that case, the Company would be entitled to seek judicial review of the Commission's action by filing yet another petition for writ of review in the circuit court concerning the propriety of charging the rates authorized by the rate order that is *already on review* in the circuit court. In that circumstance, suddenly there would exist two different writ of review cases, both involving the effectiveness of the rate order and rates set in Case No. ER-2010-0036, which are already under review (and if MIEC has its way, also involving rates that

have been superseded that were set in Case No. ER-2008-0318).[6] And the second case would be derivative of the first, since in the second case the circuit court would be placed in the absurd position of reviewing whether the Commission properly interpreted the effect of an interlocutory order that the circuit court had entered in the initial writ of review case!

This is precisely the problem identified by the Commission in its order in ***In re: Atmos Energy***, *supra*; that is, Commission actions generating multiple appeals involving the same rate order without knowing what the courts will ultimately do. Not only would both of these tandem appeals involve the same rate orders, but they would also both involve Commission action regarding a *circuit court* order (the Order) that is not directed to the Commission and which, as noted above, is an *interlocutory order* not itself subject to direct review on appeal and which is subject to change by the circuit court at any moment. *See* ***Englezos v. Newspress & Gazette Co.***, 980 S.W.2d 25, 36 (Mo. App. W.D. 1998) ("'[a]t any time before final judgment a court may open, amend, reverse or vacate an interlocutory order.'") (quoting ***Around the World Importing, Inc. v. Mercantile Trust Co.***, 795 S.W.2d 85, 88 (Mo. App. E.D. 1990)) & ***Pulitzer Publishing Co. v. Transit Casualty Co.***, 43 S.W.3d 293, 298 (Mo. banc 2001) (discussing general rule that interlocutory orders are not subject to direct appeal).

Such a result also makes no sense given that the circuit court, in the now-existing writ of review case, possesses whatever authority it needs to apply the Order, including the authority to ensure that sufficient security exists in connection with its stay so that all parties are protected according to the requirements of the law and in accordance with the due process rights of all parties, including the Company.

[6] As the Commission is aware, since it is a party to these cases, the rate orders from Case No. ER-2008-0318 were the subject of a writ of review proceeding in the Pemiscot County Circuit Court, where a stay of the rates as to Noranda only was entered by the circuit court. Those rate orders are now the subject of further appeal in the Southern District of the Court of Appeals.

Or consider the situation that would result if the Commission were to accept Public Counsel's so-called "straightforward" interpretation of the Order and act as Public Counsel requests, but the Cole County Circuit Court in fact applies the Order according to its terms, that is, applies the stay only to the rates of the Movants, as they requested.[7] At that point, the Commission will have entered an order impacting the operation of rates that are already on review in Cole County (and in fact, if one accepts MIEC's position, that affects the operation of different rates that are on review in a different court – the Southern District Court of Appeals) – in a manner inconsistent with the stay orders respecting the rate orders on review entered by the Circuit Courts of Pemiscot and Cole Counties.

Consider the ratemaking and regulatory mess such a result would create and the resulting unfair impact on Ameren Missouri and ultimately on its customers. If Ameren Missouri suddenly had to start foregoing what would amount to annual cash flows in the hundreds of millions of dollars based upon a Commission order that is not in accord with the orders of the courts with jurisdiction over the very rates Public Counsel and MIEC ask the Commission to in effect roll-back, and without the protection of a sufficient bond, the Company would apparently be left entirely without a remedy. It would be without an apparent remedy because it could not practically file 1.2 million lawsuits to recover the small sums at issue for the vast majority of its customers. Such an action would also have a real, lasting and harmful impact on the Company and on its customers, and would turn the presumption of validity of Commission orders on its head, all of which is discussed further below. *See* Section D of this pleading, which addresses the continued lawfulness, reasonableness and effectiveness of the Commission's rate orders,

[7] In fact, the Order grants exactly what Movants asked for: it grants *Movants' request*, which was to allow them to divert a portion of *their* billings into the Court's registry if they posted a small bond designed to cover the time value of the delayed cash flows reflected by their diverted payments and their diverted payments alone.

pending appeal, and Section F of this pleading, which briefly discusses the consequences of a cash loss of this magnitude on the Company and on the service it provides.

Those kinds of problems are why the General Assembly chose to have courts decide what happens to monies being paid by customers under rate orders and rates approved thereby while those *presumptively valid*[8] orders and rates are on review in the courts. Those kinds of problems are also why the General Assembly chose to have the courts decide when and under what circumstances a portion of the rates which continue to be lawfully charged should be impounded, and what bond is required with respect to any portion of the rates not being collected from customers affected by a circuit court stay (or, in the case of a rate decrease order that continue to be collected by the utility pursuant to a stay, pending judicial review).

C. The Order Does Not In Any Event Apply to Billings Other Than the Movants' Base Rate Billings.

What makes Public Counsel's request all the more ill-advised is that it misstates the legal effect of the Circuit Court's stay order. Section 386.520, RSMo[9] provides a statutory mechanism to obtain a stay of Commission orders as part of the judicial review process contained in Sections 386.510 through 386.540, RSMo (2000 and Cum. Supp. 2010). The Circuit Court can stay a Commission order "in whole or in part," but any stay is expressly conditioned upon the posting of a bond "sufficient in amount and security to secure the prompt payment, by the party petitioning for review [MIEC here] of all damages caused by the delay in the enforcement of the order or decision of the commission." Section 386.520.1.

[8] *See* Section D of this pleading, *infra.*
[9] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

By its plain terms and as matter of law, the Order "grants Movants' request to stay or suspend"[10] the Commission's order in Case No. ER-2010-0036 – nothing more and nothing less. Conclusion, Order, p. 50. Movants' request was as follows: "Movants pray for an order of the Court staying the effect of the May 28, 2010 Report and Order and the Order Approving Tariff Sheets thereunder *as to any increase to Movants*" (emphasis added).[11]

The grant of the Movants' request, and a stay as to them, is also conditioned upon the Movants' posting a bond equal to 3.5% of $12.3 million. *Id.* The $12.3 million used to determine the required bond equals the annual base rate billings *for the Movants alone*. The Order also grants Movants' request to pay into the court's registry the difference between *their* base rate billings at the 2010 rates set in Case No. ER-2010-0036 and what their base rate billings would be under the 2007 rates set in Case No. ER-2010-0036. *Id.*

The remaining 49 pages of the Order outside its Conclusion are nothing more than an extended *obiter dicta* discussion reflecting the meandering analysis and opinion of one (now former) circuit judge regarding what the law governing stays in Missouri, in his singular view, might be. *See* ***Swisher v. Swisher***, 124 S.W.3d 477, 482 (Mo. App. W.D. 2003) (Discussing the non-binding nature of *dicta.).* Indeed, Judge Wilson himself recognized this to a large extent. In what was one of his last opinions before leaving the bench, Judge Wilson indicated that he hoped his discussion would "set the stage for our appellate courts to provide more authoritative guidance." Order, p. 3. The Order also notes that Judge Wilson was aware that "the conclusions reached by the Court may not have any immediate effect outside the parties before it

[10] The Movants are Noranda, Anheuser-Busch, Enbridge, and Doe Run, and do not include the other "members" of MIEC who were parties to Case No. ER-2010-0036, or who also sought review of the Commission's decision in that case pursuant to MIEC's Petition for Writ of Review in Cole County Circuit Court Case No. 10AC-CC00474.
[11] Motion of Relators Anheuser-Busch Companies, Inc., The Doe Run Resources Corporation, Enbridge Corporation, and Noranda Aluminum, Inc. for Stay and Suggestions in Support, filed September 13, 2010, Cole County Circuit Court Case No. 10AC-CC00474.

– at least not until the Court's conclusions are affirmed or rejected by the appellate courts." Order, p. 47. His "conclusions" reflected in his *dicta* have not been affirmed by the appellate courts. And if indeed the Order is ultimately reviewed by the Missouri Court of Appeals, the appellate court will be concerned with the propriety of the operative language in Judge Wilson's order (*i.e.*, the Conclusion, which grants Movants' request), not the 49 pages of *dicta* preceding it.

Indeed, "the law in Missouri is clear that the decretal/operative portion of an order is controlling and cannot be changed or diminished by findings or by a memorandum opinion, even though the latter be part of the same single document." ***Page v. Page***, 516 S.W.2d 537, 539 (Mo. App. 1974). *See also* ***Foraker v. Foraker***, 133 S.W.3d 84, 102 n.5 (Mo. App. W.D. 2004) ("'[W]hen a conflict exists within the text of a court order, the portion of the order wherein the court gives its imprimatur or *exercises its power* trumps inconsistent language appearing elsewhere in the order.'" (emphasis added)) (quoting ***Harris v. Desisto***, 932 S.W.2d 435, 447 (Mo. App. W.D. 1996)); ***State ex rel. Missouri Highway and Transportation Comm'n v. Westgrove Corp.***, 306 S.W.3d 618, 623 (Mo. App. E.D. 2010) ("The legal principle is firmly established that the operative effect of an order lies in the order or decretal portion itself, rather than in any accompanying recitals, finding, memorandum or *opinion*." (emphasis added)). *See also* ***Business Men's Assuruance Co. of America v. Graham***, 984 S.W.2d 501, 506 (Mo. banc 1999) (noting that an "appellate court is primarily concerned with the correctness of the trial court's result, not the route taken by the trial court to reach that result" and that a "judgment will be affirmed if cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient."). The only operative part of the Order is its Conclusion, found on page 50, where Judge Wilson, after a lengthy discussion of his observations and

opinions about Section 386.520, proceeds to grant exactly what Movants asked for: a stay of the rate increase as to *them*, and their request to impound the difference between the higher rates and the lower rates reflected on *their* base rate billings.

There is another reason the stay reflected in the Order cannot apply as broadly as Public Counsel contends as a matter of law. As noted above, under Section 386.520.1, any stay is expressly conditioned upon the posting of a bond "sufficient in amount and security to secure the prompt payment, by the party petitioning for review [MIEC here] of all damages caused by the delay in the enforcement of the order or decision of the commission." Such a bond has not been posted. Indeed, it is undisputed that the impoundment in the circuit court's registry of a portion of the four Movants' billings, and the combined $430,000 of bonds that the four Movants have posted, provides security only respecting the disputed portions of the base rate billings *to the Movants*.

Without a sufficient bond, the stay cannot apply more broadly as a matter of law because a stay, like all injunctive relief, is conditional on the posting of a sufficient bond. A sufficient indemnity bond is one of the "essential preliminary steps to the granting of injunctive relief pendente lite." ***State ex rel. Kansas City v. Public Service Com'n***, 244 S.W.2d 110, 116 (Mo. 1951). In Missouri, posting an insufficient bond is equivalent to posting *no bond at all* and likewise precludes the trial court from having authority to grant injunctive relief. ***State ex rel. American Bankers' Assur. Co. v. McQuillin***, 168 S.W. 924, 926 (Mo. 1914) ("The right to grant a temporary or preliminary injunction . . . is forbidden by statute until a sufficient bond is executed to the other party. . . . If such an injunction is issued without bond, it is inoperative, and disobedience to its commands is not a contempt." (internal quotations and citations omitted)); *see also* ***Ruddy v. Corning***, 501 S.W.2d 537, 539 (Mo. App. 1973) ("The requirement

that a bond be executed prior to issuance of a temporary injunction is jurisdictional, and a temporary injunction issued without a bond is void."). *See also* Section 386.520.1, RSMo (the bond must be "sufficient in amount and security" to secure "all damages . . .").

It is curious that MIEC claims that the Order applies more broadly. MIEC Response, ¶ 6. As noted, the Order grants MIEC's request, which was limited to the Movants. In addition, in the only two appellate cases that exist that involve stays,[12] (both of which were relied upon heavily by MIEC before the circuit court) the stays were indeed limited to those requesting them. Yet MIEC now so easily "concludes" what the Order does and does not provide for, even though MIEC's conclusion is contrary to the specific grant of relief contained in the Order, to MIEC's position before the circuit court, to the limited and insufficient bond posted by Movants, and to the stay process utilized in the only two reported cases where a rate increase was stayed.

D. The Relief Requested by Public Counsel Ignores the Law Respecting the Continued Effectiveness of Commission Orders Until Further Commission Action After Final Judicial Review.

The Commission's rate orders remain in effect *throughout* the pendency of the judicial review process. ***Osage Water Co. v. City of Osage Beach***, 58 S.W.3d 35, 43 (Mo. App. S.D. 2001), *citing* ***State ex rel. GTE North v. Pub. Serv. Comm'n***, 835 S.W.2d 356, 368 (Mo. App. W.D. 1992). *See also* Section 386.270 (cited by the ***Osage Water*** and ***GTE*** courts) ("All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful . . . until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter").

Even at the point in time when final judicial review is concluded and where the courts have found error in the Commission's actions, the "rates, tolls . . ." etc. remain effective until the

[12] ***State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n***, 996 S.W.2d 608 (Mo. App. W.D. 1999), and ***State ex rel. Monsanto v. Pub. Serv. Comm'n***, 716 S.W.2d 791 (Mo. banc 1986).

Commission acts; indeed, the courts cannot direct the Commission what action to take. ***GTE North*** illustrates this principle of law. In ***GTE North***, the circuit court found error in the determination of certain "separation factors" (the separation factors proposed by GTE North had been rejected) that impacted the charges GTE North was allowed to make under the tariffs approved by the Commission. The circuit court then remanded the case to the Commission and directed it to "allow GTE North to increase local services rates and charges" essentially to levels that would be based on GTE North's calculation of the separation factors. The Commission appealed the circuit court's reversal and challenged the circuit court's ability to direct the Commission to set any particular rates or charges or to act in a particular manner.

The Court of Appeals reversed the circuit court. In doing so, the Court of Appeals recognized that the courts have "no authority to direct the Commission what order to make . . .." ***Id.*** at 362. In discussing this principle in more detail, the Court of Appeals noted that the Supreme Court's decision in ***State ex rel. Anderson Motor Lines v. Pub. Serv. Comm'n***, 134 S.W.2d 1069 (Mo. 1939), *affd.*, 154 S.W.2d 777 (1977), "makes very clear that the *only* instance in which a court may tell the Commission what its action should be is in a case where the Commission has excluded evidence that it should have received" (emphasis added). ***GTE North***, 835 S.W.2d at 363. The Court of Appeals also made clear that even if the circuit court, *on the merits*, finds error in the Commission's order this "does not invalidate the order of the Commission while the appeal continues." ***Id.*** at 368.

Here, not only is the Commission's order in Case No. ER-2010-0036 still on review, the merits of the Commission's order and of the rates currently in effect for Ameren Missouri have not yet been examined. If the circuit court cannot direct the Commission to act regarding rate orders and tariffs authorized thereby until final judicial review is over, and even then, if the

circuit court cannot direct the Commission as to what order to enter to make, then certainly an interlocutory stay order that Public Counsel contends, incorrectly, should apply beyond the four Movants provides no authority for Commission action now; that is, if the Commission were free to act at all.

This demonstrates that Public Counsel's conclusory allegation that the Commission has a "ministerial duty" to "cancel" or "suspend" the presumptively lawful tariffs on file for the Company is just plain wrong. The Commission would not have a ministerial duty to cancel or suspend or change the Company's tariffs even if judicial review were over and if error had been found in the underlying rates. A ministerial duty only arises if the actor (e.g., a governmental official or agency) must take a particular action and has no discretion whatsoever with respect to whether the action is taken, or what the action must be. *See* ***State ex rel. Kansas City Power & Light Co. v. McBeth***, 322 S.W.3d 525, 531 (Mo. banc 2010) ("'A ministerial duty is of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed'" (*quoting* ***Rustici v. Weidemeyer***, 673 S.W.2d 762, 769 (Mo. banc 1984)). Because the courts cannot direct the Commission regarding what order to make, even when a Commission order has been reversed, a ministerial duty does not exist.

The Commission does not have a "ministerial duty" to act now any more than it did when the Pemiscot County Circuit Court issued a stay of the rates set in Case No. ER-2008-0318 as those rates applied to Noranda. If it had such a duty, as Public Counsel (and Noranda, as a member of MIEC) now claims, then the Commission should have stamped the Company's 12(M) rate schedule, applying to Large Transmission Service customers – of which there is only

one, Noranda – "cancelled or suspended" immediately after the Pemiscot County Circuit Court entered its stay order in September 2009. Of course this contention is pure nonsense, and neither Public Counsel nor Noranda ever made any such contention. Ameren Missouri continued to charge Noranda the rates set in Case No. ER-2008-0318, because those rates and the rate order authorizing them remained prima facie lawful and reasonable pending the appeal. Noranda, however, paid a portion of those rates to the circuit court's registry, creating a fund arising from the rates that was then subject to the circuit court's jurisdiction and the *circuit court's jurisdiction* alone. This is also the circumstance existing in Cole County.

Moreover, consider the lack of logic inherent in Public Counsel's (and MIEC's) position. They ask the Commission to "resurrect" either the tariffs implemented pursuant to the 2009 rate order or pursuant to the 2007 rate order. However, those tariffs were superseded as a matter of law when the tariffs that became effective on March 1, 2009, superseded the 2007 tariffs, and when the tariffs that took effect on June 21, 2010, superseded the 2009 rates. They ask the Commission to do so without consideration of the current facts and circumstances, including what rates must be charged today to constitute just and reasonable rates.[13]

The point is not that the Commission should have to answer those questions today; it should not, and it cannot, because the General Assembly wisely realized that concurrent jurisdiction between two bodies over the same orders was unworkable and would threaten the orderly operation of the ratemaking and judicial review process reflected in the Public Service Commission Law.

[13] Indeed, Public Counsel's Motion may be an end-run around the need to file a Section 386.390 complaint alleging that the existing rates are unjust and unreasonable.

E. While denial of Public Counsel's Motion can and should be entered with reasonable promptness, the "deadline" urged by Public Counsel does not exist.

For the reasons discussed above, the Commission can and should deny Public Counsel's motion on the grounds that the Commission lacks jurisdiction over the rates Public Counsel asks the Commission to "cancel" or "suspend," and also on the grounds that the Order does not support the requested relief even if jurisdiction did exist. And while the Commission has already recognized that Public Counsel's request for expedited relief is unreasonable, it is important to point out that the bases for Public Counsel's request that the Commission provide the relief Public Counsel seeks do not in any event exist.

Public Counsel did not file his motion as promptly as he could have under the circumstances, as required by the Commission's rules.[14] That his request does not comply with the Commssion's rules is evidenced by the following facts.

While on the one hand claiming that he could not have filed his motion because Movants did not post a bond until February 15, Public Counsel on the other hand contends that the Order is "quite straightforward" and that its principles are "simple." If one were to assume, as Public Counsel does, that those contentions were true, then Public Counsel had exactly 57 days *prior* to the date he filed his Motion to advise the Commission that its so-called "ministerial duty" would arise the moment a bond was posted.[15] Had Public Counsel done so, the false deadline he seeks to create – just four business days after he made his request – would not have existed. Had Public Counsel done so, and if the Commission had any jurisdiction to grant the relief he seeks, the Commission would have then had an appropriate period of time to consider the relief, to otherwise provide for a fair process to consider Public Counsel's request (consistent with basic

[14] Commission rule 4 CSR 240-2.080(16) requires that a request for expedited treatment be made as soon as it could have been (or an explanation of why it was not be given) under the circumstances.
[15] December 20, 2010 to February 15, 2011 spans 57 days.

notions of fairness and the due process rights of the Company), and could have then been in position to enter an appropriate order, that is, if and when a bond was posted.[16]

Public Counsel (and MIEC) appears to imply that not only did the lack of a bond preclude the filing of Public Counsel's Motion, but so did settlement discussions. That contention is also incorrect. Public Counsel asserts that settlement discussions have taken effect "since that time," with "that time" being December 20, 2010. In fact, settlement discussions did not begin until about three weeks later, on January 11. Consequently, even if Public Counsel did not desire to make a filing while settlement discussions continued, this did not preclude Public Counsel from advising the Commission that its so-called "ministerial duty" would arise when a bond were posted during the three-plus weeks after the Order was issued and before settlement discussion arose. In summary, the decision not to give the Commission more than the requested four business days to consider Public Counsel's request, and to act, was Public Counsel's decision and Public Counsel's decision alone.[17] The Commission should not let that decision force it to take extrajurisdictional, premature, and improvident action.

F. The relief sought by Public Counsel would not serve, and indeed would do harm to, the public interest.

Not only did Public Counsel not file his motion as promptly as he could have under the circumstances, but the rush-to-judgment (that is, if that judgment involved granting or considering granting the requested relief) he seeks from the Commission would not serve the

[16] Public Counsel apparently believed the Company did not necessarily have a right to respond to his motion at all, as evidenced by Public Counsel's suggestion that the Company must file a response on the third business day after the Motion was served, that is, "[i]f the Commission wishes to hear from AmerenUE." Simple notions of fairness, the Commission's rules, and due process demand that the Company be afforded the opportunity to be heard from and, if necessary, to have a hearing and all process that it is due prior to the drastic step of rolling back its rates by $230 million annually. The Company has confidence that the Commission recognizes these basic principles. In any event, given the Commission's lack of jurisdiction and the lack of support for the relief Pubic Counsel seeks, the Commission can and should promptly deny Public Counsel's Motion.

[17] Public Counsel may suggest that the delay was also a matter of his limited resources, and that may be true. That does not, however, support a motion for expedited treatment.

public interest, and indeed would significantly harm it.[18] This Commission has been delegated the responsibility of engaging in an 11-month rate case process, based upon a consideration of all relevant factors, to determine the just and reasonable rates that the utilities under its jurisdiction must charge in order to meet their obligation to provide safe and adequate service to the customers they have an obligation to serve. The General Assembly has purposefully vested the Commission's orders, including its rate orders, with a presumption of validity that survives throughout the judicial review process. The courts properly employ a deferential standard of review to the Commission's ratemaking determinations. The Legislature also provided a mechanism that operates as part of the circuit court/appellate court judicial review scheme and while the courts exercise their exclusive jurisdiction over the orders and rate on review, to stay all or some portion of Commission orders and to implement conditions relating to any such stay as the courts determine are appropriate. That power, *including the power to apply and to ensure compliance with the courts' orders*, rests with the courts and *not* with this Commission.

Public Counsel (and MIEC) seeks to turn this longstanding and carefully constructed legislative scheme for rate-setting and judicial review on its head, by asking this Commission to do something it has no jurisdiction to do, based upon an Order that does not order what they claim it orders, and to do it quickly.[19] In effect, Public Counsel asks this Commission to cancel its tariffs based on nothing more than an erroneous interpretation of an interlocutory order of the circuit court, entered at the early stages of the appellate review process, at a time when the Commission lacks jurisdiction to act in any event. Public Counsel and MIEC claim there will be

[18] Public Counsel tries to bolster his expedited treatment request with the claim that the relief he seeks should be granted quickly to "avoid customer confusion." Nothing could possibly cause more customer confusion than for the Commission to take hasty, unprecedented and extra-jurisdictional action of suspending tariffs that remain legally effective until found otherwise by a court with final appellate jurisdiction.

[19] Public Counsel and MIEC are also quite presumptuous in telling the Commission that one week – including two weekend days and a state holiday – is "sufficient time" for the Commission to consider Public Counsel's motion (Public Counsel's Motion, ¶ 10; MIEC Response, ¶ 8).

"irreparable harm" if the action they seek is not taken.[20] As pointed out earlier, this is not only unlawful, but it is poor policy as it would lead to confusion, duplicative appeals, and inconsistent results. It is also poor policy because, as noted earlier, it would disrupt and undermine the entire system of public utility regulation and judicial review because, among other things, it would effectively reverse the presumption of validity given Commission orders throughout the entirety of the judicial review process, it would put the Commission in the position of trying to apply court orders not directed to the Commission (instead of the court applying its own orders), and it would lead to these kinds of attempts in every rate case on review.

As noted above, this Commission determined by its 2009 rate order in Case No. ER-2008-0318 that the Company required a rate increase of approximately $163 million annually and needed a fuel adjustment clause to have a reasonable opportunity to earn a fair return. On that basis, the Commission approved, as just and reasonable, the rates filed pursuant to that order. The Commission then determined by its 2010 rate order in Case No. ER-2010-0036 that the Company required a rate increase of approximately $230 million annually and approved, as just and reasonable, the rates filed pursuant to that order. Indeed, this Commission is defending, as well it should, those orders and its approval of those rates as part of the judicial review proceedings pending in the Southern District of the Court of Appeals and in the Cole County Circuit Court. The relief Public Counsel seeks would, at a point in time when the rate orders are presumptively lawful, in effect cancel the Commission's two rate decisions even as the Commission defends those rate orders in the courts.

[20] Payment of monies by customers pending the review processes contained in Sections 386.500 through 386.540 does not automatically constitute "irreparable injury" in any event. *See, e.g,* ***AG Processing***, 276 S.W.3d at 312 (citing the general rule that injuries in terms of money, time and energy necessarily expended in the absence of a stay do not constitute irreparable injury).

Loss of the cash flows provided by the increased revenues allowed by those orders will have real and detrimental consequences on the Company, on the service it can provide, on the operation of its generating units, on its costs, including on its cost of capital, and ultimately on its customers, both from the standpoint of the quality of the electric service they receive and on the longer-run cost of providing that service to them.

If Public Counsel and MIEC were to get their wish that the Company be deprived of hundreds of millions of dollars of revenue the Commission recently determined was needed to produce just and reasonable rates, the Company will have no choice but to drastically reduce its spending on items critical to providing reliable service at a reasonable cost. And while the Company believes the Commission should and will deny the relief that is being requested, if the Commission were to consider any other course of action, the Company hereby asserts its right to be heard and present evidence respecting the impact of any such action and the extraordinarily difficult, complex, and unprecedented ratemaking, service, and cost-of-service impacts such an action would create. Even after hearing, any such action could not be made effective until after the Company is given sufficient time to seek rehearing. Section 386.500; ***State ex rel. Public Counsel v. Pub. Serv. Comm'n***, 236 S.W.3d 632, 636-37 (Mo. banc 2007). Moreover, given the unprecedented and extraordinary nature of the request that has been made, the Company would ask that the Commission suspend any such action pending appropriate action to review its propriety in the courts.

It is also important to keep in mind that if their wish were granted there would be no adequate security to protect the Company (and ultimately its customers as well) from the harm occasioned by such a rate rollback because the only funds being deposited into the circuit court's registry are those relating to Movants' billings. Indeed, the minimal $430,000 bond they have

posted relates only to damages for delay in receiving that part of the Movants' base rate billings that are being impounded.

An objective reading of Public Counsel's request leads one to the conclusion that Public Counsel is attempting to obtain from the Commission what he cannot obtain in the circuit court, that is, a rate rollback for 1.2 million customers, but without posting the bond that Section 386.520 requires. Perhaps this end-run arises from Public Counsel's realization that he cannot post a bond in an amount equal to the several hundred millions of dollars that would be required to provide sufficient security to protect the Company after the dust settles and judicial review of the 2009 and 2010 rate orders is concluded.

CONCLUSION

For the reasons stated above, the Commission should DENY Public Counsel's request.

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Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response and Reply of Union Electric Company d/b/a Ameren Missouri was served via e-mail, as follows, on the 25th day of February, 2011.

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