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January 24, 2001

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RE: Case No. EO-2000-580

FILED²
JAN 24 2001
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **STAFF'S INITIAL BRIEF**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Dennis L. Frey

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Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

JAN 24 2001

Missouri Public
Service Commission

In the Matter of an Investigation into an)
Alternative Rate Option for Interruptible)
Customers of Union Electric Company)
d/b/a AmerenUE.)

Case No. EO-2000-580

STAFF'S INITIAL BRIEF

I. INTRODUCTION

On November 18, 1999, the Missouri Public Service Commission ("Commission") approved a Stipulation and Agreement ("Stipulation") that was filed in the most recent rate design case (Case No. EO-96-15) of Union Electric Company d/b/a AmerenUE ("UE" or "Company"). Under the terms of the Stipulation, all parties, including MEG Interruptibles ("MEG"), agreed that tariff Rate 10M, under which MEG took electric service from the Company, was to be eliminated, effective June 1, 2000. Rate 10M, which provided MEG with credits toward their electric bills in exchange for permission for UE to curtail power to them when system conditions warranted, was in fact eliminated in accordance with the Stipulation.

Also as part of the Stipulation, the parties agreed that UE would file its "Rider L" for Commission approval, which was granted, effective June 1, 1999. In anticipation of UE's filing of "Rider M," the other signatory parties agreed that, in the event MEG subsequently made application with the Commission for consideration of an additional alternative interruptible rate, they would not object on procedural grounds. On March 20, 2000, MEG filed, without objection

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on procedural grounds from the other Stipulation signatories, an Application with the Commission, requesting, *inter alia*, a Commission Order directing the Company to prepare a proposed interim interruptible tariff incorporating the terms and conditions set forth in an exhibit attached to said Application.

In place of Rate 10M, the Company now has two optional tariff riders available to customers with as little as 250 kW of curtailable load. Rider L went into effect on June 1, 1999, and Rider M, an options-based curtailment rider, became effective on May 6, 2000.

II. ARGUMENT

A. The Legal Question

Before turning to the Staff's specific concerns about the subject MEG proposal, Staff will respond to the Commission directive, in its December 21, 2000 Order Regarding Briefs, that the parties address the following question in their briefs: *"Even if the Commission determines that a tariff similar to the 'Brubaker Proposal' would be in the public interest, what authority does the Commission have to require Union Electric Company d/b/a AmerenUE to file a tariff implementing that proposal?"*

It bears re-stating at the outset that, pursuant to the aforementioned Stipulation in Case No. EO-96-15, the signatory parties agreed that they would not object on procedural grounds to the filing by any other such party of an application with the Commission for consideration of an alternative interruptible rate. Accordingly, when MEG filed its Application, neither Staff nor any other party lodged such an objection. Nevertheless, upon being ordered by the Commission to respond to this question, Staff does not consider that it is precluded by the Stipulation from doing so. Further, because the potentially dispositive nature of the issue here raised by the Commission (i.e., one of jurisdiction), the issue is arguably substantive and not procedural.

Considering the question in general, the Staff asserts that the Commission most assuredly has the authority to order a regulated utility to implement a particular tariff proposal at the instance of another party. In a rate design case, for example, any party may advance a particular rate proposal for the Commission's consideration. Likewise, in a complaint case, Staff or some other party may support a particular rate, and request that the Commission order the utility to adopt it. Indeed, this is not an uncommon practice in such cases. The question, then, is really contextual; *i.e.*, whether the Commission may order UE to adopt such a tariff provision in the instant case.

The Staff is persuaded that the Commission does indeed have the authority to require UE to file a tariff implementing MEG's proposal. Section 386.250(1) RSMo 1994¹ confers on the Commission's general jurisdiction over the "manufacture, sale or distribution of...electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to...electric plants, and to persons or corporations owning, leasing, operating or controlling the same." Further, the Commission, in the exercise of its regulatory authority, assures that the charges of utilities subject to its regulation are, pursuant to Section 393.130.1, "just and reasonable."

The Commission is granted broad authority to discharge its statutory duties. In particular, under Section 386.040, the Commission "shall be vested with and possessed of the powers and duties in this chapter specified, and also powers necessary and proper to enable it to carry out fully and effectually all the purposes of this chapter." Section 386.250(7) provides that the Commission's jurisdiction shall extend "[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either

¹ Unless otherwise noted, all subsequent statutory references are to RSMo 1994.

expressly, or impliedly.” “[T]he authority of the Commission is referable to the police power of the State which power may never be abridged.” *State ex rel. and to Use of Public Service Commission et al v. Blair, Circuit Judge*, 146 S.W.2d 865, 868 (Mo. Banc 1940). “In any circumstance, where a statute is reasonably open to construction. . . the Commission does have the power, in the first instance, to determine administratively its own jurisdiction.” *Id.* at 874. Section 393.140(5) states in pertinent part: “Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. . . .”

This case is not a “garden variety” complaint case. It did not arise as would an ordinary complaint regarding rates; *i.e.*, with the Section 386.390 requirement that such a complaint, not of the Commission’s own motion, be signed by the Office of the Public Counsel (“OPC”), or specified government officials, or at least twenty-five customers or prospective customers. Moreover, MEG does not assert that a tariff provision in existence is not just and reasonable; rather, MEG claims, in essence, that the absence of a provision once in existence is not just and reasonable and is, in fact, discriminatory as to MEG.

As noted earlier, this case has its genesis in Case No. EO-96-15. The Stipulation specifically provided for the possibility that MEG would file an application such as the one MEG filed on March 20, 2000. Had the issue here presented been litigated in Case No. EO-96-15, the Commission surely would have had the jurisdiction to consider the subject rate proposal. In a sense, then, the Stipulation left a “window” open for continued argument in the context of a rate

design case. Accordingly, Staff is of the opinion that the case falls within the Commission's broad statutory grant of authority, as set forth above, and that the Commission may therefore take jurisdiction of this issue and decide the case on the merits.

Alternatively, the Commission may elect to regard MEG's filing as in the nature of a complaint, albeit one that has not been "perfected," i.e., one that has not met the Section 386.390.1 requirement that a complaint regarding rates be signed by OPC, or specified government officials, or at least twenty-five customers or prospective customers. Section 386.390.1 also permits the Commission to hear a rate complaint "of its own motion." In fact, just recently the Commission decided a complaint case (Case No. EC-99-553) involving GS Technology Operating Company, Inc. ("GST") and Kansas City Power & Light Company ("KCPL"). In its petition, GST requested, among other things, that "this Commission take immediate steps to protect GST from exposure to unjust and unreasonable charges for electric service." The Commission agreed with KCPL that the complaint had not been perfected but nevertheless took jurisdiction "of its own motion," stating:

The Commission agrees with KCPL that GST's complaint must be perfected under Section 386.390.1. Laundry, Inc., *supra*, and its progeny have to do with misclassification, that is, which of several approved rates should a consumer be charged and not, as here, with whether a rate is just and reasonable. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority. The Commission concludes that it may do so in this order. Therefore, the Commission shall determine the merits of GST's complaint "upon its own motion" as authorized by Section 386.390.1.

Thus, regardless of whether the Commission adopts the Staff's view that the broad powers accorded the Commission under existing law confer the necessary jurisdiction to decide this case, the Commission may nevertheless view the case as a complaint case and decide it "of its own motion."

B. The Merits of the MEG Proposal

The Staff is opposed to the interruptible rate concept proposed by MEG. It is fair to point out that at the time the Stipulation was executed in Case No. EO-96-15, Staff was under the impression that if MEG subsequently decided to make its own proposal, MEG would actually be offering something new. Unfortunately, the MEG proposal at issue is nothing more than a not-so-veiled attempt to have the Commission re-institute a tariff provision that was fairly negotiated away by MEG, presumably in exchange for what MEG regarded as compensating benefits.

The fact is that the MEG proposal is, in essence, the same as the now-defunct Rate 10M. Indeed, on cross-examination MEG witness Rader concurred with this opinion. (Tr. 54, lines 9-11). Moreover, to the extent that the MEG proposal modifies Rate 10M, the overall effect is to put even tighter constraints on the Company; this, at a time when, with the advent of wholesale competition and looming retail competition, UE requires greater flexibility in its operations in order to successfully meet the needs of both its customers and its shareholders. Of particular significance is the fact that the MEG proposal eliminates UE's ability to call for a curtailment as it approaches a system peak, thus increasing UE's reserve requirements. (Watkins Rebuttal, Ex 7, p. 6 lines 9-13).

As noted in its prefiled testimony, Staff is opposed to the relief sought by MEG in its application. There is no evidence that the Company needs a tariff provision that provides for mandatory curtailments in order to maintain reliability. (Watkins Rebuttal, Ex. 7, p.2-3, lines 14-15). In fact, the evidence is to the contrary. Since UE eliminated Rate 10M and introduced Rider L and Rider M, there have been no reported instances of reliability problems. (Watkins Rebuttal, Ex. 7, p. 3, lines 6-7; Kovach Rebuttal, Ex. 6, p. 4, lines 13-15).

The effect of the elimination of Rate 10M was to reduce the Company's curtailable load by 40,000 kW (40 MW); however, the Company has approximately 100 customers taking service under the Rider L program, and five customers signed up for Rider M. These two optional programs amount to 150 MW and 24 MW, respectively, for a grand total of 174 MW of potentially curtailable power. Although this total amount of load curtailment is not 100% assured, the Company believes that there is more than enough participation in these voluntary programs to offset the 40 kW reduction in curtailable load created by the elimination of Rate 10M. (Tr. 114, lines 12-25; Tr. 115, lines 1-12).

MEG's proposed alternative interruptible rate tariff, being merely a slightly modified version of the previous Rate 10M, is plagued with the same multitude of deficiencies as the old Rate 10M. The deficiencies are glaring in comparison to the types of interruptible rates more recently approved for other Missouri utilities. In particular, the following problems are noted:

a. Perhaps most important, the proposed credit of \$5.00 per kW per month, the same credit amount that existed under Rate 10M, is too high. (Watkins Rebuttal, p.3, line 14, p.5, line 6). The Staff believes that such a credit must be cost-based. (Tr. 144, lines 22-23). It is to be noted that all other Missouri electric utilities offering discounts for interruptible load employ a much lower value than was called for under Rate 10M. The average credit paid by the other Missouri utilities is only \$2.01. (Watkins Rebuttal, Ex. 7, p. 5, lines 10-14).

Furthermore, an additional study would be needed to establish a cost-based rate. This is not an insignificant task. To develop a rate equivalent based on the value of a combustion turbine to the Company requires developing a production cost run using hourly loads to determine production costs in every hour, and a subsequent analysis to

determine how much cost could be avoided with additional capacity. (Tr. 145, lines 8-20). In short, a further analysis of UE's current avoided costs, which accounts for all relevant factors, would have to be performed in order to determine the appropriate level of the discount. The clear need for such a study should, by itself, preclude the Commission from ordering UE to prepare a proposed interim interruptible tariff incorporating the terms and conditions set forth in MEG's Application in this case.

b. Aside from the amount of the rate discount, perhaps the most onerous feature of both the current MEG proposal and the old Rate 10M, and the one that clearly demonstrates its abject unsuitability in the new world of wholesale power competition, is the requirement that the Company first exhaust all available opportunities to purchase power at any cost, before calling for load curtailments by its interruptible customers. No other Missouri electric utility operates under a tariff containing such an unconscionably restrictive provision (Watkins Rebuttal, Ex. 7, p. 6, lines 14-19); indeed, the very purpose of such a rate is to avoid the cost of having to purchase additional power (energy and/or capacity). This provision is particularly problematic because in today's wholesale environment, with prices now driven by market forces, there is a strong likelihood that power will always be available, though perhaps at a very high price, and that UE will find itself in a situation where, in effect, it will never be able to curtail power. (Watkins Rebuttal, Ex. 7, p. 7, lines 9-14).

It must be acknowledged that the MEG proposal permits UE, in times of very high prices, to call for voluntary curtailments; however, the proposal limits the Company to a total of only 60 hours per year for such cost-driven curtailments and requires the

Company to further reimburse MEG at least \$450 per MWh (90% of \$500). (Brubaker Direct, Ex. 1, Sch. 1).

c. Other Missouri electric utilities base the credit paid to a curtailable customer on the amount of load that the customer is expected to be able to curtail at the time it is called upon to do so. By contrast, under both MEG's current proposal and Rate 10M, the customer pays a discounted rate "applied every month to all kilowatts in excess of a predetermined firm power level." (Watkins Rebuttal, Ex. 5, lines 21-22). Thus, credits may be being paid on megawatts for which there is no expectation of curtailment, and once again, MEG could be selling UE "air." (TR. 62, lines 6-9).

d. The other electric utilities specify a maximum number of times the utility may curtail the customer. In no case is such maximum less than 20 times per year. Under the current MEG proposal and old Rate 10M, however, there is no such specificity; however, an unwritten rule seems to be: No more than 10 curtailments in a year, with an average not to exceed 6 curtailments per year. (Watkins Rebuttal, Ex. 7, p.6, lines 1-6). Staff takes the position that an interruptible rate should explicitly state the maximum number of, and/or maximum cumulative hours of, load curtailments that are allowed during each year. An analysis would have to be performed in order to determine the appropriate maximum, which would then be a relevant factor to consider in determining the appropriate level of the discount.

e. The other utilities are not limited as to the specific reasons for which they may interrupt. Their only limitations are the maximum duration of interruptions and/or the number of interruptions allowed per year. Under Rate 10M, however, UE could interrupt only for reliability reasons or when a new system peak load was expected to be

established. MEG's new proposal calls for the elimination of the system peak load as a justification for a curtailment, and is thus even more stringent. (Watkins Rebuttal, Ex. 7, p. 6, lines 7-13). The Staff believes that no restrictions should be placed on the utility as to its reasons for curtailing load. If, however, such restrictions are made a part of the rate offering, they should be explicitly stated and should be verifiable. Further, any such restrictions are relevant factors that should be considered in determining the appropriate level of the discount.

An additional problem with both the old Rate 10M, and the MEG proposal is the fact that the three cement companies are unable to abide by all of the terms of the tariff. On cross-examination, MEG witness Dorris, the plant manager at Holnam, Inc., testified that Holnam requires an hour's notice in order to curtail its interruptible load, but that, if "everything went perfectly well," the cement company "might be able to do it in 30 minutes." (Tr. 75, lines 2, 22-23). According to Mr. Dorris, a loss of power, such as would result from an instantaneous remote shut-down, "could do extreme damage to (the) kiln system." (Tr. 77. line 22). If that be the case for all three cement companies, the language in the proposed alternative interruptible rate, requiring curtailable load to be curtailed immediately without delay and permitting UE to compel the MEG companies to install suitable relays and signal systems on their premises to enable UE to immediately curtail power remotely through the Company's load dispatcher, would seem to make MEG's proposed rate unavailable to the MEG Interruptibles, absent some off-tariff under-the-table side agreement. Indeed, Mr. Dorris testified to the existence of some such written side agreement between Holnam and UE, which the witness described as "...basically a contract between us and AmerenUE where they allow us one hour to get down to our predetermined seven meg usage." (Tr. 75, lines 13-15).

A final consideration is the fact that Commission approval of the alternative interruptible rate, as outlined by MEG, would mean that other parties would be required to pay for the \$2.4 million annual windfall for MEG in excess of any actual cost savings to UE. The answer to the question of who pays and how much depends upon whether UE continues to operate under an alternative regulation plan similar to the one currently and previously in force. Under an alternative regulation plan, this cost would be shared between the Company's shareholders and its customers, with the share going to each group dependent upon UE's earnings picture for the particular year in question. In the absence of such a plan, the entire cost would be borne by Missouri ratepayers.

Earlier, the Staff suggested that Commission approval of MEG's proposal at this time would, at best, be premature since more work will be required to develop a true cost-based rate and to further modify and specify conditions. A second consideration is that the reliability benefits, if any, of the MEG proposal are unlikely to occur until next summer. No evidence has been presented as to why it is important to reduce the rate applicable to MEG effective prior to June 1. (Watkins Rebuttal, Ex. 7, p. 8, lines 1-4).

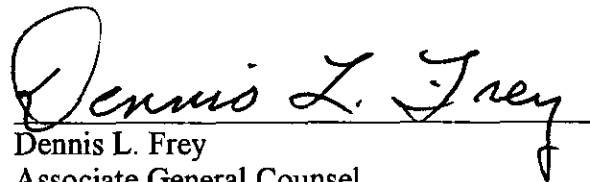
III. CONCLUSION

The Staff strongly recommends that the Commission reject MEG's proposed alternative interruptible rate scheme. The proposal is not needed for reliability purposes and is out of step with the realities of today's competitive wholesale market. Further, the rate, which is not cost-based, is excessive, and the conditions under which curtailments may be imposed are not properly specified. Additional detailed analyses and (likely) argument would be needed to fully develop a solid proposal that makes sense for the Company and all of its customers. In addition,

the important question of who would have to pay how much of the \$2.4 million bill cannot be known at this time.

Respectfully submitted,

DANA K. JOYCE
General Counsel

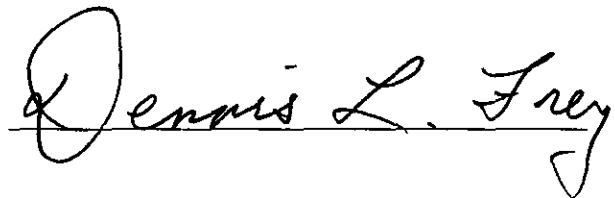
A handwritten signature in cursive script, reading "Dennis L. Frey", written over a horizontal line.

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 24th day of January 2001.

A handwritten signature in cursive script, reading "Dennis L. Frey", written over a horizontal line.

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Revised: January 24, 2001 (ccl)

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