**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of a Proposed Rule Regarding Electric Utility Fuel and Purchased Power Cost Recovery Mechanism | ) ) ) ) | Case No. EX-2006-0472 |

**RESPONSE IN OPPOSITION TO PUBLIC COUNSEL'S APPLICATION FOR REHEARING**

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE) and hereby responds in opposition to the Office of the Public Counsel's (Public Counsel) Application for Rehearing. In this regard, AmerenUE states as follows:

On September 21, 2006, the Commission issued two final orders of rulemaking, adopting 4 CSR 240-3.161 and 4 CSR 240-20.090. Public Counsel filed its Application for Rehearing on September 29, 2006, requesting that the Commission grant rehearing of its final orders of rulemaking, in that the orders were unjust, unreasonable, arbitrary and capricious, and unlawful. In support of its Application, Public Counsel made the following four points, each of which AmerenUE demonstrates is without merit as discussed below:

> **A. Section 536.021.6(4) RSMo 2000 requires that the Commission provide in these orders: A brief summary of the general nature and extent of comments submitted in support of or in opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with said rulemaking, together with a concise summary of the state agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule . . . In its orders of rulemaking, the Commission failed to address any of the comments submitted by Public Counsel in written form and at the hearing on September 7, 2006.**

Public Counsel's assertion that the Commission failed to address its comments and testimony in violation of Section 536.021.6(4) is erroneous. According to the Final Order of Rulemaking, seven individuals and fourteen groups submitted timely filed written comments on the proposed rules. Twenty individuals commented at the six local hearings, and ten parties

provided either comments or the testimony of witnesses at the Jefferson City hearing. The Commission cannot be expected to address each and every comment it received with regard to the proposed rules, nor does Section 536.021.6(4) require that it do so. Rather, the Commission was required to include a "brief summary" of the "general nature" of comments submitted, to provide a "concise summary" of the hearing testimony, and to include a "concise summary" of its findings with regard to such comments and testimony. The statute does not require that each comment be fully set forth and attributed to the commenter; rather, the language of the statute emphasizes brevity and summarization. Although Public Counsel was not mentioned by name, its written comments and the testimony of its witness, Russell Trippensee, in opposition to the proposed rule were summarized and addressed by the Commission in its Final Order of Rulemaking.

The essence of Public Counsel's arguments was concern that the proposed rules did not contain adequate ratepayer protections and that the proposed rules failed to provide utilities with proper incentives to operate and invest in a prudent manner. The Commission summarized and responded to similar comments in its Final Order ("The Attorney General believes that use of a fuel adjustment clause or any other rate adjustment mechanism is inappropriate and unfairly tilts the playing field in favor of the electric utilities . . . AARP asserts that though the current draft reflects hard work by the PSC Staff, it is devoid of the consumer protections promised by the Legislature when the rules were authorized . . . The Attorney General asserts that, as presently written, these rules shift 100% of the risk of fuel price changes from the utility to the consumers . . . Some commenters believe these rules must be written so that the utility continues to have its own financial interests at stake, in order to ensure some level of prudence in utility practices with a RAM and that these incentives should be structured to align the interest of shareholders and

ratepayers.") The Commission adequately summarized and addressed Public Counsel's concerns about consumer protections and utility incentives by summarizing the general nature and extent of the comments responding to similar concerns that were expressed by multiple commenters, even though Public Counsel's comments were not separately identified.

Public Counsel also objected to the clause contained in proposed rule 4 CSR 240-20.090(2)(E), which allowed an electric utility to withdraw its request for a RAM if the Commission modified the RAM in a manner unacceptable to the utility. This argument was also specifically addressed by the Commission, which explained that "[s]everal commenters noted that the proposed rule appears to give the electric utility unilateral veto power over the Commission's determination as to what RAM is appropriate for use by electric utility." The Commission responded to these comments by eliminating the so-called "veto power" from the final rule.

Finally, Public Counsel expressed concern that the 165 day RAM amendment period suggested in the proposed rules for the Transitional Period was excessively long. This concern was also address by the Commission, which stated: "Almost universally, the ratepayer commenters opposed the transitional provisions set out in (17) . . .". The Commission responded by deleting that subsection from the final rule.

Despite Public Counsel's argument to the contrary, the Final Order of Rulemaking meets the requirements of Section 536.021.6(4).

**B. In its order of rulemaking concerning 4 CSR 240-2.090, the Commission stated that "Some commenters believe these rules should … include a requirement that the utility have an approved Chapter 22 resource plan in place prior to approval of any rate adjustment mechanism." In fact, no comments made such a proposal.**

Public Counsel's statement that proposed 4 CSR 240-20.090(13) is not in substance a requirement that the utility have an approved resource plan is not credible. Public Counsel's proposed subsection (B) requires a Commission determination that the utility is in compliance with 16 pages of rules that in many respects are, today, out-of-date and in need of revision – the Chapter 22 rules. The Chapter 22 rules govern resource planning. Indeed, nothing in the Chapter 22 rules requires the Commission to ever determine that there is included a "reasonable portfolio of supply and demand side resources." In substance, what Public Counsel seeks is approval of an integrated resource plan, and because integrated resource plans are governed by Chapter 22, Public Counsel wants what would in substance be an approved Chapter 22 resource plan.

Similarly, there is no rule anywhere that requires the Commission to determine in advance that a utility has a "reasonable environmental compliance plan," or even what such a plan should include. *See Public Counsel's proposed subsection (C).*

At bottom, Public Counsel, whose comments reflect a clear opposition to fuel adjustment clauses in general, would disable the use of a fuel adjustment clause via requirements that would in effect rely upon an approved resource plan, although Public Counsel obscures its goal by referring to "reasonable portfolios" versus "approved resource plans." Moreover, the Chapter 22 rules contain *no mechanism by which approval of a resource plan or approval of a "reasonable portfolio"* as advocated by Public Counsel can be obtained. How then is the utility to obtain these determinations, or when, or within what time frames? Did Senate Bill 179, which requires consideration of FACs in a rate case, require a resource planning docket within the rate case, all completed in no more than 11 months? Public Counsel's proposed language, regardless of the

semantics applied to it, amounts to a requirement for approval of a resource plan that cannot practically be obtained.

The Commission understood well that the proposal Public Counsel made was, in substance, a requirement that the Commission make a determination that it has never made[1] and that its resource planning rules do not contemplate that it make. That the Commission did not describe Public Counsel's proposal in the *precise words* Public Counsel prefers does not in any way invalidate the Commission's Final Orders of Rulemaking issued September 21, 2006.

**C. The orders are unlawful and unreasonable in that the Commission did not consider all of the comments. A transcript of the comments made at the hearing in Joplin, Missouri on September 6, 2006, has not been made a part of the Commission's record of this case, there is no indication that the Commissioners not present at the hearing have read a transcript of those comments, and there is no indication that the Commission as a body considered those comments.**

Public Counsel misunderstands the requirements of agency rulemaking. In a *contested* case, each official who joins in a final decision must, "prior to such final decision, either hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs." MO. REV. STAT. § 536.080 (2000). However, the agency rulemaking process is not a contested case. State ex rel. Atmos Energy Corp. v. Public Service Comm'n, 2001 Mo. App. LEXIS 2272, *30-31 (Mo. App. W.D. 2001); Bruemmer v. Missouri Dep't of Labor Relations, 997 S.W.2d 112, 116-17 (Mo. App. W.D. 1999). Rather, an agency rulemaking process is analogous to the process employed by legislators when enacting legislation. Every legislator who votes on a bill need not hear every piece of testimony at legislative committee hearings or every word of debate, and the same thing is true when Commissioners participate in the rulemaking process. The procedures employed

[1] The Commission's approval of Kansas City Power and Light Company's Alternative Regulatory Plan in Case No. EO-2005-0329 is also not such a determination. That approval relates principally to the Iatan 2 plant, certain environmental upgrades and Iatan 1, and some new transmission and winds assets. It did not make findings about compliance with Chapter 22.

under the Missouri Administrative Procedure Act (MAPA) in contested cases are not applicable to agency rulemaking, in any event. State ex rel. Atmos Energy Corp. v. Public Service Comm'n, 103 S.W.3d 753, 759 (Mo. banc 2003).

The MAPA rulemaking statutes do not contain any requirement that each Commissioner joining in the final order of rulemaking read the full record, including the transcript of comments made at each public hearing. Rulemaking agencies are not even required to hold such hearings; the law states that "an agency *may* solicit comments from the public on the subject matter of a rule that the agency is considering proposing." § 536.026 RSMo (emphasis added). Further, the transcript of the comments made at the hearing held in Joplin, Missouri on September 6, 2006, was posted on the Commission's Electronic Filing and Information System on October 3, 2006, and has been made a part of the Commission's record. There is no indication that the Commission failed to consider those comments before issuing its final order of rulemaking. Public Counsel's argument is meritless.

**D. The orders are unlawful and unreasonable in that the Commission has not made all of the comments available pursuant to Section 536.027 RSMo 2000. The comments submitted at the hearing in Joplin, Missouri on September 6, 2006, have not been listed in the Commission's docket entries for this case, and thus are not available for public inspection electronically. Furthermore, the Data Center of the Commission does not have a copy of the transcript of the hearing in Joplin, Missouri on September 6, 2006.**

Public Counsel's argument is unfounded. Section 536.027, RSMo 2000, requires a rulemaking agency to retain for a period of at least three years "[a]ny written comment filed pursuant to section 536.021 in support of or in opposition to a notice of proposed rulemaking and any written record of a public hearing in connection with a notice of proposed rulemaking," and to make such records available for public inspection at all reasonable times. Nothing in Section 536.027 purports to invalidate a rule if the rulemaking agency fails to keep written comments

and records submitted to the agency during its formation. If that were the case, a rule finalized and printed could be rescinded months or years later for being "unlawful and unreasonable" if the rulemaking agency failed to retain each and every written comment and record for the required period of time.

Further, Public Counsel's point is moot, in that the comments submitted at the Joplin, Missouri hearing were posted on the Commission's Electronic Filing and Information System on October 3, 2006, and are available for public inspection.

WHEREFORE, for the foregoing reasons, AmerenUE hereby requests that the Commission deny Public Counsel's request for rehearing of its September 21, 2006 Final Orders of Rulemaking.

Respectfully submitted,

Dated: October 9, 2006

**Steven R. Sullivan**, #33102
Sr. Vice President, General
Counsel and Secretary
**Thomas M. Byrne**, # 33340
Managing Assoc. General Counsel
Ameren Services Company
P.O. Box 66149
St. Louis, MO 63166-6149
(314) 554-2098
(314) 554-2514 (phone)
(314) 554-4014 (fax)
ssullivan@ameren.com
tbyrne@ameren.com

**SMITH LEWIS, LLP**

**/s/James B. Lowery**
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com
**Attorneys for Union Electric Company**
**d/b/a AmerenUE**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 9th day of October, 2006.

Office of the General Counsel
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101
gencounsel@psc.mo.gov

Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
Jefferson City, MO 65101
opcservice@ded.mo.gov

Stuart Conrad
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Douglas Micheel
State of Missouri
P.O. Box 899
Jefferson City, MO 65102
douglas.micheel@ago.mo.gov

John B. Coffman
Consumers Council of Missouri
AARP
871 Tuxedo Blvd.
St. Louis, MO 63119
john@johncoffman.net

Diana M. Vuylsteke
Missouri Industrial Consumers
211 N. Broadway, Suite 3600
St. Louis, MO 65102
dmvuylsteke@bryancave.com

**/s/James B. Lowery**
James B. Lowery