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 STATEMENT OF POSITION ON ISSUES TO BE HEARD AT THE DECEMBER 7, 2009 EVIDENTIARY HEARING ON INTERIM RATES

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or "Company"), by and through counsel, and hereby files its Statement of Position on the issues to be heard at the December 7, 2009 evidentiary hearing on interim rates, as outlined in the *List of Issues, Witnesses, Order of Witnesses, Order of Cross-Examination, and Order of Opening* filed by the Staff on December 1, 2009, as was agreed-upon by the parties.

I. Do the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as generally proposed by AmerenUE?

Yes, the circumstances encountered by AmerenUE do warrant the Commission authorizing AmerenUE interim rate relief as generally proposed by AmerenUE. The circumstances are that AmerenUE has chronically been unable to earn anywhere close to its Commission authorized return on equity over the past several years, despite have received two rate increases since June 2007. No party has denied this fact. No party has denied that as long as the Company's investment levels remain high or are significantly increasing, it will be very unlikely that the Company will be able to earn anywhere close to its authorized return. No party has denied that hundreds of millions of dollars of lost return – under-recovery of AmerenUE's legitimate cost of equity due to regulatory lag – can never be recovered. No party has denied

that the inability of utilities in general and AmerenUE in particular to recover its legitimate costs creates a powerful disincentive to make new investments in energy infrastructure.[1]

The interim rates would be collected on an interim basis, subject to refund, with interest at the Company's short-term borrowing rate. While some parties suggest that a typical residential customer's cost of the approximately $1.31 for the interim rates per month might exceed AmerenUE's short-term borrowing rate, that claim is specious. The sum at issue amounts to the change most people have on their dresser at home, or carry in their pocket, and the far more likely scenario is that if refunds were made the customer will receive interest on money that would never have been earned, or saved, absent the refunds. Moreover, the modest size of the request when compared to the permanent rate increase sought, coupled with the extended period where the Company has been unable to come close to its authorized return on equity, strongly suggests there will be no need for refunds in any event.

In addition, the resolution of this rate case and the setting of just and reasonable permanent rates will account for all relevant factors and will ensure that the rates ultimately paid by customers as a result of this case – on an interim basis and on a going-forward basis after the case is decided – are indeed just and reasonable. As the Court of Appeals stated in its opinion in *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 569 (Mo. App. W.D. 1976), it is unreasonable to limit the Commission's authority to grant interim rates by requiring that an interim rate hearing be "coextensive with that on the permanent rates." The Court's statement necessarily means that interim rates may be granted under the circumstances presented here even though all relevant factors cannot be considered at this time.

[1] See generally the Direct and Rebuttal Testimony on Interim Rates of Gary S. Weiss and the Direct Testimony on Interim Rates of Warner L. Baxter.

The case law is unequivocal: the Commission has the discretion to approve interim rates under these circumstances. *Id.* at 565. The case law is similarly clear respecting the Commission's rate-setting duties:

> 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*.

State ex rel. Washington University v. Public Service Commission, 272 S.W. 971, 973 (Mo. banc 1925) (emphasis supplied).

Where a utility is chronically unable to come close to earning its authorized return, there has been no reasonable guarantee, and investors are not being treated fairly. This Commission can and should take the relatively modest, but very important step, of addressing that problem, in part, by approving the Company's interim rate request.

a. Should there be criteria for the Commission to use to decide whether interim rate relief is warranted? If so, what should that criteria be?

No, the circumstances of different utilities at different times will vary. In sum, there is no one-size-fits-all "standard" that can or should be developed. Rather, the decision is committed to the Commission's sound discretion. Whether the Commission finds "good cause" or "sufficient justification" or whatever label one wishes to use, the end result will always be that ratepayers will never pay one dime more than is just and reasonable because the permanent rates set in the case, and any refund (with interest) that is required, will make everyone whole. This question suggests, incorrectly, that the so-called emergency "standard" (which in fact was never a "standard" at all) is itself objective. An examination of the myriad of cases where interim rates

were at issue over the past several decades quickly reveals that the Commission's application of this so-called "standard" has not been based on "objective criteria." Nor should it be. The quest by some, in particular Public Counsel, to force the Commission to state hard-and-fast "rules" is apparently rooted in an attempt to *limit* the exercise of the Commission's discretion; to make an interim rate request and hearing complicated and difficult (essentially "coextensive with that on the permanent rates" which means that "in practical effect accelerated action on interim rates [will be] impossible."). *Laclede*, 535 S.W.2d at 569.

The Commission should not tie its hands with so-called criteria that parties will then argue *must* be applied in every case.

II. If the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as generally proposed by AmerenUE, has AmerenUE provided adequate justification for the proposed level of interim rate relief?

Yes, there is no requirement, statutory or otherwise, that AmerenUE base the amount of an interim rate request on a particular formula. While it is true that the Company's actual earned returns are not expected to match its authorized return (because of normalization adjustments, the Company's responsibility for the Taum Sauk breach, etc.), it is also true that there is ample evidence that regardless of items that can raise the earned return or lower it, AmerenUE has chronically been unable to come close to its authorized return on equity for an extended period of time. For example, if one takes adjustments that go one direction that were suggested by Missouri Industrial Energy Consumers' witness Michael Gorman into account, and adjustments that go the other way identified by AmerenUE witness Gary S. Weiss into account, the Company has under-

earned versus its authorized return by approximately 300 basis points during the past 12 months – approximately $150 million dollars.[2]

These facts demonstrate that there is little if any danger that approving $37.3 million in interim rates would result in even a temporary "over-charge" to customers. And as noted earlier, the fact that the interim rates would be collected subject to refund with interest protects customers in any event.

b. Should there be criteria for the Commission to use to determine the appropriate level of interim rate relief? If so, what should that criteria be?

No, for the reasons discussed in connection with subpart a above, these decisions need to be made on a case-by-case basis as determined by the exercise of the Commission's sound discretion. If criteria are adopted on some kind of formula, then invariably there will be protracted, time-consuming battles over whether the formula is correct and whether one factor or another factor should have been considered. In summary, advocacy for these criteria is a back-door way to create many "relevant factors" regarding every interim rate request such that the process becomes time-consuming and unwieldy. The Commission should leave its options open so that it can, when it determines to exercise its discretion to do so, promptly provide interim rate relief.

III. If the Commission finds that the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as proposed by AmerenUE, may and should the Commission adopt criteria for interim rate relief with greater applicability than the instant case?

No, for the reasons outlined in relation to Issues I and II, including subparts a and b.

[2] See the Rebuttal Testimony on Interim Rates of Gary S. Weiss

IV. Is any interim rate relief criteria other than the emergency/near emergency criteria lawful?

Yes, for the reasons discussed in detail in AmerenUE's Response to Public Counsel's Motion for Summary Determination,[3] and as stated by the Commission itself in its November 23, 2009 *Order Denying Motion for Summary Determination and Motion for Directed Verdict*. In that Order, the Commission rejected Public Counsel's contention that it was entitled to judgment as a matter of law because AmerenUE had not alleged an emergency, stating:

> Public Counsel's motion fails because the Commission is not obligated to apply an emergency or near emergency standard to AmerenUE's interim rate request, and therefore, AmerenUE is not obligated to present evidence sufficient to meet that standard [page 3]. * * * the "broad discretion" described in the *Laclede* decision would allow the Commission to approve an interim rate increase, even without proof of an emergency. Therefore, the fact that AmerenUE has not offered proof that it is facing an emergency does not preclude the Commission from approving the company's interim rate increase if it chooses to do so. [page 5].

[3] The Company Response fully addressed why an emergency is not required, in particular in Section II.A, ¶¶ 4 to 12.

WHEREFORE, the Company hereby submits the foregoing Statement of Position on the Issues presented with respect to its interim rate request.

Dated: December 3, 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 3rd day of December, 2009:

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