BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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** Tariff Nos. YE-2010-0054 and YE-2010-0055

Staff's Suggestions in Opposition to AmerenUE's Proposed Interim Rate Tariff

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its Suggestions in Opposition to the Interim Rate Tariff ("IRT") proposed by AmerenUE, states that it is strongly opposed to UE's request for interim rate relief because UE has not shown that it meets any of the standards under which this Commission has granted such relief in the past and, in the absence of exigent circumstances, Staff suggests that interim rate relief is unwarranted and possibly unlawful. In further opposition to the IRT, Staff states:

Introduction:

On July 24, 2009, the Union Electric Company, doing business as AmerenUE ("UE"), filed proposed tariff sheets seeking a general rate increase of some $401.5 million annually, approximately an 18% increase. At the same time, UE filed its Interim Rate Tariff ("IRT"), seeking an interim rate increase via customer surcharge, subject to refund with interest, of 1.67%, some $37.3 million on an annual basis. In support of this novel request, UE asserts that

- an interim rate increase will reduce UE's need to borrow more cash at historically high rates to fund system investments;
- the proposed interim rate increase represents the return,

depreciation and taxes on the rate base additions already completed and in service by May 31, 2009;

- interim relief is justified because UE is earning "far less" than its authorized return on equity;
- interim relief is also justified because UE is severely afflicted by regulatory lag, resulting in cash flow pressure and negative impact on the Company's access to capital.

Thoughtful consideration of UE's proposal should cause the Commission to reject the proposed tariff sheet.

Can the PSC grant an interim rate increase?

It is well-established that "the Commission has power in **a proper case** to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation." ***State ex rel. Laclede Gas Co. v. Public Service Commission,*** 535 S.W.2d 561, 567 (Mo. App., W.D. 1976) (emphasis added).[1] But what is "a proper case?" More to the point, is this case "a proper case" for an interim rate increase? It is Staff's view that the answer must be "no."

What is the standard for interim relief?

The ***Laclede*** Court, in recognizing the PSC's implied authority to grant interim rate increases, stated that "[s]ince no standard is specified . . . the determination as to whether or not to do so necessarily rests in [the

[1] Internal citations and footnotes have been removed from all quotations.

Commission's] sound discretion." *Id.,* at 566. Certainly, the courts have approved the use of interim relief as an emergency measure:

> the Commission's authority to grant an interim rate increase is necessarily implied from the statutory authority granted to enable it to deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public.

State ex rel. Fischer v. Public Service Commission**,** 670 S.W.2d 24, 26 (Mo. App., W.D. 1984).

The Commission has taken various positions with respect to interim rate relief since it first considered it in 1949. ***In the Matter of Southwestern Bell Telephone Co.,*** 2 Mo.P.S.C. (N.S.) 131 (1949). In these older cases, the Commission limited such increases to emergency situations, where a prompt increase was necessary to preserve the financial integrity of the utility and ensure that adequate services continued. In one frequently-quoted case, the Commission stated:

> [I]t is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show that (1) it needs additional funds immediately, (2) that the needs cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief.

In the Matter of Missouri Public Service Company, 20 Mo.P.S.C. (N.S.) 244, 250 (1975). The Commission has since applied the emergency standard in a number of cases.[2]

[2] ***In the Matter of Sho-Me Power Corp.*****,** Case No. 17,381 (1972); ***In the Matter of Union Electric Co.*****,** Case No. 17,965 (1974); ***In the Matter of Laclede Gas Co.*****,** Case No. 18,021 (1974); ***In the Matter of Missouri Public Service Co.*****,** Case No. 18,502 (1975); ***In the Matter of St. Joseph Light & Power Co.*****,** Case No. ER-77-93 (1977); ***In the Matter of Missouri Public Service Co.*****,** Case No.ER-79-59 (1978); ***In the Matter of Kansas City Power & Light Co.,*** Case No. ER-80-204 (1980); ***In the Matter of Kansas City Power & Light Co.*****,** ER-81-42 (1981); ***In the Matter of Missouri Public Service Co.*****,** Case No. ER-81-154 (1981); ***In the***

In later cases, the Commission stated that interim relief may be granted for good cause shown, even where there is no emergency:

> Empire has argued in this proceeding that the issue of whether to grant interim relief is one where the Commission should exercise its discretion, given all the facts and circumstances. The Commission agrees with Empire that this is a matter of discretion. Under Missouri law, the Commission may allow changes in rate schedules without thirty (30) days notice "for good cause shown." § 393.140(11), RSMo Supp. 1996. The Commission concludes that it may authorize the implementation of interim rates upon a showing of good cause, and such good cause may be less than an emergency or near-emergency.[3]

In the Matter of The Empire District Electric Co., 6 Mo.P.S.C.3d 17, 21 (1997).

The ***Laclede*** Court, it should be noted, had also hypothesized that some set of facts, short of an emergency, might someday be shown that would support an interim rate increase:

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

More recently, the Commission has sought to harmonize these seemingly divergent doctrines by pointing out that, in practice, "good cause" usually means

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Matter of The Empire District Electric Co.**,** Case No. ER-81-229 (1981); ***In the Matter of Missouri Power & Light Co.*****,** Case Nos. GR-81-355 and ER-81-356 (1981); and ***In the Matter of Sho-Me Power Corp.*****,** Case No. ER-83-20 (1982).

[3] Nonetheless, the Commission denied Empire's request for interim rate relief under this new "good cause" standard using language oddly reminiscent of the former "emergency" standard: "There is no showing by the Company that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted. Furthermore, the Company has shown no other exigent circumstances that would merit interim relief." ***In the Matter of The Empire District Electric Co.,*** 6 Mo.P.S.C.3d 17, 21 (1997).

"emergency": "The Commission, with the approval of the courts, has consistently viewed interim rate relief as an emergency measure." ***In the Matter of The Empire District Electric Co.,*** 2004 WL 1490383 (June 17, 2004).[4] In its most recent discussion of the matter, the Commission stated:

> To be eligible for interim rate relief a utility company must show: (1) that it needs the additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief. The Commission also has the power, on a case-by-case basis, to grant interim rate relief on a nonemergency basis where the Commission finds that particular circumstances necessitated such relief. The standard for granting interim relief on a nonemergency basis is good cause shown by the company, and determination of good cause shown is at the Commission's discretion.

In the Matter of Stoddard County Sewer Company, Inc., 2008 WL 4724833, 82 (2008).

Thus, there are now two standards under which interim rate relief may be granted to a utility.[5] These are, first, that an emergency or near-emergency exists such that immediate rate relief is necessary to preserve the company and ensure that its services continue, or, second, that some other "good cause" is shown such that the Commission is persuaded that interim rate relief is

[4] Case No. ER-2004-0570, *Order Setting On-the-Record Presentation*. Not reported in Mo.P.S.C.3d.

[5] The Commission has, on occasion, expressed some doubt that there is a standard in addition to the emergency standard. "As Empire notes in its pleadings, the Commission did partially develop a 'good cause' standard for interim relief in ***In re The Empire District Electric Company*****,** 6 Mo.P.S.C.3d 17 (Case No. ER-97-82). However, in that case the Commission based its denial of Empire's request on its conclusion that: 'There is no showing by the Company [Empire] that its financial integrity will be threatened or that its ability to render safe and adequate service will be jeopardized if this request is not granted.' The differences, if any, between this good cause standard and the historically applied emergency or near emergency standard were not clearly annunciated, and the Commission now returns to its historic emergency or near emergency standard." ***In the Matter of The Empire District Electric Co.,*** 10 Mo.P.S.C.3d 124, 126 n. 2 (2001).

appropriate. The latter standard, the "good cause shown" standard, is vague. Under the "good cause shown" standard, the Commission has granted interim relief in connection with a special contract under which an electric utility served a single customer and no other customers would be affected, ***In the Matter of Kansas City Power & Light Co.,*** 3 Mo.P.S.C.3d 396 (1995); to a wires-only company in the wake of a significant cost increase in its wholesale supply contract, ***In the Matter of Citizens Electric Corp.,*** 11 Mo.P.S.C.3d 30 (2001); and to a small sewer company in order to provide the benefit of a largely-uncontested revenue requirement increase while an objection to one aspect of the increase was heard, ***In the Matter of Timber Creek Sewer Company, Inc.,*** 2007 WL 3243348 (2007).[6]

The cases in which interim relief was granted under the "good cause shown" standard are generally so fact-specific that they are unhelpful as guidance for other situations. For example, UE's citation[7] to the Citizens Electric case, 11 Mo.P.S.C.3d 30, in which the Commission approved Citizens' request for an interim rate increase, is inapposite for the simple reason that Citizens, which is no longer under the Commission's jurisdiction for rate purposes, is like a typical rural electric cooperative, owned by its customers. Indeed, in its Suggestions filed in that case, the Staff stressed that this was an extraordinary situation justifying a non-emergency interim rate increase, with essentially no precedential value that any other Missouri electric public utility should be able to use. Additionally, the Commission has required some sort of exigent

[6] Not yet reported in Mo.P.S.C.3d.

[7] UE's Suggestions, p. 3.

circumstances in these cases. ***In the Matter of Missouri Power & Light Co.*****,** Case Nos. GR-81-355 and ER-81-356 (1981): "Although the Commission has, on occasion, granted interim rate relief in a nonemergency situation, those instances are few and in response to particular **pressing** circumstances" (emphasis added).

In summary, it is clear that the Commission has historically granted interim rate relief as a drastic remedy intended to address an imminent emergency in which the continued operation of the utility is in peril. However, if the Commission desires to apply a different standard in evaluating UE's present request, the Staff recommends suspension of the proposed IRT / Interim Rate Adjustment Rider tariff sheet. The Staff is not aware that the Commission has ever authorized interim rate relief in an electric or gas case, without suspension of the proposed interim tariff sheets. In ***Re Gas Service Co.*****,** Case No. GR-83-207, Report And Order, 25 Mo.P.S.C.(N.S.) 633, 637 (1983), the Commission stated: "[o]rdinarily an interim request results in an expedited hearing and a limited Staff audit. However, in this case the Staff was unable to audit the Company and, therefore, made no recommendation with respect to the reasonableness of the Company's request." In fact, the Staff cannot recall an interim case where, at a minimum, a limited audit was not performed by Staff, other than Case No. GR-83-207, which truly presented an extraordinary situation, ultimately culminating in the acquisition of Gas Service Company by Kansas Power & Light Company. The Staff has just commenced its audit of AmerenUE.

This is not "a proper case" for an interim rate increase.

UE has made no claim that any emergency exists here, but rather seeks relief under the "good cause shown" standard. UE's admission that there is no emergency is significant. Rate relief is not necessary to keep the lights on or to stave off catastrophic financial collapse. In a word, this admission reveals that interim rate relief is something UE would *like,* but not something it *needs.*

Just what is the "good cause" upon which UE relies? UE does not rely upon any single purported "good cause," but refers to a number of points in its suggestions, including regulatory lag and cash-flow pressures; UE's continued failure to earn its authorized rate of return; and the avoidance of short-term borrowing at historically high rates of interest. In Staff's view, the points relied on by UE do not justify interim rate relief, whether taken singly or together.

UE's purported failure to earn its authorized rate of return does not support interim rate relief.

UE is hardly the first utility to seek interim rate relief because its earned rate of return is below its authorized rate of return. The Commission has not, however, found that theory persuasive: "A mere showing that a company's return is below its previously authorized rate of return has never prompted the Commission to grant interim relief." ***In the Matter of The Empire District Electric Co.,*** 24 Mo.P.S.C. (N.S.) 376, 379 (1981). The Commission has stated:

> In this case, Empire argues that its return has fallen to a point that the Commission should grant a request for interim rate relief pending the outcome of Empire's permanent rate case. This Commission addressed the same issue in a case which was appealed to the Missouri Court of Appeals, Kansas City District (now called the Western District). The Commission stated that **an**

> **interim increase should be granted only where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity.**

In the Matter of The Empire District Electric Co., 6 Mo.P.S.C.3d 17, 20 (1997) (emphasis added). UE has not asserted in this matter that its earned rate of return is so unreasonably low as to show such a deteriorating financial condition that would impair its ability to render adequate service or render it unable to maintain its financial integrity.

A 1981 Western District Court of Appeals decision, ***State ex rel. Missouri Public Service Co. v. Fraas*****,** 627 S.W.2d 882 (Mo. App., W.D. 1981) (***MPS***), from an era of unprecedented inflation, in finding that an "attrition" issue was subject to the general mootness doctrine, that "[t]he choice of method with which to meet the inflation problem rests largely within the expert discretion of the administrative body, and for that reason the court will not presume to dictate the choice of method to the Commission. [Citations omitted]." *Id.* at 888.

Missouri Public Service Company (MPS) had proposed that an attrition adjustment be used to supplement its rate increase and the Commission declined. MPS argued that the Commission's rate increase determinations were being rendered obsolete by inflation, the Commission's use of historical test years and the length of time required for judicial review, thus requiring the utilities to file subsequent rate increase cases. MPS contended that "the net result is to deny the utilities any opportunity to earn a fair return, thus violating due process." 627 S.W.2d at 886, 885. Neither the Constitution nor the Supreme Court

decisions interpreting the Constitution guarantee that a utility shall earn a specific return. ***Federal Power Commission v. Hope Natural Gas Co.*****,** 320 U.S. 591, 602-03, 64 S.Ct. 281, 288; ***Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*****,** 262 U.S. 679, 692-93; 43 S.Ct. 675, 679; 67 L.Ed. 1176, ___ (1923); a*ccord* ***Duquesne Light Co. v. Barasch*****,** 488 U.S. 299, 314; 109 S.Ct. 609, 619; 102 L.Ed.2d 646, ___ (1989). On this matter, the Missouri Western District Court of Appeals has stated as follows:

> . . . A rate tariff is intended only to permit an opportunity to make the percentage of return determined by the Commission to be reasonable. As put by one authority, "the utility's return allowance might be compared with a fishing or hunting license with a limit on the catch. Such a license does not guarantee that the holder will catch anything at all; it simply makes the catch legal (up to a specified limit) provided the holder is successful in his own efforts." 1 Priest, Principles of Public Utility Regulation 202 (1969) (quoting Welch, Cases and Text on Public Utility Regulation 478 (Rev.Ed.1968)).

Fraas**,** *Supra,* 627 S.W.2d at 887 n. 3.

Specifically regarding regulatory lag, the Western District Court of Appeals noted some time ago that the Legislature could address regulatory lag by eliminating Missouri circuit courts as the first step in the process of regulatory review of Commission decisions:

> Among other possible changes which the legislature might want to consider would be a provision for filing petitions for judicial review directly in the court of appeals, thus considerably reducing regulatory lag by eliminating the circuit court level of review.

Fraas**,** *Supra,* 627 S.W.2d at 888 n. 4.

UE asserts that similarly to North Dakota, Montana, and Minnesota, this "Commission should use interim rates to mitigate the lag between the occurrence of higher utility costs and the ability to implement a permanent rate increase to

reflect those higher cost levels."[8] UE cites, in its footnote 2, a July 21, 2008, Minnesota Public Utilities Commission ("MNPSC") Order Setting Interim Rates, respecting Minnesota Power, "[a]pproving a $35.5 million interim electric rate increase (nearly 80% of the permanent electric rate increase request), subject to refund" as an example that the Missouri Commissioners should emulate. AmerenUE does not mention that there is a very specific Minnesota State Statute on interim rate relief that the MNPSC followed in granting interim rate relief in the case which AmerenUE cited. The applicable Minnesota statute cited by the MNPSC in its July 21, 2008, Order setting Interim rates states, in part, as follows:

> **Minnesota Statutes Section 216B.16, Subd. 3. Interim rate:**
>
> (a) Notwithstanding any order of suspension of a proposed increase in rates, the commission shall order an interim rate schedule into effect not later than 60 days after the initial filing date. The commission shall order the interim rate schedule ex parte without a public hearing. Notwithstanding the provisions of sections 216.25, 216B.27, and 216B.52, no interim rate schedule ordered by the commission pursuant to this subdivision shall be subject to an application for a rehearing or an appeal to a court until the commission has rendered its final determination.
>
> (b) Unless the commission finds that exigent circumstances exist, the interim rate schedule shall be calculated using the proposed test year cost of capital, rate base, and expenses, except that it shall include: (1) a rate of return on common equity for the utility equal to that authorized by the commission in the utility's most recent rate proceeding; (2) rate base or expense items the same in nature and kind as those allowed by a currently effective order of the commission in the utility's most recent rate proceeding; and (3) no change in the existing rate design. In the case of a utility which has not been subject to a prior commission determination, the commission shall base the interim rate schedule on its most recent determination concerning a similar utility.

[8] UE's Suggestions, p. 4 n. 2.

UE also cites in its footnote 2 a January 30, 2008 Order On Interim Rates of the North Dakota Public Service Commission ("NDPSC") "[a]pproving a $17.1 million interim electric rate increase (more than 80% of the permanent electric rate increase request), subject to refund," as another example that the Missouri Commissioners should emulate. UE does not mention that there is a very specific North Dakota State Statute on interim rate relief that the NDPSC followed in granting interim rate relief in the case which UE cited. The applicable North Dakota State Statute, N.D.C.C. §49-05-06(2)-(4) cited by the NDPSC in its January 30, 2008 Order On Interim Rates states, in part, as follows:

> 2. Notwithstanding that the commission may suspend a filing and order a hearing, a public utility may file for interim rate relief as part of its general rate increase application and filing. If interim rates are requested, the commission shall order that the interim rate schedule take effect no later than sixty days after the initial filing date and without a public hearing. The interim rate schedule must be calculated using the proposed test year cost of capital, rate base, and expenses, except that the schedule must include:
>
> a. A rate of return on common equity for the public utility equal to that authorized by the commission in the public utility's most recent rate proceeding;
>
> b. Rate base or expense items the same in nature and kind as those allowed by a currently effective commission order in the public utility's most recent rate proceeding; and
>
> c. No change in existing rate design.
>
> 3. In ordering an interim rate schedule, the commission may require a bond to secure any projected refund required by subsection 4. The terms of the bond, including the amount and surety, are subject to the commission's approval.
>
> 4. As ordered by the commission, the utility shall promptly refund to persons entitled thereto all interim rate amounts collected by the public utility in excess of the final rates approved by the commission plus reasonable interest at a rate to be determined by

the commission.

Failure to earn the authorized rate of return was argued to the ***Laclede*** Court in the seminal case already cited above and that court was not persuaded.[9] The ***Laclede*** Court quoted, approvingly, analyses under which interim relief would be justified only if the earned rate of return was so inadequate as to amount to confiscation. ***Laclede,*** *supra,* 535 S.W.2d at 570-571. The constitutional principle involved in confiscation and its application to ratemaking was succinctly stated by the United States Supreme Court:

> The question in the case is whether the rates prescribed in the commission's order are confiscatory and therefore beyond legislative power. Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this court that citation of the cases is scarcely necessary.

Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 690, 43 S.Ct. 675, 678, 67 L.Ed. 1176, ___ (1923). The ***Laclede*** Court approvingly quoted a federal district court in Colorado that stated, "for us to find that the present rate results in confiscation of the company's private property, we would have to make a finding based on evidence that the present rate is outside of the zone of reasonableness, and that its effects would be such that within the upcoming two months, until the Commission acts, the company would suffer financial disarray."[10] *Id.*, *quoting*

[9] ***St. ex rel. Laclede Gas Co. v. Public Service Commission,*** 535 S.W.2d 561, 570-574 (Mo. App., W.D. 1976).

[10] Note that this decision simply recapitulates the emergency standard traditionally relied upon by this Commission in granting interim rate relief.

Mountain States Telephone & Telegraph Co. v. Public Service Commission of Colorado, 345 F.Supp. 80, 85 (D.C. Colo., 1972). The ***Laclede*** Court also quoted the Louisiana Supreme Court:

> We need not, indeed we cannot, determine what are valid permanent rates and charges. We can determine only whether a continued imposition of present tariffs would constitute confiscation of the Company's property. Although, it may be that the Company should receive a higher rate of return on its investment and is entitled to have the Commission fix rates and charges which will produce such a return, the record does not justify a finding that the present rate of return is so inadequate as to be confiscatory[.]

Laclede, *supra, quoting* ***South Central Bell Telephone Co. v. Louisiana Public Service Commission,*** 272 So.2d 667, 669 (La. 1973).

UE does not even assert that its earned rate of return is so low as to be confiscatory, and so its reliance on this point must fail. While the issue of confiscation can only be resolved upon the evidence received at a hearing, it is worth noting that UE admits in its Suggestions that its earned rate of return for the twelve months ending March 31, 2009, was 5.87%, at a time when it is well-known that the federal funds rate was zero. That level of return, while well below the 10.76% authorized in UE's last rate case, simply cannot be characterized as confiscatory.[11]

UE's experience of regulatory lag does not support interim rate relief.

Regulatory lag, which is the interval that passes between the occurrence of a material change in revenue requirement and its reflection in rates, is the primary justification relied on by UE to support its request for interim relief:

[11] UE does not discuss in its Suggestions the impact on its rate of return of its loss of the load associated with the Noranda Aluminum, Inc., plant in New Madrid, Missouri, and associated revenues, or its destruction of its Taum Sauk hydroelectric facility and consequent revenue loss. Noranda represented fully 6.0% of UE's total base rate revenues.

> Stated directly, these Suggestions ask the Commission to do what it has always had the power to do: decline to require an emergency or near-emergency and apply the Commission's discretion to simply allow the IRT to become effective according to its terms on October 1, 2009 **in order to mitigate the severe impact of regulatory lag on AmerenUE in this rate case.** [12]

At page 17 of his Direct Testimony AmerenUE witness Warner L. Baxter states that the financial consequences of regulatory lag in Missouri "include the fact that it is very difficult for a utility to have a reasonable opportunity to earn its allowed return, especially in a period of rising costs and investment as we are experiencing now and which we expect to continue in the future." On page 18 of his Direct Testimony, Mr. Baxter has a chart that shows a comparison of AmerenUE's earned and allowed rate of returns. This is the same chart that appears at page 7 of AmerenUE's Suggestions In Support Of Interim Rate Tariff (IRT). Conspicuously absent from the chart or the narrative description are the identification of explanatory factors such as the loss of the Noranda Aluminum, Inc. ("Noranda") load and Taum Sauk. In fact, AmerenUE chooses to treat events such as the loss of the Noranda load and Taum Sauk as unrelated to it not earning its authorized rate of return. There is no mention of Noranda in AmerenUE's July 24, 2009 Suggestions In Support Of Interim Rate Tariff (IRT), but at page 7, paragraph 11 of that document AmerenUE relates that "[a]ccording to the Company's First Quarter of 2009 Surveillance Report (submitted to the Commission's Auditing Manager as required by the Commission's fuel adjustment clause rules), the Company's return on equity for the 12 months

[12] ***In the Matter of Union Electric Company doing business as AmerenUE,*** Case No. ER-2010-0036 (*Suggestions in Support of Interim Rate Tariff (IRT),* filed July 24, 2009) at 4 (hereinafter "UE's Suggestions).

ending March 31, 2009 (which happens to be the test year period filed in this case) was just 5.87% versus an authorized return on equity in the Company's last rate case of 10.76%." Again not seeking to disaggregate Noranda from its support for its interim filing, Mr. Baxter states at pages 11-12 if of his Direct Testimony, in part, as follows:

> Q. Aside from the requested rate increase, what are the other key aspects of this case?
>
> A. * * * *
>
> . . . We are also requesting that the tariff under which we serve Noranda Aluminum, Inc. ("Noranda") (Rate Schedule 12(M) (Large Transmission Service)) be modified to prospectively address the significant lost revenues AmerenUE can incur due to Noranda's operational issues, like those losses resulting from the January, 2009 ice storm. AmerenUE witness Wilbon L. Cooper will address this issue in more detail in his direct testimony. Finally, the Company is requesting that approximately $37 million of its requested rate increase that is directly related to rate base additions since our last rate case (which are already providing service to our customers) be reflected in interim rates, subject to refund, effective October 1, 2009.

On page 24, lines 7-16 of the Direct Testimony of AmerenUE witness Wilbon Cooper, Mr. Cooper states that Noranda Aluminum, Inc.'s (Noranda) revenues are approximately 6.0% of AmerenUE's total base rate revenues and that since January 28, 2009, "an unprecedented and significant loss of the Company's retail load and the revenues associated therewith has occurred for a period of time that at this time cannot be determined:"

> As detailed in the direct testimony of AmerenUE witness Ronald C. Zdellar, on Wednesday January 28, 2009, an extraordinary and devastating ice storm occurred in Southeast Missouri and caused severe damage to the transmission lines through which the only customer served under this tariff—Noranda Aluminum, Inc. ("Noranda")—receives service. Consequently, an unprecedented

> and significant loss of the Company's retail load and the revenues associated therewith has occurred for a period of time that cannot at this time be determined. It should also be noted that Noranda's revenues constitute approximately six percent of the Company's total base rate revenues, and that no other single customer even approaches having such a material impact on the Company's revenue requirement. [Footnote omitted.]

The Commission has said, "[t]he mere fact of regulatory lag also does not justify interim relief." ***In the Matter of The Empire District Electric Co.,*** 24 Mo.P.S.C. (N.S.) 376, 379 (1981). UE complains that regulatory lag is particularly vexing in Missouri in view of the eleven-month long rate case process, the use of a historic test year and the anti-CWIP statute.[13] The ***Laclede*** Court also addressed regulatory lag, saying:

> Because of the necessity to make these investigations, hold hearings and permit arguments with respect thereto, the proceedings before regulatory bodies for rate increases inevitably entail considerable time and have led to delay in the granting of increases which is generally referred to as "regulatory lag." While this delay is regrettable, the courts have recognized that some lag is unavoidable and have generally held that no deprivation of constitutional rights occur because of suspension of the proposed increase pending a hearing thereon, provided the delay for purposes of such hearing is not unreasonably long.

Laclede, *supra,* 535 S.W.2d at 570. No court has ever held that Missouri's eleven-month long rate case process is "unreasonably long" and UE cites no authority for that proposition.

ISRS

UE has tied its interim rate increase to the cost associated with plant additions since the last rate case. The Infrastructure System Replacement

[13] "CWIP" is construction work in progress. Section 393.135, RSMo, prohibits the inclusion in rates of any amounts reflecting electric utility assets that are under construction.

Surcharge, ISRS, is a statutory mechanism that currently allows gas and water companies to increase rates between rate cases associated with transmission and distribution plant additions. This mechanism considers not only plant additions, which increase rates, but also the offsetting items of increases in the depreciation reserve and the deferred income tax reserve. Furthermore, not all plant additions are considered in the calculation of an ISRS. Plant additions related to customer growth, revenue producing, are not included.

If UE has intended its IRT to be comparable to ISRS, it has failed to account for all the offsets to plant additions. It has not recognized the increase in the deferred income tax reserve as an offset to plant additions. Furthermore, UE has made no adjustment to exclude plant associated with customer growth. Finally, approximately 36% of the plant UE has included in its IRT calculation is for additions to intangible, production and general plant, which would not be considered in an ISRS calculation.

The procedure recommended by UE in this case is unreasonable.

UE filed the IRT with a proposed effective date of October 1, 2009, and "respectfully requests that the Commission allow the IRT to take effect according to its terms on October 1, 2009 [or] if the Commission were to suspend the IRT, the Company respectfully requests that the Commission suspend the IRT for no more than one additional month and set a prompt hearing respecting the propriety of the IRT sufficiently in advance of the suspension period, so that the Commission will be in a position to lift the suspension after any such hearing so

that the IRT can take effect no later than November 1, 2009."[14]

The Commission has traditionally been cautious in granting interim rate relief because "this extraordinary remedy" necessarily "requires the Commission to make a determination without the benefit of a thorough Staff audit." ***In the Matter of The Empire District Electric Co.,*** 24 Mo.P.S.C. (N.S.) 376, 379 (1981). The ability of the non-utility parties to evaluate such a request is necessarily limited. ***In the Matter of Missouri Public Service Co.,*** 22 Mo.P.S.C. (N.S.) 427, 429 (1978). Staff cannot recall a request for interim relief that was not suspended, as UE requests here. UE seeks interim relief on an expedited basis, yet the assertions of regulatory lag and inadequate earnings on which it relies, as well as its claim regarding the rate base additions reflected in the IRT, are factual and must therefore be established in contested case proceedings.[15] Contested case proceedings necessarily include discovery, testimony given under oath or affirmation, and cross-examination, all of which take substantial time and cannot be accomplished before October 1, 2009, or even by November 1, 2009.[16]

The Due Process Clauses of the Missouri and United States Constitutions apply to this Commission.[17] The procedural due process requirement of fair trials by fair tribunals applies to an administrative agency acting in an

[14] UE's Suggestions, p. 2.

[15] Because a suspension order has been entered, this file-and-suspend docket has become a contested case under the Missouri Administrative Procedures Act. ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 49 (Mo. banc 1979). Therefore, UE's IRT is already subject to contested case procedures.

[16] *See* § 536.070, RSMo, and Chapter 2 of 4 CSR 240.

[17] Mo. Const., Art. I, § 10; U.S. Const., Amd. 14, § 1.

adjudicative capacity. ***State ex rel. AG Processing, Inc. v. Thompson,*** 100 S.W.3d 915, 919 (Mo. App., W.D. 2003), ***Fitzgerald v. City of Maryland Heights,*** 796 S.W.2d 52, 59 (Mo. App., E.D.1990), *both citing* ***Withrow v. Larkin,*** 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). "The cardinal test of the presence or absence of due process in an administrative proceeding is defined . . . as 'the presence or absence of rudiments of fair play long known to the law.'" ***Jones v. State Dept. of Public Health and Welfare,*** 345 S.W.2d 37, 40 (Mo. App., W.D. 1962). There is not likely to be time enough for the "rudiments of fair play long known to the law" between now and October 1, 2009.

To put it another way -- Commission actions must be upheld if they are found to be lawful and reasonable. ***State ex rel. AG Processing, Inc. v. Public Service Commission,*** 120 S.W.3d 732, 734 (Mo. banc 2003). Certainly, the law would permit the Commission to simply allow UE's IRT to take effect on October 1, 2009, ***Laclede,*** *supra*, 535 S.W.2d at 566,[18] but could such a course of action be reasonable? Particularly since "[e]ven under the file and suspend method, by which a utility's rates may be increased without requirement of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended. However, a

[18] "Simply by non-action, the Commission can permit a requested rate to go into effect." ***Laclede,*** *supra,* 535 S.W.2d at 566.

preference exists for the rate case method, at which those opposed to as well as those in sympathy with a proposed rate can present their views." ***State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 49 (Mo. banc 1979). This is a burden that the Commission cannot meet by following the procedural course recommended to it by UE in this case.

Staff further points out that, in the past, this Commission has required that a request for interim rate relief be filed as a separate case. Thus, in 1980, Kansas City Power & Light Company (KCPL) sought to place Iatan 1 in rate base by a permanent rate case that was docketed as Case No. ER-80-48. ***In the Matter of Kansas City Power & Light Co.*****,** 23 Mo.P.S.C. (N.S.) 474 (1980). KCPL filed its permanent rate case for Iatan 1 on August 3, 1979. On January 28, 1980, KCPL filed an interim rate increase case that was docketed as Case No. ER-80-204. ***In the Matter of Kansas City Power & Light Co.*****,** 23 Mo.P.S.C. N.S.) 413 (1980). The Staff did not oppose interim rate relief for KCPL. The Commission found that KCPL was engaged in an austerity program and that an interim rate increase would enable KCPL to have sufficient interest coverage to issue $50 million of new first mortgage bonds in December 1980. Consequently, the Commission authorized KCPL interim rate relief in Case No. ER-80-204. The Staff opposed the inclusion of Iatan 1 in rate base as excess capacity in the permanent rate case, and the Commission agreed. The Commission in its June 19, 1980, Report & Order in Case No. ER-80-48 did not allow KCPL to include Iatan 1 in rate base, but authorized KCPL to continue to

accrue AFUDC on Iatan 1.

On August 6, 1980, KCPL filed another permanent rate increase case that was docketed as Case No. ER-81-42, but as part of that case KCPL filed a Motion For Immediate Suspension And Interim Rate Relief and attached to the motion as an exhibit were revised tariff sheets, bearing no effective date, designed to increase gross annual Missouri retail electric service revenues by approximately $28.1 million on an interim basis pending final Commission action on the permanent rate increase request of approximately $45.4 million. ***In the Matter of Kansas City Power & Light Co.*****,** 24 Mo.P.S.C. (N.S.) 50 (1980) (*Order Dismissing Motion for Interim Rate Relief*). KCPL alleged that the current rate levels were confiscatory because they excluded certain costs incurred by KCPL when the Commission last set rate levels for KCPL and which were currently being incurred by KCPL, namely, the exclusion from rate base of Iatan 1, the disallowance of certain fuel-related expense, and the disallowance of KCPL's contributions to the Electric Power Research Institute.

The Staff filed a Motion To Dismiss alleging that the interim filing (1) was not made in the proper form, being neither a separate filing of tariffs, under Sections 393.140 and 393.150, nor a separate filing of an application, pursuant to applicable Commission rule, and (2) made no averment or prima facie showing of the existence of an emergency or changed circumstances and thus was a collateral attack and a second motion for rehearing of Case No. ER-80-48. The Commission found:

> In light of the Court's holding in *Laclede Gas*, the Commission concludes that the appropriate method for filing a request for

> interim rate relief is the filing of interim tariffs , as a separate case, under the file and suspend method, prescribed by Sections 393.140 and 393.150, RSMo 1978. Since an interim proceeding under any other method would be of "very doubtful effectiveness," it would be in the best interest of neither the Company nor the Commission to proceed by such other method.
>
> * * * *
>
> . . . while the Commission does have the discretionary power to grant interim rate increases to utilities within its jurisdiction in proper cases, (*State ex rel. Laclede Gas Co. v. P.S.C., supra*) the Commission is under no legal compulsion to entertain a request for an interim rate increase during the pendence of a permanent rate increase request. "In its very nature, an interim rate request is merely ancillary to a permanent rate request . . . ." *Laclede Gas, supra*, at 565. Also, it is the law that normal "regulatory lag" is unavoidable and that no deprivation of constitutional rights occurs because of a suspension of a proposed increase pending a hearing thereon, provided the delay for purposes of such hearing is not unreasonably long. *Laclede Gas,* at 570, and cases cited therein.

24 Mo.P.S.C. (N.S.) at 52-53.

UE knows how to properly file an interim rate case. It has previously filed at least one interim rate increase case, Case No. 17,965, on November 30, 1973, for approximately $18.9 million in annual gross revenue, pending the determination of its permanent rate case, Case No. 17,972, also filed on November 30, 1973, which was for approximately $42.8 million in increased annual gross revenue. ***In the Matter of Union Electric Co.*****,** 18 Mo.P.S.C. (N.S.) 440 (1974) (*Report & Order* -- Case No. 17,965); ***In the Matter of Union Electric Co.*****,** 19 Mo.P.S.C. (N.S.) 93 (1974) (*Report & Order* -- Case No. 17,972).[19] UE asserted in its application in Case No. 17,965 that it had not

[19] UE's interim rate case has the lower case number even though both cases were filed on the same day and it is not clear from the Commission's Report & Order in UE's permanent rate case on what date that case, Case No. 17,972, was filed. Nonetheless, UE's application in the interim rate case, Case No. 17,965, states: "Contemporaneously with the filing of this Application for

earned its authorized rate of return due to continuing increases in costs in providing electric service in Missouri and that it needed the interim rate increase in order to earn its authorized rate of return.

In its Report & Order in the interim rate case, the Commission, among other things, stated that:

> . . . Company was able to arrange debt financing and in fact had arranged $70,000,000 of debt financing in February of 1974[20]. . . .
>
> * * * *
>
> Therefore, although the Commission is of the opinion that while it has the authority to grant interim rate increases, that authority may only be exercised where a showing has been made that a deteriorating financial situation exists which constitutes a threat to a company's ability to render adequate service.[21]
>
> In the instant case, Union Electric has not suffered distinctive and sudden declines in its revenues, it can arrange debt financing with present revenues and it will be able to pay dividends to its shareholders.
>
> We believe Company has failed to prove the necessity for the proposed interim, temporary increase in rates. There is insufficient showing by Company that its ability to render reasonable and adequate service would be jeopardized by a continuation of existing rates. The question of the adequacy or

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Interim Rate Increase, Applicant has filed with this Commission revised tariffs designed to increase annual electric revenues by $42,760,000."

[20] The Report And Order further reflected that Union Electric intended in 1974 to sell an additional approximately $40.7 million in bonds, $40.0 million in preferred stock, and $57.6 million in common stock; sell bonds in 1975, 1976, 1977, and 1978; sell preferred stock in 1976 and 1978; and sell common stock in 1975, 1977, and 1978. ***In the Matter of Union Electric Co.***, Case No. 17,965, Report & Order, 18 Mo.P.S.C. (N.S.) 440, 444-45, 447 (1974).

[21] Regarding its caution given the absence of specific statutory authority, the Commission continued in its Report & Order: "Furthermore, the Commission is of the opinion that since there is an absence of specific statutory authority it should cautiously exercise its power to grant temporary or emergency rates because cases of this nature contemplate a rather speedy action on the part of the Commission which is contrary to the long established principle that a thorough study should be made by the Commission, its staff and all other interested parties before rates are approved." *Id*. at 446-47.

> inadequacy of Company's rate of return on a long-term basis will be given thorough and appropriate consideration in the final disposition of issues in the permanent rate case. . . .

***In the Matter of Union Electric Co.*,** 18 Mo.P.S.C. (N.S.) 440, 446-47 (1974) (*Report & Order*).

UE does not mention in its Suggestions its 1982 Motion Of Union Electric Company To Place Partial Increase In Effect Subject To Refund (Motion For Partial Increase) in its 1981-1982 rate increase case, Case No. ER-82-52. ***In the Matter of Union Electric Co.*,** 25 Mo.P.S.C. (N.S.) 194, 196 (1982) (*Report & Order*). In that case, UE sought an increase in jurisdictional gross annual revenues of approximately $128.0 million, exclusive of gross receipts taxes. The Staff was the only party, other than UE, to file revenue requirement testimony. The Staff filed direct testimony on March 8, 1982. On March 19, 1982, UE filed its Motion For Partial Increase alleging that the Staff's filed direct testimony showed UE's jurisdictional gross annual revenues should be increased within a range of approximately $23.1 million to $31.0 million, exclusive of gross receipts taxes, and that UE should be permitted to earn during the interim pending the outcome of the case. More specifically, UE stated:

> As is apparent from the testimony filed in this case, the Company is presently providing service to its customers at rates below the cost of providing such service. At a minimum, therefore, the Company should be allowed to increase its rates by $23,067,000 on an annualized basis, pending the outcome of the case. The Company agrees to refund with interest at the prime rate any amounts collected during such interim period in excess of any increase finally authorized by the Commission in this proceeding.

The Commission heard oral arguments on UE's Motion for Partial Increase and received briefs. On May 28, 1982, the Commission issued an Order Denying Motion but stated that it would establish Case No. OO-82-277:

> In the Commission's opinion, the Company's arguments, authorities and response to important considerations raised by Staff and Public Counsel in their briefs render the instant record insufficient to be the basis for breaking new ground in the area of interim or "partial" relief. However, the Commission is of the opinion that justification for interim or partial increases may exist apart from a near emergency financial condition which may impair a company's ability to serve.
>
> For this reason, the Commission will establish Docket No. OO-82-277 for the purpose of receiving written comments or suggestions by any interested regulated utility or transportation company or any other party, concerning a proper and lawful method of presenting interim or partial rate requests and the reasonable criteria to be employed in considering those requests. . . .

The Commission's Order Denying Motion is not published in the Commission's reporter series but it and the Motion of Union Electric Company to Place Partial Increase In Effect Subject To Refund are noted in the Commission's Report & Order reported at 25 Mo.P.S.C. (N.S.) at 196.

On June 11, 1982, the Commission issued an Order Establishing Inquiry Into Certain Matters of Concern to the Commission, establishing Case No. OO-82-277. The Commission did not limit the proceeding to written comments or suggestions concerning a proper and lawful method of presenting interim or partial rate requests, and the reasonable criteria to be used by the Commission in considering those requests. On page 1 of its unreported Order Establishing Inquiry Into Certain Matters Of Concern To The Commission, the Commission stated that it was establishing Case No. OO-82-277 as:

> . . . a very general, and informal, proceeding designed to solicit a variety of viewpoints on a broad range of procedural and substantive matters of direct concern to the Commission. This case is not designed to be a contested case or a rulemaking. No reply comments or oral hearing are contemplated, and it is possible that no order will issue as a result of this proceeding.

At pages 3-4 of its Order, the Commission explained that it would "carefully review all written suggestions filed in this proceeding, and then will determine appropriate responsive action to, or implementations of, those suggestions, or order further proceedings which the Commission may determine necessary as a result of any of the suggestions." Tax normalization is among the substantive matters that the Commission requested written suggestions regarding, in addition to interim or partial rate requests, and updating answers to data requests from prior cases as part of minimum filing requirements is among the procedural matters that the Commission requested written suggestions regarding.

On January 23, 1984, the Commission issued an Order Closing Docket in Case No. OO-82-277. The Commission said at page 1 of its two-page Order that the purpose of the docket was the "gathering of input on the Commission's practice and procedure," and that upon reviewing the comments filed in the docket, "the Commission has taken action in certain cases." The Commission found at page 1 that therefore "its objectives in establishing Docket No. OO-82-277 have been realized and concludes that it should be closed."

One Commissioner, prior to Case No. ER-82-52, had previously indicated a desire for an alternative to the emergency standard for interim or partial rate increases pending the processing of a company's permanent rate increase case.

On January 9, 1981, The Empire District Electric Company filed for interim rate relief, which was docketed as Case No. ER-81-229. Empire had a permanent rate case pending at the time, Case No. ER-81-209. In a Report & Order issued on June 17, 1981, the Commission denied Empire's interim relief request, finding as follows:

> . . . The Company's bond and preferred dividend coverage projections by quarters for 1981 do not fall to or below the minimum coverages required.
>
> . . . the Company has not shown that it is in a financial situation that would warrant the granting of interim relief.
>
> * * * *
>
> A mere showing that a company's return is below its previously authorized rate of return has never prompted the Commission to grant interim relief. Such a showing will almost always be the case where a company has pending a permanent request. The mere fact of regulatory lag also does not justify interim relief.

***In the Matter of The Empire District Electric Co.*,** 24 Mo.P.S.C. (N.S.) 376, 378-79 (1981) (*Report & Order*).[22]

Commissioner John C. Shapleigh, who noted that he had been on the Commission for four months, filed a dissenting opinion proposing new criteria for the granting of interim relief. He recommended that a hearing be held "similar to those commonly held by Missouri circuit judges in connection with preliminary injunctions" and that portion of the company's request for interim relief, if any, that meets the following criteria should be granted to the company, subject to refund with interest at 104% of the prime rate during the interim period:

[22] ***In the Matter of The Empire District Electric Co.***, Case No. ER-81-229, Order Denying Application [To Withdraw Report And Order Or, In The Alternative, To Grant A Rehearing]," 24 Mo.P.S.C. (N.S.) 383 (1981).

(a) A substantial probability exists that the company will receive, in the permanent case, rates which are at least equal to or greater than the interim relief;

(b) Irreparable injury to the company will occur if interim relief is not granted;

(c) No substantial harm will occur to ratepayers if the interim relief is granted;

(d) No harm will occur to the public interest if the interim relief is granted; and

(e) Based on Items [(a)-(d)] above, the potential hardships to the company of the loss of the revenue during the interim period outweighs the potential hardship to the ratepayers in the event that the interim relief is greater than the relief allowed in the permanent case and monies must be refunded to the ratepayers at interest.

24 Mo.P.S.C. (N.S.) at 380.

He further stated that:

> In all cases all factors concerning the company's rate base, revenues and expenses should be considered, in order that no factor be considered in isolation, a practice prohibited by the Missouri Supreme Court in ***State ex rel. Utility Consumers Council v. Public Service Commission*****,** 585 S.W.2d 41 (Mo. banc 1979). The company must present a total company picture justifying the interim relief and the opposing parties must then present evidence that the total company picture does not support interim relief . . . .

24 Mo.P.S.C. (N.S.) at 381. Commissioner Shapleigh explained that interim relief would be denied if a party presented sufficient evidence at the hearing to demonstrate to the Commission that one or more of his criteria were not met. *Id*. at 380. Of course, Commissioner Shapleigh made his proposal in the absence of Senate Bill 179 (i.e., in the absence of FAC and ECRM legislation).

In Empire's permanent rate case, Case No. ER-81-209, Empire, the Staff, and the Office of the Public Counsel entered into a Stipulation & Agreement, which was accepted by the Commission in an unreported Report & Order dated August 18, 1981, that Empire be authorized to file revised tariffs designed to increase Missouri jurisdictional gross electric revenues by $11,629,014, exclusive of applicable gross receipts, franchise and other local taxes.

On January 2, 1981, and March 31, 1981, Missouri Power & Light Company (MPL), a subsidiary of Union Electric Company,[23] filed proposed permanent tariffs increasing rates for gas and electric service provided to customers in the Missouri service area of MPL, respectively, Case Nos. GR-81-222 and ER-81-304. On June 1, 1981, MPL filed proposed revised gas and electric tariffs designed to increase gas and electric rates on an interim basis to customers in the Missouri service area of MPL, respectively, Case Nos. GR-81-355 and ER-81-356. MPL and the Staff entered into a Stipulation & Agreement that MPL should be authorized to file revised interim electric and gas tariffs designed to increase MPL's Missouri jurisdictional gross annual electric revenues by $2,198,610, exclusive of applicable gross receipts taxes, and increase MPL's Missouri jurisdictional gross annual gas revenues by $793,091, exclusive of applicable gross receipts taxes, interim subject to refund with interest. The Commission found that MPL met the traditional criteria for interim rate relief:

[23] On December 15, 1983, the Commission issued a Report & Order in *In re Union Electric Co., Missouri Utilities Co., Missouri Power & Light Co., and Missouri Edison Co.*, Case No. EM-83-248, 26 Mo.P.S.C. (N.S.) 418 (1983) , authorizing, among other things, Missouri Utilities Co., Missouri Power & Light Co., and Missouri Edison Co., three utility subsidiaries of UE, to merge with and into UE.

> The evidence in the present case finds Missouri Power & Light Company with inadequate interest coverages, an inability to pay common dividends out of current earnings, and an inability to reasonably engage in equity financing. To disallow interim rate relief in this case would, in the Commission's opinion, result in damage to the Company's financial integrity and the Company's ability to render safe and adequate service. Therefore, the Commission is of the opinion that the stipulation and agreement as presented by the Company and the Staff of the Missouri Public Service Commission in this matter is reasonable and proper and should be accepted. . . .

Page 6, Report & Order, Case Nos. GR-81-355 and ER-81-356 (July 7, 1981); unreported decision. Commissioner Shapleigh filed a concurring opinion in which he stated that he agreed with the approval of the interim gas and electric rates not only because the Empire met the emergency criteria for interim relief, but "also because I believe that the criteria which I have proposed be used by this Commission in the granting of interim relief have been met in this case." *See* Dissenting Opinion of John C. Shapleigh, Commissioner, The Empire District Electric Company, Case No. ER-81-229 (June 17, 1981). (Unreported concurring opinion).

As a result of the rate case in which the Commission authorized UE to place the Callaway 1 nuclear unit in rate base, the Commission required a phase-in into rates of Callaway 1 as permitted by Section 393.355.1 RSMo as follows:

(a) Commission ordered 8 year phase-in pursuant to authority under Section 393.355.1 RSMo: 6 years of Callaway rate increases, followed by 2 years of no Callaway rate increases; recovery of deferred equity return on Callaway rate base in years 5 through 8, requiring a 12.49% decrease in rates in year 9 after conclusion of period for recovery of deferred equity return; Callaway-related deferred income taxes amortized over a 2 year period

(b) Total increase over the phase-in period of approximately $652 million or 66% increase in rates

In none of the situations identified below did UE "volunteer" to forego or reduce an increase of rates associated with the phase-in of the Callaway 1 nuclear generating unit, or "volunteer" to otherwise reduce rates, without the Commission first either opening a docket to commence an investigation or the Staff commencing an earnings audit which showed UE to be in an excess earnings situation, despite UE's claim in a February 4, 1987 pleading noted below:

PRIOR UE RATE AND OTHER REVENUE REQUIREMENT CASES

(1) Case Nos. AO-87-48, EO-85-17 and ER-85-160 – Federal Tax Reform Act of 1986, signed into law October 22, 1986, lowered the federal corporate tax rate of Commission jurisdictional utilities from 46% to 34% – on November 3, 1986, the Commission issued an Order Establishing Docket, opening Case No. AO-87-48, to investigate the revenue effects of the Act upon Commission jurisdictional utilities and directed Commission jurisdictional utilities with calendar year 1985 jurisdictional revenues in excess of $2 million to comply with reporting requirements set out in the body of the Commission Order

(a) UE filed, on December 22, 1986, the Response Of Union Electric Company, in which UE clearly indicated at page 5 that it was not simply volunteering to reflect in rates the effect of the Tax Reform Act of 1986:

> . . . The Company is receptive to an individual proceeding limited to the issue of changes in income tax expenses. The Company's agreement to immediately reflect the lower tax rate assumes a willingness by all parties to limit the proceeding to TRA '86 income tax changes.
>
> The rate phase-in plan which the Company is presently implementing provides a unique opportunity for incorporating the TRA '86 savings into our rates. The Company proposes modifying its phase-in plan so that its customers may receive

immediate benefit of these tax reductions and at the same time not adversely affect the Company's shareholders.

(b) UE filed, on February 4, 1987, Verified Motion OF Union Electric Company For Waiver Of Filing The Calendar Year 1986 Cost Of Service Data – UE stated at page 1 that the filing of this data should be waived for, among other reasons, "Commission Staff auditors are already at the Company's main office building, compiling a 1986 cost of service study for the Company's electric operations -- presumably with a view to the possibility of filing a complaint case against the Company."

(c) UE filed, on March 24, 1987, Motion To Revise Rate Phase-In Plan, And To Allow Tariffs To Become Effective On Less Than 30 Days Notice

(d) Commission granted UE's Motion To Revise Rate Phase-In Plan, And To Allow Tariffs To Become Effective On Less Than 30 Days Notice in an April 3, 1987 Order Granting Motion (cited at 29 Mo.P.S.C. (N.S.) 51-52, but not published in Mo.P.S.C. (N.S.)) – the Commission ordered smaller rate increases in Years 3 through 6 of the phase-in than originally authorized by the Commission in its 1985 Callaway 1 Report And Order in order to reflect lower federal corporate tax rate as a result of the Tax Reform Act of 1986

(e) On April 9, 1987, the Commission issued an Order delegating to the Staff authority to prosecute a complaint as to the reasonableness of the rates and charges of UE – on April 24, 1987, the Staff filed a complaint, Case No. EC-87-114, against UE alleging that its current rates were excessive and not just and reasonable – on April 30, 1987, the Office of the Public Counsel (OPC) filed a complaint, Case No. EC-87-115, against UE alleging that its current rates were excessive and not just and reasonable

(2) Case Nos. EC-87-114 and EC-87-115 – Excess Earnings Complaint Cases – December 21, 1987 Report and Order issued (29 Mo.P.S.C. (N.S.) 313)

(a) Staff requested that Years 4 through 6 of phase-in rate increases be eliminated, the accrual of additional phase-in deferrals end, the accumulated balance of phase-in credits be reduced, and rates be decreased by $30 million on an annual basis

(b) Commission permitted a .38% increase in rates, rather than a 4.6% increase in rates for Year 4 of the phase-in, eliminated Years 5 and 6

of the phase-in rate increases, and terminated the accrual of phase-in deferrals

Phase-In Year	Original Phase-In Per MoPSC Decision In 3/29/85 Report And Order In Case Nos. EO-85-17and ER-85-160	Phase-In As Modified by Tax Reform Act of 1986 Per 4/3/87 MoPSC Order Granting Motion[24] In Case Nos. AO-87-48, EO-85-17 and ER-85-160	Phase-In As Modified by 12/21/87 MoPSC Decision In Excess Earnings Complaint Case Nos. EC-87-114 and EC-87-115
1 (April 9, 1985)	14% $138.0million		
2 (April 9, 1986)	10% $112.4 million		
3 (April 9, 1987)	7.3% $90.1 million	4.6% $57.4 million	
4 (April 9, 1988)	7.3% $96.7 million	4.6% $60.1 million	.38% $5.6million[25]
5 (April 9, 1989)	7.3% $103.7 million	4.6% $62.9 million	NO INCREASE
6 (April 9, 1990)	7.3% $111.3 million	4.6% $65.8 million	NO INCREASE
7 (April 9, 1991)	NO INCREASE	NO INCREASE	DECREASE[26]
8 (April 9, 1992)	NO INCREASE	NO INCREASE	
9 (April 9, 1993)	(12.49%) ($204.7M)[27]	(9.61%) ($142.5M)[28]	

(3) Case No. EO-87-175 – Comprehensive Customer Class Cost Of Service and Rate Design Case – November 6, 1990 Report and Order issued (30 Mo.P.S.C.(N.S.) 406); Case Nos. EM-91-29 and EM-91-404 – Arkansas Power & Light Company's (APL) Sale Of Its Missouri Facilities To UE – September 19, 1991 Report And Order issued (1 Mo.P.S.C.3d 96)

(a) UE agrees to absorb $30 million decrease in annual revenue requirement allocated to Small General Service, Large General Service, and Primary classes

[24] UE filed a Motion To Revise Rate Phase-In Plan, And To Allow Tariffs To Become Effective On Less Than 30 Days Notice on March 24, 1987 in Case Nos. AO-87-48, EO-85-17 and ER-85-160.

[25] Under the Case Nos. EC-87-114 and EC-87-115 decision, the 0.38 percent increase of $5.6 million took effect on December 31, 1987.

[26] Decrease in rates in year 7 after conclusion of period for recovery of deferred equity return.

[27] Decrease in rates in year 9 after conclusion of period for recovery of deferred equity return.

[28] Decrease in rates in year 9 after conclusion of period for recovery of deferred equity return.

(b) Rate moratorium for UE customers to January 1, 1993 (26 months)

(c) Amount of any acquisition adjustment/premium paid by UE to APL agreed by UE to be treated below the line for ratemaking purposes and not to be recovered in rates

(d) Rate moratorium for former APL customers

(4) Case No. ER-93-52 – End of Amortization Of Callaway Phase-In Deferrals – November 3, 1992 Report And Order issued (1 Mo.P.S.C.3d 416)

(a) UE agrees to $40 million decrease in annual revenues effective January 1, 1993

(b) Rate moratorium to September 1, 1994 (20 months) (possible increase in cost of decommissioning Callaway without increase in customer rates covered)

A grant of interim relief in the present case would not be reasonable.

It is not only the procedure proposed by UE in this case that is unreasonable, but the very request for interim relief where there is no emergency. Reasonableness turns on whether a Commission decision is supported by competent and substantial evidence on the record as a whole and is not against the weight of the evidence. ***Utility Consumers' Council,*** *supra,* 585 S.W.2d at 47. The Missouri Supreme Court has declared that the lawfulness and reasonableness standard under which PSC decisions are reviewed is essentially the same as the standard of review applied to cases decided by other administrative tribunals.[29] ***Love 1979 Partners v. Public Service Commission,*** 715 S.W.2d 482, 486 n. 8 (Mo. banc 1986); ***State ex rel. Public Counsel v.***

[29] Section 536.140.2, RSMo, provides: "The inquiry may extend to a determination of whether the action of the agency (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable; (7) Involves an abuse of discretion."

Public Service Commission, 210 S.W.3d 344, 353 (Mo. App., W.D. 2006). Staff suggests that it would be arbitrary and capricious and an abuse of discretion indeed to abandon the standard under which the Commission has granted interim relief since 1949, in which extraordinary rate relief is awarded to meet the necessity imposed by exigent circumstances, and instead to provide it to UE as a mere convenience.

Conclusion:

UE does not qualify for the interim rate relief it seeks under any standard previously announced or applied by this Commission. Those standards are fact-based and, in every case, interim relief has been awarded only where facts exist such that the award unmistakably serves the public interest. UE has filed its case-in-chief and has shown no public interest basis for the award of the interim relief that it seeks.

If the Commission grants UE's request, a standard established over sixty years and blessed by the courts will be broken irretrievably. How, then, could the PSC deny any company's request for immediate interim rate relief while their general rate case is being processed? Are they not all subject to regulatory lag?

WHEREFORE, by reason of all the foregoing, Staff urges the Commission to reject the IRT:

Sheet to be rejected:

Mo. P.S.C. Schedule No. 5
Original Sheet 98.14

or, in the alternative, suspend the IRT and direct the parties to jointly propose a procedural schedule, and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Kevin A. Thompson_____
KEVIN A. THOMPSON
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **27th day of August, 2009,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson_____