

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

In the Matter of Union Electric Company)	
d/b/a AmerenUE for Authority to File)	
Tariffs Increasing Rates for Electric)	<u>Case No. ER-2010-0036</u>
Service Provided to Customers in the)	
Company's Missouri Service Area.)	

PUBLIC COUNSEL’S RESPONSE IN OPPOSITION TO INTERIM RATE REQUEST

COMES NOW the Office of the Public Counsel and for its Response in Opposition to Interim Rate Request states as follows:

Introduction:

1. On July 24, 2009, AmerenUE filed, as part of its general rate increase request, a request for an interim rate increase. The interim rate increase request generally consisted of tariff sheets, testimony, and suggestions. Pursuant to a Commission order issued on July 30, Public Counsel files this response in opposition.

2. As a threshold matter, Public Counsel notes that AmerenUE does not allege any sort of emergency or any sort of threat to its ability to provide safe and adequate service. AmerenUE simply want to increase its profits more quickly than would normally be the case under the “file and suspend” method of increasing rates. Because of this, the Commission’s analysis is very different than it would be in a case where the utility alleged an emergency. In an emergency situation, the Commission would analyze factors including the depth of the emergency, the actions that the utility had taken to minimize it, and the risk of harm. None of those are considerations here. Here, the only question for the Commission to consider is whether

the decades-old procedure for considering rate increase requests is so unfair to AmerenUE that the Commission should abandon it. Public Counsel strongly urges the Commission not to abandon the time-tested general rate case approach.

AmerenUE was opposed to interim relief when rates were declining.

3. AmerenUE's request for an immediate, interim rate increase is driven by its desire to increase profits rather than by a philosophical issue with the rate case process. Perhaps the clearest indication of this is AmerenUE's¹ vehement opposition to an interim **decrease** on the grounds that it was "an Unfair, One-Sided Deviation From Normal Ratemaking Procedures."²

4. In Case No EC-87-114, the Staff filed a complaint seeking to lower AmerenUE's rates. As part of its request, the Staff sought an expedited, interim decrease. In opposing interim rate changes that might have decreased rather than increased profits, AmerenUE was outraged that the Staff would even suggest such an interim rate change to be effective before the end of the case:

Thus, what Staff apparently envisions is the second option: a hearing on the phase-in accruals before the Company cost-of-service testimony is even compiled. Inasmuch as the issue of the phase-in accruals depend entirely on the final cost of service, the Company has no idea what would take place at Staff's interim hearing. Staff would no doubt submit its own cost of service, which it began to compile more than 4 months ago. (Complaint, paragraph 9) All the Company could do under the Staff schedule, however, would be to reiterate the legal objections raised herein. It would not yet be prepared to file its own rebuttal or its own cost-of-service. Staff's hearing would be a "hearing" in name only, reinforcing **the Company's contention that rates cannot be adjusted or**

¹ Although AmerenUE operated under the name "Union Electric Company" at the time of Case No. EC-87-114, references throughout this pleading uniformly use the current *dba* of "AmerenUE."

² Case No EC-87-114, AmerenUE's "Response to Motion to Limit Scope of Proceedings, Establish a Procedural Schedule, Schedule an Early Hearing on Phase-in Accruals, and Issue an Order Making Phase-in Accruals Interim Subject to Adjustment," filed May 5, 1987, page 13.

affected until completion of the final hearing at which all parties are allowed to present their evidence.³

5. In that case, the Commission agreed with AmerenUE that Staff's proposal should be rejected:

The Missouri Court of Appeals has recognized the Commission's broad discretion to grant interim rate relief. State ex rel. Laclede Gas Company v. P.S.C., 535 S.W.2d 561 (Mo. W.D. 1976). Although the interim procedure requested by Staff is not identical to interim rate relief, it is analogous thereto. Staff does not request any rate change during the period between the interim order and the final order as is the case where interim rate relief is granted. However, Staff does allege that irreparable harm will result if interim relief is not granted and therefore an expedited hearing is justified. In the Commission's opinion the allegation that UE is accruing excessive earnings to be recovered in future rates under the Commission-approved phase-in plan does not constitute an emergency which justifies the establishment of an abbreviated hearing to determine whether speedy relief is warranted.

In this case the Commission will hear the evidence in support of and in opposition to Staff's and Public Counsel's allegation that a reduced revenue requirement is appropriate. If the Commission finds that a change in the phase-in accrual is appropriate, any such change shall take effect on a prospective basis after the Commission issues its final order in this case.

Based on the foregoing, the Commission determines that Staff's request to schedule an interim hearing for the purpose of determining the question of whether accruals booked after the date of the interim order should be subject to adjustment, should be denied.⁴

1987 Mo. PSC LEXIS 28, 10-12 (Mo. PSC 1987)

6. In the same filing, AmerenUE cites Commission precedent with respect to the emergency or near-emergency standard, and notes that since interim increases have only been allowed in such situations, an interim decrease should similarly be denied. In closing, AmerenUE trumpets, "there should be little sympathy for Staff's sudden concern about

³ *Ibid.*, at pages 15-16; emphasis added.

⁴ The Staff of the Missouri Public Service Commission, Complainant, vs. Union Electric Company, Respondent, Case No. EC-87-114, Order issued June 22, 1987, 29 Mo. P.S.C. (N.S.) 305, 1987 Mo. PSC LEXIS 28

regulatory lag.”⁵ Now that the shoe is once again on the other foot, there should be little sympathy for AmerenUE’s sudden concern about regulatory lag.

Fifty years of Commission precedent runs counter to AmerenUE’s proposal.

7. In the 1987 AmerenUE filing discussed above, AmerenUE noted that allowing an interim rate change without a showing of an emergency or near-emergency situation would run afoul of 33 years of precedent.⁶ The Commission has itself noted many times its consistent application of the emergency standard. In 1983, the Commission stated:

The Commission has broad discretion to authorize interim relief and no statutory standards are specified to control the exercise of that discretion. State ex rel. Laclede Gas Company v. Public Service Commission, 535 S.W.2d 561 (Mo. App. 1976). For many years the Commission has granted interim relief in response to emergency or near-emergency circumstances, since of necessity such relief requires the Commission to make a determination without the benefit of a thorough Staff audit. Accordingly, the Commission has exercised caution in the granting of this extraordinary remedy.

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 situation will almost always be the case where a company has pending a permanent request. The mere fact of regulatory lag does not justify interim relief either, State ex rel. Laclede Gas Company. The Commission finds that it should apply the emergency standard in this case which was set out in Re: Missouri Public Service Company, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975), as follows:

It is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show (1) it needs additional funds immediately; (2) that the need cannot be postponed; and (3) that no alternative exists to meet the need but rate relief.⁷

8. In 1986, the Commission ruled in yet another request for interim relief:

⁵ Case No. EC-87-114, AmerenUE Response, *supra*, at 22.

⁶*Ibid.*, at 21. 33 years in 1987 means approximately 55 years today.

⁷In the matter of Martigney Creek Sewer Company of St. Louis, Missouri, for authority to file temporary tariffs increasing rates for sewer service provided to customers in the Missouri service area of the Company, Case No. SR-83-166, Order issued March 4, 1983, 25 Mo. P.S.C. (N.S.) 641, 1983 Mo. PSC LEXIS 63

The Commission is of the opinion that adherence to the emergency or near emergency standard should properly be continued.

The granting of interim rate relief is an extraordinary remedy to be extended only under extraordinary circumstances. Extraordinary circumstances are required due to the abbreviated nature of the proceedings which makes it virtually impossible to set rates with the same precision as may be inherent in the longer and more deliberate proceedings involved in a permanent rate case.⁸

9. In one of the most recent denials of a utility's request for interim relief, the Commission noted that it had briefly flirted with applying a "good cause" standard. But it clearly rejected that "good cause" standard in its order:

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 MoPSC 3rd 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.⁹

10. To counter fifty years of unfavorable (unfavorable to AmerenUE) precedent, AmerenUE cites only two cases in which the Commission arguably departed from the standard.

⁸In the matter of Arkansas Power & Light Company of Little Rock, Arkansas, for authority to file interim tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company, Case No. ER-86-52, Order issued January 14, 1986, 28 Mo. P.S.C. (N.S.) 143, 1986 Mo. PSC LEXIS 53

⁹In the Matter of Tariff Revisions of The Empire District Electric Company Designed to Increase Rates on an Interim Basis for Electric Service to Customers in its Missouri Service Area, Case No. ER-2001-452, Order issued March 8, 2001, Mo. P.S.C. 3D 124, 2001 Mo. PSC LEXIS 578

These two are easily distinguished from the instant situation. The first is a Timber Creek Sewer case¹⁰ in which the Commission applied what appears to be a “near emergency” standard:

Thus, it is reasonable to conclude that as of the time of the true-up, September 30, 2007, Timber Creek will be earning \$115,310 per year less than necessary to meet its revenue requirement. In addition, **\$115,310 per year for a small company like Timber Creek is a significant amount that if forgone could quickly threaten the company’s financial integrity** and even its ability to provide safe and adequate service. The company originally indicated its need for a revenue increase in March. Suspending the general rate increase while waiting an additional 6-11 months for a decision regarding the connection fee **could be detrimental to the company’s operations.**

11. The second of two cases that AmerenUE cites to counter fifty years of precedent is a Citizens Electric case.¹¹ It is perhaps even more easily distinguished than the Timber Creek case. The Commission's order stated:

Citizens stated that without the interim increase, it would suffer the loss [*2] of approximately \$ 13,000 per day under the new contracted price for power.

...

Citizens Electric Corporation is a uniquely situated entity. Like most of the utilities that come before the Commission, it is a corporation established under Chapter 351 RSMo. Unlike other corporate entities regulated by the Commission, however, Citizens is structured such that it operates on a business plan similar to a cooperative electric corporation. Citizens' stockholders are also the consumers of the power that Citizens sells. Citizens refers to these consumers as members.

Under Citizens' business plan, all revenues in excess of costs are returned to its members in the form of capital credits. Because of its business plan, Citizens has many of the same characteristics of a rural electric cooperative.

Citizens does not generate any power. Citizens purchases all of its power under contracts in the wholesale energy market. Citizens recently completed negotiations for a new purchased power agreement which will increase the costs of its wholesale power by 15 percent beginning January 1, 2002. Citizens has not

¹⁰In the Matter of Timber Creek Sewer Company, Inc.’s Tariff Designed to Increase Rates for Sewer Service, Case No. SR-2008-0080, Order issued October 30, 2007; emphasis added.

¹¹In the Matter of the Application of Citizens Electric Corporation for Approval of Interim Rates, Subject to Refund, and for a Permanent Rate Increase, Case No. ER-2002-217, Order issued December 20, 2007, 11 Mo. P.S.C. 3D 30, 2001 Mo. PSC LEXIS 1817

requested a general rate increase since 1982.

...

The Commission finds that the agreement is reasonable in that it provides for just and reasonable rates to be set in the ongoing permanent rate case and it allows Citizens to recover in the interim, subject to refund, the increased costs of its new purchased power agreement. **Therefore, Citizens will be able to provide safe, adequate and reliable service without incurring additional debt or impairing its financial stability.**

Without the interim increase in rates, Citizens would be placed in the position of losing substantial income each day after January 1, 2002. This potential loss in income would cause Citizens difficulty borrowing money to maintain other operations and proceed with its construction contracts, **negatively impacting Citizens' ability to provide safe, adequate and reliable service to its members.**

In addition, because of its unique business plan, the increased interest on borrowed money will ultimately be paid by the consumers themselves, by virtue of their positions as stockholders. **Citizens also indicated that financial problems could result in the elimination of services to the members.**

...

Because Citizens' organization is very similar to a rural electric cooperative, the Commission finds that it is differently situated than other electrical corporations regulated by the Commission. Therefore, the Commission concludes that it is appropriate to grant interim rate relief on a nonemergency standard in this instance to permit interim rates....

Nothing in AmerenUE's current request even comes close to the unique circumstances raised in the Citizens Electric case.

The Commission should not prolong its consideration of – and the parties' involvement in – AmerenUE's self-serving request.

12. AmerenUE has budgeted millions of dollars to prosecute this case. The last two cases **each** cost ratepayers in the neighborhood of \$4 million. It would ill serve the public to allow AmerenUE to sap the resources of Public Counsel, Staff and intervenors by forcing them into fighting against a non-emergency interim rate relief request when they need to be vigorously investigating the \$402 million permanent rate increase. But that is doubtless exactly the result

AmerenUE seeks. The Commission should not allow such an outcome. Fifty years of precedent is enough; there is no need to battle over a well-settled issue in this case.

WHEREFORE, Public Counsel respectfully requests that the Commission immediately and summarily dismiss AmerenUE's request for an interim rate request.

Respectfully submitted,

OFFICE OF THE Public Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 27th day of August 2009.

/s/ Lewis R. Mills, Jr.
