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

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| 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-2007-0002** Tariff No. YE-2007-0007 |

**PUBLIC COUNSEL'S RESPONSE TO AMERENUE'S MOTION TO ADOPT PROCEDURES FOR IMPLEMENTING AMERENUE'S REQUESTED FUEL ADJUSTMENT CLAUSE, MOTION FOR DIRECTED VERDICT, AND MOTION TO DENY REQUEST FOR LEAVE TO AMEND**

COMES NOW the Office of the Public Counsel ("Public Counsel") and for its Response to AmerenUE's Motion to Adopt Procedures for Implementing AmerenUE's Requested Fuel Adjustment Clause and Motion for Directed Verdict states as follows:

RESPONSE TO MOTION TO ADOPT PROCEDURES

1. On July 7, 2006, Union Electric Company d/b/a AmerenUE filed a motion to adopt procedures for implementing a fuel adjustment clause. At the prehearing conference held on August 17 (and confirmed by notice issued the following day), the Commission set August 31 as the deadline for responses to that motion. As discussed below, AmerenUE's attempt to unilaterally amend this motion without leave of the Commission is invalid, so this pleading will address only the July 7 pleading and not the August 8 purported amendment. If the Commission grants – over Public Counsel's objections – leave to amend pursuant to 4 CSR 240-2.080(20), Public Counsel will respond to the amendment at that time.

2. AmerenUE's July 7 motion in essence asks the Commission to adopt the procedures that the Commission, with little in-depth public discussion, provided to the Secretary of State for publication as part of a proposed rule. The provisions in the proposed rule that

AmerenUE would have the Commission adopt for this case carry no weight simply because they have been published. Public Counsel strongly objected during the drafting of the proposed rules to these specific transition procedures. None of the stakeholders involved in the drafting of the proposed rules except for the utilities and possibly the Staff were in favor of these provisions. If the Commission wants to afford AmerenUE the opportunity to use some sort of transitional procedure in this case, it must use a procedure that it has evaluated and found appropriate.

3. Some of the provisions in the proposed rule simply will not bear scrutiny. 4 CSR 240-20.090(16)4(E) sets out procedures for how a utility can proceed with a fuel adjustment clause even if the Commission finds it has not complied with the final rule, and 20.090(16)F(4) sets out a procedure for how a utility can proceed with a fuel adjustment clause after the Commission finds that good cause for waiving the rules has not been shown! Surely the Commission will not adopt rules that allow a utility can proceed with a fuel adjustment clause even after the Commission has made findings that it should not proceed. And yet AmerenUE request that the Commission adopt these procedures before the Commission has even heard all the comments on them, and before the Commission has even begun to discuss the rules.

4. AARP, in its response filed today, cites a unanimous Missouri Supreme Court decision, NME Hospitals v. Dept. of Social Services, 850 S.W.2d 71 (Mo. banc 1993). Public Counsel agrees with AARP's analysis of that case that the Commission would be in error in using proposed rules before completing the rulemaking process.

MOTION FOR DIRECTED VERDICT

5. 4 CSR 240-2.130(7)(A) requires that requires that direct testimony include "all testimony and exhibits asserting and explaining that party's entire case-in chief." 4 CSR 240-2.130(8) provides that no party is permitted to supplement its prefiled direct testimony without

leave of the Commission, and AmerenUE has not requested leave to supplement its prefiled direct case.

6. In Case No. ST-2003-0562, Osage Water Company filed a request for a sewer rate increase. Public Counsel filed a motion to dismiss because the company's direct case did not contain testimony ands exhibits "asserting and explaining" the case in chief. The Commission determined that Public Counsel was in essence asking for a directed verdict, and that such a request was proper under Commission procedure.

> A directed verdict is not a summary disposition within the meaning of 4 CSR 240-2.117, and therefore that regulation does not preclude the Commission from considering Public Counsel's motion. In fact, the Commission does not have a specific procedural rule dealing with such a motion. A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden. In a civil court, a motion for directed verdict would be appropriate at the close of the case in chief of the party having the burden of proof. In a Commission case, direct testimony is prefiled and, in this case, has been before the Commission for months. 4 CSR 240-2.130(7)(A) requires that direct testimony include "all testimony and exhibits asserting and explaining that party's entire case-in chief." 4 CSR 240-2.130(8) provides that no party is permitted to supplement its prefiled direct testimony without leave of the Commission. Therefore, even though the hearing has not yet physically convened, Osage Water's case-in-chief has already been submitted to the Commission. Therefore, a motion for directed verdict is appropriate at this time.

7. In this case, AmerenUE has already submitted its case in chief in its direct testimony. As Staff noted in its response to AmerenUE's request, AmerenUE's case in chief contains only one short bullet point in the testimony of Warner Baxter. This vague mention of a fuel adjustment clause, with no detail of how the clause would operate, and especially with no testimony whatsoever that such a clause is necessary for AmerenUE's rates to be just and reasonable, falls far short of meeting AmerenUE's burden of proof.

8. The Commission, in the Osage Water case discussed above, found that the company's failure to comply with the testimony filing requirements was by itself sufficient grounds to dismiss the rate case:

> In addition to its failure to meet its burden of proof, Osage Water has failed to comply with Commission rule 4 CSR 240-2.130(7)(A) in that it failed to present its entire case-in-chief in its direct testimony. This requirement is necessary to allow all parties to prepare for hearing and to avoid unfair surprise. It is not enough to speculate that holes in its case can be patched through rebuttal or surrebuttal testimony or through cross-examination of witnesses of other parties. **Osage Water's failure to present its case in direct testimony is a further and independent basis for dismissing this case and rejecting Osage Water's tariffs.** [Emphasis added.]

9. In this case, AmerenUE's failure to meet its burden does not extend to its entire rate request, but to its request for a fuel adjustment clause. The Commission should issue a directed verdict as to the issue of whether a fuel adjustment clause should be considered in this case and should reject that request.

10. Rejecting the proposal to include a fuel adjustment clause will not unduly harm AmerenUE. If the FAC is so vital to its case, AmerenUE can withdraw the case and refile it later when it can properly include the request. If the FAC is not vital, AmerenUE can proceed with the case as it was filed – less the one paragraph bullet on the FAC.

MOTION TO DENY REQUEST FOR LEAVE TO AMEND[1]

11. On August 8, AmerenUE filed a reply to Staff's response in which it attempted to amend its July 7 motion. Commission rule 4 CSR 240-2.080(20) provides that "Any pleading may be amended within ten (10) days of filing, unless a responsive pleading has already been

[1] The August 8 pleading states "Consequently, to the extent necessary, the Company requests that its [motion] be considered amended…." Although Public Counsel does not consider this to be a request for leave to amend pursuant to 4 CSR 240-2.080(20), Public Counsel is responding to it as though it were a proper request in case the Commission treats it as such.

filed, or at any time by leave of the Commission." AmerenUE did not attempt to amend its July 7 motion within ten days of its filing (and in any event a responsive pleading had already been filed). Thus the only way for it to amend the pleading is by leave of the Commission. Such leave has not – and should not – be granted.

12. The Commission's rule on amendment of pleadings does not set a standard of review for the Commission to use in determining whether or not to grant leave to amend. However, under any standard, AmerenUE has not established any reason why it should be allowed to amend its earlier pleading and request substantially different relief.

WHEREFORE, Public Counsel respectfully requests that the Commission deny AmerenUE's request to adopt a procedure for considering a fuel adjustment clause, issue a directed verdict dismissing AmerenUE's request for a fuel adjustment clause, and deny AmerenUE leave to amend its July 7, 2006, motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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