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 Service Provided to Customers in the Company's Missouri Service Area.	)))))	**Case No. ER-2010-0036**

POST-HEARING REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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I. INTRODUCTION

This brief will address three issues: Class Cost of Service, Return on Equity, and the Fuel Adjustment Clause.

II. CLASS COST OF SERVICE

This section of this brief will reply to the brief of the Midwest Energy Users Association (MEUA). The most noteworthy aspect of MEUA's brief is what is **not** there. What is conspicuously absent from MEUA's brief is even a mention of MEUA's position – repeated in prefiled testimony, in its statement of position, and on the witness stand – about what would be an acceptable shift of revenues away from the LGS class. MEUA's entire point in its brief is "Never mind what I said I need; Noranda is getting more!"

MEUA asserts that the Commission should "take the entirety of the benefits generated"[1] by the CCOS Agreement[2] and give all those allegedly-generated benefits to LGS. MEUA refuses to acknowledge that there is not a pot of free dollars created by the CCOS Stipulation that any party can dip into. Rather the CCOS Agreement is the end result of months of negotiations among representatives of all customer classes, and where the shifts flow to is as important a part of the CCOS Agreement as where the shifts come from. Neither MEUA nor the Commission can take a piece of the CCOS Agreement and assume that the signatories would have found that piece to be reasonable in isolation. This is why the CCOS Agreement (like all stipulations and agreements filed with the Commission) includes a severability clause providing that all the terms are interdependent. If the Commission does not adopt the whole CCOS Agreement as a reasonable resolution of the

[1] MEUA initial brief at page 3.

[2] This brief will refer to the Nonunanimous Stipulation and Agreement filed on March 17 and the Addendum to that Agreement filed on March 26 collectively as the "CCOS Agreement."

issues, the Commission must resolve the issues based on the evidence in the case and not on isolated pieces of the CCOS agreement.

The Commission should concentrate on what MEUA said was reasonable, not what it thinks it can get by modifying an agreement it chose not to join, or by dipping into some imaginary "pool of dollars."[3] What MEUA has **repeatedly** said is that a reasonable result is reducing LGS/SPS revenue by 20% of the reduction indicated in any cost study.[4] The CCOS Agreement does that. Indeed the Addendum was filed for the express purpose of precisely reducing LGS/SPS revenues by the amount that MEUA witness Chriss testified was the bottom end of a reasonable range of reductions. Mr. Chriss explicitly and clearly agreed that "MEUA would be satisfied if LGS/SPS got a revenue neutral shift that is at least $4,579,274…." [5] The Commission can satisfy MEUA by finding the CCOS Agreement to be in the public interest and supported by the record, and approving the revenue shifts set forth in it.

III. RETURN ON EQUITY

This section of this brief will reply to the brief of AmerenUE. As one would have expected from the cross-examination, AmerenUE in its brief attempts to entirely re-do the return on equity (ROE) analyses of Public Counsel witness Lawton and Missouri Industrial

[3] Transcript, volume 33, pages 2847.

[4] Exhibit 551, Chriss Rebuttal Testimony, pages 7, 11; MEUA position statement, page 2; Transcript, volume 33, pages 2835-2837.

[5] Transcript, volume 33, page 2837.

Energy Users (MIEC) witness Gorman.[6] This re-do is based in large part upon AmerenUE's contention that both Mr. Lawton and Mr. Gorman should have given less emphasis to the results of their Capital Asset Pricing Model (CAPM) analyses and their Risk Premium analyses.[7] This contention is apparently grounded upon the witnesses' frank and helpful discussions that acknowledged issues with these approaches – which issues are fully and explicitly incorporated into the witnesses' ultimate recommendations on the cost of equity to AmerenUE. Mr. Lawton testified that in this case the CAPM and Risk Premium analyses produced results that are meaningful and useful.[8]

The problem with AmerenUE's recalculation is that both witnesses approached their calculation of the required ROE as an integrated whole, and gave the various analyses the appropriate weight based upon their expert judgment. AmerenUE now attempts to substitute the judgment of the lawyers writing its brief for the judgment of the experts. If these experts believed it was appropriate to overly emphasize the Discounted Cash Flow analysis at the expense of other analyses, they would have surely done so. But they didn't, and Mr. Lawton in particular firmly and explicitly rejected AmerenUE's attempts to co-opt his analysis.

With respect to AmerenUE's novel re-weighting of the various aspects of his analysis, Mr. Lawton stated:

> no witness in this case has really done that and where the two-thirds/one-third comes from, I don't know. It's certainly not financial theory and it's just arbitrary selection of a weighting. And you know, somebody has to explain to

[6] AmerenUE addresses the recommendations of Public Counsel witness Lawton under the heading: "C. Mr. Gorman's Recommendation."

[7] AmerenUE initial brief at pages 30-40.

[8] Transcript, volume 28, page 2256.

> the decision-makers, the Commission, why would you do it that way? I mean, they deserve an answer and I don't know what that answer would be.[9]

As an expert witness, Mr. Lawton was so concerned with the perversions that AmerenUE performed upon his thoughtful and considered analysis that he concluded that AmerenUE's Exhibits 175 and 176 (illustrating the AmerenUE legal team's recalculation of ROE) "shouldn't have my name on it."[10]

In response to one of many questions in which AmerenUE asked Mr. Lawton whether he would have gotten a different result if he had done something completely different from what he thought was appropriate, Mr. Lawton conditioned his answer with the statement: "With the preface that I didn't do this and wouldn't...."[11]

As part of AmerenUE's legal team's attempt to re-calculate Mr. Lawton's ROE recommendation, one of AmerenUE's attorneys had Mr. Lawton "update" his CAPM by inputting a single-day Treasury Bond value. Mr. Lawton dutifully performed the calculation, but later emphatically stated that it was absolutely inappropriate to use a single-day value.[12] Mr. Lawton testified that what AmerenUE tried to call an "update" to his analysis was in fact a different analysis[13] and noted that even AmerenUE witness Morin did not use a single-day value for a CAPM analysis.[14]

In its initial brief, Public Counsel pointed out that the inconsistent ways that

[9] Transcript, volume 28, page 2260.

[10] *Ibid*.

[11] Transcript, volume 28, page 2206.

[12] Transcript, volume 28, page 2258.

[13] Transcript, volume 28, page 2259.

[14] Transcript, volume 28, page 2258.

AmerenUE witness summarized the results of his various analyses (using the average or the median in such a way as to create a certain result) should influence the Commission's opinion of his credibility. AmerenUE chose to ignore this inconsistency in its initial brief; perhaps it could not defend it.

IV. FUEL ADJUSTMENT CLAUSE

As Public Counsel pointed out in its initial brief, the resolution of the Fuel Adjustment Clause (FAC) issue in this case turns on whether AmerenUE can sustain its burden of proof and prove that the FAC is properly structured. And yet AmerenUE simply argues in its brief that other parties have failed to prove that the FAC is **not** properly structured. AmerenUE apparently does not recognize that a FAC with only a 5% stake is not a given; it is something that must be defended, and AmerenUE has failed to offer any real defense.

AmerenUE devotes only a few pages of its massive (and massively expensive for ratepayers) initial brief to this issue. Most of the brief simply reiterates AmerenUE's rationale about why its FAC should continue, and doesn't even get into the contested issue of whether the automatic pass-through percentage should be adjusted to provide a more meaningful incentive. Nothing in the brief – or in the record in this case – lends any support to the notion that a mere 5% stake in the outcome gives any significant incentive to AmerenUE to control its fuel costs and to achieve the best outcome in the off-system sales market.

AmerenUE, rather than producing affirmative reasons and evidence to support the 5% stake, relies on three tired and inadequate arguments: 1) many other states allow 100% pass-through; 2) no party has definitively proven that 5% is too low; and 3) investors and analysts would hate it if the Commission changed the percentage. None of these, even if convincing,

satisfy AmerenUE's burden of proof.

AmerenUE completely ignores the testimony of its own witnesses about the real-life incentives embodied in their own compensation packages. As described in Public Counsel's initial brief, none of the AmerenUE witnesses that testified about this issue have compensation packages with a slender 5% at risk. The smallest percentages are 2-3 times greater than the 5% that AmerenUE currently has in place for its FAC, and several witnesses have compensation packages that have 7-8 times the incentive that AmerenUE claims is adequate. If 5% is so powerful, why doesn't AmerenUE structure its pay packages accordingly? There is no answer to this question in the record, just as there is no affirmative proof that 5% at stake in the FAC provides any meaningful incentive.

WHEREFORE, Public Counsel respectfully offers this reply brief and prays that the Commission conform its decision in this case to the arguments contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 30th day of April 2010.

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