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-2008-0318

MOTION TO REJECT OR DENY AMERENUE'S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Motion to Reject to Deny AmerenUE's Application for Rehearing states as follows:

1. After much negotiation, many of the parties to this case executed and filed a document entitled "STIPULATION AND AGREEMENT AS TO **ALL FAC TARIFF RATE DESIGN ISSUES**" (emphasis added) on December 12, 2008. AmerenUE was a participant in the negotiations and was a signatory to the agreement. In its so-called application for rehearing, AmerenUE does not allege that it was mislead during the negotiations, nor does it allege that its agreement was obtained through coercion. Attached to the agreement were exemplar tariffs sheets that illustrated with great particularity the specific tariff language, definitions and calculations upon which the parties had agreed. The same tariff sheets that were submitted with the agreement and approved by the Commission, are attached to AmerenUE's purported application for rehearing of the Report and Order, but now with different language that AmerenUE wishes was part of the agreement.

2. On December 30, 2008, the Commission issued its "Order Approving Stipulation and Agreement as to All FAC Tariff Rate Design Issues" in this case. That order approved the agreement exactly as submitted, with no deletions, modifications, or

additions. The agreement included a provision that, if the Commission approved the agreement (as it did), all parties specifically waived the right to seek rehearing. The order approving the agreement also provided that "The signatory parties are ordered to comply with the terms of the stipulation and agreement." The order became effective on January 8, 2009. No applications for rehearing were filed by any entity, and the order is now final, not subject to appeal, and immune to collateral attack.

3. On January 27, 2009, the Commission issued its Report and Order. Because the issues related to the rate design of the FAC had already been resolved by an approved agreement, the Report and Order did not address them.

4. AmerenUE cannot seek to overturn the order approving the FAC rate design through an application for rehearing of a Report and Order that did not even address those issues. AmerenUE freely and voluntarily agreed to the relevant terms of a FAC, and agreed to waive rehearing if the Commission approved the agreement, yet now seeks to avoid the consequences of the bargain that it struck. AmerenUE has no avenue to now attack the Commission's order approving the FAC rate design in this case.

5. Of course, AmerenUE is not without options to address what it believes are problems with the FAC language that it just agreed to a few weeks ago. Nothing precludes AmerenUE from reconvening the parties to the case to see if they would agree to modifications to the December 12 agreement. It could very well be the case that parties would agree to allow AmerenUE to withdraw its FAC. Withdrawing the FAC would allow AmerenUE to reap the windfall that it mentions at page 3. The parties might also be willing to consider a pass-through percentage lower than 95% which would ameliorate the short-term impact on AmerenUE of any loss of Noranda load. AmerenUE would

presumably be free to seek authorization to use a FAC in its next rate case, or to change the sharing percentage. Nothing in the agreement prevents AmerenUE from proposing different language in its next rate case, whether or not it agrees to withdraw or modify the FAC in this case. What AmerenUE cannot do, however, is collaterally attack the order approving the agreement on the FAC rate design under the guise of asking for rehearing of the Report and Order. The Commission should reject AmerenUE's application for rehearing as an impermissible collateral attack on the December 30, 2008 order approving stipulation and agreement.

6. Even if the Commission believes that it **can** void the unopposed agreement that it approved a few weeks ago, it **should not** do so. AmerenUE got exactly what it sought from this Commission. After years of effort and undoubtedly millions of dollars to get to the point where the Commission approved a FAC, AmerenUE finally has been authorized to use the exact FAC that it proposed and that it agreed to. Throughout this case, AmerenUE relentlessly pounded on the talking point that authorizing this FAC would bring AmerenUE into the "mainstream." Nothing about the change that AmerenUE now suggests in its so-called application for rehearing is "mainstream." AmerenUE does not cite to a single regulatory jurisdiction that insulates a utility from the effect of losing a customer. The operation of the FAC guarantees that AmerenUE will collect hundreds of millions of dollars from ratepayers that it might not have otherwise been able to collect as quickly. AmerenUE does not argue that the FAC will not work to its benefit (and to ratepayers' detriment) in general. AmerenUE simply argues that the bargain that it struck a few weeks ago will have a short-term benefit to ratepayers, and that benefit should not be allowed to occur. Even in the short-term, AmerenUE does not

argue that the benefits that it receives from its FAC are outweighed by the impact that the temporary loss of part of Noranda's load may bring.

7. The Commission must bear in mind that AmerenUE not only got exactly the FAC that it worked so hard for and agreed to, but it also got almost everything else it sought in this case. The only moderately significant issue that it lost was the issue of recovery of the COLA costs, and that was a clear loser for AmerenUE from the beginning. Apart from that one solitary issue, AmerenUE would be hard-pressed to identify a single significant issue in the rate case that the majority did not give to AmerenUE. AmerenUE is like a spoiled, greedy kid at a birthday party who not only gloats over his overly-generous presents, but also wants to take back all the party favors that were meant for his guests.

8. Even if the Commission can manage to rationalize its way past the legal impediments of AmerenUE's impermissible collateral attack, and overcome any sense of fundamental fairness to ratepayers, it still faces huge evidentiary hurdles. There is no competent and substantial evidence of any of the following:

- That Noranda will definitely be taking a significantly reduced level of power for a significant amount of time.
- That Noranda would have continued to take the same amount of power from AmerenUE even if the ice storm had not hit (because of the depressed price of aluminum and the general economic downturn).
- That AmerenUE took all possible actions to encourage or force Noranda to shut down production and clear its production lines before the power went out.
- That AmerenUE did everything possible to restore power to Noranda before damage was done.
- That Associated did everything possible to restore power to Noranda before damage was done.
- That Noranda did everything possible to put itself in a position to resume taking power at pre-ice-storm levels as soon as possible.
- That a rate case with a request for emergency relief will not provide adequate protection against severe financial harm.

- That the level of risk implicit in the 10.76 percent return on equity that the Commission just awarded AmerenUE did not contemplate weather risk.

These are just a few of the many evidentiary questions the Commission would have to address before it even could consider bailing AmerenUE out of one piece of the FAC it so fervently sought and recently agreed to.

WHEREFORE, Public Counsel respectfully requests that the reject or deny the "Application for Rehearing and Motion for Expedited Treatment" filed by AmerenUE on February 5, 2009.

Respectfully submitted,
OFFICE OF THE PUBLIC COUNSEL
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By:_____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 10th day of February 2009.

/s/ Lewis R. Mills, Jr.
By:_____