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-2007-0002

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On May 22, 2007, the Commission issued its Report and Order in this case. The Report and Order is unlawful, unjust, unreasonable and unconstitutional in that it completely fails to separately and adequately identify conclusions of law and findings of fact. The Report and Order is unlawful, unjust, and unreasonable in that it is not based upon competent and substantial evidence of record. The Commission's Report and Order is unjust and unreasonable and not based on competent and substantial evidence in that it fails to make findings of the basic facts that support its conclusions. The Report and Order is unlawful, unjust and unreasonable in that it made no finding as to what total revenue requirement Union Electric Company d/b/a AmerenUE should be allowed, or what rates would be just and reasonable. That order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

Public Counsel's Motion to Dismiss

2. The Commission's Report and Order is unlawful and unreasonable in that it concludes that: "There is no basis for dismissing AmerenUE from this case…." (Report and Order, page 8) The Commission bases this conclusion on an incorrect

understanding of what is necessary for a corporation to appear at a hearing. The black letter law definition of appear is: "To be properly before a court…. Coming into court by a party to a suit…." (Black's Law Dictionary, Fifth Edition, 1979) Missouri law is clear that a corporation may be represented only by an attorney.[1] Pursuant to its rules[2], the Commission has discretion to dismiss (or not) a party that fails to appear at a local public hearing. In its Report and Order, the Commission correctly finds that UE was not represented by an attorney at a number of hearings during the course of this case, and notes that other non-attorney UE employees attended those hearings. The Commission incorrectly concludes that this failure to appear does not constitute "a basis for dismissing AmerenUE from this case." The Commission could have denied Public Counsel's motion to dismiss by exercising its discretion. Instead it denied the motion under the legally incorrect belief that it had no basis for doing so.

Off-system Sales

3. The Commission improperly assigned the burden of proof by relying on the fact that "AmerenUE suggests" fewer than normal outages in 2007. A finding that fewer than normal outages will take place in 2007 is necessary for the Commission's decision on this topic; a mere suggestion by the party with the burden of proof will not

[1] Businesses operating in corporate form are entitled to certain benefits that are denied to others. In addition to benefits, however, corporations also have certain restrictions placed upon them. One such restriction in Missouri is that a corporation may not represent itself in legal matters, but must act solely through licensed attorneys. Liberty Mut. Ins. Co. v. Jones, 130 S.W.2d at 955.

Reed v. Labor & Industrial Relations Com., 789 S.W.2d 19, 21 (Mo. 1990)

[2] 4 CSR 240-2.116(3) provides that: "A party may be dismissed from a case for failure to comply with any order issued by the commission, including failure to appear at any scheduled proceeding such as a public hearing, prehearing conference, hearing, or mediation session."

suffice. Based on this suggestion, the Commission concludes that production model results "may be" more reliable than budget numbers. This is not a sufficiently definite determination on which to base rejection of Public Counsel's proposed off-system sales number.

4. The Commission erred in concluding that using a budgeted amount for off-system sales revenues violates the test-year principle but that using a modeled amount does not. The budgeted number that Public Counsel proposed and the Staff number that the Commission accepted are both based on models; neither are based on test year numbers. Both are based on expectations of future events. The only two reasons explained by the Commission for rejecting Public Counsel's proposal are UE's "suggestion" discussed in the immediately preceding paragraph and the mistaken understanding that Staff's proposed off-system sales number is more true to the test-year principle than Public Counsel's proposed off-system sales number. Neither basis is supported by the record.

Return on Equity

5. The Commission erred in not adequately analyzing and explaining its analysis of the testimony provided by the rate of return witnesses. The Commission states that "[D]espite their best efforts to educate, the experts have managed to create a thicket of conflicting opinions. If the Commission were to attempt to force its way through the tangle it could easily lose its way or even become ensnared." (Report and Order, page 57) It is the Commission's job to force its way through "thickets[s] of conflicting opinions." The Commission was created to be an expert administrative body to deal with the sometimes-complex field of utility regulation. It cannot, as it does here,

simply throw up its hands and say, "Golly, this stuff is too hard. We'll find a way to decide the issue other than figuring out the testimony." Because the Commission states that it cannot or will not rely on the expert testimony, its Report and Order is necessarily not based on competent and substantial evidence.

6. The Commission erred in completely ignoring – and acting counter to – the testimony of witness Gorman that his recommended return on equity was based on the assumption that UE would not get a fuel adjustment clause, despite relying to a large degree on Mr. Gorman's testimony in reaching its conclusion on this issue. Mr Gorman testified that, if UE did get a fuel adjustment clause, his recommendation would be reduced by thirty basis points. The Commission failed to address Mr. Gorman's testimony that there would be no need to adjust his recommendation if no fuel adjustment clause was granted, and instead made a completely unsupported adjustment[3] because it did not allow a fuel adjustment clause.

7. The Commission's ultimate conclusion that return on equity should be set at exactly 10.2 percent is completely unsupported by the record. No expert recommended that amount, and the reader or a reviewing court is unable to discern how the Commission arrived at that precise number.

Electric Energy, Inc.

8. The Commission's decision on this issue is based on the reasoning that UE was not imprudent in not requiring Electric Energy Inc. (EEInc) to continue to sell UE cost-based power after the power supply agreement expired because UE had no legal

[3] And completely unexplained. The Commission simply says his recommendation "should be pushed up a bit."

obligation to do so. [4] The Commission's reasoning is not logically sound. A person may not have a legal obligation to get out of the way of an out-of-control truck, but it would clearly be imprudent not to do so. A finding of prudence is based on what a reasonable person would do under similar circumstances, not what legal obligations that person had.

9. The Commission erred in finding that "AmerenUE had no power" to guide EEInc's decision on this matter. (Report and Order, page 59) The record clearly reveals that Ameren controls EEInc's board. It nominates the majority of board members and its nominations are always elected. Gary Rainwater, chief executive officer of Ameren (and of AmerenUE at the time) freely admitted Ameren's control over EEInc: "Of course, we control the board." (Rainwater Deposition, page 90)

10. The Commission erred in not finding that action by EEInc's shareholders and not its board of directors was required to begin selling power into the market at market-based rates rather than selling to shareholders. There is no evidence in the record that any such action ever took place.

Pinckneyville and Kinmundy

11. The Commission erred in its assignment of the burden of proof. The Commission stated that:

> While AmerenUE has the overall burden to prove that the rates it is proposing are just and reasonable, a slightly different rule applies when a party alleges the utility has been imprudent in some manner. The party alleging imprudence has the burden of creating a serious doubt as to the prudence of an expenditure. If that is accomplished, then the company has the burden of proving the expenditure was in fact prudent. (Report and Order, page 62)

[4] "Since it had no legal obligation to force EEInc. to renew the expired purchased power agreement, AmerenUE was not imprudent in not taking that action." Report and Order, page 58)

The Commission's analysis does not reveal any interpretation by any Missouri court that would support such a standard. Section 393.150.2 states that the burden of proof is on the utility. The Commission cannot lawfully change that statutory requirement by creating an unclear and arbitrary standard that another party must raise "serious doubt" about prudence. Furthermore, in this case, two parties clearly did raise serious doubt about the prudence of the purchase price that UE paid its affiliate for these generating stations.

12. Even if the Commission's burden of proof analysis is proper in other circumstances, it is not applicable to affiliate transactions. The Commission's affiliate transaction rule prohibits utilities from entering into transactions with affiliates unless they comply with the rule. One of the requirements of the rule is that a utility prove that it paid its affiliate the lesser of cost or market; another is that the basis of that analysis be set forth in the utility's cost allocation manual. UE did not comply with these requirements and did not seek a waiver; nor did the Commission grant a waiver. UE did not comply with the Commission's affiliate transaction rule that requires the utility to prove that the price it paid to its affiliate was the lower of cost or market. The Commission characterizes the evidence put forth by the State and Public Counsel as "very thin,"[5] but if UE had complied with the affiliate transaction rule, there would have been additional evidence to consider. The Commission never made a finding or a conclusion as to whether UE complied with the affiliate transaction rule; it simply cites one small section of the rule at page 66 of the Report and Order without discussion. It ignores the fact that the rule requires UE to obtain competitive bids to document that the

[5] Report and Order, page 62

price it is paying is at or lower than market price, or demonstrate why bids were not necessary. (4 CSR 240-20(3)(A)) It ignores the fact that the rule requires UE to document both the fair market value and the fully distributed cost of an asset obtained from an affiliate. (4 CSR 240-20(3)(B)) If UE had complied with this rule, the Commission would have much more evidence on which to base its decision.

13. The Commission erred in finding that the sales Public Counsel used to establish a market price do not accurately represent the market at the relevant time. The record shows that there was a glut in the market, and combustion turbines were selling very cheaply. The Commission failed to recognize that what it considers as atypical "forced" sales were in fact typical of prices in the market at that time. There is no evidence in the record of any other arms-length sales at higher prices at that time. Because this was an affiliate transaction, the Commission recognized that UE has a higher burden to meet to prove that the price it paid was fair, and UE did not present any evidence to show a higher market price.

14. On May 31, the Office of Administration and the Department of Economic Development jointly filed an Application for Rehearing. Public Counsel concurs with the arguments raised in Section 3 ("The Pinckneyville and Kinmundy CTGs" at pages 3-5) of that application and incorporates them as though fully set out herein.

Peno Creek

15. The Commission's analysis of the Peno Creek issue seems to rely on the same burden of proof analysis that it used on the Pinckneyville and Kinmundy issue.[6] As such, it suffers from the same infirmities discussed at paragraph 11 above.

16. The Commission erred in relying on the testimony of UE witness Voytas about the source of the $390'kW cost that Public Counsel proposes. At page 68-69 of the Report and Order, the Commission cites Mr. Voytas' rebuttal testimony (Exhibit 60) for a finding that that figure was based on a 1995 analysis. However, Public Counsel witness Kind in his surrebuttal testimony (Exhibit 408, page 29, lines 1-10) makes clear that the $390/kW figure was based on a 1999 analysis. The Commission chose not to rely on Public Counsel's analysis because it mistakenly believed that the analysis was based on a 1995 estimate.

17. The Commission erred in finding that Public Counsel witness Kind has "no particular expertise in the design of AmerenUE's construction fleet." (Report and Order, page 69) Even UE concedes that Mr. Kind has for many years rarely missed a resource planning meeting. (Transcript, pages 3091-3092) More of Mr. Kind's experience in this area is described in questions by Commissioner Gaw. (Transcript, page 3353)

SO2 Allowance Sales

18. On May 31, the Office of Administration and the Department of Economic Development jointly filed an Application for Rehearing. Public Counsel concurs with

[6] At page 69 of the Report and Order, the Commission appears to conclude that the law requires Public Counsel to raise serious doubt about UE's prudence, and that absent such showing, UE's Peno Creek construction expenditures can be recovered from ratepayers without UE affirmatively proving that they were prudent.

the arguments raised in Section 4 ("SO2 Allowance Sales" at pages 5-6) of that application and incorporates them as though fully set out herein.

Taum Sauk Regulatory Capacity

19. The Commission erred in concluding that there was not sufficient evidence in the record to support an adjustment for the value of the regulatory capacity that would have been available had UE not destroyed the Taum Sauk plant. There is evidence to support finding a value for regulatory capacity. There is evidence to support a finding of the size in megaWatts) of the Taum Sauk facility. There is evidence to support a finding that UE has begun to make sales of regulatory capacity and that it could have sold the regulatory capacity from Taum Sauk if it was available. These are all the pieces needed to make the adjustment that Public Counsel proposed.

20. The Commission finds that Public Counsel's proposed adjustment "also assumes the entire capacity of the Taum Sauk plant would have been available for sale for the entire year, another fact for which there is no supporting evidence in the record." (Report and Order, page 117) The Commission, by making such a statement, reveals its lack of understanding of a sale of "regulatory capacity." Any resource (such as a combustion turbine or a pumped storage facility) that can be sold as regulatory capacity can be sold on a year-round basis. Whether the energy from that facility is available most of the year or none of the year does not matter; the regulatory capacity can be sold for the entire year. The Commission does not need evidence about Taum Sauk's availability in order to adopt Public Counsel's proposed adjustment. There is no need for the Commission to "assume … evidence into existence"[7] because it is all in the record.

[7] Report and Order, page 117

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its May 22, 2007, Report and Order.

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 31st day of May 2007.

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