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

APPLICATION FOR REHEARING

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

1. On January 27, 2009, the Commission issued its Report and Order in this case. The Report and Order is unlawful, unjust, unreasonable and unconstitutional in that it 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 unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

2. The Commission's Report and Order is unlawful and unreasonable in that it improperly shifted the burden of proof on the capital structure issue. The Commission concedes the paucity of evidence at page 14, but nonetheless decides in AmerenUE's favor. It is clear from the Commission's discussion that it does not believe that AmerenUE proved its case on this issue, and it is also clear that it believes that Staff did not prove its case either. In the case of a tie, the Commission should not guess who is

more likely to be right, it should follow the dictates of Section 386.150.2 RSMo 2000, which provides that: "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the … electrical corporation…."

3. The Commission erred in relying upon evidence from another case in determining the appropriate return on equity (ROE). At page 22, the Commission resorts to a decision in another case, involving a different utility different parties, different issues, and different witnesses, decided over six months ago, to come up with an estimate of 25 basis points for the difference in ROE between a BBB- and BBB+ rating. The Commission then takes this 25 basis point estimate – which has no support in the record in **this** case – and arbitrarily concludes that a 20 basis point upward adjustment to return on equity is necessary. There is no evidence that 25 basis points is a valid starting point, but even if there was such evidence, there is no evidence that 20 basis points (rather than 10 or 5) is a reasonable adjustment for AmerenUE.

4. The Commission makes a similar error when it guesses that the difference between using a quarterly Discounted Cash Flow (DCF) analysis and an annual DCF analysis would be five basis points for AmerenUE. The Commission noted at page 23 that AmerenUE witness Morin's estimate of 20 basis points was too high, and then guesses that the difference for AmerenUE is five basis points. Nothing in the Commission's decision reveals why the difference is as high as five basis points rather than one or two or even less.

5. The Commission erred in finding Staff witness Hill's return on equity recommendation not credible based solely on his result. Four witnesses provided ROE

recommendations: Mr. Hill at 9.5 percent, Ms. LaConte at 10.2 percent, Mr. Gorman at 10.2 percent, and Dr. Morin at 10.9 percent. The midpoint of the range, and the number supported by two of the four witnesses, is 10.2 percent. Mr. Hill's recommendation is 70 basis points below the midpoint, and Dr. Morin's is 70 basis points above it. It is arbitrary and capricious for the Commission to entirely disregard Mr. Hill's testimony on the basis of the results of his analysis. To do so is to pre-suppose that there must be a "right" ROE, and that Mr. Hill's recommendation is not credible because it is too far from the "right" answer. Such reasoning is circular: the Commission determined AmerenUE's ROE without reference to Mr. Hill's testimony, then concluded that his testimony was not credible because it did not match up with the Commission's determination.

6. The Commission erred in not adjusting AmerenUE's return on equity for the authorization of a fuel adjustment clause. A fuel adjustment clause (FAC) is just one aspect of a utility's business that makes up its risk profile. The Commission made an explicit adjustment to match AmerenUE's pre-FAC risk with the other companies in Mr. Gorman's proxy group. This adjustment (assuming it was properly calculated) would match AmerenUE's risk before being authorized to use a FAC with Mr. Gorman's proxy group. By authorizing a FAC, the Commission has significantly decreased AmerenUE's risk. Even AmerenUE witness Morin conceded the difference in risk amounted to about 25 basis points. The Commission acted arbitrarily and capriciously when it made an adjustment to align AmerenUE with the risk of Mr. Gorman's proxy group, then refused to recognize that its authorization of a FAC undid that alignment.

7. The Commission erred in establishing a "tracker" for vegetation management costs and infrastructure inspection costs to retroactively true-up past revenues and expenses, and in allowing recovery (through amortizations) of specific past expenses for these items. This is clearly unlawful retroactive ratemaking. The seminal UCCM[1] decision defines retroactive ratemaking as redetermining rates already established and paid:

> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n, 537 S.W.2d 655 (Mo. App. 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. See Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co., 284 U.S. 370, 389-90, 76 L. Ed. 348, 52 S. Ct. 183 (1932); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 70 L. Ed. 808, 46 S. Ct. 363 (1926); Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).

8. The fuel adjustment clause authorized by the Commission is unlawful and unreasonable in that it does not comply with Section 386.266.4(1) RSMo Cumm. Supp. 2006, which provides that the Commission may approve a FAC if it is "[r]easonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The statute does not specify "at least a fair return" or "no more than a fair return," and so must be interpreted to mean that a FAC must be designed to provide a fair return and no more than a fair return. The Commission's entire analysis is geared toward

[1] State ex rel. Utility Consumers Council, Inc. v. Public Service Com., 585 S.W.2d 41, 58 (Mo. 1979)

a determination that the FAC will allow **at least** a fair return, and the Commission completely ignores the fact that the FAC will likely provide **more than** a fair return. The Commission notes that AmerenUE's actual earned return on equity was 9.31 percent for the period of May 2007 through August 2008 as support for its position that AmerenUE cannot earn at least a fair return without a FAC, but it does not do any analysis to determine whether a FAC will provide a return on equity that is more than fair.

9. The Commission erred in determining that allowing 95 percent of changes in fuel and purchased power to flow through the FAC will provide a meaningful incentive to manage those costs. The Commission finds, on a similar issue, that "a prudence review is not a complete substitute for a good financial incentive" (Report and Order, page 40), but completely fails to cite any facts that would show that 5 percent of fuel and purchased power at risk is a "good financial incentive." The record reveals that members of AmerenUE management have significantly higher percentages at risk in order to provide incentive for good performance.

10. The Commission erred in rejecting the adjustment to depreciation rates proposed by Public Counsel witness Dunkel. No party disputes that the actual book reserve exceeds the theoretical reserve. Indeed, no party contested any aspect of Mr. Dunkel's calculation; the sole dispute is over whether rates should be changed in this case to correct this admitted imbalance. The only reason AmerenUE and the Staff gave for not changing rates in this case is that a full depreciation study might reveal changes that would offset the changes identified by Mr. Dunkel. The Commission accepts this rank speculation as the sole basis for its decision on this issue. The Commission's decision on this issue is arbitrary and capricious and against the weight of the evidence.

Although this issue is worth approximately $7 million on an annual basis, the Commission arbitrarily decides that it is not of sufficient magnitude to make an adjustment. (Report and Order, page 96). The Commission's nonchalance about the fact that the ratepayers it is supposed to be protecting have overpaid depreciation on just five accounts by a quarter of a billion dollars is astounding. Its failure to recognize that the overpayment growing by tens of millions of dollars every year is indeed drastic is equally astounding. This determination is in stark contrast to its characterization on page 14 of the capital structure issue that is worth approximately the same amount on an annual basis. The only difference is that one favors the utility and the other favors ratepayers.

The Commission completely mischaracterizes and misapplies the concept of "single-issue ratemaking." The undisputed evidence on this issue is that certain nuclear production accounts should be adjusted to keep ratepayers from continuing to overpay on those accounts. The undisputed evidence also shows that an adjustment of all accounts, based on the most recent data available, would significantly increase the adjustment rather than offset it. There is no competent evidence that any factors would offset the proposed adjustment. Unlike a case of single-issue ratemaking, this adjustment was proposed in direct testimony in a general rate case. No party, in two subsequent rounds of prefiled testimony and three weeks of live hearings, was able to adduce any evidence to counter that direct testimony. Under these circumstances, vaguely mentioning offsetting factors is not enough to invoke the specter of single-issue ratemaking.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its January 27, 2009 Report and Order.

Respectfully submitted,

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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 5th day of February 2009.

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