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**

REPLY TO UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI'S RESPONSE

COMES NOW the Office of the Public Counsel and for its Reply to Union Electric Company d/b/a Ameren Missouri's Response to Public Counsel's Motion to Conform Tariffs with Suspension and Motion for Expedited Treatment states as follows:

Introduction:

1. Union Electric Company d/b/a Ameren Missouri's (AMMO) response does not refute Public Counsel's assertion that the Commission must act because the Commission's records fail to indicate that the tariffs it approved on June 16 and 17, 2010 are now suspended. AMMO's response is designed to do two things: 1) to mischaracterize the Suspension Order[1]; and 2) to mislead the Commission about its proper course of action pursuant to the Suspension Order. The gist of AMMO's response is that it disagrees with the legal analysis underlying the Suspension Order, and that the consequences of having its increase suspended during the appeal process are unfavorable to AMMO. None of AMMO's arguments should persuade the Commission to ignore a valid order issued by a court with competent jurisdiction.

[1] The Cole County Circuit Court's December 20, 2010 *Order Granting Stay Pursuant to Section 386.520* is referred to herein as the "Suspension Order."

2. AMMO criticizes Public Counsel for concisely setting forth its request for relief, and then takes the opposite approach by filing a twenty-one page response that barely even mentions the Suspension Order. The single most important court decision affecting the Commission's course of action with respect to AMMO's tariffs – by a very large margin – is the Suspension Order. AMMO, to the extent it addresses the Suspension Order at all, suggests that the Commission can delay compliance for an extended period or ignore it altogether. Neither is a valid response.

AMMO's characterization of the Suspension Order is disingenuous, inaccurate and misleading.

3. AMMO attempts to portray the effect of the Suspension Order to be very different from what the order itself says. This attempt is patently transparent to anyone who has actually read the order, but Public Counsel will nonetheless respond. AMMO falsely claims that "the Order 'grants Movants' request to stay or suspend' the Commission's order in Case No. ER-2010-0036 – **nothing more and nothing less**." (AMMO Response, page 9; emphasis added.) If that was the Court's ruling, the Suspension Order would have been a lot shorter. AMMO is fully aware that the judge's intent, clearly explained in the Suspension Order, was to do something significantly different than simply grant Movants' request.

4. AMMO only cites to a part of a single sentence from the "Conclusion" section, and it does so in a way that is deliberately calculated to mislead. The sentence does not say, as AMMO asserts, that the Court GRANTS Movants' request to stay or suspend the operation of the PSC's order authorizing and approving AmerenUE's 2010 Rates *as to the Movants and only as to the Movants*. Instead it says: "**For the reasons stated above**, the Court GRANTS Movants' request to stay or **suspend the operation of the PSC's order** authorizing and approving AmerenUE's 2010 Rates." (emphasis added.) Nothing in the Suspension Order even

hints that it is intended to grant word-for-word the relief that Movants requested in the "Wherefore" clause of their motion and only that relief.

5. Nor is there any validity to AMMO's self-serving and unsupported assertion that "The only operative part of the Order is its Conclusion, found on page 50…." (AMMO Response, page 10) There is language throughout the Suspension Order that is operative, decretal, and explanatory. An earlier operative section makes even more clear than the sentence in the Conclusion exactly what the Court was granting and not granting:

> Accordingly, having found the predicate facts required by Section 386.520.1, and having considered all of the relevant factors before exercising the discretion that Section 386.520.1 grants, this Court hereby GRANTS Movants' request for a stay or (more properly) **suspension of that portion of the PSC's Report and Order dated May 28, 2010, that authorized AmerenUE's to file tariffs with rates sufficient to recover an approximate $226 million increase in annual revenues**. To be clear, the Court is not staying or suspending that portion of the PSC's Report and Order that rejected AmerenUE's July 24, 2009, tariffs that would have implemented a $400 million annual rate increase.

This statement is in form and substance decretal. Together with the sentence on page 50, it makes quite clear – even if one ignores the rest of the Suspension Order – that the Court suspended the Commission's order for all customers rather than relieving Movants of their responsibility to pay increased rates.

6. The Court made very clear that the statute (Section 386.520 RSMo 2000) allows the Court to act with respect to the Commission's order, not with respect to the Movants specifically. Indeed, the Court explicitly stated that it **could not lawfully do** what UE claims that it did:

> [T]he Court concludes that there is no word or phrase which reasonably can be construed to limit the application of the Court's stay or suspension of the operation of either (or both) of the PSC's orders in the May 28, 2010, Report and Order to Movants or any other subset of AmerenUE's customers.
> …

> The Court cannot simply decree a more limited effect in the present circumstances simply because the statute has no express provisions addressing these circumstances.
> …
> If the Court were to ignore this obvious conclusion and, instead, somehow divine the presence of such authority where it plainly has not been granted, the Court would be writing (or re-writing) the law, not applying it. (Suspension Order, pp 35-37).

7. Even though the portions that are decretal in form make clear both the Court's intent and the specific effect of the Suspension Order, the Commission should not and cannot ignore the rest of the Suspension Order. None of the cases that AMMO cites provide any authority for its proposition that the Commission should read part of one sentence in isolation and ignore the rest of the Suspension Order. AMMO relies on a series of inapposite cases in its attempt to convince the Commission to "pay no attention to the man behind the curtain" and instead focus on the illusion that AMMO attempts to create that the Suspension Order does what it plainly does not do. AMMO first cites Page v. Page[2] for the proposition that "the decretal/operative portion of an order is controlling and cannot be changed or diminished by findings or by a memorandum opinion, even though the latter be part of the same single document."[3] It does not stand for the proposition that the opinion cannot be read to inform the reader's understanding of the operative portion of an order. Rather it stands for the proposition that:

> Mere recitals are not indispensable parts of judgments. The judgment or decree does not reside in its recitals, but in the mandatory or decretal portion thereof, which adjudicates and determines the issues in the case and defines and settles the rights and interests of the parties as far as they relate to the subject matter of the controversy. * * * It has also been held that if there is an inconsistency between the recitals and the decretal part of a judgment, an express adjudication controls mere recitals.[4]

[2] Page v. Page, 516 S.W.2d 537 (Mo. App. 1974).
[3] *Ibid*., at 539.
[4] *Ibid*., at 540.

There is no inconsistency between the recitals and the decretal part of the Suspension Order, as there was in the judgment at issue in Page v. Page. The issue in that case was whether a statement in the body of the Final Divorce Decree had the force of an order. The Decree had seven paragraphs, and the seventh began with the language "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED." In the fifth paragraph, the court mentioned its expectation that the husband would pay off "the outstanding indebtedness of the parties." On appeal, the husband challenged the trial court's jurisdiction to order him to pay off the loans. The appeals court simply held that the language about paying off the loan was not part of what the trial court actually ordered in the "ORDERED" paragraph, so the trial court did not overstep its jurisdiction. The Suspension Order presents a very different picture than that presented to the appeals court in Page v. Page. First, the Suspension Order is not structured like the divorce decree, which apparently had six paragraphs of "recitals" or findings of fact and one that was decretal, while the Suspension Order is mostly conclusions of law and has at least two passages that are clearly decretal in form. Second, the Suspension Order does not have a clear demarcation between "recitals" and "decree" as the divorce decree apparently did. Finally and most important, the Suspension Order does not contain any "inconsistency between the recitals and the decretal part;"[5] the Suspension Order is consistent throughout.

8. Indeed, another of the cases cited by AMMO makes clear that the entire order **must** be examined. AMMO quotes one sentence from Westgrove:[6] "The legal principle is firmly established that the operative effect of an order lies in the order or decretal portion itself, rather

[5] *Ibid*.
[6] State ex rel. Missouri Highway and Transportation Comm'n v. Westgrove Corp., 306 S.W.3d 618, 623 (Mo. App. E.D. 2010)

than in any accompanying recitals, finding, memorandum or opinion."[7] But the Westgrove case goes on to state in that very same paragraph and relying on the same underlying case that: "**The order should be examined in its entirety**, with an eye to making sense of the language used."[8] Examining the Suspension Order in its entirety, especially including those portions cited in Public Counsel's February 16 motion, the Commission must conclude that the express language of the Suspension Order suspends AMMO's rate increase as to all customers.

9. AMMO (despite its blatantly inconsistent claim that only the language on page 50 controls) points to another passage in the Suspension Order that AMMO argues limits its applicability. AMMO notes that the Court was aware that "the conclusions reached by the Court may not have any immediate effect **outside the parties** before it – at least not until the Court's conclusions are affirmed or rejected by the appellate courts." (Suspension Order, page 47; emphasis added). AMMO suggests that this sentence limits the effect of the Suspension Order to the Movants. The Suspension Order makes clear that the judge was well aware of who the parties before the Court were, and who the Movants were. The parties include the Commission itself, AMMO and the Public Counsel, which represents the public in cases before the Commission and in the courts, as well as the Movants. There is no way to read the above-quoted statement as an indication that the Court meant its Suspension Order to apply only to Movants. The Court was simply recognizing the inherent limitation of a Circuit Court order: that it has no precedent and does not apply to other parties in other cases "– at least not until it is affirmed or rejected by the appellate courts."

[7] *Ibid*., at 623.
[8] *Ibid*.

The Commission has no discretion to choose its course of action under the Suspension Order.

10. Although the Suspension Order is an effective order issued by a court of competent jurisdiction, AMMO insists that if the Commission does not ignore it, the Commission will face a never-ending loop of applications for rehearing and overlapping appeals. This assertion is wholly without merit. When the Commission issues its order responding to the Court's Suspension Order, the Commission's order will not be subject to rehearing because the Commission has no choice but to conform the tariffs to the Suspension Order.

11. Under most circumstances, an order of a circuit court would simply refer a matter back to the Commission, and the Commission would have fairly broad discretion over what it might do to comply. If the Commission were to issue a new decision on the merits in response to a remand, then that new decision would require an application for rehearing before another appeal could be taken. But no party is suggesting that the Commission issue a new order on the merits in response to the Suspension Order. The current situation is most analogous to a remand under Section 386.510 with instructions to receive specific testimony. In such a situation, if the Commission accepts the testimony as instructed, there would be no opportunity to seek rehearing of the Commission's compliance with the Court's instruction, because the Commission would have simply performed as instructed by the court.

12. In this case, the Court has taken a course of action – clearly contemplated and authorized by Section 386.520 – that is different from a normal general remand under Section 386.510. Although the Court did not include specific instructions to the Commission in the Suspension Order, the effect of the Suspension Order is much more like an order giving specific instructions than it is like a general remand. The Commission has no discretion to take additional evidence on, for example, the effect of the suspension on AMMO's cash flow. It has

no discretion to disagree with the Suspension Order. It has a simple and nondiscretionary duty to conform its records – AMMO's tariffs – to the lawfully issued Suspension Order.

13. Not every order of the Commission subject to an application for rehearing.[9] It would be nonsensical to ask for rehearing of an order denying rehearing, for example. AMMO cites to no authority for the proposition that action of the Commission to change the designation of tariffs in response to the Suspension Order would be subject to rehearing. If, after the Commission conforms its records to the Suspension Order, AMMO believes that the Commission's action was not consistent with the Suspension Order, the proper course of action would not be rehearing by the Commission, but a petition for an extraordinary writ in an appellate court.[10]

14. AMMO also asks the Commission to consider the adequacy of the bonds posted with the Circuit Court. Like its unsupported assertion that a Commission action to reflect the actual status of AMMO's tariffs would be subject to rehearing and a new writ of review proceeding, AMMO fails to cite any authority for the proposition that the Commission can make its own independent assessment of the adequacy of the bonds that have been posted in accordance with the Suspension Order. Although the Suspension Order does indicate – in what truly is *dicta* – that AMMO might be able at some future date to present evidence about raising the bond, bond has been posted in the amount required by the Suspension Order and the rate

[9] City of Park Hills v. PSC, 26 S.W.3d 401 (Mo. Ct. App. 2000); State ex rel. Southwestern Bell Tel. Co. v. Public Service Com., 592 S.W.2d 184, 188 (Mo. Ct. App. 1979)
[10] See, *e.g.*, State ex rel. Office of the Public Counsel v. Public Service Commission, 266 S.W.3d 842 (Mo. banc 2008)

increase is therefore suspended. The Commission has no authority, and AMMO identifies none, to second-guess a superior tribunal of competent jurisdiction on the amount of the bond (or on any other ruling, for that matter).

15. AMMO, at pages 12-14, cites a series of cases that deal with the way appeals progress when no suspension has been issued. By definition, we are dealing here with an entirely different process. Thus AMMO's reliance on Anderson, Osage Water and GTE North[11] is misplaced. None of those cases address the effect of a suspension pursuant to Section 386.520 on rates during an appeal. Anderson does not even discuss a suspension or a stay. Osage Water, in fact, specifically notes that a suspension pursuant to Section 386.520 might have changed the Court's approach: "Section 386.520 provides a procedure for staying or suspending the operation of an order or decision of the PSC during judicial review. There is no indication of such a stay or suspension here."[12] And the extent of the discussion in GTE North is to note that the Commission itself cannot get a stay pursuant to Section 386.520 because it cannot post a bond and that stay or suspension was not sought by any other party to the case.[13] The bottom line, according to AMMO's inapposite and limited analysis, is that Section 386.520 is simply meaningless and a Commission order maintains its effect throughout the appeal process even if suspended or stayed. There is no principle of statutory construction that allows an entire statutory section to be ignored because one party does not like it.

[11] State ex rel. Anderson Motor Lines v. Pub. Serv. Comm'n, 134 S.W.2d 1069 (Mo. 1939), affd., 154 S.W.2d 777 (1977), Osage Water Co. v. City of Osage Beach, 58 S.W.3d 35, 43 (Mo. App. S.D.2001) and State ex rel. GTE North v. Pub. Serv. Comm'n, 835 S.W.2d 356, 368 (Mo. App.W.D. 1992).
[12] Osage Water, supra, at 43.
[13] GTE North, supra, at 367.

16. In an argument similar to the one it raises about the adequacy of the bond, AMMO argues (pages 17-20) that the Commission can independently assess the impact on AMMO's cash flow and presumably ignore the Suspension Order if the Commission finds a negative impact on AMMO.[14] The Commission must reject this argument just as it must reject the argument about the adequacy of the bond. The Commission has no authority, and AMMO identifies none, to second-guess a superior tribunal of competent jurisdiction on allegedly detrimental impacts of the superior tribunal's valid order.

17. In conclusion, nothing in AMMO's Response should give the Commission any reason to believe that it can ignore the Suspension Order. The Suspension Order became effective upon the posting of the bonds on February 15, and AMMO does not claim in its Response that the bonds do not comply with the Suspension Order. AMMO simply claims that the Suspension Order is – despite its clear language – severely limited, and that complying with it might be detrimental to AMMO. The Commission should not rely on AMMOs strained and self-serving arguments.

[14] AMMO also argues (at pages 16-17) that Public Counsel failed to comply with the rule regarding expedited treatment (4 CSR 240-2.080(16)(C)) because Public Counsel could have earlier advised the Commission of the course of action that Public Counsel might take if some other entities over which Public Counsel has no control took certain steps (the posting of the bonds). Other than to point out that nothing in the rule requires advance advisory filings about possible contingent future requests, Public Counsel will not respond to this absurd allegation.

WHEREFORE, Public Counsel respectfully requests that the Commission conform AmerenUE's tariffs to the "Order Granting Stay Pursuant to Section 386.520" issued by the Cole County Circuit Court on December 20, 2010, and that the Commission do so expeditiously.

Respectfully submitted,

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By:_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 7th day of March 2011.

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