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October 10, 2006

BY HAND DELIVERY

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Missouri Public Service Commission

Ms. Cully Dale
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor Office Building
200 Madison Street
Jefferson City, Missouri 65101

Re: Case No. ER-2007-0002

Dear Ms. Dale:

Attached for filing in the above-referenced case are an original and eight (8) copies of the Missouri Industrial Energy Consumers' Response in Opposition to AmerenUE's Motion for Any Necessary Leave to File Additional Testimony, For Any Necessary Waivers, and to Deny Pending Motions.

Thank you for your assistance in bringing this filing to the attention of the Commission, and please call me if you have any questions.

Very truly yours,

Diana Vuylsteke

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DMV:rms

Attachments (9)
cc: All Parties

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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

THE MISSOURI INDUSTRIAL ENERGY CONSUMERS' RESPONSE IN OPPOSITION TO AMERENUE'S MOTION FOR ANY NECESSARY LEAVE TO FILE ADDITIONAL TESTIMONY, FOR ANY NECESSARY WAIVERS, AND TO DENY PENDING MOTIONS

Comes now the Missouri Industrial Energy Consumers ("MIEC") and responds to Union Electric Company d/b/a AmerenUE's ("AmerenUE's") September 29, 2006, Motion for Any Necessary Leave to File Additional Testimony, For Any Necessary Waivers, and to Deny Pending Motions ("AmerenUE's Motion").

1. AmerenUE has failed to comply with the necessary procedural requirements to bring a successful motion for leave to file additional evidence regarding its fuel adjustment clause ("FAC"). There are numerous procedural reasons, rooted firmly in Missouri Statutes and the Code of State Regulations, why AmerenUE should not be granted leave to file belated tariffs and testimony to support its FAC proposal.

2. **AmerenUE Failed to Include Direct Testimony in the July FAC Proposal.** On July 7, 2006, AmerenUE brought a vague and incomplete FAC proposal that failed to include the necessary direct testimony or evidence to support its proposed FAC. Subsequently, on September 29, 2006, AmerenUE brought a motion asking for leave to file tariffs and testimony regarding the FAC proposal not included in its July 7 filing. Pursuant to 4 CSR 240-1.30(7)(A), AmerenUE was required to file testimony to support its case-in-chief filed in July.[1] Under 4 CSR 240-2.065(1),

[1] "Direct testimony shall include all testimony and exhibits asserting the explaining party's entire case-in-chief." Mo. Code Regs. Ann. Tit. 4 § 240-2.130(7)(A).

AmerenUE must submit direct testimony with the tariff when submitting a general rate increase request.[2] The Commission has determined that any public utility that submits a general rate increase request must submit direct testimony simultaneously with the tariff. *See* 2003 Mo. PSC LEXIS 815 (July 1, 2003, at *4) (noting that the direct testimony must be filed in compliance with 4 CSR 240-2.130). Since AmerenUE failed to file proposed FAC tariffs and evidence on July 7, its September 29 filing should not be permitted.

3. **AmerenUE Failed to Meet the Necessary Burden of Proof.** Missouri statutes require that AmerenUE show that its rate increase proposal is "just and reasonable."[3] Missouri law also mandates that in order for the Commission to make a decision, AmerenUE needs to provide notice which should "plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect."[4] AmerenUE failed to file any tariffs, direct testimony, evidence, or exhibits explaining the FAC in its July 2006 filing. Consequently, the parties are deprived of their opportunity to meaningfully respond to the FAC. AmerenUE should not be allowed to disregard the legal burden of proof that it was required to carry with its July, 2007 filing.

4. **AmerenUE Failed to Follow the Statutory Process and Timeline for Rate Cases.** Missouri Statute 386.266, also known as Senate Bill 179, requires that the Commission approve, modify, or reject adjustment mechanisms only after providing a full hearing in a general

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[2] "A tariff filed which proposes a general rate increase request shall also comply with the minimum filing requirements of these rules for general rate increase requests. Any public utility which submits a general rate increase request shall simultaneously submit its direct testimony with the tariff." Mo. Code Regs. Ann. Tit. 4 § 240-2.065(1).

[3] "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 gas corporation, electrical corporation, water corporation or sewer corporation . . ." Mo. Rev. Stat. § 393.150 (2006).

[4] Mo. Rev. Stat. § 393.140(11) (2006).

rate proceeding.[5] AmerenUE filed a pending rate case on July 7, 2006. Since AmerenUE proposed the FAC in the midst of a pending rate case, granting AmerenUE's Motion would effectively shorten the established 11 month suspension period and curtail the rate case process established by Missouri law with respect to the FAC proposal.[6] Granting AmerenUE's motion would undermine Missouri Statute 386.266 by reducing the time period and process for the Commission's evaluation of an FAC proposal required to be considered only as part of a full rate case.

5. **AmerenUE Cannot Lawfully File Tariffs Expanding Its Rate Request.** In July 2006, AmerenUE chose to utilize the "file and suspend" method of requesting a rate change. As discussed above, AmerenUE's tariff included no proposal or discussion regarding the FAC. Having submitted its general rate increase filing through the "file and suspend" method under Missouri Statute 393.150, AmerenUE cannot subsequently file new tariffs which are part of its case in chief. The Commission is without authority to set rates outside of the statutory parameters.

6. **AmerenUE Cannot File Tariffs Expanding Its Rate Request Because "Pancaking" of Rate Proposals is Improper.** By filing its expanded rate request, AmerenUE conducted "pancaking," or filing "one rate case on top of another." *See Pennwalt Corp. v. Pub. Serv. Comm'n,* 357 N.W.2d 715, 717 (Mich. Ct. App. 1984). Numerous courts discourage "pancaking"; in fact, Pennsylvania prohibits a public utility from filing multiple rate requests with the Commission.

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[5] "The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint." Mo. Rev. Stat. § 386.266(4) (2006).

[6] Most tariffs cannot become effective until 30 days after the tariffs are filed. *See* Mo. Rev. Stat. § 393.140(11) (2006). Then, the Commission may suspend a tariff for up to 120 days which, in turn, may be extended for another six months. *See* Mo. Rev. Stat. § 393.150 (2006). Therefore, the tariff is suspended for a period of 11 months under Missouri law. *See, e.g.*, 2006 Mo. PSC LEXIS 875 (July 2006, at *2) (discussing how Section 393.150 authorizes the Commission to suspend the date of a proposed tariff for AmerenUE for 120 days plus an additional six months to allow for a hearing).

See 66 Pa. Cons. Stat. § 1308(d.1) (2006);[7] *Masthope Rapids Prop. Owners Council v. Pa. Pub. Utility Comm'n,* 581 A.2d 994, 999 (Pa. Commw. Ct. 1990) (citing and discussing the anti-"pancaking" provision of the Pennsylvania Code). A number of states have policies against "pancaking", consistent with Missouri law's requirement that a utility must file tariffs and direct testimony as part of its case-in-chief. *See, e.g., Pennwalt Corp.,* 357 N.W. 2d at 718 (holding that in Michigan, the "Commission has held that since the legislature expressed a policy in that statute favoring timely action in rate cases, and since the practice of pancaking rate applications prolongs the final decisions in earlier applications, the practice is inconsistent with the timely disposition of rate cases. . . the Commission then has developed the anti-pancaking rule in order to avoid dealing with more than one application at a time"); *Northwestern Bell Tel. Co. v. Iowa State Commerce Corp.,* 359 N.W.2d 491, 495 (Iowa 1984) (holding that "the Commission's position is that the General Assembly prescribed a unified procedure in order to end pancaking and double rate proceedings, temporary and permanent"). Rate pancaking, which will result unless AmerenUE's Motion is denied, burdens the Commission and the parties, violates Missouri's statutory rate process, violates the Commission's rules, and violates notice and due process requirements.

WHEREFORE, for the reasons stated above, the MIEC respectfully requests that the Commission reject AmerenUE's Motion for any Necessary Leave to File Additional Testimony, for any Necessary Waivers, and to Deny Pending Motions.

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[7] Pennsylvania law prohibits multiple filings whereby "no public utility which has filed a general rate increase request pursuant to this section shall file an additional general rate increase request pursuant to this section for the same type of service until the commission has made a final decision and order on the prior general rate increase request or until the expiration of the maximum period of suspension of the prior general rate increase request pursuant to this section, whichever is earlier. *See* 66 Pa. Cons. Stat. § 1308(d.1) (2006).

Respectfully submitted,

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Attorney for The Missouri Industrial Energy Consumers

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been e-mailed this 10th day of October, 2006 to all parties on the Commission's service list in this case.

Diana Vuylsteke