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**

MOTION FOR SUMMARY DETERMINATION AND REQUEST FOR LEAVE AND WAIVER, OR, IN THE ALTERNATIVE, MOTION FOR DIRECTED VERDICT, AND MOTION FOR EXPEDITED TREATMENT

COMES NOW the Office of the Public Counsel and for its Motion for Summary Determination and Request for Leave and Waiver, or, in the Alternative, Motion for Directed Verdict, and Motion for Expedited Treatment states as follows:

Introduction:

1. This motion seeks summary disposition of AmerenUE's request for approval of its interim increase tariffs. Summary disposition is appropriate when there are no material facts in dispute and only legal issues need be addressed. It is also appropriate where the moving party is not entitled to relief even when viewing all facts in a light most favorable to the moving party.

Summary Disposition under Commission rule 4 CSR 240-2.117:

2. Commission rule 4 CSR 240-2.117, "Summary Disposition," establishes procedures for the Commission to decide cases or specific issues by summary determination under appropriate circumstances. The "Purpose" section of the rule states: "This rule provides for disposition of a contested case by disposition in the nature of summary judgment or judgment on the pleadings." Both summary judgment and judgment on the pleadings are addressed in the Rules of Civil Procedure, at 74.04 and 55.27, respectively. Because of the Commission's

practice of prefiling testimony, summary disposition in this case is necessarily more like summary judgment than judgment on the pleadings.[1] The Commission's Summary Disposition rule appears to embrace both summary judgment and judgment on the pleadings; subpart (1) of the rule, although titled "Summary Determination" rather than summary judgment, outlines a process very similar to that addressed by Rule 74.04 and subpart (2) outlines a process very similar to Rule 55.27.

3. Under 4 CSR 240-2.117(1), "any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination … at any time after the close of the intervention period." While there are two restrictions on the use of summary disposition that arguably apply to the current situation, both restrictions can and should be waived by the Commission.

4. First, the rule states that "a motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the commission." In this case, the Commission has set the hearing less than sixty days after the filing of direct testimony, and thus to comply with this restriction, a motion for summary determination would have had to have been filed before AmerenUE filed its direct testimony on October 20. In this case, the Commission should grant leave to file less than sixty days prior to the hearing. This motion was filed after AmerenUE filed a second round of direct testimony in order to allow AmerenUE a more than ample opportunity to make its case, but as soon after the filing of the second round as possible. The Commission's rules provide for such a filing with leave of the Commission and this is exactly the type of situation where leave is appropriate.

[1] Indeed, as discussed below, the most analogous procedure is probably a directed verdict, although such a procedure is not specifically discussed in the Commission's rules.

5. Second, the rule appears to restrict motions for summary disposition to cases that are not cases seeking a rate increase or which are subject to an operation of law date. As discussed in more detail below, Missouri strongly favors efficient and expeditious resolution of disputes, and it is hard to reconcile this policy with a restriction on the type of case that can be resolved summarily. Commission rule 4 CSR 240-2.015, Waiver of Rules, provides that: "A rule in this chapter may be waived by the commission for good cause." Public Counsel submits that good cause exists for the Commission to waive the case-type restriction and allow the efficient and expeditious resolution of this issue without the unnecessary, and resource- and time-consuming, procedural schedule and hearing.

6. Furthermore, it appears that the Commission adopted this restriction (upon the urging of Public Counsel) to protect consumers from utilities using the summary disposition rules tactically to the detriment of the public interest. Public Counsel's comments in the rulemaking procedure in which the summary disposition rules were adopted were characterized by the Commission as follows:

> By timing the filing of the motion, the utility can use the rule as a tactical weapon to overwhelm the opposition and limit the ability of the other parties to be heard. It shifts the burden of proof from the company to Public Counsel, Staff, and other parties to come forward with evidence on a very short time frame to demonstrate factual disputes. The proposed rule does not give a non-moving party a right to discovery, but rather requires a non-moving party to show good cause to delay the response to the motion for summary judgment and conduct discovery. The PSC must allow reasonable time for discovery for non-moving parties. Public Counsel suggests that if the Commission adopts a summary judgment rule that it exclude rate making and tariff filings or any changes in rates from the scope of the rule. This summary motion practice for most of the cases before this Commission works an unreasonable hardship on the ratepayers and is a fundamentally unfair and oppressive procedure. Public Counsel is concerned that this proposed rule will lead to an attempt to deprive ratepayers of its rights to full and fair hearings. Public Counsel also suggests that summary judgment be limited to a few purposes where a preliminary legal issue should be resolved prior to further action. It could be used to determine the legal scope of a proceeding or even if a proceeding is proper as a matter of law.

In the context of a utility filing a rate case and then quickly moving for summary determination, this restriction makes sense. A utility has complete access to its own data and can take the time it needs to marshal this data in support of a rate increase request. To require consumer representatives to respond to a motion for summary determination in a rate case in ten days (as the proposed rule required), would clearly be unreasonable. The same considerations do not apply where, as here, the utility has had not one but two opportunities to make its case for interim rate relief.

7. The standard for granting a motion for summary determination in 4 CSR 240-2.117(1) is:

> The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest.

8. The Commission's rule for summary disposition is intended to promote efficient and expeditious resolution of such matters as are amenable to such resolution. The Commission has previously recognized that "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest."[2]

9. The Commission should not consider itself required, no matter what, to hold an evidentiary hearing on the interim increase tariffs. By definition, a hearing is "required" in contested matters, but nonetheless courts routinely uphold decisions disposing of contested

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[2] Determination on the Pleadings, issued in Case No. EU-2005-0041 (In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases) on October 7, 2004;

matter on the basis of summary disposition. There is nothing inherently different about a contested case involving tariffs.

Material Facts:

10. 4 CSR 240.2-117 requires that a motion for summary determination state each material fact as to which there is no genuine issue. For purposes of this motion, Public Counsel sets forth the following assertions from AmerenUE's October 20 testimony filing. To the extent that the Commission denies this motion, or to the extent that such assertions are relevant to the issues in the general increase portion of this proceeding, Public Counsel does not concede that these assertions are accurate. But for the purposes of this motion, even if they are all accurate, AmerenUE's request for interim relief must fail. As discussed in more detail below and in the attached memorandum, these facts, even if true, do not justify the extraordinary step of increasing rates without a thorough examination of all relevant factors.

> 11. The Company is requesting that rates be approved that permit it to recover approximately $37.3 million of its total requested annual increase (which is approximately $402 million) in revenue requirement on an interim basis, subject to refund.
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> 12. This interim revenue requirement increase is calculated based only on the cost of net plant additions that have been placed in service from October 1, 2008 to May 30, 2009.
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> 13. The interim revenue requirement increase includes depreciation expense, income taxes, and return on the net plant additions.
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> 14. The depreciation rates and rate of return approved in the Commission's Report and Order in the Company's last rate case, Case No. ER-2008-0318, were used to calculate the interim revenue requirement.
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> 15. An interim rate increase based upon the costs of these capital additions will help mitigate regulatory lag.
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> 16. The Commission authorized returns on equity of 10.2% and 10.76% respectively, in the Company's last two rate cases.
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> 17. For the twenty-seven months from June 2007 through August 2009, the Company's average earned return on equity was 8.06 percent.
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> 18. In two of those twenty-seven months the Company's earned return on equity equaled or exceeded the allowed return on equity in effect at that time.
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> 19. The estimated value of the Taum Sauk Plant in the current rate case (Case No. ER-2010-0036) is $26.8 million per year.

20. The after tax impact of adjusting AmerenUE's operating income to reflect the value of Taum Sauk is an increase of approximately $16.5 million per year.

21. The perspectives of fixed income investors, banks, and credit rating agencies determine the Company's cost of debt, which in turn ultimately can impact the rates paid by customers.

22. Interim rates can improve cash flow, can enhance liquidity, can enhance key financial measures, and can be helpful in a qualitative assessment of credit quality.

23. To the extent regulatory lag-reducing measures are supported and/or implemented, this will enhance a creditor's view of the Company's legislative and regulatory environment.

24. If five regulatory factors are assigned certain subjective numerical rankings, Missouri will be ranked 47th, the third lowest, indicating that Missouri regulatory lag as measured by this exercise is greater than the lag present in all but two other states.

25. Regulatory lag is inherent in regulation and is currently preventing AmerenUE from recovering its cost of service and earning its authorized return.

26. Due to normalization there are almost always some differences between a utility's authorized and earned returns.

27. It can take approximately 11 months from the time a rate case is filed until the time rates are implemented.

28. Missouri statutes do not permit utilities to reflect construction work in progress in rate base.

29. Missouri has no mechanism to periodically adjust rates for changes in rate base for plant in service between rate cases.

30. AmerenUE will fail to recover approximately $75 million over the period from October 1, 2008 through September 30, 2009, associated with plant put in service in the period.

31. Some level of regulatory lag can be a good thing for customers and utilities.

32. Excessive regulatory lag creates significant financial challenges for utilities and creates a strong disincentive to make discretionary investments in a rising cost environment.

33. Regulatory lag focuses the attention of utilities on cost control.

34. Regulatory lag is a normal feature of utility regulation that occurs in every state.

35. The current regulatory framework and policies have been utilized in Missouri for decades.

36. The level of investment that is necessary is significantly higher than it was in the past.

37. We are not currently in a declining cost environment.

38. The recession has had many consequences, including a material increase in financing costs AmerenUE has seen over the last 12 months.

39. The approval of fuel adjustment clauses in Missouri helped to mitigate regulatory lag.

40. The fuel adjustment clause does nothing to mitigate the impact of increasing levels of other expenses and capital investment.

41. Utilities can benefit from regulatory lag when there is a declining cost environment.

42. Utilities can benefit from regulatory lag when the level of investment required in their energy infrastructure is declining.

43. AmerenUE has identified meaningful cost reductions and implemented some of them.

44. AmerenUE has reduced planned expenditures in 2009 to address regulatory lag.

45. AmerenUE has implemented a voluntary separation program to address regulatory lag.

46. Approval of interim rates in this case would be a small, but important step in the direction of removing current disincentives for investments.

A directed verdict is warranted:

47. The Commission's rules do not contain explicit procedures for requesting a directed verdict. Nonetheless, the Commission has used the "directed verdict standard" to analyze and grant a motion to dismiss after the utility has filed its case in chief:

> Public Counsel's motion contains two separate arguments. If either is found to be correct, Osage Water's tariffs should be rejected. First, Public Counsel argues that Osage Water has failed to present a prima facie case to justify its request to increase its water and sewer rates.
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> …
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> Section 393.150.2, RSMo 2000, 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 ... water corporation or sewer corporation." Commission rule 4 CSR 240-2.130(7)(A) provides that a party's prefiled direct testimony shall include "all testimony and exhibits asserting and explaining the party's entire case-in-chief." Therefore, if Osage Water's direct testimony fails to show that the increased rate that it proposes is just and reasonable, it has failed to meet its burden of proof. In essence, Public Counsel is asking for a directed verdict.
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> A directed verdict is not a summary disposition within the meaning of 4 CSR 240-2.117, and therefore that regulation does not preclude the Commission from considering Public Counsel's motion. In fact, the Commission does not have a specific procedural rule dealing with such a motion. A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden. In a civil court, a motion for directed verdict would be appropriate at the close of the case in chief of the party having the burden of proof. In a Commission case, direct testimony is prefiled and, in this case, has been before the Commission for months. 4 CSR 240-2.130(7)(A) requires that direct testimony include "all testimony and exhibits asserting and explaining that party's entire case-in chief." 4 CSR 240-2.130(8) provides that no party is permitted to supplement its prefiled direct testimony without leave of the Commission. Therefore, even though the hearing has not yet physically convened, Osage Water's case-in-chief has already been submitted to the Commission. Therefore, a motion for directed verdict is appropriate at this time.[3]

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[3] Case No. ST-2003-0562, In the Matter of Sewer and Water Tariff Filings Made by Osage Water Company, Order Regarding Motion to Dismiss and Reject Tariffs issued January 20, 2004, 12 Mo. P.S.C. 3d 343, 2004 Mo. PSC LEXIS 73

In that case, the Commission agreed with Public Counsel that Osage Water had failed to present sufficient evidence in its case in chief to carry its burden. In this case, AmerenUE has filed at least two pleadings and two rounds of testimony, and has had the opportunity to present oral argument in support of its interim increase request. A motion for directed verdict is therefore appropriate at this time.

48. The standard for granting a directed verdict is well established:

> Defendant's first point contends the trial court erred in denying defendant's motion for directed verdict. We address this point of error because defects in verdict directors are irrelevant if plaintiffs have not made a submissible case. Defendant argues plaintiffs failed to make a submissible case for numerous reasons. When the asserted error is failure to grant a directed verdict for the defendant, this Court examines the evidence presented at trial to determine whether plaintiff submitted substantial evidence that tends to prove the facts essential to plaintiff's claim. Schaffer v. Bess, 822 S.W.2d 871, 876 (Mo. App. 1991). In so doing, the evidence is viewed in the light most favorable to the plaintiff, affording the plaintiff all reasonable inferences from the evidence and disregarding defendant's evidence that contradicts the plaintiff's claims. *Id*. If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper. *Id*.[4]

49. In order to make a "submissible case" for interim relief, AmerenUE would have to: 1) present evidence that it meets the Commission's established standard for the grant of such relief; or 2) present evidence that would both provide the basis for creating a new standard and also present evidence that AmerenUE meets this new standard. AmerenUE has signally failed to make a submissible case under either of these.

50. At oral argument, AmerenUE conceded – not once, but at least twice – that it does not meet the emergency standard.[5] Also at oral argument, AmerenUE conceded that its current

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[4] Lasky v. Union Elec. Co., 936 S.W.2d 797, 801 (Mo. 1997)

[5] Transcript, Volume 2, pages 34 and 67.

rates are not so low as to be confiscatory.[6] In discussions at Agenda, at least one Commissioner expressed reservations about relying on the statements of AmerenUE's attorney about whether AmerenUE meets certain standards. But now AmerenUE has filed another round of testimony and has **still not even alleged** that it meets the emergency standard or confiscatory standard. AmerenUE has entirely failed to establish any of the following: 1) that AmerenUE meets the emergency or near emergency standard; 2) that AmerenUE's current rates are so low as to confiscatory; or 3) the parameters of any standard other than these two.

51. With respect to the last of these points – establishing a new standard – AmerenUE urges the Commission to create a new standard for evaluating interim increase requests based upon a finding of good cause. But despite two rounds of testimony, pleadings, and oral argument, AmerenUE has not been able to enunciate the parameters of this standard. As AmerenUE admitted at the oral argument:

> I'm not sure what good cause would be. I guess that would be up to the discretion of the Commission. I don't -- I don't have a good overall definition. I guess all I'm saying is I believe the circumstances here do constitute good cause where AmerenUE hasn't been able to earn its authorized return and where it's invested a lot of money in the system and not -- not been able to recover the cost.[7]

The situation that AmerenUE describes above is echoed in its testimony, and is exactly what any utility seeking a rate increase faces. By definition, a utility that has been earning or exceeding its authorized rate of return will not be seeking a rate increase. Utilities are constantly investing in their systems, and every utility that is before the Commission asking to increase rates believes that it is not meeting its authorized rate of return. These two factors do not create a standard for

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[6] Transcript, Volume 2, pages 68-69.

[7] Transcript, Volume 2, pages 42-43. Nothing in the prefiled testimony is any clearer about what the parameters of a so-called "good cause" standard would be.

the extraordinary step of granting of interim relief, although they may constitute grounds for an ordinary rate increase.

52. Granting an interim increase is an extraordinary action. Because it allows a utility to increase rates without the benefit of a full audit and examination, an interim increase should only be large enough to remedy whatever extraordinary circumstances gave rise to the grant of the interim increase. In the context of the emergency standard, the Commission has found that the interim increase should only be large enough to remedy the emergency situation. The vagueness of AmerenUE's proposed good cause standard precludes such relief. Because AmerenUE has not provided any evidence that would allow the Commission to establish the parameters of good cause, the Commission likewise has no way of knowing how much interim relief will be enough to adequately relieve the situation.

53. In other words, in its case in chief, AmerenUE has failed to prove (or even allege) that it meets the Commission's established "emergency or near-emergency" standard, failed to prove (or even allege) that it meets the "confiscatory" standard mentioned in the Laclede case,[8] and failed to present evidence that provides a basis for the establishment of a new standard.

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[8] The Court in Laclede discussed Laclede's contention that the Commission should have looked at whether Laclede's rates were so low as to be confiscatory. The Court found that the Commission was soundly within its discretion in evaluating the interim request with reference to the emergency standard rather than the confiscatory standard. The Court in Laclede explicitly rejected the notion that the Commission should – or even could – evaluate the interim request based upon the "just and reasonable" standard:

> In any event, it would be unreasonable to construe this statutory section [393.140(5)] as imposing a duty upon the Commission to set "just and reasonable rates" in a special hearing for the limited purpose of considering an interim increase, since the setting of fair rates is the purpose and subject of the full rate hearing. To construe § 393.140(5) as applicable here would make the hearing on interim rates coextensive with that on the permanent rates and would therefore in practical effect make accelerated action on interim rates impossible. (State ex rel. Laclede Gas Co. v. Public Service Com., 535 S.W.2d 561, 569 (Mo. Ct. App. 1976))

Even taking all of AmerenUE's filings as gospel, the Commission has no path forward based on AmerenUE's evidence to approve an interim increase.

Motion for Expedited Treatment:

54. Public Counsel requests expedited consideration of this motion pursuant to 4 CSR 240-2.080(16). Pursuant to that rule, Public Counsel requests that the Commission act as soon as possible, and no later than the Commission's November 25, 2009 Agenda. To this end, Public Counsel requests that the Commission order that responses under 4 CSR 240-2.117(1)(C) be filed as soon as possible, and no later than November 23. If the Commission grants this motion, parties with limited resources will be spared from having to devote unnecessary time and resources to proceed through the remainder of the procedural schedule established for the interim increase. The benefit that will accrue is that these parties will thus be free to turn their attention to other issues critical to the public interest. The harm that will be avoided is that, without expeditious action, parties will not be able to address issues critical to the public interest because of the time and effort required to proceed with further consideration of the interim increase request. This motion was filed as soon as possible after the filing of AmerenUE's second round of direct testimony on October 20, 2009.

WHEREFORE, Public Counsel respectfully requests that the Commission, giving due consideration to AmerenUE's prefiled testimony, other filings and argument, summarily reject AmerenUE's interim increase tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been emailed to parties of record this 28th day of October 2009.

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