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 RECONSIDERATION OF ORDER FURTHER SUSPENDING INTERIM RATE TARIFF AND SCHEDULING EVIDENTIARY HEARING, OR IN THE ALTERNATIVE, MOTION FOR CLARIFICATION

COMES NOW the Office of the Public Counsel and for its Motion for Reconsideration of Order Further Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing, or in the Alternative, Motion for Clarification states as follows:

Introduction:

1. This motion asks the Commission to reconsider[1] its decision to take additional evidence concerning AmerenUE's interim increase request rather than simply rejecting that request. The Commission should reconsider that decision because the process used to reach it was deeply flawed and because it is bad policy. In the alternative, Public Counsel asks the Commission to clarify the scope of the proceeding.

2. On July 24, 2009, AmerenUE filed, as part of its general rate increase request, a request for an interim rate increase. The interim rate increase request generally consisted of tariff sheets, testimony, and suggestions. Pursuant to a schedule established by the Commission, numerous parties filed numerous pleadings addressing the interim increase request and oral

[1] A request for reconsideration is authorized by 4 CSR 240-2.160(2).

argument was held September 14. Following the oral argument, the Commission discussed the interim increase request and the Commission's response at two open meetings.

The flawed process used to arrive at the decision:

3. At the Commission's September 22 Agenda meeting, the Commission took up and defeated (by a vote of 2-3) an "Order Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing." At the same meeting, the Commission discussed an "Order Rejecting Interim Rate Tariff" and determined that there were three Commissioners in favor of such an order. Rather than voting on the order at that point, the Commission laid the order over until the September 30 Agenda. The delay was supported by one Commissioner who noted "I'd like to tweak the language if I could."

4. Just prior to the September 30 Agenda, the Commission withdrew the "Order Rejecting Interim Rate Tariff," and there was no substantive discussion of the order at that meeting.

5. Just prior to the next public meeting, held on October 7, the Commission added the order that it ultimately voted out at the meeting, alleging good cause for adding it to the agenda with less than 24 hours notice. Chairman Clayton introduced the discussion on this case on October 7 by stating:

> There's been a great deal of discussion and dialogue on this among staff, or not the advocacy staff, but Mr. Reed and the judge have been involved in this. I think Commissioner Davis has had some concerns. We can certainly take up whatever you all want, but I guess it would be my intention that we move forward with the order suspending the interim tariff and setting the interim rate case for hearing along the guidelines that the judge has recommended.

Clearly, the decision to vote out the previously-rejected "Order Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing" rather than the previously-supported "Order Rejecting Interim Rate Tariff" was made before the October 7 public meeting began. There was no

substantive discussion in any open meeting between the September 22 meeting when the Commission voted down the "Order Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing" and determined that there were three votes in favor of the "Order Rejecting Interim Rate Tariff" and the October 7 meeting when the Commission voted in favor of the "Order Suspending Interim Rate Tariff and Scheduling Evidentiary Hearing"[2] and did not even consider the "Order Rejecting Interim Rate Tariff."

6. Regardless of the wisdom of the Commission's decision to suspend and give further consideration to the interim increase rather than reject it, a decision making process that leaves the public completely in the dark as to why three Commissioners reversed course on such a critical issue is a badly flawed process. In addition to the substantive problems with the decision discussed below, this behind-closed-doors decision making process leaves parties with little guidance as to what the Commission as a body is seeking to accomplish at the scheduled evidentiary hearing. One Commissioner opined in the September 22 public meeting that additional prefiled testimony and an evidentiary hearing might allow the Commission to establish what AmerenUE has not even alleged: that an emergency exists. Perhaps the three Commissioners that originally decided to reject the interim increase without a hearing have come around to that point of view. Or perhaps not; without further explanation from the Commission, there is no way to know and thus it will be difficult for the parties to effectively adduce evidence and make a compelling case.

[2] This is the exact same title as the order that the Commission voted down at the September 22 meeting. While there is no way to know whether the text of two the orders is the same, certainly the effect (suspending rather than rejecting the tariffs, and setting an evidentiary hearing) of the October 7 order is exactly what the Commission rejected on September 22.

The decision is against the public interest:

7. There is little disagreement among the parties as to the historical practice of the Commission in evaluating requests for interim relief. The Commission has for sixty years almost universally applied the "emergency or near emergency" standard. The **only** three possible exceptions noted are: 1) a 1997 Empire case in which the Commission referred to a good cause standard, but nonetheless concluded its analysis with reference to the utility's "financial integrity" and "its ability to render safe and adequate service" which are wholly consistent with the emergency or near emergency standard; 2) a case involving a very small sewer company in which the Commission analyzed the request in the context of a threat to the company's financial integrity and detriment to the company's operations; and 3) a request by an electric utility operating on the cooperative plan[3] in which the Commission analyzed the request with reference to the company's ability "to to provide safe, adequate and reliable service" and impairment of "its financial stability." Given that AmerenUE has not even alleged facts or circumstances that approach any of these limited exceptions, there is nothing to be gained by five rounds of prefiled testimony and a hearing – other than diverting the scarce resources of the Commission's Staff, Public Counsel and intervenors from activities in this and other cases that will help further the public interest. While such diversion clearly works to AmerenUE's

[3] Indeed, the Commission appears to have rested its decision largely on this organization:

> Because Citizens' organization is very similar to a rural electric cooperative, the Commission finds that it is differently situated than other electrical corporations regulated by the Commission. Therefore, the Commission concludes that it is appropriate to grant interim rate relief on a nonemergency standard in this instance….

advantage, it is hard to see how it serves the public interest. Certainly such diversion is inconsistent with the "Commission's principle purpose … to serve and protect ratepayers."[4]

8. The Commission's order gives no guidance to the parties about whether the purpose of the suspension and hearing is: 1) to allow AmerenUE a further opportunity to prove the existence of an emergency or near-emergency, and so require opponents to oppose on the basis of the established standard; or 2) to take evidence about the policy implications of adopting a new standard and what that standard should be. The general implication of the order appears to be the former, but it is far from clear. Neither of these two possibilities serve the public interest. If the Commission's intent is to maintain the emergency or near emergency standard, then the Commission should reconsider because there is no reason to proceed further in that AmerenUE has admitted that it does not deserve interim relief under that standard. If, on the other hand, the Commission's intent is to establish a new standard that focuses on a utility's profit margin rather than its ability to continue to provide safe and adequate service, then the Commission should reconsider because such an approach would be contrary to the public interest.

9. The Commission unfairly gives AmerenUE five opportunities[5] to prove its case. Regardless of why the three members of the Commission reversed course and ordered further proceedings, there is no reason to allow AmerenUE such a plethora of opportunities to make its

[4] State ex rel. Capital City Water Co. v. Public Service Commission, 850 S.W.2d 903, 911 (Mo. App. 1993).

[5] AmerenUE is allowed to: 1) file its direct case, which it has already done; 2) supplement its direct filing "if it so desires" on October 20 -- even though it never requested such an opportunity pursuant to 4 CSR 240-2.130(8); 3) file rebuttal testimony on November 17; 4) file surrebuttal testimony on November 24; and 5) offer "live" testimony at the December 7 hearing.

case. The Commission should reconsider and require AmerenUE to proceed on the basis of the direct case that it has already filed. It should not allow AmerenUE to supplement its direct case and then file two more rounds of prefiled testimony for a total of four rounds of prefiled testimony plus testimony at the hearing; such a process is patently unfair to the other parties.

10. The adoption of a vague, co-called "good cause" standard is against the public interest. As discussed above, it is unclear from the October 7 order the extent to which the Commission is entertaining the application of the so-called "good cause" standard to AmerenUE's request for an interim increase, but it appears that the Commission may be considering it. In Missouri, the "good cause" standard is generally used to determine whether certain procedural requirements may be waived in order to avoid or remedy manifest injustice. Examples include whether good cause exists to set aside a default judgment, or whether good cause exists to allow an appeal filed out of time, or whether good cause exists for failure to timely provide child support payments, or whether good cause existed for an employee to terminate employment. In the last of these, courts have held that "An essential element of good cause to quit is good faith and the standard by which good cause is measured is one of reasonableness as applied to the average man or woman." (Central Missouri Paving Co. v. Labor & Industrial Relations Com., 575 S.W.2d 889, 892 (Mo. Ct. App. 1978)) The question of granting or not granting a rate increase simply cannot be resolved with reference to "good faith" and "reasonable man" standards. It is undisputed that AmerenUE, as a profit-driven entity, has a good faith belief that it should be able to quickly increase its profits, and this is a reasonable action for the average profit-driven entity to take. But these are entirely subjective judgments; the Commission's decision should be based on objective judgments like the utility's ability to continue providing safe and adequate service and the utility's continued financial stability. An

assessment of "good cause" is not used as the standard on which to determine the ultimate merits of a suit, and the Commission should not use it to evaluate AmerenUE's request for an interim rate increase.

The October 7 order should be clarified if it is not reconsidered:

11. In the event the Commission declines to reconsider its October 7 order, Public Counsel requests clarification of the scope of proceedings. Specifically, Public Counsel requests clarification of the following questions: Does the Commission intend to consider, in its evaluation of AmerenUE's interim increase tariff, an alternative to the emergency or near emergency standard? If so, does the Commission intend to develop such new standard and apply it to the evidence in this case without affording the parties eh opportunity to adduce evidence knowing the applicable standard? If the Commission adopts a good cause standard, and applies it in this case, how will the Commission determine the amount of the interim increase? AmerenUE has proposed an entirely arbitrary amount that is based upon some gross plant expenditures (without considering offsets such as depreciation); without knowing the standard, how will parties present evidence that a lower level of interim increase is sufficient to meet the standard? Will the Commission's new standard include consideration of the nature of expenditures, or just the amount of the alleged lessened profit margin? Should the parties put on evidence showing that the level of expenditures for which AmerenUE seeks expedited recovery is comparable to the level of similar expenditures other utilities? Or that the level of profitability is comparable to other utilities in this time period? Who bears the burden of proof on such issues?

WHEREFORE, Public Counsel respectfully requests that the Commission reconsider and reverse its October 7 Order or in the alternative clarify that order.

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 19th day of October 2009.

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