

**In the Matter of Union Electric Company, d/b/a
AmerenUE's Tariffs to Increase Its Annual
Revenues for Electric Service.**)
)
) **File No. ER-2010-0036**

COMES NOW Kansas City Power & Light Company (“KCP&L”), and pursuant to the Procedural Schedule submits its post-hearing brief. KCP&L’s brief will address the key questions found in the List of Issues filed by Staff on December 1, 2009. KCP&L’s brief does not necessarily follow the order of Staff’s List of Issues nor does it address overlapping issues found in the List of Issues.

As the Commission recognized in its November 23, 2009 Order Denying Motion for Summary Determination and Motion for Directed Verdict, the Commission has “broad discretion” to determine whether an interim rate adjustment should be granted. In the November 23, 2009 Order the Commission correctly interpreted the Laclede¹ case by stating that the decision does not limit the Commission’s “broad discretion” by requiring the use of an emergency standard when considering an interim rate adjustment.

¹ State ex rel Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561(Mo. App. KC Dist. 1976).

questions that there is no authority that requires the Commission to use the emergency standard or that prohibits the Commission from using some other standard. Tr. 229, lines 12-17; Tr. 235-236; lines 23-25, 1.

Despite acknowledging that the Commission has the broad discretion to authorize interim rates, Staff tries to limit the Commission's ability to grant interim rates by arguing that an interim rate cannot be a just and reasonable rate because it is not granted after consideration of "all relevant factors". Tr. 224, lines 6-15. The Laclede case recognized that it would be unreasonable to construe the Commission's duty to set "just and reasonable rates" as applicable to a special hearing for the limited purpose of considering an interim rate increase since the setting of fair rates is the purpose and subject of a permanent rate hearing. Laclede at 569. In addition, should the Commission adopt Staff's reasoning, then as a practical matter, interim rates would never be authorized since the "all relevant factors" test could never be met in an accelerated interim rate proceeding. Because the Commission will look at "all relevant factors" in AmerenUE's permanent rate case, Staff's argument should be rejected.

II. The Commission Has the Discretion to Authorize Interim Rates.

As shown above, the Commission has broad discretion in deciding interim rate cases. The Commission, at the December 7 hearing, expressed interest as to what standard it should apply when exercising that discretion. KCP&L agrees with AmerenUE that there is no "one-size-fits-all" standard that can or should be developed. Rather, the decision is committed to the Commission's sound discretion. The Commission already exercises its discretion in many other types of cases.

Of course, the Commission's discretion is not without limits. The reasonableness of a Commission decision depends on whether the order is supported by competent and substantial

evidence, whether the decision is arbitrary, capricious or unreasonable or whether the Commission abused its discretion. State ex rel. Missouri Gas Energy v. Public Service Com'n, 186 S.W.3d 376, 382 (Mo.App.W.D. 2005). The lawfulness of a Commission decision depends on whether the decision is supported by statutory or other applicable legal authority. Id.

As the Commission has already recognized, it has the legal authority under Laclede to grant interim rate increases in the absence of an emergency. In addition, the Laclede court recognized that the Commission has a large area of discretion in the exercise of its powers under §386.430 and §386.270 RSMo. Laclede at 568. Thus, a reviewing court is unlikely to hold that the Commission acted unlawfully by approving AmerenUE's interim rate request.

Staff and other parties argue that since the Commission's granting of interim rates outside of an emergency situation has not been tested by the courts, the only safe way for the Commission to proceed is to stick with its emergency standard. This argument ignores the broad authority granted to the Commission to deal with the "practical requirements of utility regulation." Laclede at 567. These practical requirements are in part based on the ever changing economic realities faced by the Commission and the utilities it regulates. The Commission should adapt its ratemaking tools to reflect current realities and should not refuse to take an approach solely because it has never been litigated before.

III. A Decision to Grant Interim Rates Is Reasonable and Appropriate.

Like AmerenUE, KCP&L is concerned about excessive regulatory lag inhibiting utility investment in Missouri. Excessive regulatory lag impacts a utility's cash flows and prevents recovery of the cost of equity by preventing a utility from having a reasonable opportunity to earn a fair return on its investment.

AmerenUE has presented uncontroverted evidence that it has chronically been unable to earn anywhere close to its Commission authorized return on equity over the past several years despite two recent rate increases since 2007. No party has denied that the rate base investments upon which the amount of the interim rate increase is based are prudent and relate to improving reliability. Ameren UE has presented uncontroverted evidence that it has substantial negative free cash flows and is investing in its system at a rate that is substantially in excess of its depreciation expense, necessitating borrowing to fund the investments and the curtailment of worthwhile projects.² AmerenUE's evidence shows that the granting of its interim rate request would be an important, positive step towards enhancing its credit quality and mitigating excessive regulatory lag.³

The Commission's use of this evidence to grant AmerenUE's interim rate request would meet the reasonableness test in the Missouri Gas Energy decision cited above. The Commission's decision to grant interim rates based on the above evidence would not be arbitrary or capricious because the interim rates would help to lessen the excessive regulatory lag which AmerenUE demonstrated and encourage investment in electric infrastructure.

A decision granting interim rates would not be an abuse of the Commission's discretion. An abuse of discretion would only occur if the Commission's decision is "clearly against the logic of circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Richardson v. State Hwy. & Transp. Com'n, 863 S.W. 2d. 876, 881 (Mo. banc 1993). A reviewing court is unlikely to find that the Commission's act as untenable or arbitrary since the same court has recognized that the Commission has discretion

² See generally the Direct and Rebuttal testimony on Interim Rates of Gary S. Weiss and the Direct Testimony on Interim Rates of Warner L. Baxter.

³ See Baxter Surrebuttal testimony on Interim Rates, p. 9; Tr. 415-416; 421-422; 457.

to grant interim rates. The decision would not defy reason as the Commission held a hearing and carefully considered the evidence of AmerenUE's underearnings and the policy considerations surrounding the curtailment of excessive regulatory lag. If reasonable people can differ about the propriety of the Commission's interim rate decision, then the Commission cannot be said to have abused its discretion. Id. The decision would not work an injustice because the interim rates would be subject to refund with interest.

KCP&L believes that the needs of Missouri's electric infrastructure investment, such as transmission investment to integrate renewable sources of energy into the grid and investment in smart grid technology, are substantial. If electric utilities can't timely recover their cost of service, including a reasonable opportunity to earn a fair return on their infrastructure investment, these important investments may be deferred or never made. Since the circumstances encountered by AmerenUE warrant the Commission authorizing interim rate relief, KCP&L supports AmerenUE's request.

/s/ Roger W. Steiner

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was e-mailed on this 21st day of December, 2009, to the persons on the Commission's service list in this case.

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