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

DISSENTING OPINION OF
COMMISSIONER TERRY M. JARRETT

Because I believe that this Commission should follow its rules, I dissent from the grants of intervention discussed below.

PROCEDURAL HISTORY

The Missouri Public Service Commission ("PSC") received thirteen timely applications to intervene in this matter.[1] The majority of the Commission voted to grant the applications to intervene of The Consumers Council of Missouri ("Consumers Council" or "CCM"), AARP, Missouri-ACORN ("MO-ACORN"), Natural Resources Defense Council ("NRDC"), Missouri Retailers Association ("Missouri Retailers" or "MRA"), and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC"). In my opinion, none of these applications complied with the Commission's rules.

The applications of MO-ACORN and MJMEUC's both received responses. AmerenUE filed a response to MO-ACORN's application to intervene wherein AmerenUE alleged that MO-ACORN failed to comply with the Commission's rules in making its Application, and alleged that MO-ACORN had engaged in conduct that

[1] On August 17, 2009 the Commission granted intervention to The Missouri Energy Group; *See Order Granting the Application to Intervene of The Missouri Energy Group*.

violates Commission rules, specifically, 4 CSR 240-2.075(3).[2] MO-ACORN in response raised questions about the constitutionality of the Commission's rules.

AmerenUE also filed a response to the application to intervene of MJMEUC, raising the issue of the Commission's jurisdiction. AmerenUE alleged MJMEUC serves wholesale customers of AmerenUE, and that MJMEUC's members take transmission from the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO" or "MISO"). AmerenUE argues that these two areas are regulated exclusively by the Federal Energy Regulatory Commission ("FERC"). MJMEUC responded by stating that transmission and distribution are within this Commission's jurisdiction and directly relate to delivery of safe and reliable service to MJMEUC's members, showing their interest in this case. AmerenUE renewed its opposition to a grant of intervention by filing a response.

During the public agenda meeting on August 26, 2009, the Commission considered and discussed twelve applications to intervene. The Commission subsequently granted the intervention of five of the twelve applicants, leaving seven applications for future consideration.[3] On September 2, 2009, the remaining seven applications came before the Commission. The application to intervene of the IBEW was granted by a 5 – 0 vote of the Commission. As to the remaining six applications, Commissioners Clayton, Davis, Gunn and Kenney voted in favor of granting the

[2] AmerenUE has raised serious allegations concerning the actions of MO-ACORN with regard to this case. Absent a hearing, which has not been set regarding these allegations and which would allow for the admission of evidence, this Commission should not at this time make any findings as to the claims asserted by AmerenUE regarding MO-ACORN.

[3] On August 26, 2009 the Commission granted intervention to three additional applicants. *See Order Granting the Application to Intervene of Laclede Gas Company, Order Granting the Application to Intervene of Charter Communications, Inc., Order Granting the Application to Intervene of The Missouri Industrial Energy Consumers*. On August 28, 2009 the Commission granted intervention to two additional applicants. *See Order Granting the Application to Intervene of Missouri Department of Natural Resources, and Order Granting the Application to Intervene of The Midwest Energy User's Association*.

applications. I voted nay to granting the six remaining applications for reasons which I will more fully set out below; specifically, these six applications did not comply with Commission rules nor did the applicants seek a waiver from rule compliance.

The majority has not only disregarded existing Commission rules[4], but also has engaged in improper making of special rules for select persons and entities.[5] For this reason I dissent from the Commission's Orders Granting Intervention to Consumers Council, AARP, MO-ACORN, NRDC, Missouri Retailers Association, and MJMEUC. In my view, the Orders in effect represent an unlawful act of an administrative body, are arbitrary and capricious, and as improper rulemaking are void.

THE LAW AND THE RULES

This Commission has promulgated rules which control Applications to Intervene,[6] as well as rules regarding Waiver of Rules.[7] Once properly promulgated by an administrative agency under properly delegated authority, a rule has the force and effect of law.[8] **Simply put, Commission rules are law**.

Considering an application to intervene, the Commission *must* determine whether the applicant has complied with all of the applicable Commission rules: 4 CSR 240-2.060 setting forth the process for making an Application at the Commission, and 4 CSR 240-2.075 setting forth the application procedures for an individual or entity to intervene in a case; or to file a brief as *amicus curiae* for those not intervening, and who are not parties

[4] Under 4 CSR 240-2.075(4)(A) in determining whether the applicant's interest is different from the general public interest it appears necessary to understand what interest is being represented by the Office of The Public Counsel ("OPC"). Absent an order directing the OPC to show cause as to what segment of the public interest it is representing, the intervention applicants may not meet the standards set out in 4 CSR 240-2.075(4)(A).
[5] These new special rules relate to applications, intervention, and waiver of Commission rules.
[6] 4 CSR 240-2.075; *see also*, 4 CSR 240-2.060 regarding Applications.
[7] 4 CSR 240-2.015; *describing* Waiver of Chapter Two rules.
[8] *Psychare Management*, 980 S.W.2d 311, 313-314 (Mo. banc 1998); *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005).

to the case.[9,10] Applicants may also seek a waiver of any of the Commission's intervention or application rules,[11] under 4 CSR 240-2.015(1), by showing "good cause"[12]. If the application does not comply with the rules, no waiver from any rule has been sought *by the applicant*, and no waiver is granted for "good cause", then the Commission must deny the application. ***To do otherwise is an unlawful act.***[13]

THE APPLICATIONS TO INTERVENE

In considering an application to intervene the Commission must determine that each element of the Commission's rules has been met[14]. 4 CSR 240-2.075(1) provides that "[A]n application to intervene **shall** comply with these rules …" (emphasis added) making clear that absent a waiver,[15] compliance is not discretionary, but mandatory. So, before the Commission can move to the Commission's waiver provision, 4 CSR 240-

[9] The Commission rules provide two very distinct methods for advocates to address this Commission; intervention and as *amicus curiae*. Beyond these two methods, the Commission holds public hearings in contested rate cases, which provide a forum for non-represented persons to provide feedback to the Commission. Missouri law and Commission rules limit the content of communication with the Commission as well as when that communication may occur and by whom. And while the law and rules do permit the free flow of information and exchange of ideas at the Commission, there are limitations which ensure transparency during Commission cases.

[10] Intervention provides advocates access to participation in a case by affording them an opportunity to offer testimony, evidence and cross examine witnesses as compared to the filing of *amicus curiae* briefs which allow for argument and advocacy based upon the record of the case by "non-parties". 4 CSR 240-2.075(6).

[11] The burden of meeting the intervention standards lie squarely on the applicant. *See generally Augspurger v. MFA Oil Co.,* 940 S.W.2d 934, 937 (MO. App. W.D. 1997).

[12] 4 CSR 240-2.015(1); "A rule in this chapter may be waived by the commission for good cause."

[13] Denial of an application to intervene would not leave interested persons without an advocate's voice before the Commission because public hearings as well as *amicus curiae* briefs are also available. Multiple avenues exist for comment; for example, persons can file a complaint or comments with the Commission or call the Commission's Consumer Services Department. Additionally, persons can lodge comments or complaints with the Office of the Public Counsel, or participate in Commission scheduled local public hearings.

[14] These rules include 4 CSR 240-2.060 Applications, 4 CSR 240-2.075 Intervention, and 4 CSR 240-2.080 Pleadings, Filing and Service. Nothing in 4 CSR 240-2.075 excuses an Applicant seeking intervention from compliance with any Chapter Two rules. To the extent a particular rule does not squarely fit a particular applicant; the applicant is free to plead as to its reason for non-compliance; *See* 4 CSR 240-2.015(1).

[15] 4 CSR 240-2.060(4) sets forth that additional information is required when seeking a waiver under 4 CSR 240-2.060(1). As no applicant considered here sought a waiver from Commission rules, no "additional information" was supplied.

2.015(1), the Commission must first find that the rules set forth in 4 CSR 240-2.060[16] and 4 CSR 240-2.075[17] have been met.

WAIVER FOR "GOOD CAUSE"

After making these findings the Commission must then move on to rule on any application for waiver including whether "good cause" exists.[18] Even a deficient application to intervene can be granted by the Commission if a waiver is requested and the waiver standard of "good cause" is met. While no words in 4 CSR 240-2.015(1) set forth *who* is responsible for making the showing of "good cause" to the Commission for waiver, the burden to establish that an applicant has met the Commission's requirements for intervention are squarely on the applicant[19] and therefore, if an applicant cannot meet those requirements, the burden rests with the applicant to seek relief through the waiver rule.[20]

Although the term "good cause" is frequently used in the law,[21] the Commission's rule does not define it.[22] Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given "must be real not imaginary, substantial not

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[16] Applications.
[17] Intervention.
[18] Waiver of Rules.
[19] *See*, e.g., *Augspurger v. MFA Oil Co.*, 940 S.W.2d 934, 937 (Mo. App. W.D. 1997) (discussing the corollary intervention rules contained in the Missouri Rules of Civil Procedure).
[20] 4 CSR 240-2.015(1).
[21] *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).
[22] It is appropriate to resort to the dictionary to determine its ordinary meaning. *See State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute). Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *Black's Law Dictionary,* 692 (6th ed. 1990); similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties." *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See, e.g., Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

trifling, and reasonable not whimsical."[23] And some *legitimate factual showing is required*, *not just the mere conclusion of a party or his attorney*.[24] By the Commission on its own initiative proffering facts and evidence upon which to reach its findings and ultimately its conclusion outside of the hearing process, and where no other party is permitted to participate, creates a new Commission rule for intervention in violation of Chapter 536, RSMo., and runs squarely afoul of the rights afforded through due process. One party filed responses to at least two different applications to intervene. Those responses do not in any way address any fact that the majority raised outside the hearing process during the Commission's agenda discussion of the applications to intervene, or the resulting orders in this case. The majority's orders rely on facts not alleged in the applications or responses.

The majority chose to act in an arbitrary and capricious manner and chose to rationalize that action by suggesting that it would better promote transparency and create a more open and full adversarial process which will keep the case moving forward in a timely manner. These goals are not the purpose of intervention. The majority's approach ignores the Commission's rules and the protections of due process which are embedded in promulgated rules.

COMMISSIONERS ACTING ON BEHALF OF THE APPLICANTS

Commission rules provide the authority for the Commission to waive its own rules when an applicant seeks a waiver. But, the Commission does not have the authority on its own initiative to waive its rules. The Commission runs the risk of improper

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[23] *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

[24] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

rulemaking including the attendant violations of due process which accompany that action. **The circumstance before the Commission is whether (1) when examining deficient applications to intervene under rules 4 CSR 240-2.060 and 4 CSR 240-2.075, (2) the Commission can reach 4 CSR 240-2.015(1) (the waiver provision), and (3) ultimately grant a waiver of Commission rules**[25] ***without acting as an independent advocate for an interested person*** **seeking to become a party to a case.**[26] In this case, that is exactly what the majority has done by raising a motion to waive commission rules under 4 CSR 240-2.015(1) on its own initiative. This action is tantamount to acting for the applicants in this case and unnecessarily subjects the majority's impartiality to question. Further, the Commission waiver rule applies to any rule in Chapter 2 – so if Commissioners advocate for interested persons (or parties in cases), such unfettered discretion could have sweeping ramifications in Commission practice and procedure.

Even assuming, for the sake of argument, that any Commissioner could act for interested persons (or parties) in a contested case, waiver is still permissible only upon a showing of "good cause" and due process afforded to parties affected by the motion to waive the rules.

The majority could have taken a different path here, one which it has taken many times before, by issuing a notice of deficiency to the applicants giving them the opportunity to cure the deficiencies, or to seek a waiver.[27] This procedure allows the applicants to advance their position while also following the rules. Instead, the majority has acted for the applicants by acknowledging that failure to follow Commission rules is

[25] Assuming the Commission can find the "good cause" threshold met after it reaches 4 CSR 240-2.015(1).
[26] It should be noted that all of the Applicants are represented by legal counsel.
[27] The Commission by waiving rules on its own motion may have created its own conundrum if one of the intervention applicants moves for withdrawal.

acceptable (4 CSR 240-2.060, 4 CSR 240-2.075), and that a waiver of Commission rules under 4 CSR 240-2.015(1) can be advanced, argued and granted by the majority on its own initiative where the application provides no request or factual support for a waiver or for the granting of the application under the rules.

Beyond the majority's action in contravention of its rules, the Commission also indirectly has taken on the question of the constitutionality of Commission rules despite its lack of authority to do so.[28] "Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments [and] [r]aising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide."[29] Accordingly, the Commission must "presume [a] statute is constitutional and has no power to declare it otherwise."[30] Nevertheless, since "it is the duty of courts of competent jurisdiction to review justiciable constitutional claims put before them,"[31] the Commission "may hear evidence from [the parties] to develop a factual record in which the constitutionality of the statute[s] may be determined later, in the proper forum."[32] No authority provides otherwise for regulations. With regard to at least one application to intervene,[33] the Commission did not merely create evidence for the purpose of developing a record outside the hearing process on a constitutional

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[28] *See Order Granting Application to Intervene of Missouri-Acorn* ("Requiring such a membership organization to provide a list of its members ***would be unduly burdensome***, and could unconstitutionally chill the first amendment rights of its members.")(Emphasis added).

[29] *Duncan v. Missouri Bd. for Architects, Professional Engineers & Land Surveyors*, 744 S.W.2d 524, 531 (Mo. App. E.D. 1988) (citing *Joplin v. Indus. Comm'n of Missouri*, 329 S.W.2d 687, 689 (Mo. banc 1959)). *See also State ex rel. Kansas City Terminal Ry. v. Public Serv. Comm'n,* 272 S.W. 957, 960 (Mo. 1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); *State ex rel. Missouri Southern R.R. v. Public Serv. Comm'n,* 168 S.W. 1156, 1164 (Mo. banc 1914) (Public Service Commission has no power to declare statutes unconstitutional).

[30] *Missouri Bluffs Golf Joint Venture v. St. Charles County Bd. of Equalization*, 943 S.W.2d 752, 755 (Mo. App. E.D. 1997).

[31] *Fayne v. Dept. of Social Services*, 802 S.W.2d 565, 567 (Mo. App. W.D. 1991) (*citing State ex rel. Hughes v. Southwestern Bell Tel. Co.*, 179 S.W.2d 77, 81 (Mo. 1944)).

[32] *Missouri Bluffs*, 943 S.W.2d at 755; in the case at hand, the proper forum would be the circuit court.

[33] *See Application to Intervene of Missouri-Acorn*.

question; it actually rested a portion of its Order on constitutional grounds, which is beyond the scope of this agency's jurisdiction.[34]

A complete and comprehensive review of the applications to intervene, as well as the Commission's orders granting intervention, reveal how the majority has ignored this Commission's rules. The majority also sought comfort and refuge in the notion that many of the applicants for intervention have sought intervention in prior cases and been granted intervention. An administrative agency is not bound by *stare decisis*, nor are agency decisions binding precedent on the Missouri courts.[35] *Stare decisis* does not apply here and an applicant's prior intervention in Commission proceedings does not support intervention under 4 CSR 240-2.075(1)-(6). The majority also advanced as a rationale for ignoring its rules, that the element of time and moving the process forward were considerations in granting intervention, elements not enumerated under the rules. The Commission's rules represent the protections of due process to parties and other interested persons. The time rationale overlooks the fact that the Commission has influence over its calendar and timing with regard to a case. If there is a concern about timing, the appropriate course of action is to amend the case procedural schedule, not to

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[34] *Id.* at FN.[26]

[35] *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue,* 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue,* 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue,* 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue,* 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n,* 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

ignore the Commission rules. Besides, late intervention is frequently granted in Commission cases, which further illustrates that the timing argument is not persuasive.

(1) Application to Intervene by the Consumer's Council of Missouri and Order Granting the Application to Intervene of the Consumers Council of Missouri

Section 4 CSR 240-2.060(1) – (6) governing applications also apply to an Application to Intervene under 4 CSR 240-2.075(1)[36]. Here, the Consumer's Council of Missouri failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically the Council has omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

Even though the application is deficient, the rules have leniency built in. Deficiencies can be cured if they are made prior to the granting of the authority sought in the application. Moreover, the Council could have sought a waiver pursuant to 4 CSR 240-2.015(1), which it did not. Each of these items represents a failure to comply with Commission rules and as such, fail to provide the Commission with an application that is satisfactory, and warranting denial.

The Council further fails to meet the requirements of 4 CSR 240-2.075(4)(A) and (B), in that paragraph 3 of the Council's application states that its interest is "different from the general public interest," which is nothing more then a conclusory statement

[36] The purpose of Section 4 CSR 240-2.060 is stated as "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule".

unsupported by any allegation of fact. Accordingly, the Council's efforts fail on this rule. Also, 4 CSR 240-2.075(4)(A) requires more than just an interest different from that of the general public interest, but there must be a *showing* that the interest may be "adversely affected by a final order arising from the case." The Council makes no such showing. The Council does state at paragraph 4 its grounds for opposition as to revenue requirement and discriminatory rate design, but this does not demonstrate how the Council will be adversely affected by a final order as required by the rule. Thus, the Council fails to meet the requirements of 4 CSR 240-2.075(4)(A). 4 CSR 240-2.075(4)(B) does provide an alternative to 4 CSR 240-2.075(4)(A) if the applicant can show that "granting intervention would serve the public interest." The Council states at paragraph 5 that it "believes that its intervention and participation in this proceeding would serve the public interest …" which again is nothing more then a mere conclusion and completely fails to make any showing as is required by the rule.

The Council's application is deficient, fails to make the showing required by Commission rules, and as such, by law, must be denied by this Commission. Instead, the Commission has issued an Order Granting Intervention which specifically *finds* that the interest of the Council is "different from that of the general public, and may be adversely affected by a final order arising from the case." Nothing in the application supports such a finding and as such, can only be based upon facts and evidence relied upon outside the pleading of the Applicant. Commissioners are expected to come to cases with knowledge, experience and expertise. But, where the majority creates facts and makes evidentiary rulings regarding an Application without providing existing parties an opportunity to rebut, refute, or even respond to such facts and evidence, other parties are

denied due process. Additionally, the Commission's order finds that "allowing the Council to intervene will serve the public interest" while the Council provided no basis in its pleading which supports the Commission's finding. The majority has created evidence, relied upon that evidence and ultimately made a finding based upon that evidence in granting the application of the Council. This does not comport with our rules.

(2) Application to Intervene by AARP and Order Granting the Application to Intervene of AARP

AARP failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, AARP has omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

Additionally, AARP omits from its application a list of its members as required by 4 CSR 240-2.075(3), but does disclose that there are approximately 755,000 AARP members currently residing in the state of Missouri. AARP did not request a waiver from any of the Commission rules. Under 4 CSR 240-2.075(4)(A), AARP must show that the interest it represents here are different from that of the general public and that the interest may be adversely affected by a final order in this case. AARP states at ¶3 that the interest it represents is different and goes on to describe how that interest is different; (1) seniors are particularly vulnerable to increases in energy prices, (2) seniors devote a higher percentage of their total spending than do other age groups on residential energy

costs, and (3) many seniors have special needs and safety concerns with regard to access to their electric service. AARP also in ¶3 describes how proposals in this matter may "directly and adversely impact those Missouri seniors who are receiving electric service from AmerenUE." AARP however goes further in its application by also providing a public interest basis for intervention in ¶4 by articulating that it has provided testimony regarding rates and services for older utility consumers in "numerous cases." While compliance with 4 CSR 240-2.075(4)(A) or (B) is laudable, this does not overcome the other deficiencies which have already been put forth here, and even despite AARP's efforts with regard to compliance with some portions of the rules, its deficiencies none the less garner the conclusion that intervention should not have been granted.

The Commission's order granting the application to intervene of AARP makes no showing that AARP was compliant with Commission rules (including 4 CSR 240-2.060 and 4 CSR 240-2.075) or that any waiver was requested and granted. Because the application of AARP is deficient, there is no support for the Commission's Order granting intervention.

(3) Application to Intervene by Missouri-ACORN and Order Granting the Application to Intervene of Missouri-ACORN

MO-ACORN filed an application to intervene in this matter, and like the Council and AARP, did not meet the requirements of the Commission rules. MO-ACORN also filed an Answer to AmerenUE's response to MO-ACORN's application. The answer challenged the constitutionality of 4 CSR 240-2.075. MO-ACORN did however

overlook 4 CSR 240-2.060 in its response, which has provisions similar to 4 CSR 240-2.075.[37]

MO-ACORN's application failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, MO-ACORN omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M). Additionally, MO-ACORN omitted from its application a list of its members as required by 4 CSR 240-2.075(3). At a minimum, MO-ACORN in its Amended Application to Intervene and response to AmerenUE states that "it is not an association of persons but is an Arkansas corporation[.]"[38], which thus raises the issue of MO-ACORN's failure to comply with 4 CSR 240-2.060(1)(C), by not providing a certificate from the secretary of state that it is authorized to do business in Missouri as well as 4 CSR 240-2.060(1)(E), by not providing a copy of the registration of a fictitious name from the secretary of state.

MO-ACORN does state its proposed interest in the case at ¶6 of its Amended Application by purporting to represent "low-and moderate-income families" but later in ¶7 purports to represent "residential electric customers" a distinction which has a difference in this Commission's consideration of the application. Additionally, MO-ACORN claims to also represent "communities" of "low-and moderate-income families" without providing any details as to how these communities have unique interests to be

[37] 4 CSR 240-2.075(3) "An association filing an application to intervene shall list all of its members." *cf.* 4 CSR 240-.2.060(1)(J) "If any applicant is an association, a list of all of its members."
[38] *See Answer of MO-ACORN to Response of AmerenUE to Application to Intervene of MO-ACORN*, ¶1.

represented here.[39] Assuming that MO-ACORN represents both "low-and moderate-income families" and "residential electric customers" it is difficult to square this representation with that advanced by other intervention applicants and the interest represented by the Office of the Public Counsel, as such, under 4 CSR 240-2.075(4)(A) it is unclear from the application how MO-ACORN's interest is different from that of the "general public" and more specifically – how these two groups interest may be adversely affected by a final order of the Commission in this case. Rather MO-ACORN simply states that it is opposed to "any unjust and unreasonable revenue requirement or discriminatory rate design for AmerenUE's residential electric customers[.]" which presumably attempts to demonstrate an adverse affect.

Since unjust and unreasonable rates are unlawful along with discriminatory rates, MO-ACORN's alleged support for intervention is merely a restatement of the law, and not necessarily a demonstration of an interest that is different from the general public. MO-ACORN does state to the Commission that it represents a "separate demographic from the general public interest" which does not *de facto* "create[ ] a unique perspective and interest …" Representing a separate demographic does not necessarily differentiate a group's interest from that of the general public interest and here, MO-ACORN has provided no facts or evidence to provide such an explanation. Rather, MO-ACORN rests on its own conclusion to purportedly meet the requirements of 4 CSR 240-2.075(4)(A). MO-ACORN has not met its burden under this section, and as such, intervention would rest instead on meeting the threshold set forth in 4 CSR 240-2.075(4)(B), "that granting the proposed intervention would serve the public interest." MO-ACORN again falls short in its Application and its Amended Application, by drawing its own conclusion, not

[39] *See Application to Intervene of Missouri-Acorn*, ¶6.

supported by facts; "MO-ACORN believes that its intervention and participation in this proceeding would serve the public interest …"[40] This statement provides neither a how, or why, for this Commission's consideration.

MO-ACORN raises questions regarding the constitutionality of this Commission's rules, but as I have already addressed earlier, this Commission lacks jurisdiction to rule on questions of constitutionality.

MO-ACORN does however draw to the Commission's attention that AmerenUE did not oppose its intervention. Opposition by a party does not relieve MO-ACORN of its obligation to comply with Commission rules. MO-ACORN has not met the requirements of 4 CSR 240-2.075(4)(B) either. The Commission's Order granting intervention to MO-ACORN provides an analysis of the "purpose of the regulation" regarding disclosure of association under 4 CSR 240-2.075(3), but provides no basis whatsoever to support this alleged purpose. The majority even goes so far in this order as to state that "limited membership" and its attendant changes from case to case is helpful for the Commission and other parties to know, but provides no corollary explanation as to why this same rationale would not similarly apply to membership, which is not limited. The Commission finds that inclusion of the word "association" in a title is not the "type of association to which the regulation is aimed" – without providing any factual or evidentiary basis for reaching this conclusion. The Order further finds that requiring such a list from MO-ACORN would be "unduly burdensome". Nothing in the applicant's pleadings in this case suggests that meeting the requirements of 4 CSR 240-2.075(3) is "unduly burdensome"; creating a due process problem because no party had any notice of or opportunity to rebut the majority's finding.

[40] *See Amended Application to Intervene by Missouri-Acorn*, ¶10.

The Commission's order also finds that MO-ACORN's interest in this case is different from that of the general public and that this interest may be adversely affected by a final order arising from this case, despite the absence of any showing by MO-ACORN as to how its interest is different and how that interest would be adversely affected. In evaluating how an interest is different, compliance with 4 CSR 240-2.075(3) could provide additional evidence to support that a difference exists. Lastly, the Commission's order finds that allowing MO-ACORN to intervene "will serve the public interest" despite the fact that the only basis for this finding by the Commission is the conclusion by MO-ACORN themselves that intervention will serve the public interest. Since MO-ACORN did not seek a waiver from any of the Commission's rules, intervention was not appropriate because MO-ACORN's application, and its amended application, failed to comply with the Commission's rules.

(4) Application to Intervene by NRDC and Order Granting the Application to Intervene of NRDC

Section 4 CSR 240-2.060(1) – (6) governing applications also apply to an Application to Intervene under 4 CSR 240-2.075(1)[41]. Here, the NRDC failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically NRDC failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M).

[41] The purpose of Section 4 CSR 240-2.060 is stated as "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule".

The NRDC further failed to address the requirements of 4 CSR 240-2.075(4)(A), and (B) unless one concludes that the application in ¶1, and its explanation of the NRDC's member's interest would amount to "an interest which is different from that of the general public". While NRDC states that their reason for intervening is so that its "members and others may benefit from well designed and cost-effective energy efficiency programs and renewable resources" this statement alone in ¶1 and the remainder of the pleadings, do not demonstrate what "adverse affect[]" would occur on its members by a final order of the Commission in this case. NRDC does plead a bare conclusion at ¶5 by concluding that "NRDC has interests different from those of the general public or average ratepayer, which could be adversely affected by the decision in this case."[42] Under 4 CSR 240-2.075(4)(B) NRDC can still make a showing worthy of intervention if they demonstrate that granting intervention "would serve the public interest" – but here the NRDC specifically pleads that it's "members and others may benefit" – which is not synonymous with serving the public interest. NRCD's claimed expertise in the design and implementation of utility programs and policies designed to deploy energy efficiency and peak demand reduction "to benefit the public" may arguably be meant to "serve the public interest" but NRDC's pleading falls well short of connecting the dots which are specifically set out in 4 CSR 240-2.075(4)(A) and (B). The NRDC does offer its own conclusion at ¶6 that "[I]t will serve the public interest for NRDC to be allowed to intervene" a conclusion which is not supported. As such, in my opinion, NRDC's application is incomplete and deficient.

[42] The NRDC provides no factual support for, or definition of, "average ratepayer", a category which it purports to represent based upon its application for intervention.

The Commission's Order granting intervention specifically *finds* that the interest of the NRDC is "different from that of the general public, and may be adversely affected by a final order arising from the case." This finding is not supported by NRDC's application, and further, no facts are found to support the Commission's finding as well. Additionally, the Commission's Order finds that "allowing the NRDC to intervene will serve the public interest" where the NRDC has provided nothing but its own conclusion that this is so. Again, as in the prior applications reviewed, the Commission overlooked deficiencies in the application and made findings in its final Order which are unsupported by the application. The Order is unlawful under the circumstances.

(5) Application to Intervene by Missouri Retailers Association and Order Granting the Application to Intervene of Missouri Retailers Association

The Missouri Retailers Association failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Specifically, the MRA omitted a list of all of its members under 4 CSR 240-2.060(1)(J), failed to provide a statement indicating whether the applicant has any pending action or final unsatisfied judgments under 4 CSR 240-2.060(1)(K), failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M). The MRA requested no waiver from any Commission rules.

The MRA failed to meet the requirements of 4 CSR 240-2.075(3) by failing to list all of its members and under 4 CSR 240-2.075(4)(A), and (B), in that ¶1 states that its interest is "different from the general public interest" which is nothing more than a conclusory statement. The MRA does explain the distinctive characteristics of its members in ¶1, which arguably are intended to support the conclusion that its interest is

"different" but it is not entirely clear from the pleading that this is the case. It could be said that depending on reliable electric service at reasonable rates "in order to survive in this economy" is not unique or different from that of the general public interest. Also, that "employ[ing] their workforce, and to continue to provide their products and service at reasonable prices" may be a difference, but it cannot with any certainty be said that this interest is different from the "general public interest". In my opinion, the MRA's efforts fail on this rule. Also, 4 CSR 240-2.075(4)(A) requires more then just an interest different from that of the general public interest, but there must be a showing that the interest may be "adversely affected by a final order arising from the case." The MRA makes no such showing. 4 CSR 240-2.075(4)(B) does provide an alternative to 4 CSR 240-2.075(4)(A) if the applicant can show that "intervention and participation would serve the public interest." Here, the MRA states at ¶5 that it "believes that its intervention and participation in this proceeding would serve the public interest …" which again is nothing more then a mere conclusion and completely fails to make any factual showing as is required by the rule.

The Commission's Order also does nothing more, as in the NRDC order, with findings made to support conclusions which were not supported by facts in the application. As such, the MRA's application to intervene is deficient on many counts and should not have been granted.

(6) Application to Intervene by MJMEUC and Order Granting the Application to Intervene of MJMEUC

MJMEUC failed to comply with 4 CSR 240-2.060(1) by not including required information in its application. Notably, MJMEUC does provide the necessary statutory reference required by 4 CSR 240-2.060(1)(F), but failed to include a statement indicating

whether the applicant has any pending action or final unsatisfied judgments or decisions against it as it required by 4 CSR 240-2.060(1)(K). MJMEUC failed to provide a statement that no annual report or assessment fees are overdue under 4 CSR 240-2.060(1)(L), and failed to subscribe and verify the application as required by 4 CSR 240-2.060(1)(M), and these items were not furnished "prior to the granting of the authority sought."[43]

MJMEUC did not state whether it supports or opposes the relief sought by AmerenUE, and therefore, MJMEUC's application was deficient under 4 CSR 240-2.075(2). Also, under 4 CSR 240-2.075(4)(A) the Commission may permit intervention on a showing that the proposed intervenor has an "interest which is different from that of the general public". MJMEUC's application at ¶5 states that its interest "is different from that of the general public" in that it represents municipal electrical systems throughout the state which take transmission through MISO and that have wholesale power contracts with AmerenUE, an interest that is not presently represented. MJMEUC however fails to demonstrate in its application how these interests "may be adversely affected by a final order" in the case. As such, MJMEUC's pleading fails to meet the requirements of 4 CSR 240-2.075(4)(A).

Next MJMEUC tries to plead its way into the case through 4 CSR 240-2.075(4)(B) by showing that its intervention would "serve the public interest." At ¶6 MJMEUC provides a rationale for intervention under the "public interest" threshold but still does not indicate how intervention serves that interest. As was stated earlier in this dissent, interests can be represented before the Commission in avenues other then intervention, specifically through the filing of *amicus curiae*. Here MJMEUC provides

[43] 4 CSR 240-2.060(2).

no details on how the interests of the municipal utilities will be impacted, or how the public interest is served by granting intervention. ¶6 at best is designed to provide a conclusion on the question of public interest and nothing more, and as such does not bring MJMEUC into compliance with the Commission rule.

Further, in dissecting the response of AmerenUE to MJMEUC's application to intervene, there is a question of fact which has been raised, which is whether a wholesale customer has an interest in a general *retail* rate increase request, when *wholesale* rates are regulated by the Federal Energy Regulatory Commission ("FERC"), and how that wholesale customer can be affected by the final order in the case.[44] Since there is no relationship between MJMEUC and AmerenUE with respect to this case, it is difficult to understand how it would serve the public interest to grant them intervention. MJMEUC, in its response to AmerenUE's opposition to its application to intervene also tries to build an argument that MJMEUC cities are reliant on AmerenUE's transmission and distribution systems, that AmerenUE's participation in MISO has uncertainty and thus creates risk for MJMEUC cities, as well as how transmission and distribution upgrade costs are being charged to "bundled retail customers." MJMEUC is a wholesale customer and thus its interest in "bundled retail" is not an appropriate dovetail into this case. While AmerenUE's participation in MISO may create uncertainty for MJMEUC, FERC's exclusive jurisdiction over regional transmission operators does not create a backdoor for intervention in this general retail rate increase proceeding which rises to the level of serving the public interest as contemplated by the rules.

[44] See *Reply of the Missouri Joint Municipal Electric Utility Commission to AmerenUE's Opposition to Application for Intervention*, ¶1.

As such, MJMEUC's application is not in compliance with the Commission's rules and should have been denied. Denial however would not mean that MJMEUC would not have a voice before the Commission, as the filing of *amicus curie* under 4 CSR 240-2.075(6) is another avenue for advocacy.

CONCLUSION

This Commission may have liberally granted intervention in the past, but that past approach is no excuse for this Commission in this case to disregard its properly promulgated rules. A deficient application to intervene does not require denial of that applicant's request for participation. On the contrary, this Commission's rules provide for a waiver upon a showing of good cause. Furthermore, my suggestion with regard to these applications was for the Commission to issue a notice of deficiency, or allow time to seek a waiver. This procedure allows each applicant an opportunity to comply with the Commission rules and, where compliance could not be achieved, seek a waiver.

Because the Commission's Orders granting intervention as to these applicants are not final for purposes of appeal, I believe that a corrective course of action is warranted. That course is for the Commission to withdraw its Orders granting intervention and issue new orders to the applicants to correct the rule deficiencies or seek waivers.

The result reached by the majority here could have been achieved in a lawful manner, and still can be. The majority has the opportunity now to right the wrong.

Terry M. Jarrett

Terry M. Jarrett, Commissioner

Issued this 17th day of September, 2009.