BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers In the Company's Missouri Service Area.	))))	**Case No. ER-2007-0002** Tariff No. YE-2007-0007

AARP and CCM's Response in Opposition to AmerenUE's Motion Regarding 'Transitional Procedures' for a Fuel Adjustment Clause

COMES NOW the AARP and the Consumers Council of Missouri (CCM), by and through counsel, pursuant to Commission Rule 4 CSR 240-2.080, and respond to the Union Electric Company d/b/a AmerenUE ("AmerenUE") motion entitled "Motion to Adopt Procedures for Implementing UE's Requested Fuel Adjustment Clause" ("Motion") it filed along with new proposed tariff sheets on or about July 7, 2006, as part of its request for an additional rate increase of approximately $360 million annually. In support of this response, AARP and CCM state as follows:

1. AmerenUE's Motion seeks relief based upon an invalid citation. 4 CSR 240-20.090(16) is, in fact, a *proposed rule* which is being vigorously opposed by various consumer interests that hope to convince the Commission to reject (or significantly modify) it in the context of a separate Commission proceeding, Case No. EX-2006-0472. A rulemaking hearing is scheduled in that case for September 7, 2006.

2. If the Commission grants the relief requested in AmerenUE's Motion, then the Commission will have unlawfully prejudged its rulemaking case, Case No. EX-2006-0472. The official comment period set for the proposed rules in Case No. EX-2006-0472 ends on September 7, 2006—the same day that the final hearing on the rules is to be held in Jefferson City, Missouri. AmerenUE's Motion apparently assumes that the Commission has already made up its mind regarding the proposed rules before this comment period has run its course. However, AARP and CCM would like to believe that the Commission is still open-minded to arguments calling for the rejection of or amendment to its proposed rules and that the Commission is fully committed to giving due consideration to all comments throughout the rulemaking process, as required by law.

3. The legal requirements for notice and comment in a rulemaking are controlled by Section 536.021 RSMo. 2000, which states in part:

> 1. No rule shall hereafter be made, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent order of rulemaking . . .
>
> 7. Except as provided in section 536.025 [emergency rule procedures][1], any rule, or amendment or rescission thereof, shall be null, void and unenforceable unless made in accordance with the provisions of this section.

The importance of the notice and comment period for a proposed rule was underscored by a unanimous Missouri Supreme Court decision, NME Hospitals v. Dept. of Social Services, 850 S.W.2d 71 (Mo. banc 1993). The Court struck down an administrative

[1] The Commission chose not to initiate an emergency rulemaking procedure in conjunction with the proposed FAC Rules.

action by the Department of Social Services because of a failure to properly follow rulemaking procedures, stating, “The very purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification...To neglect the notice . . . or to give effect to a *proposed* rule before the time for comment has run...undermines the integrity of the procedure”. Id., p. 74. (emphasis in original).

4. AmerenUE’s Motion also requests that the Commission act in an unlawful manner because AmerenUE is asking that the Commission issue an order regarding a rate adjustment in violation of Section 386.266.12 RSMo 2000. Subsection 12 of the new law (SB 179) states that the Commission “shall have previously promulgated rules to implement the application process for any rate adjustment mechanism under this section prior to the commission issuing an order for any rate adjustment.” The law does not say that the Commission may issue an order based upon merely proposed rules; rather, the Commission must previously issue a final order of rulemaking before it may issue an order regarding any FAC or Rate Adjustment Mechanism (RAM).

5. Allowing AmerenUE to initiate a new rate request in a separate filing after it has already initiated a “file and suspend” tariff proposal also violates the requirement of subsection 4 of the statute that the initial establishment of any FAC mechanism must be developed together with all relevant factors of a general rate case. This new law is clear that a FAC or RAM may only be approved “. . . after providing the opportunity for a full hearing in a general rate proceeding.” Subsection 386.266.4 RSMo 2000. This

general rate case proceeding has already been initiated and its scope cannot be further enlarged part of the way into the suspension period, allowing parties less than a full and fair opportunity to review and respond to that rate proposal together with all relevant factors previously placed into issue in the current rate case proceeding. State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. banc 1979).

6. Furthermore, AmerenUE may not lawfully file any additional proposed tariffs raising a new request subsequent to the original tariff filing that initiated this rate case, and which was already suspended in July 2006. AmerenUE itself chose the "file and suspend" method of requesting a rate change, as opposed to the "complaint" method of requesting a rate change. State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20, 28- 29 (Mo. banc 1975). AmerenUE's initial tariff filing (which includes no tariff proposal regarding a FAC or other RAM mechanism) served to place the public on notice as to the scope of this proceeding, and it may not subsequent to this tariff filing expand upon its rate request. Allowing AmerenUE to file yet another rate increase request in the middle of this rate case proceeding would constitute an unlawful "pancaking" of rate increase requests, one on top of another, unfairly placing other parties at a disadvantage as they are forced to chase a moving target.

7. The "transitional procedures" that AmerenUE is requesting be ordered in this rate case are themselves deficient with regard to due process. Parties would be given extremely short timelines to respond to any newly adopted rule or new RAM

procedure. Due process requires that Commission proceedings be fair and consistent with rudimentary elements of fair play. State ex rel. Fischer v. Public Service Commission, 645 S.W. 2d 39, 43 (Mo. App. 1982). The procedures proposed by AmerenUE are insufficient to allow adequate opportunity to address fundamentally significant changes that could be proposed at a significantly late date in this rate case. AmerenUE itself chose the timing as well as the method of its rate case filing. Other parties should not be prejudiced simply because AmerenUE wishes to propose a FAC or RAM proposal later during this rate case after certain procedural deadlines controlling when parties must file their direct case have already passed.

WHEREFORE, AARP and CCM respectfully request that the Commission reject AmerenUE's Motion.

Respectfully submitted,

/s/ John B. Coffman

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to counsel for each of the parties on the service list for this matter on this 31st day of August 2006.

/s/ John B. Coffman

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