

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

CONCURRING OPINION OF CHAIRMAN ROBERT M. CLAYTON III

This Commissioner concurs in the Commission's denial of AmerenUE's request for an interim rate increase. Although this is not the first time a utility has made such a request, any rate increase without a full, comprehensive audit by the PSC staff is atypical of Commission process because it would take effect without consideration of "all relevant factors."¹ In 1974, the Commission defined an exception to this rule and allowed an interim rate increase using an "emergency standard."² Following a challenge to the Commission's ruling, the Court utilized the "emergency standard" as an appropriate exception to standard practice.³ Ever since, the Commission has generally followed that standard when evaluating interim rate increase requests.

"Emergency" was defined in the *Laclede* case as a circumstance of when "the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity."⁴ The Commission has departed from that standard only in rare situations, either limited to small utilities or limited to well-defined circumstances with larger utilities. In recent cases, the few examples of departure from the emergency standard have involved small

¹ *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979).

² Commission, Case No.18021 (1974).

³ *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 574 (Mo. App. K.C. Dist. 1976).

⁴ *Id.*

companies with limited capital and a need to make necessary investments.⁵ Throughout the years, instances of interim request have also appeared in larger cases filed by large utilities.⁶

The request before us today is nothing like that. It is a request by a large (the largest) Missouri utility with complex books, geographically diverse investment needs and operations in various sectors. The utility has admitted that it is not facing an emergency, that the company's ability to offer safe and adequate service is not in question and that customers do not face any change in service. The "danger" of not approving the request is that certain investment decisions "may" be delayed or canceled at some undefined or speculative point in the future. While AmerenUE's interim request pales in comparison to its overall requested increase, AmerenUE could not affirmatively establish how a 1.67 percent temporary increase in rates would have any impact on significant investment decisions, attempts to attract capital or overall debt ratings.

AmerenUE, and other regulated utility intervenors, seek approval of this interim increase based on evidence that the utility is "chronically underearning" due to significant or "excessive regulatory lag." AmerenUE cites an inability to effectively recover costs or to make needed investments in infrastructure. AmerenUE argues that it is earning a return, but it is not earning enough to accomplish its goals or continue its infrastructure plan. AmerenUE and the utility intervenors argue that this process employed since 1913 must be changed because of inherent unfairness in waiting for processing of rate cases which statutorily cannot exceed eleven months. Other parties argue that these are the same utilities which enjoyed beneficial "regulatory lag" during the 1990s and 2000s when their earnings may have exceeded their authorized rate of

⁵ In the Matter of the Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase (SO-2008-0289); and In the Matter of Evergreen Lakes Water Company, Inc. Small Company Rate Increase (WR-2006-0131).

⁶ Staff Post-Hearing Brief pg. 30-42 (GR-2010-0036).

return.⁷ Utilities are the principal holders of such earnings information, they control the timing of when to file a rate case and as the managers of the business, they have control over costs.

In reviewing this request, we must be mindful of the significance of departing from past practice. We must be mindful of the implications for future applications with other utilities and in other cases. While the rhetoric suggests this decision only applies to AmerenUE and its customers, this decision will establish precedent for future cases affecting nearly all Missouri customers. If the Commission departs from the “emergency standard,” it is important to establish a standard that will provide guidance to future applicants and opponents. Alternative proposals or standards have proven either to not be standards at all (that we should just use the Commission’s discretion on a cases by case basis, which leads to arbitrary decisions)⁸ or weak standards that do not take into account external circumstances such as management decisions or the overall economy.⁹ It is this Commissioner’s opinion that the “emergency standard” serves a purpose and should be kept as the precedent employed by the Commission. If the Commission is to change precedent and set a new policy for circumstances beyond an “emergency,” it must have definable criteria that either offer direct benefits to rate paying customers or further some infrastructure goal or policy of the Commission. Neither example is present in this case.

The Commission has conducted a full hearing, full opportunity for briefing and opportunity for cross examination of witnesses to fully explore the implications of the request. It

⁷ “If there is any kind of a chronic condition with respect to AmerenUE’s earnings, history demonstrates that AmerenUE chronically exceeds its authorized rate of return. In fact, over the last twenty-five years, regulatory lag has worked in AmerenUE’s favor about ten times as long as it has worked to AmerenUE’s detriment.” Public Counsel’s Brief on Interim Rate Request pg. 10-11 (GR-2010-0036).

⁸ “The bottom line is that there can be no serious debate that the Commission has the legal authority to exercise its “broad discretion” to approve interim rates in a non-emergency situation.” Ameren Post Hearing Brief on Interim Rates, pg. 15 (GR-2010-0036).

⁹ “Over the past few years, due to excessive regulatory lag, AmerenUE has been chronically and consistently unable to earn anywhere close to its authorized return.” Ameren Post Hearing Brief on Interim Rates, pg. 1 (GR-2010-0036).

has been a helpful exercise in reviewing the history of such requests and to fully examine the financial circumstances faced by AmerenUE. While this policy may cause everyone to have more work, we should err on the side of more process than less, when making such a critical decision.

Aside from AmerenUE's admission that it does not face an emergency and that there has been no acceptable alternative standard of exception suggested, now is not the right time to change this policy. The national and regional economies are struggling and there is great uncertainty in the markets. Further, granting a rate increase without benefit of a full audit on questions of disputed facts sends the wrong message to the rate paying customers who may also be facing challenging financial circumstances.

There is no question that AmerenUE faces challenging times from a downturn in the economy and a reduction in energy consumption. There is no question that all businesses are struggling with their rates of return. But, those factors alone do not justify application of a new standard to grant rate increases without a full staff audit and consideration of "all relevant factors."

Therefore, I must concur in the denial of the request.

Respectfully Submitted,

A handwritten signature in black ink that reads "Robert M. Clayton III". The signature is written in a cursive, flowing style.

Robert M. Clayton III
Chairman

Dated at Jefferson City, Missouri,
On this 13th day of January, 2010.