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-2008-0318** Tariff File No. YE-2008-0605

DISSENTING OPINION OF COMMISSIONER KEVIN D. GUNN AND CHAIRMAN ROBERT M. CLAYTON III

These Commissioners concur with many of the majority positions contained in the Report and Order, including the exclusion of costs related to the potential construction of Callaway II from rate base. However, the majority's authorization of a 10.76 percent return on equity (ROE), rather than an ROE of between 10.0 and 10.2 percent, authorization of a fuel adjustment clause (FAC) that shifts an unreasonably high portion of risk upon the rate payers, failure to require AmerenUE to improve the materials used to market and educate customers about its Pure Power program, and rejection of the Hot Weather Safety Program pilot force these Commissioners to respectfully dissent.

Return on Equity

The majority's authorization of a 10.76 percent ROE, rather than an ROE of between 10.0 and 10.2 percent, especially combined with the authorization of a fuel adjustment clause that shifts 95 percent, virtually all, of the risk of rising fuel costs to the rate payers force these Commissioners to respectfully dissent on this issue.

While most of the Report and Order is based upon the record evidence, in making their findings on this issue, the majority seems more driven to justify a desired ROE than to analyze and accept the evidence presented in this case. In fact, the majority did not accept

the analysis of any single expert that submitted testimony on this issue. Instead the majority took a buffet approach to each expert's testimony picking and choosing the various inputs and models, shifting and adjusting each expert's testimony until producing a number that fell in line with an ROE of 10.76 percent. In the instances where the majority could not manipulate an expert's recommendation sufficiently to move it into the range they appeared to be seeking, the majority simply found the testimony of that witness not credible. For example, the majority found Staff witness Mr. Hill not credible, because his recommendation was too low and because AmerenUE's witness, Dr. Morin, said Mr. Hill's analysis was flawed. Similarly, the majority ignores MEG's witness, Ms. LaConte, on the basis of her experience rather than an objective review of her analysis.

These Commissioners found most credible and persuasive the testimony of MIEC's expert Mr. Gorman who recommended the Commission allow AmerenUE an ROE of 10.2 percent without an FAC or 9.95 to 10.0 percent if an FAC is authorized.[1] Not only was Mr. Gorman's thorough and detailed analysis convincing, but his analysis stood up under cross- examination. Additionally, Ms. LaConte and the Public Counsel also supported an ROE of 10.0 to 10.2 percent.[2]

Additionally, these Commissioners disagree with the majority analysis that authorization of an FAC does not necessitate a reduction in ROE. Although the majority found the implementation of a fuel adjustment clause will reduce AmerenUE's business risk, they ignore the impact the higher level of risk AmerenUE faced prior to such authorization would have had on AmerenUE's bond rating. In contrast the majority makes a 20 basis point upward adjustment to Mr. Gorman's ROE calculation, or rather the

[1] Gorman Direct, Ex. 600, Page 2, lines 5-7, and Tr. Page 543, lines 1-9, and Page 548, lines 2-25.

majority's modified Gorman ROE calculation, to account for AmerenUE having a lower bond rating than Mr. Gorman's proxy companies, most of which have FACs. Further, AmerenUE's profile has not changed a great deal from its last ROE award of 10.2 percent in its last rate case.

These Commissioners believe the evidence supports an ROE in the range of 10.0 to 10.2 percent, depending on other factors included in the Report and Order. This range would be consistent with past AmerenUE awards and can fairly complement any type of FAC or other award granted by the Commission.

Fuel Adjustment Clause

As addressed in detail below, these Commissioners disagree with many of the majority's findings and positions regarding the FAC issue. However, due to the unprecedented turmoil in investment markets, these Commissioners could have joined with the majority on this issue but for the structure of the authorized FAC which inappropriately shifts 95 percent, virtually all, of the risk of rising fuel costs to the rate payer.

The record reflects that the objective conditions surrounding AmerenUE's fuel costs have not changed significantly since AmerenUE's last rate case. In that case the Commission found that fuel costs for AmerenUE were not sufficiently volatile to justify the use of an FAC.[3] The bulk of AmerenUE's delivered coal costs, which will increase over the next several years, have been locked in by contract.[4] Accordingly, as was found by the Commission in AmerenUE's last rate case, AmerenUE's fuel costs are rising, but are not

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[2] LaConte Direct, Ex. 650, Page 2, lines 3-4; and Post-Hearing Brief of the Office of the Public Counsel, at Page 3.

[3] *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*, Report and Order, Case No. ER-2007-0002, May 22, 2007, page 26.

[4] Neff Direct, Ex. 47, Page 4, Lines 7-13. The precise numbers are highly confidential.

"volatile."[5] However, in the present case, the majority appears to have found this lack of volatility irrelevant on the basis that "regulatory lag in a rising cost environment will deprive AmerenUE of an opportunity to earn a fair return on its investment."[6] Under the majority's reasoning, just and reasonable rates could never be set outside a recession, because rising costs in a historic test year jurisdiction, like Missouri, would never allow a utility to earn its authorized return.

The majority correctly finds that the test year fuel costs in this case do not include the increases that AmerenUE expects in its hedged fuel costs for 2009. The fact that these increases are not included in rates set in this case is due to the timing of AmerenUE's filing of the case. The timing of that filing was fully within AmerenUE's control. The difference does not reflect fuel price volatility, but simply a known increase. Accordingly the only volatility in AmerenUE's net fuel expense for 2009 primarily depends on volatility in the prices that it may receive from its off-system sales into the MISO energy market.[7] The majority found that the volatility in market prices for off-system sales should be considered in the analysis of whether a company's fuel costs are volatile. These Commissioners disagree. The majority considered what it calls "net fuel cost" in its analysis of whether there is sufficient volatility in AmerenUE's fuel costs to justify authorization of an FAC. "Net fuel cost" is actual fuel costs, which the majority agrees are not independently volatile, minus off system sales income, which the majority found to be volatile. Neither Section

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[5] *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*, Report and Order, Case No. ER-2007-0002, May 22, 2007, page 23.

[6] *Id*. at page 44.

[7] Mantle Surrebuttal, Ex. 224, Pages 3-4.

386.266 RSMo (Supp. 2008) nor Commission Rule 4 CSR 240-3.161 provide for an off-system sales adjustment mechanism. Section 386.266.1 RSM0 expressly provide for an,

> "interim energy charge or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred fuel and purchased-power costs, including transportation."

The fact that the FACs previously authorized by this Commission have provided for off-system sales revenues to flow through those FACs and thereby offset increased fuel costs with increases in off system sales revenues does not make it appropriate to consider fluctuations in off-system sales revenues in an analysis of whether an FAC is needed. Having off-system sales flow through an FAC avoids the potential for the utility to over-earn at the expense of its rate payers in the event both fuel costs and off-system sales revenues exceed those in base rates. Specifically, a company with an FAC will recover additional money from rate payers to cover fuel costs above those built into base rates for a specific period of time. It would not be appropriate for that company to collect off-system sales revenues in excess of the amount set in base rates during that same period, because the power sold off-system would be generated using that purchased fuel.

For the reasons set out above, awarding AmerenUE an FAC under normal economic conditions would not and could not be justified, as in AmerenUE's last rate case. However, there is no question that the country is faced with unprecedented economic conditions. The competition for capital is fierce. The Commission must be mindful of risks faced by regulated utilities during times of economic downturn. Due to current market conditions, a FAC may be appropriate with a reasonable balance of risk and reward and sufficient consumer safeguards. Unfortunately, the majority shifts 95 percent, virtually all, of the risk on rate payers.

Given these Commissioners' belief that AmerenUE's fuel costs are not volatile and AmerenUE does not require an FAC to address volatile fuel costs, but rather to allow it to better compete in capital markets, the risk of increasing fuel costs should have been more equitably divided between the company and ratepayers. To accept the majority's position would require these Commissioners to ignore the fact that every one of AmerenUE's residential, small business and commercial customers are facing the same economic conditions that could justify authorizing any FAC for AmerenUE. This shared economic burden mandates a more equitable sharing of the fuel cost risk.

These Commissioners found more credible the testimony of each of the witnesses testifying on this issue that were not sponsored by AmerenUE each of whom testified that the 95/5 sharing mechanism ultimately adopted by the majority was inappropriate and that a more balanced sharing of fuel cost risk should be adopted.[8] Accordingly, these Commissioners would have considered authorizing an FAC for AmerenUE that balanced the risk between company and rate payers at 50 percent. These Commissioners would also have considered the potential for additional risk sharing by customers with additional consumer protections such as the FAC cap proposed by MIEC expert witness Maurice Brubaker or customer benefits such as a reduction in the ROE award. The majority's decision to eliminate virtually all, 95 percent, of AmerenUE's fuel cost risk and shift that risk directly on its ratepayers force these Commissioners to respectfully dissent on this issue.

[8] Brubaker Direct, Ex. 606, Page 5, lines 8-21; Brubaker Direct, Ex. 607, Page 2, lines 16-18, and Page 9, lines 2-23; Brubaker Surrebuttal, Ex. 609, Page 4, lines 13-20; Cohen Direct, Ex. 500, Page 23, line 20 to page 24, line 5; and Kind Rebuttal, Ex. 404, Page 6, lines 21-23.

Pure Power Program

These Commissioners disagree with the majority's continuation of AmerenUE's Pure Power program without significant changes. The record clearly reflects the great potential for customer misunderstanding. AmerenUE and 3 Degrees should be required to improve the materials used to market and educate customers about the Pure Power program so that customers know what they are purchasing.

Having thoroughly analyzed the Pure Power marketing and customer education materials filed in this case, these Commissioners have serious concerns that many of the people participating in the program believe they are paying for AmerenUE to invest in renewable technologies that deliver cleaner energy to the customers' homes. Although the purchase of a REC can stimulate demand for additional renewable energy, RECs are for the purchase of power generated in the past and do not provide any "clean" energy directly to AmerenUE ratepayers.

This case represents the Commission's only opportunity to ensure that the marketing materials in question are appropriately modified until either AmerenUE's files its next rate case or a complaint is filed against the company. Accordingly, although these Commissioners strongly support programs that encourage investment in clean energy, including AmerenUE's Pure Power program, the majority's decision not to require AmerenUE to submit revised Pure Power marketing and customer materials to the Commission for approval forces these Commissioners to respectfully dissent on this issue.

Hot Weather Safety Program

These Commissioners strongly dissent to the majority's rejection of the hot weather safety pilot program proposed by AARP. AARP asked the Commission to order AmerenUE to instigate a limited, experimental pilot program designed to encourage low-income

seniors to turn on their air conditioners during hot weather by offering them a $5.00 per day bill credit for the 9.5 extreme heat days experienced during an average summer.[9]

These Commissioners concur with the majority finding that seniors refusing to turn on their air conditioners in very hot weather are at a greater risk of dying from heat related illness, and their finding that the cost of providing the bill credits in question would only be $114,000. These Commissioners also share the majority's stated concern for the health of AmerenUE's elderly citizens. However, the majority's determination that AARP's proposed pilot should be rejected on the basis that "[t]his sort of program has never been tried anywhere else and AARP admits it does not really know how it will work," and "there is no indication that a bill credit of $5.00 per day will actually prompt an at risk elderly person to turn on their air conditioning," force these Commissioner's to dissent.

These Commissioners cannot agree with the majority's refusal to even study ways to potentially reduce heat related deaths. The majority finding that there is no evidence the proposed pilot program would convince an at-risk person to turn on their air conditioning is correct. However, it is also true that there is no basis to assume it would not work.

Instead of opting for a small scale, scientifically designed pilot study that would answer the question of whether such a bill credit could convince at risk seniors to use their air conditioning, the majority arbitrarily decided it cannot work. These Commissioners believe the majority's "can't" attitude must be changed to at least a "we'll try" attitude. By design, a "pilot program" is a test to see if certain actions, in this case, a bill credit, can influence a desired reaction, in this case get at-risk individuals to use their air conditioning.

These Commissioners note that AmerenUE has done some good work in this area and they should be commended for it, but we can and must do better.[10]

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[9] Howart Direct, TR page 1165, line 20 to page 1166, line 2.

In conclusion, the majority has granted an ROE greater than is supported by the record. They have also granted an FAC whose sharing mechanism is not equitable in its sharing of risk. For these reasons, coupled with the majority's inaction on the Pure Power program and rejection of the Hot Weather Safety program forces these Commissioners to respectfully dissent.

[10] The case of *Johnson v. Missouri Dept. of Health and Senior Services*, 174 S.W.3d 568, (Mo. App. 2005) serves as an illustration of the importance of this program. In *Johnson*, a nursing home administrator was disciplined for failing to recognize the need to timely initiate air conditioning for her skilled nursing facility. An unchecked rise in outside temperature of only 11 degrees (from 80 to 91 degrees) over a four day period resulted in the death of four residents, ranging in age from 66 to 88, from hyperthermia, despite the increased use of fans and attempts to keep the residents fully hydrated. This tragic incident demonstrates just how susceptible the elderly are to heat and how the simple use of air conditioning would have saved these lives. Clearly, any program that promotes the use of air conditioning to reduce unnecessary loss of life is worth trying.

For the foregoing reasons, these Commissioners respectfully dissent.

Respectfully submitted,

Kevin D. Gunn
Commissioner

Robert M. Clayton III
Chairman

Dated at Jefferson City, Missouri
On this 27th day of January, 2009.