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 Annual Revenues for Electric Service	)))	Case No. ER-2010-0036

RESPONSE TO REQUEST FOR INTERIM RATE RELIEF

COMES NOW the Midwest Energy Users' Association and for its Response to AmerenUE's request for Interim Rate Relief respectfully states as follows:

1. On July 24, 2009, Ameren filed tariffs to implement a $401.5 million dollar rate increase. As designed by Ameren, this amounts to an increase of approximately 18% on all AmerenUE electric customers. Realizing the already difficult economic climate facing its ratepayers and the exacerbating effect an 18% increase will have on these same ratepayers, Ameren claims "concern about the impact of any rate increase on customers."[1] While feigning such concern, Ameren's testimony lacks any actual recognition of the impact of its rate increase on customers. Rather, Ameren ignores the fate of its customers already suffering from double digit unemployment and instead focuses on the "additional challenges" the recession has caused for the Company.[2] In fact, Ameren's only true recognition of the financial impact of this rate increase comes in the form of future promises including the possibility of cost reductions in executive compensation.[3]

Boiled down then, it is apparent that this case is focused solely upon Ameren's ability to weather the pending financial crisis with profits intact rather than their customers' ability to pay electric bills. Along these lines, Ameren largely ignores consumer impacts

[1] Baxter Direct at page 21.
[2] Baxter Direct at pages 14-16.
[3] Baxter Direct at page 22.

and instead proposes several regulatory innovations that will inevitably lead to more frequent and larger rate increases all designed with the goal of protecting the shareholders' earnings. For instance, relative to this immediate pleading, Ameren asks that the Commission allow it to implement a portion of its rate increase on an interim basis.

2. Ameren's request for interim rate relief is founded on its sudden dislike of regulatory lag. As the Commission has recognized, regulatory lag is "the lapse of time between a change in revenue requirement and the reflection of that change in rates."[4] As costs increase then, the utility will temporarily suffer while it waits for such increased costs to be reflected in rates. This is the situation which Ameren currently bemoans. That said, however, regulatory lag can also be beneficial to the utility. During periods in which overall costs are declining, the utility can benefit, in the form of windfall profits, from the delay in recognizing these reduced costs in rates. As this Commission has previously recognized, "utilities do not particularly like regulatory lag when their costs are increasing, but regulatory lag can also favor the utility when their costs are decreasing."[5] While suggestions of windfall profits may be largely forgotten given the current economic situation and the seemingly continuous string of electric utility rate increases, Ameren was recently the recipient of such windfall profits.

3. On July 2, 2001, the Staff of the Missouri Public Service Commission filed its Complaint alleging that AmerenUE was over-earning in an amount of $213 to $250 million. Subjected to the regulatory lag which Ameren now condemns, Staff and ratepayers were forced to sit and watch while Ameren collected windfall profits for over a year before rates could actually be reduced to account for the decreases in costs which

[4] *In the Matter of St. Louis County Water*, Case No. WR-96-263, Report and Order at page 8.
[5] *Re: Union Electric Company*, 257 P.U.R.4th 259 (2007).

Ameren had experienced. Ultimately, tariffs implementing the stipulated rate increase did not become effective until August 23, 2002, approximately fourteen months after Staff's complaint was filed. Recognizing that the stipulated rate reduction provided for approximately $110 million in rate reductions, Ameren was allowed, through the effect of regulatory lag, to over-earn by approximately $9 million per month. Thus, for the entire fourteen month period, Ameren benefited from regulatory lag in the amount of **$126 million**. During this entire time, Ameren was not heard to condemn the effects of regulatory lag. Rather, Ameren was silently reaping the benefits of the same lag that it now bemoans. The utilities' schizophrenic attitude towards regulatory lag (i.e., both bemoaning the lag when it is associated with reflecting increased costs in rates and then embracing that same delay when it allows them to pocket increased profits associated with decreased costs) has been previously noted by this Commission.

> Lessening the effect of regulatory lag by deferring costs is beneficial to a company but not particularly beneficial to ratepayers. Companies do not propose to defer profits to subsequent rate cases to lessen the effects of regulatory lag**,** but insist it is a benefit to defer costs. Regulatory lag is a part of the regulatory process and can be a benefit as well as a detriment.[6]

4. In addition to Ameren's recent receipt of windfall profits, regulatory lag has served to benefit other utilities in Missouri. For instance, in a situation in which two utilities merge, the effect of regulatory lag is such that the combined entities are permitted to retain 100% of all merger synergies until these decreased costs are finally reflected through the ratemaking process. This fact was recently recognized in the Commission's approval of the KCPL / Aquila merger. "The Applicants revised merger plan proposes to

[6] *Re: Missouri Public Service*, 129 P.U.R. 4th 381 (1991) (emphasis added).

rely on the natural regulatory lag that occurs between rate cases to retain any portion of synergy savings."[7]

5. Recognizing the well known effects of regulatory lag as well as the fact that regulatory lag may be both detrimental and beneficial, the utility has generally been expected to manage its operations in a manner to minimize the deleterious effects of regulatory lag while simultaneously benefiting from the positive effects. As one Commissioner has noted:

> After five years MGE should be well versed in its understanding of regulatory lag. Regulatory lag is not an economic phenomenon. It is not an unusual, significant, or unaccountable occurrence that suddenly appears for no explainable reason. Management is responsible for planning and operating the activities of the Company. If the Company is unable to or chooses not to implement processes and procedures which would limit the effect of regulatory lag upon its finances, it should not expect the Commission to protect it from any resulting economic detriment if any occur.[8]

6. Contrary to Ameren's immediate characterization, regulatory lag has been universally recognized as being inherently advantageous in that it forces the utility to work towards its maximum efficiency. Recognizing that a utility will experience decreased profits while it waits the eleven months necessary to get higher costs reflected in rates, utilities have a great incentive to ensure that it does not experience these higher costs. Furthermore, recognizing that it is permitted to keep any profits experienced in the interim, the utility is actually motivated to reduce costs and keep these windfall profits. As the Commission has recognized, "[t]he good effect of regulatory lag is that it provides the utility with a strong incentive to maximize its income and minimize its costs."[9] In fact, while other regulatory devices can be implemented which attempt to provide similar

[7] *Re: Joint Application of Great Plains Energy Incorporated*, 2008 Mo.P.S.C. Lexis 693 (2008).
[8] *Re: Missouri Gas Energy*, 188 P.U.R. 4th 30 (1998) (Concurring opinion of Commissioner Robert Schemenauer).
[9] *Id.*

motivation to the utility, the Commission has recognized that each is inherent inferior to the incentives created by regulatory lag.

> If, however, a fuel adjustment clause is in place, the utility has less financial incentive to minimize its fuel costs because those costs will be automatically recovered from ratepayers. Efforts can be made to design a fuel adjustment clause in a manner that maintains some incentive; for example, the Missouri statute authorizing a fuel adjustment clause requires the utility to file a new rate case every four years and requires the Commission to review the prudence of the company's purchasing decisions every 18 months. But regulatory reviews are only a partial substitute for the direct incentives that can result from a utility's quest for profit.[10]

7. Given the incentive to act efficiently that is inherent within regulatory lag, as well as the fact that regulatory lag can work both for and against the utility, the Commission has steadfastly limited its authority to grant interim rate relief to those situations in which a utility can actually show financial distress, otherwise known as the emergency standard. As originally devised in 1949, the Commission limited its authority to grant interim relief only to those situations in which the utility could make a showing of confiscation.[11] This interim standard remained in place until 1975 when the Commission enunciated the emergency standard.

> Therefore, it is incumbent upon the Company to demonstrate conclusively that an emergency does exist. The Company must show that (1) it needs additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief.[12]

Since that Missouri Public Service Company case, the Commission has frequently reiterated the emergency or near emergency standard.[13] In fact, the majority of

[10] *Id.* (emphasis added).
[11] *Re: Southwestern Bell Telephone Company*, 2 Mo.P.S.C. (N.S.) 131 (1949).
[12] *Re: Missouri Public Service Company*, 20 Mo.P.S.C. (N.S.) 244 (1975). The standard set forth in the Missouri Public Service Company proceeding has also been referred to as a "test of immediate need." See, *Re: Missouri Public Service Company*, 22 Mo.P.S.C. (N.S.) 427, 429 (1978).
[13] *Re: Missouri Public Service Company*, 22 Mo.P.S.C. (N.S.) 427 (1978); *Re: Kansas City Power & Light Company*, 23 Mo.P.S.C. (N.S.) 413 (1980); *Re:Missouri Public Service Company*, 24 Mo.P.S.C. (N.S.) 245 (1981); *Re: Martigney Creek Sewer Company*, 25 Mo.P.S.C. (N.S.) 641 (1983); *Re: Arkansas Power & Light Company*, 28 Mo.P.S.C. (N.S.) 143 (1986); *Re: Raytown Water Company*, 1 Mo.P.S.C. 3d 184 (1991).

jurisdictions have similarly limited their authority to instances in which an emergency has been demonstrated. "There has to be a showing that but for an immediate infusion of ratepayer funds petitioner would not be able to continue to provide safe, adequate and proper service or reasonably access the market for needed construction or expense."[14] "In deciding the question, the commission believes that there must exist an obvious revenue deficiency couple with . . . an inability to arrange debt financing or attract capital at reasonable costs without increased operating revenues."[15] "[T]here was little evidence presented concerning possible curtailments of service, efforts to reduce costs or efforts to obtain alternative financing. Based upon the limited evidence presented, the commission could not grant petitioner emergency rate relief."[16]

8. In 1997, the Commission, while declining to grant interim relief, recognized that it could grant interim relief based upon "good cause shown."

> The Commission has authority in a proper case to grant interim rate increases pending a determination of an application for a permanent increase. Since no standard is specified in statutes to control the Commission as to whether to order suspension of a proposed rate schedule, the result is within the sound discretion of the Commission and an emergency situation need not necessarily be established. Section 393.140, § 11, RSMo 1994, states: "The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe." The standard for allowing interim rate relief is not necessarily emergency conditions but good cause shown by the company, and determination of good cause shown is at the Commission's discretion.[17]

While announcing this standard, however, the Commission expressly found that evidence of reduced profits below the last authorized return on equity was not sufficient good cause to grant interim relief.

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[14] *Re: Jersey Central Power & Light Company*, 38 PUR4th 115, 117 (N.J. 1980).
[15] *Re: Commonwealth Edison Company*, 40 PUR4th 62 (Ill. 1982).
[16] *Re: Hoosier Energy Rural Electric Cooperative, Inc.*, 62 PUR4th 419, 422 (Ind. 1984).
[17] *Re: Empire District Electric Company*, 6 Mo.P.S.C. 3d 17 (1997).

> In this case Empire has not demonstrated good cause for granting interim relief. The evidence demonstrates that Empire earned a return on equity of 7.97 percent and that was caused in large part by an unexpected increase in fuel costs. Under the facts of this case, ***the inability of the company to earn its authorized return on equity does not, in and of itself, constitute sufficient justification for granting interim relief***.[18]

9. In this case, Ameren asks the Commission to further loosen the standard by which it considers interim relief. Having not met the emergency standard, and recognizing that it fails to meet the good cause standard expressed in Empire, Ameren seeks to lower the bar. Orders from other jurisdictions, however, provide clear indication of the implications of such a reduced interim standard.

> Since the adoption of the modified standard in D.P.U. 380 companies have, with increasing frequency, sought interim relief and have sought to expand upon the reasons for interim relief. This experience indicates that the broadening of our previous standard has served mainly to impose administrative burdens upon an already tightly constrained six-month suspension period. The filing and reviewing of such interim proposals have presented serious problems in the expeditious and proper treatment of general rate filings.
>
> In light of these factors, the department hereby returns to the strict emergency standard as described in the Western Massachusetts Electric and Boston Edison cases. We will henceforth grant interim relief only in extraordinary cases where a genuine emergency is clearly shown to exist.[19]

10. In the case at hand, Ameren has neither shown that it meets the emergency standard or the good cause standard previously enunciated by this Commission. Relative to the emergency standard, Ameren has failed to show that it needs additional funds immediately; that the need cannot be postponed; and that no other alternatives exist to meet the need but rate relief. As applies to the Commission's stated good cause standard, Ameren relies almost entirely on claims that it has failed to earn its authorized return on equity. Recognizing that this failure may result from numerous causes including the

[18] *Id.*
[19] *Re Fitchburg Gas & Electric Light Company*, 52 PUR4th 197, 201-202 (Mass. 1983) (emphasis added).

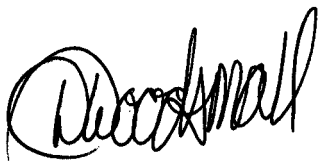
possibility of mismanagement, the Commission has refused to use these deflated earnings as a basis for granting interim relief. As the Commission has held, ***"the inability of the company to earn its authorized return on equity does not, in and of itself, constitute sufficient justification for granting interim relief.***"

11. As demonstrated, regulatory lag is not inherently evil. In fact, by its very nature, regulatory lag forces a utility to act in an efficient manner. This Commission has previously recognized that other devices are necessarily inferior to the incentives created by regulatory lag. For this reason, the Commission should be skeptical of utility attempts to pick and choose those cost items that it believes should be allowed to be reflected in rates on an expedited basis and which costs should be subjected to the standard 11 month regulatory lag. Inevitably, utilities will game this system by foisting increased costs on ratepayers in an expedited fashion, while sheltering its windfall profits when costs decrease. For this reason, the Commission should maintain its reliance on either the emergency standard or a good cause standard which precludes interim relief based upon the company's failure to earn its authorized return.

WHEREFORE, the Missouri Energy Users' Association respectfully request that the Commission deny Ameren's request for interim rate relief.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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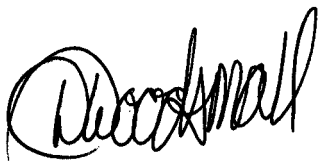
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: August 27, 2009