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November 13, 2001

VIA HAND DELIVERY

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
Jefferson City, MO 65101

FILED³

NOV 13 2001

**Missouri Public
Service Commission**

Re: MPSC Case No. EC-2002-1

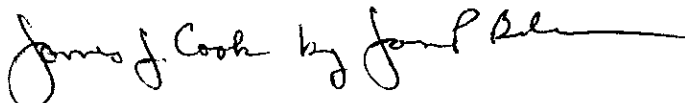
Dear Mr. Roberts:

Enclosed for filing on behalf of Union Electric Company, d/b/a AmerenUE, in the above matter, please find an original and eight (8) copies of **Union Electric Company's Motion to Establish a Test Year and Proposed Procedural Schedule.**

The Company requests the opportunity to respond to the submissions of the Staff and other parties. This request is addressed at the end of this pleading.

Kindly acknowledge receipt of this filing by stamping a copy of the enclosed letter and returning it to me in the enclosed self-addressed envelope.

Very truly yours,



James J. Cook
Managing Associate General Counsel

JJC/mlh
Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

NOV 13 2001

Missouri Public
Service Commission

The Staff of the Missouri Public
Service Commission,

Complainant,

v.

Union Electric Company, d/b/a
AmerenUE,

Respondent.

Case No. EC-2002-1

**UNION ELECTRIC COMPANY'S MOTION
TO ESTABLISH A TEST YEAR AND
PROPOSED PROCEDURAL SCHEDULE**

The Staff of the Public Service Commission of the State of Missouri ("Staff") has proposed a test year beginning July 1, 1999 and ending June 30, 2000, with selected items updated through December 31, 2000. *Staff Excess Earnings Complaint Against AmerenUE Company* ¶ 17. After carefully reviewing the Staff's filing, comparing it against data available to the Staff prior to its filing, and comparing it to more recent data, UE has determined that the Staff's test year is seriously out of date and inappropriate for the setting of rates which would become effective in mid-2002. Therefore the Company proposes a test year ending June 30, 2001. Ultimate selection of a test year lies with the Public Service Commission of the State of Missouri ("Commission"). UE, therefore, hereby respectfully requests that the Commission adopt its proposed test year.

I. The Test Year Should Capture The Most Recent And Representative Data

a. Selection of the Most Recent Test Year is Consistent with the Rulings of this Commission and the Laws of this State

One of the fundamentals of "ratemaking" is the use of a "test year." This is the simple devise of choosing a specific period of time for which to examine a company's expenses and revenues. Basically, if the company's revenues during the test year do not cover its expenses and a certain return to investors, a rate increase would be appropriate. If the revenues are in excess of the company's expenses and appropriate return, a rate reduction might be warranted. Since the test year is used to determine rates for the future, it is important that the time period used for this purpose be as representative of the future as possible. The rates being set will determine the company's financial strength and ability to provide its essential service.

Selection of a test year falls within the Commission's area of expertise. *State ex rel. GTE North, Inc. v. Missouri Pub. Serv. Comm'n*, 835 S.W.2d 356, 370 (Mo. Ct. App. 1992). In doing so, however, the Commission may not act in an arbitrary or capricious manner, or make a selection that lacks a reasonable basis. *State ex rel. Missouri Power & Light Co. v. Public Serv. Comm'n*, 669 S.W.2d 941, 944 (Mo. Ct. App. 1984). Despite its duty to propose rates that satisfy the Commission's legal constraints, the Staff's proposed test year is arbitrary and lacks any reasonable basis.

Of the two proposed test years, UE's is the reasonable choice because it relies on more recent, and more representative data than does the Staff's. Because load and customer base change from year to year, because economic conditions change, and inflation steadily drives costs upward, a more recent test year will usually be a better

vehicle for anticipating future costs. Even where a recent test year has been used, this Commission has approved the notion of adjusting those test year numbers with post-period data rests on the assumption that more recent data provides a better basis for future projection. *See, e.g., GTE North*, 835 S.W.2d at 368. Indeed, the Commission has itself recognized that a reasonable test year captures the most current available data. *In re Southwestern Bell Telephone Co.*, 1980 Mo. PSC LEXIS 48, at *9 (1980), for instance, where the parties' proposed test years differed by only one month, the Commission selected the later-ending test year as "reasonable and proper, since it is desirable to use, in setting rates for the future, the most recent test period for which data is available." *Id.*; *see also In re AmerenUE Co.*, 1992 Mo. PSC LEXIS 14, at *5 (1992) (approving stipulation raising estimate of decommissioning costs where estimate was based on more recent data). In the interest of capturing the most recent data possible, the Commission has previously ordered use of a test year that post-dated in part an action's filing date. *See In re Empire Dist. Elec. Co.*, 2001 Mo. PSC 1296, at *4 (2001) (ordering parties to adopt test year ending only four days prior to the issuance of the test year order).

b. Staff's selection of a June 30, 2000 test year is unreasonable and arbitrary.

i. Staff's data was more than one year old at the time Staff filed its case.

The Staff's proposed test year is unreasonable and arbitrary. This is not even a case, such as *In re Southwestern Bell*, *supra*, where the proposed test years differ only marginally. Rather, the parties propose entirely different years. Not only does the Staff use dated data, but data that was over a year old at the time of filing. By the time

the Commission adjudicates this matter, some of the Staff's data will be nearly three years old.

ii. Prior to its July 2001 filing, Staff rejected all attempts by the Company to assist in updating the test year.

There is no excuse for the Staff's selection of this inappropriate test year. Well prior to its filing of this case in July 2001, the Staff had access to the necessary data to use, at a minimum, a test year ending December 31, 2000. But the Staff rejected this, in lieu of pursuing its own, out-of-date test year. Prior to Staff's July 2001 filing, UE went so far as to offer its assistance to Staff in updating its analysis for a test year ending December 31, 2000, but this offer was rejected.

UE has also subsequently provided the Staff with all the documentation necessary to adopt a test year ending June 30, 2001, or at least update the year-end 2000 test year, and did so as soon as it was available as early as July and August 2001. But this too was rejected by the Staff. *See* Attached Affidavit of Gary S. Weiss.

The Commission has recognized the importance of capturing as much change in a regulated market as possible, when inductively projecting future costs. *See, e.g., In re Great River Gas Co.*, 1985 Mo. PSC LEXIS 9, at *11 (1985) (adopting lead lag study because "use of more recent data makes it more reflective of current collection time"); *In re Investigation into Various Issues Related to the Missouri Universal Serv. Fund*, 2000 Mo. PSC LEXIS 900, at *3 (2000) (ordering parties to base embedded cost model on most recent data available). By virtue of being so stale, the Staff's test year cannot possibly capture a realistic level of UE's costs going forward.

iii. Significant changes in the Company's cost of service are ignored by the use of Staff's test year.

As indicated in Mr. Weiss' affidavit, there have been significant changes in the Company's cost of service since the period covered by the Staff's test year. Just looking at the increases in expenses for labor, power plant maintenance, tree trimming and injuries and damages indicates a total of over \$35 million dollars in additional costs beyond the costs included in Staff's test year. In addition, the Company estimates that normalized electric net operating income has decreased by \$50 to \$75 million for the year ended June 31, 2001, compared to the Staff's test year. While it might be argued that there may be offsetting decreases in the Company's cost of service, the use of a more current test year, rather than piecemeal updating, will be the best vehicle to obtain an accurate assessment of the Company's cost of service.

Staff's test year similarly fails to take into account macroeconomic change. For instance, in the Fall of 1999, when Staff's test year begins, the overall economy, and the energy sector in particular, enjoyed robust health and steady growth. UE's test year, on the other hand, captures the changes which have taken place in the economy since then, and, in particular, those in the energy sector. In addition, given the events of September 11, and their effects on the nation's economy, UE's test year is much more likely to be predictive of its cost of service on which rates are to be based in the near future.

That Staff's outdated test year necessitates many more adjustments than would a more recent year, additionally militates in favor of UE's proposal. The number of necessary adjustments grows as more changes become "known and measurable." The

test year choice should seek to minimize necessary adjustments because each need for an adjustment further calls into question the overall accuracy of the test year's predictive value. As the Supreme Court has recognized, "[t]he economic judgments required in ratemaking proceedings are often hopelessly complex and do not admit of a single correct result." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989). Each additional computation compounds the possibility of error, and further calls into question the Commission's ultimate conclusion.

Obviously, if the Commission chooses to adopt the Staff's test year, the Company will propose adjustments to that period, to more accurately reflect the Company's actual cost of service. These adjustments will be necessary and appropriate. However, where possible, the selection of the test year should seek to minimize the number of necessary additional calculations.

iv. Adoption of a June 30, 2001 test year may necessitate the Company's filing of a rate case.

Given the arbitrariness of the Staff's adopted year, UE is most skeptical that it can serve as the basis for calculating anything approximating a just and reasonable rate for several years into the future. Because selection of the test year is so central to cost of service ratemaking, the adoption of Staff's test year could necessitate UE filing its own rate case, using a June 30, 2001 or later test year, in the near future. The Company recognizes that this would not be the most efficient use of the Company and Commission resources. However, the changes that have occurred since the Staff's proposed test year are so significant that the Company may have no choice.

v. Staff's Arbitrary or Opportunistic Choice of Test Year Raises Takings and Due Process Clause Concerns

The Staff's arbitrary test year not only offends the Commission's statutory obligations under Missouri law, but also raises concerns of a Constitutional dimension. The Commission's choice of evaluative methodology, and the subsidiary aspects thereof, do not implicate Constitutional concerns so long as the overall result thereof cannot be said to be unreasonable. *Duquesne Light Co.*, 488 U.S. at 310, 313-15. This holds true so long as the Commission's choices remain consistent and reasonable. However, "a state's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."

Such opportunistic conduct first raises a takings issue. As the Supreme Court has recognized, a utility's ongoing viability rests largely in the hands of the regulatory agency. "The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks." *Id.* at 315. The Federal Constitution guarantees investors in publicly regulated, but privately owned firms, a return "commensurate with returns on investments in other enterprises having corresponding risks." *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923); accord *Duquesne*, 488 U.S. at 314. The opportunistic and arbitrary switching of methodologies, selectively imposing the downside of business cycles without corresponding gain for the upside, increases the risk

inherent in a concern. Absent a corresponding increase in investor's rate of return on this now riskier business venture, such conduct effects a taking.

The opportunistic and arbitrary switching of methodologies also raises a more basic due process claim. The due process clause of the Fourteenth Amendment protects fundamental notions of justice and fair play. It also grants publicly regulated companies the right to know the terms under which they will be regulated. While certainly states are permitted to change their regulatory structures or methods, such changes must take place in a transparent and visible manner. The arbitrary selection of regulatory vehicles, varying from case to case or even issue to issue, such as making the choice of an obviously outdated test year here, violates these fundamental notions, and consequently raise due process concerns.

II. Proposed Procedural Schedule

a. Use of June 30, 2001 test year should not delay these proceedings.

Had the Staff used a more appropriate test year when they made their filing, there would be no need for any additional time to complete this case. As indicated in Mr. Weiss's affidavit, Staff had the information to use a more current test year, but chose not to. Well prior to their July filing, Staff had all of the information needed for a test year ending December 31, 2000. In fact, Staff used much of this data in various ways, but specifically chose not to use that more current test year.

Moreover, Staff has now had the data for a June 30, 2001 test year since at least early August 2001. (See Weiss affidavit.) Staff should not need a significant amount of additional time to review it.

At the Prehearing Conference, held on November 8, 2001, the parties, including the Company, agreed to a procedural schedule if the Staff's test year is adopted by the Commission. The Company believes that the Staff should be able to complete the analysis of the Company's rebuttal filing, which will include the more recent data, within the time allowed in that schedule.

However, the Company is aware that the Staff objects, at least in part, to the Company's proposed test year because of the additional time that they say would be required for the Staff to prepare its response to the Company's rebuttal filing. The Company is also aware of the concern that such additional time for the Staff's review would result in a delay of the hearings in this matter, beyond the dates currently assumed to begin on March 4, 2002. However, the importance of this case to the Company and its customers, necessitates the use of the best data available.

- b. If the Commission rules that use of a June 30, 2001 test year should delay these proceedings past June 1, 2002, the Company will consent to a rate change retroactive to June 1, 2002.**

The Company proposes that, in order to use the more appropriate test year, provide additional time for the Staff and other parties to respond to the Company's filing, and still address the concerns about a delay in the hearings in this case, the rates resulting from the Commission's Report and Order in this matter be effective retroactively to a date on which such rates would have been effective pursuant to the schedule submitted by the Staff. The proposed schedule filed by Staff, and believed to be agreed to by all parties, assuming the use of the Staff's test year, calls for the hearings to be held from March 4 through March 22, 2001. Assuming the usual time for briefing by the parties

and deliberation by the Commission, it is reasonable to assume that rates resulting from that schedule would become effective on June 1, 2002. The Company proposes that if its test year and proposed schedule (or some reasonable variation of that schedule) is adopted, the rates resulting from the Commission's decision would be effective retroactively to June 1, 2002.

The Company is not interested in prolonging this matter. However, the Company is very interested in assuring that the Commission bases its decisions on the most appropriate data reasonably available to it. Basing those decisions on outdated and unrepresentative data is inappropriate for the legal and practical reasons stated above. The Company's proposed schedule and agreement to make the Commission's decision effective on the same date as it would under the Staff's proposed schedule, allows the Commission to use the appropriate data, and yet assures the Commission and the parties that no one would be harmed by the additional time required.

The schedule attached to this pleading (Attachment 1) provides for additional filings to accommodate the Staff in evaluating the more current test year. It provides for an additional Company filing to respond to Staff's rebuttal to the Company's filing, and then allows for one final filing by the Staff to rebut the Company's filing. Since Staff retains the burden of proof in this complaint case, it is appropriate that Staff have the final filing.

III. Request For Time To Reply

The Company respectfully requests the opportunity to reply to the test year and scheduling pleadings being submitted by the Staff and other parties. Specifically, the Company requests ten days to prepare and file that reply.

The Company suggests that since both proposed schedules (the schedule agreed to previously if the Staff's test year is adopted, and the Company's proposed schedule – Attachment 1, hereof) call for the next filing to be on December 21, 2001, there will be no delay caused by the time required for this requested reply.

WHEREFORE, for the reasons stated above, Union Electric Company respectfully requests this Commission to direct that the parties utilize a test year in this case of the twelve months ending June 30, 2001; and that the Commission adopt the schedule attached hereto. In addition, the Company requests the opportunity to reply to other submissions, within ten days from today.

November 13, 2001

Respectfully submitted,

UNION ELECTRIC COMPANY
d/b/a AmerenUE

By: James J. Cook by Joseph L. Behrke
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ATTACHMENT 1

PROPOSED PROCEDURAL SCHEDULE, IF COMMISSION ORDERS A TEST YEAR OF **JUNE 30, 2001**

Event	Date
AmerenUE Files Rebuttal Testimony - Including June 30, 2001 Test Year data	12/20/01
OPC and Intervenors File Rebuttal Testimony	01/18/02
MIEC Responds to AmerenUE Discovery	01/25/02
Staff Files Supplemental Direct Testimony - Based on New Test Year	03/22/02
Depositions of Staff Supplemental Direct Witnesses	04/12/02
AmerenUE, OPC, and Intervenors File Rebuttal to Staff Supplemental Direct Testimony and Cross-Rebuttal	05/10/02
Staff Files Surrebuttal Testimony	05/24/02
Completion of Depositions of Staff Surrebuttal Witnesses	06/07/02
Prehearing Conference	06/11-12/02
Staff Files List of Issues, Order Of Issues, Order Of Witnesses, & Order Of Cross-Examination and Parties Submit Statements Of Positions	06/14/02
Hearing Begins	06/19/02 - 07/03/02 07/08/02 - 07/12/02

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that there were some prior period entries recorded in December, 1999 that had to be adjusted out for the test year June 30, 2000 but would not be a problem if they moved to the December 31, 2000 test year.

3. Later as the MPSC Staff started providing me with workpapers, I noticed that even on the expense adjustment workpapers the data through December 31, 2000 was included and in some instances used to calculate the adjustment made to the June 2000 test year. They did attempt to make an adjustment to operating expenses to reflect the 12 months ended December 31, 2000 labor expenses. They also used the actual fuel cost for the year 2000 to calculate their fuel expense for weather normalized and adjusted kWh sales. Throughout the spring and early summer, many of the MPSC Staff's data requests were being updated with current data. By the time the MPSC Staff completed their on site audit they actually had information through April and/or May of 2001. The June 2001 data was provided in late July or early August; and the September 2001 filing of the last sharing period earnings report, included a detailed cost of service accounting run along with workpapers.

4. By not moving to the 12 months ended June 2001, the MPSC Staff is ignoring some significant increases in expenses. For example the electric labor increased more than \$15 million without annualizing the wage increases that took effect during this period; the contract power plant maintenance increased more than \$5 million; the Missouri distribution other expenses, includes tree trimming, increased over \$5 million; and the injuries and damages expense increase by more than \$10 million. In total, the Company estimates that the normalized electric net operating income decreased \$50 to

\$75 million for the 12 months ended June 30, 2001 compared to the 12 months ended June 30, 2000.

5. I hereby swear and affirm that the information contained in this affidavit is true and correct.

/S/
Gary S. Weiss

Subscribed and sworn to before me this _____ day of November, 2001.

Notary Public

My Commission expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via first class U.S. mail, postage prepaid, on this 13th day of November, 2001, on the following parties of record:

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