Missouri Public Service Commission

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November 26, 2001

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EC-2002-1 – Staff of the Missouri Public Service Commission, Complainant, vs. Union Electric Company, d/b/a/ AmerenUE, Respondent.

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **STAFF REPLY TO UNION ELECTRIC COMPANY'S MOTION TO ESTABLISH A TEST YEAR AND PROPOSED PROCEDURAL SCHEDULE.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

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Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission Complainant, v. Union Electric Company, d/b/a AmerenUE, Respondent.	)	Case No. EC-2002-1

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

Comes now the Staff of the Missouri Public Service Commission (Staff) in reply to Union Electric Company's Motion To Establish Test Year And Proposed Procedural Schedule filed with the Commission on November 13, 2001. Having reviewed the filing of Union Electric Company (UE), d/b/a AmerenUE, the Staff sees no reason to alter its proposal respecting test year, update period and procedural schedule. In reply to UE's Motion To Establish Test Year And Proposed Procedural Schedule, the Staff states as follows:

1. UE asserts that there are significant changes in its cost of service not addressed by the Staff's test year and update period. UE has had approximately six months to study the Staff's case and almost a year with its own books and records from the 12-months ended December 31, 2000 to determine all the issues that it wishes to raise with the Staff's excess earnings/revenues complaint case. Nothing has prevented UE from identifying those changes, quantifying their impact, and supporting its positions for a filing of its rebuttal testimony on December 20, 2001. Any other approach at this time will delay this case further.

The test year in a rate or complaint case is the starting point for the determination of a utility's cost to provide service to its customers. The test year is never the final answer. Test years are adjusted to reflect a party's position that an element in the test year does not fairly represent the cost of doing business in the future for which new rates are set. The important element is that the parties are knowledgeable respecting what is actually booked or recorded in the test year. Without this knowledge, a party cannot form an opinion much less propose an adjustment regarding items in the test year results.

The Staff's case including its test year was filed on July 2, 2001. UE has had ample time to study the Staff's filing and conduct discovery. UE's proposed test year was not even available at the time the Staff filed its complaint, as UE had not closed its books for the year ending June 30, 2001. Now UE asserts that the Staff's case is deficient because the Staff did not use a test year that was unavailable for audit when the Staff filed its case.

It will take time and thus further delays for the Staff and other parties to become knowledgeable regarding the major items that are causing cost shifts in UE's test year. Under the Staff's approach, UE will be required to identify and support these items in its rebuttal filing so no additional time than is in the Staff's proposed procedural schedule should be required to discover and become knowledgeable regarding the entries in UE's books and records for the test year proposed by UE. Under UE's proposal, the Commission must either grant additional time for the Staff and other parties to identify the underlying facts respecting UE's cost shift assertions and thereby accept additional delays in the processing of this case, or deny its Staff and the other parties the opportunity to determine the bases of the cost shifts included in UE's asserted test year results. Even though UE now states that it is willing to implement a rate reduction retroactive to June 1, 2002, it is willing to do so only if the Commission further delays

the processing of this case by providing UE seven weeks to further respond to the Staff's case, and provide the Staff only two weeks to reply to UE's additional filing.

The Staff notes that UE cites in its November 13, 2001 filing several telecommunications cases and does not seek to distinguish those cases on the basis that UE is an electrical corporation and not a telecommunications company. The Staff cited in its November 13, 2001 a 1993 Staff excess earnings/revenues complaint case against Southwestern Bell Telephone Company (SWBT) (*Re Staff of the Missouri Pub. Serv. Comm'n v. Southwestern Bell Tel. Co.*, Case Nos. TC-93-224, et al., Report And Order, 2 Mo.P.S.C.3d 479, 486-87 (1993)(*SWBT II*) and will cite additional telecommunications company cases herein.

2. The very first case cited by UE in its November 13, 2001 filing *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356 (Mo.App. 1992) is worth a closer look than provided by UE. GTE North pursued review of various decisions of the Commission in a rate increase case filed by GTE North in 1989 and decided by the Commission in 1990. One of the issues on review, separation factors, was a test year issue respecting the proper determination of GTE North's revenue requirement. In providing background respecting the issue, the Court defined various terms related to the issue, including "test year":

> "The accepted way in which to establish future rates is to select a test year upon the basis of which past costs and revenues can be ascertained as a starting point for future projection." *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 645 S.W.2d 44, 53 (Mo.App.1982). A test year is a tool used to find the relationship between investment, revenues, and expenses. Certain adjustments are made to the test year figures; "normalization" adjustments used to eliminate non-recurring items of expenses or revenues and "annualization" adjustments used to reflect the end-of-period level of investment, expenses and revenues. Adjustments are also made for events occurring outside the test year. The criteria used to determine whether a post-year event should be included in the analysis of the test year is whether the proposed adjustment is (1) "known and measurable," (2) promotes the proper relationship of investment, revenues and expenses, and (3) is representative of the conditions anticipated during the time the rates will be in effect.

835 S.W.2d at 368.

The Court held that test periods and adjustments "are factual determinations and, as such, within the expertise of the Commission." 835 S.W.2d at 370. The Court also stated that the Commission's decision not to incorporate a known and measurable item into the determination of the utility's revenue requirement was not unlawful, i.e., an abuse of discretion, so long as the resulting rates were just and reasonable. *Id.* The Court recognized that the Commission needs the "best possible data," which may not be the most current possible data:

> . . . Mindful that the central purpose of the "test year" is as a predictor, it makes sense for the Commission to be allowed flexibility in order to establish that the best possible data be analyzed for its predictions to achieve a degree of accuracy. . . .

Id. at 372.

GTE North also argued that the Commission's failure to follow its decision on test year and adjustments for separation factors in *Staff of Missouri Public Serv. Comm'n v. Southwestern Bell Tel. Co.*, Case Nos. TC-89-14, et al., 29 Mo.P.S.C.(N.S.) 607 (1989) (*SWBT I*) was arbitrary and capricious. The Western District Court of Appeals in the *GTE North* case held that the Commission's departure from its decision in *SWBT I*, by itself, was not sufficient reason for reversal of the Commission. 835 S.W.2d at 871:

> . . . "Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." *Columbia v. Missouri State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo.App.1980). It is the impact of the rate order which counts; the methodology is not significant. *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457 (Mo.App.1987).
>
> . . . The court [in *State ex rel. Arkansas Power & Light*] further held:
>
> > If the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry is at an end. No methodology being statutorily prescribed, and ratemaking being an inexact science, requiring use of different formulas, the Commission may use different approaches in different cases.
>
> *Id.* at 462. (citations omitted).

835 S.W.2d at 371. These pronouncements are consistent with the United States Supreme Court's holding in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989), which case is cited at various points in UE's November 13, 2001 filing:

> . . . **Today we reaffirm these teachings of *Hope Natural Gas:* "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end.** The fact that the method employed to reach that result may contain infirmities is not then important." *Id.,* at 602, 64 S.Ct., at 288. This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones.

109 S.Ct. at 617; Emphasis added.

> Similarly, **an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." *Hope,* 320 U.S., at 602, 64 S.Ct., at 288.** The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. . . .

Id. at 619; Emphasis added.

3. As noted paragraph 1 above, the Staff cited in its November 13, 2001 filing the Commission's Report And Order, the section on test year, respecting the Staff's second excess earnings/revenues complaint case against SWBT. The *GTE North* case cited in paragraph 2 above contains a reference to the Staff's first excess earnings/revenues complaint case *SWBT I.* The section in *SWBT I* on test year is worth noting. The Staff filed its complaint case in August 1988 utilizing a 1987 test year with adjustments made to certain test year data. Test year results became available in February 1988 with certain items not available till April 1988. SWBT argued that the Staff's test year and adjustments were not representative of SWBT's actual 1987 financial picture, nor did they represent an appropriate basis for setting rates in the Staff's complaint case. SWBT argued that the Commission should use (1) 1987 actual data if the

Commission sought to determine whether SWBT overearned in 1987, (2) projected data if the Commission sought to set rates for the future and (3) proposed a true-up using 1988 actual data which would be available by the end of February 1989.

The Staff and Public Counsel opposed a true-up and objected to the true-up proposed by SWBT. The Commission noted that "[t]heir objections rested mainly on the time required to audit the actual data and that no true-up was necessary based on 1988 data which had been reviewed." 29 Mo.P.S.C.(N.S.) at 613. The Commission further decided as follows in rejecting SWBT's position:

> . . . Whether adjustments to the test year are appropriate as proposed by the parties will be addressed on an issue by issue basis.
>
> The Commission has determined further that a true-up as proposed by SWB is not warranted by the circumstances in this case. The evidence indicates that the effects of inflation on SWB's costs will be minimal and that growth in revenues will continue through this period. True-ups in the past have been utilized to offset the effects of inflation and the delay in implementation of rates caused by regulatory lag. Even though the delay in implementation of rates in this case may be longer than usual, the mere delay in implementation does not render the rates unreasonable. Revenue growth and Company management decisions could offset any increase in costs caused by inflation.
>
> The Commission specifically rejects the true-up proposal of SWB at the hearing. The effect of a true-up as proposed would be an entire reauditing of SWB operations and thus a substantial delay in the implementation of new rates. If the Commission adopted a true-up as proposed by SWB it could never set new rates, since there would always be need for a true-up. The Commission must base its decision on data at some point in time. The Commission has determined the 1987 test year, as adjusted, is appropriate in this case. The Commission has determined it can make an intelligent forecast on that basis and it would be inappropriate to use 1988 actual data without an audit to determine if the 1988 data maintained the appropriate revenue, expense, and investment relationship.

29 Mo.P.S.C.(N.S.) at 614.

If the Commission were to adopt the approach proposed by UE in its November 13, 2001 filing and proposed by UE at the November 8, 2001 prehearing conference, the Commission would place itself, in essence, in the situation it addressed in *SWBT I,* i.e., it could never set new rates, since there would always be need for a true-up. Although not addressed in its

November 13, 2001 filing, UE indicated at the November 8, 2001 prehearing conference that its test year and update proposal was a test year of the 12-months ended June 30, 2001, updated through September 30, 2001.

4. At page 2 of UE's November 13, 2001 filing, UE states, in part, that "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." A 1981 Western District Court of Appeals decision, *State ex rel. Missouri Public Serv. Co. v. Fraas*, 627 S.W.2d 882 (Mo.App. 1981)(*MoPub*), from an era of unprecedented inflation, as compared to the present period of continually falling interest rates, related, in finding that the attrition issue was subject to the general mootness doctrine, that "[t]he choice of method with which to meet the inflation problem rests largely within the expert discretion of the administrative body, and for that reason the court will not presume to dictate the choice of method to the Commission." *Id.* at 88.

Missouri Public Service Company (MoPub) had proposed that an attrition adjustment be used to supplement its rate increase and the Commission declined. MoPub argued that the Commission's rate increase determinations were being rendered obsolete by inflation, the Commission's use of historical test years and the length of time required for judicial review, thus requiring the utilities to file subsequent rate increase cases. MoPub contended that "the net result is to deny the utilities any opportunity to earn a fair return, thus violating due process." 627 S.W.2d at 886, 885.

5. UE appended to its November 13, 2001 filing an affidavit of Mr. Gary S. Weiss, who, among other things, states at the bottom of page 1 of his affidavit: "I offered to give them a copy of my year end cost of service run for the 12 months ended December 31, 2000." None of the Staff accountants recall Mr. Weiss indicating at any time that he had a year-end cost of service run for the 12 months ended December 31, 2000. The filing of Mr. Weiss' affidavit on November 13, 2001 is the first that the Staff became aware that Mr. Weiss has a year end cost of service run for the 12 months ended December 31, 2000. There is nothing in Mr. Weiss'

affidavit to cause the Staff to alter its position that the twelve months ended June 30, 2000 updated to December 31, 2000 is an appropriate test year and update period.

6. Throughout UE's November 13, 2001 filing there is an overwhelming air of reproach respecting the test year issue. In repeatedly stating what in UE's mantra the Staff has had time to do in the course of its audit of UE and since its filing on July 2, 2001 UE appears to take the view that the only public utility that the Commission is charged with regulatory responsibilities respecting is UE. In its November 13, 2001 filing UE views the Commission and its Staff as operating in a vacuum of no other cases pending before the Commission, nor regulatory responsibilities existing, than processing UE cases. Thus, there is no test year and update period that is appropriate to UE other than the ones suggested by UE, and there are no problems created by UE's proposals because UE's proposals cause no problems for UE, regardless of what other cases may be pending before the Commission or are in the offing.

The Staff accountants who were assigned to the audit of UE that became Case No. EC-2002-1 were also assigned to the rate case audit of Laclede Gas Company, Case No. GR-2001-629, and some will be assigned to the rate case audit of Citizens Electric Corporation, Case No. ER-2002-217. The Staff financial analyst assigned to the audit of UE that became Case No. EC-2002-1 is the manager of that department, and, as a consequence, has had oversight responsibility over that department's activity in all major proceedings before the Commission involving that department. The Staff engineers and economists assigned to the audit of UE that became Case No. EC-2002-1 were also assigned to the rate case audit of Empire District Electric Company, Case No. ER-2001-299, and the rate case audit of UtiliCorp United Inc., Missouri Public Service division, which has a direct testimony filing date of December 6, 2001. These members of the Staff, during the course of the Staff's audit of UE, which became Case No. EC-2002-1, have been assigned to other cases, are assigned to other cases and will be assigned to other cases during the pendency of Case No. EC-2002-1. Also, two Staff engineers and two Staff accountants assigned to the audit of UE which became Case No. EC-2002-1 left their

employment by the Commission and other Staff members have had to assume their responsibilities.

Although UE may believe that the Commission Staff should be made available to fit UE's convenience, to date other Commission business has not permitted that to occur. Furthermore, UE's threatening the Commission at page 6 of its November 13, 2001 filing with the filing of a rate increase case should not cause the Commission to do anything other than what is appropriate, i.e., adopt the Staff's proposed test year and update period.

7. At pages 7-8 of its November 13, 2001 filing, UE charges that "[t]he 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 elects a taking." UE further argues at page 8 of its November 13, 2001 filing that "[t]he 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 [of justice and fair play], and consequently raise due process concerns." UE's perspective, also stated at page 7 of its November 13, 2001 pleading, is that (1) **"[t]he 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." and (2) "[a]s the Supreme Court has recognized, a utility's ongoing viability rests largely in the hands of the regulatory agency."

The Staff does not find the word "guarantee" at the pages of the United States Supreme Court decisions cited by UE. The interpretation found in the *MoPub* case previously cited in this pleading is the meaning properly imparted to the *Bluefield* case cited by UE. The United States Supreme Court stated, among other things, that the utility is to be accorded rates that will provide it an opportunity to earn a return that "should be reasonably sufficient to assure confidence in the

financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." 43 S.Ct. at 679. The Western District Court of Appeals stated in MoPub case in addressing the attrition issue that:

> The record in this case indicates that inefficient management would tend to explain at least in part the short fall between the allowed and earned rates of return.[3]. . .
>
> [3] Mismanagement would deprive a public utility of any complaint about insufficient earnings. A rate tariff is intended only to permit an opportunity to make the percentage of return determined by the Commission to be reasonable. As put by one authority, "the utility's return allowance might be compared with a fishing or hunting license with a limit on the catch. Such a license does not guarantee that the holder will catch anything at all; it simply makes the catch legal (up to a specified limit) provided the holder is successful in his own efforts." 1 Priest, Principles of Public Utility Regulation 202 (1969) (quoting Welch, Cases and Text on Public Utility Regulation 478 (Rev.Ed.1968)).

627 S.W.2d at 887.

The Staff states again what it has previously said respecting its test year and update proposal. The Staff's test year and update proposal does not prohibit UE from filing with the Commission whatever adjustments UE deems appropriate should the Commission adopt the Staff's test year and update period.

8. At page 6 of its November 13, 2001 filing, UE states that "[b]ecause selection of 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." UE's filing is not clear on this point, and the Staff is not suggesting that UE be permitted to further delay proceedings by being permitted additional time to clarify its position, if UE's filing on this date, November 26, 2001, does not address this point. The Staff assumes that the filing that UE is suggesting that UE might make is a rate reduction case associated with a third alternative regulation plan to be proposed by UE.

The Staff assumes that UE is not suggesting at page 6 of its November 13, 2001 filing that UE would file a rate increase case. The Staff bases this assumption on UE's offer on page 9 of its November 13, 2001 filing to make any rate change retroactive to June 1, 2002, if the Commission rules that use of a June 30, 2001 test year, as proposed by UE, should delay these proceedings past June 1, 2002. The Staff assumes that UE is not planning to file a rate increase case and proposing to make the increase in rates retroactive to June 1, 2002, if a rate increase Report And Order cannot be issued by June 1, 2002.

But UE may be suggesting on page 6 of its November 13, 2001 filing that a rate reduction is only appropriate if the Commission adopts a third alternative regulation plan, and if the Commission opts to keep UE at traditional cost of service regulation, then, indeed, it would file a rate increase case. Again, UE's filing is not clear on these points, and the Staff is not suggesting that UE be permitted to further delay proceedings by being provided additional time to clarify its position, if UE's filing on this date, November 26, 2001, does not address these points. If UE desires to provide any clarification not contained in its filing on November 26, 2001, it should be included in its rebuttal filing on December 20, 2001. The six months that UE will have had to respond to the Staff's July 2, 2001 filing is unprecedented, and the Staff does not believe that continued delay is warranted.

Should UE file a rate reduction case contested by the Staff, Public Counsel, or some other party, the Commission would likely confront a number of novel issues. If UE files its own rate reduction case, any party advocating that a larger rate reduction is appropriate would have the burden of proof, but even if a party to the proceeding proved that a larger rate reduction was appropriate, there is the question whether a larger rate reduction than filed for by UE can be effectuated within the context of UE's own rate reduction case. Seemingly, the Commission would have to address the argument that for the Commission to order a larger rate reduction than that filed by UE, some entity, such as the Staff, would have to file a complaint case seeking a larger rate reduction than UE's rate reduction filing.

It is in the context of the matters addressed in this paragraph of the Staff's Reply that the Staff notes the comment in the Commission's November 19, 2001 Order Granting Intervention that "[t]he Commission does not ordinarily entertain requests for intervention in complaint cases." With all due respect to the Commission, the Staff believes that a review of Staff initiated rate reduction complaint cases will show that the Commission has entertained requests for intervention in Staff initiated rate reduction complaint cases, such as *SWBT I* and *SWBT II*. The Commission may have intended to refer to rate reduction cases filed jointly by a utility, the Staff and Public Counsel such as Case No. ER-99-313, In the Matter of the Stipulation And Agreement Reducing the Annual Missouri Retail Revenues of Kansas City Power & Light Company, Order Denying Intervention And Approving Stipulation And Agreement (April 13, 1999).

9. UE asserts at page 9 of its November 13, 2001 filing that its proposed procedural schedule, based on its proposed test year, "provides for additional filings to accommodate the Staff in evaluating the more current test year." UE's proposed procedural schedule accommodates no party other than UE. It provides UE seven weeks (49 days) for an additional filing of testimony and provides the Staff two weeks (14 days) to respond to UE's additional filing of testimony. The Staff related in its November 13, 2001 filing that at the November 8, 2001 prehearing conference UE stated that it would file in this case the rebuttal testimony of 25 to 30 witnesses. Thus, under UE's proposal the Staff would have 14 days to respond to the additional filing of UE of possibly 25 to 30 witnesses. As the Commission is well aware, the Commission's own discovery rule, 4 CSR 240-2.090, provides a 20-day response time for data requests.

Wherefore, the Staff requests that the Commission adopt the test year (12-months ended June 30, 2000) and update period (July 1, 2000 to December 31, 2000) and the procedural schedule proposed by the Staff (procedural events culminating in hearings March 4-22, 2002) in the Staff's November 13, 2001 filing with the Commission.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 26th of November, 2001.

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Case No. EC-2002-1
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