BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Noranda Aluminum, Inc., et al.,	)	
Complainants v. Union Electric Company,	)	File No. EC-2014-0223
d/b/a Ameren, Respondent.	)	

COMPLAINANTS', CCM'S, AARP'S, OPC'S, MIEC'S AND MISSOURI RETAILERS ASSOCIATION'S RESPONSE TO APRIL 8, 2014 PUBLIC SERVICE COMMISSION AGENDA DISCUSSION

COME NOW Complainants, AARP, Consumers Counsel of Missouri ("CCM"), Missouri Industrial Energy Consumers ("MIEC"), Missouri Retailers Association ("MRA"), and Office of Public Counsel ("OPC"), pursuant to the Commission's Order inviting responses to agenda discussion on the scheduling of this matter, and in response state:

A. Introduction

This Complaint alleges, and the direct testimony supports, the claim that Ameren has over-earned, is over-earning, and will for some time continue to over-earn, all at the expense of ratepayers. In response, Ameren has proposed delay at every turn in an effort to run out the clock to a time when it is no longer overearning (some time after it places substantial new plant in service). Ameren's position was predictable and understandable. Its job is to earn as much profit for its shareholders as possible. Fortunately for ratepayers, this Commission has the authority to protect their interests by quickly giving them a hearing and an opportunity to prove their case. As in Case No. EC-2014-0224, justice delayed is justice denied, for if the Commission waits long enough to act, Ameren's capital expenditures will nullify the cause for lower rates. Time is money; for each month of delay in deciding this matter, ratepayers are overpaying by $3.7 million, and that is without consideration of the lower and reasonable return on equity ($5.6 million per month with the reasonable lower return on equity).

B. This is not an interim rate case

In *State ex rel. Laclede Gas Company v. Public Service Commission*, 535 S.W.2d 561, 565 (Mo. App. 1976), the court described an interim rate proceeding:

> In its very nature, an interim rate request is merely ancillary to a permanent rate request, and in overwhelming probability the permanent rate request will have been granted before any denial of an interim increase can work its way to the point of decision by an appellate court.

The court had earlier (*Id.* at 563) stated "this application [Laclede's general rate case filing] and the proceedings thereon is referred to as the 'permanent' rate case." This case is not now, nor will it ever be, "ancillary" to a possible future Ameren general rate case.

This Complaint is brought pursuant to explicit statutory authority, particularly Section 386.390.1 and Section 393.260.1, RSMo. It is not derivative or ancillary in any respect to a different "permanent" rate case.

Moreover, the Commission has generally recognized that "interim" means "interim, subject to refund." Without the modifying phrase, "interim" has no real meaning, since all rates are just "interim" until the Commission decides that they are not just and reasonable. There is no such thing as a permanent rate that will never be changed by the Commission as changing circumstances dictate. It does not appear that the Commission intends the rates that it establishes in response to the Complaint will be subject to refund. Rather it appears that the Commission will establish rates in response to the Complaint that will continue in effect until they are later changed by a subsequent Commission order based upon a new body of evidence. As such, the Commission may explicitly recognize that the rates it establishes in response to the Complaints may only be in effect for a relatively short period of time. But they are no more "interim" than any other rates that the Commission establishes when it knows that circumstances may soon

require it to establish new and different rates that are just and reasonable under the new circumstances.

This is no different than the changing circumstances that recently drove Missouri's investor-owned utilities to file back-to-back rate cases. The Commission and consumers knew that the rates established in (for example) Ameren's 2007 rate case would only be in effect for a short time until Ameren could, as quickly as possible, file and conclude a new rate case. From that perspective, the 2007 rates were "interim," because the Commission anticipated that they would be short-lived. Nonetheless, the Commission's decision was based upon a consideration of all relevant factors in just the 2007 case and was not contingent upon the anticipation of what evidence in a future case might show. The rates established in Ameren's 2007 case (and all of those back-to-back cases) were not "interim," and the rates established based upon the evidence presented in this Complaint (including all of the contra-evidence that Ameren will be allowed to present under the near-consensus proposed procedural schedule) should not be "interim."

C. The Complainants have the burden of proof

The Commission has noted that the jointly proposed procedural schedule is compressed. That compression fairly reflects that each day of delay requires Ameren's customers to pay $183,000 more than is necessary for Ameren to earn a reasonable return on its investment, while providing Ameren ample opportunity to present whatever evidence it chooses.

In this independent rate complaint case, the burden of persuasion is upon the complainant, and never shifts. The burden of proof is not on the Staff, nor is it on Ameren. If the Complainants establish by a preponderance of the evidence the facts necessary to support their claim, they will prevail; if not, they will not prevail.

The proposed schedule provides Ameren adequate time to prepare its case. Ameren has propounded a single, non-substantive data request in this case, attached as Exhibit A hereto. This lone data request, submitted almost two months after the Complaint was filed, shows that Ameren requires no information from other parties to present its revenues and expenses. And this makes sense. In a typical rate increase case, Ameren presents its case based upon financial information that it possesses and constantly monitors and analyzes. The longest period of time in such a case – five of eleven months – is to allow the parties that don't have the financial information to force Ameren to share it, and then to allow those parties to analyze and validate it. None of that time is necessary when a Complainant has presented an analysis of Ameren's financial picture on Day One. The Commission simply needs to allow Ameren ample time to **present** the information that it possesses and constantly analyzes.

The Commission should always bear in mind the burden of proof. Ameren does not – in this complaint case – need to prove exactly what its rates should be; to prevail, it only needs to demonstrate that Complainants have failed to affirmatively prove that rates should be reduced. And the Commission should definitely note that – despite the passage of almost two months since the Complaint was filed (and Ameren's collection of $11 million of excess revenue in those two months) – Ameren has yet to even allege a single substantive defect in Complainants' analysis. Every single pleading that Ameren has filed has simply urged delay for delay's sake.

If the evidence filed with the Complaint in direct testimony needs adjustment, Ameren has the information it needs immediately at hand, and has already had two months to prepare it for presentation. Once the Commission requires Ameren to finally engage in the substance of the Complaint and file testimony, the Commission will be able to judge the current state of Ameren's earnings.

D. Missouri statutes explicitly provide that customers may file rate complaints, but do not require the Commission to anticipate possible future plant additions

It is axiomatic that the Commission's primary charge is to establish rates that are just and reasonable. It is equally axiomatic that the Commission does so based upon a consideration of all relevant factors. Finally, it is axiomatic that "all relevant factors" are those factors which bear on the question of what is a just and reasonable rate at the current time, not what might have been a just and reasonable rate in the past, nor what might be a just and reasonable rate in the future, although past over-earnings can be considered.

In this case, the Commission cannot – as a matter of law – consider investments in facilities that are not now in service (section 393.135). It may come to pass that Ameren's construction projects are completed on time, and it may come to pass that those projects function as anticipated when they are completed. But neither of those things has any bearing on what constitutes a just and reasonable rate now, and the Commission may not consider them.

The Commission should not lose track of what this case is about and how the Commission should process it. The statutes clearly provide a mechanism for consumers to challenge the reasonableness of utility rates.[1] Nothing in the statutes contemplates a procedure whereby the Commission waits to address the merits of a consumer complaint until such time as its Staff completes an exhaustive audit, or until such time as the utility completes construction projects and proves that they are used and useful. The whole point of the complaint statute is to allow consumers to present evidence to the Commission that a utility's rates are in excess of just and reasonable rates. If the Commission does not act promptly on a properly-filed complaint, it

[1] Sections 386.390 and 393.260. Indeed, without such a mechanism and an effective and efficient way to fulfill that mechanism at the Commission, rates could only go up. A utility would never file to seek rate decreases when rates are excessive, and so excessive rates would continue at the status quo until circumstances change to make them inadequate and force the utility to seek an increase.

is effectively ignoring its statutory duty. Complainants and the signatories to this response recognize that the Commission may review the evidence and conclude that Complainants have failed to prove overearnings. That is the how the process should work, and that is the Commission's role.

The Commission's should base its decision on the evidence and counter-evidence that will be adduced on the allegations in the Complaint. Based upon its discussion at the Agenda meeting, it appears that the Commission is considering either: 1) delaying a decision upon the properly-filed Complaint[2] until its Staff (which is not a Complainant and which has no role in the statutory complaint process) has spent several months compiling extra-Complaint evidence about what rates might be reasonable at the future point when Staff has completed its compilation; or 2) delaying making a decision on this specific Complaint on the general expectation that circumstances may change in the future that may justify a rate increase or at least militate against a rate decrease. Neither reason for delay is grounded in proper public policy, ratemaking theory, case law, or statutory provisions. The Commission is and always has been a quasi-judicial body. There is no more core judicial role than the resolution of a complaint properly put before the body. The trier of fact considers the complaint presented by the moving party, the answer by the defending party, the evidence in support and the evidence against. There is no room for or reason for speculation about future events.

The Commission should allow the Complainants to present their statutorily-sanctioned Complaint, allow Ameren adequate time to respond (taking into account the fact that two months has passed with no substantive discovery requests), and then decide the case. The statute does not impose a Staff audit requirement. Nor does the statute allow the Commission to anticipate

[2] Note that Ameren has never challenged the statutory basis for the Complaint nor the right of Complainants to file the Complaint.

possible future plant additions in determining what rates are just and reasonable today. The Commission's role always is to balance the interests of customers and the interests of the utility by allowing both sides a fair and timely opportunity to present their evidence and then making a decision as expeditiously as possible. Respondents herein have proposed a schedule to accomplish that objective.

As indicated above, the General Assembly has provided explicitly that customers can initiate rate cases. In such circumstances, the utility/respondent presents in rebuttal testimony any detailed adjustments it deems necessary, with Complainants given the opportunity to provide additional detail in surrebuttal. It is not reasonable to preempt or thwart the statutory provision by ruling the Complainants' evidence insufficient before all the evidence has been presented, or by delaying proceedings until circumstances change. Ameren has not filed motions for summary disposition (which are based on the absence of contested fact issues), but rather has filed motions to dismiss (which concede the facts alleged in the complaint, but assert failure to state a claim). The Commission should not conflate the two, and should adopt the jointly proposed procedural schedule, and require Ameren to timely produce its evidence. Each day of delay requires Ameren's customers to pay $183,000 more than Complainant's Complaint alleges is necessary for Ameren to earn a reasonable return on its investment.

Respectfully submitted,

BRYAN CAVE, LLP

By: */s/ Diana M. Vuylsteke*
Diana M. Vuylsteke, # 42419
211 N. Broadway, Suite 3600
Telephone: (314) 259-2543
Facsimile: (314) 259-2020
E-mail: dmvuylsteke@bryancave.com

Edward F. Downey, #28866
221 Bolivar Street, Suite 101
Jefferson City, MO 65109
Telephone: (573) 556-6622
Facsimile: (573) 556-7442
E-mail: efdowney@bryancave.com

Attorneys For Complainants And
The Missouri Industrial
Energy Consumers

OFFICE OF THE PUBLIC COUNSEL

By: */s/ Lewis R. Mills, Jr.*
Lewis R. Mills, Jr. #35275
Public Counsel
PO Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-1304
Facsimile: (573) 751-5562
E-mail: lewis.mills@ded.mo.gov

By: */s/ John B. Coffman*
John B. Coffman #36591
871 Tuxedo Blvd.
St. Louis, MO 63119
Telephone: (573) 424-6779
E-mail: john@johncoffman.net

Attorney For AARP And CCM

BLITZ, BARDGETT & DEUTSCH LC

By: */s/ Thomas R. Schwarz, Jr.*
Thomas R. Schwarz, Jr. #29645
Stephanie S. Bell #61855
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone: (573) 634-2500
Facsimile: (573) 634-3358
E-mail: tschwarz@bbdlc.com
sbell@bbdlc.com

Attorneys For Missouri Retailers Association

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the above pleading have been e-mailed this 10th day of April, 2014, to the following parties of record:

Missouri Public Service Commission
Kevin Thompson
Kevin.thompson@psc.mo.gov

Missouri Public Service Commission
Office of General Counsel
staffcounselservice@psc.mo.gov

River Cement Company
Lisa C. Langeneckert
llangeneckert@att.net

Sam's East
Wal-Mart Stores East, LP
Marcos Barbosa
Barbosa@bscr-law.com

Union Electric Company
Russ Mitten
rmitten@brydonlawc.om

Rick D. Chamberlain
rchamberlain@okenergylaw.com

Union Electric Company
James B. Lowery
lowery@smithlewis.com

Union Electric Company
Michael R. Tripp
tripp@smithlewis.com

Union Electric Company
Thomas M. Byrne
AmerenMOService@ameren.com

Union Electric Company
Wendy Tatro
AmerenMOService@ameren.com

City of Ballwin, Missouri
Carl J. Lumley
clumley@lawfirmemail.com

City of Ballwin, Missouri
Leland B. Curtis
lcurtis@lawfirmemail.com

City of O'Fallon, Missouri
Carl J. Lumley
clumley@lawfirmemail.com

City of O'Fallon, Missouri
Leland B. Curtis
lcurtis@lawfirmemail.com

Continental Cement Company, L.L.C.
Mark W. Comley
comleym@ncrpc.com

/s/ Edward F. Downey