BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company's 2011 Utility Resource Filing Pursuant to 4 CSR 240 – Chapter 22	)))	**Case No. EO-2011-0271**

POST-HEARING REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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February 21, 2012

Argument

This brief will address the points made in Ameren Missouri's initial brief. Some of these points are quite provocative, most of them are unsupported by any convincing citations, and they all boil down to the following: The IRP rules simply describe a process, and whether or not the utility complies with that process, the Commission has no meaningful ability to influence either the utility's compliance with the process or the outcome. As Public Counsel has repeatedly argued, the Commission's job is not to stand idly by wringing its hands when a utility is pursuing a course of action that is detrimental to the public interest. The Commission's job is to proactively take action to protect the public interest.

With respect to electric utilities, the Commission's powers are pervasive. Section 393.190(1) RSMo 2000 provides that: "The commission shall … [h]ave general supervision of all … electrical corporations." Section 393.190(2) RSMo provides that:

> The commission shall … examine or investigate the methods employed by such persons and corporations in manufacturing, distributing and supplying … electricity for light, heat or power … [and] have power to order such reasonable improvements as will best promote the public interest … and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices, apparatus and property of … electrical corporations….

This statutory authority has always been viewed to be extremely broad:

> State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the State, and to be effective must possess **the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service.**[1]

Indeed, even before May Department Stores, Missouri Courts recognized that the Commission's authority over utilities was vast and pervasive. In one of the earliest cases

[1] May Dep't Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 316 (Mo. 1937); emphasis added.

interpreting the Public Service Commission Law, the Missouri Supreme Court elaborated on the purpose and the breadth of the Public Service Commission Law:

> That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surety is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust *willy nilly*.
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> That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at -- all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it "shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."[2]

Shortly after Barker, the Missouri Supreme Court emphasized that the Public Service Commission Law (referred to as "the act" in the following passage) confers great power and great responsibility on the Commission:

> Now the act in question comes up to those judicial expectations. Recognizing that a negligently wasteful corporate life, a diseased or dishonest corporate life, or a slovenly lack of care in safety and adequacy of service are matters of public concern, are necessarily reflected in rates and income, and that regulation lies within the police power, the Legislature, as seen in paragraph two, charged the commission with the duty of supervision over corporate bookkeeping, stock issues, bond issues and creation of other indebtedness, sales of franchises as well as in matters of safety and adequacy in service. **In fine it gave the commission plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise**

[2] State ex rel. Barker v. Kansas City Gas Co., 254 Mo. 515, 534-535 (Mo. 1914)

> **bound it.** On the other hand, the act does not contemplate a confiscation of corporate property, and we include in the term "property" the right to earn a reasonable return on its investment.[3]

More recently, the Missouri Supreme Court has held that, although the Commission's powers are limited to those conferred by statute, its statutory authority includes powers that are only implied by the statutes. In a case involving the capital structure of a street railroad company regulated under Chapter 387, the Court held that the Commission, despite the lack of explicit statutory authority, could restrict distributions to shareholders:

> We start with the premise that the Commission "is an administrative body of limited jurisdiction, created by statute. It has only such powers as are expressly conferred upon it by the statutes and reasonably incidental thereto. Accordingly, we must find the power conferred by statute if it exists at all. In such search, however, we must recognize that the Commission has not only the powers and duties expressly specified but "also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter." Section 386.040. We have concluded, and hold, that the Commission did have statutory authority to make the order in question. Various sections of the statutes indicate a clear intention of the Legislature that the Commission should exercise supervision and control over the capital structure of street railway corporations and other common carriers within its jurisdiction.
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> …
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> [T]he Commission does have implied authority under Chapters 386 and 387 to require that reductions in the capital structure of a street railway company, including paid-in surplus, be made only with Commission approval.[4]

In light of its "principle purpose … to serve and protect ratepayers,"[5] the Commission should view its authority as broad enough to accomplish that end, rather than simply assuming that its authority is too limited. The cases cited by Ameren Missouri in its initial brief in no way contradict the statutory authority that the Commission has to "best promote the public interest."[6]

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[3] State ex rel. Missouri S. R. Co. v. Public Service Com., 259 Mo. 704, 724 (Mo. 1914)

[4] State ex rel. Kansas City Transit, Inc. v. Public Service Com., 406 S.W.2d 5, 8-9, 11 (Mo. 1966); case citations omitted.

[5] State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993), citing State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (1944).

[6] Section 393.190(2) RSMo

In its initial brief at page 2, Ameren Missouri correctly points out that the Commission in this case must "[1)] determine whether Ameren Missouri's IRP filing 'does or does not demonstrate compliance with the requirements of this [IRP] chapter, and [2) whether] the utility's resource acquisition strategy either does or does not meet the requirements stated in 4 CSR 240-22.010(2)(A)-(C).'" But Ameren Missouri **never again** mentions the second part of the Commission's job: determining if the resource acquisition strategy is appropriate. Indeed, it directly contradicts itself when it states, at page 5, that "[a]ll the Commission can practically do is to examine the IRP filing to ensure the planning *process* of the utility is compliant with the Commission's rules." Ameren Missouri's position is that if it checks off all the process requirements, then the Commission's inquiry is at an end. Ameren Missouri fails to address the additional requirement that the Commission must determine whether the resource acquisition strategy meets the requirements of 4 CSR 240-22.010(2)(A)-(C). This second determination entails much more than verifying that Ameren Missouri checked the boxes on planning requirements; it requires a finding that the resulting plan appropriately complies with the requirements of Chapter 22, the policies underlying integrated resource planning, and the policies of the state.

In one of the most egregious overgeneralizations in a much overgeneralized initial brief, Ameren Missouri claims at page 5 that "there were no allegations that the company failed to undertake some required analysis." The company actually refutes its own claim that there were no allegations in its footnote 8. More importantly, there are many such allegations. Neither Public Counsel nor the other parties are pursuing this case because they have nothing better to do. All the parties have invested a lot of time and energy in this case because there are many

severe deficiencies in Ameren Missouri's compliance with the IRP rules, including many instances in which the company failed to undertake some required analysis.

As many of the parties have noted, and as Ameren Missouri concedes in its initial brief, one of the central issues in this case is the meaning of the word "primary" in 4 CSR 240-22.010(2). The Commission, despite Ameren Missouri's plea for a continued lack of clarity (page 9), should clarify exactly what it means by "primary." Ameren Missouri suggests that the dictionary definition "first importance" means more important than any other consideration. Public Counsel submits that it means more important than all other considerations. Ameren Missouri's definition is subject to unintended results or manipulation: a utility could identify nine (or ten or twenty) legitimate or spurious considerations other than PVRR, and keep PVRR a very minor factor in the determination of a preferred plan.

In fact, Ameren Missouri has substituted another criterion for minimization of PVRR as the primary selection criterion. Ameren Missouri, at page 11, concedes that it allowed expected future earnings to constrain all other considerations. Thus protecting the company's future earnings became the "primary" selection criteria as that term is defined at page 7 of Ameren Missouri's initial brief. The Commission should not countenance such a subversion of the intent of the IRP rules.

Conclusion

The Commission recognized that Ameren Missouri's last IRP (in Case No. EO-2007-0409) was inadequate in many respects. Public Counsel submits that the Commission will have no choice but to conclude that the current IRP in this case is even worse. The Commission should stop buying into Ameren Missouri's "we'll do better next time" arguments, and order a new IRP to be completed as soon as possible.

WHEREFORE, Public Counsel respectfully offers this Post-hearing Reply Brief and prays that the Commission conform its decision in this case to the arguments contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 21st day of February 2012.