BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in The Company's Missouri Service Area.	))))	Case No. ER-2010-0036

AMERENUE'S POST-HEARING BRIEF ON INTERIM RATES

COMES NOW Union Electric Company d/b/a AmerenUE (AmerenUE or Company) and for its Post-Hearing Brief on Interim Rates states as follows:

I. Introduction.

The principal reason AmerenUE has requested that the Commission authorize interim rates, subject to refund with interest, in this proceeding is a simple one: It is to ask this Commission to use one of the regulatory tools it has available to it to help reduce the excessive regulatory lag that AmerenUE is experiencing. This is important because excessive regulatory lag has significant policy implications. First, it is materially affecting AmerenUE's cash flows and related financing costs, and is preventing AmerenUE from recovering its cost of equity by systematically preventing it from having a reasonable opportunity to earn a fair return on its investment. As important, excessive regulatory lag creates a strong disincentive for the Company to pursue new investments in energy infrastructure that are consistent with customers' expectations and good public policy.

Over the past few years, due to excessive regulatory lag, AmerenUE has been chronically and consistently unable to earn anywhere close to its authorized return. Its earnings have fallen short of the Commission's authorized return on equity by literally hundreds of millions of dollars over that period. Moreover, due largely to the Company's substantial investment in energy infrastructure, its negative free cash flow (cash flow

from operations, less capital expenditures and dividends) for the eighteen month period from January 1, 2007 to June 30, 2009 was $1.6 billion. (Exh. A, p. 3) AmerenUE's inability to earn anywhere close to its authorized return, and its large negative free cash flows are not due to imprudence or mismanagement by AmerenUE, or to AmerenUE's reluctance to file rate cases—the Company has filed three rate cases in the last three years. Instead, these are consequences of the Company's substantial investment in improvements to its infrastructure in a jurisdiction whose regulatory framework systematically delays utilities' recovery of costs, and ultimately prevents the full recovery of prudently incurred costs when investments needs are substantial, when costs are otherwise rising, or when a combination of those circumstances exist.

As other parties have pointed out and AmerenUE has acknowledged, some level of regulatory lag is beneficial, in that it can focus the attention of utility management on cost control. In fact, partly in response to regulatory lag, AmerenUE has already taken steps to significantly reduce its costs, as explained by AmerenUE's CEO, Warner Baxter. (Exh. A, pp. 14-16.) But excessive regulatory lag is detrimental over the long run. Regulatory lag in Missouri is particularly severe due to (a) Missouri's reliance on historical as opposed to projected costs, (b) Missouri's statutory prohibition against including construction work in progress (CWIP) in rate base, (c) the 11-month time period for processing rate cases, and (d) limitations on the use of riders in Missouri, in particular those that could reflect infrastructure investment. (Exh. I, p. 3; Schedule JPP-E1.) In Missouri, there is essentially no way for an electric utility to recover the cost of investment in infrastructure, outside of the 11-month rate case process.[1] As a consequence, AmerenUE, like any electric utility facing rising overall costs and the need

[1] Gas utilities and at least one water utility have the ability to use an Infrastructure System Replacement Surcharge (ISRS) to recover infrastructure costs between rate cases.

to make substantial investments in its energy infrastructure, has no reasonable chance to recover its full cost of service and earn a fair rate of return.

This state of affairs has resulted in repeated rate case filings for every major utility in Missouri. Unfortunately, notwithstanding those filings excessive regulatory lag still exists due to rising costs, rising investment requirements to comply with regulations and customer expectations, as well as the difficult economic climate that we are operating in. Consequently, AmerenUE's inability to timely recover its full cost of service and earn a fair return creates a disincentive to make new investments in its energy infrastructure, which is not consistent with our customers' expectations and good public policy. We firmly believe it is in the best long-term interests of our customers to remove this disincentive. The need for greater energy infrastructure investment will not only improve reliability and be consistent with our customers' expectations, but it will also drive the creation of new jobs that will benefit the State of Missouri. As Mr. Baxter pointed out, AmerenUE has already cut worthwhile projects from its capital budget, and similar projects will be have to be delayed or eliminated in the future unless excessive regulatory lag can be addressed. (Tr. 427.)

In this case, the Company is asking the Commission to take one small step to mitigate the excessive regulatory lag AmerenUE is experiencing by approving a portion of the Company's requested rate increase (less than 10%) on an interim basis, subject to refund with interest in the unlikely event that the final rate increase ultimately approved in this case is not at least that amount. This seems particularly unlikely given the fact that none of the parties who filed direct testimony regarding the Company's revenue requirement on December 18 recommended an overall revenue requirement below $37.3 million, the amount of the annual revenue requirement the Company is requesting to

recover through interim rates. The proposed interim increase is directly tied to the Company's investment in plant that is already serving customers. The proposed interim increase will not completely solve the problems posed by excessive regulatory lag. However, it would be an important step that would show the Commission is serious about addressing this issue to the extent it can within the statutory framework in which it must operate.

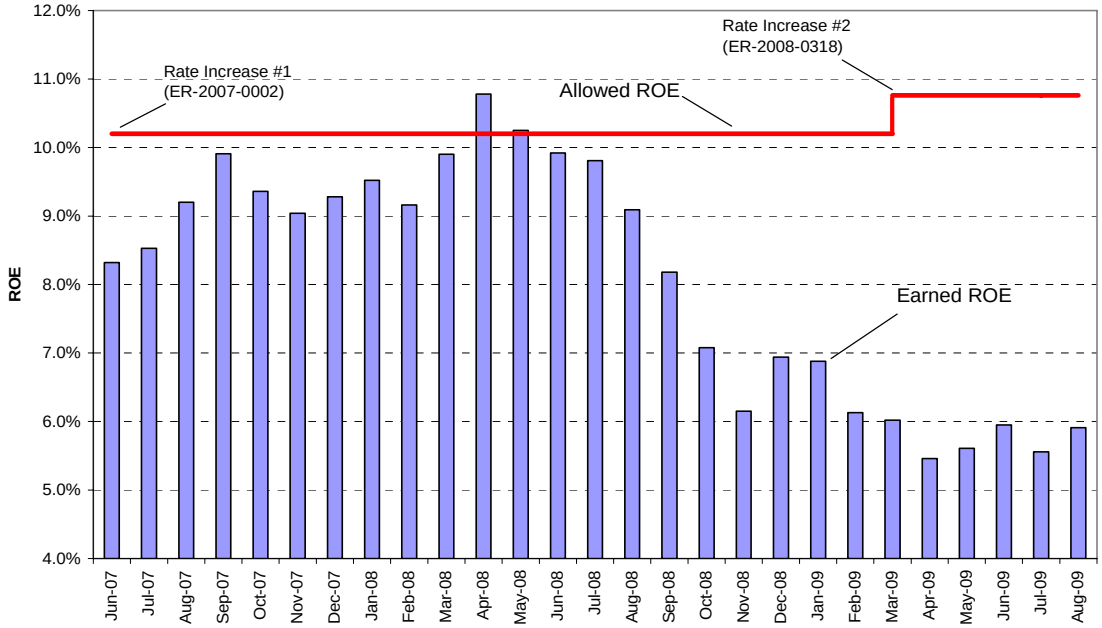
A number of parties have argued that the Commission is legally prohibited from approving interim rates in this case absent an emergency. This is not the law, as explained in detail in the Company's *Response to the Office of the Public Counsel's Motion for Summary Determination and Alternative Motion for Directed Verdict* (Company's Response), and as discussed below. In denying Public Counsel's Motion, the Commission itself recognized that the Legislature has afforded it broad discretion to approve interim rates when, in the Commission's discretion, interim rates are warranted. The circumstances presented in this case warrant the Commission's exercise of that discretion.

II. AmerenUE Has Been Chronically and Consistently Unable to Earn Anywhere Close to Its Authorized Return and Has Sustained Large Negative Free Cash Flows, Due to Excessive Regulatory Lag in Missouri.

The evidence in this case couldn't be any clearer that AmerenUE has been chronically and consistently unable to earn close to its authorized return. For example, AmerenUE witness Gary Weiss has pointed out that AmerenUE's actual average earned return on equity was just 6.16% from October, 2008, the cut-off for true-up items in the Company's last rate case, to September 2009. Since the Company's authorized return was 10.2% or 10.76% during that period, the Company's actual under-earnings (below its authorized return) were over 4%, or 400 basis points, over this period. (Exh. E, Schedule

GSW E-24). Since each 100 basis points of under-earnings equates to approximately $50 million per year, that means that AmerenUE was under-earning by more than $200 million over that period. (Exh. F, p. 5.) AmerenUE's chronic under-earnings are graphically illustrated by the below chart, which AmerenUE presented in the oral argument, and during the hearing on interim rates[2]:

Comparison of AmerenUE Earned and Allowed ROEs
(With Two Rate Increases)



Again, each 100 basis points (1%) in earnings shortfall represent approximately $50 million per year in under-earnings. As the chart clearly shows, this is not a situation where AmerenUE's earnings are equally likely to be higher or lower than the "target" authorized return on equity that the Commission has established. Instead, they are consistently falling below, and often substantially below, the authorized return.

Missouri Industrial Energy Consumers' (MIEC) witness Michael Gorman has criticized AmerenUE's comparison of its actual earned returns to the Commission-

[2] Exh. A, p. 3.

approved return on equity, and he proposes a number of adjustments to the Company's actual returns that would move them closer to the authorized return. Although AmerenUE agrees that actual returns over any particular period almost always vary from authorized returns, Mr. Gorman's suggested adjustments don't tell the whole story, and in some cases are completely inappropriate.[3] For one thing, Mr. Gorman's adjustments all go only one way—they would increase AmerenUE's earned returns if taken into account. As Mr. Weiss has pointed out, there are also adjustments that would go in the other direction—for example, an adjustment for O&M costs associated with the ice storm accounting authority order ($12.6 million); a reduction to O&M expenses that were moved into a regulatory asset in Case No. ER-2008-0318 ($26 million); and a reduction in O&M expenses to reflect the resolution in Case No. ER-2008-0318 of the Midwest Independent Transmission System Operator, Inc. (MISO) revenue sufficiency guarantee issue ($12.2 million). (Exh. E, p. 5). Mr. Gorman's analysis, which ignores these and countervailing adjustments creates a flawed view of AmerenUE's "adjusted" actual earnings.

Second, one of Mr. Gorman's suggested adjustments, annualization of the March, 2009 rate increase, is inappropriate in any event. AmerenUE's comparison of its actual returns to its authorized returns was designed to show the detrimental impact of excessive regulatory lag on its historical earnings. The fact that AmerenUE's last rate case was not decided until March, 2009—11 months after the case was filed—is one of the incidents of regulatory lag in Missouri. Pretending that the rate case was decided earlier by

[3] One exception to this general rule is the adjustment to reflect the impact of the costs associated with Taum Sauk. AmerenUE has agreed from the beginning that this is an appropriate adjustment to its earned returns. This adjustment would increase AmerenUE's actual after-tax earnings by a relatively modest $16.5 million per year. (Exh. D, p. 5.)

annualizing the rate increase to reflect a full twelve months of the additional revenue is completely inappropriate and defeats the purpose of this comparison.

Mr. Gorman's other one-way adjustments—accounting for $14 million in disallowances from the last rate case, and assuming normal storm costs and Noranda revenues—might be appropriate as part of a larger analysis that took into account adjustments going both ways. But even taken in isolation, they do not begin to account for the significant shortfall in earnings AmerenUE has experienced over the last few years and continues to experience today. As Mr. Weiss has pointed out, if all of Mr. Gorman's one-sided adjustments are considered—including the inappropriate annualization of AmerenUE's rate increase—and even if no adjustments that go the other way are taken into account, AmerenUE is still left with an earnings shortfall of $130 million per year. (Exh. E, pp. 3-4.) The point is that AmerenUE's earnings shortfall is not a matter of just a few basis points that could be offset by adjustments of the magnitude Mr. Gorman has proposed. The earnings gap is hundreds of millions of dollars per year, and no one has even suggested any adjustments that could close that considerable gap.

The evidence also shows that earnings shortfalls are not the only adverse consequence of excessive regulatory lag in Missouri. The Company's negative free cash flow for the eighteen-month period ending June 30, 2009 was $1.6 billion. Negative free cash flow, as previously mentioned, consists of cash from operations less capital expenditures and dividends. Cash flow is an important credit metric which helps determines a Company's credit quality and therefore its access to and cost of capital. (Exh. H, pp. 2-3.) Having consistent large amounts of negative free cash flow is another

indication that excessive regulatory lag is significantly impacting AmerenUE's financial condition.

AmerenUE also provided evidence that excessive regulatory lag in Missouri has played a significant role in these cash flow and earnings problems, particularly given the substantial capital investments AmerenUE has made in its system over the past few years. For example, Mr. Baxter testified that AmerenUE had invested $346.8 million in net plant additions[4] just for the period from October 1, 2008 (the cut-off date for the true-up last rate case) through September 30, 2009, none of which is reflected in rates. The under-recovery associated with these plant additions alone total approximately $75 million. (Exh. A, p. 6).[5] Although this under-recovery is due specifically to delays in recognizing the cost of plant in service in rates, like all cost under-recoveries it will be reflected in lower earnings and cash flows for the Company. And of course there are other cost increases the Company is experiencing beyond the cost of incremental capital investment in new plant. As the cost of wages, materials and supplies, fuel and other items necessary to provide service to customers increase, AmerenUE will fall further and further behind in cost recovery.

Regulatory lag is not as severe in most other states. Missouri is unusual in that it (a) has a long rate case process (11 months) compared to other states; (b) relies exclusively on historical costs, as opposed to projected costs, in setting rates; (c) prohibits the inclusion of CWIP in rate base; and (d) limits the use of riders, in particular those that could reflect infrastructure investment. Although other states share some of these obstacles to timely cost recovery, Missouri is among a very few states that have them all.

[4] Net plant additions are the increase in plant-in-service less the increase in accumulated depreciation reserve on all of AmerenUE's plant.
[5] The Company used net plant additions only through May 31, 2009 as the basis for the $37.3 million of annual revenue requirement which the Company is seeking to recovery through interim rates.

As a consequence, AmerenUE witness Johannes Pfeifenberger ranked Missouri 48th in the nation in terms of regulatory lag. (Exh. I, Schedule JPP-E1-1.) Although there is subjectivity in this exact ranking, there is no question that Missouri ranks among the states with the greatest regulatory lag. Of course, some of the factors which cause greater regulatory lag in Missouri are statutory and therefore beyond the Commission's ability to control. For example, the Commission cannot lawfully include CWIP in rate base. But there are other tools, including the approval of interim rates, which the Commission is empowered to use to combat excessive regulatory lag. In this case the Commission should approve interim rates to provide some mitigation of the adverse effects of excessive regulatory lag on AmerenUE. Indeed, the fact that there are limits on the Commission's ability to use other tools to mitigate excessive regulatory lag makes the use of interim rates even more important in Missouri than it might be in other states where other options (including CWIP in rate base and using a fully forecasted test year) exist.

III. Important Policy Considerations Support Approval of Interim Rate Relief in this Case.

There are important public policy considerations that support approval of AmerenUE's proposed interim rates to mitigate regulatory lag. For one thing, Missouri statutes instruct that the Commission should construe the Public Service Commission Act liberally, "with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." (Section 386.610 RSMo.) AmerenUE's customers pay electric rates that are among the lowest in the country and in the state. (Exh. A, p. 8.) However, AmerenUE faces a situation where it is chronically unable to recover its costs and has little or no chance to earn a fair return. This does not strike the proper balance

between all interests, as the Supreme Court explained in ***State ex rel. Washington University v. Public Service Commission***, 272 S.W. 971, 973 (Mo. banc 1925):

> The enactment of the Public Service Act marks a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, *but to further insure to the investors a reasonable return upon funds invested*. The police power of the state demands as much. *We can never have efficient service, unless there is a reasonable guarantee of fair returns for capital invested*. . . . These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. *When we say 'fair', we mean fair to the public, and fair to the investors.* (emphasis supplied.)

Approval of interim rates to mitigate excessive regulatory lag would be a small but important step toward restoring the appropriate balance as envisioned by the Legislature and the Missouri Supreme Court.

Second, AmerenUE's inability to recover its costs or stem the substantial negative free cash flows that it is experiencing impairs its financial condition. Although it is not facing an imminent financial crisis, to the extent AmerenUE is financially weaker it has less capacity to make investments in its system. Even though there is no immediate threat of a credit ratings downgrade, impairment of the Company's credit quality as a result of regulatory lag impacts its access to and cost of capital. (Exh. H, pp. 2-3.) A financially weaker utility is more vulnerable in any type of crisis, and consequently it is not good policy to weaken utilities through unreasonably delaying or denying recovery of prudently-incurred costs. Approval of interim rates in this case would be a step toward strengthening the financial condition of AmerenUE, and therefore would reflect a sound policy decision on the part of the Commission.

Finally, and perhaps most significantly, as AmerenUE has pointed out repeatedly, excessive regulatory lag provides a strong disincentive for a utility to make discretionary investments in its system. Currently AmerenUE recovers no return, taxes or depreciation

on any of the investments that it makes in its system until rates are set after an 11-month rate case process. Even when rate cases are filed one after the other (as AmerenUE has done) investment costs can remain unrecovered for 18-20 months. And recovery of these costs is not simply delayed as the term "regulatory lag" would imply—the return, taxes and depreciation incurred after an item of plant goes into service but before it can be reflected in rates are lost forever to the utility. (Exh. C, pp. 4-5). As a consequence, the utility is never able to fully recover the cost of its investment, and the more it invests, the greater its under-recovery of costs becomes. Excessive regulatory lag provides a strong incentive for utilities to invest only the bare minimum in infrastructure necessary to meet regulatory requirements, and not provide any additional investment in discretionary projects that may be beneficial to customers and the state as a whole.

As AmerenUE CEO Warner Baxter testified:

> Missouri is at a crossroads with regard to utility investment. The needs of the state are substantial—we need investment to improve reliability of the existing electric utility system to meet rising customer needs in the digital age, we need investment in energy efficiency, we need investment in "smart grid" infrastructure, we need investment in transmission facilities to integrate renewable sources of energy into the grid, and we may ultimately need investment in traditional forms of baseload generation to preserve our state's energy independence. These investments not only benefit utilities and their customers, but they create jobs in this state and make the state a more attractive location for businesses to locate.[6]

However, if electric utilities in Missouri are not permitted to recover their costs of making these types of investments, they will be deferred or they simply won't be made at all. Infrastructure improvement projects and the high-quality jobs that go with them will migrate to other states with regulatory mechanisms—such as infrastructure riders, projected test years, more timely rate case decisions and interim rates—that permit their utilities to more fully and timely recover the prudently incurred costs of enhancing their

[6]Exh. C, p 8.

systems. (Exh. C, p. 8.) This is a key policy consideration that supports the approval of interim rates as a step toward mitigating the excessive regulatory lag that exists in Missouri.

That AmerenUE is indeed experiencing excessive regulatory lag was addressed directly by Mr .Baxter in response to a question from Chairman Clayton during the interim rates hearing (Dec. 7, 2009 Tr. p. 391, line 16 to p. 393, line 9), where Mr. Baxter testified as follows:

> **Q. … And the way I wanted to set this question up is to ask you in terms of the Commission not just making a decision based on perhaps the chart that is behind you or just based on these specific set of facts, but how should the Commission from your perspective define when excessive regulatory lag exists that would suggest to future parties that come before us that an interim rate increase would be appropriate?**
>
> A. Chairman Clayton, let me see if I can address this, because defining excessive regulatory lag in a pinpoint fashion, I wish I could do that for you, but I can't. But I can tell you what I think are important factors for the Commission to consider and why I think that we have excessive regulatory lag. To be clear, this is one example, so that when you look at the difference between the authorized and earned ROE. And I think what's so meaningful about it, it isn't that it's, you know, 50 basis points, whatever. It is . . . 3 to 400 basis points, and what's important is that it comes on the heels of two rate cases. So I think . . . that's a factor. It isn't the sole factor from my perspective. The other thing that I see which is causing an excessive regulatory lag is . . . negative free cash flow. When you see negative free cash flow over two and a half years with two rate cases that's $1.6 billion, that too is a key factor to consider. And I think the third key factor, which is important to note, is that these types of circumstances, that negative free cash flow among things, is causing project deferrals, actions having to be taken that – that as we point out in my testimony and others, that we believe is not consistent with what our customers' high expectations are, and perhaps policymakers as well as what might be good public policy. * * * We're trying to deliver top quartile customer service, top quartile operations and all these other things, yet we're . . . operating in an environment and cash flows which is far below top quartile . . . and that's the challenge.

IV. Approval of AmerenUE's Proposed Interim Rates is Lawful.

a. An Emergency Is Not Required.

Several parties have questioned the Commission's legal authority to approve interim rates particularly in the absence of an emergency or near emergency situation. AmerenUE acknowledges that it is not facing an emergency or near emergency. However, Missouri law permits the Commission to approve interim rates in circumstances when an emergency does not exist.

As discussed in detail in the Company's Response,[7] the Missouri Court of Appeals has explained that although the Commission's authority to approve interim rates is not explicit in any statute, the Commission nonetheless possesses such power within the broad discretion implied from the file and suspend provisions of Sections 393.140(11) and 393.150 and from "the practical requirements of public utility regulation." ***State ex rel. Laclede Gas Company v. Public Service Commission,*** 535 S.W.2d 561, 567 (Mo. App. W.D. 1976). Although the authority of the Commission to act derived from the broad discretion implied by those statutes, the exercise of that discretion is not governed by those statutes. This is because the Commission's basis for exercising that discretion exists "wholly apart" from Section 393.150, presumably because the authority is also grounded on the "practical requirements" of regulation. ***Id.*** at 568. The court upheld the Commission's exercise of its discretion to deny Laclede's request for interim rate relief because it was earning just 16-56 basis points (.16-.56%) below the return on equity previously authorized by the Commission. Laclede had argued that the Commission was

[7] Because the Company's Response to Public Counsel's Motion has already addressed the issue of whether an emergency is required for the Commission to permit interim rates in detail, the Company will provide only an abbreviated discussion of that legal issue here.

required to approve interim rates, but the court held that denial of Laclede's request was within the Commission's broad discretion to approve or deny interim rates.

The Staff and the Commission have in the past properly read ***Laclede*** to afford the Commission discretion in approving interim rate relief and not require an emergency or near emergency as a matter of law. *See, e.g., Staff's Response to Interim Filing*, Case No. ER-2002-425 (involving The Empire District Electric Company) at p. 7 ("While not disputing that the Commission has the authority, under section 393.140(11), to grant relief for reasons *other than the existence of an emergency situation,* Staff continues to believe…[that the Commission should require an emergency.]" (emphasis supplied.) While some of the Staff's filings and statements (notably during the December 7, 2009 interim rates hearing) seem at times to be inconsistent with Staff's clear statement in the ***Empire*** case cited above, in response to Commissioner Jarrett's question at the Oral Argument held in this case in September, Staff Counsel Thompson appeared to agree that the ***Laclede*** case did not require an emergency:

> COMMISSIONER JARRETT: Doesn't the Laclede case basically broaden -- and maybe the question is how much broaden, but doesn't it -- doesn't it at least acknowledge that there may be situations where an interim -- interim rate relief is appropriate even in the absence of any emergency?
>
> MR. THOMPSON: It does suggest that, yes, sir." Tr. (Oral Argument) p. 96, lines 11-18.

In response to Chairman Clayton, Mr. Thompson also stated that "[i]t could be, in fact, the Laclede court said as much, that it could be that a situation might arise when interim relief is justified even though there's no emergency," and he agreed that there is "no authority which would state that we either have to use the emergency standard . . . or that we are prohibited from using some other standard . . . [that] [t]here's nothing that

clearly states that."[8] In summary, the Staff has for years taken the position that an emergency is not required *as a matter of law* (although the Staff generally advocates for adherence to an emergency standard), and the Staff has not stated otherwise in this case.[9]

Just a few weeks ago, the Commission held that "…the 'broad discretion' described in the ***Laclede*** decision would allow the Commission to approve an interim rate increase, even without proof of an emergency. Therefore, the fact that AmerenUE has not offered proof that it is facing an emergency does not preclude the Commission from approving the company's interim rate increase if it chooses to do so." *Order Denying Motion for Summary Determination and Motion for Directed Verdict,* issued November 23, 2009, p. 4. This is consistent with previous Commission decisions granting interim rate relief in non-emergency situations, and the Commission's regular practice of approving interim rate adjustments in non-emergency situations through the purchased gas adjustment (PGA) mechanism for gas utilities.

The bottom line is that there can be no serious debate that the Commission has the legal authority to exercise its "broad discretion" to approve interim rates in a non-emergency situation. Given AmerenUE's chronic inability to recover its costs and earn a fair return on its investment, its large negative free cash flows, and the likelihood that beneficial projects will be canceled unless excessive regulatory lag can be mitigated, this is a case where the Commission should exercise that discretion.

[8] Tr. (Dec. 7, 2009) p. 228, lines 22-25; p. 229, lines 12-17.

[9] All the Staff has done in this case is to speculate that there could be some amorphous risk of judicial disapproval if an emergency is not required. That speculation should not prevent the Commission from making the right policy choice here: to mitigate the detrimental effect of excessive regulatory lag by approving interim rates for AmerenUE. As Commissioner Gunn posed the question: "So what is the fundamental harm in allowing them to start recovering six months or five months earlier than they normally would? MR. THOMPSON: From a public policy perspective, there may be no harm. It may be a good thing. It may allow investment and building that otherwise wouldn't occur." (Tr. p. 238, lines 14-21.) Indeed that is correct. There is no harm and in fact, there is good – greater financial health, including a better opportunity to come closer to earning a fair return on equity, better cash flows, better credit quality, and a greater incentive to make the investments customers and policymakers expect.

b. All Relevant Factors Need Not be Considered.

Some parties have suggested that the Commission lacks the power to set interim rates without considering "all relevant factors." They argue that rates cannot be "just and reasonable" unless all relevant factors are considered, and consideration of all relevant factors requires a full-blown rate hearing. If this argument were correct, the Commission would be completely precluded from ever approving interim rate relief under any conditions. Even in emergency situations, or where PGA adjustments are at issue, the Commission would be precluded from exercising the broad discretion that the ***Laclede*** court recognized. The Court of Appeals in ***Laclede*** recognized this fact:

> It would be unreasonable to construe this statutory section as imposing a duty upon the Commission to set "just and reasonable rates" in a special hearing for the limited purposes of considering an interim increase, since the setting of fair rates is the purpose and subject of the *full* rate hearing. To construe s. 393.140(5) as applicable here *would make the hearing on interim rates coextensive with that on the permanent rates and would therefore in practical effect make accelerated action on interim rates impossible* (emphasis supplied).[10]

Obviously a requirement that "all relevant factors" be considered cannot be the law. AmerenUE would agree that the Commission is required to consider "all relevant factors" in setting permanent rates in a rate increase (or rate reduction) case. (***State ex rel. Utility Consumers Council of Missouri v. Public Service Commission,*** 585 S.W.2d 41 (Mo. 1979)(***UCCM***).)[11] But the Company is not proposing the implementation of

[10] ***Laclede***, 535 S.W.2d at 569. It is true that the foregoing statement was in reference to Section 393.140(5), not 393.150. However, both Sections 393.140(5) and 393.150 reference the justness and reasonableness of rates; i.e., the statement in ***Laclede*** quoted immediately above applies just as strongly to the "just and reasonable" language in Section 393.150.2 as it does to the "unjust" and "unreasonable" language in Section 393.140.

[11] The Staff agrees with the Company's interpretation of ***UCCM***, that is, that the need to consider all relevant factors only arises when permanent, not interim rates are at issue. Tr. p. 221, lines 21-23 (Mr. Thompson, answering "absolutely not" when asked if the Commission must consider all relevant factors); p. 254, lines 21-24 (Mr. Thompson pointing out that the ***UCCM*** case was addressing all relevant factors in relation to setting permanent rates).

permanent rates prior to the conclusion of the full-blown evidentiary hearings that will occur in March and is not proposing the implementation of permanent rates without a consideration of all relevant factors. To the contrary, the Company is simply proposing an interim rate increase which is ancillary to a permanent rate case. In other words, the proposed interim rate adjustment is only one part of a larger proceeding in which permanent rates are set, subject to the Commission's consideration of all relevant factors.[12] Customers are protected in that the interim rates, if found to be unjust and unreasonable after consideration of all relevant factors in the larger rate proceeding, are refundable with interest. And equally importantly, the Company is protected from under-recovering its costs if the level of interim rates is ultimately deemed to be just and reasonable based on those considerations.

As also addressed in greater detail in the Company's Response, the need to consider "all relevant factors" and to set "just and reasonable" rates is a need that exists when permanent rates are set because permanent rates are not subject to refund, and due to the prohibition on retroactive ratemaking, cannot be refunded even if ultimately determined to be unjust or unreasonable. But that concern does not apply to interim rates. The fact that the Commission could have simply allowed the interim rates to take effect without suspending the interim rates tariff, and without considering all relevant factors, demonstrates that it cannot be the law that the mere act of suspending the tariff suddenly transformed the Commission's duty into one where the justness and reasonableness of the rates must be finally determined based upon a consideration of all relevant factors, and the approval of interim rate relief becomes *de facto* impossible.

[12] Commissioner Gunn addressed this issue during the December 7, 2009 hearing: "Q. Do the parties view this proceeding as an ancillary proceeding . . . a sub-proceeding . . to the permanent case . . ..? * * * [as a] sub tariff of . . . the larger tariff that has been filed . . . [that] will become wholly subsumed by the larger tariff taking into account all relevant . . . factors?" Messrs. Mills, Lowery, Thompson, Byrne and Coffman all agreed. Tr. p. 255, line 12 to p. 256, line 25.

There is no statute that prescribes how or when interim rates should be approved (or disapproved), and there is no statute (including Section 393.150.2) that governs the Commission's exercise of the discretion the courts clearly indicate the Commission possesses in deciding under what circumstances interim rates can be approved.[13] Rather, the Commission possesses implied authority to grant interim rates, in its sound discretion, when the practical requirements of public utility regulation warrant it, whether it suspends the tariffs containing proposed interim rates or not.

V. The Amount of the Proposed Interim Rate Increase is Appropriate.

Staff has criticized the amount of the interim rate increase AmerenUE is requesting, which consists of return, taxes and depreciation on net plant additions for the period from September 30, 2008 (the cut-off for inclusion of plant items in the Company's last rate case) to May 31, 2009. Staff witness Stephen Rackers argues that if interim rates are approved this amount should be adjusted to (a) reduce net plant by the increases in the accumulated deferred income taxes (ADIT) from September 30, 2008 through May 31, 2009, (b) exclude any new plant added to serve new business, and (c) take into account any efficiencies that may have been created by the addition of new plant. Mr. Rackers justifies these proposed adjustments because they are adjustments made in the context of gas and water ISRS cases. (Exh. K, pp. 7-8.)

In response, AmerenUE witness Weiss has pointed out that unlike an ISRS proceeding, this proceeding is not determining permanent rates in the absence of consideration of all factors that affect cost of service. As Mr. Rackers himself admits, however, when permanent rates are ultimately set in this case, the factors Mr. Rackers

[13] Staff also agrees: "I'm saying that the power to grant interim rate relief is implied. It's not expressly granted. * * * And I'm further saying that an interim rate by its very nature cannot be just and reasonable because it is not granted after due consideration of all relevant factors." Tr. p. 224, lines 6-7; 10-13.

has addressed will be given due consideration.[14] Mr. Weiss also points out (and Mr. Rackers agrees with this as well)[15] that there are other factors that may cut the other way. For example, O&M costs are likely to increase with plant additions, property taxes may well increase and rate of return will change. (Exh. F, pp. 2-3). And of course, plenty of additional plant has been added since May 31, 2009 which is not being taken into account.

The bottom line is that an interim rate request, subject to refund with interest, which is ancillary to a permanent rate case does not have to be calculated to account for every factor. In fact, as previously discussed, by definition interim rates do not take into account all relevant factors. AmerenUE in fact could have requested that an arbitrary percentage of its permanent rate increase (10%, 20%, 30%) be put into effect subject to refund. The fact that AmerenUE elected to propose a very conservative increase based on its plant additions does not mean that the factors Mr. Rackers proposed, or the factors cutting the other way which Mr. Weiss has identified, must be taken into account in calculating the amount of the increase. So long as the Commission believes that the increase is appropriate, it can and should be approved.

Another important consideration is that all parties have now filed their direct testimony addressing the revenue requirement for AmerenUE's permanent rate increase request. AmerenUE's reading of the Staff's report and other parties' direct testimony indicates that no party is proposing less than a $37.3 million increase—the amount of the interim rate increase the Company is requesting. For this reason as well Mr. Rackers' proposed adjustments should be rejected.

[14] Tr. p. 588, line 12 to p. 589, line 4; p. 590, line 14 to p. 591, line 9.
[15] Tr. p. 592, lines 2 -22.

VI. Conclusion.

AmerenUE is facing a situation where excessive regulatory lag is chronically and systematically preventing it from recovering its costs (particularly those associated with new investment in its system), from having a reasonable opportunity to earn its authorized return and from stemming the tide of large negative free cash flows it is experiencing. In short, excessive regulatory lag is financially damaging the Company and providing a strong financial disincentive for the Company to invest in infrastructure to develop smart grid, improve reliability, develop transmission facilities and undertake other beneficial projects that would improve the electric grid in Missouri, attract industry to the state and generate high quality jobs.

As AmerenUE CEO Warner Baxter testified:

> The bottom line it that it is important that we not lose sight of the issue and the related policy implications we are trying to address with our interim rate request (and in many respects, through our entire general rate case filing). We are not seeking to eliminate regulatory lag. We accept some level of regulatory lag as inherent in the regulatory framework. We also accept our responsibility to manage our operations efficiently on behalf of our customers, as well as to address certain levels of regulatory lag. There is no doubt that we have done that in the past, are doing so presently, and will continue to do so in the future. Instead, what we are seeking to address with this interim rate request and in the remainder of our general rate case is the excessive regulatory lag we are experiencing in Missouri. This excessive regulatory lag is being driven by several factors, including the economy, the need for significant investment in energy infrastructure now and in the foreseeable future, and current regulatory policies and frameworks that are not adequately addressing these circumstances. The excessive regulatory lag has several policy implications, including that it is materially affecting AmerenUE's cash flows and related financing costs, and is preventing AmerenUE from recovering its cost of equity by systematically preventing AmerenUE from having a reasonable opportunity to earn a fair return on its investment. In addition, the existing regulatory framework creates a strong disincentive to pursue new investments to meet increasing customer expectations and/or strongly support state and federal policies and initiatives.[16]

The Commission should take a small but important step to address excessive regulatory lag by approving AmerenUE's proposed interim rates in this case.

[16] Exh. C, pp. 7-8.

Respectfully submitted,

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d/b/a AmerenUE

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing have been e-mailed, to the service list of record this 21st day of December, 2009.

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