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-2012-0166

APPLICATION FOR REHEARING AND REQUEST FOR RECONSIDERATION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or the "Company") and, pursuant to § 386.500.1, RSMo.,[1] and 4 CSR 240-2.160, respectfully applies for rehearing of the Commission's Report and Order in the above-captioned proceeding which was issued December 12, 2012 ("Report and Order") and requests reconsideration of certain of the decisions reflected in the Report and Order. In support of its Application and Request, the Company states as follows:

1. Commission decisions must be lawful (i.e., the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003); *State ex rel. Alma Tele. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). The decision is reasonable only if supported by competent and substantial evidence of record. *Alma*, 40 S.W.3d at 387. Moreover, Commission decisions must not be arbitrary, capricious, or unreasonable. § 536.140.1(6), RSMo. The Commission is a creature of statute and it has only the powers conferred on it by the Legislature. *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 73 S.W.2d 393, 399 (Mo. banc 1934).

[1] Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

2. A review of the evidentiary record in this case and applicable law demonstrates that the Report and Order fails to comply with the above-referenced legal principles respecting the Commission's determination of two issues, as follows: the Commission's decision regarding the 2010 property tax refund, and the Commission's decision regarding the level of property tax expense used to set the revenue requirement. While the Commission's decisions regarding return on equity ("ROE") and the customer charge for the residential and small general service ("SGS") rate classes arguably satisfy the applicable minimum legal standards, for the reasons outlined below the Company requests that the Commission reconsider its decisions on the ROE and customer charge issues.

Application for Rehearing

2010 Property Tax Refund

3. The Commission's decision on this issue reflects a fundamental misapplication of the law. Moreover, aside from legal considerations, the decision is fundamentally unfair given that past rates had assumed a level of property tax expense that was lower than the property tax expenses the Company has actually paid.

4. The law on this issue is clear. Decades of public utility jurisprudence establish the principle that "'[c]ustomers pay for service, not for the property used to render it. Their payments are not contributions to depreciation *or other operating expenses,* or to capital of the company.'" *See, e.g., State ex rel. Empire District Electric Co. v. Pub. Serv. Comm'n*, 100 S.W.2d 509, 512 (Mo. 1936), *quoting Board of Public Utility Commissioners v. New York Telephone Co.,* 271 U.S. 23, 70 L.Ed 808 (1926) (emphasis added). What that means is that when a utility receives rate revenue from customers those dollars belong to the utility and the utility alone. *Cf. Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Mo. 1950) ("When

the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions.").[2]

5. In Case No. EO-2010-0036, the Commission used the Company's actual 2009 property tax expense (the last known and measurable sum falling within the test year in that case) as an estimate of the property tax expense the Company could be expected to incur once new rates were set in that case.[3] When it did so it was a virtual certainty that the estimate would be wrong, meaning the Company's revenue requirement might contain "too many or too few" dollars for property tax expense, as is the case with virtually every revenue requirement component. Indeed, the Commission acknowledges this reality in paragraph 7 at page 45 of the Report and Order. Regardless, an estimated sum based on history was used to establish the revenue requirement, and that revenue requirement was then converted to rates based on assumed billing units also established by that rate case. From and after that moment, every dollar the Company collected belonged to the Company and as a matter of law it mattered not whether the Company paid more or less property tax expense than had been assumed. From and after that moment, customers were not "paying" the Company's property taxes. Nor did customers "pay for" the Company's property taxes in prior years. To the contrary, in every year customers are paying for the benefit of having a line attached to their meter and for the kilowatt-hours they consume.

[2] The Commission, also citing *Straube*, recognized this most basic of ratemaking principles when discussing the ESOP issue in this case. At page 25 of the Report and Order the Commission clearly recognized that dollars collected by a utility are "shareholder-owned funds to which ratepayers have no claim." The Commission also properly recognized that this was not only true because the ESOP tax deduction belonged to Ameren Corporation, but that it would also have been true if Ameren Missouri were a standalone company.

[3] The Commission also included an additional $10 million to cover expected property taxes associated with the Sioux scrubbers.

6. The Report and Order states that "this is a unique situation," reflecting the Commission's apparent contention that it can disregard these settled legal principles because of that "unique situation." It can't. A "unique situation" does not change the law, and it does not allow the Commission to retroactively take away $2.9 million that belongs to the Company given that the "established rates" were followed. The Commission's order purporting to do so is therefore unlawful.

7. Perhaps the Commission is trying to reach a result that is fair and, apparently, the Commission must believe that retention by the Company of the $2.9 million would be unfair, as paragraph 8 on page 46 of the Report and Order appears to suggest. That suggestion is reflected in the Commission's statement that if it had known any property tax refund would not be reflected in rates in the future it "might" have disregarded the property taxes actually paid by the Company during the test year for Case No. ER-2010-0036. An entirely different set of ratemaking issues would have been presented had the Commission disregarded test year property taxes in that case (e.g., we would submit that there would have been no competent and substantial evidence to disregard the test year level of expense, or to arbitrarily depart from the Commission's longstanding practices for estimating property tax expense for the purpose of setting rates). But we need not debate what the Commission could or could not have lawfully or reasonably done in that case because that case is over; the rates were set; the dollars collected pursuant to those rates belong to the Company.

8. In any event, the Company's retention of the refund works no unfairness on customers. While as noted one cannot lawfully look at the costs that "customers paid for," since customers pay for service not costs, if one were to view rates in that fashion the conclusion would be that customers have *underpaid* property taxes, leading to the unmistakable conclusion

that giving customers this refund is fundamentally unfair to the Company. The actual property taxes paid by the Company in 2009 and 2010 were $5.25 million more than had been assumed in the last two rate orders. Even after retaining the $2.9 million refund, the undisputed evidence of record in this case demonstrates that the Company *under-collected* its 2009 and 2010 property tax expense by $3.56 million.

9. In summary, the Commission's order on this issue is unlawful and, regardless of what the Commission said it "expected" to happen when it issued its Report and Order in Case No. ER-2010-0036, the Commission's order on this issue in this case is also unfair. Consequently, the Commission should reverse its order requiring a refund of the property tax refund through a 2-year amortization. Doing so would raise the Company's revenue requirement by $1.45 million.

Property Taxes Used to Set the Revenue Requirement

10. The Company claims no unlawfulness regarding the Commission's resolution of the property tax expense issue in this case. However, as outlined above the Commission also errs when its decisions are unreasonable, and its property tax expense decision is unreasonable.

11. While the Company concedes that the Commission could reasonably have chosen to ignore the historic, consistent year-after-year increase in property tax rates and thus decline to adopt the Company's alternative proposal that the revenue requirement reflect property taxes based upon the June 2012 certified value and a projection of 2012 tax rates, the Commission could not reasonably ignore the fixed, entirely certain 2012 certified value.

12. We know with 100 percent certainty that the value of the Company's assets for property tax purposes is higher than the value used to determine the 2011 taxes that the Commission has relied upon. Consequently, not only is there no competent and substantial

evidence supporting using the 2011 asset valuation, doing so is contrary to the overwhelming weight of the evidence in that the *only* evidence in the case is that the 2012 asset valuation has superseded the 2011 valuation and that it must be and will be used to calculate 2012 property taxes.

13. We concede that it is within the Commission's discretion, based upon the record, to conclude that the 2011 tax *rate* is the most reasonable, historical figure to apply to the value of the Company's assets to determine property tax expense to use to set the revenue requirement in this case. Put another way, we concede that given the use of an historical test year approach to developing a revenue requirement, the Commission has discretion to rely on only historical data. In doing so, the Commission is assuming that the 2012 tax rate will in fact match the 2011 tax rate. That could possibly happen in spite of the consistent history of tax rate increases in recent years.

14. But the Commission is also assuming that the 2012 asset *valuation* will match the 2011 asset valuation. It is *impossible* for that to happen, for we know *with certainty* that the 2012 certified valuation (issued by the State Tax Commission in June, 2012, prior to the true-up cut-off date) is higher.

15. Consequently, based upon the record, there is no evidence that supports using the 2011 valuation that is a component of the Company's 2011 property tax payment, and doing so is arbitrary, capricious and reflects an abuse of the Commission's discretion. Consequently, the Commission should reverse its decision on property tax expense and instead order that the revenue requirement be set using the historic 2011 tax rate as applied to the 2012 certified (and certain) asset valuation, which would increase the Company's revenue requirement by $1.06 million.

Request for Reconsideration

Return On Equity

16. A review of the Report and Order suggests that one of the reasons the Commission decided to set the Company's allowed ROE at 9.8% was because of a (mistaken) perception that Ameren Missouri's opportunity to earn a fair return[4] is comparable to that of its peers. But that conclusion ignores substantial and competent evidence of record that is largely uncontroverted. That evidence demonstrates that the regulatory laws (and in some cases, policies) employed in Missouri indeed do make it more difficult for Missouri utilities to earn a fair return, and that this reality means that the Company has greater risk than its peers.[5] After all, consider two comparable utilities (A and B), both of which were allowed an ROE of 9.8% by their public utility commissions, but which have a different opportunity to actually earn that 9.8% (with B having less of an opportunity). Under those circumstances an investor is going to invest in utility A because in reality utility A's cost of equity is cheaper than Utility B's. Consequently, when the public utility commission awarded utility B just 9.8%, it did not award utility B an ROE commensurate with enterprises of similar risk and it did not set its ROE at a level that is reflective of its true cost of equity. To the contrary, it awarded utility B an unfairly low ROE commensurate with what would have been fair for a *less* risky enterprise.

17. That is what the Commission has thus far done in this case. By any measure, it has allowed Ameren Missouri an ROE that is less than the average ROE allowed for its peers (other integrated electric utilities), even though as a whole its peers have a better opportunity to

[4] By "fair return" we mean the Company's actual cost of equity.

[5] As shown on Schedule RBH-E8 (to Ex. 20) 22 of the 34 operating subsidiaries in the Hevert Original Proxy Group are authorized to earn a cash return on CWIP, 19 of 34 companies are able to use a forecasted or partially forecasted test year to establish base rates, and interim rate relief is commonly available to the operating subsidiaries in certain jurisdictions. *None* of those mechanisms are available to Ameren Missouri.

actually earn the higher ROEs that they have been allowed (9.9% for the third quarter of 2012; 10.05% for the first nine months of 2012; 10.27% for calendar year 2011).

18. Nor is it reasonable for the Commission to for the first time focus on data from one quarter (e.g., the third quarter of 2012) instead of using an average over a full year (e.g., the trued-up test year) as the Commission's "reasonableness check." We don't take a data from a quarter (or two) and use that data as an estimate for any other component of the revenue requirement, and we should not do so respecting ROE either.[6] But that too is what the Commission has thus far done as it is clear that had the Commission employed the reasonableness check it has employed in numerous cases over the past several years, encompassing longer more representative time periods, it would have had to conclude that the average allowed ROE for integrated electric utilities was in fact above 10%.

19. What this tells us is that the Commission has put the Company in an even more difficult position than it has been in historically in terms of its opportunity to actually earn its cost of equity, which for the reasons discussed above is higher than any of these averages. While we won't argue in this case that the Commission's decision on ROE violates *Hope*[7] and *Bluefield*[8] as a matter of law, we are arguing that the Commission's decision is contrary to the spirit of those decisions, and more to the point for purposes of this Request for Reconsideration, is contrary to what is needed to attract investment that the Company does need to address the bow wave of capital needs it is facing relating to its aging infrastructure. Make no mistake: a below-average allowed ROE will make it harder for the Company to attract equity capital and to

[6] For example, by pointing to data from the third quarter the Commission in fact is using data outside the trued-up test year. At times this is appropriate where there is a known and measurable figure that we know will remain the same after rates take effect, but no one has any idea what the average allowed ROE will be starting after January 2, 2013 when rates take effect. Moreover, use of a data from one or two quarters reflects information from a small sample size, further undermining such data's reliability.
[7] 320 U.S. 591 (1944).
[8] 262 U.S. 679 (1923).

do so on reasonable terms.[9] As Ameren Missouri witness John Reed testified, when Ameren Missouri's opportunity to earn its cost of equity is undermined, Ameren Missouri's shareholder, Ameren Corporation, "has little incentive to invest in Missouri beyond the basic requirements to maintain system reliability and service."[10] As Mr. Reed also testified, an inferior opportunity earn a fair return also (1) undermines the Company's ability to support Ameren Corporation's financial condition, putting Ameren Corporation at a disadvantage in raising capital among companies with otherwise commensurate risks, which in turn directly impacts Ameren Missouri and its customers through higher capital costs and less investment; and (2) makes Ameren Missouri a less attractive investment than Ameren Illinois for Ameren Corporation's limited capital.[11]

20. The Commission is also ignoring the chronic inability of the Company to earn its authorized ROE, despite four prior increases and hundreds of millions of dollars of expenditure reductions. In this regard the Report and Order speculates that this problem may just be due to a "temporary downturn." Report and Order, p. 14. The Report and Order suggests that regulatory mechanisms it has adopted should be "allowed to work," implying that Ameren Missouri perhaps won't face a greater risk of being unable to earn a fair return in the future. *Id.* p. 35. The record does not support these statements, however. The "downturn" referred to didn't start until late 2008/early 2009. Ameren Missouri was chronically under-earning well before then.[12] Moreover, aside from the two-way storm restoration cost tracker that will be implemented in this case (and which could benefit customers just as much as it could benefit the Company), the

[9] And equity capital is certainly needed because the Company's ability to borrow is not unlimited.
[10] Ex. 4, p. 23, l. 8-10.
[11] Ex. 3, p. 6, l. 17-23. That disadvantage also exists vis-à-vis investments Ameren Corporation can make in its regional transmission company.
[12] See the chart at page 6 of Ameren Missouri's Initial Post-Hearing Brief, showing that on a rolling 12-month basis to a point as far back as July 2006 the Company consistently earned far below its then-allowed return, prior to the downturn.

regulatory mechanisms the Commission referred to have been in place for several years.[13] The Company's chronic inability to earn its authorized return has continued despite those mechanisms.

21. Nor should the Commission draw the conclusion that "all is well" simply because for one 12-month period the Company was able to earn about 30 basis points above its then-authorized ROE. The evidence showed that return was inflated due to abnormally hot weather and a one-time power contract refund of $30 million which all by itself increased the earned ROE by more than 50 basis points. One can't set rates by normalizing out the effects of such factors and then judge whether a utility is earning a fair ROE by including such factors in the analysis. That the Commission's Staff and other parties agreed in this case that the Company did need a substantial rate increase (and thus is not "over-earning") further demonstrates that this isolated and completely unrepresentative statistic tells us little to nothing about whether the Company in fact has a reasonable opportunity to earn a fair ROE as compared to its peers under normal circumstances. A final piece of evidence not mentioned or acknowledged by the Report and Order is Mr. Gorman's corrected chart (Ex. 70) which completely confirms precisely what Mr. Baxter told the Commission in his testimony, what the undersigned counsel for the Company told the Commission in opening statements, and what the Company has consistently told the Commission: for nearly seven years running the Company has essentially had no reasonable opportunity to earn its allowed ROE.

[13] The Company is very appreciative of the efforts the Commission has made in improving the regulatory framework. Certainly the Company believes that its Plant-in-Service Accounting proposal is needed, but the Commission disagreed. Putting aside Plant-in-Service Accounting, however, as pointed out earlier, lack of CWIP in rate base, lack of a forecasted test year (which cannot even be used for rate base, due to Proposition One), and an unwillingness to use interim rates short of financial catastrophe, remain systemic deficiencies in the Missouri ratemaking process.

22. The point is that these historical and largely undisputed facts show that there *is* a problem with Missouri's regulatory framework. That problem in turn translates into greater risk, and that greater risk justifies a higher than average allowed ROE than other utilities (enterprises of comparable risk) are authorized. The Commission should reconsider its decision on the Company's ROE in light of these considerations.

Customer Charges – Residential and SGS Rate Classes

23. Although the Commission acknowledges that "the effect of payback periods associated with energy efficiency would be small,"[14] at page 110 of the Report and Order, the Commission nevertheless found that "[s]hifting customer costs from variable volumetric rates, which a customer can reduce through energy efficiency efforts, to fixed customer charges, that cannot be reduced through energy efficiency efforts, will tend to reduce a customer's incentive to save electricity." But that finding is pure speculation and the Commission should reconsider its decision.

24. The basis for the Commission's finding are statements made in the prepared rebuttal testimony of Natural Resources Defense Council witness Pamela Morgan. But the assertions made in Ms. Morgan's prepared testimony on this issue are nothing more than speculation based on unfounded assumptions, as her admissions from the witness stand make clear. During cross-examination, Ms. Morgan admitted that she doesn't know what effect, if any, an increase in monthly customer charges will have on customers' willingness to invest in energy efficiency measures. And the record is clear as to why she doesn't know: (i) Ms. Morgan admitted that she performed no study to test the validity of her assumptions;[15] and (ii) she testified she is not aware of any study that has examined the effect customer charges have on

[14] Report and Order, p. 111.
[15] Tr. p. 426, l. 14-19.

customers' willingness to invest in energy efficiency or that has determined whether customers' attitudes regarding energy efficiency investments are negatively affected by changes in customer charges.[16]

25. The Commission's finding also ignores the compelling evidence presented by Ameren Missouri's witness William Davis – which was not rebutted by any other party – that because increasing the customer charge from $8 to $12 per month will have only a minimal effect on customers' overall annual energy costs the proposed increase will not adversely affect customers' willingness to invest in energy efficiency. Among other things, Mr. Davis' testimony established that:

- For those customers who see an overall increase in energy costs as a result of the proposed increase in the monthly customer charge, the ***annual*** increase for most customers will be between $5 and $25;[17]

- No customer will see an ***annual*** increase in total energy costs of more than $48 as a result of the proposed customer charge increase;[18]

- Total energy costs (which consist of both the monthly customer charge any volumetric charges for energy used) will decrease for approximately half the Company's customers if the proposed customer charge increase is approved;[19] and

- Almost 60 percent of Ameren Missouri's low income customers will experience lower total annual energy costs if the monthly customer charge is increase to $12.[20]

Mr. Davis' evidence also established that the Company's proposed customer charge increases would increase the weighted average payback period for Residential class customers by just 12 days.[21]

[16] *Id*. p. 425, l. 14-20.
[17] Ex. 39, p. 3, l. 15-16.
[18] *Id*.
[19] *Id*. p. 9, l. 20 - p. 10, l. 7.
[20] *Id*. p. 12, l. 4-20.
[21] Ex. 40, p. 3, l. 3-22.

26. Further, Mr. Davis demonstrated that the percentage of fixed costs proposed to be collected by the requested customer charge barely moves. Currently, Ameren Missouri collects 91% of its fixed costs through its volumetric charge. The proposal to raise the customer charge to $12 would only reduce that percentage to 89%.[22]

27. Taken together, this evidence refutes the Commission's finding that the Company's proposed increases in the monthly customer charges of the Residential and Small General Services rate classes will decrease customers' willingness to invest in energy efficiency measures. While the Company appreciates the Commission's desire to not negatively impact Ameren Missouri's energy efficiency efforts, there is no basis for this concern. Consequently the Company's customer charges should be increased as recommended by Company witness Wil Cooper.

WHEREFORE, the Company hereby respectfully requests that the Commission grant rehearing of its Report and Order with respect to its decision regarding the 2010 property tax refund and its decision regarding the level of property tax expense used to set the revenue requirement, and that it reconsider its decisions regarding ROE and the customer charges for the residential and SGS rate classes.

[22] *Id*, p. 10, l. 14-16.

Dated December 21, 2012.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Application for Rehearing and Request for Reconsideration of Union Electric Company d/b/a Ameren Missouri was served via e-mail, to the parties of record to the above-captioned case on the 21st day of December, 2012.

/s/ James B. Lowery
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