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	)	Case No. ER – 2010 – 0036
In the Company's Missouri Service Area	)	

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT IN THE REPORT AND ORDER REGARDING INTERIM RATES

I respectfully dissent. In my opinion, the substantial evidence in the record demonstrates that the company is lawfully entitled to the interim rate adjustment increasing its rates by approximately $37.3 million. I find that the majority's findings of fact are incomplete, requiring me to make additional findings of fact as set out below.[1]

I. Procedure

The majority decision sets out the procedural history in this case. For ease of reference, I repeat it here.

On July 24, 2009, Union Electric Company, d/b/a AmerenUE, submitted a tariff, YE – 2010 – 0054, along with supporting schedules, and testimony designed to implement a rate increase for electric service. The Commission has suspended the effective date of that rate increase tariff until June 21, 2010, and a hearing on the general rate increase is scheduled to begin on March 15, 2010. Along with this rate increase tariff, AmerenUE filed a separate tariff to implement an interim rate adjustment[2], YE – 2010 – 0055, increasing AmerenUE's rates by

[1] All references herein are to RSMo 2000 unless otherwise noted.

[2] The majority failed to mention that the interim rates proposed by the company were subject to refund with interest if the Commission later found that the company was not entitled to the rate increase.

approximately $37.3 million, which would amount to a 1.67 percent increase for its customers. That interim rate tariff was to go into effect on October 1, 2009.

On September 24, 2009, the Commission suspended AmerenUE's interim rate tariff from October 1, 2009, until October 10, 2009. Thereafter, on October 7, 2009, the Commission further suspended that tariff until January 29, 2010. In the same order, the Commission directed the parties to prefile direct, rebuttal, and surrebuttal testimony and scheduled an evidentiary hearing to take place on December 7, 2009.

In compliance with the established procedural schedule, the Commission conducted an evidentiary hearing on December 7, 2009. No party made any request for additional hearing time on this case, either at the December 7, 2009 hearing or by pleading.[3] AmerenUE, Staff, Public Counsel, Missouri Industrial Energy Consumers (MIEC), Kansas City Power & Light Company (KCP&L), and Laclede Gas Company, filed post-hearing briefs on December 21, 2009.

II. Findings of Fact

What the majority has put forward as "findings of fact," in my opinion, are not a model of fact finding. Instead, they appear more as a recitation of positions of parties, without any fact being identified or specifically found by the Commission. As such, I offer here the facts[4] relevant to make a decision in this case, and the conclusions of law which can be drawn from

[3] See generally, *Transcript*, Vol. 3, p. 226, lns. 4 – 25, p. 227, lns. 1 – 25.

[4] Section 393.270.4, specific to complaint cases, is nonetheless instructive on relevant factors in rate determination matters, making clear that the Commission determines what facts are considered, rather the parties. Section 393.270.4 states:

> "In determining the price to be charged for gas, electricity, or water ***the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question*** although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." (Emphasis added).

those facts to reach the ultimate conclusion that AmerenUE's interim rate increase is just and reasonable on the whole record and its filed tariff should be placed into effect immediately, with the rate increase subject to refund by the terms of the tariff. To the extent that there are any facts in the majority's findings of fact section, I incorporate them herein by reference, and make the following additional findings of fact:

1. In its Report and Order in Case No. ER – 2008 – 0318 issued on January 27, 2009, the Commission approved rates which would permit the Company to earn a rate of return on its common equity ("ROE") of 10.76 percent. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 3, lns. 3 – 5.

2. AmerenUE filed with this Commission an interim tariff, YE – 2010 – 0055, along with supporting schedules and testimony on July 24, 2009. The tariff would allow the company to recover approximately $37.3 million in additional revenue on an interim basis. *Weiss, Direct Testimony (Interim Rate)*, Ex. D. p. 2, lns. 6 – 16. The money collected under the tariff, along with interest, would be subject to ratepayer refund pending the Commission's final determination in AmerenUE's additional rate increase request filed simultaneously with this rate increase request. *Id.*

3. The calculation is based upon the net plant additions that AmerenUE placed in service from October 1, 2008 to May 30, 2009, and also includes depreciation expense, income taxes, and return on the net plant additions. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 2, lns. 6 – 16. The revenue requirement was calculated in accordance with the depreciation rates and rate of return as Ordered in Case No. ER – 2008 – 0318. *Id.* The calculations begin with the first day after the end of the true up period in Case No. ER – 2008 – 0318 and the last day of the

most current month at the time this rate case was filed, or May 31, 2009. *Id*., *See also*, *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 7, lns. 13 – 14.

4. The plant and reserve balances stated by AmerenUE are confirmed by expert testimony that the $37.3 million interim rate request is reflective of the plant and depreciation reserve balances that are recorded in AmerenUE's general ledger on May 31, 2009. *Rackers, Direct Testimony (Interim Rate)* Ex. J, p. 3, lns. 10-13.

5. The Company has invested $346.8 million in net plant additions from October 1, 2008, through September 30, 2009. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 6, lns. 7 – 8. All of this investment was placed in service after the true-up cut-off date established in the Company's most recent rate case, ER – 2008 – 0318. *Id.* lns. 8 – 10.

6. Without the interim rate increase, the Company will fail to recover approximately $75 million over this period associated with these in-service investments. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 6, lns. 17 – 18. This figure reflects the Company's under-earnings associated with net rate base additions from October 1, 2008, through September 30, 2009, and reflects the return, depreciation, and taxes on net increased investment in plant during that period. *Id.* lns. 18 – 22. These costs will be permanently lost in total if no interim rate increase is authorized. *Id.* ln. 22, p. 7, lns. 1 – 2.

7. All of the plant (capital additions) encompassed in this rate request, and described in the findings of fact paragraphs 5 and 6 have been placed into service and are currently serving AmerenUE's customers. *Weiss Direct Testimony (Interim Rate)*, Ex. D, p. 3, lns. 3 – 5; *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 7, lns 8 – 9.

8. The Company has been earning below its allowed ROE every month since June 2008, and from January 2009, to May 2009, the Company's actual earned ROE was under 7

percent. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 3, lns 4 – 5. In April 2009, and May 2009, the actual earned ROE was under 6 percent. Over the past 12 months, the average earned return was 6.32 percent -- 416 basis points below the allowed ROE. *Weiss, Direct Testimony (Interim Rate),* Ex. D, p. 2, ln. 22; p. 3, lns. 1 – 2.

9. This persistent lack of the ability to earn its allowed ROE has adversely affected the cash flow of the Company. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 3, lns. 7 – 11. Since January 1, 2007, the Company has experienced negative free cash flow of approximately $1.6 billion through June 30, 2009. *Weiss, Direct Testimony (Interim Rate)*, Ex. D, p. 5, lns. 1 – 13.

10. As a result of this negative free cash flow, the Company must either borrow against its existing credit facilities or access the debt and equity markets to fund its operations. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 4, lns. 1 – 2. Among other things, this situation drives the Company's financing costs up meaningfully, especially where the capital markets have been challenging. *Id.* lns. 3 – 5. These increased costs are eventually borne by the ratepayers. *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 13, lns. 15 – 16.

11. Since the fall of 2008, our country has been involved in what has been characterized as a Global Financial Crisis ("GFC"). Transcript, Vol. 3, p. 358, lns. 1 – 13; p. 405, lns. 23 – 25, p. 406, lns. 1 – 9. Credit markets have been tight, leading to a much higher cost of capital for the Company. *Baxter, Direct Testimony (Interim Rate)*, Ex. A, p. 4, lns. 3 – 4; *Transcript*, Vol. 3, p. 390, lns. 5 – 10; p. 405, lns. 15 – 25, p. 407, lns. 1 – 5.

12. The economic situation currently facing AmerenUE is unprecedented in recent times. *Id.*; *Transcript*, Vol. 3, *passim*.

13. AmerenUE lost several million dollars in capacity for credit facilities due to the liquidation of Lehman Brothers. *Transcript*, Vol. 3, p. 383, lns. 3 – 10. Access to capital was seriously impacted by the reduced number of financial institutions which remained in the marketplace. *Id.* lns. 5 – 10.

14. The global financial crisis and regulatory lag together support the interim rate relief requested. *Transcript*, Vol. 3, p. 358, lns. 1 – 17. What happened in the economy is causal to AmerenUE's failure to earn its allowed ROE. *Id.*

15. When circumstances are beyond the control of the utility it is appropriate to grant interim rates which serve as a financial safety net. *Transcript*, Vol. 3, p. 540, lns. 20 – 25, p. 541, lns. 1 – 7.

16. In Missouri, there is a history of "regulatory lag" approaching eleven months from the date a utility files its proposed rate increase and the Commission order allowing it to put any increased rate into effect. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 5, lns. 13 – 23; *Baxter, Rebuttal Testimony (Interim Rate)*, Ex. B, p. 3, lns. 21 – 23; *Pfeifenberger, Direct Testimony (Interim Rate)*, Ex. I, p. 3, lns. 12 – 13. Regulatory lag represents a mismatch of costs and revenues, meaning that the Company's rates are not reflective of, nor do they provide for recovery of, the Company's current level of operations and maintenance expenditures and cost of capital investment. *Weiss, Direct Testimony (Interim Rates)*, Ex. D, p. 2, lns. 20 – 21; p. 3, ln. 1.

17. Several factors drive regulatory lag in Missouri, including the length of the regulatory process, use of historical costs to set rates, Missouri statutes do not permit utilities to reflect construction work in progress in rate base, and lack of a mechanism to periodically adjust rates for changes in rate base for plant in service between rate cases to reflect the return, property

taxes, and depreciation associated with increases in net plant in service. *Baxter Direct Testimony (Interim Rate)*, Ex. A, p. 5, lns. 13 – 23.

18. The $37.3 million interim rate request reflects the cost of net plant placed in service from October 1, 2008, through May 31. 2009. *Baxter Direct Testimony (Interim Rate)* Ex. A, p. 7, lns. 13 – 15.

III. Analysis

AmerenUE filed, and this Commission suspended, a tariff seeking a rate increase.[5] That tariff is not unique under Missouri law, nor should it be treated any differently. Missouri law states that this Commission must use the "just and reasonable" standard when suspension has occurred and any hearing is held.[6] Yet here, the majority concocted, out of thin air, a threshold *discretionary* standard to be used prior to reaching an analysis as to whether the tariff is "just and reasonable." The majority's decision, while paying lip service to what constitutes "just and reasonable" rates, instead required this utility to show that it "is facing extraordinary circumstances"[7] while also showing a "compelling reason to implement an interim rate increase."[8] Whatever standard this is, it is not the just and reasonable standard, and is wholly unsupported by law.

The creation of an unlawful threshold of *discretionary* review, prior to applying the standard of "just and reasonable" rate setting required under Section 393.150(2), may now unwittingly allow the majority of this Commission to operate with impunity in addressing any rate increase request. This Commission does not have the legal authority to apply a

[5] The tariff has been titled by AmerenUE as an Interim Rate Adjustment Tariff. Nothing in Missouri statute designates what constitutes an "interim" rate. Arguably all rates, because they are subject to later change, are by their very nature interim in nature.

[6] Section 393.150(1) and (2).

[7] ***Report and Order Regarding Interim Rates***, Case No ER – 2010 – 0036, p. 12.

[8] *Id.*

discretionary standard as a threshold prior to determining whether a filed rate is just and reasonable, and as such, I disagree with the majority's legal analysis, application of law to facts, as well as its final conclusion.

A. The Law

Missouri utilizes the file and suspend method of rate making.[9] There is nothing in the statutory scheme for rate setting in Missouri that differentiates between the style of a particular rate.[10] Rather, Missouri law refers to a rate or charge set forth in a schedule[11] with nothing segregating any particular rate, charge or even schedule into categories such as interim, temporary, expedited, permanent, and otherwise requiring different legal treatment. Similarly, familiar terminologies such as permanent rate case and full rate case process[12] are also legally irrelevant because a filing seeking a change in a rate, charge or schedule is also not segregated in law in any manner except case status—noncontested or contested.[13] The tendency of the parties and the majority to rest on colloquial terminology that may have woven its way over time into

[9] The "file" provision is set out in Section 393.140(11) and the "suspend" provision is set out in Section 393.150; *See generally* ***State ex re. Jackson County, et. al v. Public Service Comm'n, et. al***, 532 S.W.2d 20 (Mo. banc 1975) (discussing the "file and suspend" method of ratemaking).

[10] *See Transcript* Vol. 3, p. 226, lns. 4 – 25, p. 227, lns. 1 – 25 (wherein Staff counsel offers by way of explanation that a limited number of witnesses, only two, provides evidence that this case is not governed by the "file and suspend" provisions of Section 393.150). I disagree, nothing in Section 393.150 limits or constrains the evidentiary process, rather both Section 303.140(11) and 393.150 simply outline the time within which a rate increase may be set.

[11] The specific term "tariff" is not used in Sections 393.140(11) or Section 393.150, but is referenced in other sections of Chapter 393. Section 393.140(11) states that "no change shall be made in any *rate or charge*, or in any form of contract or agreement, or any rule or regulation relating to any *rate, charge or regulation* relating to any *rate, charge or service* … which shall have been filed and published by a [ ] electrical corporation …" (Emphasis added). Section 393.150 states that "whenever there shall be filed with the commission by any [ ] electrical corporation [ ] any *schedule stating a new rate or charge*, or any new form of contract or agreement, or any *new rule, regulation or practice relating to any rate, charge or service* or to any general privilege or facility …" and later stating in the same subsection "the commission [ ] may suspend the operation of such *schedule and defer the use of such rate, charge, form of contract or agreement, rule regulation or practice* …" (Emphasis added).

[12] Missouri statutes make the following references (without regard to explanation, definition or meaning); "regular rate case" Section 393.1030.2(4) RSMo Cum. Supp. 2009, "general rate case," Section 393.1000(1)(d) RSMo Cum. Supp. 2009, and Section 393.1009(3)(c) RSMo Cum. Supp. 2009, and "small company rate case," Section 393.146.1.11 RSMo Cum. Supp. 2009. All of the *rate case* references are relative new additions to Missouri law.

[13] *See* ***State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n.***, 585 S.W.2d 41 (Mo. banc 1979), denoting "permanent rate" increases.

practice, does not reflect the very laws designed for the fair administration of the Public Service Act which was created to provide fairness to both the public and utility investors.

The interplay between Sections 393.140(11) and 393.150, and the numerous cases applying these specific sections provide the lawful roadmap for rate setting in Missouri. A careful reading of the plain meaning of the statutes, and an attention to detail in reviewing and analyzing applicable case law (and the cases upon which those cases rely) is determinative. The majority seems to have gotten caught up in the "outcome" rather than applying the law to the facts. However, the foundation of administrative law requires this Commission to apply the law as it is written.

The fundamental element that sets an interim rate request apart from what are generally considered permanent rate requests, is not *why* the request is made, but *when* the rate is needed to go into effect. This is the framework of the two statutory provisions considered in this case. By placing the analytical focus on the *why* continues to cause acrobatic maneuvering by both the majority and the advocates for the parties, which I find unnecessary. If the questions are answered in the order I have suggested, *when* before *why*, not only does the law fall into place, but so does the proper legal standard which must be applied to the filing.

The distinction drawn between Section 393.140(11) and 393.150 with regard to the *when* (effective dates and timing of rates) is lost on the majority in their analysis; instead they focus on the *why*. One of the reasons the *why* is so important to the majority is their reliance on the holding in ***Fischer*** to support the idea that in some way "interim rate" filings and "permanent rates" are not only distinguishable, but are married to each other for the purposes of rate setting; in truth, they are not. ***State ex. rel. Fischer v. Pub. Serv. Comm'n***, 670 S.W.2d 24, 27 (Mo. App. W.D. 1984). ***Fischer*** does not stand for the proposition that two rate filings are inexorably

tied together for rate making purposes; rather, ***Fischer*** was a case dealing with the standard for appellate review and appeal. ***Fischer*** makes no holding as to two separate rate filings with regard to Commission treatment for the purposes of rate setting, or the legal standard, or burden of proof in rate setting under such circumstances. Tying the two together in the analysis as to *why* a temporary or interim rate is requested exacerbates the flaw in the majority's analysis. Accordingly, the majority's reference in its present Order regarding ***Fischer*** fails to recognize this important distinction. ***Fischer*** does not control here.

B. Noncontested Case

Section 393.140(11) sets out a *discretionary* system for conducting rate setting in Missouri by granting the commission latitude with regard to *when* an increase in a rate shall become effective. This framework is generally referred to as a noncontested case. Subsection (11) essentially grants the Commission authority to provide expeditious rate treatment, allowing the Commission to implement rates without the benefit of a full and complete hearing, or under limited circumstances without the necessity of providing thirty days notice upon "good cause" shown. Good cause provides for *discretion* by the Commission when it makes its determination and may include such issues as application of a financial need test, establishment by the utility that an economic or other emergency exists, or some other unique situation which merits *discretionary* review under the circumstances of a proper case. An example of such a proper case would be where the Commission allows an interim rate request to go into effect at the time requested and without suspension of the tariff.

In this case, the majority stated that "AmerenUE did not meet its burden of proving that it is facing extraordinary circumstances and has not demonstrated a compelling reason to implement an interim rate increase[.]" Had this case been one where Section 393.140(11) was

applicable, it is arguable that the majority's approach could have been tenable; but, this was not an uncontested case. The suspension of AmerenUE's filed rate legally requires consideration under Section 393.150, not 393.140(11).

C. Contested Case

Section 393.150 controls this case. This Commission, by ordering the suspension of the filed tariff,[14] and holding a full hearing,[15] is bound by the law as described in Section 393.150, and as such, a contested case has occurred here.[16] Once the Commission suspends a rate under Section 393.150, constitutional protections are invoked and the Commission is bound by its *duty* in a Section 393.150 case to find that a rate is just and reasonable. For the regulator, it is the trigger of constitutional protections that mean the Commission is no longer afforded the *discretion* provided for under Section 393.140(11), but instead must apply Section 393.150 to administer its *duties.*

Missouri's statutory provisions not only authorize the Commission to prescribe just and reasonable rates, they also impose a specific *duty* to prescribe just and reasonable rates. When a tariff has been suspended, and any hearing is held in a rate increase proceeding, the Commission has a statutory *duty* to determine and prescribe "just and reasonable" rates.[17] Once rates are

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[14] Section 393.150 allows the Commission to suspend the "operation of such schedule and defer the use of such rate …" after notifying the electrical corporation "of its reasons for such suspension …" No statutory standard for the exercise of suspension is stated in the law. The Commission thus has *discretion* in exercising this power. In this case, suspension is not at issue – nor the *discretion* with regard to suspension which is implied in the law.

[15] Section 393.150(1) states: " … after full hearing …"

[16] Section 536.010(4).

[17] In the case of a complaint the statute goes so far as to prescribe that the rates permit an electrical corporation to make a "reasonable average return upon capital actual expended …" Section 393.270(4).

suspended and a hearing set, the provisions of a contested case are triggered.[18] And, once this *duty* is triggered it must be performed and it must be based upon the evidence of record.

D. Just and Reasonable Rates

The legal standard of just and reasonable rates is well settled in the law. The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,[19] subject to judicial review of the question of reasonableness. ***St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri***, 236 S.W. 852 (Mo. *banc*. 1922). A "just and reasonable" rate is one that is fair to both the utility and its customers ***St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n***, 515 S.W.2d 845 (Mo. App. 1974); it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested." ***St. ex rel. Washington University et al. v. Pub. Serv. Comm'n***, 272 S.W. 971, 973 (Mo. *banc* 1925). In 1925, the Missouri Supreme Court stated:

> The enactment of the Public Service Act marked 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 further to 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 guaranty 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.

Id.

[18] This can be contrasted to the provisions of Section 393.140(11) which follow a noncontested case standard, with the Commission granted the authority to exercise its *discretion* with regard to the time when a rate shall go into effect. Even though a rate may be suspended under 393.140(11) it is a suspension of a rate that exceeds the effective date that moves the rate increase request to the application of Section 393.150. At that point the interest and the rights of the utility are affected, resulting in the protections afforded through due process, including a timely hearing.

[19] Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

The Commission's guiding purpose in setting rates is to protect the consumer against the natural monopoly of the public utility, generally the sole provider of a public necessity. ***May Dep't Stores Co. v. Union Elec. Light & Power Co.***, 107 S.W.2d 41, 48 (Mo. App. 1937). "[T]he dominant thought and purpose of the policy is the protection of the public . . [and] the protection given the utility is merely incidental." ***St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n***, 179 S.W.2d 123, 126 (1944). However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service. ***St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 49 (Mo. banc 1979). "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment." ***St. ex rel. Missouri Public Service Co. v. Fraas***, 627 S.W.2d 882, 886 (Mo. App. 1981).

The Commission has exclusive jurisdiction to establish public utility rates, ***May Dep't Stores***, 107 S.W.2d at 57, and the rates it sets have the force and effect of law, ***Utility Consumers Council***, 585 S.W.2d at 49. A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission ***Id.***; neither can a public utility change its rates without first seeking authority from the Commission. ***Deaconess Manor Ass'n v. Pub. Serv. Comm'n***, 994 S.W.2d 602, 610 (Mo. App. 1999). A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes are just and reasonable, but the final decision is the Commission's. ***May Dep't Stores***, 107 S.W.2d at 50. Thus, "[r]atemaking is a balancing process." ***St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n***, 765 S.W.2d 618, 622 (Mo. App. 1988).

IV. Conclusions

Approval of the proposed interim rates is supported by competent and substantial evidence upon the whole record. There is no credible evidence in the record on behalf of the staff, public counsel, or the intervenors that the company is not entitled to the rate increase requested.

The Company has met its burden of proof under section 393.150. The Company has plant in service that is used and useful, benefitting the ratepayers. The Company is not recovering its costs for this plant in service, and is seriously under-earning due to unreasonable regulatory lag and the Global Financial Crisis which drives up its cost of capital. The rate increase request, which is interim, is just and reasonable given the facts in this case.

Despite the facts in the record, the majority failed to prescribe the just and reasonable rates which the evidence clearly showed to be justified. The majority here has simply rejected the rate put forth by AmerenUE without making a single finding of fact to support that the rate was not "just and reasonable" or how it reached such a conclusion. The majority reasoned that "in its discretion" the rate was not supported by the evidence. This is insufficient under the law. By applying a standard of *discretion* in a 393.150 case, the majority has ascribed itself to an arbitrary standard for rate setting here, one which is clearly not permitted under the law. The *discretionary* threshold applied by the majority has in essence created a barrier to a just and reasonable rate.

What the majority has done, in my opinion, is to have morphed the *discretion* afforded the Commission under Section 393.140(11) regarding the implementation of rates which may go into effect immediately or on a date sooner than that required for a full hearing, with the provisions of Section 393.150(2) which requires "just and reasonable" rates, to reach its ultimate

conclusion. These two statutory sections are different, and while they can be harmonized they cannot be conjoined to transform the law. The majority's approach here essentially has rewritten years of law and jurisprudence with regard to the setting of rates under the guise that in some way the rate filed by AmerenUE is different, unique or merits special treatment. In this case, AmerenUE's rate was suspended and a hearing held, so there can be no dispute that the standard which applies is that the rate be "just and reasonable" and that the *duty* of the Commission is set by Section 393.150.

In my view, the rate case review process in this case has been completed – a rate was filed by AmerenUE, the rate suspended and a full hearing held. The party seeking the rate increase bears the burden of proof to demonstrate that the rate is just and reasonable. This is a straight forward filing by a utility requesting an increase in rates. And, while that increase request included caveats, such as the increase being temporary and subject to a refund pending the outcome in a different, but simultaneously filed rate increase request, makes no difference in what should have been this Commission's application of law to facts and legal conclusions in this case. The Commission's exercise of *discretion* in a Section 393.150 case is simply not the type of *discretion* analogized in the ***Laclede*** case, as the ***Laclede*** court most certainly would not have been advocating for unconstitutional action such as confiscation of utility property, in my opinion. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 535 S.W.2d 561 (Mo. App. K.C. Dist. 1976). The reference was, in my view, meant to encompass the *discretionary* latitude the Commission does possess as to the suspension of a rate, schedule or charge under Section 393.150 and the *discretion* the Commission possesses by allowing rates to go into effect by

operation of law (without a hearing), or within a shortened timeframe under Section 393.140(11).[20]

To further understand my opinion here, it is important to acknowledge that I agree with the Public Counsel's cautioning against reliance on the ***Laclede*** case, in that the court by its own admission stated that the decision was advisory. Also, to the extent that ***Laclede*** seems to suggest that this Commission has adopted a rule regarding "interim" rate relief and an applicable standard (which essentially is the genesis for much of the analysis on interim relief), I would point out that the Court only acknowledged that this Commission had "point[ed] out" that it had "adopted a rule" in ***Re Southwestern Bell Tel. Co.***, 2 Mo. P.S.C., (N.S.) 131, 535 S.W.2d 561, 566. To the extent the interim rate "standard" has as its genesis ***Southwestern Bell***, I am skeptical that what was argued by the Commission's counsel in ***Laclede*** is as much a rule as it is nothing more than a general recitation of Commission findings without any indication that a rule of general applicability was intended by the Commission's Order.[21]

The statutory *duty* of the Commission in this rate case, where hearings have been held and the rate suspended, is to determine and prescribe the just and reasonable rates to be in force and effect thereafter. Here, a hearing was held and evidence adduced. The Commission's Order denying AmerenUE's rate tariff, described by AmerenUE as an interim rate tariff, is unlawful because the Commission failed to find that the rate proposed was not *just and reasonable* but instead, simply rejected out of hand, AmerenUE's tariff for *discretionary* reasons.

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[20] The ***Laclede*** Court recognized that "[T]he 'file and suspend' provisions of [Sections 393.140(11) and 393.150] lead inexorably to the conclusion that the Commission does have *discretionary* power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing …" This passage demonstrates that the focus of the Court was not on the type of rate proposed but rather by the time when the rate would become effective.

[21] Because Commission decisions have no precedential value, absent a rule of general applicability being established, the finding announced in ***Southwestern Bell*** has no binding effect on this Commission.

The Commission's Order fails to recognize the constitutional and statutory *duty* of the Commission to grant expeditious relief when the utility meets its burden of proof. The notion of due process and equal protection under the Missouri and U.S. Constitutions, and the statutory requirement that rate regulation shall provide "just and reasonable" rates have been turned on their head here where the Order erroneously applies a standard not recognized under law for the denial of a rate increase request. Here, the majority seems to be suggesting that its denial is only temporary because another rate increase is following this very case. Denying a just and reasonable rate, even for a little while, does not make it lawful. Limited or temporary confiscation is just as prohibited by law as total and permanent confiscation. The majority's inference that AmerenUE can wait until its next rate increase request proceeding (which was filed simultaneously with this rate increase request) amounts to saying that some confiscation is permissible, or that confiscation can be required if it is only temporary until a later rate case can be decided.

When a commission prescribes rates which do not provide the opportunity to earn the cost of service, or as generally stated to earn a reasonable return on the value of the property devoted to public service, such rates are confiscatory. The Supreme Court of the United States in ***Bluefield Waterworks v. West Virginia Pub. Serv. Comm'n. et al.***, 262 U.S. 679, 690 (1923) considered this so well settled that citation of cases was unnecessary.

> "***The question in the case is whether the rates prescribed in the commission's order are confiscatory, and therefore beyond legislative power.*** Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary [:] …"

(Emphasis added).

The evidence in this case was uncontroverted that plant is in the service of the public, that the public is benefiting, that AmerenUE has asked for recovery of those costs, and this Commission has said no. Denial of the request however is not enough; it is that denial along with the evidence which was presented by AmerenUE that it has been consistently unable to earn even close to its rate of return that has convinced me that denial of the rate now is confiscatory of AmerenUE's property for the benefit of the public without just compensation.

Despite the majority acknowledging that "any rate, including an interim rate, the Commission approves must be just and reasonable …" it wholly failed to make any finding that the rate filed by AmerenUE was not just or reasonable. Instead, the majority made its findings for denial on *discretionary* terms, which is only appropriate for consideration under Section 393.140(11).

The bad economic conditions today are unprecedented, and while they impact upon ratepayers as well as utilities, that does not negate the utilities duty to provide safe and reliable service at just and reasonable rates. As such, the GFC and its impact on utilities is a factor that merits consideration by the Commission in determining whether a rate is just and reasonable. To suggest that such a crisis is merely a part of general economic conditions that a utility is expected to navigate totally overlooks the severity of the situation and the direct impact it has on a utility's ability to not only attract capital, but to do so at a reasonable rate.

Externalities encompassing the magnitude of this crisis cannot be ignored. Accelerated rate implementation or interim rates should be available to a utility. Circumstances beyond the direct control of the utility, such as the GFC, support the reasonableness of such a rate request. The GFC has demonstrated that forces beyond the control of a utility may be so great in

magnitude that without a rate increase, provision of utility service may be jeopardized (whether immediately or in the long term). Access to credit is one element, but when banks close and no longer exist, access is completely forestalled.

Much focus was placed by the majority on AmerenUE's admission that it was not experiencing an emergency[22] in its analysis. From my point of view even if AmerenUE stated that no emergency existed,[23] it is incumbent upon this Commission to review the facts and make that determination itself. It is not the role of this Commission to defer to the parties "conclusions" regarding matters of law, and as such, the majorities' apparent comfort in reliance on AmerenUE's admission is of no consequence here. The regulatory responsibility of this Commission is to review the matter at hand, which can include reaching a conclusion based upon the facts different then that which is suggested by a party to the case.

I acknowledge that there is a cost associated with utility service and that denial of a rate increase request which is temporary or interim in nature can have the unintended consequence of not only costing the ratepayer more, but exacerbating any later possible rate shock. While I offer no opinion or make any judgment with regard to the AmerenUE rate case which remains pending before the Commission, in this case I believe is it important to point out that the Commission clearly demonstrated that it is capable of acting expeditiously in compliance with Section 393.150(2)'s requirement that the "commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible[.]" and not stretch a rate increase request (such as this interim request) out to a full

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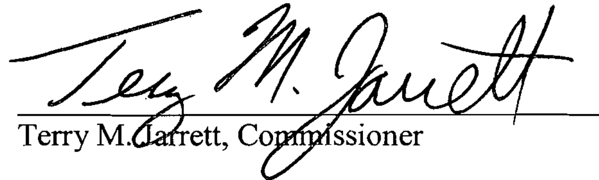
[22] ***Report and Order***, p. 9.

[23] Had AmerenUE declared in a statement to this Commission that it was experiencing an emergency, ***of any type or nature***, even if it had not been experiencing one before making such a statement, it most certainly would have found itself experiencing one after, as the financial markets would in all likelihood have reacted in response to such admissions, regardless of the "legal standard" being applied or used by this Commission. This Commission must be mindful of market reaction and the associated seriousness when it undertakes examination of a utility's witnesses, and the unintended consequences which can flow.

eleven months. The result reached, however, was even in that shortened time frame legally wrong.

Based on the foregoing, I would have granted AmerenUE's request for the interim rate increase.



Terry M. Jarrett, Commissioner

Submitted this 3rd day of February, 2010.