

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 16th day of
March, 2011.

In the Matter of Union Electric Company, d/b/a)	
AmerenUE's Tariffs to Increase Its Annual)	<u>File No. ER-2010-0036</u>
Revenues for Electric Service)	

**ORDER DENYING PUBLIC COUNSEL'S
MOTION TO CONFORM TARIFFS**

Issue Date: March 16, 2011

Effective Date: March 26, 2011

On February 16, 2011, the Office of the Public Counsel filed a motion asking the Commission to conform Union Electric Company, d/b/a Ameren Missouri's rate tariffs to the Order Granting Stay Pursuant to Section 386.520 issued by the Circuit Court of Cole County on December 20, 2010. Public Counsel's motion explains that the Circuit Court of Cole County has granted a request to stay the effectiveness of the Commission's report and order that approved those rates, and that the stay took effect when the Missouri Industrial Energy Consumers (MIEC) filed suspending bonds on February 15, 2011. Public Counsel contends the stay order suspends the increased rates that were allowed under the Commission's report and order and that therefore Ameren Missouri no longer has the authority to charge those rates. For that reason, Public Counsel asks the Commission to mark Ameren Missouri's tariffs as "cancelled" or "suspended." Public Counsel also asks the Commission to designate Ameren Missouri's superseded tariffs as once again effective.

Later on February 16, MIEC filed a pleading supporting Public Counsel's motion. MIEC also points out that it has obtained a similar stay of the Commission's Report and

Order in Ameren Missouri's previous rate case, ER-2008-0318. Therefore, it contends Ameren Missouri's rates must be rolled back to their 2007 levels.

Public Counsel asked the Commission to rule on its motion by February 23, only one week after Public Counsel filed its motion. The Commission denied Public Counsel's request for expedited treatment in an order issued on February 18 and directed that anyone wishing to respond to Public Counsel's motion do so no later than February 25.

The Missouri Energy Group, AARP, and the Consumers Council of Missouri filed responses supporting Public Counsel's motion on February 25. On that same date, Ameren Missouri filed a response to Public Counsel's motion and a reply to MIEC's response to that motion. Ameren Missouri urges the Commission to deny Public Counsel's motion because the courts that are dealing with the appeals of the Commission's rate case decisions currently have exclusive jurisdiction over those rate case. Ameren Missouri also argues that Public Counsel's interpretation of the stay orders issued by the circuit courts is incorrect. Public Counsel replied to Ameren Missouri's response on March 7.

Ameren Missouri, Public Counsel, and the parties that support Public Counsel's motion raise many interesting arguments about the state of the law and the proper interpretation of the stay orders issued by the Circuit Court of Cole County and the Circuit Court of Pemiscot County. Public Counsel may be correct that the stay order issued by the Circuit Court of Cole County in December of 2010, suspends the rates that Ameren Missouri is currently charging its customers, requiring the company to revert to earlier approved rates. It may also be that Ameren Missouri is correct and the circuit court's stay order applies only to those large industrial customers who have posted appeal bonds with

the circuit court. Whatever the correctness of those arguments, the decision about how the circuit court orders should be interpreted is not in the hands of the Commission.

The law in Missouri is very clear. When its rate case orders were challenged in circuit court, the circuit court gained exclusive jurisdiction over these matters, including the tariffs by which Ameren Missouri implemented the Commission's orders. While the circuit court has exclusive jurisdiction, the Commission may not enter a "modified, extended or new order."¹ The Commission does not regain jurisdiction until it receives a mandate from a court following the conclusion of final judicial review.² Any action the Commission takes without jurisdiction would be void and without effect.

No court has issued a mandate to the Commission in these matters. Indeed, nothing in the suspension orders issued by the Circuit Court of Cole County or the Circuit Court of Pemiscot County directs the Commission to do anything. All questions about how the suspension orders are to be interpreted or put into effect are squarely within the exclusive jurisdiction of the courts, and nothing the Commission can do will have any effect on those orders.

A close reading of Public Counsel's motion reveals that Public Counsel is well aware that the Commission has no jurisdiction to modify, extend, or implement the stay orders issued by the circuit court judges. Instead, Public Counsel is asking the Commission to do what it describes as a ministerial duty by conforming Ameren Missouri's tariffs to the courts' suspension orders. In other words, Public Counsel is asking the Commission to make a mark on a piece of paper or include a note on a computer file indicating that Ameren

¹ *State ex rel. Mo. Cable Telecommunications Ass'n v. Mo. Pub. Serv. Comm'n*, 929 S.W. 2d 768, 772 (Mo. App. W.D. 1996).

² *Id.* See also, *State ex rel. City of Joplin v. Mo. Pub. Serv. Comm'n*, 186 S.W. 3d 290 (Mo. App. W.D. 2006).

Missouri's tariffs have been suspended and that earlier tariffs are once again in effect. Public Counsel claims that the Commission should do so to avoid confusion among Ameren Missouri's customers about which rates they are being charged.

However, as Public Counsel recognizes, the stay orders issued by the circuit courts stand on their own. Because it does not have jurisdiction, nothing the Commission can do will change anything about those stay orders or any effect they may have on Ameren Missouri's tariffs. For the Commission to confuse the public by making a show of purporting to change tariffs when it has no power to do so would be irresponsible and would do a disservice to the public. Much as this Commission may not limit the scope of Circuit Court orders, it may also not expand the order beyond its scope. That scope is determined by the stay order and the stay order alone. Any interpretation of that stay must be resolved by Missouri's courts and the Commission has no jurisdiction to act otherwise.

The Commission is mindful of the concern expressed by Judge Wilson of the Circuit Court of Cole County when he indicated that the law as it currently exists seems to create a "dead zone" that might allow Commission orders to avoid effective judicial review when utility companies file frequent rate cases that accumulate during the judicial review process only to be superseded by the next rate case decision. The Commission is also mindful that if judicial review is ineffective, the residential ratepayer may bear a greater burden than other ratepayers. However, only the legislature is able to make the statutory changes necessary to change the process for judicial review of the Commission's orders. As it stands, these issues may only be addressed in higher courts in an appeal of the interlocutory order to the Missouri Court of Appeals or as a decision on the merits by the Circuit Court of Cole County. The Commission encourages the parties, to the extent that it

can, to as expeditiously as possibly resolve these matters to end any uncertainty that may currently exist.

THE COMMISSION ORDERS THAT:

1. Public Counsel's Motion to Conform Tariffs with Suspension is denied.
2. This order shall become effective on March 26, 2011.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Clayton, Jarrett,
and Kenney, CC., concur;
Davis, CC., concurs with separate concurring opinion to follow.

Woodruff, Chief Regulatory Law Judge