

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**MISSOURI INDUSTRIAL ENERGY CONSUMERS'
RESPONSE IN OPPOSITION TO AMERENUE'S MOTION TO STRIKE**

Missouri Industrial Energy Consumers ("MIEC") submits its Response in Opposition to Union Electric Company d/b/a AmerenUE's ("AmerenUE") Motion to Strike MIEC's Application for Rehearing. For its Response, MIEC states as follows:

I. INTRODUCTION

The Commission's Order Adopting Procedural Schedule and Establishing Test Year (the "Scheduling Order") in this case explicitly waived Commission Rules 4 CSR 240-2.045(2) and 4 CSR 240-2.080(11), which prescribe that pleadings filed electronically after the Commission's business hours are considered filed as of the next business day. *See* Scheduling Order at pg. 5. The Scheduling Order instead held that electronic filings are timely if filed by midnight before the due date. *Id.* In total disregard of the Scheduling Order's plain language, AmerenUE now takes the untenable position that MIEC was required to file its Application for Rehearing by midnight on the business day preceding the due date. AmerenUE's position has no basis in fact or law, because:

- MIEC complied with R.S. Mo. § 386.500's requirement that an application for rehearing be filed before the effective date of the Report and Order;
- The Commission waived the timing rules that otherwise would have required MIEC to file its application for rehearing by 5:00 p.m. on the last business day before the Report and Order's effective date; and
- It is a well-established principle of Missouri law that timing rules should be broadly construed in favor of allowing appeals on the merits to proceed.

II. ARGUMENT

A. MIEC’S Application for Rehearing was Timely Pursuant to § 386.500 RSMo.

The deadline for filing an application for rehearing is set forth in § 386.500(2) which provides in relevant part: “No cause of action arising out of any order or decision of the commission shall accrue in any court...unless that party shall have made before the effective date of such order or decision, application to the commission for a rehearing.” Here, the Commission’s Report and Order was issued with an effective date of June 7, 2010. In full compliance with § 386.500(2) and the Scheduling Order, MIEC filed its motion to strike at 11:25 p.m. on Sunday, June 6, before the effective date of the Commission’s Report and Order in this rate case. Missouri law plainly permits an application for rehearing to be filed on the day before the effective date of a Commission order. *See, e.g., State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n of the State of Mo.*, 276 S.W.3d 303, 305 (Mo. Ct. App. 2008) (Commission issued an order with an effective date of May 31, 2007, and a party filed its application for rehearing on May 30, 2007).

B. MIEC’S Application for Rehearing was Timely Pursuant to the Scheduling Order.

The Scheduling Order states: “For purposes of this case, the Commission *waives* Commission Rules 4 CSR 240-2.045(2) and 2.080(11) so that filings made in EFIS are *timely if filed before midnight on the date the filing is due.*” *See* Scheduling Order at pg. 5 (emphasis added). The clear impact of such waiver is to allow EFIS filings at any time before midnight on the due date of that filing.¹ Note the Commission’s use of the word “waive.” Pursuant to 4 CSR

¹ Rule 4 CSR 240-2.045(2) specifically address electronic filing and states that any document filed electronically “shall, if received during business hours of the commission’s records room, be considered filed as of that day, otherwise, such item or document shall be considered filed as of the next following business day.” Similarly, Rule 4 CSR 240-2.080(11) states that “the date of filing shall be the date the pleading or brief is stamped filed by the secretary of the commission. Pleadings or briefs received after 4:00 p.m. will be stamped filed the next day the commission is regularly open for business.”

240-2.105, the Commission may waive any of its rules. AmerenUE's argument that the Scheduling Order "modified" 4 CSR 240-2.045(2) and 2.080(11) is absurd given the plain language of the Scheduling Order. AmerenUE's tortured interpretation of the Scheduling Order suggests that the waiver operated only to limit the file-prior-to-5:00 pm. aspect of the Rules, while the remainder of the rules (the portions stating that a filing received after the close-of-business is considered filed the next business day) somehow remained in effect. This interpretation is disingenuous and requires adding words to the plain language of the Scheduling Order.

The Commission waived the specified rules in their entirety, plain and simple. Such waiver clearly operated to allow MIEC to file at any time prior to midnight on June 6, 2010. In fact, the Commission itself has argued to the Missouri Supreme Court that a waiver of 4 CSR 240-2.045(2) and 2.080(11) would operate *to allow* filing an application for rehearing on "Saturday or Sunday, prior to the effective date of the [Commission's] order." *State ex rel. Office of the Pub. Counsel v. Pub. Serv. Comm'n of the State of Mo.*, 236 S.W.3d 632, 637 (Mo. banc 2007). Thus, AmerenUE's reliance on that case fails.

The other case AmerenUE cites in its motion, *Staff v. Suburban Water and Sewer Co.*, Case No. WC-2007-0452 et al., 2007 WL 2695262 (Mo. P.S.C.), likewise is inapposite because that case also did not involve a waiver of the Commission's rules. Rather, in that case the Commission relied on the very rules it waived in the present case. *Id.* In *Suburban Water*, the Commission ruled that an application for rehearing was untimely when filed at 5:52 p.m. on the last business day before the effective date of an order, because "**by rule**, that filing is considered filed on the following business day." *Id.* (emphasis added). The "rule" referred to was 4 CSR

240-2.045(2). *Id.* AmerenUE also fails to point out that on appeal the Cole County Circuit Court ruled that the Commission’s interpretation of this rule unlawfully shortened the statutory period established by §386.500 because an application for rehearing is timely if filed prior to 11:59 p.m. on the effective date. *Cole County Circuit Court Case No. 07AC-CC00926*. The Cole County Circuit Court’s decision was affirmed by the Missouri Supreme Court in *Case No. SC 89164*.

C. The Commission’s Rules Should Be Broadly Construed in Favor of Allowing Rehearing.

AmerenUE presents its tortured construction of the Commission’s Rules and Scheduling Order in a last-ditch attempt to block MIEC’s right to apply for rehearing and therefore its rights of appeal. AmerenUE’s interpretation is particularly ill-conceived in light of the principle that “rules should be liberally construed in favor of permitting appeals to proceed.” *Dunkle v. Dunkle*, 158 S.W.3d 823, 833 (Mo. Ct. App. 2005) (appellate court analyzed conflicting rules regarding appeal of family court commissioner’s ruling, and construed the rules broadly to allow appeal on the merits to proceed). To the extent that the Commission finds any ambiguity regarding MIEC’s deadline to apply for rehearing – which MIEC maintains there is not – such ambiguity should be resolved in favor of MIEC so as to allow an appeal on the merits. Equity demands such a result, as does well-established precedent. Such a rule “reflects the important policy underlying Missouri’s judicial system that because cases should be heard on the merits if possible, the statutes and rules governing the orderly administration of justice should be construed liberally in favor of allowing appeals to proceed.” *Rector v. Kelly*, 183 S.W.3d 256, 262 (Mo. Ct. App. 2005).

CONCLUSION

Striking MIEC's Application for Rehearing as untimely would contravene the plain language of the Scheduling Order which waives 4 CSR 240-2.045(2) and 4 CSR 240-2.080(11). It would also result in unlawful modification of the statutory period established by §386.500, which allows the application for rehearing to be filed any time before the effective date of the Commission's Report and Order. Based on all of the above, the Commission should deny AmerenUE'S Motion to Strike MIEC's Application for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been transmitted by e-mail this 14th day of June, 2010, to all parties on the Commission's service list in this case.

/s/Diana Vuylsteke

