

**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)
Annual Revenues for Electric Service)

Case No. ER-2010-0036
Tariff Nos.YE-2010-0054
and YE-2010-0055

**STAFF'S RESPONSE TO COMMISSION ORDER REGARDING NEW
CASE FILE FOR CONSIDERATION OF AMERENUE'S IRT TARIFF**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, in response to the October 7, 2009 Order Regarding New Case File For Consideration Of AmerenUE's Tariff To Implement An Interim Rate Increase. The Commission directed any party wishing to express an opinion on whether the Commission should create a new case file for consideration of AmerenUE's interim rate increase tariff shall do so no later than October 14, 2009. In response, the Staff states as follows:

1. The Staff covered this procedural matter in large part in its Staff's Suggestions In Opposition To AmerenUE's Proposed Interim Rate Tariff at pages 21-23 filed on August 27, 2009. The Staff noted that interim rate relief has traditionally been addressed principally in a subsequent or contemporaneous separate filing by the electrical corporation of interim tariff sheets for emergency rate relief to the filing of permanent tariff sheets by the electrical corporation.

2. The Staff cited at page 3 of its Suggestions In Opposition filed on August 27, 2009 *State ex rel. Fischer v. Public Serv. Comm'n*, 670 S.W.2d 24 (Mo.App. W.D. 1984) for purposes of addressing the standard for interim rate relief. There is also language of significance concerning procedure and the fact situation in the underlying cases is worthy of note. As a consequence, the Staff will discuss these cases in some detail. Missouri Public Service Company

(MPS) filed a permanent rate case on September 5, 1980 for \$29,250,000 in increased annual electric revenues, assigned Case No. ER-81-85, and an interim rate case on November 5, 1980 for \$15,000,000 in increased annual electric revenues, assigned Case No. ER-81-154. Included in the interim rate filing was a request for authority to defer and recover in future rates extraordinary purchased power and maintenance costs incurred as a result of the forced outage of generator unit 3 at MPS's Sibley generating station. The Staff and MPS reached a nonunanimous Stipulation And Agreement only as to certain accounting and ratemaking treatment regarding extraordinary costs associated with the forced outage of Sibley 3. MPS also agreed to reduce the remaining portion of its interim electric rate relief request in Case No. ER-81-154 to \$6,087,000 on an annual basis. The Office of Public Counsel ("OPC") was not a signatory to the Stipulation And Agreement. 670 S.W.2d at 25. Paragraph 4 of the unpublished Sibley 3 Stipulation And Agreement between MPS and the Staff stated in part as follows:

. . . Timely approval of this Stipulation is necessary to provide the Company and its independent auditors with a basis for accounting and ratemaking treatment in the Company's financial statements of the costs associated with the Sibley generator failure. Without timely approval by this Commission of this accounting and ratemaking treatment as set forth herein, the Company's ability to finance may be severely constrained.

3. MPS filed a letter with the Commission requesting an evidentiary hearing to be held on February 3, 1980 regarding the Sibley 3 Stipulation And Agreement stating that an Order was necessary effective on or before February 13, 1981 in order to provide MPS and its outside auditors with a basis for accounting and ratemaking treatment of the costs associated with the Sibley 3 generator failure for purposes of MPS's 1980 and future financial statements. The evidentiary hearing was scheduled for and held on February 3, 1981. The Commission accepted the terms of the Sibley 3 Stipulation And Agreement in a Report And Order in the interim case, ER-81-154, issued on February 3, 1981, with an effective date of February 13, 1981. The

Commission's Report And Order noted that the costs to be recovered by MPS for the Sibley 3 generator failure were to be recovered over a reasonable period of time to be determined by the Commission's Report And Order to be issued in MPS's pending permanent rate case, Case No. ER-81-85. OPC filed a Motion For Rehearing, which was overruled by the Commission, and OPC did not seek judicial review of the interim February 3, 1981 Report and Order. 670 S.W.2d at 25; *Re Missouri Public Service Company*, Report And Order, Case No. ER-81-154, 24 Mo.P.S.C.(N.S.) 150 (February 3, 1981); *Re Missouri Public Service Company*, Report And Order, Case No. ER-81-154, 24 Mo.P.S.C.(N.S.) 245 (March 2, 1981). The February 3, 1981 Report And Order in Case No. ER-81-154 was not the end of the MPS interim rate case.

4. The Commission's March 2, 1981 Report And Order in interim rate case, Case No. ER-81-154, states that on February 20, 1981, the Staff filed a Motion To Dismiss And Request For An Order Disallowing Any Additional Interim Relief based primarily on the Staff's position that no emergency or immediate need for additional funds existed beyond the relief addressed by the February 3, 1981 Report And Order. The Commission held in its March 2, 1981 Report And Order that the evidence contained in the record did not reflect a situation wherein it was proper for the granting of further interim relief. No motion for rehearing was filed respecting the March 2, 1981 Report And Order. *Re Missouri Public Service Company*, Report And Order, Case No. ER-81-154, 24 Mo.P.S.C.(N.S.) 245 (March 2, 1981); 670 S.W.2d at 25-26.

5. MPS and the Staff entered into a nonunanimous Stipulation And Agreement in the permanent rate case, Case No. ER-81-85, and an evidentiary hearing was held on rate design and the amortization of the costs associated with the Sibley 3 outage. The Commission held in Case No. ER-81-85 that the only issue before it with respect to the Sibley 3 outage was what was/were

the proper amortization period/periods over which the extraordinary costs associated with the outage were to be recovered. The Commission held that OPC's position in the permanent rate case that amortization of the extraordinary costs associated with the outage of Sibley 3 was unlawful retroactive ratemaking, was untimely, a collateral attack on a final and unappealable order of the Commission regarding ratemaking and accounting treatment in Case No. ER-81-154, and thus, prohibited by Section 386.550. The Commission found in Case No. ER-81-85 that it was unclear what specific amortization period or program OPC was recommending. The Commission held that the amortization periods, over which the extraordinary costs associated with the outage were proposed to be recovered, were consistent with the Case No. ER-81-85 nonunanimous Stipulation And Agreement of MPS and the Staff, were reasonable and proper, and were supported by the record evidence. 24 Mo.P.S.C.(N.S.) at 334-35; 670 S.W.2d at 26.

6. OPC filed a motion for rehearing of the Commission's Case No. ER-81-85 Report And Order. The motion for rehearing was overruled by the Commission. OPC sought judicial review of the Commission's Case No. ER-81-85 Report And Order. The Western District Court of Appeals held that the interim rate proceeding/filing even though assigned a different case number than the permanent rate proceeding/filing was ancillary to the permanent rate proceeding/filing, and review in the permanent rate proceeding includes review of the Orders made in the interim rate proceeding and such review does not constitute a collateral attack on those Orders made in the interim proceeding:

The *Laclede* court discussed the relationship between an interim rate request and a permanent rate request. This court stated that in its "very nature, an interim rate request is merely ancillary to a permanent rate request." 535 S.W.2d at 565[1]. As the court in *Laclede* found, there is no express statutory provision for an interim rate increase. Such an increase was sought in this case as part of a permanent rate increase. It is clear that the request for an interim rate increase did not stand on its own as an entirely separate and distinct proceeding. Thus, the interim rate case in issue, although assigned a number different from that assigned the permanent case

by the Commission, has no independent status but is simply a part of the company's permanent rate request.

* * * * *

. . . As pointed out above, the interim request in issue has no independent status or existence and is meaningful only in relation to the permanent request which was filed. It is subordinate to and in aid of the primary action, the permanent rate request.

It follows that the interim rate request made by the company is a part of the same proceeding as the permanent rate request. This is true even though the company filed a separate request for an interim rate increase and the Commission assigned different numbers to the two requests. Consequently, orders made in the interim request cannot be considered as having been made in an action separate and apart from the permanent request. Under the definition of “collateral attack” in *Flanary*, an appeal from the order made in the interim request is not necessary in order to appeal from an order made in the permanent request because the proceedings are one and the same, differing only with regard to the timing of the increase requested. Thus, under such conditions an appeal from a final order made in the permanent rate case will subject to review orders made in connection with the interim case.

670S.W.2d at 26-27.

7. Thus, aside from tradition and some appellate cases dealing with that tradition of separate permanent and interim rate increase cases, it would appear from the 1984 Western District Court of Appeal’s decision that it is irrelevant whether the Commission proceeds by one case or two. But the Staff would note the question left by the following sentence near the conclusion of the Court’s decision:

. . . the question is not whether Public Counsel could have appealed the order of February 3, 1981, but whether review in the permanent rate case constitutes a collateral attack on that order.

670 S.W.2d at 27.

WHEREFORE, the Staff files the instant response to the Commission’s October 7, 2009 Order Regarding New Case File For Consideration Of AmerenUE’s Tariff To Implement An Interim Rate Increase.

Respectfully submitted,

/s/ Kevin A. Thompson

Kevin A. Thompson
Chief Staff Counsel
Missouri Bar No. 36288

Steven Dottheim
Chief Deputy Staff Counsel
Missouri Bar No. 29149

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102-0360
(573) 751-2690 (Telephone - Thompson)
(573) 751-7489 (Telephone - Dottheim)
(573) 751-6969 (Fax – Thompson)
(573) 751-9285 (Fax – Dottheim))
e-mail: kevin.thompson@psc.mo.gov
e-mail: steve.dottheim@psc.mo.gov

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 14th day of October, 2009.

/s/ Kevin A. Thompson