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 POST-HEARING BRIEF

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Introduction

The Staff has endeavored in this brief to address the issues raised in this the interim rate relief portion of Case No. ER-2010-0036 by focusing on questions raised at the evidentiary hearing on December 7, 2009, in concurring opinions to Commission Orders and at the oral argument on September 14, 2009. The Staff believes that the information provided in its August 27, 2009 filing Staff's Suggestions In Opposition To AmerenUE's Proposed Interim Rate Tariff is most relevant and recommends it, but will not repeat it herein. For convenience, the Staff has placed at the Conclusion to its brief its December 3, 2009 Statement Of Positions with the correction that it noted at the commencement of the evidentiary hearing on December 7, 2009.

What Is AmerenUE's Revenue Requirement As Determined By The Staff's Direct Case Filed On September 18, 2009?

Since AmerenUE has asserted that the $37.3 million it is seeking in interim rate relief is less than 10% of its permanent rate increase case, the Commission should be clear what is the composition of the AmerenUE rate increase case because with a rate adjustment mechanism (RAM) - fuel adjustment clause (FAC) - environmental recovery cost mechanism (ECRM), the representation of the dollar amount of the rate increase is not as simple a depiction of the amount involved as previously has been the experience. Mr. Baxter provides such a representation of AmerenUE's rate increase case in his July 24, 2009 Direct Testimony. There are two components to AmerenUE's approximate $402 million rate case according to Mr. Baxter: (1) approximately $227 million in rebasing AmerenUE's net fuel costs that would otherwise, in the absence of the rate case, have been reflected in adjustments to customer rates pursuant to the existing FAC, and (2) approximately $175 million largely in non-fuel capital costs and expenses. (Baxter Direct Testimony, p. 5, lns. 7-16. In the Staff's direct case filed on Friday, December 18, 2009, Mr. Rackers identified the revenue requirement determined by the Staff as follows:

Q. Please describe the Staff's direct case revenue requirement filing in this proceeding.

A. The results of the Staff's audit of AmerenUE's rate case request can be found in the Staff's filed Accounting Schedules, and is summarized on Accounting Schedule 1, Revenue Requirement. This Accounting Schedule shows that the Staff's recommended revenue requirement for AmerenUE in this proceeding ranges from approximately $218,207,027 to $250,800,449, based upon a recommended rate of return (ROR) range of 7.39% to 7.72%.

Q. What portion of the Staff's recommended increase in the cost of service is the result of increasing net fuel expense above the amount currently included in base rates?

A. The revenue requirement calculated by the Staff includes an increase of approximately $200 million in the net fuel cost included in base rates. This increase includes the changes in net fuel cost since the September 30, 2008 true-up cut-off date in Case No. ER-2008-0318 that are currently being recovered through the fuel adjustment clause. This increase also includes the changes in net fuel cost that are estimated to occur through January 31, 2010, the true-up cut-off date in this rate case.

The remainder of the Staff's $18 to $51 million revenue requirement range is largely due to increases in non-fuel costs.

With the emergency or near emergency standard, the issue is much more than whether the Staff files a revenue requirement for the utility in the permanent rate portion of the proceedings equal or greater than what the utility is seeking on an interim basis.

"Interim" Rate Relief

As an administrative agency, a creature of statute, this Commission has those powers expressly conferred upon it by the General Assembly and also such others as are necessarily implied.[1] Indeed, the General Assembly emphasized the Commission's possession of implied authority in the Public Service Commission Law that created the agency, "[a] "Public Service Commission" is hereby created and established, which said public service commission shall be

[1] ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41, 47 (Mo. banc 1979); ***State ex rel. City of West Plains v. Public Service Commission,*** 310 S.W.2d 925, 928 (Mo. banc 1958).

vested with and possessed of the powers and duties in this chapter specified, **and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter**" (emphasis added).[2] The power to grant an interim rate increase is just such an implied power.[3] It is not expressly conferred upon the Commission by statute, but is inherent in the Commission's express authority to set just and reasonable rates upon due consideration of all relevant factors. The Missouri Court of Appeals has stated exactly this:

> [T]he Commission's authority to grant an interim rate increase is necessarily implied from the statutory authority granted to enable it to deal with a company in which immediate rate relief is required to maintain the economic life of the company so that it might continue to serve the public. * * * there is no express statutory provision for an interim rate increase.[4]

The Commission's authority to grant an interim rate increase is well-established. In 1976, in the ***Laclede*** case, the Western District of the Missouri Court of Appeals held that "the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file-and-suspend statutes and from the practical requirements of utility regulation."[5] Three years later, the Missouri Supreme Court gave its approval, stating that "an interim rate increase may be requested where an emergency need exists[.]"[6]

A proceeding on an interim rate increase is "[i]n its very nature, . . . merely ancillary to a permanent rate request[.]"[7] Some confusion exists concerning the standard applicable to an interim rate. It is ***not*** the "just-and-reasonable" standard applicable to a permanent rate increase.

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[2] Section 386.040, RSMo.
[3] The term "interim" is consistently used, by the courts and by the Commission in its orders, to refer to a *temporary* tariff that will shortly be replaced by a permanent tariff. Consequently, such tariffs are not similar to tariffs filed with the intent that they become permanent and the latter are not properly described as "interim."
[4] ***State ex rel. Fischer v. Public Service Commission of Missouri,*** 670 S.W.2d 24, 26 (Mo. App., W.D. 1984).
[5] ***State ex rel. Laclede Gas Co. v. Public Service Commission,*** 535 S.W.2d 561, 567 (Mo. App., K.C.D. 1976).
[6] ***State ex rel. Utility Consumers Council of Missouri v. Public Service Commission of Missouri,*** 585 S.W.2d41, 48 (Mo. banc 1979).
[7] ***Laclede,*** *supra,* 535 S.W.2d at 565.

How do we know that? First of all, the ***Laclede*** Court said as much: "**Since no standard is specified** . . . the determination as to whether or not to do so necessarily rests in [the Commission's] sound discretion."[8] That Court also said:

> it would be unreasonable to construe this statutory section as imposing a duty upon the Commission to set 'just and reasonable rates' in a special hearing for the limited purpose of considering an interim increase, since the setting of fair rates is the purpose and subject of the full rate hearing. To construe § 393.140(5) as applicable here would make the hearing on interim rates coextensive with that on the permanent rates and would therefore in practical effect make accelerated action on interim rates impossible.[9]

Second, thoughtful consideration of the matter inevitably results in this conclusion. An interim rate can never be a just and reasonable rate. Why? Because it is set without due consideration of all relevant factors.[10] As the ***Laclede*** Court also said, "The 'file and suspend' provisions of the statutory sections quoted above 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 as to what will constitute a fair and reasonable permanent rate."**[11] However, in the case of an interim rate, it is necessarily set with consideration of only one factor, which is the very emergency facing the utility that has called the interim rate increase into existence. Because it is not just and reasonable, and cannot

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[8] ***Laclede,*** *supra,* 535 S.W.2d at 566 (emphasis added).
[9] *Id.*, at 569.
[10] Section 393.270.4, RSMo, "**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); ***Utility Consumers' Council,*** *supra,* 585 S.W.2d at 49 ("the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended"); ***State ex rel. Missouri Water Co. v. Public Service Commission,*** 308 S.W.2d 704, 719 (Mo. 1958) ("the phrase 'among other things' clearly denotes that 'proper determination' of such charges is to be based upon *all* relevant factors"). Note that the "consideration-of-all-relevant-factors" standard is stated only in a provision applicable to rate complaints, but has been applied by the Court to the file-and-suspend method as well, because "all of the statutes reference rates and charges must be read and interpreted with reference to the others." ***State ex rel. Jackson County v. Public Service Commission,*** 532 S.W.2d 20, 28 (Mo. banc 1975).
[11] ***Laclede,*** *supra,* 535 S.W.2d at 566 (emphasis added).

be just and reasonable, the interim rate increase is subject to refund. There is a true-up for this reason. Why? Because the customers have paid too much or too little, as inevitably happens when a rate is set without considering all relevant factors.

An assertion has been made that the ***Laclede*** case does not control here because the present tariff has been suspended while the tariff at issue in ***Laclede*** was not. That assertion is simply wrong. The interim rate tariff in ***Laclede*** was not "filed" in the normal manner, but was attached to Laclede's application for interim rate relief as an exhibit.[12] Nonetheless, the Commission treated the tariff as if it had been filed and suspended and the Court made it clear that the Commission had discretion to do so:

> Even if we were to assume arguendo that Laclede could and did elect some variant procedure separate from that specifically specified by the statutes, that still would not enable it to escape from the existence of a wide discretion on the part of the Commission. The Public Service Commission itself confers a large area of discretion to the Commission in the exercise of its powers.[13]

The lesson is clear that hyper-technical efforts to limit the Commission's authority based on the manner in which a tariff comes before it are misguided and wrong.[14] Even though the Commission suspended the present interim rate relief tariff, it retains the discretion "to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and reasonable permanent rate."[15] To conclude otherwise "would make the hearing on interim rates coextensive with that on the permanent rates and would therefore in practical effect make accelerated action on interim rates impossible."[16]

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[12] ***Laclede,*** *supra*, 535 S.W.2d at 567.
[13] ***Laclede,*** *supra*, 535 S.W.2d at 568.
[14] To conclude otherwise would unnecessarily hamper the Commission in its exercise of the State's police power to set fair rates as required by the public interest; additionally, it would allow utilities to game the system by controlling how their tariffs come before the Commission.
[15] ***Laclede,*** *supra*, 535 S.W.2d at 566 (emphasis added).
[16] *Id.*, at 569.

The *Laclede* Decision -- § 393.140 RSMo. or § 393.150 RSMo. and Does It Matter?

A question has been raised as to whether the ***Laclede*** decision was founded on § 393.140 or § 393.150, and whether it makes any difference. Sections 393.140 and 393.150 together describe the file-and-suspend method of ratemaking. The ***Laclede*** case, consequently, depends equally upon both of those statutes because, as that court stated, the Commission treated the interim rate relief tariff at issue as though it had been filed and suspended, although it had not.[17]

Section 393.140(11) provides, in pertinent part, that:

> Unless the commission otherwise orders, 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 service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe.

Section 393.150, in turn, provides:

> 1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer 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, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or sewer corporation, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and

[17] ***Laclede,*** *supra*, 535 S.W.2d at 568. The tariff was actually presented to the Commission as an exhibit attached to an application.

> twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective.
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> 2. If any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the gas corporation, electrical corporation, water corporation or sewer corporation, and 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.

These two complementary statutes describe the two halves of the file-and-suspend method of ratemaking.[18] Section 393.140(11) provides that a proposed tariff will become effective thirty days after filing if the Commission takes no action.[19] Such a case is a non-contested case;[20] no hearing is necessary,[21] although the Commission has discretion to hold one.[22] Should the Commission decide to allow a proposed tariff to take effect by operation-of-law, it must nonetheless base its decision upon consideration of all relevant factors.[23] Review of

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[18] ***State ex rel. Jackson County v. Public Service Commission,*** 532 S.W.2d 20, 28 (Mo. banc 1975) ("A price fixed by the file and suspend method-§ 393.140-falls within the classification noted [i.e., is subject to the requirement of consideration of all relevant factors at § 393.270(3)]. * * * Of significance is the fact a 'hearing' is proper under the file and suspend method as provided in § 393.150"); *see* ***Fischer,*** *supra,* 670 S.W.2d at 26 ("the Commission has the authority to grant interim rate increases implied from **the "file and suspend" sections, §§ 393.140 and 393.150"**) (emphasis added).

[19] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 48; ***Jackson County,*** *supra,* 532 S.W.2d at 28-29.

[20] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 49.

[21] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 49.

[22] Section 393.150.1, "Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or sewer corporation any schedule stating a new rate or charge . . . the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once . . . but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice[.]" This provision also authorizes suspension of the tariff, but does not require it.

[23] ***Utility Consumers' Council,*** *supra,* 585 S.W.2d at 49.

that decision is limited to lawfulness.[24] Section 393.150, in turn, authorizes the Commission to suspend a proposed tariff for up to 120 days plus six months beyond its original proposed effective date. Exercise by the Commission of its authority under this section requires a hearing[25] and converts the originally non-contested matter into a contested case.[26] As it must when acting under § 393.140(11), the Commission must consider all relevant factors when making its decision.[27] Review is for both lawfulness and reasonableness.[28]

In summary, the Commission's authority under § 393.140(11), RSMo, is not significantly different from its authority under § 393.150, RSMo. Under either statute, the Commission must consider all relevant factors. The only exception to this requirement is an accelerated proceeding upon an interim rate relief request, in which the Commission may act expeditiously, upon consideration of less than all relevant factors, if the public interest demands such action. "Nonetheless, a preference exists for the rate case method, at which those opposed to as well as those in sympathy with a proposed rate can present their views."[29] As the ***Laclede*** Court stated:

> Laclede seemingly realizes the inconclusiveness of the proof offered by it in this interim rate proceeding, and it attempts to flesh out its proof by making reference to evidence submitted and findings made in the permanent rate proceeding, Case No. 18,015. Thus it points out in its reply brief that 'the Commission in the permanent rate case, decided only a few months after the rejection of the interim rates, found a rate of return in excess of 8.7% to be just and reasonable.' Rather than helping Laclede, **this reference simply emphasizes the desirability of leaving the whole question of just and reasonable rate (unless imperative facts require to the contrary) to the permanent rate proceeding in which all the facts can be developed more deliberately with full**

[24] ***State ex rel. Public Counsel v. Public Service Comm'n,*** 210 S.W.3d 344, 354 (Mo. App., W.D. 2006) ("review in a noncontested typically probes only the lawfulness of an agency's order without consideration of its reasonableness and without need for review of competent and substantial evidence").
[25] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 48.
[26] Section 536.010(4), RSMo; ***State ex rel. Yarber v. McHenry,*** 915 S.W.2d 325, 328 (Mo. banc 1995).
[27] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 49.
[28] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 47 ("On appeal, our role is to determine whether the commission's report and order was lawful and, if so, whether it was reasonable") (citations omitted).
[29] ***Utility Consumers Council,*** *supra,* 585 S.W.2d at 49.

opportunity for an auditing of financial figures and a mature consideration by the Commission of all factors and all interests.[30]

A "Guaranteed" Return?

In its Statement of Position, filed herein on December 3, 2009, AmerenUE presented this quotation:

> The enactment of the Public Service Act marks 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 to further 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 guarantee 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.*[31]

AmerenUE then went on to state,

> Where a utility is chronically unable to come close to earning its authorized return, there has been no reasonable guarantee, and investors are not being treated fairly. This Commission can and should take the relatively modest, but very important step, of addressing that problem, in part, by approving the Company's interim rate request.

In view of the language emphasized by AmerenUE and its further assertion that it has been deprived of a purportedly required "reasonable guarantee," Staff points out that no particular return is ever guaranteed to a regulated public utility. Rather, Due Process requires that rates be set so as to afford a reasonable opportunity to earn a fair return upon the value of the private property devoted to the public service.[32] What does this mean? It means only that a rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which

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[30] ***Laclede,*** *supra*, at 574 (emphasis added).

[31] ***State ex rel. Washington University v. Public Service Commission,*** 272 S.W. 971, 973 (Mo. banc 1925) (emphasis supplied).

[32] ***St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n,*** 585 S.W.2d 41, 49 (Mo. banc 1979); a***nd see Bluefield Water Works & Improv. Co. v. Pub. Serv. Comm'n of West Virginia***, 262 U.S. 679, 690, 43 S.Ct. 675, 678, 67 L.Ed. 1176, 1181 (1923) ("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 services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment").

it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law."[33] "All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level."[34] "[I]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry ... is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."[35]

AmerenUE has neither alleged nor shown that the Commission has set rates for it that have destroyed the value of its property for all the purposes for which it was acquired.

Cost and Access to Debt Capital

In *State ex rel. Laclede Gas Co. v. Public Service Commission*, the Missouri Court of Appeals affirmed a Commission Report And Order denying a request for an interim rate increase by Laclede Gas Company. 535 S.W.2d 561 (Mo. App. W.D. 1976). The Commission's denial of the interim rate increase was based upon the Commission's finding that Laclede could not demonstrate "that the rate of return being earned [was] so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity." This standard, generally referred to as the "emergency" standard, is the only interim rate relief standard that has been affirmed upon review by the courts of this State.

Access to Debt Capital and the Emergency/Near Emergency Standard

AmerenUE is currently requesting from the Commission an interim rate increase, yet has stated at various times that the current state of the Company's financial affairs do not rise to a

[33] ***Duquesne Light Co. v. Barasch,*** 488 U.S. 299, 307-308, 109 S.Ct. 609, 615-616, 102 L.Ed.2d 646, ___ (U.S. 1989) (citations omitted).
[34] *Id.*
[35] *Id.*, 488 U.S. at 310; 109 S.Ct. at 617, 102 L.Ed.2d at ___.

level as to satisfy the "emergency" standard. (Vol. 2, Tr. 33: ln. 20 – Tr. 34: ln. 4; Tr. 67: ln. 22) On this point, Staff and the Company appear to be in agreement.

A utility's ability to issue debt through debt capital market is an important factor to be taken into consideration in an examination of the financial integrity of any entity requesting interim rate relief. In fact, AmerenUE ought to have been aware of the weight assigned to capital market access by the Commission in at least one prior AmerenUE interim rate increase request. In specific, on November 30, 1973, AmerenUE filed with the Commission an interim rate increase request, assigned Case No. 17,965. *See In the Matter of Union Electric Co.*, 18 Mo.P.S.C. (N.S.) 440 (1974) (Report And Order). In Case No. 17,965, AmerenUE sought an interim increase in gross revenue pending the Commission's decision in a "permanent" rate case filed concurrent with the interim request. *Id*. AmerenUE asserted in its application in Case No. 17,965 that the Company had not earned its authorized rate of return due to continuing increases in costs in providing electric service in the State of Missouri and that the interim rate increase was necessary in order to attain the Company's authorized rate of return. *Id.* at 443.

These arguments are strikingly similar to those echoed throughout the course of the proceedings arising from the Company's current request, and such arguments should be as unsuccessful today as they were in 1973. In its Report And Order in Case No. 17,965, the Commission found that the Company, during the period surrounding its interim rate request, had been "able to arrange debt financing and in fact had arranged $70,000,000 of debt financing…" *Id.* at 444. As evident in the Commission's Report And Order, the ability of the Company to arrange this debt financing was a key factor in the Commission's decision to deny AmerenUE's request for the interim increase in rates. Specifically, the Commission's Report And Order stated as follows:

> Therefore, although the Commission is of the opinion that while it has the authority to grant interim rate increases, that authority may only be exercised where a showing has been made that a deteriorating financial situation exists which constitutes a threat to a company's ability to render adequate service. Furthermore, the Commission is of the opinion that since there is an absence of specific statutory authority it should cautiously exercise its power to grant temporary or emergency rates because cases of this nature contemplate a rather speedy action on the part of the Commission which is contrary to the long established principle that a thorough study should be made by the Commission, its staff and all other interested parties before rates are approved.
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> In the instant case, Union Electric has not suffered distinctive and sudden declines in its revenues, **it can arrange debt financing with its present revenues** and it will be able to pay dividends to shareholders.
>
> We believe the Company has failed to prove the necessity for the proposed interim, temporary increase in rates. There is insufficient showing by the Company that its ability to render reasonable and adequate service would be jeopardized by a continuation of existing rates….

Id. at 446-47 (emphasis added).

Much like the state of the Company's ability to issue debt in 1973 (emphasized by the Commission above), the AmerenUE of today can access, and recently has accessed, the debt markets given the Company's current financial situation. In his Rebuttal Testimony on Interim Rates, filed November 17, 2009, Staff witness David Murray addressed AmerenUE's current access to debt capital stating:

> **On March 13, 2009 AmerenUE issued $350 million of 30-year senior secured notes.** According to AmerenUE's response to Staff Data Request No. 0275, AmerenUE has not had access to the commercial paper market over the last twelve (12) months due to its lower short-term credit rating (A-3/P-3) and the general disruption in the capital markets that have occurred over this period. **Although AmerenUE has not been able to issue commercial paper, it does have $500 million in direct capacity through a $1.15 billion credit facility (effectively $1.05 billion) shared by Ameren, Ameren Generating Company and AmerenUE.**

Murray Interim Rebuttal, Ex. M, pp. 8-9 (emphasis added).

AmerenUE does not meet the "emergency" standard previously affirmed by Missouri Court of Appeals in *Laclede*. Failure to meet this "emergency" standard has been confirmed by the Company on numerous occasions and is further supported by evidence of record demonstrating the Company's current ability to access the debt capital market.

Cost of Debt Capital and the Good Cause Standard

In *State ex rel. Laclede Gas Co. v. Public Service Commission*, the Missouri Court of Appeals held "that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation." 535 S.W.2d 561, 567 (Mo. App. W.D. 1976). Although as stated above the "emergency" standard is the only standard that has been affirmed upon review, the Commission has previously stated that a second, "good cause" standard does in fact exist. In a 2008 Commission Report And Order the Commission specifically stated as follows:

> To be eligible for interim rate relief a utility company must show: (1) that it needs the additional funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief. The Commission also has the power, on a case-by-case basis, to grant interim rate relief on a non-emergency basis where the Commission finds that particular circumstances necessitated such relief. The standard for granting interim relief on a nonemergency basis is good cause shown by the company, and determination of good cause shown is at the Commission's discretion.

In the Matter of Stoddard County Sewer Company, Inc., 2008 WL 4724833, 82 (2008).

From a cost-of-debt perspective, the Company can no more meet the "good cause" standard for interim rate relief than it can the "emergency" standard, discussed above. From a cost-of-debt perspective any "good cause" appears to be related to the Company's position as to the perceived benefits an interim rate increase may potentially have on ratepayers. It is the

Staff's position that these perceived benefits will not materialize, or in the alternative, that the Company has not provided adequate proof that such will be the case.

In his Surrebuttal Testimony on Interim Rates, Company Witness Lee Nickloy concedes that "he [does] not believe the implementation of interim rates, taken by itself, would drive an upgrade of AmerenUE's credit ratings." (Nickloy Interim Surrebuttal, Ex. H, p. 1). Despite Mr. Nickloy's statements regarding the effect, or lack thereof, of the interim rate increase on the Company's credit **ratings**, Mr. Nickloy stated that the decision to grant interim rate relief would result in a positive effect on the Company's credit **quality**. (Vol. 3, Tr. 466: lns. 19-24) (emphasis added).

If Mr. Nickloy has any support for this assertion, it is not in the record in this case. Sprinkled throughout the Mr. Nickloy's testimony on interim rates and discussed verbally by him at the December 7, 2009 interim rate hearing, Mr. Nickloy refers repeatedly to the "qualitative" and "quantitative" assessments and analyses conducted by those credit rating and financial services firms whose credit quality assessments of AmerenUE purportedly alter the terms of, and even AmerenUE's access to debt capital (theoretically resulting in savings or costs to consumers). Nowhere are these "qualitative" or "quantitative" analyses found.

As stated in the Rebuttal Testimony on Interim Rates of David Murray, "Mr. Nickloy has not provided any specific information on expected cost savings that would be flowed through to ratepayers if AmerenUE is allowed its proposed interim rate increase. Mr. Nickloy also has not provided any information on specific credit quality improvements for AmerenUE if the interim rate increase is allowed." (Murray Interim Rebuttal, Ex. M, p. 5). Omission of these analyses was confirmed by Mr. Nickloy at the interim rate evidentiary hearing on December 7, 2009. (Vol. 3, Tr. 470: lns. 5-13).

In response to questioning from Public Counsel, Mr. Nickloy stated that he had not calculated the subjective improvement on credit quality that he believed would result from Commission approval of the interim rate increase (Vol. 3, Tr. 455:lns. 20-24), and that it would be "difficult to quantify" in the next rate case the impact of the interim increase on the Company's credit quality and quantitative difference in the Company's debt costs. (Vol. 3, Tr. 457: lns. 17-23). When pressed further, Mr. Nickloy stated that it was "probably impossible" to isolate a single component from an overall credit analysis. (Vol. 3, Tr. 458: lns. 2-6).

From a financial perspective AmerenUE has not demonstrated that "good cause" exists for the Commission to award the Company an interim rate increase. An interim rate increase will not increase the Company's credit rating. The Company has not shown that an interim rate increase will increase the Company's credit quality. An interim rate increase may hypothetically result in a benefit to consumers…a benefit that, if ever actualized, would be "probably impossible" to measure.

AmerenUE's New Criteria/Standard of No Criteria/Standard

AmerenUE argues in its December 3, 2009 Statement Of Position that there should not be criteria for the Commission to use to decide whether interim rate relief is warranted because that decision is committed to the Commission's sound discretion on a case-by-case basis. (AmerenUE Statement Of Position, pp. 3, 5). AmerenUE accuses entities that suggest that there should be criteria as intending to limit the Commission's exercise of its discretion in order "to make an interim rate request and hearing complicated and difficult (essentially 'coextensive with that on the permanent rates' which means that 'in practical effect accelerated action on interim rates [will be] impossible.'). *Laclede*, 535 S.W.2d at 569." (AmerenUE Statement Of Position, p. 4). The Staff's identification and relating of past Commission interim rate cases in this brief

and in the Staff's August 27, 2009 filing (Staff's Suggestions In Opposition To AmerenUE's Proposed Interim Rate Tariff) shows that the practical effect of the Staff advocating the emergency or near emergency criteria/standard has not been as AmerenUE asserts and the Staff states that the Staff's intent has not been as AmerenUE asserts. The Commission has been able to apply its emergency or near emergency criteria/standard over the years on an accelerated basis.

The Staff had thought that possibly AmerenUE was proposing "net plant" as a new measure of interim rate relief for those electric utilities that have been "chronically"[36] unable to achieve their authorized rate of return or even for every electric utility due to what AmerenUE characterizes as "excessive regulatory lag."[37] In fact, Counsel for AmerenUE seemed to propose "net plant" as a possible recurring partial AmerenUE antidote to "excessive regulatory lag" at the oral argument on September 14, 2009:

> COMMISSIONER GUNN: . . . you gave three essential reasons for that, does an interim -- an interim rate increase doesn't solve -- it may solve a short-term problem, but it doesn't solve a long-term problem. It doesn't fix the errors in the system that Ameren is saying is causing the problem.
>
> MR. BYRNE: Yes, and it doesn't even fully solve the -- the earnings shortfall. You know, it doesn't even fully solve that problem. But it's a -- but it's -- but it's a step in the -- in the right direction.

Vol. 2, Tr. 181, lns. 1-11.

* * * *

[36] Black's Law Dictionary, 8th ed. does not contain an entry for the word "chronic," but the 6th edition at pages 241-42 does:

> Chronic. With reference to diseases, of long duration, or characterized by slowly progressive symptoms; deepseated and obstinate, threatening a long continuance; – distinguished from acute.

[37] The term "excessive regulatory lag" is used throughout AmerenUE's testimony: Ex. A, Baxter Direct, p. 1, lns. 19-20; Ex. A, Baxter Direct, p. 8, lns. 12, 21-22; Ex. A, Baxter Direct, p. 16, ln. 10; Ex. B, Baxter Rebuttal, p. 1, ln. 20; Ex. B, Baxter Rebuttal, p. 2, ln. 19; Ex. B, Baxter Rebuttal, p. 3, lns. 7, 11, 12; Ex. B, Baxter Rebuttal, p. 4, ln. 1; Ex. C, Baxter Surrebuttal, p. 6, ln. 9; Ex. C, Baxter Surrebuttal, p. 7, lns. 19, 20, 23; Ex. C, Baxter Surrebuttal, p. 9, ln. 2.

> COMMISSIONER GUNN: . . . it doesn't really solve the long-term systematic issue.
>
> MR. BYRNE: I -- I think the Commission could -- could get to the point where it allows investment and infrastructure to be -- to be recovered on an interim base regularly. If it did that, that would -- that would be a step towards solving the problem.
>
> COMMISSIONER GUNN: And then you're getting rid of that -- I mean, then -- then you're -- you're not only saying not only is it not an emergency standard, but it becomes a regular practice of the Commission in order to grant interim rate increases. So we are -- we are adding a component to traditional ratemaking.
>
> MR. BYRNE: You could do that, you have the power to do that, yes. . . .

Vol. 2, Tr. 183, lns. 9-25. But Mr. Warner L. Baxter, as President and Chief Executive Officer of AmerenUE, clarified AmerenUE's position on December 7, 2009 that the dollar amount, represented by the net plant in question in this case, was the key for AmerenUE:

> MR. MILLS: Yes. Is it not true that when other parties raised questions about whether or not it was accurately tied to the iron in the ground, as you put it, that you said that does not matter for the purposes of interim rate case?
>
> MR. BAXTER: That is correct. And what we said and what I stated in my testimony was that we provided a reasonable proxy, and we did tie it to -- to the plant in service, but it wasn't necessary in terms of an overall interim rate increase; that, in fact, as you appointed out, we could have simply said, 10, 20, 30 percent. So it isn't so much the nature of the specific calculation from our perspective.
>
> It is that you're asking for an interim rate increase for all the policy reasons that we've cited, but it's 10 percent of our overall increase, and the Commission has the ability to look at all relevant factors and determine if that's appropriate.
>
> MR. MILLS: Most of the rationale you've advanced in support of the interim rate increase would support a simple percentage as well as the calculation you've done; is that correct?
>
> MR. BAXTER: That's correct.

Mr. Rackers testified that a simple net plant criterion for determining whether a utility is entitled to interim rate relief is not based on an examination of (a) whether regulatory lag exists

or (b) to what degree regulatory lag exists. A net plant criterion simply examines whether the revenue requirement associated with the calculation methodology produces a positive number. Thus, a utility may meet the positive net plant criterion for interim rate relief and in fact be over-earning its revenue requirement, or may be experiencing excessive regulatory lag, but not meet the UE criterion. These situations may occur because other components of the utility's cost of service may offset the revenue requirement associated with the change in net plant. (Ex. K, Rackers Rebuttal, p. 10, ln. 8-16).

Mr. Rackers noted that The Empire District Electric Company (Empire) and Missouri-American Water Company (MAWC) had recently filed rate increase cases, Case No. ER-2010-0130 and Case No. WR-2010-0131, respectively. He stated that the net plant adjustment proposed by AmerenUE for its interim rate relief calculation of $37.3 million would produce interim rate relief amounts of over $9.0 million and $1.0 million, respectively, for Empire and MAWC. Mr. Rackers testified that the interim rate increase level he calculated for MAWC reflects an adjustment to eliminate plant, net of contributions-in-aid-of-construction (CIAC), and depreciation reserve amounts that were recognized in MAWC's Infrastructure System Replacement Surcharge (ISRS) that was effective July 18, 2009, as a result of Case No. WO-2009-0311. For MAWC, what otherwise would be part of an interim rate increase under the UE net plant proposal, was part of the ISRS increase that was effective July 18, 2009, as a result of Case No. WO-2009-0311. (Ex. L, Rackers Surrebuttal, p. 2, l. 14 – p. 3, ln. 3). Separate statutory sections apply to ISRS for water corporations (Sections 393.1000 - .1006 RSMo.) and gas corporations (Sections 393.1009 - .1015 RSMo.).[38]

[38] Staff would note that ISRS Sections 393.1000(3)(b) and 393.1009(3)(b) contain the language "[a]re in service and used and useful" rather than the language of Section 393.135 "fully operational and used for service" which is applicable to electric plant and electrical corporations

Counsel for Laclede Gas Company (Laclede) noted that Laclede had just filed a new rate increase case (Case No. GR-2010-0171) and was not seeking interim rate relief and one of the reasons is because of ISRS:

> . . . I just said we didn't seek interim rate relief, and one of the reasons we didn't seek interim rate relief is we have an alternative available to us that's not available to Ameren, and that's the ISRS mechanism. And that doesn't recover all plant, but it does allow us to go ahead and make safety related investments, public improvement related investments, and have a reasonably timely basis for collecting it.

(Vol. 3, Tr. 281, lns. 4-12).

Mr. Rackers testified that the ISRS mechanism allows gas and large water companies to recover the costs of specific types of distribution plant; the majority of the plant qualifying is related to the replacement of existing distribution mains. The AmerenUE proposal includes all net plant (plant less depreciation reserve) between the true-up cutoff date in AmerenUE's last rate increase case to the most current month for which accounting data was available at the time of the filing of the pending rate increase case. The ISRS calculation considers ADIT and property taxes, but AmerenUE's proposed net plant calculation accounts for neither. (Ex. K, Rackers Rebuttal, p. 7, ln. 18 – p. 8, ln. 8).

Staff Audit Based On Less Than The Maximum 11 Month Statutory Suspension Period

Staff witness Stephen M. Rackers, an auditor with the Commission for more than 30 years, testified that the present maximum 11 month suspension period in rate increase cases permits a thorough review of the utility's case and a true-up of historical data and that "[a]ny reduction in the current eleven-month time frame would only serve to shorten the period that could be included in the true-up." (Ex. K, Rackers Rebuttal, p. 6, lns. 15-17; Ex. J, Rackers Direct, p. 1, lns. 13-14).

Assuming The Commission Adopts AmerenUE's Interim Rate Relief Proposal, Staff Maintains AmerenUE Has Not Properly Reflected The Revenue Requirement Associated With The Change In Net Plant

It is the Staff's position that AmerenUE has not properly reflected the revenue requirement associated with the change in net plant. The $37.3 million interim relief revenue requirement calculation of AmerenUE is the change in net plant, i.e., plant less depreciation reserve from October 1, 2008 (the first day after the true-up period in AmereUE's last rate increase case, Case No. ER-2008-0318) through May 31, 2009 (the most current month for which accounting data was available at the time of the filing of the pending rate increase case). There are three adjustments that AmerenUE has not recognized in its calculation, which the Staff contends should be made. The Staff has performed calculations of the first two of these adjustments, which the Staff maintains are appropriate ratemaking adjustments and which reduce AmerenUE's $37.3 million interim rate request. The calculations take net plant from the true-up date of the prior rate increase case to the most current month for which accounting data was available at the time of the filing of the present rate increase case minus (1) accumulated deferred income tax (ADIT) related to plant additions, $5.9 million, (2) plant additions serving new customers, $2.7 million, and (3) related cost savings due to efficiencies from plant additions, no calculation. (Ex. K, Rackers Rebuttal, p. 2, ln. 3 – p. 3, ln. 13).

Mr. Rackers testified that the ADIT adjustment is accepted regulatory practice in determining the revenue requirement associated with return on investment. In particular, it is an adjustment accepted by the Missouri Commission and used by AmerenUE in its calculation of revenue requirement in the permanent rate case. (Ex. K, Rackers Rebuttal, p. 2, lns. 14-21). Regarding plant additions serving new customers, Mr. Rackers stated that since associated revenues, net of expenses, have not been included in the AmerenUE net plant calculation, the

plant additions serving new customers should also be eliminated. (*Id*. at p. 3, lns. 1-5). Finally, Mr. Rackers noted that since some of the change in net plant likely is related to plant additions which are intended to improve efficiency, likely there are cost savings related to the change in net plant which should be considered. There is no quantification of this last item. (*Id*. at p. 3, lns. 6-13).

Mr. Baxter acknowledged in his surrebuttal testimony that "[i]n the context of setting the permanent rates that will arise from this case, Mr. Rackers' adjustments would be legitimate," but he argued that as with Mr. Rackers' adjustments there "would be any number of additional adjustments going the other way which would increase the Company's revenue requirement and that will also be taken into account as part of the final resolution of this case" and "[t]he problem with taking all these factors into account in connection with an interim rate request is that you quickly reach the point where interim rates could only be implemented after a full-blown rate case that considers 'all relevant factors.'" (Ex. C, Baxter Surrebuttal, p. 2, lns.4-7, 11-13). Mr. Rackers limited his proposed adjustments to items specifically related to net plant. AmerenUE correctly recognized that depreciation reserve is an adjustment to plant additions that it should recognize and it included the change in the depreciation reserve balance in its calculations. Mr. Rackers recommends that other appropriate adjustments specific to plant additions be recognized. Mr. Rackers has not suggested that all relevant factors are required to be reviewed in a proper interim rate case.

No Statutory Recognition For Timeframes For Excess Earnings/Revenues Complaint Cases

The question of the timeframe, if any, provided by statute or case law respecting the Commission's processing of excess earnings complaint cases has been raised in this proceeding. Questions were posed by the Chairman to one counsel and by one counsel to one witness. No

party has noted the statement of AmerenUE in its September 8, 2009 filing entitled *Union Electric Company d/b/a AmerenUE's Reply To Responses And Suggestions In Opposition To AmerenUE's Implementation Of Interim Rates* that the procedure in complaint cases should be reciprocal to AmerenUE's proposal for interim rate increase relief. At paragraph 14, AmerenUE states as follows:

> 14. The Company agrees that the Commission not only has the discretion to allow interim rate increases that are subject to refund without requiring an emergency, but also would have the discretion to allow an interim rate decrease (subject to later collection) in an over-earnings complaint case without requiring an emergency. Indeed, the point of interim rates (increases or decreases) is to reduce regulatory lag by better matching the costs incurred to provide service with the rates customers pay to obtain that service. If the Commission did allow interim rate increases, it would also be appropriate to allow interim decreases in an appropriate circumstance.

The Staff is not aware of AmerenUE previously ever having taken the position in the paragraph just noted.

Regardless of paragraph 14 above in the September 8, 2009 AmerenUE pleading, there is the action of AmerenUE in the Staff's 2001-2002 excess earnings complaint case, Case No. EC-2002-1, about which Public Counsel on December 7, 2009 cross-examined AmerenUE witness Gary S. Weiss regarding:

> Q.[MR. MILLS] Now, do you recall a Case No. EC-2002-1? That was the complaint case brought by the Staff which --
>
> A.[MR. WEISS] Yes, I do.
>
> Q. -- in which there was a reduction and then an ongoing series of additional reductions. Do you recall that?
>
> A. That is correct.
>
> Q. Since that case ultimately ended up with a credit to customers and an ongoing series of reductions, would an interim decrease have been appropriate at the beginning of that case?

A. Well, at the time that case was filed by the OPC and Staff, the company in response filed a rate case that indicated a large increase was required. So at that point in time, I think there was a large dispute as to whether there really was a rate decrease required or not.

Q. And how much time elapsed before the company ultimately agreed for a cumulative decrease of roughly $100 million or actually roughly $150 million?

A. We actually made that retroactive to April of '0 -- April. So I think it only was about nine months that elapsed in the final results.

Q. But in your opinion, that would not have warranted an interim decrease at the beginning of the case; is that correct?

A. Well, it would not have warranted 100 percent of that estimated overearnings since the actual amount of overearnings was a big issue considering the company had filed for a rate increase in response.

Q. Would any amount of interim decrease have been appropriate at that time?

A. I think at some point in time, if it became obvious that there was a rate decrease required, at that point in time an interim rate decrease would have been put into effect.

Vol. 3, Tr. 433, ln. 15 – Tr. 434, ln. 25.

Chairman Robert M. Clayton, III asked Counsel for Laclede the bounds of the Commission's authority in an excess earnings complaint case regarding an interim rate reduction and the following exchange occurred on December 7, 2009:

CHAIRMAN CLAYTON: Last question. In terms of regulatory lag, aside from the file and suspend method where a complaint is filed against a utility, is it lawful to do an interim rate reduction at the start of a case where you have a complaint filed?

MR. PENDERGAST: I -- right at the start of the case, I don't know that I would say it would. If the case were postured to where it had gotten to a point like it was today and, you know, five or six months had transpired, people had had an opportunity to go ahead and do an audit and, you know, the amount of the reduction was relatively a small portion of the other, I think it probably would be appropriate to look at that and do that.

CHAIRMAN CLAYTON: Should any policy that the Commission decide to implement associated with interim rate changes, should they be identical on

> whether it be associated with the file and suspend method versus during a plaint process?
>
> MR. PENDERGAST: I think you ought to look at it both ways. I think you'd want to go ahead and have symmetry. One of the things that Mr. Buck addresses in his testimony is with the tremendous amount of information, management, technology we have today, being able to determine where a utility is at any given point in time in its regulatory earnings ought to be something that we can not only achieve, but that we can go ahead and use to set rates more quickly, whether those rates are going up or they're going down based on whether costs are declining or going down and based on a consideration of everything. And so, yeah, I think symmetry is an appropriate objective to pursue.

Vol. 3, Tr. 281 ln. 24 - Tr. 283, ln. 4.

The Staff will relate in some detail the procedural details of the Staff's 2001-2002 excess earnings complaint case against AmerenUE because it is rather instructive as to the lack of statutory recognition afforded excess earnings/revenues complaint (rate decrease) cases versus rate increase cases. On July 2, 2001, the Staff filed an excess earnings complaint and direct testimony and schedules asserting that based on the Staff's proposed return on common equity range AmerenUE's earnings/revenues were excessive in the range of approximately $250 to $213 million per year, exclusive of license, occupation, franchise, gross receipts, or other similar fees or taxes in Case No. EC-2002-1. The Staff utilized a test year of the 12 months ending June 30, 2000 and an update period through December 31, 2000. The Chief Regulatory Law Judge served as the presiding RLJ in the case. No action setting a test year in the case occurred until 157 days after the Staff had filed its direct testimony and schedules, when on December 6, 2001 the Commission issued an Order granting AmerenUE's motion to change the test year from that on which the Staff had filed its direct testimony and schedules, and set the test year as the 12 months ending June 30, 2001. The Staff and AmerenUE entered into a Stipulation with respect to procedural schedule and related matters, pursuant to which the Staff filed new direct testimony and schedules on March 1, 2002, based on a test year of the 12 months ending June 30, 2001

with an update period through September 30, 2001, and evidentiary hearings were scheduled to commence on July 11, 2002. *Re Union Electric Co., d/b/a AmerenUE*, Order Approving Jointly Filed Revised Procedural Schedule, Case No. EC-2002-1, 11 Mo.P.S.C.3d 74-75 (2002).

In the Staff's case the amount of excess earnings/revenues increased based on the new test year and update period. The Staff determined a new return on common equity range and based on that range the Staff contended that AmerenUE's excess earnings/revenues were in a range of from $285 million to $246 million per year, exclusive of license, occupation, franchise, gross receipts, or other similar fees or taxes. AmerenUE's response was its rebuttal case filed on May 10, 2002 in which it asserted that based on its revenue requirement study it had a $148 million earnings/revenues deficiency. The evidentiary hearing in Case No. EC-2002-1 commenced on July 11, 2002, but on July 12, 2002, the parties informed the Commission that an agreement in principle had been reached that would resolve all issues. On July 16, 2002, a Stipulation And Agreement was filed that resolved all issues. The Stipulation And Agreement, among other things, provided for a one-time credit of $40.0 million to customers and a reduction in rates of $110.0 million over three years. *Re Union Electric Co., d/b/a AmerenUE*, Report And Order Approving Stipulation And Agreement, Case No. EC-2002-1, 11 Mo.P.S.C.3d 411 (2002).

***The Brattle Group's* Ranking Of The Missouri Commission As "The Third Lowest"**

Commissioner Gunn's close reading of *The Brattle Group's* analysis of regulatory lag in the utility commissions of the states and Washington, D.C., sponsored in this proceeding by AmerenUE witness Johannes Pfeifenberger, raised appropriate concerns regarding the problems with the analysis which ranks the Missouri Commission 47th. Although his brief direct testimony focused on the Missouri Commission ranking "47th, the third lowest, indicating that Missouri regulatory lag as measured by the overall ranking in this table [i.e., Table 1] is greater

than the lag present in all but two other states," (Ex. I, Pfeifenberger Direct, p. 3, lns. 8-10, Schedule JPP-E1-1), Mr. Pfeifenberger stated on cross-examination that he had previously presented to a state commission part of the analysis that he had filed in this case, but not the consolidated ranking which is Table 1. (Vol. 3, Tr. 488, lns. 1-4; Tr. 489, lns. 7-18). He testified that the weightings used to develop the ranking in Table 1 (Ex. I, Pfeifenberger Direct, Schedule JPP-E1-1), showing the Missouri Commission ranking 47th in Table 1, are his own, the ranking system he developed for Table 1 is purely judgment, and the precise ranking of states in Table 1 is not within the accuracy of a scientific study. (*Id*. at 490, lns. 8-18). Also it should be noted that Mr. Pfeifenberger/*The Brattle Group* has labeled Table 1 "Preliminary Ranking Of States By Factors Mitigating Regulatory Lag." (Emphasis added). No explanation is provided why the ranking is "preliminary" other than the following colloquies between Commissioner Gunn and Mr. Pfeifenberger, which establish that *The Brattle Group* analysis is in part based on old, partially verified information, which contains known inaccuracies, and that Mr. Pfeifenberger personally prefers to look at the supporting tables (Tables 2-6), rather than Table 1, which supporting tables contain more information than Table 1:

> Q.[COMMISSIONER GUNN] So you've given Hawaii half a point, but if you go to the narrative, the narrative states that there's no statutory time limit within a rate case must be completed. You have to make every effort to issue a decision within nine months, but this is the key sentence, rate cases have typically taken well over a year to complete.
>
> So you have given Hawaii a half point for having a light state legislative encouragement to get things done in nine months, but in reality it takes them longer to get the cases done than we do in Missouri, but you give Missouri no points for that. Could you explain that to me?
>
> A.[MR. PFEIFENBERGER] Yes. You know, the ranking, you know, is labeled preliminary ranking, and what I found was that once you sort of dive into the details like this and really compare everything across. And then what I particularly found was respect to fuel adjustment clause when we did the research, if you just rely on the public sources, you get to those kind of discrepancies, and

you know, with -- I have not compared these sources across the different variables, and that would probably be an adjustment worth making.

(Vol. 3, Tr. 493, ln. 17 – Tr. 494, ln. 14).

Q. So when you go to Table 3 on JPP-3 [i.e., Table 3: "Time Needed For Rate Case In States," Schedule JPP-E1-3] and you have Hawaii listed as having time to issue decision once case is filed as nine months, that's also incorrect?

A. Well, that's the target.

Q. But that's not what this says [i.e., Table 4: "Details Behind Temporary Or Interim Rates," Schedule JPP-E1-4]. This says, I mean, Missouri you have 11 months. We've brought things in earlier than that, but that's our statutory maximum?

A. Yes.

Q. Hawaii doesn't have a statutory maximum --

A. That's correct.

Q. -- so both in practice and reality, that nine months is incorrect?

A. You know, I think that, you know, the nine months is what is listed in the table from RRA [i.e., Regulatory Research Associates], but looking at the other data points, that nine months would probably need to be adjusted for the average time it takes.

(Vol. 3, Tr. 495, lns. 1-17).

Q. And so there may -- because this is labeled preliminary, there may be inaccuracies or things that are wrong in this table? I mean, we've kind of established that.

A. That is right. When I did the research on fuel adjustment clauses, I also started out with publicly available data that was available from RRA and from Moody's and other places, and what I did find is as we -- that we actually did a survey of all the traditionally regulated states, and we probably made, you know, between five and ten substantive adjustments to the other surveys based on that more detailed review.

So I think the way you need to look at Table 1 is really this is indicative, and you do have to look -- I personally prefer to look at the supporting tables that provide more information because that gives you a better flavor of what the, you know, one or zero or .5 really might mean. But because the variables are so different,

> what I tried to attempt here is get something that gives us a combined score because what I found was even once Missouri had a fuel adjustment clause, it was based on historic data and didn't adjust as frequently.

(Vol. 3, Tr. 498, ln. 10 - Tr. 499, ln. 6).

* * * *

> Q. But you didn't weight the different variables, right? You've mentioned now a couple times fuel adjustment clauses and historic test year because that's the data you've checked, but those aren't weighted more heavily than the other variables?
>
> A. No, they're not, and one could of course with respect to your question about the ECRM, I was actually some time ago talking to EEI because I've been trying to get some of the industry groups to sort of keep the data up to date. NARUC stopped doing that ten years ago unfortunately.

(Vol. 3, Tr. 499, ln. 19 - Tr. 500, ln. 4).

When one reviews Table 3: Time Needed For Rate Case In States, one finds the following states with the indicated "Time To Issue Decision Once Case Is Filed," based on maximum/target months shown, for 2 months on either side of 11 months maximum/target:

13 Months	12 Months	11 Months	10 Months	9 Months
Ca.(18mo/12mo)	Arizona	Illinois	Arkansas	Hawaii
New Mexico	Louisiana	Missouri	Indiana	Idaho
	Michigan	New York	Iowa	Maine
	New Hampshire		Kentucky	Montana
	Wisconsin		Washington	North Carolina
	South Dakota		Wyoming	Ohio
				Oregon
				Tennessee
				West Virginia
				Wash., D.C.

(Ex. I, Pfeifenberger Direct, Schedule JPP-E1-3).

Given AmerenUE's request for interim rate relief and AmerenUE's referral to the ratemaking process in Missouri as constituting excessive regulatory lag, Mr. Baxter was asked on cross-examination what had prevented AmerenUE from requesting that the Commission set a

schedule requiring less than the statutory maximum 11 months. Mr. Baxter seemed to be surprised by the question and did not have an adequate response:

> Q.[MR. DOTTHEIM] When AmerenUE filed its direct testimony and tariff sheets on July 24, AmerenUE did not request that the Commission take less than the full 11 months possible to process its permanent rate increase case, did it?
>
> A.[MR. BAXTER] I don't believe that's the case.
>
> Q. There was nothing preventing AmerenUE from making such a request, was there?
>
> A. I guess, Mr. Dottheim, that's probably a legal question that I don't know if we had to file it the way we did. I don't know if there were requirements in terms of how you file it or in the context of a filing you can ask for expedited treatment, I don't know.

(Vol. 3, Tr. 352, ln. 24 – Tr. 353, ln. 11).

Relevant Examples Of Prior Interim Rate Cases

On January 28, 1980 KCPL filed as Case No. ER-80-204 interim tariffs designed to increase electric rates in its Missouri service territory on and after February 28, 1980, $36.1 million, interim subject to refund in the event the Commission awarded KCPL less than that amount in KCPL's $76.0 million permanent rate increase case, Case No. ER-80-48, which KCPL had filed on August 3, 1979. On February 14, 1980, the Commission suspended the interim tariffs for 120 days beyond February 28, 1980 and set the matter for hearing on March 14-15, 1980. *Re Kansas City Power & Light Co.*, Case No. ER-80-204, Report And Order, 23 Mo.P.S.C.(N.S.) 413 (1980). The Commission noted that KCPL's most recent prior permanent rate increase case was Case No. ER-78-252, *Re Kansas City Power & Light Co.*, Case No. ER-78-252, Report And Order, 23 Mo.P.S.C.(N.S.) 1 (1979), and related the following financial information:

	ROR	ROE

Authorized 3 / 5 / 79	9.47%	13.4%
Effective 3 / 15 / 79	9.47%	13.4%
July 1979	7.90%[1]	11.56%[2]
Dec. 1979	6.10%[1]	8.89%[2]

[1]July and Dec. 1979 ROR based on Staff's monthly surveillance report.

[2]July and Dec. 1979 ROE based on KCPL exhibit.

23 Mo.P.S.C.(N.S.) at 416.

KCPL for the nine-month period ending December 1979 paid out approximately $12.0 million more for operating expenses than it received from customers for payment of services received. The above noted drop in earnings foreclosed conventional capital markets to KCPL to finance its operating expenses. The Commission found that no additional first mortgage bonds or preferred stock could be issued by KCPL at the time of the hearing because KCPL's interest coverages were inadequate; if KCPL could market preference stock, the cost and terms would be unreasonable and prohibitive. The Commission also determined that although KCPL exceeded its short-term lines of credit of $57.0 million, its short-term credit possibly could be increased through compensating bank balances or fees. The Commission found that KCPL increasing its short-term credit through compensating bank balances or fees was not an advantageous approach because the prime lending rate at the time was 18%. KCPL's common stock was selling at 60% of book value and KCPL was showing a negative profit, i.e., it was paying out more money than it was bringing in. 23 Mo.P.S.C.(N.S.) at 416-17.

KCPL proposed to sell $50.0 million of first mortgage bonds in December 1980. A Staff exhibit showed that if the Commission authorized a $30.0 million interim rate increase to take effect in April 1980, it was likely that by September 1980, KCPL would have the interest coverage necessary to issue the $50.0 million of first mortgage bonds in December 1980. 23

Mo.P.S.C.(N.S.) at 417. KCPL had adopted an austerity program, including a hiring freeze on employees, a reduction in the amount of overtime worked, a reduction in business travel and meetings, a reduction in the amount of advertising, a reduction in fuel inventory levels, a deferral in the 1980 construction budget through cancellation of projects or deferrals through 1981 or beyond; reductions in distribution construction, reductions in transmission and distribution maintenance, among other items. The austerity program had not been in effect long enough for it to have affected KCPL's financial position. The Commission was of the opinion that the cost savings from the austerity program would approximate $4.0 million. *Id*. Thus, while KCPL and the Staff agreed that $29.0 million of interim rate relief was justified, the Commission reduced that amount by $4.0 million and awarded KCPL an interim rate increase of $25.0 million. 23 Mo.P.S.C.(N.S.) at 415, 417-18.

On September 5, 1980 Missouri Public Service Company (MPS) filed a permanent rate case, revised tariff sheets, to increase rates approximately $29.25 million, annually. *Re Missouri Public Service Co.*, Report And Order, Case No. ER-81-85, 24 Mo.P.S.C.(N.S.) 332 (1981). On November 5, 1980, MPS filed revised interim tariff sheets with a requested effective date of December 5, 1980 to increase electric service rates by approximately $15.0 million, annually. By Order dated November 24, 1980, the Commission suspended the proposed interim tariff sheets until April 4, 1981, and on December 4, 1980, the Commission ordered other procedural dates. MPS and the Staff filed in the interim rate case a Stipulation And Agreement respecting ratemaking treatment for certain extraordinary costs associated with the failure of the Sibley 3 generating unit. An evidentiary hearing was held and the Commission issued on February 3, 1981 a Report And Order (unreported) in the interim case comprising an accounting authority order providing for the amortization of $6.8 million of costs associated with the failure of the

Sibley 3 generating unit. The amortization period was to be determined in the permanent rate case. MPS reduced its interim rate request from $15.0 million to $9.5 million. *Re Missouri Public Service Co.*, Report And Order, Case No. ER-81-154, 24 Mo.P.S.C.(N.S.) 245-46 (1981).

On February 23-24, 1981 a hearing was held regarding MPS's request for interim rate relief. As a result of the accounting authority order, the emergency financial crisis which MPS was facing was alleviated. MPS no longer contended that its interest coverage under its indenture of mortgage did not permit it to issue long-term debt. Also MPS agreed that its ability to continue to render service was not seriously impaired. 24 Mo.P.S.C.(N.S.) at 246. The Commission held that although the evidence may have justified a granting of interim rate relief on an emergency basis at the time of the filing of the case, changed circumstances as a result of the accounting authority order no longer made that true. The Commission rejected the suspended interim tariff sheets, and ordered that no interim rates would be authorized. *Id*. at 248.

The Gas Service Company (Gas Service) is the predecessor to Missouri Gas Energy, a division of Southern Union Company. On December 16, 1982, in the midst of an extremely busy time at the Commission respecting rate increase and other cases,[39] Gas Service filed an application for expedited treatment, prepared testimony and interim revised rate schedules reflecting a proposed increase in rates for natural gas service designed to increase gross utility revenue by $7,841,328, on an interim basis, exclusive of gross receipts and franchise taxes for an eight month period from February 1, 1983 through September 30, 1983. Gas Service alleged that it was seeking emergency interim relief and requested that the Commission set its filing for a hearing no later than January 5, 1983. Anomalously, the Gas Service interim rate increase case

[39] Major pending rate increase cases included Union Electric Company, Kansas City Power & Light Company, Missouri Public Service Company, and the impending AT&T - Southwestern Bell Telephone Company (SWBT) divestiture case / SWBT rate increase case. 25 Mo.P.S.C.(N.S.) at 637.

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filing was made in advance of its permanent rate increase filing, Case No. GR-83-225, by two weeks.

On December 21, 1982, the Staff filed a response in which it stated that based on current rate case proceedings and Staff resources it would be unable to submit testimony at any hearing before January 5, 1983 and would not have accounting and financial analysis personnel available to audit Gas Service until March 1983 and the results of such an audit would not be able to be presented to the Commission until early April 1983. On December 30, 1982 Gas Service filed permanent revised tariffs designed to increase gross utility revenue by $20,966,511, on a permanent basis, exclusive of gross receipts and franchise taxes. On January 4, 1983, the Commission issued its Suspension Order in Gas Service's interim rate case, Case No. GR-83-207, and set an evidentiary hearing for January 11, 1983 for the Staff, Public Counsel and interested parties to appear and present evidence relative to the reasonableness of Gas Service's request. *Re Gas Service Co.*, Report And Order, Case No. GR-83-207, 25 Mo.P.S.C.(N.S.) 633-35 (March 3, 1983; Chairman Shapleigh and Commissioners McCartney, Fraas, Dority, and Musgrave, concurring); *Re Gas Service Co.*, Case No. GR-83-207, Supplemental Report And Order, 25 Mo.P.S.C.(N.S.) 659 (March 25, 1983; Chairman Shapleigh and Commissioners McCartney, Dority, and Musgrave, concurring; Commissioner Fraas, not participating); *Re Gas Service Co.*, Report And Order, Report And Order, Case No. GR-83-225 (September 7, 1983)(Decision unreported in Mo.P.S.C.(N.S.)).

The Staff filed testimony stating that it had no recommendation because it was unable to perform an audit of Gas Service. At the hearing on January 11-12, 1983, Gas Service was the only party which presented evidence as to the reasonableness of the interim emergency rate request. A February hearing also was held by the Commission.

Gas Service alleged in Case No. GR-83-207 that it was seeking emergency interim relief to maintain its financial integrity until permanent rate relief could be granted because of a financial emergency brought about by increasing natural gas prices, decreased usage, and increased uncollectibles. The evidentiary hearing was held on January 11, 1983 and initial and reply briefs were filed on January 31 and February 4, 1983, respectively. The Commission reopened the record for the purpose of taking additional evidence on February 10, 1983 and at the conclusion of the reopened hearing the parties presented oral argument. 25 Mo.P.S.C.(N.S.) at 634-35.

On March 3, 1983, the Commission issued a Report and Order in Case No. GR-83-207. The Commission stated that Gas Service's financial situation constituted an emergency warranting interim rate relief because evidence showed that Gas Service was unable to issue long term debt, meet its dividend requirement, or issue common stock or preferred stock in any substantial amount or on any reasonable basis; Gas Service's financial situation was likely to deteriorate further unless there was interim rate relief; and Gas Service's financial integrity was threatened. 25 Mo.P.S.C.(N.S.) at 637.

The Commission's March 3, 1983 Report And Order noted that at the January 1983 hearing Gas Service's President testified that although Gas Service had no formalized austerity program, Gas Service had always been engaged in such a program. He further testified that Gas Service could no longer make reductions to boost earnings and still maintain a minimum level of service; without interim relief Gas Service would defer all capital expenditures and 50% of maintenance costs; and if it suspended capital expenditures, it might have to be relieved of its duty to provide service to new customers. (It was also disclosed at the January hearing that Gas Service was engaged in a $600,000 renovation of its Crown Center offices in Kansas City.) At

the February 1983 hearing, Gas Service's President indicated that if it continued to defer maintenance of its system, it would no longer be in compliance with the National Safety Transportation Board requirements. 25 Mo.P.S.C.(N.S.) at 638-39.

Also at the February 1983 hearing, Gas Service produced evidence that it implemented an expense containment program effective January 15, 1983 entailing reductions, freezes or deferrals but only through March 31, 1983. The cost containment program included reductions, freezes or deferrals to officers' salaries, wages, overtime, hiring, consultants, inventories, dues, donations and contributions, capital expenditures, meetings and travel, and advertising. The Commission inferred that the cost containment program was in response to questions posed at the January 1983 hearing. 25 Mo.P.S.C.(N.S.) at 638. At page 9 of its January 18, 1983 Suspension Order And Notice Of Proceedings in Gas Service's permanent rate increase case, Case No. GR-83-225, the Commission expressed its concerns by directing an investigation into the financial management of Gas Service:

> ORDERED: 20. That Company and Staff shall, and other parties may, unless otherwise ordered by the Commission, undertake to provide evidence and argument sufficient for the Commission to determine:
>
> A. The degree to which the Company has "efficient and economical management"; further, whether a Commission determination on this point should be utilized by the Commission in making its determination of the Company's authorized return on equity or rate base and, if so, how it should be utilized; further, whether a Commission determination on this point should be utilized <u>after</u> its determination of Company's authorized return on equity or rate base as an adjustment thereto, and, if so, how it should be so utilized. In particular, and in light of the frequent financial emergencies alleged by the Company which result in virtually annual requests for emergency rate relief, the Commission specifically directs the Staff to fully investigate, using Staff personnel or outside consultants, if necessary, the quality and efficiency of top financial management policies, procedures and personnel, and submit Staff report or recommendations with respect thereto.

B. Whether Company is experiencing some form of "attrition" and if so: (1) should the Commission take any action with respect thereto, and, if so, (2) what are the alternatives and recommendations of the parties with respect to such action.

In its March 3, 1983 Report And Order, the Commission stated that even though Gas Service was experiencing an emergency, it was not going to award Gas Service rate relief because Gas Service should have reduced the amount requested by the cost containment savings. The Commission said that Gas Service should have requested only the minimum amount necessary to alleviate the emergency. The Commission was not convinced that Gas Service was doing everything possible to cut expenses, and questioned the prudence of the $600,000 renovation and Gas Service's decision to increase its dividend requirement in January 1982. The Commission denied the interim request for $7.8 million, but stated that it would leave the docket open to permit Gas Service to file an amended request for a lesser amount to remedy Gas Service's emergency situation. The Commission scheduled an evidentiary hearing for March 16, 1983. 25 Mo.P.S.C.(N.S.) at 639-40.

On March 10, 1983 Gas Service filed an amended emergency interim rate request seeking approximately $6.2 million during the period prior to the operation-of-law date of Gas Service's permanent rate increase case. Gas Service's amended request was based upon adjustments to its budget in a few general categories. A hearing was held on March 16, 1983. The Commission found that Gas Service should be granted an interim increase, subject to refund with interest, in the amount of approximately $3.4 million dollars. 25 Mo.P.S.C.(N.S.) at 662. The Commission noted the unique character of the case, stated its desire to address Gas Service's presentation in the matter, and related that the Commission in Gas Service's permanent rate case had expressed its concerns by directing in the suspension order and notice of hearing an investigation into the financial management of Gas Service:

> . . . In its original filing Company asserted an emergency, yet it made little or no showing of a commitment to cost containment. In its Report and Order issued March 3, 1983, the Commission gave specific directives to the Company as to what was expected in its amended filing. The Commission directed the Company to file based on the minimum amount necessary to alleviate the emergency. . . . The Company's presentation did not deviate substantially from its make-whole posture exhibited at the previous hearings.
>
> The unique character of this case rendered deliberation difficult as the Commission was faced with no Staff audit, budgeted figures and an uncooperative Company whose evidence often lacked credibility. Were it not for extensive cross-examination performed by the other parties, a final determination in this case would have been far more difficult.
>
> . . . The Commission has expressed its concerns in the Company's permanent case by directing in its suspension order and notice of hearing an investigation into the financial management of the Company.
>
> Throughout this case the Company has made various allegations concerning its ability to provide safe and adequate service and its ability to maintain necessary coverages to insure its ability to engage in long-term financing. The Commission expects the Company to take any action necessary, consistent with providing safe and adequate service, to maintain necessary coverages, to maintain its cost containment program, and to institute further cost containment measures as may be necessary. . . .

25 Mo.P.S.C.(N.S.) at 664.

In the Gas Service permanent rate case, Case No. GR-83-225, the Commission accepted and adopted a Stipulation And Agreement in disposition of all matters. Gas Service was authorized to file revised permanent gas tariffs designed to increase Missouri jurisdictional gross annual revenues by $14.1 million, exclusive of applicable franchise and occupational taxes, effective for sales on and after September 15, 1983. Unreported Decision.

On June 13, 1983, Missouri Public Service Company (MPS) commenced a tender offer to purchase the necessary number of shares of common stock of Gas Service to have voting control over Gas Service and effectuate a business combination of Gas Service and MPS. On June 17, 1983, MPS filed an application with the Commission initiating Case No. GM-83-365 in which

MPS sought Commission authorization to (i) purchase the necessary shares of common stock of Gas Service, (ii) enter into a plan of reorganization, (iii) enter into an agreement of merger, and (iv) engage in such other acts as necessary to consummate the transactions required to effect the business combination of Gas Service and MPS. On July 18, 1983, Kansas Power & Light Company (KPL, predecessor to Western Resources, Inc., now Westar Energy, Inc.) and Gas Service filed a Joint Application with the Commission in Case No. GM-84-12 for Commission authorization for KPL to (i) acquire all outstanding shares of Gas Service common stock, pursuant to a tender offer, (ii) subsequent acquisition of any remaining, untendered outstanding shares of Gas Service through a merger into Gas Service of a wholly owned subsidiary of KPL, whereupon Gas Service would become a wholly owned subsidiary of KPL.

On August 5, 1983, MPS filed in Case Nos. GM-83-365 and GM-84-12 a Motion For Leave To Withdraw Application In Case No. GM-83-365 As Amended, And Application To Intervene In Case No. GM-84-12. In said Motion, MPS stated: "After due consideration, the Board of Directors of MoPub has determined that it would not be in the best interest of the Company and its shareholders to amend its tender offer in response to the tender offer of KPL and, accordingly, MoPub is terminating its tender offer for the purchase of Gas Service stock." On August 12, 1983, the Commission issued an Order in Case Nos. GM-83-365 and GM-84-12 dismissing Case No. GM-83-365 and granting MPS's request to withdraw its application to intervene in Case No. GM-84-12.

On November 16, 1976, St. Joseph Light & Power Company (SJLP) filed with the Commission an application for emergency/interim rate relief with revised tariff sheets designed to increase annual revenues by approximately $2.5 million on an annual basis.[40] SJLP contended

[40] Subsequently on December 20, 1976, as a result of the enactment of Section 393.135 (Proposition No. 1) by voters on November 6, 1976, SJLP filed revised tariff sheets effective as of February 1, 1977 reducing rates by $1.4

that without emergency/interim rate relief, it would default on the Iatan project because no other alternatives for meeting its construction commitments were available. SJLP further contended that default on Iatan would jeopardize its ability to provide adequate service, which would compromise SJLP's status as an independent electric utility and possibly require SJLP to merge with a larger electric utility. The Commission stated that "the pivotal issue in this case is Company's need for the additional generating capacity which Iatan will provide and the secondary issue is how will Company finance its participation in Iatan with or without the emergency rate relief requested in this case." 21 Mo.P.S.C.(N.S) at 358.

The Commission found that (1) appropriate cost/benefit economic analysis indicated that SJLP should postpone completion of Iatan 1 for at least one year from its planned in service date of 1980, but (2) SJLP was the junior partner of KCPL, no great savings would result to KCPL from bringing Iatan 1 on line in 1981 over 1980, and (3) SJLP had no authority to postpone Iatan 1 one or more years. On March 4, 1977 in *Re St. Joseph Light & Power Co.*, Case No. ER-77-93, Report And Order, 21 Mo.P.S.C.(N.S.) 357, 368, 373 (1977), the Commission approved emergency/interim rate relief for SJLP contingent upon, among other things, SJLP entering into a binding agreement disposing of 57 to 67 megawatts (MWs) of its 157 MW entitlement to Iatan 1 capacity by the effective date of the final Report And Order issued in connection with SJLP's permanent rate case, *Re St. Joseph Light & Power Co.*, Case No. ER-77-107, Report And Order, 21 Mo.P.S.C.(N.S.) 466 (1977)(Chairman Mulvaney and Commissioners Sprague and Jones

million by removing construction work in progress from rate base. As a consequence, SJLP's requested emergency electric rate increase was for $3.9 million over the rates on file and in effect as of February 1, 1977.

concurred; Commissioner Fain concurred with separate opinion; Commissioner Pierce dissented with opinion).[41]

The Commission authorized emergency/interim rate relief in the amount of an increase of annual gross electric revenues of $1.3 million, exclusive of gross receipts and franchise taxes, pending resolution of SJLP's pending permanent rate increase case on the basis that the "Company's financial integrity and credit worthiness will be impaired to the extent that the capital necessary for the provision of safe and adequate service cannot be raised." 21 Mo.P.S.C.(N.S) at 372, 373. The Commission went on to state that it could not ignore the extreme financial burden which full participation in the Iatan project placed on SJLP and its customers. Therefore, the Commission conditioned its authorization of emergency/interim rate relief on SJLP being required to refund the emergency/interim rate relief to its customers if:

> (1) its return on common equity exceeded 13.5% during the period that the emergency/interim rates were in effect;
>
> (2) it did not submit to the Commission documentary evidence that it had entered into a binding agreement disposing of 57 to 67 MWs of its Iatan 1 entitlement by the effective date of the final Report And Order issued in connection with SJLP's permanent rate case, ER-77-107; and
>
> (3) the interim rates authorized by the Commission were found by the Commission in the permanent rate case to be unreasonable.

Id.

On June 3, 1977 KCPL and SJLP executed an amending supplement to their Iatan Memorandum Of Understanding, which adjusted their ownership interests in Iatan upon authorization by the Commission. By a joint application filed July 26, 1977 in Case No. EO-78-

[41] The Case No. ER-77-93 Report And Order reported at 21 Mo.P.S.C.(N.S.) 356 does not reflect the correction made to the date by which SJLP was directed by the Commission to dispose of 57 to 67 megawatts of Iatan 1 capacity. The correction is reflected in an unreported Correction Order issued by the Commission on April 26, 1977 in Case No. ER-77-93.

12, KCPL and SJLP sought Commission approval of the proposed adjustments to their ownership interests in Iatan as to the site, common facilities and Iatan 1 generating unit. On August 22, 1977 in Case No. EO-78-12, the Commission issued an Order Granting Application To Adjust Ownership Interests (unreported decision) authorizing KCPL and SJLP to adjust their ownership interests in Iatan as requested and as reflected in the First Supplement to their Iatan Memorandum Of Understanding. The Commission concluded that "the authority sought is in the public interest in that it permits SJLP, within the time dictated, to divest itself of a portion of its entitlement at Iatan in compliance with the Commission's order in Case No. ER-77-93."

Historical Perspective – Section 393.135 RSMo., The Historical Test Year, Regulatory Lag, And The Attrition Adjustment

In the 1980's many of the utilities regulated by the Commission argued to the Commission, the courts on review, and the Legislature that despite whatever return on equity the Commission might authorize the utilities to earn, they were being financially ravaged by the interaction of rampant inflation with regulatory lag (11 month maximum suspension periods), historical test years (Proposition 1, Section 393.135 for electric utilities), and the mootness doctrine (by the time judicial review of the Commission rate increase decision made its way through circuit court, the court of appeals, and, possibly beyond the court of appeals, new rates from a subsequent rate increase case would be in effect, mooting the rate case and the rates on review). *State ex rel. Missouri Public Serv. Comm'n v. Fraas*, 627 S.W.2d 882, 885 (Mo.App. W.D. 1981)(*Fraas*). In *Fraas*, the Western District Court of Appeals held that besides the mootness issue, MPS's attrition argument failed for at least two reasons. One, because MPS had not provided sufficient proof that the ratemaking procedures authorized by the Commission would produce a confiscatory result without an attrition allowance. MPS had failed to earn its authorized return on equity for the five year period 1974-78 by an average of 75 basis points, and

its common stock consistently sold at below book value. *Id*. at 886. The Court held there were matters of factual determination to be made by the Commission, which left the whole attrition question under the general rule of mootness. *Id*. at 887.

The Court held that the other obstacle that stood in the way of it addressing the issue of an attrition allowance was that "[t]he choice of method with which to meet the inflation problem rests largely within the expert discretion of the administrative body, and for that reason the court will not presume to dictate the choice of method to the Commission. [citations omitted]." 627 S.W.2d at 888. The Court noted that a number of devices are available and have been used in rate cases to counter inflation, a number of which this Commission uses. *Id*. at 887-88. The Court noted that one of the devices used to meet the inflation problem was the use of a future or projected test year, instead of an historical test year, but this mechanism is beyond the Commission's power to use:

> . . . This particular approach would not be available in Missouri because of the adoption by popular vote of Initiative Proposition 1, now Section 393.135. However, the Commission in this case did use a modified version of the projected year model by utilizing a test year which was adjusted to take into account known and measurable future changes. That concept was implemented by the holding of what the Commission denominates as "a true-up hearing."

Id. at 888. The Court commented that besides the Legislature addressing the problem by possibly adopting fuel adjustment clause legislation, there was another means by which the Legislature could address "regulatory lag":

> Among other possible changes which the legislature might want to consider would be a provision for filing petitions for judicial review directly in the court of appeals, thus considerably reducing regulatory lag by eliminating the circuit court level of review.

Id. n.4.

Further Historical Perspective – Section 393.135 RSMo., The Historical Test Year, And Forecasted Fuel

Counsel for Laclede Gas Company raised the issue of "forecasted fuel" in his cross-examination of Staff witness Stephen M. Rackers. Forecasted fuel was a device that the Staff helped fashion in the 1980's to assist electric utilities address fuel costs until the Commission directed the termination of this approach. When substantial increases in fuel costs due to double-digit inflation were a concern in the late-1970's and the early- to mid-1980's, "forecasted fuel" was a mechanism developed to address the inability to utilize a fuel adjustment clause due to the Missouri Supreme Court's holding in the *UCCM* case, *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41 (Mo.banc 1979).[42]

Missouri Power & Light Company (MPL) was a subsidiary of Union Electric Company serving Jefferson City, among other areas. On April 25, 1980 MPL filed an electric general rate increase case. MPL proposed recovery of projected fuel costs. The Staff submitted testimony for the twelve month period ending June 30, 1980 updated for known and measurable changes through September 30, 1980. The Commission adopted a test year adjusted to known changes through September 30, 1980.

MPL was a distribution company generating only approximately 1% of its electricity sales. Approximately 92% of its requirements were purchased from UE and approximately 7% of its requirements were purchased from KCPL. The Commission noted that "[a]pproximately 35 percent of the Company's expenses result from fuel costs. Those costs have been increasing at an average of 22 percent for the years 1976 through 1980." *Re Missouri Power & Light Co.*, Case No. ER-80-286, Report And Order, 24 Mo.P.S.C.(N.S.) 257, 267 (1981). MPL proposed a refund at the prime rate of any overcollection of fuel costs based on an audit one year after the

[42] The Staff would note that sometimes confusion is created by the mere shorthand reference to "UCCM" (Utility Consumers Council of Missouri, Inc.) because the fuel adjustment clause *UCCM* case is not the only notable court decision with "UCCM" in the caption.

effective date of the rates to be allowed. MPL assumed the risk of nonrecovery of any amount actually expended for whatever reason by MPL above its forecasted fuel amount. *Id.* at 268. The Commission held as follows:

> In the Commission's opinion the evidence of record establishes an experience of consistent accuracy in the UE's fuel cost forecast but the record is almost totally devoid of any support for such impression concerning the similar estimates of KCPL. . . . An allowance for budgeted fuel increase should be included in this case only to the extent supported by the UE fuel forecast contained in the evidence.
>
> Generally, the Commission has little willingness to resort to budgeted figures or allowances too distant from the test year to create an impression of reliability. Due to the peculiar circumstances of this case and of the Company involved, the Commission is persuaded to take a forward look at its fuel costs. . . .

Id. at 267.

UE and the Staff agreed to use the forecasted fuel device for the first time in UE's 1981-82 rate increase case, Case No. ER-82-52. The Commission accepted UE's and the Staff's proposal stating as follows:

> Generally the Commission only has been willing to use budgeted figures or allowances when not too distant from the test year for reasons of reliability. The Commission has been using budgeted fuel costs, when there has been an adequate refund provision, in recent cases. Under the Staff's proposal any overpayment of budgeted fuel costs will be refunded. Any under recovery of fuel costs will still be absorbed by the Company. Since it assumes the risk absorbing any fuel costs above budget, the Company still has the incentive to keep its fuel costs at a level as reasonable as possible. In the Commission's opinion the refund provision is adequate protection against the Public Counsel's criticism that the forecast may not be precise.

Re Union Electric Co., Report And Order, Case No. ER-82-52, 25 Mo.P.S.C.(N.S.) 194, 209 (1982). The Commission's Report and Order authorized inclusion in rates of approximately $4.7 million representing the estimated increase in fuel costs above the February 1982 level experienced by UE. For purposes of the forecasted fuel true-up, the Staff was to use the last paid invoice price of coal, gas, and oil delivered by October 31, 1982. UE, the Staff, and Public

Counsel on December 17, 1982 entered into a Stipulation And Agreement Regarding Refund Of Fuel Costs providing for the refund to customers of the amount $215,658. In an unreported January 17, 1983 Order Directing Refund in Case No. ER-82-52, the Commission approved the Stipulation And Agreement Regarding Refund Of Fuel Costs. Forecasted fuel was agreed to by UE, the Staff, Public Counsel, and certain other parties in a revenue requirement Stipulation And Agreement in UE's next rate increase case, Case No. ER-83-163. The Commission accepted and adopted the Stipulation And Agreement in an unreported July 6, 1983 Report And Order which settled part of Case No. ER-83-163. Other issues, including the question of the recovery of the costs of the cancelled Callaway II generating unit, went to hearing. In the UE - Callaway Generating Station rate increase case, forecasted fuel was a settled item addressed by the Commission in one paragraph:

> This issue was originally to be resolved in Phase II of this case and in the order in Case No. ER-84-168. By agreement, the issue of forecasted fuel costs was omitted from Case No. ER-84-168 and held over for resolution in this case. The agreement indicates UE is obligated to refund any overcollection with interest, and cannot recover for any deficiency. This matter was addressed in the true-up proceedings held on March 7, 1985. A stipulation and agreement was entered into by the parties which resolved this issue. The true-up stipulation is set out separately in this order. The commission finds that the agreement between the parties concerning the amount stipulated to for forecasted fuel costs is appropriate and that the method of collecting the money subject to refund is also appropriate, and therefore will adopt the stipulation and agreement between the parties on this issue.

Re Union Electric Co., Report And Order, Case Nos. EO-85-17 and ER-85-160, 27 Mo.P.S.C(N.S.) 183, 265 (March 29, 1985).

The Commission also adopted the forecasted fuel mechanism in KCPL and Empire rate increase cases. *Re Kansas City Power & Light Co.*, Case No. ER-82-66, 25 Mo.P.S.C.(N.S.) 229, 245-47 (1982); *Re The Empire District Electric Co.*, Case No. ER-83-42, Report And

Order, 26 Mo.P.S.C.(N.S.) 58, 62, 76 (1983); *Re The Empire District Electric Co.*, Case No. EO-83-364, 27 Mo.P.S.C.(N.S.) 16, 18-19 (1984).

The Public Counsel either joined in stipulation and agreements on forecasted fuel or did not oppose the stipulation and agreements until the KCPL rate increase case in 1983. Public Counsel opposed the forecasted fuel Stipulation And Agreement entered into by the Staff and KCPL in *Re Kansas City Power & Light Co.*, Case No. ER-83-49, Report And Order, 26 Mo.P.S.C.(N.S.) 104, 127 (1983). Public Counsel raised forecasted fuel among a number of issues on a writ of review to Cole County Circuit Court. The case was not prosecuted further by Public Counsel and was eventually dismissed by the Cole County Circuit Court for want of prosecution.

The Commission chose to discontinue use of the forecasted fuel mechanism in the 1986 KCPL - Wolf Creek rate case stating in the Report And Order that the allowance of forecasted fuel is an extraordinary remedy for highly inflationary times which protects the Company from paying costs which are beyond its control but that low inflation rates and stabilizing fuel prices indicate there is no need for forecasted fuel in the instant case. The Commission related that it believed that fuel prices at that time were equally as likely to decrease as increase. Public Counsel maintained that the Commission should no longer engage in a forecasted fuel procedure which allowed a utility to change its rates after the operation-of-law date with consideration given to only one of several factors affecting those rates, i.e., fuel costs. *Re Kansas City Power & Light Co.*, Case Nos. EO-85-185 and EO-85-224, Report And Order, 28 Mo.P.S.C.(N.S.) 228, 403-04 (1986).

When the Commission issued its KCPL - Wolf Creek rate case Report And Order, the Staff had already proposed forecasted fuel in the Arkansas Power & Light Company - Grand

Gulf Nuclear Station rate case, Case No. ER-85-265. The Commission again rejected forecasted fuel commenting as follows regarding forecasted or estimated test years:

> The Commission Staff has frequently recommended forecasted fuel allowances in the past in times of rapid inflation and volatile fuel prices. Under those conditions the time required to handle even an emergency interim case will assure that the collection of fuel, one of the largest items of expense, will always be deficient. The Commission generally disfavors the use of totally forecasted or estimated test years, however, the use of forecasted fuel allowances has been a commonly accepted ratemaking principle to protect the Company's earnings from the ravages of rampant inflation.
>
> In the instant case Staff's evidence establishes that contract coal prices have not been rising significantly in the recent past and there appears to be no need for such an allowance. Staff's evidence also indicates that the price of bituminous coal under contract to steam electric utilities rose less than one percent between September, 1984 and September, 1985, and that price had fallen almost 1.5 percent from September, 1985 to January, 1986. On the merits of the proposition, there is simply no persuasive reason why the Commission would feel the necessity to make a forecasted fuel allowance even if the Staff had recommended such an allowance, which is not the case. Even in the absence of countervailing evidence the Company's support for the forecasted fuel request is inadequate to warrant approval.

Re Arkansas Power & Light Co., 28 Mo.P.S.C.(N.S.) 435, 454-55 (1986).

Historical Perspective – Alternative Rate Regulation

At the hearing on December 7, 2009, Counsel for Laclede also referred to the two AmerenUE experimental alternative regulation plans (EARPs). Before the AmerenUE EARPs from 1995-2001, there was the Southwestern Bell Telephone Company (SWBT) incentive regulation experiment from 1990-1993. The SWBT alternative regulation experiment eventually agreed to was the result of a Staff excess earnings complaint case against SWBT, a local network modernization plan proposed by SWBT (TeleFuture 2000) to supplant the rate reduction proposed by the Staff, and SWBT seeking to delay by judicial review and stay proceedings the Commission's Report And Order decreasing SWBT's rates by $101.3 million. *Re Staff of Missouri Public Service Comm'n. v. Southwestern Bell Telephone Co.*, Case No. TC-89-14, et

al., Report And Order, 29 Mo.P.S.C.(N.S.) 607 (June 20, 1989); *Re Staff of Missouri Public Service Comm'n. v. Southwestern Bell Telephone Co.*, Case No. TC-89-14, et al., Order Concerning Motion For Stay, Depreciation Rates, And Establishing An Incentive Plan Docket, 29 Mo.P.S.C.(N.S.) 684 (June 30, 1989); *Re Southwestern Bell Telephone Co.*, Case No. TO-90-1, Order Granting Interventions And Approving Joint Recommendation (1991)(In the Matter of an Incentive Plan for Southwestern Bell Telephone Co.); *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385 (Mo. banc 1990). When that alternative regulation experiment concluded and the Commission offered a new plan to SWBT, the Commission noted the limits of its power in such matters which is presently the case for electrical corporations as was the case with telephone corporations - *Re Staff of Missouri Public Service Comm'n. v. Southwestern Bell Telephone Co.*, Case No. TC-93-224, et al., Report And Order, 2 Mo.P.S.C.3d 479 (1993):

> The issue of an alternative form of regulation for SWB originated in the reports filed by SWB, Staff and OPC in Case No. TO-90-1. Those reports were filed pursuant to an agreement adopting what has been termed the "revised experimental incentive regulation plan". The experimental plan was established for a three-year period and has been extended until January 1, 1994, to allow consideration of a future alternative regulation plan. The reports discussed the perceived successes or failures of the experimental plan and offered proposals for the development of a future plan. Case No. TO-93-192 was established to address a future plan and Staff's complaint case, TC-93-224, was consolidated with TO-93-192 since many of the issues and positions of the parties in the two cases overlapped. The proposals sometimes refer to the plans as incentive plans. For the Commission's purposes, the proposals will be viewed as proposals for alternative regulation, and thus the focus is shifted to the reasonableness of an alternative form of regulation rather than the need for incentives and what these incentives are.

Id. at 567.

* * * *

> . . . The Commission addresses its authority to approve an alternative regulation plan in the Conclusions of Law. The Commission has concluded that it has the necessary authority to approve a reasonably structured alternative regulation plan, as described in this Report And Order, and that a company may voluntarily agree to operate under such a plan.

Id. at 572.

* * * *

> . . . The Commission will not order SWB to share its earnings through credits but has offered SWB this alternative to meet the need for flexibility expressed by SWB in this case. The Commission could not order the credits, but it believes that SWB may agree to make the credits as part of its acceptance of an alternative regulation plan such as the AMP.

Id. at 585.

* * * *

> Based upon the foregoing conclusions of law, the Commission will order SWB's rates reduced by $84,617,000. . . . the Commission has concluded that it could not adopt SWB's alternative regulation plan proposal but will offer SWB, instead, a plan based upon parameters the Commission has found to be reasonable. If SWB agrees to the AMP as approved by the Commission, it may commence operations under the AMP on January 1, 1994.
>
> *IT IS THEREFORE ORDERED*:

Id.

* * * *

> 2. That Southwestern Bell Telephone Company shall inform the Commission on or before December 28, 1993, if it will agree to the Accelerated Modernization Plan approved in this Report And Order.

Id. at 586.

Counsel for Laclede also cross-examined Mr. Rackers regarding accounting authority orders (AAOs). The Western District Court of Appeals in *Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434, 438 (Mo.App. W.D. 1998) stated that the Western District Court of Appeals in *State ex. rel. Office of the Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806 (Mo.App. W.D. 1993) made it clear that AAOs are not the same as ratemaking decisions:

> . . . This court specifically stated that by allowing a deferral under an AAO, the PSC was not granting "rate relief" to the utility, and was not determining the "actual amount of the deferred costs" that would be recovered. Instead, the rate decision would "be determined in a later rate case," which the PSC ordered to be filed by the end of the calendar year. *Id.* at 812. As is applicable to the case at bar, the opinion stated that the AAO, "did not presume to determine a new rate

> but effectively permitted" the utility to file a rate case by the end of the year, "and then to present evidence and argue that the deferred costs recorded ... should be considered by the Commission in approving a rate change." *Id.* at 813. The court reiterated the holding that nothing in the AAO order served to automatically entitle the utility to recover in the subsequent rate case the full amount of the deferred charges allowed by the previous AAO. *Id.*

Id. at 437.

> . . . the court made it clear that AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings. *Public Counsel*, 858 S.W.2d at 813. The whole idea of AAOs is to defer a final decision on current extraordinary costs until a rate case is in order. At the rate case, the utility is allowed to make a case that the deferred costs should be included, but again there is no authority for the proposition put forth here that the PSC is bound by the AAO terms. *Id.* . . .

Id. at 438.

Conclusion

Interim Rates: Staff's Statement Of Position

I. Do the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as generally proposed by AmerenUE?

No, the circumstances presently encountered by AmerenUE, resulting in AmerenUE earning less than its authorized rate of return, do not warrant interim rate relief because interim rate relief has only been authorized and found lawful where prompt action is necessary to preserve the financial integrity of the utility and ensure that adequate service continues without interruption.

a. Should there be criteria for the Commission to use to decide whether interim rate relief is warranted? If so, what should that criteria be?

Yes, there should be criteria and those criteria are the existence of a deteriorating financial condition of the utility which would impair the continuation of adequate service or render the utility unable to maintain its financial integrity such that immediate rate relief is required.

II. If the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as generally proposed by AmerenUE, has AmerenUE provided adequate justification for the proposed level of interim rate relief?

The present circumstances do not warrant interim rate relief for AmerenUE.

a. Should there be criteria for the Commission to use to determine the appropriate level of interim rate relief? If so, what should that criteria be?

Yes, there should be criteria if there is to be a standard. Completely ad hoc / discretionary "criteria" is not a standard. Given the net plant interim rate relief proposal of AmerenUE, the criteria should be net plant as adjusted by Staff witness Steve Rackers (net plant from the true-up date of the prior rate increase case to the most current month for which accounting data was available at the time of the filing of the present rate increase case minus related accumulated deferred income tax, plant serving new customers, and related cost savings due to efficiencies). Given the emergency / near emergency standard, the criteria is that interim rate relief shall be that amount, and no more than that amount, reasonably necessary to preserve the financial integrity of the utility or ensure that adequate service continues without interruption. The Commission has held that to be eligible for interim rate relief a utility must show that: (1) it needs the additional funds immediately, (2) the need cannot be postponed, and (3) no alternative exists to meet the need other than an increase in rates. Thus, if the utility's financial integrity is impaired because it needs to finance, but it cannot do so because its financial metrics (interest coverages) are not adequate, the criteria for the Commission to use to determine the appropriate level of interim rate relief is what level of interim rates will produce the necessary financial metrics (interest coverages) to permit the utility to finance.

III. If the Commission finds that the circumstances presently encountered by AmerenUE warrant the Commission authorizing AmerenUE interim rate relief as proposed by AmerenUE, may and should the Commission adopt criteria for interim rate relief with greater applicability than the instant case?

The Commission cannot lawfully adopt a policy of general applicability outside of a rulemaking.

IV. Is any interim rate relief criteria other than the emergency / near emergency criteria lawful?

No. Missouri law authorizes the Commission to set just and reasonable rates after consideration of all relevant factors. The courts have found that the Commission's ratemaking authority necessarily extends to granting interim rate relief as necessary to a utility to address a deteriorating financial condition which would impair the continuation of adequate service without interruption or render the utility unable to maintain its financial integrity. The Commission is not presently authorized to grant interim rate relief for any other reason.

V. If the emergency / near emergency criteria is not the sole lawful criteria for interim rate relief, what other criteria is lawful?

At the present time, no other criteria are lawful.

Respectfully submitted,

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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 22nd day of December, 2009.

/s/ Steven Dottheim