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August 31, 2006

Ms. Colleen Dale  
Secretary and Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Missouri 65102

**FILED<sup>4</sup>**

AUG 31 2006

Missouri Public  
Service Commission

Re: Union Electric Company d/b/a AmerenUE  
Case Nos: ER-2007-0002

Dear Ms. Dale:

Accompanying this letter for filing in the above referenced matters are the original and eight (8) copies of the State of Missouri's Response in Opposition to Union Electric's Motion to Adopt Procedures For Implementing UE's Requested Fuel Adjustment Clause and the State's Motion to Strike Portions of the Direct Testimony of Union Electric witness Warner Baxter.

Thank you for your assistance with this filing. If you have any questions please do not hesitate to contact me.

Sincerely,

JEREMIAH W. (JAY) NIXON  
Attorney General

A handwritten signature in black ink, appearing to read "Douglas E. Micheel".

Douglas E. Micheel  
Assistant Attorney General

cc: Parties of Record

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

**FILED<sup>4</sup>**

AUG 31 2006

In the Matter of Union Electric Company            )  
d/b/a AmerenUE for Authority to File Tariffs        )  
Increasing Rates for Electric Service Provided     )  
to Customers in the Company's Missouri            )  
Service Area.    )

Missouri Public  
Service Commission

Case No. ER-2007-0002

**The State of Missouri's Response in Opposition to Union Electric's Motion to Adopt  
Procedures For Implementing UE's Requested Fuel Adjustment Clause**

Comes now the State of Missouri by and through its Attorney General Jeremiah W.  
(Jay) Nixon and for its Response in Opposition to Union Electric's Motion to Adopt  
Procedures for Implementing UE's Requested Fuel Adjustment Clause states as follows:

1. On July 7, 2006 Union Electric ("UE") filed concurrently with its tariffs  
proposing its electric rate increase a Motion To Adopt Procedures For Implementing  
AmerenUE's Requested Fuel Adjustment Clause ("FAC"). In that Motion UE requested  
that the Commission enter an order adopting and applying for purposes of this case the  
provisions which appear as subsection (16) of proposed rule 4 CSR 240-20.090 among  
other things.

2. On July 31, 2006, the Staff of the Commission filed its Response to UE's  
Motion noting in part that the "Staff is opposed to AmerenUE's Motion To Adopt  
Procedures For Implementing AmerenUE's Requested Fuel Adjustment Clause..."

3. On August 8, 2006 UE filed its Reply to Staff amending its prayer in its initial  
Motion suggesting a deadline of September 30, 2006 by which UE would file its FAC

tariff sheets, supporting direct testimony, and the other 19 items of information contemplated by proposed rule 4 CSR 240-3.161(2).

4. At the early prehearing conference the Regulatory Law Judge directed parties to file their response to UE's Motion no later than August 31, 2006.

5. In its Motion UE seeks an order from the Commission "adopting and applying for purposes of this case the provisions which appear as subsection (16) of proposed rule 4 CSR 240-20.090." Subsection (16) is delineated as "Transitional Period Respecting Initial RAM Rules Proposed and Adopted." This section of the **proposed** rule sets out the procedures that a electric utility is apparently required to use if it files a rate case prior to the effective date of the FAC rules. In fact, what UE seeks is the Commission to "adopt and apply" the **proposed** rules found in subsection (16) of rule 4 CSR 240-20.090.

6. If the Commission grants UE's request to use the proposed rules in this proceeding the Commission would be prejudging its proposed rules. Adopting those rules prior to the comment period provided for by Section 536.021 RSMo 2000 would render useless the comment period. Currently comments on the proposed rules in Case No. EX-2006-0472 are not due until September 7, 2006.

7. Section 536.021 sets forth the notice and comment procedures for rulemaking, amending, and rescinding. The purpose of the notice and comment period is to provide information to the agency through statements of those in support of or in opposition to the proposed rule. In *St. Louis Christian Home v. Missouri Comm'n on Human Rights*, 634 S.W.2d 508, 515 (Mo. App.1982), the court observed:

“The very purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification...To neglect the notice...or to give effect to a *proposed* rule before the time for comment has run...undermines the integrity of the procedure. (emphasis in original)

cited with approval in *NME Hospitals v. Dept. of Social Serv.*, 850 S.W.2d 71,74 (Mo. banc 1993).

In its Motion, UE requests that the Commission give effect to the proposed rules contained in subsection (16) prior to the expiration of the comment period for the proposed rule.

8. In its initial Motion at paragraph 4 UE candidly notes that “[t]hese transition provisions do not at this point have the force and effect of law in that they appear only in proposed rules.” Nonetheless, UE specifically asks that the Commission adopt and apply the provisions which appear as subsection (16) of proposed rule 4 CSR 240-20.090. By doing so, UE invites this Commission to violate Section 536.021 by prejudging its proposed rule 4 CSR 240-20.090. A rule adopted in violation of Section 536.021 is void. *NME Hospitals* at 74.

9. UE in its Motion points out that Section 386.266.9 allows for a utility to request a FAC prior to the finalization of the rate adjustment mechanism “RAM” rules. That is correct, but that does not mean that the Commission is obligated to grant the utilities request. Nor does it permit the Commission to disregard the law. In light of the fact that any RAM can not go into effect until after valid rules have been promulgated the appropriate action for the Commission to take is to deny any electric utility a FAC until it

has promulgated valid final rules. UE was certainly aware of the requirements of SB 179 as they were undoubtedly one of the parties at the negotiating table when the final version of SB 179 was drafted.

10. Allowing UE to supplement its current filing with completely new tariffs a full eighty-four days after UE has filed its proposed tariffs and those tariffs have been suspended by this Commission violates Section 393.150. Such action is contrary to the regulatory scheme that was set up by the Legislature when it enacted the Public Service Act of 1913.

11. Electric rate increases may be initiated by either the “file and suspend” method or under the “complaint” method. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 28- 29 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976).

12. In this proceeding the Commission has used the “file and suspend” method regarding UE’s proposed electric rate increase. On July 10, 2006 UE submitted to the Commission certain proposed tariff sheets, Tariff File No. YE-2007-0007. The purpose of that filing according to UE was to implement a general rate increase for retail electric service to customers in its Missouri service area. UE stated in its filing that the new retail electric service rates are designed to produce an additional \$360,709,000 in gross annual electric revenues, exclusive of applicable gross receipts, sales, franchise or occupational fees or taxes.

13. On July 11, 2006, this Commission entered its Order Directing Notice, Suspending Tariff, Setting Hearings, and Directing Filings, (herein after Suspension Order), suspending all of UE's proposed tariffs pursuant to Section 393.150 RSMo 2000 thus creating the instance case.

14. In its filing of proposed tariffs UE wholly failed to file any tariffs that related to its proposed FAC. By its Motion UE admits that it has failed to file such tariffs with its initial filing and now is requesting that it be allowed to file these new tariffs as part of this case no later than September 30, 2006. (See; Amended Prayer for Relief UE's Reply to Staff.) Such a filing if allowed by the Commission would be contrary to the statutory procedure for filing a rate increase as delineated by statute.

15. As noted in paragraph 11 above there are only two statutory ways in which an electric utility such as UE can initiate a general electric rate increase, the file and suspend method and the complaint method. In this proceeding UE deliberately failed to include its FAC tariffs in its initial tariff filing and thus should be foreclosed from providing completely new tariffs more than two months after the original tariffs have been suspended by order of this Commission.

16. To allow UE to file such tariffs would be creating a third method of setting rates. The Commission has no such statutory authority to create a new method for setting rates.

17. This Commission's powers are limited to those conferred by statute, either expressly, or by clear implication as necessary to carry out the powers granted to it. *State*

*ex rel. Utility Consumers Council, Etc. v. Public Service Commission*, 585 S.W.2d 41,49 (Mo. banc 1979). Simply put, the statutory framework set up by the Legislature for setting an electric utilities rates does not provide the Commission the authority to grant UE's request.

18. It is worth noting that it is UE and UE alone that chose the timing of the filing and the contents of the filing. For whatever reason UE made a specific decision to file tariffs that did not include a FAC. (Contrast that with the tariffs filed by Aquila in Case No. ER-2007-0004, wherein they provided proposed FAC tariffs that were subsequently suspended by the Commission).

19. Nothing in Section 386.622 alters in anyway the method in which electric utility rates are set by the Commission. Section 386.622.1 notes that an electric utility may make application to seek approval of rate schedules (tariffs) authorizing a FAC. Subsection 4 of 386.622 gives the Commission authority to approve a FAC after providing the opportunity for full hearing in "a general rate proceeding, including a general rate proceeding initiated by complaint." This language recognizes that there are only two ways in which an electric utility can seek a rate increase, the "file and suspend" method and the "complaint" method. It provides no authority whatsoever to allow UE to file new tariffs over two months after its initial tariffs have been filed and suspended by the Commission.

20. Nor does UE's Motion to Adopt Procedures For Implementing its Requested Fuel Adjustment Clause or the vague and uninformative one paragraph contained on the

prefiled direct testimony of UE witness Baxter at page 21 and 22 satisfy the statutory requirements for having the FAC be part of this proceeding. The tariffs that form the basis of UE's proposed rate case have been suspended. UE should not now be allowed to file new tariffs in the same proceeding.

21. To allow UE to file its proposed FAC tariffs as requested by UE would result in a due process violation. Parties were not given appropriate notice of UE's intention to file FAC tariffs.

22. The Commission in its Suspension Order paragraph 12 directed the Commission's Data Center to serve a copy of this order upon the county commission of each county in Union Electric Company d/b/a AmerenUE service area, and upon every party to UE's last rate case. Anyone who reviews UE's proposed and suspended tariffs would not be given notice that UE was seeking a FAC in this proceeding.

Understandably, the Commission's Suspension Order is silent on this matter because such a request was not contained in the proposed tariffs filed by UE. Nor does UE's press release, a copy of which was provided with its filing, provide even a mention that UE is going to be seeking a FAC.

23. Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. *State ex rel. Fischer v. Public Service Commission*, 645 S.W. 2d 39, 43 (Mo. App. 1982). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances to appraise interested parties of the pendency of the action and



afford them an opportunity to present their objection. *Division of Employment Security v. Smith*, 615 S.W.2d 66, 68 (Mo. banc 1981) citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, L.Ed. 865 (1950).

24. Allowing UE to file its new FAC tariffs and information supporting those tariffs as requested by UE would result on a violation of any other parties due process rights given the fact that the Commission via its Suspension Order has made the determination that to properly understand and process this rate request, the largest request in Missouri history, the request must be suspended for the complete allowed statutory time frame. By allowing UE to file its new tariffs no later than September 30, 2006 as requested by UE would be allowing the utility the ability to unilaterally circumvent the statutorily provided eleven month suspension period. This unilateral shortening of time unfairly impinges on the parties rights to thoroughly review this matter and effectively circumvents the Commission's decision to suspend these proposed tariffs for eleven months for review.

25. Certainly UE's requested new filing for a FAC will have some impact, as yet unknown, on its current filing. Parties will be doing work, reviewing the filing and formulating positions on UE's proposed tariffs only to have those positions rendered obsolete by UE's new filing. This would have the effect of once again allowing UE to unilaterally change its filing and shorten the for review by other parties. Allowing such action cannot be consistent with the rudimentary elements of fair play.

26. UE's failure to file tariffs proposing its FAC and provide the initial information required to demonstrate the FAC's impact on the proposed rate filing results in a violation of the Commission's minimum filing requirement Rule 4 CSR 240-3.030(2)(B)1-7. The purpose of the rule is to proscribe information that must be filed by an electric utility when seeking a general rate increase. Items 1 through 7 of Rule (2) (B) require UE to provide basic information regarding the proposed increase. If UE is allowed to file new tariffs proposing a FAC as requested the information contained in the minimum filing requirements will be rendered incorrect. Once again the notice of UE's proposal will be insufficient. Moreover, the Commission should not condone UE failing to comply with its rules.

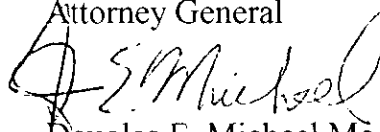
27. UE was well aware that Rule 4 CSR 240-2.065 (1) requires a utility to file its direct testimony when it files its proposed tariffs for a general rate increase. In this case, UE wholly failed to file any tariffs, substantive testimony or information supporting its request to seek a FAC. To grant UE's request to file new FAC tariffs and testimony no later than September 29, 2007 would fly in the face of this Commission rule that is designed to require utilities to file **all** of their direct testimony in support of a general rate case filing at the time the tariffs are filed.

28. Administrative agencies such as the Public Service Commission, just as the general public, are bound by the terms of the rules promulgated by them. *Berry v. Moorman Mfg. Co.*, 675 S.W.2d 131,134 ( Mo. App. 1984).

WHEREFORE, the State of Missouri requests that the Commission deny Union Electric's request to Adopt Procedures For Implementing UE's Requested Fuel Adjustment Clause and any other relief the Commission deems appropriate.

Respectfully Submitted,

JEREMIAH W. (JAY) NIXON  
Attorney General

A handwritten signature in black ink, appearing to read "D. E. Micheel", is written over the printed name of Douglas E. Micheel.

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The undersigned hereby certifies that on the 31<sup>st</sup> day of August, 2006, a copy of the original of the foregoing was hand delivered or sent via 1<sup>st</sup> class, postage paid, U.S. Mail to:

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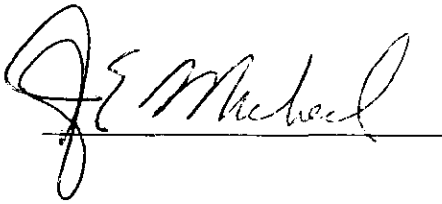
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