BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for the Issuance Of an Accounting Authority Order Relating to its Electrical Operations.	))))	**File No. EU-2012-0027**

THE MIEC'S APPLICATION FOR REHEARING

COMES NOW the Missouri Industrial Energy Consumers ("MIEC"), and pursuant to 4 CSR 240-2.160(1), hereby files its Application for Rehearing respecting the Commission's November 26, 2013 Report and Order. In support of its Application, the MIEC states that the Commission's Report and Order in this case is unlawful, unreasonable and unsupported by competent evidence on the record. In support hereof, the MIEC states as follows:

Introduction

This case represents Union Electric Company's d/b/a Ameren Missouri ("Ameren") third bite at the apple. After pleading with the Commission for a fuel adjustment clause ("FAC"), Ameren finally obtained one in Case No. ER-2008-0318, on January 27, 2009, the day before an ice storm hit Southeastern Missouri, causing an extended loss in service to Ameren's biggest customer, Noranda Aluminum.[1] Although part of Ameren's pitch for the FAC was that it could benefit consumers (by providing 95 percent of the margin when off-system sales are higher than anticipated), it immediately asked the Commission to modify the FAC to remove that benefit for off-system sales of power that otherwise would have been sold to Noranda. This Commission denied that request as untimely. Ameren then sold the power to two other customers, but refused to treat those sales as off-system sales. Staff filed a prudence case against Ameren, and this Commission, and the Missouri Court of Appeals, determined that the revenues from those customers were off-system sales, 95 percent of the margins of which should flow through to

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1 MIEC Ex. 1., Brubaker Rebuttal, p. 2, ll. 8-15.

customers.[2] Having failed in those attempts, Ameren brought the instant application to the Commission.

This case presents the third bite at the apple. The question is whether Ameren is to be afforded an accounting authority order ("AAO") allowing it to "defer" approximately $36 million of the approximately $43 million in revenue that it planned to receive from Noranda Aluminum, but instead received from other parties, particularly from American Electric Power Association ("AEP") and Wabash Valley Power Association ("Wabash"), during the 14 month period following an ice storm that hit southeast Missouri in January 2008. Noranda could not accept and did not purchase as much power since its plant had been damaged by the loss of power after the storm. Because of the operation of Ameren's FAC in Ameren's tariffs, 95 percent of the $43 million in such revenue from AEP and Wabash was required to flow through the FAC to Ameren's ratepayers because it constituted "off-system sales." The $36 million figure ("FAC-Redirected Revenue") is what Ameren represents to be its "unrecovered fixed costs" that it planned to incur to serve Noranda that it did not recover because of the operation of its FAC tariff. The evidence shows that the FAC clause already benefitted Ameren by well over $150 million since its inception,[3] but with the AAO, and the anticipated recovery of the $36 million windfall from future ratepayers, Ameren's benefit under the FAC will increase by $36 million.

What the term "defer" or "deferral" means is that Ameren will be allowed to "book" the $36 million in unrealized revenue at issue to a particular account on its balance sheet for consideration in a subsequent rate case. In that rate case, Ameren will urge this Commission to set rates higher than Ameren needs to recover its anticipated costs of operation plus a reasonable return on equity.

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2 *Id.*, p. 2, l. 16 – p. 3, l. 4..

3 *Id.*, p. 9, ll. 1-7.

This Commission adopted and is supposed to follow the Uniform System of Accounts ("USOA"). The USOA sets standards for deferral. The USOA allows deferral for "extraordinary items":

> Extraordinary items. . . . Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (emphasis added)

What this plain language means is that the "item" must occur in the "current period," must be rare, and must be of significant effect.[4] For the reasons that follow, the Commission decision here is unlawful, unreasonable and unsupported by competent evidence on the record in concluding that Ameren met that USOA standard or that the FAC-Redirected Revenue at issue is even an "item" under that standard.

I. Even if there was an "Extraordinary Item," it Nevertheless Did Not Occur in the "Current period"

The undisputed facts show that Ameren's application for the subject AAO was untimely. It is undisputed that operation of Ameren's FAC during the 14 month period beginning January 2009 resulted in the FAC-Redirected Revenue.[5] It is undisputed that Ameren closed its books for financial reporting purposes for fiscal years 2009 by March 31, 2010 and for 2010 by March 31, 2011.[6] It is also undisputed that Ameren did not file the subject application until July 25, 2011. Moreover, it is also undisputed that Ameren filed and completed two rate cases (ER-2010-0036 and ER-2011-0028) since the 2009 ice storm.[7] By the terms of the USOA, particularly General

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4 *See In the matter of the Application of Southern Union Company for the Issuance of an Accounting Authority Order Relating to its Natural Gas Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)*, File No. GU-2011-0392, p. 14.

5 Report & Order, Finding 3.

6 MIEC Ex. 1., Brubaker Rebuttal, p. 4, ll. 10-18; Barnes testimony, Vol. 2, Tr. 90, l. 25 – p. 91. Ln. 9.

7 MIEC Ex. 1., Brubaker Rebuttal, p. 3, ll. 5-6.

Instruction No. 7, Ameren's request for the subject AAO was untimely since the periods when the costs are alleged to have been unrecovered were already closed before Ameren filed its application for AAO. In other words, the allegedly unrecovered fixed costs at issue were incurred in periods already closed long prior to the "current period." The plain language of accounting standard General Instruction No. 7 compels this result The Commission's decision is not supported by competent and substantial evidence, and is in fact belied by that evidence.

II. The Commission's Decision Improperly Fails to Address the Timeliness Issue

Multiple parties, including the MIEC, Public Counsel, and this Commission's own Staff, noted that both under the USOA General Instruction No. 7, and this Commission's decision in GU-2011-0392, Ameren's request for the AAO was untimely. The Commission failed to render adequate findings on this issue. Indeed, the Commission provided no analysis of this issue, dismissing the parties' claims as "no[t] persuasive."[8] The Commission's failure to render findings and analysis is grounds for reversal.[9] A simple comparison of the subject order to the order issued in GU-2011-0392 shows that the Commission knew that this issue was important, and should have addressed it.

In GU-2011-0392, this Commission recognized that for an "item" to be deferred under General Instruction No. 7, the event must occur during the "current period." There, the Commission addressed the timeliness issue by concluding that "[t]he tornado occurred in the current period because it occurred on May 22, 2011, which was the period of the application."[10] Here, the Commission did not address the issue at all, for had it done so, it would have been required to state: "[t]he [ice storm and its impact's interaction with the FAC] occurred in [2009 and 2010] [which] [are not in] the current period[, 2011,] … which was the period of the application."

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8 Report & Order, n. 2.

9 *See State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 24 S.W.3d 243 (Mo. App. 2000).

10 *See* GU-2011-0392, p. 14.

III. The Finding that Ameren Failed to Recover the Costs at Issue is not Supported by Competent and Substantial Evidence

The Commission found as a fact that "[t]he amount of unrecovered fixed costs attributable to serving Noranda during those 14 months [when Noranda was unable to accept its full load] is $35,561,503." Finding 3. In fact, the testimony, even of Ameren's own witnesses, says otherwise. That evidence shows that Ameren realized less revenue than it had anticipated, but fully recovered all of its costs. That is because Ameren earned a profit in 2009 and 2010, when it supposedly was not recovering its costs. That it earned a profit for those periods is undisputed.[11]

Ameren employed creative arguments in its attempt to recover unrealized profits under the guise of unrecovered fixed costs. This Commission fell for the argument, even though it is not supported by the evidence. The evidence shows that: (1) Ameren sold to Wabash and AEP power that it had planned to sell to Noranda;[12] (2) the revenue so generated was treated as off-system sales revenue under Ameren's FAC tariff and, accordingly, shared with consumers;[13] (3) because of the operation of the FAC tariff in that regard, Ameren realized less benefit from the FAC tariff than it had anticipated;[14] (4) Ameren still realized over $150 million in benefits under the FAC tariff since its adoption;[15] (5) while Ameren links its claim to the ice storm, the ice storm did not cause Ameren to incur any additional costs not otherwise figured in its rates;[16] and (6) costs incurred by Ameren are not attributed to specific customers because Ameren attempts to recover its "whole cost of service" from all of its ratepayers.[17] In short, despite Ameren's slick packaging, it did not incur unrecovered costs due to the ice storm. The facts show that Ameren realized less benefit under its FAC tariff

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11 MIEC Ex. 1., Brubaker Rebuttal, p. 5, l. 18 - p. 6, l. 4.
12 *Id.*, p. 2, l. 22 - p. 3, l. 4.
13 *Id.*
14 *Id.*
15 *Id.*, p. 9, ll. 1-7.
16 Transcript, p. 92, ll. 4-25.
17 Barnes testimony, Tr. Vol 2, p. 101 l. 21 - p. 102, l. 9.

than it anticipated. Deferral of unrealized profits, particularly because of the operation of FAC tariff that, on balance, so greatly benefits Ameren, are not contemplated under General Instruction No. 7.

A recent opinion of the Western District Court of Appeals[18] is instructive and reinforces why the requested AAO is illegal and unreasonable. The Court, at page 484 of the opinion, succinctly stated why unrealized revenues were at the heart of Ameren's claim:

> Though Barnes testified that the AEP and Wabash "contracts simply allowed Ameren [] to recover costs that had previously been allocated to Noranda sales," in reality, Ameren seeks nothing more than to recover lost retail revenues it had assumed it would receive when setting its rates in the 2008 general rate case.

The Court repeatedly referred to "lost revenues" or "revenue loss" while repeatedly noting that Ameren referred to under-recovery of its "fixed costs."

IV. "Extraordinary Items" Do Not Include Anticipated But Unrealized Profits

The evidence is clear that Ameren's rates reflected the cost to serve all parties, including Noranda.[19] Ameren incurred no extra uncompensated expenses as a result of the ice storm or Noranda's partial shut-down.[20] What Ameren did realize, primarily because it refused to give up the benefits of its FAC tariff, was lower profits than it had anticipated. Lower profits under these circumstance do not constitute an extraordinary item to be included as a "regulatory asset" under the USOA.

In GU-2011-0392 this Commission clearly explained the subject utility accounting. Starting at page 11, this Commission explained that normally "net income shall reflect all items of profit and loss during the period[.]" The USOA defaults to "current recording." However, a utility sometimes will not record an item of profit and loss to net income for a year and rather book a "regulatory asset or liability" to its balance sheet in account 182.3 (asset) or 254 (liability). Definition 31

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18 *State ex rel. Union electric Company d/b/a Ameren Missouri v. Public Service Commission*, 399 S.W.3d 467 (Mo. App. 2013).

19 Barnes testimony, Tr. Vol 2, p. 101 l. 21 - p. 102, l. 9.

20 Barnes testimony, Tr. Vol 2, p. 93, ll.7-25, p. 102, l. 18 – p. 103, l. 16.

provides that such assets or liabilities result from actions of regulators such as the Commission: "Regulatory assets and liability arise from specific revenues, expenses, gains, or losses" that would have been incurred in one period but are likely to be included in other periods. What Ameren seeks here is a regulatory asset. Under Definition 31, a regulatory asset results from specific expenses (such as the cost to repair a power plant damaged by a tornado). A regulatory liability would result from certain revenues (such as a large insurance recovery). Revenues are not a "regulatory asset" that can be deferred to benefit a utility. They are a regulatory "liability," that under certain circumstances, can be deferred to compensate utility customers.[21]

General Instruction No. 7, set forth above, allows the conversion of a current expense or revenue into a regulatory asset or liability if the "item" is "unusual" or "abnormal" in nature and occurs "infrequently." The item should be "significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future." Ameren seeks to defer certain of its fixed costs that were clearly built into rates. A fixed cost, such as the depreciation of a power plant or the salaries of the plant operators, are "usual" and "normal," and will recur constantly. It is for that very reason that every party other than Ameren objected to deferring these allegedly unrecovered fixed costs.

Ameren sought to bend or break the accounting rules to rename its disappointing earnings shortfall a failure to recover some of its costs. But its fixed costs were foreseeable, and recurring. Its unrealized revenues are not expenses or costs that can be deferred as a "regulatory asset." Nothing in the USOA rules allow that. The ice storm was extraordinary and unforeseeable, but Ameren fixed costs were the opposite. Indeed, those costs were the foundation for Ameren's rates.

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21 *See, e.g.*, File No. EU-2012-0027.

Moreover, as Ameren witness Barnes freely testified, it was the operation of Ameren's FAC tariff, that led to Ameren's shortfall in revenue.[22] When Ameren applied for the FAC tariff, it repeatedly argued that the tariff could benefit ratepayers, particularly when off-system sales increased. Its revenue shortfall resulted from the FAC tariff as much as it did the ice storm. Application of a utility's tariff as written is hardly rare or unusual, and thus not "extraordinary."

Last, this Commission recently addressed this very issue in another case, and decided it correctly. That decision contained detailed findings and analysis. In Case No. GU-2011-0392, Southern Union sought an AAO to defer unrealized profits that it potentially could have generated if the Joplin tornadoes had not destroyed its sales to residential customers. This Commission held that "AAOs do not create an item for recording."[23] This Commission further explained in that case that even the term "Lost Revenue . . . is misleading because it suggests that the Company had the money and then lost it, which is untrue. . . . 'Ungenerated [revenue]' fully expresses the characteristic determinative of the claim."[24] There, the Commission refused to create an accounting item by "layering fiction upon fiction" because "to issue an AAO for ungenerated revenue would create a phantom loss."[25]

V. That This Commission Can Undo Its Error In Ameren's Next Rate Case is No Basis for Abusing the Rules of Accounting

The Commission's decision emphasizes that its allowance of an AAO does not automatically allow for rate "recovery" in Ameren's next rate case.[26] That may be true, but that does not justify bending or breaking the accounting rules. This Commission should follow its own rules. It adopted the USOA and should follow that system of accounting, just as other regulatory bodies across the

22 Barnes Surrebuttal, Ameren Ex. 3, p. 2, n. 1.
23/ Report and Order, Case No. GU-2011-0392, p. 2.
24/ *Id.*
25/ Report and Order, GU-2011-0392, p. 25.
26 Report & Order, Conclusions 3 and 5.

country have. The Commission's failure to follow its own accounting rules is arbitrary, illegal and unreasonable.

VI. Allowing Ameren to Defer its Unrealized Revenues is the First Step in Retroactive Ratemaking and Illegal

Granting the AAO would prove legally futile under Missouri law. Under well established Missouri law, a utility is not permitted to recover in a subsequent case revenue that it failed to generate in a prior period.[27] Such a practice violates Missouri's law against retroactive ratemaking.[28] *State ex rel. Utility Consumers Council*, describes retroactive ratemaking as follows:

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established.[29/]

The *UCCM* Court, at page 39, concluded that:

> [T]he risk of a dramatic loss of retail revenue is a business risk every utility faces.... [T]he risk of lost revenue is simply not a risk a utility is authorized to remediate with a fuel adjustment clause.

In this case, Ameren recovered all of its expenses and still made a profit, albeit a smaller one than it had contemplated. There were no losses. Rather, Ameren seeks to defer, for later collection from ratepayers in a rate case, anticipated but unrealized additional profits that it did not make as a result of the combination of the 2009 ice storm. While *UCCM* does not prohibit the *deferral* of such amounts, it does prohibit the recovery of such amounts from future ratepayers in a subsequent rate case. Accordingly, the granting of Ameren's AAO request in this case is legally futile, because the deferral is for the sole purpose of subsequent recovery as part of prohibited retroactive ratemaking. For that additional reason, the Commission's decision is illegal.

27/ *See State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41 (Mo. 1979).
28/ *Id.*
29/ *Id.*

WHEREFORE, the MIEC seeks rehearing and reversal of the Commission's decision granting Ameren's request for an accounting authority in the Report and Order issued in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was mailed, electronically, to all counsel of record on December 24, 2013.

/s/ Edward F. Downey