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	)	Case No. EU-2012-0027
Of an Accounting Authority Order	)	
Relating to its Electrical Operations	)	

INITIAL POST-HEARING BRIEF OF UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

I. PROCEDURAL HISTORY

Union Electric Company d/b/a Ameren Missouri (hereinafter "Ameren Missouri" or "the Company") initiated this docket on July 25, 2011, by filing its Application for Accounting Authority Order ("Application"). The Application asks the Commission to issue an Accounting Authority Order ("AAO") that would enable the Company to defer to Account 182.3, Other Regulatory Assets, the fixed costs that Ameren Missouri was unable to collect from Noranda Aluminum, Inc. ("Noranda") for a fourteen month period immediately following a devastating ice storm that struck southeastern Missouri in late January 2009 (the "January 2009 ice storm"). It is important to note that the Company's deferral request is limited to the fixed cost portion of Ameren Missouri's overall cost of service that the Commission assigned to Noranda's rate class in Case No. ER-2008-0318.[1] As will be discussed in more detail *infra*, immediately following, and as a direct result of, the January 2009 ice storm, Noranda was forced to drastically curtail smelting operations at its plant in Southeast Missouri, which meant that its demand for electricity dropped significantly during the 14-month period immediately following that storm. Because of that drop in demand, Ameren Missouri was unable to recover the fixed costs that in Case No. ER-2008-0318 the Commission determined should be paid by Noranda.

[1] *In the Matter of Union Electric Company, d/b/a Ameren UE's Tariffs to Increase Its Annual Revenues for Electric Service (February 6, 2009).*

The non-Ameren Missouri parties to this case – the Commission Staff ("Staff"), the Office of the Public Counsel ("OPC"), the Missouri Industrial Energy Consumers ("MIEC"), and Barnes-Jewish Hospital – all oppose the Company's request for an AAO.

In accordance with a procedural schedule established by the Commission, witnesses for the Company filed direct and surrebuttal testimonies and witnesses for Staff, OPC, and MIEC filed rebuttal and/or cross-surrebuttal testimonies. A hearing was held on May 3, 2012, for the purpose of taking testimony and receiving evidence from the parties, and at the conclusion of that hearing the Regulatory Law Judge directed the parties to submit post-hearing briefs describing and discussing the evidence and legal issues relevant to the Company's Application.

This is Ameren Missouri's initial brief in support of its request for an AAO. In that request, the Company asks the Commission to defer to Account 182.3 approximately $36 million in fixed costs that the Company would have collected from Noranda but for the fact that following, and as a direct result of, the January 2009 ice storm Noranda was forced to curtail smelting operations and substantially reduce its demand for electricity. More specifically, as described in the surrebuttal testimony of Lynn Barnes, Ameren Missouri's Vice President, Business Planning and Controller, the Company asks the Commission to authorize the Company to record a debit to Account 182.3, to create a regulatory asset, and to also record a credit to Account 407.4, which is the account the USOA prescribes when specific identification of a regulatory asset cannot be made.[2] The Company further requests that it be allowed to amortize the deferred costs over a reasonable period, commencing with the effective date of rates set in its pending rate case, Case No. ER-2012-0166; provided, however that the annual amount of the amortization is included in the revenue requirement used to set rates in that case.

II. INTRODUCTION AND BACKGROUND

To fully understand and appreciate the basis for Ameren Missouri's Application, the Commission must first understand the chain of events that preceded that filing and how those events both relate to one

[2] Ameren Exhibit 3, p. 3, lns. 1-7.

another and affected the Company. The January 2009 ice storm was the first link in that chain. The severity of that storm for both Ameren Missouri and its customers, the extreme damage it caused to the Company's transmission and distribution system, and its effect on the operations of Noranda's aluminum smelter will be described and discussed in greater detail *infra*. For purposes of this introduction, however, the effects of that storm can be summarized as follows. Immediately following, and as a direct result of, the January 2009 ice storm and the damage caused by that storm, Noranda was forced to curtail its smelter operations so that it could repair damage done to its production lines.[3] Those repairs took approximately fourteen months to complete, and during that period Noranda drastically reduced the amount of electricity that it purchased from Ameren Missouri. It was not until the end of that period that Noranda's demand for electricity returned to pre-storm levels.[4]

The significant drop in Noranda's demand for electricity meant that during that 14-month period Ameren Missouri was unable to recover fixed costs that had been assigned to Noranda in Case No. ER-2008-0318. The inability to collect those fixed costs posed a material threat to Ameren Missouri's financial results and threatened its ability to earn a fair rate of return. Ordinarily, the loss of a single customer, either permanently or for a lengthy period, does not pose a material financial threat to an electric utility as large as Ameren Missouri. But Noranda is no ordinary customer. It is by far the Company's largest single customer, with sales to Noranda representing approximately 11 percent of Ameren Missouri's system-wide native load.[5] At the time of the January 2009 ice storm, energy sales to Noranda produced approximately $139 million in annual revenue.[6] And because of Noranda's 98 percent load factor – the ratio of a customer's average load to its peak load – the flow of revenues from Noranda varied little from year to year.[7]

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[3] Ameren Exhibit 1, p. 16, lns. 10-15; Ameren Exhibit 2, p. 3, lns. 13-23.
[4] *Id.* p. 17, lns. 5-10.
[5] Ameren Exhibit 2, p. 4, lns. 12-14.
[6] *Id*.
[7] *Id.* lns. 14-16.

The curtailment of Noranda's operations meant that Ameren Missouri would not be able to collect the fixed costs that the Commission assigned to Noranda's rate class in Case No. ER-2008-0318. Those fixed costs totaled approximately $36 million over the fourteen-month period Noranda's operations were curtailed.[8] Fixed costs don't vary with the amount of electricity sold and don't go away if a customer leaves Ameren Missouri's system or discontinues service for an extended period of time.[9] Consequently, even though Noranda's demand for electricity declined, the fixed costs that Ameren Missouri incurred to provide that electricity did not decline.

It is important to note that the amount at issue in this case does not represent all of the costs that Ameren Missouri would have collected during the 14-month period that company curtailed its smelting operations.[10] Variable costs, which, as their name implies, vary with the amount of electricity sold can be avoided if a large customer, like Noranda, terminates or interrupts its demand for service.[11] Consequently, the Company is not seeking to recover any variable costs it incurred during the 14-month period when Noranda curtailed its smelting operations.

Prior to the effective date of the Commission's Report and Order in Case No. ER-2008-0318, Ameren Missouri would have been able to mitigate the loss of Noranda's fixed costs by simply selling into the off-system power market excess electricity made available as a result of Noranda's curtailment and using the revenues derived from those sales to recover the fixed costs that the Company otherwise would have recovered through rates charged to Noranda. But shortly after the January 2009 ice storm that option was no longer available, because in Case No. ER-2008-0318 the Commission approved a fuel adjustment clause ("FAC") for Ameren Missouri that, in part, required the Company to use revenues derived from off-system sales to offset increases in fuel and purchased power costs incurred between general rate cases. Therefore, following the effective date of rates set in Case No. ER-2008-0318, Ameren

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8 At the commencement of the hearing in this case, the parties announced a stipulation and agreement regarding the amount of fixed costs that are at issue in this case. The specific amount agreed to in that stipulation and agreement is $35,561,503. (Transcript p. 17, lns. 2-12)

9 Ameren Exhibit 3, p. 7, lns. 13-17; Staff Exhibit 3, p. 13, lns 10-11.

10 Transcript p. 87, ln. 21 – p. 88, ln 2.

11 Staff Exhibit 3, p. 13, lns. 7-10.

Missouri no longer was able to use revenues derived from off-system sales – except for those derived from long-term full or partial requirements power sales – to mitigate the financial effects of the fixed costs lost as a result of a decline in electricity sales to a customer like Noranda.

Faced with this new reality and recognizing the potential threat to its earnings, Ameren Missouri took several steps to mitigate the adverse financial effects of the loss of the fixed costs it expected to collect from Noranda. Within a week of the end of the January 2009 ice storm the Company filed an application for rehearing in Case No. ER-2008-0318, which asked the Commission to allow Ameren Missouri to retain a portion of the off-system sales revenue sufficient to cover the anticipated loss of fixed cost support that resulted from Noranda's reduced demand for electricity. But the Commission denied the Company's application. In its order announcing that decision the Commission stated that because the terms of the FAC were part of a previously approved, multi-party stipulation, changing the FAC in the manner Ameren Missouri had requested would require setting aside the stipulation, reopening the record to take evidence on the proposed changes, and issuing a final order before the March 1, 2009, operation of law date in the case. Completing all those tasks within the less than two weeks available was, the Commission concluded, impossible.[12]

Having failed in its effort to be allowed to change its FAC tariff, Ameren Missouri next tried to mitigate the financial effects of the loss of fixed costs it expected to collect from Noranda by entering into long-term, full or partial requirements off-system sales transactions. As noted previously, those revenues would be exempt from the provisions of the FAC, which required non-exempt off-system sales revenues to be used to offset increases in fuel and purchased power costs. To accomplish this objective the Company entered into two contracts: one with AEP Operating Companies ("AEP") and another with the Wabash Valley Power Association ("Wabash").[13] This strategy worked until, during its first periodic FAC prudence review, the Staff challenged Ameren Missouri's claim that the revenues derived from the AEP and Wabash transactions were exempt from the FAC. In its Report and Order in Case No. EO-2010-

12 *Order Denying AmerenUE's Application for Rehearing*, Case No. ER-2008-0318 (February 19, 2009), p. 2.
13 Ameren Exhibit 2, p. 5, lns. 3-13.

0255,[14] which took effect May 7, 2011, the Commission agreed with Staff's position. The Commission therefore ordered the Company to return to its retail customers, through refunds or reductions in FAC charges, 95 percent of the revenues that Ameren Missouri had collected from its sales to AEP and Wabash.

Therefore, it wasn't until the Commission's May 7, 2011, order that Ameren Missouri first learned that its efforts to mitigate the adverse financial effects of the January 2009 ice storm and the resulting curtailment of Noranda's smelting operations would not be successful. That meant that the Company had to again confront the challenge of trying to mitigate the loss of fixed cost support that it expected to receive from Noranda. Ameren Missouri quickly concluded that unless it acted quickly the nearly $36 million in fixed costs that were assigned to Noranda in Case No. ER-2008-0318 would be lost forever. At that point that there was only one avenue that remained available to protect the Company: seek an AAO from the Commission that would allow Ameren Missouri to defer the unrecovered fixed costs so they could be considered for possible recovery in the Company's next rate case. So on July 25, 2011 – less than three months after the Commission's Report and Order in Case No. ER-2010-0255 – Ameren Missouri filed its Application seeking an AAO.

One final background item merits discussion: whether the amounts at issue is this case are "fixed costs" or are, instead, "lost revenues/profits." Ameren Missouri believes that fixed costs and lost revenues are two sides of the same coin. Moreover, as it stated in its previously filed position statement, the Company believes the attempt by Staff, MIEC, and OPC to draw a sharp distinction between fixed costs and lost revenues is a false controversy based on a distinction without a difference.

[14] *In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company, d/b/a Ameren Missouri,* Case No. EO-2010-0255 (May 7, 2011). In a judgment issued May 21, 2012, the Circuit Court of Cole County, in an appeal taken by Ameren Missouri, determined that the Commission erred, as a matter of law, when it concluded that the AEP and Wabash sales did not reflect long-term partial requirements sales that are exempt from the FAC's definition of off-system sales. The court's judgment remands the Report and Order in Case EO-2010-0255 to the Commission for further action consistent with that judgment.

The evidence in this case establishes that in Case No. ER-2008-0318 the Commission allocated or assigned to Noranda's rate class a portion of the fixed costs that were included in Ameren Missouri's overall revenue requirement in that case. Because Noranda is the only customer in that rate class, that meant the Commission expected that the Company would recover those fixed costs from Noranda.

As noted earlier, fixed costs are only a portion of the overall revenue requirement that the Commission used to set Noranda's rates. That overall revenue requirement consisted of prudently incurred operating expenses, depreciation, taxes, and a reasonable return on the value of Ameren Missouri's property that was devoted to the public service. In addition, certain of the costs that make up the overall revenue requirement are fixed while other costs are variable. Variable costs, which largely consist of fuel and purchased power costs, vary with the amount of electricity that Ameren Missouri sells and can be avoided if the demand for electricity declines. Fixed costs, on the other hand, are those costs that must be incurred in order for the Company to be ready to provide service to all its customers. Unlike variable costs, fixed costs do not decrease or disappear altogether if a customer, like Noranda, significantly reduces the amount of electricity it uses.

Collecting rates is the way the Company recovers from customers the fixed and variable costs it incurs to provide electric service. Those rates are set based on the overall revenue requirement that the Commission determines is reasonable and on the allocation of that revenue requirement the Commission makes to the various rate classes. Consequently, although the rate revenues that Ameren Missouri expected to receive from Noranda as a result of the Commission's Report and Order in Case No. ER-2008-0318 were the means by which the Company would recover the costs of providing service, that does not mean that revenues are synonymous with costs, in general, or fixed costs, in particular. Under normal circumstances, however, rate revenues are the means by which a utility recovers its costs.

As for the attempt by the Company's adversaries to denominate the amount at issue in this case as "profits" or "lost profits," certainly the fair rate of return portion of the overall revenue requirement that was assigned to Noranda in Case No. ER-2008-0318 is a part of the fixed costs that Ameren Missouri seeks to defer in this case. But it is a very small part of those costs. The overwhelming majority of fixed costs consist of the other elements of the revenue requirement, e.g. costs like the cost of generation and transmission facilities, employee salaries and wages and the non-capital costs of the offices those employees work in and the equipment they use to perform their jobs. But to generally refer to the amount at issue in this case as "profits" or "lost profits" distorts the true nature of the Company's request beyond recognition.

III. ARGUMENT

A. The Provisions of the Uniform System of Accounts Give the Commission the Authority to Grant Ameren Missouri's Application

In Missouri, there is no statute or Commission rule that specifically mentions utility applications for AAOs or that prescribes legal or regulatory principles governing such applications. Section 393.140(4) and (8), RSMo,[15] respectively, authorize the Commission, on a case-by-case basis and at its discretion, to "prescribe, by order, forms of accounts, records, and memoranda" to be kept by utilities or "after hearing, to prescribe by order the accounts to which particular outlays and receipts shall be entered, charged or credited."[16] In addition, §393.140(4) generally vests the Commission with the authority to "prescribe uniform methods of keeping accounts, records and books" of utilities subject to its jurisdiction. But nowhere in the statutes or the Commission's rules are the standards that govern AAOs explicitly stated. In the absence of such standards, the Commission has developed its own set of regulatory principles to govern AAO applications by Missouri utilities.

The Commission did not develop the regulatory principles governing AAOs in a vacuum. Instead, decisions in past AAO cases show that the Commission was guided by, and wisely has chosen to closely follow, the accounting rules and principles that it has adopted under the authority conferred by

[15] Unless otherwise noted in this brief, all statutory references are to the Revised Statutes of Missouri.

[16] See *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n.*, 858 S.W.2d 806, 809-10 (Mo App. 1993). In this case the court declined to decide whether §393.140(4), which does not require a hearing, or §393.140(8), which requires a hearing, governs the Commission's issuance of AAOs. Because a hearing had been held in the case under appeal, the Court ruled that the party raising the issue had not been prejudiced by the Commission's concluding that §393.140(4) was the source for its authority to issue an AAO.

§393.140(4). The accounting rules and principles relevant to this case are those prescribed in 4 CSR 240-20.030, which directs electric utilities whose operations are subject to the Commission's regulatory jurisdiction to use the Uniform System of Accounts approved for major electric utilities by the Federal Energy Regulatory Commission ("USOA").

One of the most comprehensive discussions of how the Commission approaches utility requests for AAOs can be found in the Commission's 1991 Report and Order in consolidated Case Nos. EO-91-358 and EO-91-360 (the "Sibley Order").[17] Although the Sibley Order has no binding precedential effect on the Commission's decision in this case, that order is both useful and instructive because it describes the regulatory principles and accounting standards that the Commission traditionally has applied in AAO cases.

The Sibley Order contains several conclusions regarding AAOs that are relevant and applicable to Ameren Missouri's request in this case. First, the Commission concluded that its authority to grant AAOs is rooted in the provisions of the USOA.[18] Second, the Commission concluded that although the USOA generally requires a utility to offset costs incurred in one period against revenues from the same period,[19] in certain circumstances the USOA provides a means for a utility to deviate from that general rule and to defer certain items affecting net income from one period to a different period.[20] Third, the Commission found that because the deferral of items to a future period serves to improve financial results for the period in which the items otherwise would have been booked,[21] the USOA only allows deferrals of items that are extraordinary, unusual and unique, and non-recurring.[22] Finally, the Sibley Order concludes that although the USOA allows for the deferral of certain extraordinary items without Commission approval –

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[17] *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Authority Order Relating to Its Electrical Operations*, Case No. EO-91-358 (Dec. 20, 1991); *In the Matter of the Application of Missouri Public Service for the Issuance of an Accounting Authority Order Relating to Its Purchase Power Commitments*, Case No. EO-91-360 (Dec. 20, 1991).

[18] Sibley Order p. 3.

[19] *Id*. p. 4.

[20] *Id*. p. 3.

[21] *Id*.

[22] *Id*. p. 7.

i.e., those whose effect on a utility's net income is greater than five percent – a utility may still seek specific Commission authority to defer such items if the utility believes it would be prudent to do so.

> By seeking a Commission decision the utility would be removing the issue of whether the item is extraordinary from the next rate case. All other issues would still remain, including, but not limited to, the prudency of any expenditures, the amount of recovery, if any, whether carrying costs should be recovered, and if there are any offsets to recovery.[23]

In his rebuttal testimony in the current case, Staff witness Mark Oligschlaeger states that the Commission has established two criteria that must be satisfied in order for a Missouri utility to qualify for an AAO: (1) that the costs to be deferred "pertain to an event that is extraordinary, unusual and unique, and not recurring," and (2) that the financial effects of the extraordinary event are material.[24] Staff's position seems to be somewhat at odds with the Sibley Order, because in that case the Commission stated that in AAO cases "the primary focus is on the uniqueness of the event, either through its occurrence or its size."[25] In addition, as Mr. Oligschlaeger acknowledged during cross-examination, his position also is somewhat at odds with the provisions of the USOA itself, which allows for the deferral of non-material items with Commission permission.[26] For purposes of this case, however, it is irrelevant whether the Sibley Order or the USOA establish two criteria for AAOs or just one because the evidence in this case clearly shows that the amount Ameren Missouri seeks to defer satisfies both of Staff's criteria: i.e., the item to be deferred is the result of an extraordinary event and it is material.

Both the Company and the Staff appear to agree that, consistent with the Sibley Order, the accounting principles contained in the USOA govern Ameren Missouri's request to defer the item at issue in this case through an AAO.[27] In her rebuttal testimony, Ms. Barnes describes and discusses the provisions of the USOA that apply in this case. The provisions of the USOA she specifically discusses are: (1) the description of Account 182.3, Other Regulatory Assets; (2) the definition of Regulatory

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[23] *Id*.
[24] Staff Exhibit 3, p. 6, lns. 7-10.
[25] Sibley Order p. 8.
[26] Transcript p. 164, lns. 8-17.
[27] Ameren Exhibit 3, p. 3, lns. 10-15.

Assets and Liabilities; and (3) General Instruction No. 7, which defines and prescribes the appropriate accounting and regulatory treatment of extraordinary items.[28]

Under the USOA, regulatory-created assets that relate to ratemaking and that are not includible in other accounts are to be booked to Account 182.3, Other Regulatory Assets. The USOA's description of that account states, in relevant part, as follows:

> A. This account shall include the amounts of regulatory-created assets, not includible in other accounts, resulting from the ratemaking actions of regulatory agencies. (See Definition No. 30.)
>
> B. The amounts included in this account are to be established by those charges which would have been included in net income determinations in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services. . . The amounts recorded in this account are generally to be charged, concurrently with the recovery of the amounts in rates, to the same account that would have been charged if included in income with incurred . . .
>
> C. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.
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> D. The Records supporting the entries to this account shall be kept so that the utility can furnish full information as to the nature and amount of each regulatory asset included in this account, including justification for inclusion of such amounts in this account.

The USOA's definition of "Regulatory Assets and Liabilities," which is the "Definition No. 30" that is parenthetically referred to in the description of Account 182.3 quoted above, states:

> Regulatory Assets and Liabilities are assets and liabilities that result from rate actions of regulatory agencies. Regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses that would have been included in net income determinations in one period under the general requirements of the Uniform System of Accounts but for it being probable:
>
> A. that such items will be included in a different period(s) for purposes of developing the rates the utility is authorized to charge for its utility services; or
>
> B. in the case of regulatory liabilities, that refunds to customers, not provided in other accounts, will be required.

[28] *Id*.

General Instruction No. 7, which is entitled "Extraordinary Items" and which prescribes the criteria for categorizing items affecting profit and loss as "extraordinary," states, in relevant part, as follows:

> It is the intent that net income shall reflect all items of profit and loss during the period with the exception of prior period adjustments as described in paragraph 7.1 and long-term debt as described in paragraph 17 below. 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. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.) To be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary.

Interpreted together – as they must be – these three provisions reveal several important principles regarding the mechanism the USOA has created for the deferral of extraordinary items. Those principles must be clearly understood in order to properly evaluate and rule on Ameren Missouri's request for an AAO, include the following:

- Although the general rule is that items of profit and loss that occur in the same period must, for accounting and regulatory purposes, be reflected in that period for purposes of determining earnings, the USOA has created an exception to that rule for extraordinary items and has created a special accounting mechanism for dealing with such items.

- The USOA created a mechanism to defer extraordinary items so that they can be considered for possible inclusion in rates in a future period with one purpose in mind: to enable a utility to protect its earnings from the effects of extraordinary events. If that were not the purpose then there would be no reason for the USOA to include General Instruction No. 7, which specifically carves-out from the general rule an exception for the financial impacts of extraordinary events.

- Expenses, revenues, gains, and losses are all legitimate candidates for deferral to Account 182.3. Indeed, those very words are used in the USOA's definition of regulatory assets and liabilities. In addition, General Instruction No. 7 defines "extraordinary items" to include "all items of profit and loss," and the description of Account 182.3 similarly speaks in terms of all items "which would have been included in net income." Indisputably, both revenues and expenses, including fixed costs, are items that are included in a utility's net income. Equally indisputably, the failure to collect revenues or recover fixed costs would each contribute to a utility's financial loss.

- In order to qualify as "extraordinary" under the USOA an event or transaction must satisfy each of the four criteria specified in General Instruction No. 7. The event or transaction must be: (1) of unusual nature and infrequent occurrence; (2) significant effect; (3) abnormal and significantly different from the ordinary and typical activities of the utility; and (4) not reasonably be expected to recur in the foreseeable future.

- An item is considered to be significant under the USOA, and therefore eligible for deferral, if its effect on a utility's net income by as little as five percent. In fact, the USOA specifically provides for the deferral of events whose financial effect is less than five percent of net income if the utility first obtains the Commission's permission.

- The USOA contemplates that extraordinary items deferred to Account 182.3 can – and should – be included in the revenue requirement used to develop a utility's rates in the future. This is clear from (1) the language of subsection B of the description of Account 182.3, which specifically states that the amounts that are to be included in that account are those items that "would have been included in net income . . . in the current period under the general requirements of the Uniform System of Accounts but for it being probable that such items will be included in a different period(s) for purposes of developing rates that the utility is authorized to charge for its utility services," and (2) almost identical language that appears in subsection A of the USOA's definition of Regulatory Assets and Liabilities.

One additional thing also is clear from the provisions of the USOA discussed *supra*: the USOA fully authorizes the Commission to grant Ameren Missouri the AAO it seeks in this case if the Commission chooses to do so, regardless of whether the Company's Application is characterized as a request to defer unrecovered fixed costs or unrecovered revenues. Ms. Barnes testified that the USOA "contemplates deferral of revenues . . . because the purpose of a deferral is to preserve earnings that would otherwise be affected by an extraordinary event, and revenues are a component of earnings."[29] During the hearing Mr. Oligschlaeger also testified in support of the proposition that the USOA gives the Commission the authority to defer revenues that it was unable to collect as a result of an extraordinary event.[30] In fact, Mr. Oligschlaeger specifically stated that Staff has never taken the position that it is unlawful for the Commission to defer lost revenues to Account 182.3.[31] So regardless of whether the amount at issue is characterized as "lost revenue" or "fixed costs," the USOA authorizes the Commission to grant Ameren Missouri the relief it is requesting.

[29] *Id*. p. 7, lns. 6-8.
[30] Transcript p. 165, lns. 16-23.
[31] *Id*. p. 158, lns 20-24.

B. The January 2009 Ice Storm And the Resulting Curtailment of Noranda's Smelter Operations Each Qualify as an Extraordinary Event Under the USOA

On January 26, 2009, a Canadian cold front struck Missouri bringing with it snow, sleet, and freezing rain.[32] Although these conditions were concentrated in Southeastern Missouri, over the three day duration of the storm the sleet conditions also extended to parts of Central and Eastern Missouri.[33] More than two and one-half inches of ice covered most of Southeast Missouri,[34] which caused line loadings – i.e., the accumulation of ice on the Company's aerial transmission and distribution lines – that greatly exceeded the design limits of those facilities.[35] The weight of the sagging, ice-covered lines caused utility poles to break and the lines those poles were supporting to fall to the ground. That caused service outages of various durations for more than 36,000 of Ameren Missouri's customers.[36] Altogether, the damage caused by the January 2009 ice storm required the Company to reconstruct or replace 3,771 utility poles, 659 transformers, and more than 278 miles of aerial transmission and distribution cable.[37]

In its written report to Staff regarding that ice storm, Ameren Missouri concluded that "[t]he severe ice storm which began January 26, 2009, resulted in the most significant damage to the UE distribution system in history."[38] That report went on to state that the storm presented the Company with "many logistical challenges we had never faced in the past."[39] Its own written report shows that Staff shared Ameren Missouri's assessment that the January 2009 ice storm was extraordinary compared to other storms the Company had experienced.

> Over two and one-half inches of ice covered most of the southeast portion of the state. Heavy ice accumulation loading on lines caused over 3,800 Ameren UE transmission and distribution poles to break. (One measure of the severity of the damage to an electric utility system is the number of poles replaced per 1000 outages. For this ice storm, over 100 poles per 1000 outages was experienced from this ice storm. In contrast, the summer

[32] Ameren Exhibit 1, p. 3, lns 5-6.
[33] *Id.* lns. 7-8.
[34] *Id*. p. 4, lns. 1-2.
[35] *Id*. p. 5, lns. 5-7.
[36] *Id*. p. 10, lns. 7-8.
[37] *Id.* lns. 11-22.
[38] *Id*, p. 7, lns. 9-11.
[39] *Id.* lns. 14-15.

> storm of 2006, which affected approximately 645,000 AmerenUE customers had a 2 pole per 1000 outages average.[40]

Staff's report further noted that "[s]everal issues within this severe weather event presented AmerenUE with challenges it had not encountered previously," and that "[t]he intensity and geographical concentration of the outages was more extensive that what the Company had experienced in the past."[41]

Noranda, Ameren Missouri's largest customer, was particularly hard hit by the January 2009 ice storm. The storm damaged transmission lines belonging to Associated Electric Cooperative, Inc., which transmit electricity from Ameren Missouri's system to Noranda. The damaged lines caused an outage that affected approximately 75 percent of Noranda's smelter capacity.[42] As a result of that outage, Noranda was forced to close two of its three pot lines, and the remaining pot line lost 46 of its reduction pots.[43] Molten aluminum "froze" throughout the smelter rendering much of the facility inoperable. Ultimately, the "frozen" aluminum had to be jack-hammered out of its pots in order to restore the smelter to service.[44] In total, the power outage caused by the January 2009 ice storm rendered 398 of Noranda's 528 reduction pots inoperable.[45]

David Wakeman, Ameren Missouri's Vice President of Energy Delivery – Distribution Services, described the nature of the damage Noranda suffered as follows:

> The metal in the reduction pots froze when the power supply was lost. This required many of the pots to be removed by jackhammering so they could be replaced. As the International Aluminum Institute (AIA) explains "the smelting process is continuous. A smelter cannot easily be stopped and restarted. If production is interrupted by a power supply failure of more than four hours, the metal in the pots will solidify, often requiring an expensive building process.[46]

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[40] *Id.* lns. 21-30.
[41] *Id*. p. 7, ln. 32 – p. 8, ln. 2.
[42] *Id*. p. 15, ln. 15 – p. 16, ln. 9.
[43] *Id*. p. 16, lns 12-15.
[44] Ameren Exhibit 2, p. 3, lns. 13-23.
[45] Ameren Exhibit 1, p. 16, lns. 12-16.
[46] *Id*. p. 16, ln. 26 – p. 17, ln. 3.

Mr. Wakeman also stated that it took fourteen months to make repairs following the ice storm, which meant that Noranda's demand for electricity did not return to pre-ice storm levels until April 2010.[47]

Mr. Wakeman further testified that it was improper and irrelevant for Staff witness Lena Mantle to rely on definitions from Merriam-Webster.com for her analysis of whether the January 2009 ice storm was "extraordinary" for purposes of this case. He pointed out that the USOA's General Instruction No. 7 contains the relevant definition, and that based on the four criteria stated there both the January 2009 ice storm and the 14-month curtailment of Noranda's smelting operations, and the loss of fixed cost support during that period, qualify as extraordinary.[48]

Ms. Mantle's error is understandable in light of her admission that at the time she filed her rebuttal testimony in this case she was not familiar with any of the provisions of the USOA that apply to AAOs.[49] When confronted with the USOA's definition during cross-examination, however, she admitted that she, too, now believes that the January 2009 ice storm and the resulting loss of Noranda's fixed cost support each satisfy all of the criteria found in General Instruction No. 7.[50] With that admission, all parties who expressed an opinion on the issue fully agree that the events giving rise to Ameren Missouri's Application in this case qualify as extraordinary under the USOA.[51]

C. **The Fixed Costs that Ameren Missouri Was Unable to Collect from Noranda During the 14-Month Period Following the January 2009 Ice Storm Satisfy Both of the Commission's Standards for Granting AAOs**

As noted in Section I of this brief, Mr. Oligschlaeger testified that based on prior Commission cases there are two criteria that must be met in order for a Missouri utility to qualify for an AAO. First, the utility must demonstrate that an item it seeks to defer pertain to an event that is extraordinary, unusual

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47 *Id*. p. 17, lns. 7-9.
48 *Id*. p. 4, lns. 1-15; p. 18, lns. 13-17.
49 Transcript p. 123, lns. 6-12.
50 *Id*. p. 126, ln. 20 – p. 129, ln. 7.
51 Neither MIEC's witness nor the witness for the OPC stated an opinion as to whether the January 2009 ice storm or the 14-month loss of Noranda's rate revenues qualifies as extraordinary under the applicable standard.

and unique, and non-recurring.[52] Second, the utility must show that the financial effect of that item is material.[53] Ameren Missouri's Application satisfies both those criteria.

As noted in the preceding section of this brief, all parties who expressed an opinion on the issue agree that the January 2009 ice storm and the 14-month curtailment of Noranda's smelting operations satisfy all four of the criteria for an extraordinary event that are contained in the USOA's General Instruction No. 7. In addition, the evidence conclusively demonstrates that each of those events was of an "unusual nature and infrequent occurrence," was of "significant effect" to Ameren Missouri financial results, was "abnormal and significantly different from the ordinary and typical activities" of the Company, and that both events were of a type that would not "reasonably be expected to recur in the foreseeable future."

Ameren Missouri also presented evidence on the second of the Commission's two conditions, and that evidence was not controverted by any other party. General Instruction No. 7 establishes a materiality threshold of five percent of a utility's net earnings. Ms. Barnes testified that the amount of unrecovered fixed costs at issue in this case represents nearly 8.5 percent of the Company's net income, even when the off-system sales revenues from AEP and Wabash is included in the calculation.[54] MIEC's witness Maurice Brubaker sought to minimize the financial impact of the loss of Noranda's fixed cost support, noting that it "is less than 60 basis points on ROE [return on equity]."[55] But, as Ms. Barnes pointed out in her surrebuttal testimony, in past rate cases other members of Mr. Brubaker's firm have presented testimony that made clear that they do not share Mr. Brubaker's characterization of 60 basis points as insignificant.[56]

D. <u>**The Fixed Costs that Ameren Missouri Was Unable to Collect from Noranda as a Result of the January 2009 Ice Storm Represents the Type of Financial Loss that Can and Should Be Deferred Under the USOA**</u>

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[52] Staff Exhibit 3, p. 6, lns. 7-10.
[53] *Id.*
[54] Ameren Exhibit 3, p. 6, lns. 11-16.
[55] MIEC Exhibit 1, p. 7, lns. 19-20.
[56] Ameren Exhibit 3, p. 14, lns. 3-18.

As noted in the previous discussion of the provisions of the USOA that apply to Ameren Missouri's Application, the definition of Regulatory Assets and Liabilities specifically states that such assets can arise from "revenues, expenses, gains, or losses." Because the Company was unable to collect a normal level of rate revenues from Noranda during the 14-month period that company curtailed its smelting operations, nearly $36 million in fixed costs, which the Commission assigned to Noranda in Case No. ER-2008-0318, went uncollected as well. So regardless of whether that amount is viewed as lost revenue or unrecovered fixed costs, the USOA still permits it to be deferred as a regulatory asset. In addition, because during that 14-month period Ameren Missouri was unable to shift that fixed cost burden by increasing rates to other customers, no other customers paid those costs on Noranda's behalf.[57] That means that the Company's inability to recover those fixed costs also qualifies as a financial loss, which the USOA also specifically permits to be deferred to a regulatory asset.

It is also critical to understand that Ameren Missouri's Application does not seek to defer "unearned profits" or to recover revenues for services that were never provided. To conclude otherwise denies the "regulatory compact" and the significant difference between utility rates and the prices that competitive businesses charge. Under the regulatory compact, utilities, like Ameren Missouri, are given a legal monopoly to serve a defined territory. In exchange for that monopoly, however, the utility looses the ability to set its own prices for the service it provides. Instead, the authority to set utility rates is vested in federal and state regulatory agencies, which are required to set rates that both allow the utility to cover all of its prudently-incurred costs of providing service plus provide a fair rate of return. Although that rate of return is not guaranteed, when setting rates regulators must give the utility a reasonable opportunity to earn a fair rate of return.[58] That same obligation extends to other policies and actions by regulators, such as policies governing the circumstances under which utilities are allowed to defer extraordinary items so that they can be considered for recovery in future rate cases. Regulatory policies that do not allow the

[57] Transcript p. 178, lns. 12-21.
[58] *Id*. p. lns. 2-9.

utility to recover its prudently incurred costs of providing service and provide a reasonable opportunity to earn a fair rate of return violate the regulatory compact.

In its recent Report and Order in Case No. GU-2011-0392,[59] the Commission denied the request by the Missouri Gas Energy Division of Southern Union Company ("MGE") for authority to defer revenues lost as a result of a devastating tornado that struck the Joplin, Missouri, area in May 2011. But the portion of that Report and Order ("MGE Order") that discusses the revenues that MGE lost as a result of an extraordinary event fundamentally misinterprets and mischaracterizes the nature of a utility's approved rates and what those rates represent and are designed to achieve. For example, the MGE Order equates lost revenue – or "ungenerated revenue" as it is denominated in the order – solely with "a reduced opportunity for profit while ignoring the costs saved by providing service."[60] The order further states that "[e]ven if there were a drop in revenue, it would not prevent recovery of fixed costs,"[61] and continues by stating "[u]ngenerated revenue never has existed, never does exist, and never will exist. Revenue not generated from service not provided, represents no exchange of value. There is neither revenue nor cost to record in the current period nor in any other."[62] And in its conclusion regarding MGE's request to defer lost revenues, the Commission states:

> An AAO only determines the period for recording an item but the Company seeks an AAO to create the item itself by layering fiction upon fiction. To issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company [MGE].[63]

All of the statements quoted above ignore the difference between utility rates and the prices charged by an unregulated business. Those statements also ignore how rates are set for a regulated utility, what those utility rates represent in terms of cost recovery, and how a sudden, unexpected, and substantial

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[59] *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)* (February 24, 2012).
[60] MGE Order,, p. 22.
[61] *Id.*
[62] *Id*. p. 25.
[63] *Id.*

drop in rate revenues affects a utility and its ability to recover its prudently incurred costs of providing service.

Utility rates are set to allow the utility to recover its "cost of service," which is defined as the sum of reasonable and prudent operating expenses, depreciation expense, taxes, and a reasonable rate of return on the net value of the utility's property that is devoted to the public service.[64] In rate case parlance, a utility's overall cost of service is referred to as the "revenue requirement," and in a general rate case rates are set so that the revenues derived from rates will equal the utility's revenue requirement"[65] Certainly the rate of return – the means by which a utility has the opportunity to earn a profit – is part of the revenue requirement used to set a utility's rates, but it is only a small part. Operating expenses, depreciation, and taxes make up the overwhelming majority of the revenue requirement for any utility. In addition, even the rate of return used to set rates is not pure profit. Instead, it, too, consists of certain costs the utility incurs to provide service: i.e., the interest payments the utility owes to its bondholders and preferred stockholders.[66]

After a utility's revenue requirement has been determined, the Commission next decides how that revenue requirement will be allocated or assigned to each of the utility's various rate classes so that rates for each class can be calculated. That process is known as rate design.[67] The costs that are assigned to each rate class include all of the various elements of the utility's revenue requirement, including fixed costs.[68] Through the rate design process the Commission, explicitly or implicitly, obligates each customer class to pay its respective fair share of the utility's overall costs of providing service.

Mr. Oligschlaeger confirmed that the Commission followed the rate design process described in the preceding paragraph when it set rates in Case No. ER-2008-0318.[69] In that case, Noranda was the

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[64] Transcript p. 171, ln. 19 – p. 172, ln. 1.
[65] *Id*. p. 175, ln. 21 – p. 176, ln. 5.
[66] *Id*. p. 10-14.
[67] *Id*. p. 176, ln. 6 – p 177, ln. 4.
[68] *Id*, p. 176, lns. 15-22.
[69] *Id*. p. 177, lns. 5-11.

sole customer in Ameren Missouri's Large Transmission rate class.[70] Therefore, when it assigned a portion of the Company's overall revenue requirement to the Large Transmission rate class the Commission intended that Ameren Missouri would recover all those costs – including fixed costs – from Noranda.[71]

Fixed costs are just what the name suggests: they are costs that do not vary in amount with the amount of energy an electric utility sells.[72] They are, in effect, the costs a utility must incur in order to be ready to provide service if a customer decides to hook up to the system and begin using electricity. Examples of fixed costs are the costs of a utility's generation, transmission and distribution facilities, its business offices, the salaries and wages of its employees, and many of the non-capital costs the utility incurs to maintain its assets. Most fixed costs are not "customer specific," i.e., they are not directly attributable to a particular customer or customer class but, instead, represent the utility's overall cost of providing service to all customers. And fixed costs don't go away – i.e. they cannot be "saved" – if a particular customer or customer class reduces or discontinues service.

Variable costs are different. Variable costs have a direct relationship to the amount of energy a utility sells, so if a customer reduces its energy consumption or ceases to take service altogether variable costs can be reduced or "saved."[73] Fuel and purchased power expenses make up the largest portion of a utility's variable costs.

When Noranda was forced to curtail its smelting operations following the January 2009 ice storm the rate revenues Ameren Missouri received from Noranda dropped significantly – well below the level anticipated when the Commission set rates in Case No. ER-2008-0318. But the sudden decline in Noranda's demand for electricity did not reduce Ameren Missouri's fixed costs of providing service.[74] Consequently, even though it recorded fewer revenues during the fourteen months Noranda's operations

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[70] *Id*. lns 17-22.
[71] *Id*. p. 177, ln. 12 – p. 178, ln. 1.
[72] Staff Exhibit 3, p. 13, lns. 10-11.
[73] *Id*. lns. 7-10.
[74] *Id*.

were curtailed the Company continued to record all of the fixed costs that the Commission assigned to Noranda as part of the rate design adopted in Case No. ER-2008-0318. But because rates cannot be changed between rate cases, Ameren Missouri had no opportunity to shift to other rate classes any or all of the fixed cost recovery obligation that the Commission assigned to Noranda. Because no other customer paid any of the fixed costs that Noranda was supposed to pay, Ameren Missouri's shareholders were forced to step in and absorb those costs, a consequence that is reflected in the reduced earnings the Company reported beginning in February 2009.[75]

Contrary to the Commission's findings in the MGE Order, the fixed costs at issue in this case do represent an "exchange of value" because all customers, including Noranda, benefitted from the availability of electric service following the January 2009 ice storm. And fixed costs are what enable the Company to make service available to customers. All the fixed costs that were allocated to Noranda were recorded even though the amount of electricity Noranda used declined significantly. Ameren Missouri's inability to recover Noranda's portion of those fixed costs, in turn, caused the Company to suffer a financial loss which resulted in a reduction in earnings. That loss will be made permanent unless the Commission grants the Company's request for an AAO in this case. If Ameren Missouri's shareholders are required to bear all of the fixed costs that had been allocated to Noranda, that will represent "a reduced opportunity for profit," but AAO's are intended to address that very issue: to protect utilities from earnings shortfalls caused by an extraordinary event.[76]

E. **Ameren Missouri Timely Filed Its Request for an AAO**

The Company's request for an AAO is just the latest link in a chain of events that began in January 2009, and although Ameren Missouri's Application was not filed until July 2011 it was timely

[75] Transcript p. 178, lns. 12-21.

[76] *See* Order Approving and Incorporating Unanimous Stipulation and Agreement, *In the Matter of the Application of The Empire District Electric Company for the Issuance of an Accounting Authority Order Relating to its Electrical Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-2.020(2)* (December 7, 2011), p. 3 ("The AAO technique protects the utility from earnings shortfalls . . .")

because the filing occurred within a short time after the Company first became aware that its efforts to mitigate the financial impact of that storm would be unsuccessful.

The Commission issued its Report and Order in Case No. ER-2008-0318 on January 27, 2009, in the midst of the January 2009 ice storm. In addition to finding that the Company should be allowed to increase the revenue it collects from customers by approximately $162.6 million,[77] the Commission also determined that Ameren Missouri should be allowed to implement an FAC, which would allow the Company to track and recover between rate case changes in its base cost of fuel and purchased power.[78] One feature of the FAC required Ameren Missouri to include all revenues derived from the off-system sale of electricity, as defined in the FAC tariff sheets, in the periodic rate adjustments authorized by the FAC. These off-system sales revenues were to be used to offset increases in fuel and purchased power costs, thereby minimizing customer rate increases attributable to those costs[79]

When Ameren Missouri learned that Noranda would be forced to curtail operations because of damage caused by the ice storm, the Company quickly filed an application for rehearing, which asked the Commission to revise the terms of the FAC. Those revisions would have allowed Ameren Missouri, during the period Noranda's electric usage was reduced, to retain a portion of its off-system sales revenues equal to the fixed costs it would be unable to collect from Noranda. But the Commission denied the application for rehearing without considering the merits of the Company's request, stating its reasons for that decision as follows:

> If the Commission were to grant AmerenUE's application for rehearing it would have to set aside the approved stipulation regarding the fuel adjustment clause, reopen the record to take evidence on the appropriateness of the proposed change [to the FAC tariff sheets], and make a decision before the March 1, 2009 operation of law date. Such action is obviously impossible.[80]

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[77] Report & Order, *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service* (February 6, 2009), pp. 4-5.

[78] *Id*. pp. 57-77.

[79] Ameren Exhibit 2, p. 5, lns. 3-13.

[80] Order Denying AmerenUE's Application for Rehearing, *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service* (February 19, 2009), p. 2.

Because the Commission's order denying rehearing prevented Ameren Missouri from revising its FAC tariff sheets, the Company desperately needed an alternate strategy that would allow it to mitigate the substantial financial loss it otherwise would suffer due to the loss of the fixed costs it was supposed to collect from Noranda. The strategy Ameren Missouri decided on involved making long-term requirements power sales to AEP and Wabash.[81] Under the terms of the FAC, such sales were not included within the definition of off-system sales. That meant that Ameren Missouri would be able to retain the revenues from those sales and use those revenues to offset the financial effects of the loss of fixed costs from Noranda.[82] For more than two years following the January 2009 ice storm it appeared the Company's strategy would be successful.

But the Commission's Report and Order in Case No. EO-2010-0255[83] changed everything. In that order the Commission found that the AEP and Wabash sales were not long-term requirements sales, as Ameren Missouri believed, but were instead off-system sales as defined in the Company's FAC tariff sheets. Based on that finding, the Commission ordered Ameren Missouri to pay to its customers 95 percent of the revenues it had received from AEP and Wabash. So beginning in May 2011, Ameren Missouri was forced once again to develop a strategy to deal with financial impacts of the loss of the fixed costs it had expected to collect from Noranda.

That new strategy required Ameren Missouri to request an AAO, so the Company filed its Application in the current case on July 25, 2011, a date that was less than three months after the effective date of the Commission's Report and Order in Case No. EO-2010-0255.

Despite the sequence of events described above, both Staff and MIEC argue that the Company's Application is untimely because it was filed more than two and one-half years after the January 2009 ice storm, well after Ameren Missouri closed its books for the 2009 and 2010 fiscal years.[84] Ultimately,

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[81] Ameren Exhibit 2, p. 5, lns. 5-9.

[82] *Id*. lns. 11-13.

[83] *In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company, d/b/a Ameren Missouri* (May 7, 2011).

[84] Staff Exhibit 3, p. 8. lns. 9-23; MIEC Exhibit p. 4, lns. 10-18.

however, the Commission should reject the argument advanced by Staff and MIEC because it is contrary to both the letter and spirit of the USOA.

Mr. Oligschlaeger acknowledged during cross-examination that there is nothing in the USOA that specifies when a utility must file an application for an AAO, and that, similarly, no Commission rule prescribes a filing deadline.[85] He added, however, that he believes the USOA requires a filing in the "current period," which he defines as the period in which the alleged extraordinary event occurred.[86] He further stated that he believes the USOA also requires the Commission to grant the utility's request in the same period, and believes it would be inappropriate for the Commission to issue an order granting an AAO in a subsequent period even if the utility filed its application seeking such relief in the period in which the extraordinary event occurred.[87]

From a purely literal standpoint, Mr. Oligschlaeger's arguments appear to have some merit; after all, the USOA includes the phrase "current period" in both the description of Account 182.3 as well as in General Instruction No. 7. But on closer analysis his literal interpretation of the phrase "current period" is inconsistent both with the overall purpose of those portions of the USOA that pertain to AAO applications as well as with past Commission decisions dealing with such applications.

For example, as the Commission observed in its final order in Case No. EU-2011-0387, which is a recent AAO case involving The Empire District Electric Company, the purpose of an AAO is to protect a utility from earnings shortfalls attributable to extraordinary events. That objective cannot be achieved if the Commission adopts the overly-literal interpretation of the USOA proposed by Mr. Oligschlaeger and MIEC.

In addition, if, as Mr. Oligschlaeger suggests, the "current period" in which Ameren Missouri was required to request an AAO is 2009, an AAO application in that period would have been impossible. Although the ice storm that is central to this case occurred in 2009 and the actual loss of fixed cost

[85] Transcript, p. 185, lns. 6-17.
[86] *Id*. lns. 9-11.
[87] *Id.* p. 181, ln. 5 – p. 182, ln. 9.

support from Noranda occurred over a 14-month period that included parts of 2009 and 2010, Ameren Missouri could not have applied for an AAO in either of those years because it was not yet suffering any material, adverse financial effects from either the storm or the loss of Noranda's fixed costs. During both those years, Ameren Missouri believed it was successfully mitigating its losses by making long-term requirements power sales to AEP and Wabash. It wasn't until May 7, 2011, the effective date of the Commission's Report and Order in Case No. EO-2010-0255, that the Company first learned that its mitigation efforts would be unsuccessful and that, without further action, it would permanently suffer the adverse financial effects of loss of Noranda's fixed costs following the January 2009 ice storm.

Mr. Oligschlaeger's interpretation also would deny a utility the earnings protection afforded by the USOA if an extraordinary event occurred so late in an accounting period that it would be impossible to both file an application for an AAO and have the Commission rule on that application within that period. Such a result is fundamentally unfair, is not supported by any language in the USOA, and is inconsistent with past decisions of the Commission. Perhaps recognizing this, Mr. Oligschlaeger suggested that one way to avoid such a result would be for the utility to defer extraordinary items before the Commission issues an order authorizing such action.[88] But when questioned about his proposal, Mr. Oligschlaeger admitted he was "not absolutely certain" that a utility could unilaterally take such an action under current accounting rules, which include, but are not limited to, the USOA, and that, ultimately, the final decision would rest with the utility's outside auditors.[89]

Finally, Mr. Oligschlaeger's proposed interpretation of the phrase "current period" is inconsistent with past Commission decisions where the authority to defer items through an AAO was granted in a different accounting period than the one in which the extraordinary event occurred. In her surrebuttal testimony, Ms. Barnes discussed a previous case involving Ameren Missouri, where the Company filed an AAO application in November 2007 that sought authority to defer extraordinary items caused by a January 2007 ice storm. The Commission did not issue its order granting that AAO until May 2008, well

[88] *Id*. p. 182, ln. 10 – p. 183, ln. 15.
[89] *Id*. p. 183, lns. 6-15.

after Ameren Missouri closed its books for 2007.[90] MGE's recent AAO case is another example that that shows that the Commission has not adopted Mr. Oligschlaeger's literal interpretation of the USOA. In that case, the tornado that gave rise to MGE's application for an AAO occurred in May 2011, but the Commission did not issue its order granting the application until late February 2012.[91]

A more reasonable interpretation of the phrase "current period" is that it refers to the period in which a utility begins to experience the adverse effects of an extraordinary event. That, after all, is when a deviation from the USOA's general rule – i.e., that revenues and expenses from the same period should be offset against one another to determine net income – becomes necessary if a utility is to be protected from an earnings shortfall. For Ameren Missouri, that period was 2011, the very year in which the Company filed its Application. Even Mr. Oligschlaeger admitted that although the chain of events giving rise to Ameren Missouri's request for an AAO began with the January 2009 ice storm, the Company didn't learn it would not otherwise be able to recover Noranda's fixed costs until the Commission issued its order in Case No. EO-2010-0255.[92] In addition, Ms. Barnes confirmed that the entries made in Ameren Missouri's books in 2011 and 2012, as a result of that order, relate to the loss of Noranda's fixed costs in 2009 and 2010. She further testified that if the Commission orders further refunds of the AEP and Wabash revenues at the conclusion of Ameren Missouri's pending prudence review,[93] the financial effects of the loss of Noranda's fixed costs will extend beyond 2012 and be recorded on the Company's books even further into the future.[94]

Those provisions of the USOA that are relevant to this case are intended to give utilities an opportunity to protect themselves from the adverse financial impacts of extraordinary events. That means that it is the period in which the utility records those financial impacts that is of paramount importance. The only interpretation of the phrase "current period" that is consistent with that purpose is the

[90] Ameren Exhibit 3, p. 10, lns. 2-13.
[91] MGE Order pp. 7-8, 27.
[92] Transcript, p. 184, lns. 3-20.
[93] *In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri*, Case No. EO-2012-0074.
[94] *Id.* p. 112, ln. 18 – p. 119, ln. 2.

interpretation proposed by Ameren Missouri. The alternate interpretation proposed by Staff and MIEC, especially under the facts of this case, is both overly literal and, ultimately, punitive. More importantly, though, Staff's and MIEC's proposed interpretation fails to achieve the result intended by the USOA, which contemplates that a utility will be able to defer the adverse financial effects of extraordinary events from one period to another and that recovery of those effects can, and will, be allowed in future rates.

F. **<u>Miscellaneous Objections to Ameren Missouri's AAO Application Made by Staff, MIEC, and OPC are Unfounded and Invalid</u>**

Staff, MIEC, and OPC raise a number of miscellaneous objections to Ameren Missouri's request for an AAO in this case. As the following discussion shows, however, none of those objections has merit.

<u>Objection 1: An AAO Cannot Be Granted for Rate Revenues that a Utility is Unable to Collect from Its Customers</u>

Some or all of Ameren Missouri's opponents argue that it would be inappropriate for the Commission to grant Ameren Missouri the authority to defer the fixed cost portion of the rate revenues the Company was unable to recover from Noranda during the 14-month period that company curtailed its smelting operations. The parties base this argument on their belief that the USOA does not allow for the deferral of lost rate revenues.

That argument is demonstrably wrong. First and foremost, as was discussed earlier in this brief, the relevant portions of the USOA either explicitly or implicitly provide for the deferral of revenue. Revenue is specifically mentioned in the USOA's definition of "Regulatory Assets and Liabilities," and revenue is included within the meaning of the phrases "items of profit and loss" and amounts "which would have been included in net income" that are found in General Instruction No. 7 and in the USOA's description of Account 182.3, respectively.

In her surrebuttal testimony, Ms. Barnes explained the reason the USOA provides for the deferral of both expenses and revenues, and why that rationale is particularly compelling with respect to the Company's Application:

> The reason the USoA contemplates deferral of revenues is because the purpose of a deferral is to preserve earnings that would otherwise be affected by an extraordinary

> event, and revenues are a component of earnings. A utility's revenues affect net earnings because revenues are the means by which a utility collects from its customers the costs it incurs to provide service. If because of an extraordinary event like the 2009 ice storm a customer the size of Noranda is significantly curtailed or out of service for an extended period of time, the utility loses a significant portion of the revenues expected by both the Company and the ratemaking process to help pay the cost of providing service. That is because the fixed costs of providing service do not go away when a large customer is significantly curtailed or out of service. And if customer-generated revenues are not available to pay those fixed costs, the burden shifts to the Company's shareholders, who pay those unrecovered costs through reduced earnings.
>
> When the January 2009 storm occurred resulting in the loss of power to Noranda, the result was not the same as if the same event would have impacted another customer. Sales to Noranda constitute over 10 percent of the Company's system-wide native load sales. Sales to Noranda are approximately equal to the sales of all of the rest of the Company's industrial customers combined. Noranda is such a large and significant customer that it is in its own rate class. That means that the Company was unable to recover all of the fixed costs allocated to that entire rate class. Between rate cases it was impossible for Ameren Missouri to shift any part of the costs allocated to Noranda's rate class to any or all of the other rate classes, thereby making it impossible to recover those costs at all.[95]

In its final order in Case No. EU-2011-0387, the Commission itself recognized that the "AAO technique protects the utility from earnings shortfalls."[96] A utility's net income is adversely affected by unexpected declines in revenues in the same manner it is if expenses are unexpectedly increased.[97] That's because for utilities a decline in revenue represents a reduction in the amount of fixed cost support the utility was supposed to receive from the rates revenues it receives from its customers. Therefore, if the objective of the USOA is to protect utilities from earnings shortfalls due to extraordinary events, then it is imperative that both revenues and expenses qualify for deferral via an AAO. After all, as Ms. Barnes explained, revenues are the only vehicle that is available to a utility to collect from its customers the costs it incurs to provide service, and if the ability to collect a significant amount of costs is interrupted that will have a direct and adverse effect on earnings.

In addition, its own rules show that the Commission believes the USOA allows utilities to defer lost revenue. Mr. Oligschlaeger acknowledged that the rule dealing with Demand-Side Programs

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[95] Ameren Exhibit 3, p. 7, ln. 6 – p. 8, ln. 3.
[96] *Order Approving and Incorporating Unanimous Stipulation and Agreement*, p. 3.
[97] Ameren Exhibit 3, p. 7, lns. 5-17.

Investment Mechanism, 4 CSR 240-20.093, authorizes electric utilities to defer lost revenues, which the rule defines as the net reduction of retail revenue that occurs when approved demand-side programs cause a net reduction in electricity consumption below the level used to set rates.[98] Another Commission rule, 4 CSR 240-13.055, which prescribes standards governing discontinuance of service during cold weather, allows gas utilities to defer revenue losses that are incurred to comply with that rule.[99] It seems obvious that if it was inappropriate to defer lost revenue – as Ameren Missouri's opponents suggest – the Commission would not have provided for such deferrals in its own rules.

Finally, although there are few reported regulatory commission decisions dealing with deferral requests similar to Ameren Missouri's, the Company was able to find one such case. In an order issued in 1992, the Hawaii Public Utilities Commission authorized the Kauai Electric Division to defer a portion of the revenues it lost following Hurricane Iniki.[100] That hurricane destroyed more than 30 percent of the utility's transmission and distribution system, which, among other things, resulted in a prolonged loss of a significant portion of the utility's rate revenues and the cost recovery those revenues provide. In all other cases the Company reviewed the revenue loss caused by storms was short-lived and ended as soon as service was restored.

In its MGE Order, the Commission considered the Hawaii decision but found that it was inapplicable because the relief, facts, and procedure in the Hawaii case were significantly different from those presented by MGE's application.[101] But that finding ignores two important facts regarding the Hawaii Commission's order. First, the "lost gross margin amounts" that the Hawaii Commission authorized the utility to defer represented a portion of the revenues the utility was unable to collect from customers as a result of the hurricane. And second, although the deferral was agreed to as part of a stipulation, the Hawaii Commission was not required to approve that stipulation. Consequently, the

[98] 4 CSR 240-20.093(1)(Y).

[99] 4 CSR 240-13.055(14)(F)(4).

[100] *Re Citizens Utilities Company, Kauai Electric Division*, Docket No. 7517, Decision and Order No. 12064 (December 9, 1992).

[101] MGE Order, p. 6.

decision of the Hawaii Commission does, in fact, represent recognition by a state utility regulatory commission that it has the authority, should it decide to use it, to authorize a utility to defer rate revenue lost as a result of an extraordinary event.

<u>Objection 2: The Accounting Rules and Standards for the Deferral of Expenses Don't Apply to Requests to Defer Revenue</u>

Both Staff and MIEC want the Commission to believe that requests to defer lost revenues and the fixed cost support those revenues provide are subject to different rules or standards than requests to defer extraordinary expenses. But there is simply no basis for that argument in the USOA. The same provisions of the USOA that apply to and govern the deferral of expenses also apply to and govern the deferral of revenue. Simply stated, the USOA does not prescribe one set of accounting rules that apply to the deferral of expenses and a separate set of rules that apply to revenues. Even Mr. Oligschlaeger was forced to concede the accuracy of that statement.[102] Consequently, if the Commission has in the past prescribed and applied regulatory standards that govern utility requests to defer extraordinary expenses, those same standards apply to Ameren Missouri's Application in this case.

Staff and MIEC also argue that as long as a utility has any amount of positive net income it does not qualify to defer lost rate revenues. But the USOA doesn't support that argument either. General Instruction No. 7 clearly states that to be considered extraordinary – and thus eligible for deferral via an AAO – an item of profit and loss "should be more than approximately 5 percent of net income, computed before extraordinary items."[103] If, as Staff and MIEC suggest, the USOA intended that a utility have no positive net income before it can be authorized to defer lost rate revenue, the materiality threshold in General Instruction No. 7 would be at or near 100 percent. But, as even Mr. Oligschlaeger was forced to admit, 100 percent isn't the applicable standard.[104] He further admitted that in two recent cases, one involving The Empire District Electric Company and the other involving MGE, the Commission authorized AAOs that enabled those utilities to defer expenses even though each of those companies had

[102] Transcript p. 165, lns. 9-15.
[103] Staff Exhibit 5.
[104] Transcript p. 165, lns. 4-8.

positive net incomes at the time the AAOs were authorized.[105] Indeed, if a utility was required to show that it had a negative net income before it could obtain an AAO, it is unlikely that any utility would ever qualify.

Staff also appears to suggest that Ameren Missouri's Application is deficient because it does not allege that the Company's financial viability or its ability to provide safe and adequate service was placed in jeopardy as a result of the loss of fixed cost support provided by Noranda's rate revenues.[106] But, again, the standards that Staff argues apply to Ameren Missouri in this case have no support in either the USOA or in past Commission decisions. During cross-examination Mr. Oligschlaeger admitted that neither compromised financial viability nor the inability to continue to provide safe and adequate service is listed in the USOA as a condition precedent to granting a utility the authority to defer extraordinary items. In fact, he testified that most utilities that are able to satisfy the USOA's five percent materiality threshold will not be in financial jeopardy or at risk of being unable to provide safe and adequate service.[107] He also testified that he is not aware of any past case where the Commission has applied those standards to any utility that was seeking an AAO.[108]

Objection 3: There Were Regulatory Alternatives to an AAO That Ameren Missouri Could Have Pursued

Staff's argument that a utility should be required to show that its financial viability is in jeopardy before it can be authorized to defer revenues is related to another Staff argument: that in lieu of an AAO, Ameren Missouri should be forced to seek emergency, interim rate relief to remedy the financial consequences of unrecovered fixed costs.[109] But, again, Staff's argument is unreasonable and is also contrary to both the USOA and past Commission decisions.

In Missouri, the proof standard that the Commission has established for emergency, interim rate relief is very high and extremely difficult to meet. A utility that seeks such relief must show that it has

[105] *Id*. p. 167, ln. 25 – p. 168, ln. 2.
[106] Staff Exhibit 3, p. 18, lns. 7-13.
[107] Transcript p. 164, ln. 23 – p. 165, ln. 3.
[108] Transcript p. 163, ln. 21 – p. 164, ln. 1.
[109] Staff Exhibit 3, p. 18, lns. 4-13.

minimal or negative earnings.[110] Not surprisingly, few utilities have been able to satisfy that standard, as evidenced by Mr. Oligschlaeger's testimony that the last time he can recall the Commission granting such relief was in the early 1980s.[111]

Mr. Oligschlaeger also testified that the USOA does not contain any requirement that a utility seek emergency, interim rate relief before it can qualify for an AAO, and that he is unaware of any past decision where the Commission has imposed such a requirement.[112] In two recent AAO cases discussed earlier, one involving Empire and another involving MGE, both utilities were granted AAOs without having to show that they were in financial jeopardy or that they had minimal or negative earnings. And although the AAO authorized for each of those companies was for the deferral of extraordinary expenses, there is nothing in the USOA that suggests that a different and more exacting standard should be applied to requests to defer lost rate revenues.

Staff and MIEC also argue that Ameren Missouri could have addressed the loss of Noranda's fixed cost support in the two general rate cases that the Company filed after the January 2009 ice storm.[113] But this argument, too, fails because it is contrary to the facts and certain well-established regulatory principles that would have applied to effectively thwart any such effort.

From a factual standpoint, prior to the Commission's May 2011 Report and Order in Case No. EO-2010-0255 Ameren Missouri was attempting to mitigate the negative effects of the loss of Noranda's fixed cost support through long-term requirements sales to AEP and Wabash. That means that at the time the Company filed each of its last two rate cases – Case Nos. ER-2010-0036 and ER-2011-0028 – it was collecting and recording off-system sales revenues that were expected to make up the fixed costs that Ameren Missouri was not able to collect from Noranda.[114] Mr. Oligschlaeger testified that under those

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[110] Transcript p. 169, ln. 24 – p. 170, ln. 6.
[111] *Id*. lns. 7-12.
[112] *Id*. p. 170, ln. 21 – p. 171, ln. 10.
[113] Staff Exhibit 3, p. 12, lns. 7-11; MEIC Exhibit 1, p. 3, lns. 5-11.
[114] Transcript p. 185, ln. 24 – p. 186, ln. 12.

circumstances it is unlikely that Staff – or the Commission – would have sanctioned a double recovery of those same costs through an increase in the Company's retail rates.[115]

From a regulatory policy standpoint, the fixed costs that are at issue in this case would have been outside the test period used in one or both of Ameren Missouri's two, post-ice storm rate cases, and Staff generally does not support, and the Commission generally does not allow, a utility to include out of period costs in the revenue requirement used to set future rates.[116] One exception to that rule is for the amortization of amounts deferred via an AAO.[117] But Ameren Missouri did not have an AAO to defer the fixed costs it was unable to collect from Noranda following the January 2009 ice storm, so that exception would not have been available in either of the two post-ice storm rate cases.

In addition, the fixed costs that Ameren Missouri was unable to collect from Noranda were non-recurring costs, and Staff generally opposes any attempt by a utility to recover non-recurring costs as part of the revenue requirement used to set rates.[118] More generally, however, Mr. Oligschlaeger testified that it is unlikely Staff would have supported any effort by the Company to recover through rates in either Case No. ER-2010-0036 or ER-2011-0028 the fixed costs it was unable to collect from Noranda during the 14-month period immediately following the January 2009 ice storm.[119]

Staff also argues that Ameren Missouri could have remedied the financial effects of the loss of Noranda's rate revenues by filing a general rate case.[120] But, like all of its other so-called alternatives to an AAO, this argument fails because it is contrary to the facts. Since the January 2009 ice storm, Ameren Missouri has filed and prosecuted two general rate cases. The Company filed Case No. ER-2010-0036 on July 24, 2009,[121] which was less than seven months after the January 2009 ice storm and less than four months after the effective date of rates set in Case No. ER-2008-0318. Ameren Missouri filed its next rate

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[115] *Id*.
[116] *Id*. p. 188, lns. 6-13
[117] *Id*. p. 180, ln. 17 – p. 181, ln. 4.
[118] *Id*. lns. 14-18.
[119] *Id.* p. 188, ln. 23 – p. 189, ln. 4.
[120] *Id*. p. 172, ln. 25 -- p. 173., ln. 5.
[121] Report and Order, *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service*, (June 7, 2010), p. 5.

case, Case No. ER-2011-0028, on September 3, 2010,[122] which was less than three months after the effective date of rates set in Case No. ER-2010-0036. Mr. Oligschlaeger testified that in Missouri it generally takes 11 months to prosecute a general rate case from start to finish and several additional months to prepare a case for filing.[123] Given that testimony, it would have been impossible for the Company to have prepared and filed rate cases any faster than it did following the ice storm. Moreover, even if it had been able to do so, as discussed earlier in this section there are numerous reasons why any attempt by Ameren Missouri to seek recovery of the fixed costs it was unable to collect from Noranda would have been unsuccessful.

Finally, Ms. Mantle argues that Ameren Missouri could have avoided the financial consequences associated with the loss of Noranda's fixed cost support if the Company simply had withdrawn its FAC tariff following the January 2009 ice storm.[124] But the chronology of events following the ice storm shows that this alternative was not a realistic option.

The Commission issued its Report and Order in Case No. ER-2008-0318 on January 27, 2009, in the middle of the January 2009 ice storm. On February 5, 2009, Ameren Missouri filed its application for rehearing,[125] which asked the Commission to modify the FAC to allow the Company to retain off-system sales revenues sufficient to offset the fixed costs it would be unable to collect from Noranda. The Commission denied Ameren Missouri's application for rehearing on February 19, 2009.[126] In its order denying rehearing, the Commission concluded that modifying the FAC would require setting aside a previously approved stipulation and reopening the record to take evidence on the proposed changes, and that it would be impossible to complete both those tasks before the March 1, 2009, operation of law date in that case. On February 19th the Commission also issued its order approving all of the compliance tariffs, including the FAC tariff sheets, that Ameren Missouri filed in response to the Commission's

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[122] Report and Order, *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariffs to Increase Its Annual Revenues for Electric Service*, (July 23, 2011), p. 4.
[123] Transcript p. 173, ln. 19 – p. 174, ln. 1.
[124] Staff Exhibit 2, p. 11, lns. 8-13.
[125] Transcript, p. 135, lns. 9-13.
[126] *Id*. p. 135, ln. 24 – p. 135, ln. 1.

Report and Order.[127] Once approved, those tariff sheets had the force and effect of law and could not be changed without a Commission order specifically authorizing a change.

The sequence of events recounted above clearly shows that by the time Ameren Missouri learned that the Commission would not grant the request to modify the FAC to make up for the loss of Noranda's fixed costs, the Commission had already approved all the Company's compliance tariffs. Once those compliance tariffs had been approved, even Staff admits that Ameren Missouri no longer had the legal right to unilaterally withdraw its FAC.[128] Moreover, at that point there was no reason for the Company to believe that a formal request to withdraw the FAC would have been successful because, like the modifications to the FAC that were proposed in the application for rehearing, withdrawing the FAC would have required the Commission to set aside a previously approved stipulation and reopen the record to take evidence on the proposed withdrawal. The Commission already had concluded that such a course was impossible to achieve before the operation of law date.

But beyond the factual and legal impediments to Staff's argument that Ameren Missouri could have withdrawn its FAC tariff sheets, the Company believes it is important for the Commission to note how punitive Ms. Mantle's proposal is. The statute authorizing the FAC was intended to enable utilities to recover between rate cases all additional, prudently incurred costs of fuel and purchased power that the utility incurred between general rate cases. As Ms. Mantle notes in her rebuttal testimony, during the 14-month period from March 2009 through May 2010 – which roughly correlates to the period Noranda curtailed is smelting operations – Ameren Missouri incurred, and was able to recover from customers through the FAC, more than $122 million in additional fuel and purchased power costs.[129] Without the FAC, the Company would have been able to collect nothing. So, reduced to its basics, the "alternative" that Ms. Mantle proposes would have required Ameren Missouri to choose between losing approximately $36 million in fixed costs – which, in Case No. ER-2008-0318, the Commission had determined were

[127] *Id*. p. 136, lns. 13-20.
[128] Transcript p. 136, ln. 21 – p. 137, ln. 10.
[129] Staff Exhibit 2, p. 11, lns. 16-19.

prudently incurred costs – or losing $122 million in prudently incurred fuel and purchased power costs. That's not much of a choice, and not much of an alternative. It's a Catch – 22.

Objection 4: Ameren Missouri Should Not Be Granted an AAO Because the Financial Impacts of the Loss of Noranda's Fixed Costs Was Booked in 2009 and 2010

Mr. Oligschlaeger testified that it would be inappropriate for the Commission to grant Ameren Missouri's request for an AAO because the "financial impact of the [January 2009 ice] storm was fully reflected in the Company's published financial results" for fiscal years 2009 and 2010.[130] But Mr. Oligschlaeger's statement is demonstrably false. Certainly, during the 14-month period following the January 2009 ice storm Ameren Missouri's 2009 and 2010 financial records recorded a decline in Noranda's rate revenue without any corresponding decline in fixed costs. But those financial records also recorded off-system sales revenues from AEP and Wabash, which offset the fixed costs that the Company was unable to collect from Noranda.

As discussed *supra*, however, following its May 2011 Report and Order in Case No.EO-2010-0255 the Commission required Ameren Missouri to return to its customers a portion of the off-system sales revenues it received from AEP and Wabash. Those refunds began in 2011 and continue today. In addition, a second prudence review of the Company's FAC is pending, where both Staff and MIEC are proposing that the balance of the AEP and Wabash sales revenues should be returned to customers. If the Commission adopts that argument, refunds of those amounts likely will begin later this year and will continue into 2013 and perhaps beyond.

These facts clearly show the inaccuracy of Mr. Oligschlaeger's assertion that Ameren Missouri recorded all of the financial impacts of the January 2009 ice storm on its books in 2009 and 2010. Indeed, it would have been impossible for the Company to do so because the unmitigated adverse financial impacts related to the loss of Noranda's rate revenues were not even known until May 2011 when the Commission issued its final order in Case No. EO-2010-0255. Moreover, because the second prudence review case had not yet been decided, the possible financial impacts of the fixed costs the Company was

130 Staff Exhibit 3, p. 8, lns. 15-16.

unable to collect from Noranda may not be fully reflected on the Company's books even today. Consequently, because some of the financial effects of the loss of Noranda's fixed cost support were recorded in 2011 and are still being recorded today, there is no question that it was appropriate for Ameren Missouri to file its AAO request in July 2011, and it would be equally appropriate for the Commission to grant that request at the conclusion of this proceeding.

Beyond that, Staff and MIEC seem to selectively apply their principle that once a fiscal year's books are closed they cannot be reopened. For example, neither party appears to object or find fault with the fact that off-system sales revenues that were booked in 2009 and 2010 were returned to customers in 2011, 2012, and that additional revenues may be returned even further into the future. In addition, it appears Staff does not object if additional expense associated with an extraordinary event is booked in one year but is authorized to be deferred in another year. That, after all, is what happened in the recent MGE AAO case: the extraordinary expenses that MGE incurred for the 2011 tornado were booked in that year but the Commission did not approve the AAO authorizing deferral of those expenses until 2012. A previous Ameren Missouri AAO case exhibits a similar chronology. In November 2007 the Company filed a request for an AAO to recover extraordinary storm costs that it incurred in connection with a January 2007 ice storm.[131] The Commission issued an order granting that request, but the order wasn't issued until May 2008, well after Ameren Missouri had closed its books for fiscal year 2007.[132]

<u>Objection 5: Granting Ameren Missouri's Request for an AAO Would Constitute Unlawful Retroactive Ratemaking</u>

The rebuttal testimonies of witnesses for both Staff and MIEC claim that if the Ameren Missouri's request for an AAO is granted the Commission will be engaging in unlawful retroactive ratemaking.[133] Mr. Oligschlaeger clarified his position by testifying that although granting the AAO would not be retroactive ratemaking, allowing the Company to recover any of the deferred amounts in

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131 *In the Matter of the Application of Union Electric Company d/b/a AmerenUE for an Accounting Authority Order Regarding Accounting for the Extraordinary Costs Relating to Damage from the January 2007 Ice Storm*, Case No. EU-2008-0141.

132 Ameren Exhibit 3, p. 9, ln 15 – p. 16, ln. 13.

133 Staff Exhibit 3, p. 11, ln. 23 – p. 12, ln. 6; MIEC Exhibit 1, p. 9, ln. 9 – p. 10, ln. 3.

future rates might be.[134] MIEC's witness, Maurice Brubaker, appears to share Mr. Oligschlaeger's clarified position.

Because neither of these witnesses is an attorney, it would be error for the Commission to give any weight to their opinions regarding legal questions such as whether the Commission would be guilty of retroactive ratemaking if it either grants Ameren Missouri's request for an AAO or later allows any amounts the Company is allowed to defer to be included in the revenue requirement used to set future rates. But since Staff and MIEC have raised the issue and because it is was one of the issues listed on the parties' April 18, 2012, joint filing, Ameren Missouri will address that issue here.

In its 2006 decision in *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, the Missouri Court of Appeals directly addressed the question of whether an AAO that allowed utilities to defer revenue lost due to compliance with the Commission's Emergency Cold Weather Rule constitutes unlawful retroactive ratemaking. The court concluded it does not.

> Although recovery under the AAO is conditioned on filing a subsequent rate case, this is not a case of retroactive ratemaking. This court has held that it is permissible to "defer the final decision on current extraordinary costs until a rate case is in order." [citation omitted] . . . The AAO allows current losses due to the rule to be separately accounted, thus preserving the uncollected, deferred fees until the next rate case. At that time the losses in combination with any other factors may be considered in determining a new rate. This is not retroactive ratemaking because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being used to set rates to be charged in the future.[135]

As the language of the court's decision makes clear, the Commission is not guilty of retroactive ratemaking under Missouri law if it (1) grants a utility the authority to defer items via an AAO, or (2) allows some or all of the deferred amounts to be included in future rates. The court further clarified its holding by stating that because the deferred items are part of the costs used to set future rates, as opposed to being used to charge customers more for service they received in the past, including those deferred costs in future rates is not retroactive ratemaking.

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[134] Transcript p. 179, lns. 2-11.
[135] *State ex rel. Missouri Gas Energy v. Public Service Commission,* at 335-6.

Other cases in which the Court of Appeals has considered the same or similar questions and reached the same result include: *State ex rel. Aquila, Inc. v. Public Service Commission*, 326 S.W.2d 20, 27-8 (2010); *Missouri Gas Energy v. Public Service Commission*, 978 S.W.2d 434, 436-7 (1998), and *State ex rel. Office of the Public Counsel v. Public Service Commission*, 858 S.W.2d 806, 810-11 (1993).

In its final order in Case No. EU-2011-0387, the Commission similarly concluded that granting a utility's request for an AAO does not constitute retroactive ratemaking, and cited *Missouri Gas Energy* as support for that conclusion.

Objection 6: Ameren Missouri's Request for an AAO is an Attempt to Circumvent or Overturn the Commission's Decision in Case No. EO-2010-0255

At page 9 of his rebuttal testimony, Mr. Oligschlaeger characterizes Ameren Missouri's request for an AAO as follows:

> What UE seems to be attempting is to avert through an AAO current recognition of the financial effect of that Commission decision [in Case No. EO-2010-0255] on its books. UE is, in effect, attempting to defer an amount of income approximately equal to the financial effect resulting from the Commission's decision in Case No. EO-2010-0255, and then seek future recovery of the deferrals in a general rate proceeding.
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> . . . .
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> . . . In other words, by granting UE an AAO to "defer" Noranda "lost revenues," the Company will be allowed to offset in approximate terms on its financial statements the negative consequences of the Commission's decision in Case No. EO-2010-0255.[136]

There are numerous factual and conceptual errors in Mr. Oligschlaeger's characterization. First and foremost, the two events Mr. Oligschlaeger referred to – the financial effects of the loss of Noranda's rate revenues and fixed cost support they provide and the amounts Ameren Missouri was ordered to return to customers following the Commission's decision in Case No. EO-2010-0255 -- are related but they are not the same. As has been discussed *supra*, following the January 2009 ice storm the Company attempted to mitigate the adverse financial effects of the loss of Noranda's rate revenues by selling surplus power to AEP and Wabash. In effect, the revenues derived from those sales were supposed to serve as a surrogate

[136] Staff Exhibit 3, p. 9, lns. 7-14.

for the fixed costs Ameren Missouri was unable to collect from Noranda. However, to achieve that objective, the Company would have to be allowed to keep those off-system sales revenues. Ultimately, that wasn't allowed.

In Case No. EO-2-10-0255, the only question presented to the Commission for decision was whether Ameren Missouri's sales to AEP and Wabash qualified as long-term full or partial requirements sales under the Company's FAC. If the Commission concluded they were, the revenues derived from those sales would be exempt from the FAC and would not have to be returned to customers. But the Commission concluded those sales were not exempt, and Ameren Missouri was required to pay its customers a portion of the AEP and Wabash sales revenues. The Commission's decision in that case was limited to the question that was presented for decision, and the Commission did not determine (1) whether the January 2009 ice storm and the resulting 14-month loss of Noranda's fixed costs qualified as an extraordinary event; (2) whether the financial effects of that event were material under the USOA; or (3) whether Ameren Missouri should be allowed to defer some or all of the financial effects of that event to Account 182.3. All those questions are new and are presented for decision for the first time in this case.

Certainly, there is a connection between this case and Case No. EO-2012-0255. If the ice storm and the loss of Noranda's fixed cost support had never occurred, there would have been no need to sell excess power to AEP and Wabash. And if the Commission had not issued its decision in Case No. EO-2010-0255, there would be no need for the Company to apply for an AAO. But the connection ends there. Case No. EO-2010-0255 concerned, and was limited to, the classification of certain off-system sales revenues under the Company's FAC tariff sheets. The current case, however, involves none of those issues.[137] The current case concerns whether the ice storm and the Company's inability to recover fixed costs from Noranda constitute an extraordinary event, and whether the effects of that event should be deferred via an AAO. Neither of those issues was presented to, or decided by, the Commission in Case

[137] Transcript p. 189, lns. 10-20.

No. EO-2010-0255.[138] In fact, Mr. Oligschlaeger admitted that the issues in this case and those in Case No. EO-2010-0255 "aren't that similar."[139]

He also testified that although the issues in this case and in Case No. EO-2010-0255 are not similar, the dollar amounts are.[140] But that testimony is not accurate. The amount at issue in Case No. EO-2010-0255 was slightly more than $17 million in off-system sales revenues, whereas the amount at issue in this case is slightly less than $36 million in fixed costs.

Objection 7: Ameren Missouri's Request for an AAO is the Same as the AAO Request that the Commission Denied in Case No. GU-2011-0392

Both Staff and MIEC argue that because the Commission recently rejected MGE's request to defer lost revenues in Case No. GU-2011-0392 the Commission should similarly deny Ameren Missouri's request in this case.[141] But that argument must fail because of the significant differences between the facts underlying Company's request and those underlying MGE's request in the earlier case.

Ms. Barnes directly spoke to one of those differences – an overall reduction of revenue following the extraordinary event that gave rise to the AAO request – in her surrebuttal testimony.

> The Commission denied MGE's request . . . because the Commission concluded that MGE's overall revenues did not decrease despite the devastation of the storm even that gave rise to MGEs AAO request. But that is not the case here. In 2009, even when including the revenues recorded from the AEP and Wabash contracts that the Commission subsequently ordered to be flowed through the Company's FAC, Ameren Missouri's electric revenues decreased by $56 million compared to 2008. And, as I have stated previously, the majority of those revenue losses is attributable to the loss of the Noranda load.[142]

Corresponding to the overall drop in revenue, Ameren Missouri experienced a significant reduction in its earned rate of return following the January 2009 ice storm.[143] In sharp contrast, the Commission's Report

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138 *Id.* p. 189, ln. 21 – p. 190, ln. 7.
139 *Id.* p. 190, lns. 8-17.
140 *Id*.
141 Staff Exhibit 3, p. 18, lns. 14-20; MIEC Exhibit 1, p. 6, ln. 19 – 7, ln. 3.
142 Ameren Exhibit 3, p. 12, ln. 19 – p. 13, ln. 3.
143 See Exhibit B to Ameren's verified Application. This exhibit shows an immediate drop in earnings immediately following the January 2009 ice storm that continued through September 2009. Throughout the entire 14-month period that Noranda's operations were curtailed, the Company's earned return never exceeded 7.12%, and that return included the off-system revenues from AEP and Wabash.

and Order in MGE's AAO case notes that there was no drop in that company's overall revenue as a consequence of the Joplin tornado.[144]

Another significant difference is the financial impact the extraordinary event had on each utility. The MGE order states that the Joplin tornado resulted in the disconnection of approximately 3,200 customers, which represents slightly more than one-half of one percent of MGE's customer base.[145] Although Noranda is only one customer, sales to that one customer represent approximately 11 percent of Ameren Missouri's native load sales.[146]

One additional difference between the two cases is also worth noting. In its case, MGE was unable to precisely quantify the amount of fixed cost support that it would lose as a result of the Joplin tornado. In fact, the Commission's Report and Order states that MGE was only able to hypothecate its losses.[147] In the current case, Ameren Missouri and the other parties have stipulated to the exact amount of fixed costs that are at issue -- $35,561,503 – so no hypothecation of the financial effects of the lost Noranda rate revenue is required.

CONCLUSION

As the Commission recently recognized in its final order in Case No. EU-2011-0387, the provisions of the USOA that allow a utility to defer to a future period certain extraordinary items were designed to achieve one primary purpose: to afford a utility the opportunity to protect itself from earnings shortfalls attributable to the financial effects of extraordinary events. In so doing, the USOA recognizes that these financial effects are not limited to increased expenses, but also extend to any item of revenue or expense that affect a utility's net income as well as to losses resulting from extraordinary events. Ameren Missouri's Application in this case simply seeks to utilize applicable provisions of the USOA for the purpose for which they were intended.

144 MGE Order, p. 22.
145 *Id.* p. 8.
146 Ameren Exhibit 2, p. 4, lns. 12-16
147 MGE Order, p. 22.

Although the Company's request to defer the fixed costs it was unable to collect through rates from Noranda following the January 2009 ice storm is somewhat unusual, allowing the deferral of lost rate revenue is far from unprecedented. As this brief and the record evidence in this case make clear, The Commission has for some time allowed Missouri electric utilities to defer revenues losses incurred through compliance with Demand-Side Program Investment Mechanisms, 4 CSR 240-20.093, and also has allowed Missouri gas utilities to defer revenues losses incurred through compliance with the Commission's Cold Weather Rule, 4 CSR 240-13.055. If the USOA allows the Commission to authorize utilities to defer lost revenue in those instances, certainly it cannot seriously be argued that the USOA either prohibits or does not contemplate the deferral of the almost $36 million in rate revenue that Ameren Missouri lost following the January 2009 ice storm. If the rationale for allowing deferrals is compelling under the Commission's Cold Weather and Demand-Side Program Investment Mechanisms rules, the rationale is even more compelling under the facts of this case.

There can be no doubt that because of an extraordinary event – the January 2009 ice storm and the resulting curtailment of Noranda's smelting operations – the Company was unable to collect from Noranda the fixed costs that are at issue in this case. The only question that remains, therefore, is whether the Commission will allow Ameren Missouri to avail itself of the mechanisms created by the USOA to deal with these types of situations.

There also can be no doubt that the fixed costs that the Company was unable to collect from Noranda represent a real financial loss. Ameren Missouri's uncontested evidence regarding the earnings declines it experienced following the January 2009 ice storm clearly show that the storm had a material financial impact on the Company.

Therefore, based on the arguments presented in this brief, and consistent with the weight of the competent and substantial evidence on the record in this case, the Commission should grant Ameren Missouri's request to record a debit of $35,561,503 in uncollected fixed costs to Account 182.3, to create a regulatory asset, and also record a credit to Account 407.4, which is the account the USOA prescribes when specific identification of a regulatory asset cannot be made.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief of Union Electric Company d/b/a Ameren Missouri was served via e-mail, on counsel for each of parties of record on the 30th day of May, 2012:

/s/ L. Russell Mitten