BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MISSOURI INDUSTRIAL ENERGY CONSUMERS' INITIAL POST-HEARING BRIEF

The Missouri Industrial Energy Consumers ("MIEC") respectfully submits its Initial Post-Hearing Brief in accordance with the Commission's Order Setting Procedural Schedule in this case.

I. INTRODUCTION

> *"Ungenerated 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. . . . Services not provided and revenues not generated are mere expectancies, are things that simply did not happen, and are not items at all."*[1/]

Union Electric Company d/b/a Ameren Missouri's ("Ameren") pending application for an accounting authority order ("AAO") should be denied for at least three reasons:

A. **Ameren improperly seeks to recover phantom profits**: The amount Ameren seeks to defer in this case does not constitute un-recovered incremental expenses or costs due to an extraordinary event, but rather phantom profits resulting from ungenerated revenues. In that regard, the amount Ameren seeks to defer is no different than a normal decrease in revenue Ameren typically experiences with

1/ Report and Order, File No. GU-2011-0392.

the fluctuation in weather (e.g., a cool summer). Ungenerated revenues are simply not subject to deferral by an AAO in this or any other jurisdiction, and thus Ameren's request should be denied.

B. **Ameren's AAO application is untimely**: Even if ungenerated revenues were subject to deferral by an AAO, Ameren's request is more than two years too late as it was filed long after the period in which the "extraordinary event" to which it relates occurred. Accordingly, the request should be denied.

C. **Granting the requested AAO would prove legally futile**: Even if the Commission were to grant Ameren Missouri's AAO request in this case, Missouri's prohibition against retroactive ratemaking would prohibit the Commission from factoring the deferred amounts into rates in a subsequent case. Accordingly, granting the AAO in this case would prove legally futile and an inefficient use of the Commission's and the parties' time and resources.

For these reasons, discussed more fully below, the Commission should deny Ameren Missouri's AAO application in this case.

II. HISTORY

The current case represents Ameren's third bite at the same proverbial apple. In January, 2009, immediately after receiving the fuel adjustment clause ("FAC") it had been seeking for nearly two years, Ameren's service area was hit by a severe ice storm that knocked out power lines to Noranda Aluminum, Inc. ("Noranda").[2/] Notably, while the storm was certainly severe, it did not result in a decrease of Ameren's revenues even as significant as decreases in revenue Ameren typically experiences due to fluctuations in

[2/] Report and Order, Case No. E0-2010-0255, p. 4

weather (e.g., cool summers).[3/] Nevertheless, Ameren sought Commission intervention to avoid the revenue shortfall that it anticipated as a result of not providing service to Noranda.[4/] Immediately after the storm, in Case No. ER-2008-0318, Ameren sought to revise the tariff associated with its new FAC to allow it to generate revenues from off-system sales to offset the revenue shortfall it anticipated from temporarily losing Noranda.[5/] However, the Commission rejected its application for rehearing in that case.[6/]

Shortly thereafter, Ameren made a second attempt to recover the ungenerated revenues by entering into two off systems sales contracts with American Electric Power Corporation ("AEP") and Wabash Valley Power Association ("Wabash"), and failing to flow the revenues from those off system sales contracts through the FAC.[7/] Ameren's failure to flow the revenues from those sales through the FAC was discovered and brought to light in Case No. EO-2010-2055. In that case the Commission rightly found that Ameren's failure to flow the revenues from AEP and Wabash contracts through the FAC was illegal, improper and imprudent.[8/]

Having failed to avoid its decline in profits by the above two means, Ameren filed the instant case. In this case, Ameren is undertaking its third attempt to recover the ungenerated revenue by applying for an AAO. In an apparent attempt to convince the Commission that the amount at issue is a real item of expense that can actually be deferred by an AAO, Ameren, for the first time in the past three years, curiously

---

3/ Ameren Missouri Response to DR MIEC 1-10, Ex. 3.

4/ Report and Order, Case No. E0-2010-0255, p. 4

5/ *See* Report and Order, Case No. E0-2010-0255, at p. 6.

6/ *Id.* at p. 7.

7/ *Id.* at p. 8.

8/ Case No. EO-2010-0255 was recently reversed by Cole County Circuit Court Judge Beetem in Case No. 11AC-CC00336. However, the parties supporting the Commission's decision in Case No. EO-2010-0255 will appeal the lower court's decision in the Missouri Court of Appeals, and anticipate that the Commission's original Report and Order will be affirmed.

characterizes the ungenerated revenue as "lost fixed costs." Ameren's characterization of the amount it seeks to defer is misleading, as the amount does not represent any real cost or expense, but rather represents an accounting fiction, and no item at all.

For the reasons set out more fully below, Ameren's request should be denied.

III. ARGUMENT

A. Phantom Profits are Unrecoverable.

Ameren's Request should be denied, because rather than defer an actual item of expense, it seeks to create phantom profits from ungenerated revenues. Just to be crystal clear, Ameren is not seeking to defer any expenses that it actually incurred as a result of the 2009 ice storm at issue in this case. In fact, all of the expenses it incurred as a result of the ice storm were recovered through the base rates from the rate case that immediately followed the storm.[9/] This fact became explicitly clear when Ameren Witness Lynn Barnes ("Ms. Barnes") testified that Ameren's actual costs associated with the 2009 ice storm were recovered in base rates:

> We incurred O&M costs as a part of the storm restoration. However, they were not in excess of what storm costs that are built into base rates already were. So we recovered those through our base rates just because we automatically have a level of storm costs expected built into rates.[10/]

So, Ameren is not seeking to defer expenses it incurred repairing poles, cables, transformers, etc., that were damaged in the storm.[11/] Indeed, all of those expenses were included and recovered in base rates.[12/] In fact, before Ameren filed its application in this case, it was clear to the Commission and all parties involved that Ameren was seeking, by various means, to replace revenue that it had anticipated generating from its power

---

9/ Transcript, p. 92, lns. 21-25.
10/ Transcript, p. 93, lns. 11-16.
11/ Transcript, p. 92, lns. 4-20.
12/ *Id.*

sales to Noranda.[13/] However, having failed so far to replace the ungenerated revenue, Ameren, in this case, suddenly changed course and began referring to the ungenerated revenue as "lost fixed costs."

Creative linguistics aside, what Ameren actually seeks to do in this case is unprecedented in this or any other jurisdiction: **Ameren seeks to defer a fiction**. Ameren is seeking to "defer" for subsequent ratemaking treatment, profits that do not exist, never have existed, and never will exist. In essence, Ameren is seeking to create out of thin air profits that could have *potentially* existed if Ameren would have been able to provide service to Noranda after the 2009 ice storm. However, deferring fictional profits does not fit within the function or purpose of an AAO in Missouri, or any other jurisdiction.

An accounting authority order provides an accounting method whereby a utility is permitted to defer an item of actual incremental expense on its books for later ratemaking treatment.[14/] However, where, like in this case, there is literally no item to defer, granting an AAO makes no sense, because one cannot defer a non-item. Furthermore, this Commission has recently disposed of a similar request by the Southern Union Company ("Southern Union") in Case No. GU-2011-0392. In that case, Southern Union sought an AAO to defer ungenerated profits that it potentially could have generated if the Joplin tornadoes had not destroyed it's ability to provide service to residential customers. The Commission held that, "AAOs do not create an item for recording."[15/] The Commission further explained in that case that even the term "Lost Revenue . . . is misleading because

---

13/ *See generally* Report and Order, Case No. EO-2010-0255.
14/ Brubaker Rebuttal, Ex. 1, p. 5, lns. 1-4.
15/ Report and Order, Case No. GU-2011-0392, p. 2.

it suggests that the Company had the money and then lost it, which is untrue. . . . 'Ungenerated [revenue]' fully expresses the characteristic determinative of the claim."[16/]

While, Ameren may try to distinguish GU-2011-0392 on the grounds that Southern Union's revenues did not demonstrably decrease in that case, such a distinction is meaningless. Irrespective of whether Ameren's revenues remain constant, increase or decrease, the Commission will not create an accounting item by "layering fiction upon fiction" because "to issue an AAO for ungenerated revenue would create a phantom loss."[17/] Furthermore, in the Southern Union case, the Commission found that "any drop in revenue from the tornado resulting from the tornado related disconnections ("ungenerated revenue") threatens neither the Company's ability to provide safe and adequate service, nor its opportunity to earn a profit."[18/] Similarly in this case, Ameren provided no testimony that its decrease in revenue associated with the ice storm threatened its ability to provide safe and adequate service or to earn a profit. On the contrary, according to the information provided by Ameren in this case, Ameren had a common equity balance at December 31, 2009 of approximately 3.9 billion.[19/] And the "revenue shortfall" is less than 60 basis points (.6%) on Ameren's return on equity.[20/] Accordingly, even though Ameren experienced a decrease in revenue as a result of its inability to provide service to Noranda, the decrease does not merit, under any regulatory policy, Commission intervention. In sum, the Commission's reasoning for denying the AAO in GU-2011-0392 precisely applies in this case. Namely, an AAO is inappropriate because:

16/ *Id.*
17/ Report and Order, GU-2011-0392, p. 25.
18/ *Id.* at p. 10.
19/ Brubaker Rebuttal, Ex. 1, p. 7, lns. 15-20.
20/ *Id.*

> ungenerated 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. The Company showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis. That is because the Company cannot have an item of profit or loss when it provides no service, whether the cause of no service is ordinary or extraordinary. Services not provided and revenues not generated are mere expectancies, are things that simply did not happen, and are not items at all.[21/]

In light of the fact that the amount at issue in this case constitutes nothing more than a mere expectancy, an accounting fiction, it would be unprecedented (and technically impossible) for the Commission to defer the amount for later ratemaking treatment. Accordingly, Ameren's request that the Commission essentially create phantom profits from ungenerated revenue in this case should be denied.

B. **Ameren's Application is Untimely by At Least Two Years.**

Even if ungenerated revenues were subject to deferral by an AAO, Ameren's request is untimely as it was filed approximately two years after the period in which the "extraordinary event" to which it relates occurred. On page 14 of the recent Report and Order in Case No. GU-2011-0392, the Commission cited the Uniform System of Accounts ("USoA") to define the timeliness of an AAO. The USoA defines extraordinary items as "those items related to the effects of events and transactions which have occurred during the current period." (emphasis added). In that case, the Commission held that the "timeliness of an application rests on a determination of whether the request was during [the] current period," noting that the application in that case was filed during the same period as the event (tornado) occurred. In this case, the "extraordinary event" occurred more than three years and two rate cases ago in January,

---

[21/] Report and Order, GU-2011-0392, p. 25.

2009. Thus, the period in which Ameren could have timely filed for an AAO ended when it closed its books for fiscal year 2009.[22/]

Ameren provided no testimony or evidence in the case that its AAO application was filed within the same period as the extraordinary event (the ice storm). Indeed, in a rather creative attempt to sidestep this glaring deficiency, Ameren appeared to argue at the hearing that the real extraordinary event in this case was the Commission's Report and Order in Case No. EO-2010-0255, where the Commission found that Ameren had imprudently failed to flow the revenues from AEP and Wabash through the FAC. If indeed this is Ameren's argument, it fails as a matter of law. The Commission heard and disposed of this same argument at least once before on page 21 of its Report and Order in File No. EO-2008-0216, where it held that "an adverse ruling is not an unusual, infrequent, abnormal or extraordinary event."

Ameren further appeared to argue at the hearing that its application is timely, because it did not know it needed an AAO during the period in which the storm occured, because it entered into contracts with AEP and Wabash to replace the Noranda revenue. Ameren's argument begs the question it seeks to answer. If granting an AAO would be appropriate now, it would have been appropriate during the period in which the storm occurred. Ameren's failure to apply for it then, precludes Ameren from coming before this Commission three years after the "extraordinary event" and requesting it now. Thus, even if Ameren merited an AAO in this case (it does not), there is simply no avoiding the fact that Ameren's application is more than two years too late. Therefore, Ameren's request should be denied as untimely, because it has filed its application more than two years after the period in which the "extraordinary event" to which it relates occurred.

22/ Brubaker Rebuttal, Ex. 1, p. 4, lns. 10-18.

C. **Granting Ameren's AAO Request Would Prove Legally Futile.**

Even if Ameren's application was not filed two years too late, it should still be denied, because granting the AAO would prove legally futile under Missouri law. Under well established Missouri law, a utility is not permitted to recover in a subsequent case revenue that it failed to generate in a prior period.[23/] Such a practice violates Missouri's law against retroactive ratemaking.[24/] *State ex rel Utility Consumers Council*, 585 S.W.2d 41, (Mo 1979) ("UCCM") describes retroactive ratemaking as follows:

> The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established.[25/]

In this case, Ameren seeks to defer, for later ratemaking treatment, ungenerated revenue that it could not collect as a result of the combination of the 2009 ice storm with the restrictions provided in Ameren's FAC. While *UCCM* does not prohibit the *deferral* of such amounts, it does prohibit such amounts being factored into rates in a subsequent case. Accordingly, granting Ameren's AAO request in this case would prove legally futile, because subsequent ratemaking treatment of the deferred amounts would constitute prohibited retroactive ratemaking under Missouri law. Thus, any deferral of the amounts requested in this case would result in a futile and unwarranted waste of time and resources for the Commission and all parties involved. Therefore, Ameren's request should be denied.

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

24/ *Id.*

25/ *Id.*

IV. Conclusion

In sum, Ameren's application for an accounting authority order in this case should be denied, because (1) Ameren failed to present any evidence that there even exists an actual accounting item to defer, and the Commission cannot create a phantom loss to defer for subsequent ratemaking treatment; (2) even if phantom profits/losses were deferrable under an AAO, Ameren's application for deferral is more than two years out of time; and (3) granting Ameren's AAO request in this case would prove legally futile, because the Commission cannot legally factor the deferred amount into rates in light of Missouri's prohibition against retroactive ratemaking. For these reasons, Ameren Missouri's application for an AAO should be denied.

Respectfully submitted,

BRYAN CAVE LLP

/s/ Brent Roam

Diana M. Vuylsteke, #42419
Brent Roam, #60666
211 North Broadway, Suite 3600
St. Louis, MO 63102
Phone: (314) 259-2543
Fax: (314) 259-2020
E-mail: brent.roam@bryancave.com
E-mail: dmvuylsteke@bryancave.com

Attorneys for the Missouri Industrial Energy Consumers

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail this 30th day of May, 2012, to the parties on the Commission's service list in this case.

/s/ Brent Roam