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

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| In the Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for the issuance of an Accounting Authority Order relating to their Electrical Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2). | ) ) ) ) ) ) ) | Case No. EU-2014-0077 |

**AMEREN MISSOURI'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION AND FOR EXPEDITED TREATMENT**

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and, in compliance with the Commission's February 3, 2014 *Order Granting Motion for Extension of Time* granting Ameren Missouri permission to respond to the Midwest Energy Consumer Group et al.'s ("MECG") *Motion for Reconsideration and Motion for Expedited Treatment* (the "Motion") by 2:00 p.m. February 4 2014, hereby files its response to the Motion.

1. The Motion seeks admission into evidence in this case of an entire 46 page post-hearing brief filed by Ameren Missouri in a different case involving different facts. In fact, MECG, joined by the Staff of the Commission ("Staff") and the Missouri Industrial Energy Consumers ("MIEC") (collectively, "Movants"), claim that the Commission has no choice – is indeed "required" – to admit the brief into the evidentiary record in this case simply because Movant MECG offered it during the evidentiary hearing.[1] Apart from the incredible claim that just because a document in another case file is offered it must be admitted, Movants spend approximately one-half of their Motion reciting their view of the applicability of the doctrine of judicial admissions. The Motion clearly assumes that the brief constitutes a judicial admission and thus should be admitted. Movants' misstate and misapply the law.

[1] Motion, ¶ 2 (claiming Section 536.070(5), RSMo." requires" admission simply because MECG offered it and the brief happens to be in the Commission's case file for File No. EU-2012-0027).

2. For their claim that Section 536.070(5) RSMo. requires admission of the brief Movants' cite the Report and Order in *In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Co.*, 10 Mo. P.S.C. 3d 56, 57 (Mo. P.S.C. 2001) (Commission Case No. WO-98-223). Neither Section 536.070(5) nor the Commission's Report and Order in Case NO. WO-98-223 require or support the admission of the brief in question. In that case the Commission relied on Section 536.070(5) and 4 CSR 240-2.130(2) for the proposition that documents "may" be received into evidence if they are offered in accordance with these rules; however, because the particular items had not been offered during the hearing as required by the rules, the Commission held that citations to these documents should be stricken. *Id.* at 58. There is, however, absolutely no suggestion in the Report and Order that if a document from any Commission file is identified during the hearing, it is then "required" to be admitted in another Commission matter. Moreover, nothing in the rules or the cited case suggests that other evidentiary rules are negated simply because a document may have been offered during a hearing and may be contained in a Commission file in another case; if this were the case, Section 536.070(5) would not require that they be offered in the first instance. The question here is whether a legal brief in another case is admissible in the case at bar under the applicable rules of evidence. It is not.

3. Movants indeed admit, at least by implication, that it is the rules of evidence that control the disposition of the Motion by arguing that the proffered brief is admissible under evidentiary rules.[2] Because as explained below the referenced brief does not constitute an admission, the Commission was correct in refusing its admission in

[2] Motion, ¶¶5 and 6.

this proceeding. As discussed below, notwithstanding the fact that the brief does not state an "inconsistent position" to the one Ameren Missouri has taken in this case, the *legal* arguments in that brief as to the discretion of the Commission to grant an accounting authority order under the particular facts and circumstances in that case or Ameren Missouri's view in that case as to the legal effect of General Instruction 7 of the Uniform System of Accounts ("USoA") are simply just that—legal arguments regarding what a federal regulation, applied to Missouri public utilities by a state regulation, does or does not require. Missouri case law makes clear that legal conclusions are not admissible as admissions; to the contrary, under certain circumstances only statements of *fact* can constitute admissions. *See, e.g., Lazane v. Bean*, 782 S.W.2d 804, 805 (Mo. App. W.D. 1990); *see also Kelso v. C.B.K. Agronomics, Inc*., 510 S.W.2d 709, 729 (Mo. App. W.D. 1974) ("Plaintiffs' counsel properly pointed out that in any event the pleadings' legal conclusions were not admissible as admissions against interest, and *only the statements of fact* against the interest of the pleading party were in any wise admissible." (emphasis added)); *Voss v. Merchants Dairy Co*., 373 S.W.2d 662, 664 (Mo. App. E.D. 1964) (an admission of fact that is actually a conclusion of law is "no evidence"). The legal arguments in Ameren Missouri's brief in another action and based upon entirely different facts do not constitute admissions of fact, but instead are legal arguments inadmissible in this proceeding.

4. Although Movants assert in one place that they desire the admission of the legal brief in a prior Commission matter for the mere purpose of showing that Ameren Missouri has now changed its position, they argue otherwise—that the legal arguments

made in the brief constitute" judicial admissions"[3] and, as such, are admissible. Despite the inconsistency in Movants' position, the issue in the first instance is not whether the legal brief at issue constitutes a judicial admission or an evidentiary admission, but whether the legal arguments even constitute an admission at all. As demonstrated above, they do not. To the contrary, as noted they are not admissions of fact but rather they reflect legal arguments about what the USoA and Commission regulations (may or may not provide for or require. Consequently, they are not admissions at all.

5. Even had the proffered brief contained a factual admission on the part of Ameren Missouri (it does not), Missouri courts have not extended the "harsh doctrine" of judicial admissions, that can be applied to an appellate brief, to briefs or suggestions filed in a trial court (or, as here, at the equivalent of the trial court – the Commission). *Peace v. Peace*, 31 S.W.3d 467, 471-472 (Mo. App. W.D. 2000) (holding that the trial court erred in treating facts admitted in a party's responsive brief as a judicial admission); *see also Mitchell Engineering Co. v. Summit Realty*, 647 S.W.2d 130 (Mo. App. W.D. 1982) (cited by movants at p. 5 of their Motion) (holding that statement in prior *appellate* brief may constitute an admission against interest [and not a judicial admission] in the instant proceeding). Movants' assertion that the trial (post-hearing) brief in question from another case constitutes a judicial admission is unsupported and contrary to law.

6. Because legal arguments in another brief can never constitute judicial admissions of fact (there is no such thing as a judicial admission of law), and because even factual statements contained in a legal brief filed at the trial (or Commission) level

[3] "The case law regarding judicial admissions is well established in both Missouri and nationwide" (followed by two pages of discussion of why the judicial admission doctrine supports Movants' claim that the brief should be admitted). Motion, ¶¶ 7 to 11.

cannot constitute judicial admissions in a different case, Movants' Motion fails as a matter of law and must be denied.

7. Regardless, there is no inconsistency between Ameren Missouri's legal position in the prior case and its legal position in this case. Movants claim that Ameren Missouri's discussion of USoA General Instruction 7 in the post-hearing brief in File No. EU-2012-0027 is inconsistent with the legal position it takes in this case where, relying upon this Commission's own Report and Order, Ameren Missouri states in its Position Statement as follows:

> There are no "standards" that limit the Commission's discretion in ruling upon a request for an Accounting Authority Order ("AAO"). As the Commission has long stated, decisions on AAO requests are "best performed on a case by case basis." *In re: Missouri Public Service*, Report and Order, 1 Mo. P.S.C. 3d 200 (Dec. 20, 1991). While the Commission has examined various factors in the past – most notably whether the AAO request involves something "extraordinary" (which the Commission has in the past defined as "unusual and nonrecurring" (*Id.*)) -- the Commission is not bound to any one standard or factor and has broad discretion to determine each AAO request based upon the particular circumstances of the request at issue. *In re: KCP&L*, Order Approving Stipulation and Agreement, File No. EU-2012-0131 (Eff. Apr. 30, 2012) ("there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to a particular set of circumstances.").

8. It is true that Ameren Missouri's prior brief points to USoA General Instruction 7 in arguing in that case that the ice storm at issue in that case and its impact on Ameren Missouri's financial condition was "extraordinary" within the meaning of the Instruction. The Commission too has looked to General Instruction 7 in examining whether an AAO request arises from something extraordinary, yet the Commission has never – and neither has Ameren Missouri—said that General Instruction 7 limits the Commission's discretion in an AAO case or that an AAO must arise from something extraordinary as defined by General Instruction 7 or otherwise. In the case cited by Movants themselves (the *Sibley* case), the

Commission clearly stated that its decision about whether to grant an AAO "fall[s] within its broad discretion to determine what costs are recoverable." *In re: Missouri Public Service,* 1 Mo. P.S.C.3d 200 (Dec. 20, 1991). Indeed, a reading of Ameren Missouri's entire brief in the other case makes this clear. There Ameren Missouri stated that "there is no statute or rule that . . . prescribes legal or regulatory principles governing such [AAO] applications." Ameren Missouri Initial Post-Hearing Brief, File No. EU-2012-0077, p. 8. Ameren Missouri also stated that the Sibley order, where the Commission looked in part to General Instruction 7, "has no binding precedential effect on the Commission's decision in this [Ameren Missouri's AAO] case," noting that it was instructive in that case because of the standards the Commission has "traditionally applied." *Id.,* p. 9.

9. Movants herculean efforts to "admit" Ameren Missouri's legal arguments in a brief into "evidence" in this case is an attempt to use those legal arguments to undermine the applicants' AAO request in this case. Movants' argument might just as well be aimed at the Commission for looking to General Instruction 7 in the past (in the *Sibley* case and in the Commission's Reports and Orders in the applicants' last rate cases), and Movants just as well ought to claim (incorrectly) that the Commission was acting "inconsistently" when it stated that "there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to a particular set of circumstances." *In re: KCP&L*, Order Approving Stipulation and Agreement, File No. EU-2012-0131 (Eff. Apr. 30, 2012).[4]

[4] If Ameren Missouri is "guilty" of anything, it is that its statements in the prior post-hearing brief were not as clear as they could have been regarding the fact that the Commission has looked General Instruction 7 for guidance and could do so again if it chose. After all, in that case no one claimed the ice storm was not extraordinary under whatever definition one wants to apply. Ameren Missouri never made the legal argument that General Instruction 7 was a limit on the Commission's discretion in an AAO case, however.

10. Movants' Motion is truly a tempest in a teacup. Movants can – and have – pointed to past cases where the Commission has looked to General Instruction 7, and Ameren Missouri has pointed out (as has the Commission itself) that the Commission is not required to do so. The fact that the Commission has looked to General Instruction 7 in the past, and that Ameren Missouri, citing those past cases, has also referenced General Instruction 7, is in no way inconsistent with the legal point made in this case; that is, that the USoA in general, and General Instruction 7 in particular, do not limit the Commission's discretion in an AAO case.

11. For this reason and because Movants have misapplied the judicial admission doctrine it would be error for the Commission to admit the prior post-hearing brief into evidence in this case. Movants' Motion should be denied.

Respectfully submitted,

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Dated: February 4, 2014

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Ameren Missouri's Application for Intervention was served via electronic mail (e-mail) or via regular mail on this 4th day of February, 2014, on:

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