EFORE 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.	)	

REPLY BRIEF OF
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Union Electric Company d/b/a Ameren Missouri (hereinafter "Ameren Missouri" or "the Company") hereby files it brief in reply to the initial post-hearing briefs filed by the Missouri Public Service Commission Staff ("Staff"), the Office of the Public Counsel ("OPC"), the Missouri Industrial Energy Consumers ("MIEC"), and Barnes-Jewish Hospital ("BJH").

I. THE AMOUNT THAT AMEREN MISSOURI SEEKS TO DEFER IN THIS CASE CONSISTS ENTIRELY OF FIXED COSTS THAT THE COMPANY WAS UNABLE TO COLLECT FROM NORANDA FOLLOWING THE JANUARY 2009 ICE STORM

No one can seriously question that the amount Ameren Missouri seeks to defer in this case solely consists of the fixed costs the Company was unable to collect from Noranda Aluminum, Inc. ("Noranda"), during the 14-month period immediately following the devastating ice storm that struck southeastern Missouri over the three-day period January 26-28, 2009 ("January 2009 ice storm"). Commencing with its July 25, 2011, "Verified Application for Accounting Authority Order" ("Application"), Ameren Missouri consistently has referred to the amount it seeks to defer as unrecovered "fixed costs." For example, paragraph 6 of the Application both describes the factual circumstances underlying its request for an Accounting Authority Order ("AAO") and identifies the nature of the amount the Company seeks to defer:

> The loss of load at the Noranda plant had an immediate and devastating financial impact on Ameren Missouri. Sales to Noranda constitute approximately 11% of the Company's system-wide native load sales. Annual revenues from Noranda, which do not vary significantly due to Noranda's load factor of approximately 98%, were approximately $139 million at the time of the ice storm. Moreover, a significant portion of the Company's ***fixed costs*** are allocated to the Large Transmission Service class (of

> which Noranda is the only member) in rate cases. Without Noranda's revenue contribution, the Company has no opportunity to recover these fixed costs because while the ice storm caused the Company's kilowatt-hour sales to be reduced by approximately 11%, its fixed costs weren't reduced at all. [emphasis added]

The direct testimony of Lynn Barnes, the Company's Vice President, Business Planning and Controller, contains a similar description of the nature of Ameren Missouri's request:

> [A]pproximately $36 million of the Company's ***fixed costs*** were not recovered as they represented the portion of those costs that were allocated to the Large Transmission Service class (of which Noranda is the only member). Thus, without Noranda's revenue contribution, the Company had no opportunity to recover these fixed costs because while the ice storm caused the Company's ***fixed costs*** to be reduced . . . its ***fixed costs*** were not reduced at all.[1] [emphasis added]

The surrebuttal testimony of David Wakeman, the Company's Vice President of Energy Delivery – Distribution Services, also clearly identifies the amount at issue in this case as unrecovered fixed costs: "As a result of [the Noranda] outage, Ameren Missouri was unable to collect approximately $36 million in revenue to cover ***fixed costs*** that had been assigned to Noranda's rate class during the period Noranda was out of service."[2] [emphasis added]

Certainly, there are references to "revenues" or "lost revenues" in Ameren Missouri's prepared testimony in this case, but that is to be expected. After all, even Staff acknowledges that rate revenues are the only means the Company has to collect from its customer classes the fixed costs that the Commission assigned to them in Case No. ER-2008-0318.[3] As described in the Company's initial brief, after it had determined a fair and reasonable cost of service/revenue requirement in that case, the Commission assigned to of Ameren Missouri's rate classes the costs, including fixed costs, for which each was responsible and then set rates for each class that were designed to allow the Company to recover those assigned costs. However, if a customer like Noranda, which comprises an entire rate class, drastically reduces its use of electricity, the corresponding loss of rate revenue means that Ameren Missouri will be unable to recover a significant portion of its overall costs. The fixed cost portion of those overall costs

[1] Ameren Exhibit 2, p. 4, lns. 17-23.
[2] Ameren Exhibit 1, p. 14, lns. 16-19; Transcript p. 72, ln. 25 – p. 73, ln. 4.
[3] Transcript p. 158, lns. 2-6.

cannot be avoided, that is, the Company still must incur those costs regardless of the amount of electricity it sells. Those unavoidable fixed costs, which it was unable to collect from Noranda following the ice storm, are the costs that Ameren Missouri seeks to defer in this case.

In its initial brief, Staff contends that the amounts the Company seeks to defer are "lost revenues" and not fixed costs.[4] The precise basis for that contention, however, is unclear because the argument presented in Staff's brief appears to focus primarily on what Ameren Missouri is not requesting in this case as opposed to what it is requesting. For example, nearly three pages of Staff's brief are devoted to a discussion of the fact that the Company has not requested to defer any operations and maintenance expense or capital-related costs associated with the January 2009 ice storm.[5] But, as explained by Ms. Barnes in testimony excerpted in Staff's brief, no such request was necessary because storm restoration expenses that already were included in rates were sufficient to cover all of Ameren Missouri's out of pocket expenses related to the ice storm.[6] Mr. Wakeman further explained that the majority of the costs the Company incurred to restore service following the ice storm were capital costs,[7] and, as Ms. Barnes explained, such costs are routinely included in rate base in the next general rate case and, therefore, are not the kinds of costs that are deferred via an AAO.[8]

Staff's initial brief also cites in support of its argument the prepared rebuttal testimony of MIEC's witness Maurice Brubaker, who testified that "there is no requirement that a utility recover the fixed costs that are allocated to a class only from that class . . ."[9] However, Staff ignores, or at least fails to acknowledge, the testimony its own witness, Mark Oligschlaeger, who admitted during cross-examination that during the 14-month period immediately following the January 2009 ice storm no other Ameren Missouri customers paid any of the fixed costs that were assigned to Noranda in Case No. ER-2008-

[4] Staff's Initial Brief pp. 5-13.
[5] *Id*. pp. 5-7.
[6] *Id*. p. 5.
[7] *Id*.
[8] Transcript p. 92, ln. 15 – p. 93, ln. 4.
[9] Staff's Initial Brief p. 8.

0318.[10] Consequently, those costs remain unrecovered from any customer, and unless the Commission grants the Company the AAO it seeks in this case, Ameren Missouri will forever lose the opportunity to seek recovery of those fixed costs from its customers.

MIEC also argues that the amount at issue in this case is not unrecovered fixed costs, but, unlike Staff, MIEC contends that amount should be viewed as "phantom profits from ungenerated revenues"[11] The only evidence MIEC cites in support of that argument is Ms. Barnes' testimony explaining why the Company is not seeking an AAO for out of pocket costs associated with the ice storm. But, again, evidence about what Ameren Missouri is not seeking to defer in this case proves nothing about the nature of the amount it is seeking to defer.

MIEC also appears to argue, based in the Commission's recent decision in Case No. GU-2011-0392, that the fixed costs that Ameren Missouri seeks to defer are "fictional," and that granting an AAO to defer such costs "makes no sense."[12] But that argument ignores uncontroverted evidence presented by both Ms. Barnes and Mr. Oligschlaeger that fixed costs do not vary based on the amount of electricity the Company sells, and that fixed costs do not decline or disappear if there is a decline in the amount of electricity sold. Consequently, regardless of the amount of electricity that Noranda purchased during the 14-month period immediately following the ice storm, Ameren Missouri continued to incur all of the fixed costs that the Commission assigned to Noranda in Case No. ER-2008-0318. Far from being a request to defer "fictional profits" or a "non-item,"[13] the Company's Application seeks authority to defer real fixed costs that it actually incurred but was unable to collect from Noranda or any of its other customers.[14]

BJH's initial brief also argues that the amount at issue is really "revenues" and not fixed costs, but BJH bases its argument on cherry-picked references to the word "revenues" from Ms. Barnes'

[10] Transcript p. 178, lns 12-21.
[11] MIEC's Initial Brief p. 4.
[12] *Id*. p. 5.
[13] *Id*.
[14] Transcript p. 178, lns. 12-21.

testimony in Case No. EO-2010-0255.[15] Such an argument is problematic for at least two reasons. First, neither BJH nor any other party offered Ms. Barnes' prior testimony into evidence in this case. Consequently, that testimony, even if it were relevant or probative, does not constitute competent and substantial evidence on which the Commission can base its decision in this case. Second, as discussed in Ameren Missouri's initial brief, the issues in Case No. EO-2010-0255 differ materially from the issues in this case. Thus, Ms. Barnes' references to "revenues" in that case, especially when those references are taken out of context, are of no probative value whatsoever to questions at issue in this case.

In the end, the controversy over whether the amount Ameren Missouri seeks to defer in this case is unrecovered fixed costs or lost revenues is much ado about nothing. Again, the Company is seeking the recovery of the fixed costs that it *actually incurred*, and that would have been paid through rate revenues from Noranda if the ice storm had not occurred. As the Company's counsel stated in his opening statement:

> We acknowledge that the company's request could be fairly characterized as either an AAO to recover lost fixed costs, lost or unrecovered fixed costs, or lost revenues that were expected to pay those fixed costs. It's two sides of the same coin in our view. Both characterizations are correct.[16]

Moreover, as Ms. Barnes explained in her surrebuttal testimony, the question of whether the amount at issue in this case is characterized as "fixed costs," "revenue," or "lost revenue" is immaterial under applicable provisions of the Uniform System of Accounts ("USOA"):

> Irrespective of what the parties want to call the request, the USoA clearly states in its definition of regulatory assets and liabilities that "specific *revenues*, expenses, gains or losses that would have been included in net income, qualify as items that can be recognized and deferred through an AAO . . . The other parties' witnesses provide no authority for the concept – which in fact is directly rebutted by the USOA itself – that an AAO cannot address revenue shortfalls due to an extraordinary event. So whether you characterize Ameren Missouri's request as involving revenues or fixed costs, the Company's application still meets the USoA's criteria for deferral through an AAO.[17] [emphasis original]

II. AMEREN MISSOURI TIMELY FILED ITS APPLICATION FOR AN AAO

[15] BJH's Initial Brief pp. 2-3.
[16] Transcript p. 34, lns. 12-17.
[17] Ameren Exhibit 3, p. 6, ln. 20 – p. 7, ln 4.

As stated in Ameren Missouri's initial brief, the Company's request for an AAO is just the latest link in the chain of events that started with the January 2009 ice storm. As further noted in that brief, however, even Staff acknowledges that Ameren Missouri did not experience any adverse financial consequences from that storm until May 2011, which was the effective date of the Commission's Report and Order in Case No. EO-2010-0255.[18] The Company filed its Application initiating this case within three months of that date, which means that Ameren Missouri's request for an AAO was timely-filed under any reasonable interpretation of either the USOA or decisions of the Commission in prior AAO cases.

Staff, MIEC, and OPC each argue in their respective initial briefs that the Commission should deny Ameren Missouri's request for an AAO because the Company did not file its Application in the "current period" as required by the USOA.[19] But those arguments are based on an isolated and overly literal interpretation of a single phrase in one section of the USOA. By focusing on that single phrase, those parties ignore the overarching purpose of all of the relevant provisions of the USOA that pertain to the deferral of extraordinary items. As the Commission recently recognized in its final order in Case No. EU-2011-0387, "[t]he AAO technique protects the utility from earnings shortfalls . . ."[20] The interpretation proposed by Staff, MIEC, and OPC would have the opposite effect.

The argument that Ameren Missouri's Application was not timely appears to be based on two facts. First, the 14-month period during which Noranda curtailed its smelting operations, when the Company experienced a significant reduction in Noranda's rate revenues, spanned portions of fiscal years

[18] Transcript p. 184, lns. 13-20.

[19] See, e.g., Staff's Initial Brief p. 13.

[20] The Commission's full statement was "[t]he AAO technique protects the utility from earnings shortfalls and softens the blow with results from extraordinary construction programs." At pages 18-19 of its initial brief, Staff appears to suggest that Ameren Missouri's citation of only part of the Commission's statement was intended to deceive. Nothing could be further from the truth. The use of the conjunctive "and" in that statement means that the Commission believes the AAO technique protects a utility from two, distinct adverse effects. Because the second of those effects – the financial blow associated with extraordinary construction projects – is not relevant to this case, the Company saw no need to refer to that portion of the Commission's statement. No deceit was intended, and Staff was wrong to suggest otherwise.

2009 and 2010.[21] Second, Ameren Missouri's financial statements for 2011 and 2012 do not reflect any reduction in rate revenues for electric sales made to Noranda.[22] The first fact cannot be considered in isolation, because doing so ignores other relevant information, such as when the Company first experienced the adverse financial effects of the loss of Noranda's fixed cost support. The second statement is true, but it is largely irrelevant because the amount at issue in this case concerns the fixed costs that the Company was unable to collect from Noranda during the 14-month period immediately following the January 2009 ice storm. Although the fixed costs at issue in this case were booked during 2009 and 2010, the adverse impact on Ameren Missouri's finances did not occur until 2011. And those adverse effects were recorded on the Company's books during 2011 and 2012.

As noted in the Company's initial brief, the Commission's order in Case No. EO-2010-0255 changed everything related to when and how the January 2009 ice storm would affect Ameren Missouri's earnings. It was not, as MIEC claims, the extraordinary event that gave rise to the Company's Application. That event – the event that made it impossible for Ameren Missouri to recover its fixed costs from Noranda – was the January 2009 ice storm and the resulting curtailment of Noranda's smelting operations. The Report and Order in Case No. EO-2010-0255 merely triggered the adverse financial effect stemming from the extraordinary events that occurred in 2009.

Each of the links in the chain of events that culminated in the filing of the Company's Application is recounted and discussed at pages 23-24 of Ameren Missouri's initial brief. That discussion makes clear that until the Commission issued its Report and Order in Case No. EO-2010-0255 the Company suffered no adverse financial effects of the loss of Noranda's rate revenues because prior to May 2011 the effects of the fixed costs Ameren Missouri was unable to collect from Noranda were offset by revenues derived from what the Company believed were long-term requirements power sales to AEP Operating Companies ("AEP") and Wabash Valley Power Association ("Wabash"). Therefore, prior to

[21] *Id.*; MIEC's Initial Brief pp. 6-7; OPC's Initial Brief pp. 2-3.
[22] Staff's Initial Brief p. 13.

the effective date of that order, the Company's net income was not adversely affected by its inability to collect Noranda's fixed costs.

That changed in 2011, when the Commission ordered Ameren Missouri to flow back to customers 95 percent of the revenue it received from sales to AEP and Wabash. The requirement to refund those revenues meant that the Company books would, for the first time, reflect a loss due to its inability to collect fixed costs from Noranda during 2009-2010. The refund payments to customers commenced in 2011 and continued into 2012. Consequently, in terms of a shortfall in Ameren Missouri's earnings – the very consequence an AAO is designed to protect against – 2011 was the accounting period in which the Company first felt a material adverse impact of the January 2009 ice storm.

Although neither the Commission's rules nor the USOA prescribe a time period following an extraordinary event within which a utility must file an application for an AAO, Ameren Missouri filed its Application within three months of the effective date of the Commission's Report and Order in Case No. EO-2010-0255, an interval that is well within acceptable limits based on past practice. For example, in Case No. EU-2008-0141, which Ms. Barnes discussed in her surrebuttal testimony, Ameren Missouri filed its application for an AAO more than 10 months after the extraordinary event on which the application was based. It appears, however, that the Commission did not consider that application to have been untimely because the Company's request for an AAO was granted.[23]

Because the purpose of those provisions of the USOA that relate to and govern the issuance of AAOs is to protect utilities from the adverse financial consequences of an extraordinary event, the better and more reasonable interpretation of the phrase "current period," as used in General Instruction No. 7, is that it means the financial period in which the utility experiences the financial effects of such an event. For Ameren Missouri, that period began in 2011, and that is the period when the Company filed its Application requesting an AAO. To adopt the interpretation of General Instruction No. 7 that is proposed

[23] Ameren Exhibit 3 p. 9, ln. 15 – p. 10, ln. 13.

by Staff, MIEC, and OPC elevates form over substance, and, in so doing, denies Ameren Missouri the protection that General Instruction No. 7 was intended to provide.

III. THE DECISION IN CASE NO. GU-2011-0392 DOES NOT PREVENT THE COMMISSION FROM GRANTING AN AAO TO AMEREN MISSOURI

At pages 19-20 if its initial brief, Ameren Missouri explains why certain of the findings and conclusions in the Commission's recent Report and Order in Case No. GU-2011-0392[24] – an AAO case involving the Missouri Gas Energy Division of Southern Union Company ("MGE")– are in error or, if not in error, why they should not be applied to bar the AAO the Company is seeking in this case. For example, in the MGE Order the Commission held that "ungenerated revenue" that MGE lost as a result of the 2011 Joplin tornado equates to "a reduced opportunity for profit while ignoring the costs saved by providing service."[25] The order further states that "[e]ven if there were a drop in revenue, it would not prevent the recovery of fixed costs,"[26] and that "[r]evenue not generated from service not provided, represents no exchange of value. There is neither revenue nor cost to record in the current period or any other."[27] In addition, the order states that it would be inappropriate to issue an AAO for revenue lost due to an extraordinary event because "[t]o issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall" for the utility requesting such relief.[28] In this case, each of those findings is either erroneous or inapplicable.

No witness for any party in this case offered any evidence that suggests – much less proves – that Ameren Missouri did not incur the almost $65 million in fixed costs that it seeks to defer via an AAO in this case. Indeed, the Company and Staff stipulated to the exact amount of fixed costs the Company

[24] *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)I* (February 2012) ("MGE Order").
[25] MGE Order p. 22.
[26] *Id*.
[27] *Id*. p. 25.
[28] *Id*.

incurred during the 14-month period when Noranda was forced to curtail its smelting operations,[29] and all of those costs were recorded on Ameren Missouri's books.

Similarly, there should be no dispute that the actual fixed costs Ameren Missouri incurred but did not collect from Noranda represent an exchange of value. Fixed costs are costs that are incurred to enable the Company to be ready to provide service to customers when and if they elect to purchase that service. Fixed costs are not customer-specific, they do not vary with the amount of electricity sold, and they do not go away – that is, they cannot be saved – if a customer, like Noranda, decreases its demand for service either temporarily or permanently.[30]

Finally, although the revenue Ameren Missouri was unable to collect from Noranda potentially represents a lost opportunity for profit, it does so because of the effect the unrecovered fixed costs, which the Commission assigned to Noranda's rate class in Case No. ER-2008-0318, have on net income. If expenses remain constant between rate cases but revenues decline, the result is a reduction in net income that will adversely affect a utility's ability to earn a fair rate of return. As the United States Court of Appeals for the District of Columbia observed almost 60 years ago:

> [e]xpenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes) are facts. There are to be ascertained, not created, by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance for a return upon the investment, being an amount over and above expenses, would be a farce.[31]

Staff and MIEC each argue that the Commission's holdings in the MGE Order require the Commission to deny Ameren Missouri's request for an AAO in this case.[32] They base their argument on the findings in the MGE Order that are discussed in the preceding paragraphs, and, for the reasons stated in those paragraphs, Staff's and MIEC's argument should be rejected. The Company incurred and recorded actual costs to make service available to Noranda during the 14-month period immediately following the January 2009 ice storm, and though Noranda was unable to purchase its usual amount of

[29] Transcript p. 17, lns. 2-12.
[30] Ameren Exhibit 3, p. 7, lns. 5-17; Staff Exhibit 3, p. 13, lns. 7-11.
[31] *Mississippi River Fuel Corp. v. FPC*, 163 F.2d 433, 437 (1947).
[32] Staff's Initial Brief pp. 16-19; MIEC's Initial Brief pp. 4-7.

electricity during that period, none of those fixed costs dissipated or went away altogether. Those costs are not fictional or "phantom," they are real. There also is nothing fictional about the fact that the Commission assigned those costs to Noranda's rate class as part of the rate design approved in Case No. ER-2008-0318. Failure to defer those costs, which will give the Company an opportunity to have those costs considered in a future rate case, will result in a loss to the Company that is both real and permanent. And if those costs are eventually allowed in future rates, what will result will not be an "unearned windfall," as MIEC claims. Instead, recovery of those fixed costs will simply restore Ameren Missouri's earnings to where they would have been had Noranda paid all of the fixed costs assigned to it in Case No. ER-2008-0318.

Staff also argues that MGE's AAO case cannot be distinguished from the current case simply because MGE's overall revenues increased following the Joplin tornado while Ameren Missouri's overall revenues significantly declined following the ice storm, and as support for its argument Staff relies on that portion of the MGE Order where the Commission found that "[e]ven if there were a drop in revenue, it would not prevent recovery of fixed costs."[33] But that finding was based on the Commission's assertions that (1) the failure to recover fixed costs "happens whenever a customer leaves [MGE's] service under ordinary circumstances"; (2) equating the loss of a customer with a reduced opportunity for profit ignores "the costs saved by providing no service"; and (3) that there is no authority for such a "lopsided definition of the opportunity to earn."[34]

Whatever evidence may have justified such assertions with regard to MGE's request for an AAO, no similar evidence exists with regard to Ameren Missouri's Application. If Ameren Missouri's Application were based on the normal ebb and flow of customers on its system, then there would be no basis for an AAO. But that's not the basis for the Company's request. Instead, Ameren Missouri's request is based on those provisions of the USOA that specifically authorize special treatment for the financial effects of *extraordinary events*. Those provisions were specifically designed to protect utilities

[33] *Id*.
[34] MGE Order p. 22.

from earnings shortfalls resulting from such events. That is not a "lopsided definition of the opportunity to earn"; rather, it simply preserves the utility's opportunity to earn its authorized return in the face of an extraordinary event. But even if it could be considered to be a "lopsided opportunity to earn," it is no more lopsided that the opportunity that is given to a utility when it is authorized to defer out of pocket expenses associated with an extraordinary event.

Moreover, just because prior Commission decisions granting AAOs have been limited to the deferral of additional out of pocket costs a utility must incur to deal with the effects of an extraordinary event, that does not mean the Commission lacks authority to authorize the same treatment for fixed costs a utility is unable to collect from customers as a result of the same type of event. As the Company pointed out in its initial brief, the USOA clearly states that all items affecting a utility's net income – including rate revenue and the cost recovery such revenue represents – also can be deferred to Account 182.3. Furthermore, even Mr. Oligschlaeger agrees that the USOA does not prescribe one set of rules and standards that apply to out of pocket expenses and a separate set that apply to revenue and unrecovered fixed costs.[35]

Unquestionably, the Commission has the authority necessary to grant Ameren Missouri's request for an AAO, and no finding, conclusion, or decision involving MGE or any other utility either changes that fact or dictates any particular result in this case. All the Company asks is that the Commission exercise that authority so that Ameren Missouri can avail itself of the protection against earnings shortfalls due to extraordinary events that the USOA provides.

IV. THE FACT THAT AMEREN MISSOURI HAD POSITIVE EARNINGS FOLLOWING THE JANUARY 2009 ICE STORM IS IRRELEVANT TO ANY ISSUE IN THIS CASE

Staff argues that because Ameren Missouri had positive net income following the January 2009 ice storm the Company recovered all of its fixed costs and does not require an AAO.[36] But that argument ignores the fact that, based on the testimony of Staff's own witnesses and applicable provisions of the

[35] Transcript p. 165, lns. 9-15.
[36] Staff's Initial Brief pp. 19-20.

USOA, positive earnings do not disqualify Ameren Missouri from receiving the AAO it seeks in this case, and in fact should have no bearing on the Commission's decision.

Mr. Oligschlaeger stated in his prepared rebuttal testimony that, based on prior Commission cases, there are two standards – and only two standards – that Missouri utilities must satisfy to qualify for an AAO. First, the utility must show that the costs to be deferred pertain to an extraordinary event. Second, the utility must show that those costs are material.[37] Uncontroverted evidence on the record in this conclusively shows that Ameren Missouri's application for an AAO satisfies both of those conditions.

As discussed in the Company's initial brief, all parties who expressed a position on the issue now agree that the January 2009 ice storm and the resulting 14-month loss of Noranda's fixed cost support each satisfy all of the criteria for an extraordinary event that are found in the USOA's General Instruction No. 7. There can be no question, therefore, that the fixed costs that Ameren Missouri seeks authority to defer satisfy the first standard described by Mr. Oligschlaeger. The only remaining question is whether those costs are material.

During the hearing in this case, Mr. Oligschlaeger acknowledged that in order to be considered material under General Instruction No. 7 an item has to have a five percent or greater impact on a utility's net income,[38] and stated that any utility that meets or exceeds that five percent threshold satisfies the Commission's materiality standard.[39] He also testified that a utility need not be in dire financial straits or in jeopardy of being unable to provide safe and adequate service in order to satisfy the Commission's five percent standard,[40] and acknowledged that in most circumstances an extraordinary event will cause an

[37] Staff Exhibit 3 p. 6, lns. 5-10. As Ameren Missouri noted in its intial brief, the USOA does not require a utility to satisfy the materiality standard in order to qualify for an AAO. Mr. Oligschlaeger admitted during cross-examination that the USOA's General Instruction No. 7 authorizes utilities to defer extraordinary items whose financial effect is less than five percent of net income if the utility obtains permission to do so from the Commission. (Transcript p. 164, lns. 8-17) Consequently, the statement in Mr. Oligschlaeger's prepared testimony – that a utility must establish that an item is material before it can defer that item via an AAO – is in error.

[38] Transcript p. 164, lns. 8-17.

[39] *Id*. lns. 18-22.

[40] *Id*. p. 164, ln. 23 – p. 165, ln. 4.

earnings shortfall but won't eliminate earnings altogether.[41] He further testified that, in the past, having a positive net income has not been a bar to granting an AAO, and acknowledged that in two recent AAO cases both The Empire District Electric Company and MGE were granted AAOs even though both companies showed positive earnings.[42]

If, as Mr. Oligschlaeger testified, to qualify for an AAO a utility need only show that an extraordinary event affected the utility's earnings by as little as five percent, then what basis can there be for Staff's argument that Ameren Missouri should be denied an AAO because its earnings remained positive following the ice storm? The answer is that there is no support for Staff's argument, either in the record of this case, in the USOA, or in past Commission decisions. If, as Staff suggests, a utility with any net income is disqualified from being granted an AAO, then the materiality threshold in General Instruction No. 7 would be 100 percent, not five percent. But, as Staff's own witness admitted, 100 percent is not the standard set by the USOA.[43]

As discussed in the Company's initial brief, Ms. Barnes testified that the approximately $65 million in fixed costs that Ameren Missouri was unable to collect from Noranda during the 14-month period immediately following the January 2009 ice storm reduced the Company's net income by approximately 8.5 percent. No witness challenged that calculation. Moreover, there is no evidence on the record in this case that the Company has failed to satisfy the five percent materiality standard that the Commission has applied in past AAO cases. Simply stated, Staff is attempting to impose a new and significantly more exacting standard on Ameren Missouri – a standard that Staff's own witness admits is not based on the requirements of the USOA[44] – than the Commission has ever imposed on any other utility seeking an AAO. That new standard should be rejected because it is unreasonable and is not supported by any competent and substantial evidence.

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[41] *Id*. p. 167, ln. 7-12.
[42] *Id*. p. 167, ln. 25 – p. 168, ln. 2.
[43] *Id*. p 165, lns. 4-8.
[44] *Id*. p. 169, lns. 11-15.

V. GRANTING AMEREN MISSOURI'S REQUEST FOR AN AAO AND ALLOWING THE DEFERRED COSTS TO BE INCLUDED IN FUTURE RATES DO NOT CONSTITUTE UNLAWFUL RETROACTIVE RATEMAKING

In their respective initial briefs, both Staff and MIEC continue to argue that Ameren Missouri's request for an AAO should be denied because allowing any deferred amounts to be included in future rates constitutes unlawful retroactive ratemaking.[45] However, neither party provides any statutory or case law that directly supports its argument.

Both Staff and MIEC rely on the Missouri Supreme Court's decision in *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41 (1979) ("*UCCM"*), as support for their arguments. But an analysis of that case, however, shows that it provides no support whatsoever for either party's argument. First and foremost, the facts of the *UCCM* decision did not include either an AAO or an order where the Commission allowed in future rates costs that were previously deferred. Consequently, none of the general principles of regulatory law stated in that decision qualify as a holding on the question of whether it is lawful for the Commission to allow in future rates costs previously deferred via an AAO. At best, those general principles provide a basis for speculation as to how the court might rule if that question were presented to it.

But there is no need to speculate how those general principles apply to the questions specifically at issue in this case because there is case law from the Missouri Court of Appeals that is directly on point. The Company's initial brief cites four such cases. *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), each concern the question of whether granting an AAO constitutes retroactive ratemaking, and each concludes that it does not. *State ex rel. Missouri Gas Energy v. Public Service Commission*, 210 S.W.3d 330, 335-6 (2006), concerns the additional question of whether it is retroactive ratemaking when the Commission includes previously deferred costs in future rates. In that case the court also answered

[45] Staff's Initial Brief pp. 27-28; MIEC's Initial Brief p. 9.

that question in the negative. In addition, there are at least two other aspects of those decisions that also are worth noting. First, all four or those cases were decided well after the Missouri Supreme Court decided *UCCM*. Second, three of the four Court of Appeals decisions specifically cite *UCCM*, which means the judges in each of those cases were familiar with the general legal principles espoused in *UCCM* when they rendered each of their subsequent decisions. And although the fourth case does not specifically cite *UCCM*, it does cite one of the other cases that did consider *UCCM*. That strongly suggests that that court also was aware of the general holdings found in that case.

Staff also cites in support of its position *State ex rel. Public Service Commission v. Fraas*, 627 S.W.2d 882 (Mo. App. 1981), although the purpose of that citation is unclear. As described at pages 884-85 of the court's decision, that case considered the question of whether a pending appeal of a rate case order is rendered moot by an order in a subsequent rate case that, by operation of law, supersedes the preceding order. Generally, the court concluded, the prior order is moot, except where the question presented is "of a recurring nature, is of general public interest and importance, and will evade appellate review unless the court exercises its discretionary jurisdiction." But neither the general rule regarding mootness nor the court's exception applies to the question of whether including previously deferred costs in future rates constitutes retroactive ratemaking.

VI. AMEREN MISSOURI DID NOT "MISUSE" EVIDENCE REGARDING THE N-FACTOR

The most puzzling argument in Staff's initial brief is the one found at pages 22-27 under the heading "Ameren Missouri's Misuse of the 'N Factor.'" There Staff appears to claim that it was inappropriate for Ms. Barnes to include in her surrebuttal testimony a footnote that states, in relevant part, "[i]n adopting that provision [the "N" Factor], the parties and the Commission implicitly acknowledged that it is not appropriate for the Company to suffer a loss in this situation."[46] The loss to which Ms. Barnes referred is the loss of the fixed cost support that would occur if, in the future, Noranda's usage drops 40 million KWh below the level used to set rates in the Company's most recent rate case. As

[46] Ameren Exhibit 3 p. 8.

described in Ameren Missouri's initial brief, if that happens, the "N" Factor allows the Company to retain off-system sales revenues sufficient to make up for the fixed costs it is unable to collect from Noranda.

The basis for Staff's claim that Ms. Barnes' testimony regarding the "N" Factor is improper is language contained in the "First Nonunanimous Stipulation and Agreement" ("Stipulation") among certain of the parties to Case No. ER-2010-0036. That document is not in evidence in this case, and Staff's counsel did not ask Ms. Barnes any questions regarding the terms of that document during cross-examination. Staff also did not object to the footnote in Ms. Barnes' surrebuttal testimony when it had a chance to do so, nor did Staff file a motion to strike that portion of her testimony. Consequently, there is no evidentiary basis for Staff to raise an argument about the footnote in its initial brief, to cite a document not in evidence as support for that argument, or for the Commission to find that Ms. Barnes' testimony regarding the "N" Factor constitutes a "misuse" of the Stipulation or otherwise is improper. But because Staff's initial brief makes these arguments, Ameren Missouri is compelled to respond.

The "N" Factor was introduced into this case by Staff's own witness, Lena Mantle. At page 14 of her rebuttal testimony, Ms. Mantle states that because of the "N" Factor Ameren Missouri would not, in the future, suffer the same loss it suffered following the January 2009 ice storm. But she doesn't explain how or why the "N" Factor would produce that result. The need to provide answers to those questions is what motivated Ms. Barnes to include testimony regarding the "N" Factor in her surrebuttal testimony. She was simply filling in critical details about the "N" Factor that Ms. Mantle did not include in her testimony.

As for Staff's arguments about what the Stipulation does nor doesn't say or whether Ms. Barnes' statements regarding the Stipulation were incorrect or improper, Staff had ample opportunity to deal with those issues during the hearing in this case. But, for whatever reason, Staff chose not to do so. Argument in its initial brief, however, is not evidence and is no substitute for evidence, and it would be improper for the Commission to allow Staff to, for the first time, attempt to impeach Ms. Barnes' sworn testimony in a post-hearing brief.

Ms. Barnes' testimony regarding the "N" Factor does not specifically reference the terms of the Stipulation. Instead, she simply states that the "N" Factor was something "the parties in the case agreed to and the Commission approved . . ." Moreover, the "N" Factor is important because it was approved by the Commission, which made the "N" Factor part of Ameren Missouri's approved tariff, not because it was included in the Stipulation. As far as Ms. Barnes's contention that by adopting the "N" Factor "the parties and the Commission implicitly acknowledged that it is not appropriate for the Company to suffer a loss in this situation," that is nothing more than an expression of her opinion, which, as an expert witness, she is entitled to give. If it disagrees with her opinion, Staff should have attempted to impeach Ms. Barnes during the hearing. But Staff chose not to do so, and Ameren Missouri believes that decision was strategic. After all, other than the opinion expressed by Ms. Barnes, what other plausible interpretation is there of why the "N" Factor was developed and approved in Case No. ER-2010-0036? And why was it again approved in the general rate case that followed, Case No. ER-2011-0028?

In the same part of its brief, Staff also argues that granting Ameren Missouri the AAO it seeks in this case would reward the Company for conduct that, in its Report and Order in Case No. EO-2010-0255, the Commission found was imprudent, improper, and unlawful. But Staff's argument grossly distorts both Ms. Barnes' testimony and the Commission's order.

At page 10 of her surrebuttal testimony – which Staff cites as the basis for its argument – Ms. Barnes addresses charges that the Company's AAO application was untimely. She correctly states that prior to the Commission's decision in Case No. EO-2010-0255 it would have been inappropriate for Ameren Missouri to request an AAO because during that period the Company believed it was successfully offsetting its loss of Noranda's fixed costs with revenues derived from AEP and Wabash. She further testified that:

> [o]nce the Commission ruled that the Company had to refund the revenues from the Wabash and AEP sales to customers through the FAC, and it was clear for the first time that the Company would experience a significant under-recovery of its costs, the Company promptly filed its application – certainly within a reasonable time. As a

> practical matter the Company had no choice but to delay the filing of its application and it should not be punished for doing so.[47]

By that testimony, Ms. Barnes neither states nor implies that the Commission's decision in Case No. EO-2010-0255 punished the Company. Instead, she simply explains why Ameren Missouri did not request an AAO until 2011.

As for the Report and Order in Case No. ER-2010-0255, the Company's initial brief explains that the evidence in this case clearly shows that the issues the Commission decided there are completely different from the issues that are presented for decision in this case. Even Mr. Oligschlaeger admitted that the issues in the two cases "aren't similar."[48] When the Commission found in its order that Ameren Missouri acted "inappropriately," that finding was limited to what the Commission determined was the Company's incorrect interpretation of the language of the fuel adjustment clause. The Commission did not state, as Staff contends in its brief, that Ameren Missouri acted "imprudently, improperly, and unlawfully," and Ms. Barnes never argued that the Company should be rewarded for such behavior.

CONCLUSION

The arguments presented by Staff, MIEC, OPC, and BJH in favor of denying Ameren Missouri's request for an AAO are neither compelling nor persuasive. Moreover, they are not supported by applicable law or the weight of competent and substantial evidence on the record in this case.

Therefore, based on the arguments presented both in this brief and in the Company's initial brief, and consistent with applicable law and 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.

[47] Ameren Exhibit 3 p. 10, lns. 18-23.
[48] Transcript p. 190, lns. 12-17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 12th day of June, 2012.

/s/ L. Russell Mitten