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

AMEREN MISSOURI'S REPLY TO STAFF'S RESPONSE

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and for its Reply to the *Staff Response to Commission Order Directing Notice and Filings* filed in this proceeding on August 18, 2011 (*Staff's Response)* states as follows:

1. On July 25, 2011, Ameren Missouri initiated this proceeding by requesting an Accounting Authority Order ("AAO") for the fixed costs it has been unable to recover due to the reduction in load of Noranda Aluminum, Inc. ("Noranda") resulting from the severe ice storm which occurred in the Missouri Bootheel in January 2009. The costs that Ameren Missouri was unable to recover were incurred from January, 2009 through April, 2010, during the period that Noranda's aluminum smelter was operating at significantly less than full load due to the damage it sustained during the ice storm. The *Staff's Response* proposes that the Commission schedule a prehearing conference for the purpose of setting a procedural schedule in this case, and Ameren Missouri believes that this proposal is appropriate if the Commission is unwilling to issue an AAO based on the pleadings. However it does not appear to Ameren Missouri that there are any disputed facts that would require a hearing.[1]

2. The *Staff's Response* contains a number of arguments against Ameren Missouri's AAO request which are completely meritless. The *Staff's Response* suggests that Ameren

[1] While Missouri courts have not definitively ruled on the issue, the Commission has previously rejected the argument that a hearing is required in an AAO case. *See In re: Missouri Public Serv. Co.*, Report and Order, 1 Mo.P.S.C.3d 200, 204 (Dec. 20, 1991).

Missouri should be left with no recourse – not even an *opportunity* in a future rate case -- to recover over $36 million in costs it has so far been unable to recover due to an extremely unusual act of God which substantially impaired the ability of Noranda, the Company's largest customer by far, to take power for an extended period of time. Such an unfair result is not dictated by Missouri law, as the Staff's pleading suggests. Moreover, depriving Ameren Missouri's shareholders of the opportunity to recover these considerable costs, when the consequences of the ice storm could not have been foreseen or prevented, where there is no allegation that the failure to recover these fixed costs is the result of any imprudence on Ameren Missouri's part, and where there is no allegation that these costs in fact were recovered by Ameren Missouri through its rates would be an extremely poor policy decision. Granting an AAO would merely afford the Company the opportunity to seek recovery of these costs in its next rate case, and the Commission should grant the AAO for that purpose.[2]

3. Staff first argues that Ameren Missouri's AAO request must be denied because it was filed too late. Staff points out that the Company's request was filed 30 months after the January, 2009 storm. Not only does Staff cite no authority for the proposition that there is some kind of "deadline" for making an AAO request, the circumstances here demonstrate that there are legitimate justifications for the timing of the AAO request made in this case. As Staff points out, the Company initially attempted to address the impact of the ice storm by filing an Application for Rehearing in Case No. ER-2008-0318, the rate case that was decided just a day prior to the ice storm. In its Application for Rehearing the Company requested that its newly-

[2] Granting an AAO does not constitute ratemaking. Rather, an AAO simply allows the utility to defer an item on its books for *later* ratemaking treatment consideration in a subsequent general rate proceeding. *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806, 812-13 (Mo. App. W.D. 1993) (In rejecting Public Counsel's single-issue ratemaking challenge to the AAO at issue in that case, the Court of Appeals stated that "[t]he Commission did not grant rate relief to MPS." Moreover, the AAO "did not presume to determine a new rate but . . . [allowed the utility] to present evidence [in a later rate case] and argue that the deferred costs . . . should be considered . . ." when new rates are considered, along with all relevant factors.).

approved fuel adjustment clause ("FAC") tariff be modified to permit it to retain revenues from incremental off-system sales made possible only because of the loss of Noranda's load. The Company argued that such a modification would keep the Company and its customers in the same position that they would have been in had no ice storm occurred. The Commission denied the Company's Application for Rehearing for two reasons. First, the Commission denied it because the Company was requesting a change to the FAC's terms which would have required the Commission to set aside the stipulation in which the parties had agreed to the terms of the Company's FAC tariff. Second, the Commission denied it because there was insufficient time to re-open the evidentiary record and hold a hearing prior to the operation of law date in that case.[3]

4. The Company next attempted to mitigate the impact of the ice storm by working within the terms of the FAC tariff that the Commission approved. Specifically, the Company entered into what it believed (and, respectfully, continues to believe) were contracts that reflected long-term requirements sales with two customers, AEP Operating Companies, Inc. ("AEP") and Wabash Valley Power Association, Inc. ("Wabash"), to sell the power that would not be taken by Noranda. Under the Company's FAC tariff, revenues derived from long-term requirements sales were treated exactly like revenues from the sales to Noranda—both were excluded from the FAC. By entering into those contracts Ameren Missouri sought to recover its fixed costs, and, at the same time, keep its remaining customers financially indifferent to the effects of the ice storm. Unfortunately for the Company, in Case No. EO-2010-0255 the Commission (by a 3-2 vote) determined that the AEP and Wabash contracts did not qualify as long-term requirements sales within the meaning of those terms as contained in the FAC tariff. Although the Commission did not find that entering into the AEP and Wabash sales contracts

[3] Contrary to prior suggestions by Staff and others, nothing in the Commission's *Order Denying Rehearing* indicates that the Commission made a decision on the merits regarding *future* ratemaking decisions the Commission might be called upon to make due to the impact of the ice storm.

was imprudent, the Commission did find that the Company's decision to classify contracts as long-term requirements sales and exclude them from off-system sales revenues under the FAC was imprudent, improper and unlawful.

5. The litigation in Case No. EO-2010-0255 was time-consuming. In fact, the Commission did not finally resolve the case until it issued its order denying Ameren Missouri's Application for Rehearing on May 26, 2011. Until that case was decided, Ameren Missouri had no basis on which it could file this application for an AAO. Ameren Missouri fully expected the Commission to determine that the AEP and Wabash contracts reflected long-term requirements sales whose revenues were excluded from the FAC. If that had been the outcome, Ameren Missouri would have received the revenues from the sale of the power that Noranda did not take, would have fully recovered the fixed costs that revenues from those sales were designed to cover, and there would be no need for this proceeding. A concurrent application for an AAO would have been correctly perceived as an attempt to recover the same costs through two separate mechanisms—double dipping on the part of the Company. Once the Commission issued its final order denying rehearing in Case No. EO-2010-0255, Ameren Missouri acted promptly to file this case. Consequently, contrary to the Staff's assertions, the timing of this filing provides no basis to reject the Company's request for an AAO.

6. Second, the Staff argues that the Company's request for an AAO is not a "request for a traditional AAO for which the Staff has recommended approval in the past." The Staff points out that traditionally Staff has only recommended AAOs for out-of-pocket expenditures for extraordinary repair and restoration costs rather than lost fixed cost components of rates (which the Staff characterizes as lost revenues). What Staff has "traditionally" *recommended* has no bearing on the Commission's authority to grant an AAO, and does not match what the

Commission has in fact done in the response to AAO requests in the past.[4] The Commission itself "has found that an AAO would be appropriate in a wide variety of circumstances."[5] And while it is true that in the wake of severe storms utilities have not usually requested lost fixed cost recovery, this is because there has simply not been much in the way of lost fixed costs to recover. Usually service to customers is restored in a matter of hours, or at most days, following even the most severe storm. In this unusual case, Ameren Missouri's single largest customer, whose usage approaches 10% of Ameren Missouri's system usage, was operating at a substantially reduced load for about *15 months* after the ice storm was over. Over that period, Ameren Missouri failed to recover more than *$36 million* of fixed costs that were directly allocated to that customer. This is a far more significant financial impact than most "traditional" storms cause, and it fully warrants the issuance of an AAO. The fact that the consequences of the 2009 ice storm do not fit neatly into Staff's view of "traditional" AAOs is simply no reason for the Commission to deny the Company's request.

7. Finally, the Staff argues that Ameren Missouri is precluded from obtaining an AAO in this proceeding by collateral estoppel. This argument is deficient for several reasons. First, even if collateral estoppel applied (and it does not) the Commission is not strictly bound by its principles. *See, e.g., In Re: The matter of Southwestern Bell Telephone Co.'s Proposed Radio Common Carrier Tariff***,** 1990 Mo. PSC LEXIS 52 **(**"The Commission is not strictly bound by the principles of stare decisis, res judicata or collateral estoppel."). In an appropriate case, such as this one, the Commission has the power to grant relief even where a court would be precluded from doing so by the principles of collateral estoppel. More significant, however, is the fact that

[4] That the Commission is not bound by Staff's view of when an AAO should, or should not be granted, one need look no further than the Commission's own prior AAO decisions, For example, Staff has more than once tried to convince the Commission to adopt a multi-part "test" that if applied might preclude the granting of an AAO in a myriad of circumstances where the Commission has found that an AAO should be adopted. The Commission has repeatedly rejected Staff's "test." *See, e.g., Re Missouri-American Water Co.*, 237 P.U.R.4th 353 (Nov. 10, 2004).
[5] *Re: Missouri Gas Energy*, Report and Order, 2008 WL 5351369, at *17 (Dec. 17, 2008).

collateral estoppel does not apply in this circumstance because the issue presented in this AAO case is not identical to any issue previously decided on the merits by the Commission. Moreover, not only has the Company not had a *full and fair* opportunity to litigate the lost fixed cost recovery issue, it has not had the opportunity to litigate it at all.[6] The question of whether the Commission should issue an AAO to permit Ameren Missouri the opportunity to recover its costs resulting from the ice storm has never been raised or decided previously. The two decisions that Staff cites as the basis for its collateral estoppel argument—the Commission's order on rehearing in Case No. ER-2008-0318 and the Commission's Report and Order in Case No. EO-2010-0255 both addressed the general topic of the impact of the ice storm that caused Noranda's load to drop, but both orders addressed completely different issues than whether deferred accounting should be allowed for the fixed costs not recovered because of that load drop. The order on rehearing in Case No. ER-2010-0318 addressed whether the Company's FAC tariff should be modified. The Commission declined to modify the tariff and the Company is not re-litigating that decision in this case. In Case No. EO-2010-0255 the Commission determined that approximately $17 million in revenues derived from the AEP and Wabash contracts did not constitute long-term requirements sales that are exempt from the FAC. Although the Company is appealing that decision, it has filed an FAC adjustment that will flow the $17 million through its FAC and it is not re-litigating that decision in this case.

8. On the unique and undisputed facts presented here, we have a devastating storm that in fact did cause an extraordinary loss that, to the Company's knowledge, has never occurred for a Missouri utility before. The Company has never asked for the relief it is requesting in this

[6] Four factors must be applied in determining if collateral estoppel applies: (1) was the issue decided in the prior adjudication identical with the issue presented in the present action; (2) did the prior adjudication result in a judgment on the merits; (3) was the party against whom estoppel is asserted a party to (or in privity with) a party to the prior action; and (4) did the party against whom collateral estoppel is asserted have full and fair opportunity to litigate the identical issue in the prior action. *See, e.g. St. Louis University v. Hesselberg Drug Co.*, 35 S.W.3d 451, 455 (Mo. App. E.D. 2000).

proceeding before, and such relief has never been addressed in any Commission order. Under those circumstances, neither principles of collateral estoppel nor any other principle precludes the relief sought or in any other way proscribes the Commission's authority to approve the AAO request made in this case.[7]

9. One final point, which the *Staff's Response* completely ignores, is the issue of fairness – fairness to customers and fairness to utilities, in this case, Ameren Missouri.[8] In January, 2009 Ameren Missouri's Southeast Missouri service territory was hit with arguably the most devastating ice storm in the history of this state. The Company worked diligently to restore service quickly and succeeded in doing so under extremely adverse weather conditions. The financial impact of that storm as of this moment is that the Company has thus far been left holding the bag with $36 million in fixed costs that it could not recover. On the other hand, customers, including Noranda, are receiving a huge windfall from sales of power that were no longer being taken by Noranda, the revenues from which are being flowed through the FAC.

10. Although it does not appear to bother the Staff, this is an extremely unfair result which places a significant and completely unwarranted cost burden on the Company's shareholders. The ice storm was unforeseeable and unpreventable, Ameren Missouri did absolutely nothing wrong (and in fact the Company's employees did yeomen's work in restoring service), yet Staff doggedly continues to argue that the Company must bear the costs imposed by this extremely severe and unusual event. This is not a result that is required (or even permitted)

[7] Staff also briefly mentions two other arguments, that is, it claims there "might be" an argument that the AAO request at issue here is prohibited single-issue or retroactive ratemaking. Both arguments have been rejected by Missouri courts in the AAO context. *See Public Counsel*, 858 S.W.2d at 812-13 (as noted *supra*, granting an AAO is not ratemaking at all, and isn't prohibited single-issue ratemaking); *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n,* 301 S.W.2d 556, 569-70 (Mo. App. W.D. 2010) (rejecting the claim that granting an AAO is retroactive ratemaking.).

[8] The Commission recognizes that its authority to grant AAOs in proper circumstances is one of the tools that allows it to properly and fairly balance the interests of customers, and shareholders. *Missouri-American Water Co., supra* , 2008 WL 5351369, at *8.

under Missouri law, and if adopted it would represent extremely bad regulatory policy for the state of Missouri.

WHEREFORE, Ameren Missouri respectfully requests that the Commission summarily grant it the Accounting Authority Order it has requested, thus affording it the opportunity to seek recovery of the fixed costs that it failed to recover due to the impact of the January, 2009 ice storm on Noranda's operations in its next rate case, at which time the Commission will be able to consider the merits of such request together with all other relevant factors. In the alternative, if the Commission is unwilling to summarily grant the relief requested, the Commission should schedule a prehearing conference so that the parties can develop a procedural schedule.

Respectfully submitted,

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d/b/a Ameren Missouri

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 29th day of August, 2011.

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