BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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)	))))))	**File No. EU-2014-0077**

MOTION FOR RECONSIDERATION AND
MOTION FOR EXPEDITED TREATMENT

COMES NOW the Midwest Energy Consumer's Group, and joined by the Missouri Industrial Energy Consumers and Staff, pursuant to 4 CSR 240-2.160, and for their Motion for Reconsideration and Motion for Expedited Treatment respectfully state as follows:

1. On January 28, 2014, the Commission held its evidentiary hearing in the above-captioned matter. During that hearing, MECG attempted to offer into evidence Ameren's brief in Case No. EU-2012-0027 as a judicial admission. Based upon the objection of KCPL and Ameren, that there was no authentication of the document by a witness (it was not offered for the truth of the assertions) the presiding officer denied MECG's offer of the Ameren brief into evidence in this case. Upon Staff's request, the document was received as an offer of proof. Contrary to the presiding officer's ruling, the document is admissible as a judicial admission without authentication. As such, the rejection of the Ameren brief into the record in this case is procedural error. For this reason, MECG, MIEC and Staff ask that the Commission grant reconsideration of the presiding officer's ruling and include the Ameren Initial Brief from Case No. EU-2012-0027 in the record in this case.

2. Section 536.070(5), RSMo requires the document's admission since it is a record that was in the agency's file. That subsection provides:

> (5) Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as part of the record by reference thereto when so offered.

3. In addition, this Commission's rule 4 CSR 240.2.130 provides that the document, as a public record with the Commission, shall be admitted when properly identified, which this document clearly was:

> (1) In any hearing, these rules supplement section 536.070, RSMo.
>
> (2) If any information contained in a document on file as a public record with the commission is offered in evidence, the document need not be produced as an exhibit unless directed otherwise by the presiding officer, but may be received in evidence by reference, provided that the particular portions of the document shall be specifically identified and are relevant and material. The information may be assigned an exhibit number for identification.

4. This Commission acknowledged and applied these rules to a similar objection in its Report and Order in WO-98-223, In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Company. There, at page 4, this Commission dealt with a Motion to Strike references to testimony and a brief in another case. It would have denied the Motion had the offering party, unlike the MECG here, identified the document at hearing:

> Both Section 536.070(5) and Rule 4 CSR 240‑2.130(2) require that matter contained in the agency's files actually be offered during the hearing in order to become part of the record. Therefore, the motion to strike must be granted.

5. As noted at hearing and above, Ameren Brief was not offered for the truth of the assertions but rather to show Ameren's change of position. While not binding,

Missouri Courts sometimes look to the federal rules of evidence. Federal Rule of Evidence 801 governs the scope of the evidentiary hearsay rule, had that issue weighed on the judge's decision. Subsection (d) of that rule excludes certain statements from the scope of the hearsay definition. Specifically, certain opposing party statements are not considered to be hearsay:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

6. In the case at hand, MECG offered a brief filed by Ameren, an opposing party, regarding its interpretation of the Uniform System of Accounts. Specifically, the brief was filed by counsel for Ameren acting in a representative capacity and was authorized by Ameren. As such, the Ameren brief does not fall constitute hearsay. Given that the contents of the brief are relevant to the immediate proceeding, the brief should have been accepted as evidence in this case.

7. The case law regarding judicial admissions is well established in both Missouri and nationwide.

> Judicial admissions of a party are admissible in evidence even though not against the declarant's interest when made or afterward, and may be used either to attack his or her credibility of as affirmative substantive proof against him or her. Any deliberate, clear, and unequivocal statement, either written or oral, made in the course of a judicial proceeding, qualifies as a judicial admission. . . . Judicial admissions may occur at any time during the litigation process, and are not limited to a statement made in a particular motion or application proceeding.[1]

Importantly, as here, judicial admissions are not required to be made in the context of the immediate case. Rather, a judicial admission may occur in another judicial proceeding.

> So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used, such as on a former trial of the case, or it may be made in some other action or judicial proceeding, the record of the former action being admissible for the purpose of establishing the admission. . . . However, with respect to conclusiveness, an admission made in another case does not have the same force as a judicial admission in the same case, but is regarded as being in the nature of an ordinary, extrajudicial, or quasi admission. . . . Availability of other evidence of the fact does not affect the admissibility of a judicial admission, but it may be received, although declarant is an available witness or even present in court. . . . An admission contained in a pleading in one action may, however, be received in evidence against the pleader on the trial of another action, even though the former action involved a stranger to the subsequent one. . . For prior pleadings to be admissible such pleadings must indicate that the party against whom they are admitted has adopted a position inconsistent with that in the earlier litigation.[2]

8. The doctrine which allows for the admissibility of statements made in other judicial proceedings is also recognized by Wigmore.

> That the statements of the pleadings are *not those of the party himself* must be immaterial, since they are those of his authorized attorney. The appointment of attorney and counsel makes them agents to manage the cause in all of its parts, including unquestionably the pleading. The agent's utterances for the principal in the pleadings bind the party as solemn judicial admissions; much more, then, may the agency suffice to admit them as informal quasi admissions.[3]

[1] C.J.S. Evidence §542.
[2] C.J.S. Evidence §542 and §547 .
[3] IV Wigmore, Evidence §1066 (Chadbourn rev. 1972).

9. Still again, McCormick points out that the statements of an authorized attorney made in another proceeding are judicial admissions that can be offered against the party.

> If an attorney is employed to manage a party's conduct of a lawsuit, the attorney has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statement, which unless allowed to be withdrawn are conclusive in the case. Such formal and conclusive admissions, which are usually framed with care and circumspection, are sometimes contrasted with an attorney's oral out-of-court statements, which have been characterized as "merely a loose conversation."[4]

10. More important to the immediate proceeding, the doctrine allowing for judicial admissions made in other cases is also well accepted in Missouri. As far back as 1874, Missouri Courts have allowed for the judicial admission of an attorney contained in another case.

> It was perfectly competent for plaintiffs to offer in evidence the petition which the attorney of Rawlings, at the latter's instance, had filed in the suit against Pennison [another case]; and this wholly regardless of the question, whether Rawlings had even seen the petition after it was drawn up, or not?[5]

11. Similarly, in Mitchell Engineering Co. v. Summit Realty, the Court expressly acknowledged that the doctrine regarding judicial admissions should extend to briefs in previous cases. "What we now decide and rule is that briefs from prior appellate proceedings are permissible sources of admissions against interest and as such, if not otherwise prohibited by policy or rule of law, are admissible as competent and substantial evidence in subsequent trials or hearings."[6]

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[4] McCormick on Evidence, 7th Edition, §259.
[5] Dowzelot v. Rawlings, 58 Mo.. 75 (1874).
[66] Mitchell Engineering Co., a Division of CECO Corp. v. Summit Realty Co., Inc., 647 S.W.2d 130 (Mo.Ct.App. W.D. 1982). See also, Kansas City v. Keene Corporation, 855 S.W.2d 360 (Mo. 1993)

12. As can be seen, in its previous brief, Ameren has made statements which are contradictory to its statements in the immediate case. While not a conclusive judicial admission since it was in another case, it may be offered to show Ameren's contradictions. Specifically, in the current case, Ameren claims that the USOA does not impose any particular standard for a request to defer certain costs under an Accounting Authority Order.

EO-2014-0077: "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.")."[7]

In contrast, in its Initial Brief in Case No. EU-2012-0027, Ameren clearly indicated that the USOA allows for the deferral of only extraordinary items.

EU-2012-0027: "Interpreted together – as they must be – these three provisions [Definition No. 30, Account 182.3 and General Instruction 7] reveal several important principles regarding the mechanism the USOA has created for the deferral of extraordinary items. Those principles must be clearly understood in order to properly evaluate and rule on Ameren Missouri's request for an AAO including the following:

• Although the general rule is that items of profit and loss that occur in the same period must, for accounting and regulatory purposes, be reflected in that period for purposes of determining earnings, the USOA has created an exception to that rule for

("Facts stated in a brief filed in a prior appellate proceeding in a case constitute ordinary admissions against interest, which are admissible in subsequent trials or hearings").

[7] Ameren Position Statement, Case No. EO-2014-0077, filed January 14, 2014, at page 1.

extraordinary items and has created a special accounting mechanism for dealing with such items.

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

• In order to qualify as "extraordinary" under the USOA an event or transaction must satisfy each of the four criteria specified in General Instruction No. 7. The event or transaction must be: (1) of unusual nature and infrequent occurrence; (2) significant events; (3) abnormal and significantly different from the ordinary and typical activities of the utility; and (4) not reasonably be expected to recur in the foreseeable future.[8]

13. As can be seen, contrary to its statements in the immediate case that there is no standard for deferrals under the USOA, in its previous brief, Ameren has indicated that the only exception to the USOA policy regarding current recording of costs is in the case of an extraordinary event. Certainly, as permitted by Federal Rule of Evidence 801(d)(2) and the guidance provided by the Mitchell Engineering Court, MECG should be permitted to use these statements as a judicial admission.

MOTION FOR EXPEDITED TREATMENT

14. As permitted by 4 CSR 240-2.080(14), MECG, MIEC and Staff seek Expedited Treatment of this Motion. Specifically, MECG, MIEC and Staff ask that the Commission rule on this Motion for Reconsideration by Friday, February 7, 2014. Such expedited treatment is necessary so that parties know that they can include Ameren's previous statements in the context of their Initial Briefs. Absent such immediate action, the Commission may be required to provide for another round of briefs upon subsequent ruling on this motion.

[8] Ameren Initial Post-Hearing Brief, Case No. EU-2012-0027, filed May 30, 2012, at pages 12-13.

15. MECG, MIEC and Staff have filed this pleading as soon as reasonably practicable. Specifically, the hearing in this matter ended at 6:00 on January 28. MECG, MIEC and Staff have used the last 3 days to research the law regarding judicial admissions and draft the immediate pleading. As such, this pleading is timely as provided by the Commission's rule regarding expedited treatment.

WHEREFORE, the Movants respectfully request that the Commission reconsider the previous procedural ruling disallowing admission of Ameren's Brief in Case No. EU-2012-0027 into evidence in this case. Furthermore, in order to avoid any harm associated with the briefing of this case, MECG, MIEC and Staff ask that the Commission rule on this motion in an expedited fashion.

Respectfully submitted,

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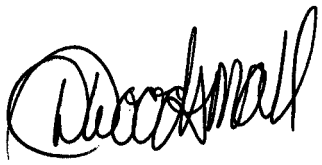
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.



David L. Woodsmall

Dated: January 31, 2014