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 SUGGESTIONS IN OPPOSITION TO APPLICATIONS FOR REHEARING

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or the "Company"), by and through counsel, and files these Suggestions in Opposition to the Applications for Rehearing filed by the Missouri Industrial Energy Consumers ("MIEC") and the Office of the Public Counsel ("OPC"),[1] as follows:

BACKGROUND/INTRODUCTION

1. By *Report and Order* issued November 26, 2013, the Commission granted the Company's *Verified Application for Accounting Authority Order*, which sought Commission approval to defer to Uniform System of Accounts ("USoA") No. 182.3 "the fixed costs that were allocated to Noranda but which it was unable to recover due to the effect on Noranda's load of the January, 2009 ice storm."[2]

2. On December 24, 2013, MIEC and OPC sought rehearing of the Commission's *Report and Order*, essentially raising many of the same arguments that they had made in their post-hearing briefs filed in this case. They[3] contend that the Commission erred in granting accounting authority to the Company for a variety of reasons, which can be categorized into the following eight basic arguments: (1) to issue an accounting authority order ("AAO") there must

[1] These Suggestions are being timely filed pursuant to the Commission's December 24 and December 30, 2013 *Orders Setting Filing Date*.

[2] Prayer for Relief, *Verified Application for Accounting Authority Order*.

[3] For purposes of these Suggestions we are listing the combined points of MIEC and OPC, some of which they both raise, and some of which are only raised by one of them.

be an "extraordinary item" in the current period, and there is no such item here; (2) the Commission's *Report and Order* contains inadequate findings of fact on the "timeliness issue" (Issue (2), *supra*); (3) the *Report and Order* is not supported by substantial and competent evidence because Ameren Missouri earned a profit during the relevant period; (4) an "extraordinary item" cannot include lost fixed costs[4]; (5) the Commission is not following its own accounting rules; (6) the AAO constitutes unlawful retroactive ratemaking; and (7) the Commission did not adequately explain why it decided as it did in this case given other AAO decisions the Commission has made.

3. The MIEC and OPC Applications also reflect disparagement of the Company's request in this case, describing it as a (presumably illegitimate) "third bite at the apple"[5] and they also accuse the Commission of being duped into granting the Company's request (the "Commission fell for the [creative] argument.").[6] OPC attempts to suggest that the Court of Appeals has in effect decided the case against the Company by concluding that a fuel adjustment clause ("FAC") (due to the specific terms of Section 386.266, RSMo. (Cum. Supp. 2011)) cannot be used to address lost revenues.[7] But OPC fails to mention the fact that the Court of Appeals took no issue with the concept that Ameren Missouri had other options (other than entering into contracts that it believed were outside the FAC) to address the impact of the ice

[4] MIEC and OPC characterize lost fixed costs as "unrealized profits" or "unearned potential additional profits."

[5] MIEC Application for Rehearing, p. 2.

[6] *Id.* p. 5. Nor does this case have anything whatsoever to do with the benefits to consumers of the FAC, as MIEC claims in the Introduction in its Application for Rehearing. MIEC continues to beat the drum on its claim that it and all other consumers should, in the end, be better off via higher off-system sales in the FAC caused solely by the ice storm, and also contend that awarding the AAO gives Ameren Missouri greater benefits under the FAC. MIEC Application for Rehearing, pp. 1-2. MIEC is dead-wrong. The facts are that consumers do derive a huge benefit from off-system sales in the FAC, and have now derived a much larger benefit than they would have derived had the ice storm never occurred. It is an entirely separate question whether Ameren Missouri should bear the brunt of the financial consequences of that ice storm. The FAC has nothing to do with the Commission's resolution of that issue.

[7] *See* OPC Application for Rehearing, p. 3, *citing State ex rel. Union Electric Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467 (Mo. App. W.D. 2013).

storm. As the *Report and Order* itself points out, the Court of Appeals expressly recognized the possibility of addressing the financial impact of the ice storm via an AAO, which is precisely what the Commission has done.[8]

4. The bottom line is that the Company's request is a legitimate means to address the significant negative financial impact the unprecedented ice storm ultimately had on the Company's earnings. OPC and MIEC made the same points they raised in their Applications in argument and briefing prior to issuance of the *Report and Order,* the Company addressed them at that time and the Commission has already rejected those arguments. The Commission hasn't been duped into anything. To the contrary, the Commission examined the circumstances of this case and determined it to be an appropriate case to exercise its broad discretion to grant the requested AAO. We now turn to an argument-by-argument rebuttal of the points raised by MIEC and OPC.

ARGUMENT

A. The Company Timely Requested an Accounting Authority Order for the Fixed Costs it Lost [Addresses arguments (1) and (2)].

5. Arguments (1) and (2) are a re-hash of arguments that were fully briefed by the parties before the Commission issued its *Report and Order*. *See, e.g., Reply Brief of Union Electric Company d/b/a Ameren Missouri*, pp. 1-4. As pointed out there, the Company timely sought relief in this case because until June 2011 (just one month before the AAO application was filed) there had been no material reduction to Ameren Missouri's income arising from the unprecedented ice storm that caused Noranda's aluminum smelter to lose power.[9]

[8] *Report and Order*, n. 25, *citing* 399 S.W.3d at 489-90.

[9] The Company's earnings were reduced in June 2011 when the Company reflected on its books the ordered refund from the first prudence review of the Company's FAC (Case No. EO-2010-0255), which changed everything with respect to when and how the ice storm would affect the Company's earnings

Consequently, the Company's request could not have been more timely.[10] Nor can anyone seriously contend the lost fixed costs are not an item that can be recorded.[11] It is undisputed that once the total impact of the ice storm on Ameren Missouri was sorted out through the conclusion of the litigation relating to the first two prudence reviews of Ameren Missouri's FAC, Ameren Missouri was left without recovery of approximately $35 million of fixed costs that Noranda did not pay – because of the ice storm – and that no other customers paid.[12]

6. MIEC and OPC's arguments in these areas amount to an attempt to shackle the Commission's broad discretion under Section 393.140(4), RSMo. (2000) to grant AAOs when the Commission determines it is appropriate to do so.[13] As the Commission noted, exercising its discretion to grant the AAO on these facts "is in the public interest because it preserves an item for consideration when setting just and reasonable rates." *Report and Order,* Conclusion of Law No. 5.

7. Nor were the Commission's findings in this area inadequate. It is clear from those findings that the Commission found that Ameren Missouri lost the approximately $35

[10] MIEC's and OPC's reliance on USoA General Instruction No. 7 in support of their "current period" or timeliness arguments is misplaced because General Instruction No. 7 has nothing to do with the creation of a regulatory asset recorded to Account 182.3 pursuant to an accounting deferral. *See* Ameren Missouri's September 9, 2013 *Supplemental Response to Order Directing Filing* and the included Affidavits of Lynn M. Barnes and James K. Guest. OPC's out-of-context citation to *Missouri Gas Energy v. PSC*, 978 S.W.2d 434, 438 (Mo. App. W.D. 1998) is also inapposite. As noted, Ameren Missouri sought the AAO as soon as it could have, and completed a rate case after it filed the AAO request because this Commission (understandably) had held this case in abeyance pending resolution of other litigation that could (and ultimately did) determine the final financial impact of the ice storm on Ameren Missouri.

[11] And this is true whether one desires to characterize them as lost fixed costs or "lost revenues," which, as the Company has pointed out, are opposite sides of the same coin. As the Commission's *Report and Order* recognizes, lost revenues can be and sometimes are an item that is recorded on a utility's books.

[12] Indeed, the Company and the Staff stipulated to the exact amount of fixed costs the Company incurred during the 14-month period when Noranda was forced to curtail its smelting operations. Tr. p. 17, l. 2-12.

[13] "The Commission considers this decision [whether to grant an AAO] to fall 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).

million in fixed costs because of the ice storm, and that this was an extraordinary loss because it was unusual and nonrecurring.[14]

B. Showing $1 of Net Income does not mean that a Utility has Covered Its Fixed Costs [Responds to Argument (3)].[15]

8. As they have done on many occasions in the past, MIEC and OPC equate any positive net income figure with a complete "recovery" of costs. They do this, in MIEC's case by claiming that the $35,561,503 of lost fixed costs at issue is "unrealized profit" ("That [Ameren Missouri] earned a profit . . . is undisputed."[16]). OPC calls it unearned potential additional profit."[17]

9. While revenues that the Company was unable to collect from Noranda potentially represent a lost opportunity for profit, that is true because of the effect the unrecovered fixed costs have on net income. In Case No. ER-2008-0318, the Commission assigned Noranda's rate class with an allocation of fixed costs. If one were to accept MIEC's and OPC's contention that a utility can never lose fixed costs if its net income is $1 or more, the allowance for a return in rates (return is, after all, not just "profit" but is a reflection of the *cost of capital* the utility must incur in order to have the funds needed to invest in its business and provide service) would be a farce and virtually no AAO could ever be granted. The courts have recognized this for years:

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

[14] *In re: Missouri Public Service*, 1 Mo. P.S.C. 3d 200 ("Extraordinary means unusual and nonrecurring").
[15] This argument was also previously made and briefed by the parties.
[16] MIEC Application for Rehearing, p. 5.
[17] OPC Application for Rehearing, p. 2.

Mississippi River Fuel Corp. v. FPC, 163 F.2d 433, 437 (D.C. Cir. 1947).

C. Whether the Sums at Issue are Characterized as Lost Fixed Costs or Lost Revenues, the Commission Had the Authority to Grant the AAO [Responds to Arguments (4) and (5)].

10. This too is a debate that was fully vetted and briefed before the *Report and Order* was issued. It is also an issue that is much ado about nothing. The AAO covers lost fixed costs the Company *actually incurred* that, but for the ice storm, would have been covered by rate revenues from Noranda. We are here talking about two sides of the same coin – either side of that coin is eligible for an AAO. The very definitions of regulatory assets (at issue here) and also regulatory liabilities speak not just to costs, but to revenues. *See* USoA Definition No. 31.

11. Nor has the Commission failed to follow its own rules (the USoA). As we have discussed herein (and as we fully briefed before the *Report and Order* was issued), approving an AAO for this extraordinary item[18] is fully consistent with the USoA. We would also note that the PSC would have the discretion to approve an AAO even if recording the deferrals it allows would not be consistent with the USoA. The USoA is reflected in rules of the Federal Energy Regulatory Commission ("FERC") that apply to public utilities (as defined in the Federal Power Act) under the FERC's jurisdiction. The Commission has *chosen* to require public utilities (as defined by state law) to keep their books according to the Federal USoA. However, in adopting its rule that applies the USoA to state public utilities (4 CSR 20.030) the Commission created no limitation on *its own* regulatory authority, and even included a specific provision that allows utilities to seek a waiver of a USoA requirement. Once again, MIEC and OPC over-read the import of the USoA and attempt to use it (by misstating what it does and does not require) to limit the Commission's broad discretion in deciding AAO requests.

[18] We would note that the ice storm, in and of itself, was certainly extraordinary and its impact on the Company's income was also extraordinary.

D. Granting an AAO is Not Retroactive Ratemaking; Indeed, it is not Ratemaking At All [Responds to Argument (6)].

12. In recent years, in case after case, MIEC in particular (and OPC at times) has attacked AAOs (and deferred sums later amortized as part of a rate case that arose from prior AAOs) as "unlawful retroactive ratemaking." Time-and-time again this Commission and the courts have rejected that argument. This very argument was made in briefing before the *Report and Order* was issued, and the Commission in fact directly addressed it in the *Report and Order*, recognizing that all an AAO does is allow a deferral on the utility's books for later consideration of the rate treatment of that deferral in a rate case. This Commission very recently discussed why an AAO does not constitute retroactive ratemaking, stating that an AAO

> is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future. Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, 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.[19]

13. As the cases that underlie the quoted passages in the Commission's above-quoted statement indicate, that an AAO does not constitute retroactive ratemaking is a well-established principle of law. This well-established legal principle cannot be compromised by the out-of-context citations MIEC and OPC make to the *UCCM* case,[20] which was decided many years prior to the many appellate cases which are legion in their recognition that an AAO (or amortization of deferred sums thereunder in a later rate case) does not constitute retroactive ratemaking.[21]

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[19] *In re: KCP&L,* Order Approving Stipulation and Agreement, File No. EU-2012-0131 (Eff. Apr. 30, 2012).

[20] 585 S.W.2d 41 (Mo. 1979).

[21] In effect, MIEC and OPC are claiming that it is only they who understand *UCCM,* and that the Courts and the Commission have been getting it wrong for years.

In this case, MIEC claims that granting the AAO is futile (and thus somehow illegal) because a utility simply cannot recover (amortize) a deferred sum from a prior period in a later rate case. OPC's contention is essentially the same. MIEC and OPC made the same contention, using slightly different words, when they sought to invalidate the Commission's authorization of a deferral of vegetation management and infrastructure inspection expenses above the level reflected in base rates in the appeal of Ameren Missouri's 2009 rate case (Case No. ER-2010-0036), claiming that "amortization of past expenses constitutes unreasonable and unlawful retroactive ratemaking" (relying on *UCCM*). MIEC and OPC Reply Brief, Case No. SD30865 et al., decided in Ameren Missouri's and the Commission's favor by *State ex rel. MIEC et al. v. Pub. Serv. Comm'n*, 356 S.W.3d 393 (Mo. App. S.D. 2011). The Southern District flatly rejected the very claim MIEC and OPC make here. The Southern District explicitly considered MIEC's claims about what *UCCM* required or prohibited – the same claims MIEC (and OPC) make here -- and rejected those claims, noting that (as here) "AmerenUE cannot go back in time and adjust the rates charged to past customers" to reflect expenses higher than those assumed when rates were set. *MIEC*, 356 S.W.3d at 319-20. The Southern District continued: "But because these authorized additional expenses were considered through the various procedures of the instant case for future ratepayers, amortized recovery of the expenses *does not constitute retroactive ratemaking*" (emphasis added). *Id.* In summary, if the actual amortization in a rate case of sums deferred is not retroactive ratemaking (that amortization is not an issue in this case at all) certainly the mere approval to defer them via an AAO cannot be retroactive ratemaking.

E. The Decision in Case No. GU-2011-0391 Does Not Prevent the Commission From Granting the Requested AAO to Ameren Missouri [Responds to Argument (7)].

14. The last argument MIEC and OPC make in support of their rehearing requests is that the Commission's decision is arbitrary and capricious for not explaining why the

Commission granted an AAO in this case, but did not do so in Case No. GU-2011-0391, which involved a request by Missouri Gas Energy ("MGE") for an AAO arising from the 2011 Joplin tornado. We addressed this very argument in great detail in our Reply Brief, filed before the *Report and Order* was issued. *See* pages 9 – 12. In summary, it is well-established that the Commission, like other administrative agencies, is not bound by *stare decisis.* See *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 371 (Mo. App. W.D. 1992). While it is true that the Commission cannot act in a completely arbitrary manner, it possesses broad discretion to decide each matter before it based upon the particular circumstances of that matter. As we previously pointed out, the facts in Case No. GU-2011-0391 are far different than the facts of this case. For example, in that case the record demonstrated that MGE's overall revenues, despite the loss of customers from the tornado, were actually *higher* than they had been before the customers were lost. Put another way, MGE did not prove it lost any fixed costs. Those facts stand in stark contrast to the facts in this case – a proven loss of approximately $35 million of fixed costs. There is nothing arbitrary and capricious about deciding the Company's request in its favor, where it proved that loss, versus deciding against MGE, where it did not.

CONCLUSION

15. MIEC and OPC have re-hashed already-rejected arguments. Their arguments as a whole reflect an attempt to limit the Commission's broad discretion to grant AAOs when the Commission determines that the particular circumstances warrant it, and they continue to re-argue legal points that the Commission and the courts have time-and-time again rejected. The large loss of fixed costs occasioned by the ice storm was extraordinary, as was the ice storm itself, which was also obviously beyond Ameren Missouri's control. The Commission's *Report and Order* approving the AAO request was lawful, reasonable and appropriate.

WHEREFORE, Ameren Missouri hereby requests that the Commission DENY MIEC's and OPC's Applications for Rehearing.

Respectfully submitted,

SMITH LEWIS, LLP

Thomas M. Byrne, #33340
Director - Assistant General Counsel
1901 Chouteau Avenue,
P.O. Box 66149, MC-1310
St. Louis, Missouri 63101-6149
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
amerenmoservice@ameren.com

ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

/s/ James B. Lowery
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail on counsel for the parties of record on the 9th day of January, 2014.

/s/ James B. Lowery
James B. Lowery