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Witness: Bradley M. Seltzer
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MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. ER-2019-0335

REBUTTAL TESTIMONY

OF

BRADLEY M. SELTZER

ON

BEHALF OF

UNION ELECTRIC COMPANY

d/b/a Ameren Missouri

**St. Louis, Missouri
January 2020**

REBUTTAL TESTIMONY

OF

BRADLEY M. SELTZER

CASE NO. ER-2019-0335

1 **Q. Please state your name and business address.**

2 A. My name is Bradley M. Seltzer. My business address is 700 Sixth Street, N.W.,
3 Washington, D.C. 20001.

4 **Q. By whom are you employed and in what capacity?**

5 A. I am an equity partner in the law firm of Eversheds Sutherland (U.S.) LLP.

6 **Q. Please describe your current responsibilities at Eversheds Sutherland.**

7 A. I am engaged in the general practice of tax law and am the co-Chair of our Energy
8 Tax Group. I specialize in the taxation of, and the tax issues relating to, regulated public
9 utilities. Included in this area of specialization is the treatment of taxes in regulation.

10 **Q. On whose behalf are you submitting this testimony?**

11 A. I am submitting this testimony on behalf of Union Electric Company d/b/a
12 Ameren Missouri (Ameren Missouri or the Company).

13 **Q. Please describe your professional background.**

14 A. For more than 40 years, I have been involved in the provision of tax services
15 principally to companies in various segments of the utility industry. I joined the
16 predecessor firm to Eversheds Sutherland, then known as Sutherland, Asbill & Brennan,
17 in 1978 directly out of law school, was later promoted to partner, and continued in that
18 capacity until 1997 when I left to join Deloitte Tax as the U.S. and Global Leader of the
19 Energy Tax Practice. In 2016, I rejoined Sutherland as a partner shortly before its merger

Rebuttal Testimony of
Bradley M. Seltzer

1 into what is now the firm of Eversheds Sutherland. Throughout my career, I provided tax
2 services primarily to electric, gas, telephone and water industry clients. My practice has
3 included tax planning for the acquisition and transfer of business assets, operational tax
4 planning and the representation of clients in tax controversies with the Internal Revenue
5 Service (IRS) at the audit and appeals levels, and at times, in tax litigation. I have often
6 been involved in procuring private letter rulings or technical advice from the IRS National
7 Office. On several occasions, I have represented one or more segments of the utility
8 industry before the IRS and/or the Department of Treasury regarding certain tax positions
9 adopted by the federal government. I have submitted written comments and have testified
10 at Department of Treasury hearings regarding legislative and administrative tax issues of
11 significance to the utility industry, including consolidated tax adjustments (CTAs), interest
12 synchronization, deregulation of public utility property, the treatment of qualified
13 decommissioning funds, and provisions of the Tax Cuts and Jobs Act relating to so-called
14 bonus depreciation and the limitations on business interest deductions. I am a member of
15 the District of Columbia and California Bars. I am a member of the American Bar
16 Association, Section of Taxation where I am a past chair of the Committee on Regulated
17 Public Utilities, and its Normalization Subcommittee, and regularly make presentations
18 before the current Energy & Environmental Tax Committee.

19 **Q. Have you previously testified in any regulatory proceedings?**

20 A. Yes, I have. I have testified regarding tax, tax accounting and regulatory tax matters
21 before the California Public Utility Commission. I have also assisted several company-
22 sponsored witnesses in the preparation of their testimony in proceedings before utility

1 commissions in North Carolina, Alaska, Louisiana, and Texas, as well as the Federal
2 Energy Regulatory Commission.

3 **Q. Please describe your educational background.**

4 A. I earned a Bachelor of Arts (B.A.) in Russian Language and Social Studies from
5 the State University of New York at Albany and a Juris Doctor (J.D.) from The National
6 Law Center at George Washington University.

7 **Q. What is the purpose of your rebuttal testimony?**

8 A. The purpose of my rebuttal testimony is to respond to Office of Public Counsel
9 witness John S. Riley's proposed negative cash working capital adjustment of \$102,020,471
10 for federal and state income tax expense.

11 **Q. What is the basis of OPC's recommendation?**

12 A. Essentially, OPC's proposed adjustment is premised on the fact that the Ameren
13 companies that file a consolidated income tax return have no current income tax liability
14 to the government, and therefore no current income tax expense, by reason of a net
15 operating loss (NOL). (Eventually the taxes will have to be paid to the government when
16 the NOL is exhausted). On this basis, Mr. Riley claims that the Company's cash working
17 capital should be reduced to reflect the lack of current tax expense.

18 **Q. Do you agree with OPC's proposed adjustment to cash working capital?**

19 A. No.

20 **Q. Why not?**

21 A. There are several reasons why the proposed adjustment is inappropriate and not in
22 the best interests of customers. First and foremost, the proposed adjustment, if put into
23 effect, would likely violate the normalization restrictions of the Internal Revenue Code and

1 result in the loss of the right to claim accelerated depreciation with respect to Ameren
2 Missouri's public utility property. This in turn would lead to higher rate base and thus
3 higher rates for customers, as I explain below. Second, essentially, OPC's proposal is a
4 form of consolidated tax adjustment, or CTA, which attempts to secure a benefit for
5 customers from the Company's filing of a consolidated tax return when it is to the
6 customers' benefit, as measured by the short-term rate impact in a given case, but to then
7 not accept the burden of a consolidated tax return when the impact in a given case would
8 cause rates to be higher. This Commission considered a similar proposal in 2014 and
9 rejected it as opportunistic and should do so here as well. Third, the OPC ignores the effect
10 of the intercompany tax allocation agreement. In 2014, when evaluating the impact of that
11 tax allocation agreement in the context of a similar (in terms of impact) adjustment
12 proposed by Missouri Industrial Energy Consumers witness Michael Brosch, this
13 Commission recognized that there was nothing unreasonable about the tax allocation
14 agreement, and that there will be times under such an agreement that it leads to lower rates
15 in a given case and times when it leads to higher rates in a given case. This Commission
16 also rejected the "heads I win, tails you lose" approach reflected both in Mr. Brosch's
17 proposal in that case and OPC's proposal here.¹ Nothing has changed that would produce
18 a different conclusion today.

¹ The Commission had this to say in rejecting the similar opportunistic proposal made in that case:
There is no evidence in this case to show that Ameren's Tax Allocation Agreement is structured in a way that would be detrimental to Ameren Missouri and its ratepayers. Instead, for several years, Ameren Missouri's ratepayers benefited from a lower rate base because of the Tax Allocation Agreement. The Tax Allocation Agreement has not changed, but in more recent years ratepayers have not benefitted from that agreement, although that may change again in the future. That fluctuation does not mean the agreement is unreasonable, and there is no evidence the fluctuation was intentionally created in order to change who benefits from the Tax Allocation Agreement. Report and Order, File No. ER-2014-0258, 2015 WL 1967858 (Mo.P.S.C.), p. *11.

1 **Q. Can you explain why adoption of the proposal would result in a normalization**
2 **violation and the loss of the right to claim accelerated or bonus depreciation to the**
3 **detriment of ratepayers?**

4 A. Under the Internal Revenue Code, specifically Sections 168(i)(9) and (10) and the
5 U.S. Department of the Treasury (Treasury) regulations thereunder, regulated public
6 utilities must use a normalization method of accounting in order to have the right to claim
7 any form of accelerated depreciation. In order to use a normalization method of
8 accounting, the utility uses its regulatory depreciation method, *i.e.*, straight line
9 depreciation, in calculating both its depreciation expense recoverable from customers and
10 its regulated tax expense recoverable from customers. The difference in taxes between
11 calculating depreciation using regulatory depreciation for cost of service and accelerated
12 depreciation in filing its tax returns represents deferred taxes which will eventually be paid
13 as the book/tax difference reverses. These deferred taxes are commonly referred to as
14 Accumulated Deferred Income Taxes (ADIT) and represent an interest-free loan from the
15 federal government which, until repaid, benefits customers by reducing rate base on which
16 the utility earns a return. If, however, the utility incurs a net operating loss, *i.e.*, if its
17 deductions exceed its revenues, the portion of ADIT attributable to accelerated
18 depreciation cannot reduce rate base until the NOL has been utilized and the utility receives
19 the interest-free loan. It is important to recognize that the total tax expense recoverable
20 from customers as part of the utility's cost of service is entirely a mathematical calculation
21 under normalization and cannot be reduced consistent with normalization.

22 **Q. But if OPC is proposing to adjust cash working capital and not regulated tax**
23 **expense, why is this a normalization violation?**

Rebuttal Testimony of
Bradley M. Seltzer

1 A. Congress and Treasury recognized that four key elements of ratemaking are
2 inextricably tied and must be treated consistently, namely, regulated depreciation expense,
3 tax expense, rate base and the reserve for deferred taxes. So, for example, if a Commission
4 disallows a capital cost as being imprudently incurred, that cost is removed from rate base
5 on which a return is allowed, no regulated depreciation expense is allowed on such costs,
6 and the ADIT attributable to the disallowed costs cannot be used to reduce rate base.
7 Similarly, as noted above, if a utility incurs tax deductions that exceed its income,
8 producing a net operating loss, the accelerated depreciation generated portion of the ADIT
9 which is attributable to that loss cannot be used to reduce rate base because it has not
10 produced cost free capital. Moreover, Congress and Treasury recognized that there would
11 likely be attempts to circumvent the normalization rules and they thus prohibit adjustments
12 other than to the four key elements that have the same impermissible effect. Since the
13 entire premise of OPC's adjustment is that deferred taxes should not be recoverable in
14 working capital, it achieves precisely the impermissible effect that Congress and Treasury
15 intended to prohibit consistent with normalization, and would result in the disallowance of
16 accelerated depreciation. The disallowance of accelerated depreciation would deprive
17 customers of the benefits of the interest free loan from the government reflected as a rate
18 base reduction.

19 **Q. How is the proposed adjustment similar to a consolidated tax adjustment?**

20 A. Generally, utility rates are determined on a stand-alone basis, to ensure that
21 customers only bear the burdens (depreciation) and receive the benefits (ADIT) of costs
22 incurred to provide regulated utility service. By introducing costs and attributes of the
23 affiliated group of which the utility is a member into the ratemaking process, a consolidated

1 tax adjustment disturbs this fundamental relationship. In the instant case, the net operating
2 losses were largely attributable to two significant losses recognized by Ameren
3 Corporation. The first was attributable to the loss on the sale of deregulated generation
4 property at the end of 2013 and the second was attributable to the loss resulting from the
5 revaluation of accumulated deferred income taxes as a result of the income tax rate decrease
6 in the Tax Cuts and Jobs Act of 2017 (TCJA). Customers of Ameren Missouri were not in
7 any way burdened by such losses and should not receive the consolidated tax savings
8 benefits therefrom. Moreover, as was the case in 2014, proponents of the adoption of CTAs
9 only urge that position when it operates to the benefit of customers in the form of lower
10 rate base in a given case, but not when it operates in the opposite direction by creating
11 higher rate base in a different case. It is for this reason that the vast majority of
12 commissions that have considered adoption of CTAs have rejected them, and only a small
13 minority of jurisdictions permit, but do not require CTAs.

14 **Q. Why did the tax rate change in TCJA result in a loss for Ameren Corporation?**

15 A. When the tax rate decreased from 35% to 21%, all accumulated deferred income
16 taxes had to be revalued to reflect the new lower tax rate. Ameren Corporation was in a
17 net deferred tax asset position at the time of the rate change, of which the majority was net
18 operating loss carryforwards from the sale of its merchant generation business. When a
19 deferred tax asset is decreased, deferred tax expense is increased. This resulted in a loss of
20 \$110 million in 2017. Ameren Corporation shareholders bore the entire loss, which was
21 not reflected in Ameren Missouri's (or Ameren Illinois') rates.

22 **Q. Has Ameren Missouri's standalone ratemaking generally favored ratepayers**
23 **as the Commission recognized in 2014?**

Rebuttal Testimony of
Bradley M. Seltzer

1 A. Yes.

2 As you can see from TABLE 1, for the period 2008 through 2018, Ameren Missouri
3 was paid for deductions which could not have produced a cash tax benefit had the Company
4 not filed as part of the Ameren consolidated tax group.

5 TABLE 1:

	Stand Alone Ameren Missouri Taxable Income/(Loss) by Year	Cumulative Stand Alone Ameren Missouri NOLC	Consolidated NOLC Allocated to Ameren Missouri by Year	Cumulative Consolidated NOLC Allocated to Ameren Missouri	Deferred tax asset based on Stand Alone NOLC	Deferred tax asset based on Cumulative Consolidated NOLC Allocated to Ameren	Impact on rate base at end of year due to consolidated filing
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
2008	(461,008,006)	(461,008,006)	(97,421,862)	(97,421,862)	161,352,802	34,097,652	(127,255,150)
2009	(162,043,265)	(623,051,271)	(65,062,485)	(162,484,347)	218,067,945	56,869,521	(161,198,423)
2010	(130,775,965)	(753,827,236)	(53,170,203)	(215,654,550)	263,839,533	75,479,093	(188,360,440)
2011	17,970,962	(735,856,274)	-	(215,654,550)	257,549,696	75,479,093	(182,070,603)
2012	12,890,120	(722,966,154)	-	(215,654,550)	253,038,154	75,479,093	(177,559,061)
2013	598,155,735	(124,810,419)	-	(215,654,550)	43,683,647	75,479,093	31,795,446
2014	24,108,993	(100,701,426)	-	(215,654,550)	35,245,499	75,479,093	40,233,593
2015	402,898,831	-	123,459,680	(92,194,870)	-	32,268,205	32,268,205
2016	156,340,796	-	-	(92,194,870)	-	32,268,205	32,268,205
2017	439,555,060	-	92,194,870	-	-	-	-
2018	553,686,028	-	-	-	-	-	-

6 The approximate cumulative quantity of this incremental cash benefit – this “extra” cost-
7 free capital – is reflected in Column (7) of TABLE 1. This significant cumulative benefit
8 (*i.e.*, a higher ADIT balance by which to reduce rate base) prevailed through 2012.
9 Beginning in 2013, Ameren Missouri on a consolidated basis finally shifted into a slightly
10 disadvantageous position, but the cumulative benefit far exceeded the succeeding
11 detriment. The average annual benefit for the period 2008-2013 was \$135,478,616.49 and
12 the average annual detriment for the period 2014-2018 was \$20,954,000.48, with no
13 detriment at all the last two years. As the Commission recognized in 2014, while there will
14 undoubtedly be fluctuations in the benefits and detriments under the tax allocation

1 agreement from year to year, customers have greatly benefited from the tax allocation
2 agreement over the years.

3 **Q. As you noted earlier, OPC's adjustment is proposed as a reduction to the**
4 **Company's cash working capital requirement, apparently premised on the fact that**
5 **while Ameren Missouri does pay cash to Ameren Corporation for its standalone tax**
6 **liability, that cash does not (at this time) get remitted to the government. Does the**
7 **context here matter?**

8 A. Not at all. The tax allocation agreement properly *requires* that Ameren Missouri
9 make those cash payments to Ameren Corporation. Eventually, the taxes will be paid to
10 the government, but the fact that they are deferred due to the NOLs being used by the
11 consolidated group does not mean Ameren Missouri is not out the cash. And since Ameren
12 Missouri is out the cash it has a cash working capital requirement associated with the cash
13 taxes it paid under the tax allocation agreement. As this Commission recognized in another
14 case involving a tax allocation agreement that operates in a similar manner, tax allocation
15 agreements "most accurately represent . . . the economics and the cash flow that actually
16 occur . . . when a consolidated return is filed."² Again, OPC is simply selectively ignoring
17 the cash flows that actually occur under the tax allocation agreement because in this
18 particular case doing so would lower rate base. As I noted earlier, this Commission has
19 rejected such an unfair and opportunistic approach.

20 **Q. Does this conclude your testimony?**

21 A. Yes.

² Report and Order, File No. ER-2014-0370, et al. (Kansas City Power & Light Co.), 2015 WL 5244724 (Mo.P.S.C.), p. *57.

