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.	))))	**Case No. EU-2011-0027**

POST-HEARING REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

This brief will address a number of the arguments and assertions raised in the Initial Post-hearing Brief of Union Electric Company d/b/a Ameren Missouri. Failure to address a particular point should not be considered as Public Counsel's acquiescence in that point. Because Public Counsel cannot simply hire extra outside counsel (like Ameren Missouri does) whenever things get busy, many of the points raised in Ameren Missouri's initial brief will be left unaddressed in this reply.

Ameren Missouri opens its brief with a discussion of procedural history, including the grant of authority for it to implement a Fuel Adjustment Clause (FAC) in ER-2008-0318. Conspicuously absent from this discussion is even a hint of how hard Ameren Missouri fought to get that authority. Reading Ameren Missouri's brief, one might get the impression that the FAC was imposed upon a less-than-eager utility by the Commission. For example, at page 5, Ameren Missouri states that it was faced with a "new reality" without ever mentioning that the "new reality" was one that Ameren Missouri fought for and all the other parties fought against. In discussing the effects of the Noranda outage and Ameren Missouri's resulting application for

rehearing at the February 11, 2009 Agenda session, Commissioner Jarrett noted that Ameren Missouri repeatedly stressed throughout the ER-2008-0318 hearings that the FAC could benefit ratepayers as well as shareholders. He noted that Ameren Missouri even raised the possibility that the FAC could even provide a windfall to ratepayers as a reason the Commission should approve it. But he concluded that what Ameren Missouri sought in its application for rehearing was to "change the rules in the middle of the game" as soon as the possibility of a substantial benefit to ratepayers actually appeared to be a possibility.

Moreover, other than a request for rehearing, Ameren Missouri took no other steps to try to change or terminate the FAC. Under the circumstances, an application for rehearing of the Report and Order was a fairly feeble attempt. An application for rehearing is not really a suitable vehicle to address changed circumstance or new evidence; it is designed persuade the Commission that the decision on the existing record was wrong. Ameren Missouri did not file a request to reopen the record pursuant to 4 CSR 240-2.110(8). It did not seek to modify the stipulation covering the terms of the FAC. It did not seek to withdraw the tariffs.[1] It did not file new tariffs with a request for expedited treatment as soon as it could.

In its brief, Ameren Missouri quickly gets to the misdirections that are at the heart of its case. At page 3, Ameren Missouri asserts that "The significant drop in Noranda's demand for electricity meant that during that 14-month period [during which Noranda's operations were curtailed] Ameren Missouri was unable to recover fixed costs that had been assigned to Noranda in Case No. ER-2008-0318." There are three different things wrong in that single sentence, and

[1] At page XX, Ameren Missouri asserts that it could not have done so because the Commission denied Ameren Missouri's application for rehearing at the same time it issued an order approving the tariffs, at the February 19 Agenda session. But it was absolutely clear that all five Commissioners were dead set against granting that application from the discussion at the February 11 Agenda – a fact of which Ameren Missouri was fully aware. Ameren Missouri had from February 11 to March 1 to make some attempt to find a way out of the situation in which it had placed itself, but it did nothing at all.

each one of them undermines Ameren Missouri's request for extraordinary accounting treatment. First, Ameren Missouri was **not** "unable to recover" fixed costs during that period. It covered all of its fixed costs during that period, plus a healthy profit. It just did not make as much profit as it wanted to. (Transcript, page 201) Second, even if one conflates revenues with fixed costs as Ameren Missouri insists upon doing, Ameren Missouri replaced all the revenues that it would have gotten from Noranda with revenues from AEP and Wabash. Of course, those replacement revenues – for reasons entirely unrelated to the ice storm – did not ultimately flow to earnings, but that does not mean they were insufficient. Third, costs were never "assigned to Noranda" in Case No ER-2008-0318. For purposes of setting rates, certain representative historical costs were allocated to the class in which Noranda is the sole member. **Allocating** costs in a class cost of service study for the purpose of setting rates is very different from **assigning** costs for recovery. Allocating costs is a method for approximating the amount of cost that would ideally be recovered from each class, but it has no applicability once rates are set. In fact, in ratemaking, costs are not assigned to and recovered from particular classes. (Transcript, pages 200-201).[2]

The phrase "material threat to … financial results" that Ameren Missouri uses on page 3 is simply a nonsensical phrase that is intended to sound weighty. There was no threat to Ameren Missouri's financial viability. There was not even a threat to Ameren Missouri's profitability. There was simply a risk of a slight diminution of earnings – the type of risk that investors willingly take and are compensated for.

At page 6, Ameren Missouri claims that its efforts to mitigate the adverse effects of the ice storm were unsuccessful. That statement is only correct from one point of view. Those efforts **were** successful from the point of view of Ameren Missouri's customers. Ameren

[2] Ameren Missouri repeatedly uses the word "assigned" with respect to a level of fixed costs allocated to the LTS class in ER-2008-0318. This brief will not address the other such instances.

Missouri was successful in receiving replacement revenues for the revenues that it would have received from Noranda, but because of the FAC that Ameren Missouri fought to get, those revenues benefitted ratepayers more than shareholders. It bears repeating that the reason shareholders did not get the revenues they expected was because of the FAC, not because of the ice storm.

Beginning at the bottom of page 6, Ameren Missouri embarks on a lengthy explanation of how revenues (which flow into the company's coffers) are just the same as costs (which flow out). This is nonsense, of course, but Ameren Missouri uses this nonsense to try to obscure the relevant point. The point of the distinction between revenues and costs is that revenues are not earmarked to costs. When Ameren Missouri makes the statement at page 6 that "fixed costs and lost revenues are two sides of the same coin" it is arguing that anticipated costs and anticipated revenues must track each other, and that is simply not how ratemaking works. This is just another version of Ameren Missouri's "assigned cost" argument, and it is as flawed as the first version. Once rates are set in a rate case, going forward, the details of how the revenue requirement was set no longer matter. If costs for one item go up and costs for another go down, the company is still able to recover its costs through the rates it is authorized to charge. Similarly, if revenues from one customer or group of customers go down, but revenues from other customers go up, the company will still have adequate revenues. But the categories of costs and the sources of revenue can and do change between rate cases. So long as the balance between revenues and costs does not get out of whack, such changes do not warrant rate increase or decreases – or extraordinary accounting treatment. The bottom line is that just because revenues from Noranda were not at the level anticipated when rates were set does not mean that Ameren Missouri did not recover the total level of fixed costs that were anticipated when rates

were set.

At page 7, Ameren Missouri makes the statement that "Because Noranda is the only customer in that [LTS] rate class, the Commission expected the Company would recover those fixed costs from Noranda." First, there is nothing in the record in this case that would show what the Commission expected in Case No. ER-2008-0318. More importantly, even if the Commission did have such an expectation, the fact that the expectation was not meant (i.e., that fixed costs were recovered from other customers) does not warrant extraordinary ratemaking treatment.

Beginning at page 10, Ameren Missouri discusses the standards that the Commission generally uses for evaluating whether costs qualify for extraordinary accounting treatment.[3] There are no Commission cases in which the Commission discusses the standards that would be appropriate for deferring potential revenues. And in any event, the standards Ameren Missouri discusses beginning at page 10 are minimum standards. Meeting them is necessary but not sufficient for the Commission to authorize deferral accounting.

One of the most difficult obstacles that Ameren Missouri faces in trying to convince the Commission to authorize deferral accounting is the fact that the potential revenues that it seeks to defer would have been received in an accounting period several periods before the one in which it sought authority. The USOA clearly limits deferrals to those items arising in the "current period." Ameren Missouri attempts to sidestep this restriction by arguing that the USOA can't possibly mean what it clearly says by arguing that such a restriction would be, well, **too** restrictive. This is akin to arguing in favor of a deduction not allowed by the tax code by saying that because the tax code allows some deductions, it must allow almost any deduction. The tax

[3] Ameren Missouri fails to acknowledge that all the prior Missouri PSC cases it cites (with the sole exception of GU-2011-0392) dealt with requests to defer costs, not to defer potential revenues. There are obvious differences, and obvious reasons to establish different standards.

code allows for some deductions, and the USOA allows for deferrals under some limited circumstances. But neither is unlimited, and the limits are easily discerned by reading what the code and the USOA actually say.

One of the reasons that Ameren Missouri argues that the clear restriction cannot be what the USOA intends is because Staff witness Oligschlaeger was "not absolutely certain" that a company could defer items it believed to be extraordinary before the Commission issued an accounting authority order. (Ameren Missouri initial brief, at page 26) Just because one particular witness in one particular case is "not absolutely certain" about all the possible ramifications of a USOA standard does not mean that the Commission should ignore the plain language of that standard. Similarly, just because prior Commission orders may not have followed this standard does not mean that the order in this case should not do so.

Ameren Missouri bolsters this argument by arguing that "current" doesn't mean the period in which revenues were received or costs were incurred, but some later period when a company decides that "effects" happen. Accounting standards are not that imprecise and they do not afford such discretion to companies. If they did, companies would be free to not account for purchases when they were made, but at some later period of the company's choosing when the company decided that the "effect" of the purchases would happen. Such a loose standard is no standard at all. So when the USOA states that: "Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items," that is exactly what it means. There is no need for an "interpretation" when the meaning is plain on its face.

Moreover, if extraordinary costs or revenues can relate to some later period of a company's choosing, how would materiality be calculated? Would it be relative to the earnings

in the period the costs or revenues were actually accrued, or relative to the earnings in the period when the "effect" happened? If the USOA really intended to allow companies such broad discretion, it would certainly have answered that question.

At page 18, Ameren Missouri claims that it "does not seek to defer 'unearned profits' or to recover revenues for services that were never provided." It then tries to deflect attention away from the fact that that is exactly what it is doing by a rambling discussion of the regulatory compact. If Ameren Missouri did provide service, why did it not bill for that service? The fact is that Ameren Missouri did not provide service to Noranda for lengthy period of time, and appropriately did not receive revenue or accrue profit for the period in which it did not provide service. The only way in which the regulatory compact is relevant to that issue is that the regulatory compact generally requires investors – not ratepayers – to bear the weather and business risks that Ameren Missouri seeks to shift to ratepayers in this case.

At page 20, Ameren Missouri returns to its "cost assignment" argument, claiming that rate design obligates each class to pay its fair share of costs. The purpose of ratemaking, as discussed above, is to establish a level of revenue recovery that will – assuming no significant changes from the test year – afford a utility a reasonable opportunity to recover its operating costs plus a fair return on its investment. The purpose of rate design is to establish a level of revenues from each class, based on historical data, that fairly apportions the revenue requirement based on the same historical data. No part of that process "obligates" any customer or any customer class to provide any specific level of revenues. Indeed it cannot. As Maurice Brubaker, the witness for the Missouri Industrial Energy Consumers, stated: "Once you set rates, you look at the results of the enterprise on an overall basis. You don't, nor could you practically, track what happens with individual classes." (Transcript, page 201)

As an important corollary to that point, Mr. Brubaker noted that Ameren Missouri failed to prove that it did not "make up" from other customers the fixed cost recovery that it anticipated but did not get from Noranda. (Transcript, page 201)

Finally, one of the most glaring weaknesses of Ameren Missouri's whole case is its response to the following exchange that took place at the end of the evidentiary hearing:

> JUDGE JORDAN: The Commission would find it helpful if the parties could find an Accounting Authority Order somewhere that addresses these – amounts of this nature that we have been discussing and include that accounting authority order to defer their reporting.
>
> MR. MILLS: And, Judge, may I also presume to suggest that the Commission should find it helpful if no party's able to find such an Accounting Authority Order?
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> JUDGE JORDAN: I think that may be implicit in the results of the parties' research.

In response, Ameren Missouri cited one Hawaii case[4] that provides no support whatsoever for Ameren Missouri's request in this case. In that Hawaii case, which the Commission considered and found uncompelling in the MGE AAO case (GU-2011-0392), the Hawaii utilities commission approved a stipulation entered into by a number of entities following a hurricane, including the Hawaii consumer advocate. That stipulation covered a number of topics, including a provision that would allow Citizens Utilities to defer revenues that it had anticipated receiving had the hurricane not hit. As this Commission is well aware, there are usually a multitude of factors that lead a particular party to sign a stipulation, and there is no way for anyone to know what role the deferral of potential lost margins played in that case. Ameren Missouri points out that "the Hawaii Commission was not required to approve that stipulation." (Ameren Missouri brief at page 30) But Ameren Missouri ignores the final provision of the stipulation itself which limited the Hawaii Commission to approving the stipulation in its entirety, or none of it:

[4] *Re Citizens Utilities Company, Kauai Electric Division*, Docket No. 7517, Decision and Order No. 12064 (December 9, 1992).

> Each provision in this stipulation is in consideration and support of all other provisions, and is expressly conditioned upon acceptance by the Commission of the agreement as a whole. In the event the Commission declines to adopt this agreement according to its terms, the agreement shall be deemed withdrawn and the parties shall be free to pursue their respective positions in this proceeding without prejudice.[5]

As is so often the case, the rest of the story is even more important. Ameren Missouri does not discuss what happened in the follow-up rate case at the Hawaii Commission. In the rate case following the deferral,[6] the Hawaii consumer advocate and the U.S. Department of Defense (DOD) argued that the deferred "lost gross margins" should not be recovered from ratepayers. Notably, the Commission stated that "The DOD also points out that [Kauai Electric] failed to identify any other utility in the country that was allowed to recover any lost gross margin associated with a natural disaster."[7] The Hawaii Commission agreed with this point, and concluded that: "In looking to other jurisdictions for guidance on this issue, it appears that no jurisdiction has allowed a utility to increase its rates for a lost gross margin claim associated with a natural disaster."[8]

In reaching that conclusion, the Hawaii Commission cited to a Mississippi case[9] which emphatically refuted the Mississippi Public Service Commission's attempt to allow recovery of lost revenues:

> Of the $ 9,994,135.00 the Commission allowed the utility to amortize, as storm related expenses, $ 1,200,713.00 was revenue the utility did not collect when it was unable to provide power to its customers. It is the position of the Company that lost revenue is no less a component of storm damage than is the damage to its physical facilities. Therefore, the utility feels that it should be compensated for

[5] Hawaii stipulation, attached hereto, page 7.
[6] Docket No. 94-0097. Docket No. 94-0308 (Consolidated) Decision and Order No. 14859, filed August 7, 1996.
[7] *Ibid*., at page 19.
[8] *Ibid*.
[9] State ex rel. Pittman v. Mississippi Public Service Com., 520 So. 2d 1355 (Miss. 1987)

> service that it never provided. Although no authority is cited by the utility for this proposition, the Commission is in agreement.
>
> **It should be noted that none of the cases cited herein, which allowed utilities to recover storm related expenses, ever once mentioned, or even alluded to, allowing the utilities to recover for revenue lost during the period when they failed to supply service to customers.**
>
> A review of the applicable code sections clearly relates that a "rate means every charge . . . charged or collected by any public utility for any service . . . offered by it to the public. . . ." See Mississippi Code Annotated, § 77-3-3(e) (Supp. 1986). Additionally both Mississippi Code Annotated, § 77-3-39(5), and Mississippi Code Annotated, § 77-3-41 (Supp. 1985), which deal with the Commission's powers to fix rates by order contain the same language to the effect that after a hearing the Commission shall determine and fix by order such rate or rates as will yield a fair return to the public utility for furnishing service to the public. Granting the Company a rate increase for power not delivered in service would require customers who incurred additional expenses because of "outage" to pay fees in addition to those previously incurred.
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> **The Commission does not have the authority to grant a rate increase for power never delivered.**[10]

This Commission should not choose this particular topic – the deferral and recovery of potential revenues – as the one to in which it is the first Commission in the nation to break with the law and past precedents.

WHEREFORE, Public Counsel respectfully offers this Post-hearing Reply Brief and prays that the Commission conform its decision in this case to the arguments contained herein.

[10] *Ibid*., at 1363; emphasis added.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 12th day of June 2012.