BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area.	)))))	**Case No. ER-2011-0028**

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

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I. INTRODUCTION

This brief will necessarily be more limited than Public Counsel's initial brief. This brief will address the issues of the inclusion of Taum Sauk rebuilding costs in rate base[1] and the appropriate pass-through percentage in the FAC.[2] Because Ameren Missouri did not address the Overview and Policy issues in its initial brief, Public Counsel has nothing to respond to (although Public Counsel notes with approval and appreciation Staff's position that the Commission must consider the testimony adduced at local public hearings). Likewise, because the Municipal Group – the only party that opposed the nonunanimous agreement on class cost of service – did not address the class cost of service issue in its initial brief, this brief will not address that issue. This brief will not address the issue of demand-side management (DSM) cost recovery except to note that the Staff's initial brief did a good job of revealing just how poorly-developed the Ameren Missouri billing unit adjustment – which surfaced for the first time in rebuttal testimony – really is, and to again note that (as discussed in Public Counsel's initial brief) it offers relatively little incremental DSM spending at a very high cost to customers.

II. TAUM SAUK

Five parties in this case took a position on the question of whether ratepayers should be forced to pay for the cost of rebuilding the Taum Sauk upper reservoir after its collapse caused by Ameren Missouri's willful disregard for its integrity. Three of those parties (Public Counsel, AARP and the Consumers Council of Missouri) oppose recovery. Only Ameren Missouri and the Staff support raising rates to allow Ameren Missouri to recover costs of rebuilding Taum Sauk.

[1] Issue 5 on the List of Issues.
[2] Issue 8 B on the List of Issues.

As noted in Public Counsel's initial brief, the costs for which Ameren Missouri seeks recovery are not "allowed costs" as that term is used in the Consent Judgment (Exhibit 157).[3] Ameren Missouri, of course, disagrees and argues to the contrary in its initial brief. The Consent Judgment, insofar as the costs at issue here are concerned, indicates that two categories of cost can be "allowed costs." These two are "enhancements" and "costs that **would have** been incurred absent the Occurrence as allowed by law." (Exhibit 157, paragraph 3, emphasis added) What is most remarkable about Ameren Missouri's initial brief is the number of times it repeats that phrase "would have" without any qualifier like "possibly" or "probably." The section of Ameren Missouri's brief addressing this provision of the consent judgment is only about two and a half pages long (and about a half a page of that is quotations), but the phrase "would have" with respect to expenditures is used seven times. Nothing in the record warrants that sort of absolute certitude. Ameren Missouri states at page 56 that Dr. Rizzo's testimony is "uncontradicted" and concludes that section of its initial brief by claiming that its testimony "regarding the costs that would have been incurred in the absence of the breach is unrefuted by any other witness." These statements are demonstrably inaccurate. As discussed in Public Counsel's initial brief, Staff witness Gilbert testified to three different possible outcomes, none of

[3] Based on a reference in Public Counsel's overall opening statement (Transcript, page 57), Ameren Missouri asserts that Public Counsel has "admitted" that the costs at issue are allowed costs. If read in isolation, that one reference could be read as a concession about allowed costs, but the following sentences make clear that that was not the intent. Counsel did not mean to concede that the costs at issue are in fact allowed costs, but to emphasize that categorizing them as "allowed costs" is the first step in the approval process, not the last. The point was that, even if Ameren Missouri is not prohibited by the Consent Judgment from seeking recovery, the Commission still gets to decide whether or not to allow recovery.

Moreover, the general rule is that "Opening statements usually are not considered as judicial admissions unless they are clear, unequivocal admissions of fact…." (McCarthy v. Wulff, 452 S.W.2d 164, 167 (Mo. 1970)) A statement like "the old upper reservoir did not have a spillway" could be considered a clear unequivocal admission of fact, but an argument stressing the Commission's role in determining what costs should be included in rate base cannot.

which would require Ameren Missouri to incur the speculative costs about which Dr. Rizzo was so supremely confident: 1) the Taum Sauk facility could be run at a lower level (indefinitely or until native load grows or off-system sales opportunities occur); 2) the Federal Energy Regulatory Commission (FERC) could grant a waiver; or 3) the FERC could grandfather the Taum Sauk plant. (Transcript volume 16, pages 2330, 2239) None of Mr. Gilbert's testimony about these alternatives is refuted by any other testimony in the record. The Commission must either find Mr. Gilbert's testimony to not be credible, or it must find that Dr. Rizzo's testimony about costs that "would have" been incurred is necessarily testimony about costs that "might have" been incurred.

At page 58 of its initial brief, Ameren Missouri states that the "Consent Judgment itself recognizes the Commission's power to audit the Company's investment in Taum Sauk…." The Consent Judgment also necessarily gives the Commission the power to determine whether particular costs are "allowed costs." None of the parties to the Consent Judgment have addressed the question of whether the costs at issue are "allowed costs," and the Department of Natural Resources explicitly testified that it is the role of the Commission to make that determination. (Transcript Volume 26, page 2056) Ameren Missouri apparently agrees. (Transcript, Volume 21, pages 663-664) The Commission cannot rely on the silence of the other parties to the Consent Judgment as any kind of statement about whether they consider the costs at issue to be "allowed costs;" it is reasonable to infer that they, like DNR, understand that to be the Commission's call. Thus, Ameren Missouri's argument at page 48 of its initial brief that DNR and the Conservation Commission "would have every incentive to provide evidence to the Commission supporting disallowance" is misplaced. Those agencies have **no** incentive to provide input on ratemaking matters. The Conservation Commission does not intervene in rate cases, and DNR, which does,

never takes positions on issues outside of weatherization and energy efficiency. Neither of these agencies has the protection of the ratepayers as part of its charge; that is the job of the Commission, and it appears that these agencies intend to have the Commission address it without their input.

Neither Staff not Ameren Missouri, in their initial briefs, provide any compelling argument why the term "enhancement" (the other category of "allowed costs" at issue here) should be defined with reference to the old upper reservoir. Staff witness Gilbert testified that the items that Ameren Missouri considers to be "enhancements" are instead just "the types of things that you would include with that type of dam," although Mr. Gilbert also considers any improvement over the state of the upper reservoir in 2005 to be an enhancement.

The Staff's position in favor of forcing ratepayers to pay for all of the costs of the rebuild that are not covered by insurance, as summed up in Staff's opening statement (Transcript Volume 21, pages 670-672), is simply that ratepayers should be happy to be getting a $490 million facility for only $90 million. It really is not any more sophisticated than that. Given that sort of attitude, it is not surprising that the prudence audit was so superficial. Public Counsel is not contesting the results of Staff's prudence audit because Public Counsel simply does not have the resources to do so. But the Commission should nonetheless not put a great deal of faith in it. Only two Staff members participated, neither had ever done any kind of a prudence audit before, and only one was an auditor by training. Ms. Carle testified that she only reviewed around 10% of the invoices for the Taum Sauk rebuild, but she was far from confident even in that determination. (Transcript, page 872) Ms. Carle testified that she had no opinion about whether any of the costs of the upper reservoir rebuild should be considered enhancements; she relied entirely on Mr. Gilbert's opinion. (Transcript, page 876) Given her level of experience and given

the small percentage of invoices she reviewed, it is difficult to imagine how Ms. Carle would have uncovered and recognized unnecessary or unreasonable expenses incurred in the implementation of the grout curtain, for example. Mr. Gilbert, on whom she so heavily relied, did not give her any guidance with respect to the grout curtain. (Transcript, pages 912-913)

Staff characterizes Public Counsel's position on the Taum Sauk issue as a "ploy." (Staff initial brief , page 54) Public Counsel's position is not a ploy, and Public Counsel resents the accusation. A ploy is a stratagem or artifice used to gain advantage over an opponent. Public Counsel believes – fervently and honestly – that ratepayers should not have to pay a single cent of the costs of rebuilding the Taum Sauk upper reservoir. Staff may not agree with this position, but to call it a ploy is insulting and unprofessional. In fact, Public Counsel's position in this case is similar to the position Staff took in the rate case in which the Commission disallowed the costs of the Harris litigation,[4] which the Staff discusses in its initial brief. In that case, Staff argued that the costs of the Harris litigation should be disallowed because Union Electric Company's actions which lead to that litigation were imprudent. Staff did not allege that any particular litigation expense was imprudent, but nonetheless urged that all litigation expenses be disallowed because of the underlying imprudence. The Commission discussed the issue and adopted Staff's position:

> The Company contends that the litigation costs are a reasonable business expense and that its attempt [*sic*] to call the bonds were aimed at reducing its cost of money which if successful would have been beneficial to ratepayers.
> In the Commission's opinion, **the Company has not shown that its action underlying** the litigation was prudent and, therefore, has not shown the inclusion of these litigation expenses to be justified.
> The Company was not being pressured by this Commission to redeem the bonds in question. The Company had intended and represented that the bonds contained

[4] Case No. EC-87-114, Staff vs. Union Electric, consolidated with EC-87-115, Public Counsel vs. Union Electric; Report and Order issued December 21, 1987; 29 Mo. P.S.C. (N.S.) 313; 90 P.U.R.4th 400; 1987 Mo. PSC LEXIS 3 (Mo. PSC 1987)

> a no call provision. **The Company was aware that its action carried a substantial risk** of litigation initiated by the bondholders as is evidenced by a letter written to a company executive by one of UE's directors in opposition to the action. It is apparent that a serious doubt existed as to the legality of the redemption attempt.
> Based on all the foregoing considerations, the Commission determines that **the consequences of the substantial risk** taken by the Company regarding the events leading up to this litigation should be placed on the shoulders of the shareholders and not Missouri ratepayers. Accordingly, the Commission concludes that Staff's adjustment should be adopted.[5]

The exact same situation confronts the Commission here: Ameren Missouri was aware or should have been aware that running the Taum Sauk full tilt in its reckless pursuit of off-system sales profits despite all the red flags "carried a substantial risk." That risk came to horrific fruition in December 2005. Just as in the Harris litigation case, the focus of the Commission should not be on whether Ameren Missouri's response to the disaster was reasonable, but why that response was necessary in the first place. Just as it did in the Harris litigation case, the Commission should conclude that the consequences of the Taum Sauk disaster "should be placed on the shoulders of the shareholders and not Missouri ratepayers."

III. FAC PASS-THROUGH PERCENTAGE

The question presented by this issue is: how thoroughly can the Commission insulate Ameren Missouri from the risk of increases in the cost of fuel and still provide Ameren Missouri with a sufficient incentive to appropriately manage fuel costs? Several of the current Commissioners were not on the Commission when the first modern-day FAC, which included a 95% pass-through percentage, was approved for Aquila, Inc. (now KCP&L Greater Missouri

[5] *Ibid.*, at 328; emphasis added.

Operations Company), even though that was just a few years ago.[6] As a result, those newer Commissioners may be affording that 95% pass-through percentage greater deference than it is due. First, it is too recent to be considered established precedent or even common practice. Second, it has been an entirely arbitrary percentage from the outset. As Public Counsel noted in its Application for Rehearing of the ER-2007-0004 Report and Order:

> The Commission's determination to allow a 95% pass-through of changes in fuel and purchased power costs is arbitrary and capricious and not based on evidence in the record. The Commissioner who proposed the 95/5 split at the Commission's May 10 [2007] open meeting, when asked by another Commissioner where the 95% came from, responded, "I plucked that number out of the air." None of the experts testified that a mere 5% stake in fuel and purchased power cost changes would provide a meaningful incentive for Aquila to control such costs, and there is no evidence of record to show that it will.[7]

Bearing in mind that there is little reason – other than sheer inertia – to give deference to the current 95% pass-through percentage, the Commission should recognize that one of the reasons that it found compelling to set the percentage so high for Ameren Missouri is no longer even in existence. This is a very significant change, and it is the end of the "coal pool." The coal pool was essentially a joint coal-buying effort managed by AmerenEnergy Fuels and Service on behalf of both regulated and non-regulated Ameren subsidiaries. Public Counsel witness Kind testified about this change:

> Public Counsel believes that, from a general perspective, the FAC mechanism currently in place for UE does not provide sufficient incentive for the Company to minimize UE's fuel procurement costs and maximize the margins gained from off-system sales (OSS). OPC believes that, at a maximum, UE should be able to recover 85% of its variations from the baseline level of fuel costs (net of OSS margins) that was set in the Company's most recent rate case. Unless UE has at least this much "skin in the game" (i.e. 15%), ratepayers cannot be assured that UE is making its best efforts to minimize its fuel procurement costs and maximize its OSS margins. Ratepayer confidence that UE is making its best efforts to minimize fuel costs is especially important under the current circumstances where UE's customers are once again faced with the prospect of a double digit rate

[6] Case No. ER-2007-0004; Report and Order issued May 17, 2007.
[7] Public Counsel's Application for Rehearing, Case No. ER-2007-0004, filed May 25, 2007.

increase at the same time many of these same customers are experiencing the impact of global economic problems on their household budgets.

Q. HAS UE CHANGED ANY OF ITS FUEL PROCUREMENT PRACTICES IN THE LAST YEAR THAT RAISES OPC'S CONCERNS ABOUT UE MAKING ITS BEST EFFORTS TO MINIMIZE FUEL COSTS IF IT DOES NOT HAVE MORE "SKIN IN THE GAME"?

A. Yes. UE has argued in the past that ratepayers could be assured that UE was making its best efforts to minimize fuel procurement costs because the coal purchases for UE were "pooled" with the purchases made for UE's merchant generation plants in the Ameren Genco. This pooling arrangement is no longer in place and OPC believes that a greater sharing percentage is needed to ensure that UE is adequately incented to minimize its fuel cost. The same incentive problem can arise in the area of off-system sales since increased sales by UE can impact the earnings that its unregulated affiliate can make from the energy and capacity sales of merchant generation plants. (Kind Rebuttal, Exhibit 302, page 15)

The Commission, when it first approved an FAC for Ameren Missouri, listed several factors that – when combined with a high pass-through percentage of 95% – would provide Ameren Missouri with sufficient incentive to control its fuel costs despite the high pass-through percentage. The very first factor that the Commission listed was the coal pool, and it is **the only one** that the Commission characterized as a "**strong incentive**":

> A 95 percent pass through provides AmerenUE sufficient incentive to operate at optimal efficiency because the company already has several incentives in place that encourage it to minimize net fuel costs. First, AmerenUE's largest fuel cost is for the purchase of Powder River Basin coal to fire its power plants. The coal AmerenUE uses is purchased by an affiliated company, AmerenEnergy Fuels and Service Company, which also purchases coal for the unregulated Ameren merchant generating companies operating in Illinois. As a result, AmerenUE pays the same price for coal as the unregulated affiliates. Presumably, Ameren has a strong incentive to minimize costs for its unregulated operations, so AmerenUE would benefit from those same incentives.[8]

The Commission no doubt considered it a strong incentive because so many Ameren Missouri witnesses emphasized how powerful an incentive the coal pool was. Witness after witness in Case No. ER-2008-0318 testified about the coal pool and the incentive it provided to

[8] ER-2008-0318 Report and Order, issued January 27, 2009, page 73; footnote omitted.

control fuel costs. (Transcript, Volume 24, pages 1417-1421) In this case, Ameren Missouri witness Lynn Barnes was asked during cross examination about the coal pool testimony in Case No. ER-2008-0318. She testified that she relied on that testimony, at least indirectly, in preparing her testimony in this case. (Transcript, Volume 24, page 1416) However, none of the Ameren Missouri witnesses addressed the coal pool issue in prefiled testimony, despite the fact that Public Counsel witness Kind raised it in his rebuttal testimony. Ameren Missouri does grudgingly recognize it as an issue for the first time in its initial brief at page 84. Ameren Missouri's downplaying of its significance – now that it is no longer in effect – is in stark contrast to the four witnesses testifying about its importance in Case No. ER-2008-0318, and in stark contrast to the Commission's characterization of it as the only "strong incentive" in the Report and Order in that case.

In addition, Ameren Missouri's attempt in its brief to minimize the significance of the coal pool as an incentive to keep fuel costs low rings especially hollow when viewed in the light of other recent statements about the coal pool's significance. In the currently-pending appeal of Case No. ER-2008-0318,[9] both the Commission itself and Ameren Missouri recognize and stress the importance of the coal pool as an incentive that, when added to the high pass-through percentage, should influence Ameren Missouri to keep fuel costs low. In its brief in that appeal, when referring to the Commission's decision in ER-2008-0318, Ameren Missouri stated:

> [t]he Commission noted that AmerenUE purchases its coal together with coal purchases for its unregulated merchant generating company affiliate (who [*sic*] has no ability to recover costs through rates charged to ratepayers) and that this provides a strong incentive to minimize costs, and in reaching this conclusion, the Commission cited to specific testimony in the record.[10]

In its brief in the same case, the Commission also recognized the strong incentive

[9] Case No. SD30865, consolidated with cases SD30888, SD30890 and SD30892.
[10] Case No. SD30865, Ameren Missouri Brief filed April 27, 2011.

provided by the coal pool. The Commission stated, also in reference to its decision in Case No. ER-2008-0318, that:

> The Commission determined a 95% pass through of fuel costs provides the company with sufficient incentive to operate at optimal efficiency because the company already has several other incentives in place to minimize net fuel costs. These incentives include contractual relationships that give AmerenUE the ability to purchase coal at the same price as its unregulated affiliates….[11]

Because one of the incentives to control costs on which Ameren Missouri urged the Commission to rely, and on which the Commission did rely, is now gone, the Commission should reexamine the pass-through percentage. Because that now-missing incentive was the only one that the Commission considered to be a strong incentive, the Commission should increase the amount of "skin in the game" in compensation. The Commission should reduce the pass-through percentage to 85% as urged by Staff witness Mantle and Public Counsel witness Kind.

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.

Respectfully submitted,
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[11] Case No. SD30865, Commission Brief filed April 27, 2011; internal citations omitted.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 13th day of June 2011.