BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service.	)))	**File No. ER-2014-0258** Tariff No. YE-2015-0003

REPLY BRIEF OF
THE CONSUMERS COUNCIL OF MISSOURI

The Consumers Council of Missouri ("Consumers Council" or "CCM") offers its Reply Brief in response to certain arguments made in the initial brief of Ameren Missouri (also the "Utility" or the "Company") in this electric general rate case regarding. Failure of Consumers Council to mention any other arguments made in the initial briefs of other parties should not be construed as acquiescence those arguments.

Deferrals should not be used to protect over-earnings or to allow double recovery.

The entirety of Ameren Missouri's Initial Brief discussion[1] regarding the solar rebate AAO deferral (and regarding other proposed amortizations) ignores the most and basic fundamental case law regarding the nature of AAO deferrals. Missouri courts have been clear that such regulatory deferrals are not ratemaking decisions and do not guarantee unadjusted rate recovery.[2] The primary concern leading to this precedent was the concern raised by consumer advocates that such deferrals could contribute to exactly

[1] Ibid, pp. 5-30.
[2] Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806 (Mo. Ct of App. 1993).

the kind of over-earnings experienced by Ameren Missouri during the very time that the solar rebate costs were incurred. The Commission clearly retains the legal ability to offset recovery, either fully or partially against any over-earnings.[3] The purpose of an AAO deferral is to protect a utility from "earnings shortfalls"[4] due to an unpredictable event, not to protect a utility's *over-earnings*! The courts have never stated that an AAO deferral could be used to move costs forward into a future period thus violating retroactive ratemaking, even when the period during which the costs were incurred was a time period that overall electric rates were already in excess of the utility's allowed return of return.

In its Initial Brief, Ameren Missouri creates its own theory of the law on regulatory deferrals, based primarily on its assertion that the Commission has never made an adjustment to a deferral based upon the over-earnings in any previous rate case.[5] Past practice does not create a legal precedent. Moreover, the Commission has never before been presented with such a stark case of excessive earnings (hundreds of millions of dollars over much of 2013 and 2014) which coincide with the relevant deferral period.

But the most unique aspect of this particular deferral recovery issue—what truly distinguishes it from all previous issues of this kind—is that Ameren Missouri argued about this solar rebate deferral in Case No. EC-2012-0223, the previous general rate case which was heard by the Commission, less than a year ago. In that case, Ameren Missouri successfully argued that the very same solar rebate costs at issue here were a reason to deny a rate reduction for electric consumers, and the utility succeeded in

[3] James Dittmer Rebuttal, Exhibit 910, p. 15.
[4] Aquila, Inc. v. PSC, 978 S.W.2d 434, 436 (Mo. Ct. App. 1998).
[5] Ibid, pp. 20-21.

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defeating consumers on that argument![6] Recovery of these costs have thus already been recognized by the Commission. Even if the Commission does not want to protect consumer from paying for excessive earnings to a monopoly utility, it may not reference those costs to deny consumers a rate reduction, and then also use those same costs to grant an increase to electric rates in less than a year's time. Such a decision would constitute double recovery, not to mention be unreasonable, arbitrary and capricious. To force consumers to pay these deferred costs, in a manner that violates cost of service ratemaking, *and to do it on top of over-earnings of this magnitude*, would constitute one of the bigger consumer rip-offs in recent utility ratemaking history.

The entire theory of "cost of service regulation" is based upon the premise that the overall revenue requirement level is sufficient to cover all reasonable costs to provide safe and adequate service. Granting AAO recovery violates both the ban on single-issue ratemaking and the ban on retroactive ratemaking; however, it has been recognized that this is an exception to those bans, but only because the deferred costs will be reviewed by the Commission along with all relevant factors in a general rate case, primarily for the purpose of ensuring that the AAO did not contribute to over-earnings. AAOs were never conceived to serve as an earnings enhancement scheme.

Perhaps because the law is not on its side, Ameren Missouri chose to cast aspersions upon MIEC and Consumers Council regarding its witnesses. Ameren Missouri does not speak truthfully when it states that MIEC procured Mr. Dittmer's rebuttal testimony and when it states that Consumers Council would have had no testimony

[6] EC-2014-0223, Report and Order, p. 13, Paragraph 24.

prepared on this topic, but for MIEC.[7] Consumers Council was deeply concerned about the fact that Ameren Missouri continued to seek double recovery of solar rebate costs and began seeking other expert witnesses to address this issue as early as during November 2014, long before any discussions with MIEC. Mr. Dittmer was not paid by MIEC for his rebuttal testimony in this case. It is Consumers Council, and Consumers Council alone, that is responsible for sponsoring and paying for Mr. Dittmer's rebuttal testimony in this case.

Despite the fact that Missouri courts have clearly stated that AAO deferrals are not ratemaking decisions and that recovery of deferred costs are subject to adjustment based upon all relevant factors and a retrospective review of earnings during the deferral period, Ameren Missouri also argues the opposite. It states that if the Commission exercises that legal right to protect consumers, then it would "effectively eliminate the Commission's ability to utilize accounting authority orders to allow deferrals when the Commission determines it is appropriate to do so."[8] However, if the Commission fails to protect consumers on this issue, it will render the law meaningless, and cause Consumers Council to be even more suspicious of utility motives when an application for an AAO deferral is requested.

If the Commission take no action in this case to prevent rates from being inflated through a deferral incurred during a period of excessive earnings, then it will send a signal that any AAO can become more than simply a way to mitigate the potential financial

[7] Ameren Missouri Initial Brief, p. 9.
[8] Ameren Missouri Initial Brief, p. 15.

impact of an unusual event—it can become a threat that consumers will wind up paying millions of dollars more than necessary. It will turn all past precedent (and past Commission reassurances) into false promises. Therefore, consumer advocates must oppose any application to avoid that future unfair results.

The total amount of Ameren Missouri over-earnings during the deferral period far exceed the proposed amortization amount of $33,697,000 annually over three years. However, the Commission could grant a partial adjustment compromise by recognizing that the amortization already began at some point during the EC-2012-0223 case (which was both a rate complaint and a "general rate case"). Such a compromise decision would at least discount the burden and give consumers some relief from the over-earnings situation that consumers properly brought to the Commission's attention in that previous general rate case proceeding.

Such a compromise decision would bring some balance back to the regulatory compact. Despite the ideas expressed in Ameren Missouri's brief about its concept of the "regulatory compact", it is confused. Truly, it is the various surcharges, trackers, and deferrals that have been awarded by this Commission in recent years that have begun to distort the regulatory compact against consumers. All of the various surcharges, trackers, and deferrals that have been awarded in recent years are extra special privileges, incrementally added to the consumer burden with the idea that they would protect the utility from unfair reductions in earnings due to "regulatory lag". The Commission should not allow these special mechanisms to be used as a shield for excessive profits nor should these special mechanisms become a way to ensure *guaranteed* rate recovery

despite over-earnings. The relentless manner in which special rate recovery mechanisms have been added to tilt the scales against consumers needs to be seriously considered. Truly Ameren Missouri's over-earnings over the past few years should serve as a cautionary tale. If these mechanisms are allowed to persist and to become "normal", then public confidence in the regulatory balance between shareholders and consumers is truly at risk.

Ameren Missouri's proposal to enter a wholesale contract with Noranda Aluminum is illegal and would significantly harm other consumers.

Missouri law prohibits Noranda Aluminum from taking wholesale power,[9] and Ameren Missouri's attempt to use a shell company to engage in an "end run" around the law would serve to merely facilitate an otherwise illegal transaction.[10] Missouri courts are unlikely to accept form over substance in such a sham arrangement.

However, form aside, it is assumed that such a wholesale deal would involve a lower rate than what Noranda currently pays, and one the Company admits will be lower than the cost to serve Noranda.[11] Ameren Missouri is thus proposing an illegal arrangement to grant a subsidy to Noranda (something that Ameren Missouri has claimed

[9] Section 91.026 RSMo.
[10] See transcript Vol. 35, p. 2950-51
[11] Ex. 26, p.32

that it is opposed to happening), but which would occur without the input of other consumers and outside of the Commission's ability to control or to balance the impact vis-à-vis other consumers. This is true because, even if it were legal, the Commission would not have jurisdiction over wholesale contracts.[12] The Commission cannot and should not force parties to enter into such a wholesale arrangement nor foist the impact unfairly upon the other customer classes.

Ameren Missouri's wholesale proposal would further violate the expectations of other customers, based upon the stipulation (signed by Public Counsel on behalf of all consumers) with its the bargain that ultimately lead to Noranda becoming a regulated customer in the first place in 2005, when the Metro East territory was removed from the Ameren Missouri system in order to compensate for the new load from Noranda Aluminum. The bargain was that Noranda would be a regulated customer, and that the interests of the that company would be worked out in the regulatory process along with the input from all other regulated consumers, in the context of general rate cases before the Commission. Ameren Missouri hopes to drive a wedge between consumers and to ensure that the interests of consumers are pitted against one another.

Furthermore, the Commission cannot cancel nor suspend a certificate of convenience and necessity ("CCN") under the terms of Ameren Missouri's wholesale proposal.[13] Nor does the fuel adjustment clause statute grant the Commission the ability to flow such a wholesale deal through the FAC, further exacerbating the current 95% risk shift onto consumers represented by that mechanism.

[12] New York v. FERC, 535 U.S. 1, 19-21 (2002).
[13] State of Missouri ex rel. City of Sikeston v. PSC, 82 S.W.2d 105 (Mo. 1935).

There is a more reasonable solution. The Consumers Council is a signatory, along with Public Counsel, the Missouri Retailers Association, the Missouri Industrial Energy Consumers ("MEIC"), and Noranda to the March 10, 2014 Non-unanimous Stipulation and Agreement ("Stipulation") regarding economic development, class cost of service, revenue allocation and rate design. While this agreement is opposed by MEGC and Walmart, the negotiations of both of those parties contributed significant consumer protection language into the final document. The Stipulation represents a just and reasonable resolution of the rate design issues in this rate case. Consumers Council stands by it and hopes that the Commission appreciates that it was vigorously negotiated by representatives of each of the customer classes that will pay the electric rates approved in this case. Such broad agreements are a just and reasonable way to resolve the complicated underlying rate design issues, and it will result in the greatest satisfaction amongst the greatest number of consumers.

As to the Noranda issues specifically, it is a far preferable resolution to a wholesale arrangement that forces Noranda off of the regulated system, dumping all risk of the situation onto other ratepayers, without any comparable protection. The Stipulation solution is far superior, particularly in the manner that it includes a 50% escalator to be applied in each rate case over the next ten years. This escalator would keep Noranda engaged in the rate case process and ensure that the interests of Noranda and the interests of other ratepayers continued to be aligned. Noranda would still be making a positive contribution to fixed costs and its continued presence as a consumer on the regulated system would remain an economic benefit to all other consumers and to the

state of Missouri.

Despite the criticisms of one objecting party, the Stipulation contains numerous consumer protections (some proposed by that same objecting party) that would prevent unjust enrichment by Noranda during the ten year period if it can take advantage of the IAS rate. And as a regulated rate, the Commission and other parties would continue to have the ability to monitor the IAS rate to ensure that the benefits continue to accrue to all ratepayers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all parties on the official service list of this case at the Missouri Public Service Commission, on this 10th day of April, 2015.

/s/ John B. Coffman