



Missouri Public Service Commission

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FILED²

FEB 13 2014

Missouri Public Service Commission

Judge or Division: Jordan, Senior Regulatory Law Judge	Appellate Number:
Appellant: Office of the Public Counsel	Missouri Public Service Commission File Number: EU-2012-0027
Respondent: Missouri Public Service Commission	

(Date File Stamp)

Notice of Appeal

Notice is given that <u>the Office of the Public Counsel</u> appeals to the Missouri Court of	
Appeals <input checked="" type="checkbox"/> Western <input type="checkbox"/> Eastern <input type="checkbox"/> Southern District.	
<u>2-13-14</u> Date Notice of Appeal Filed (to be filled in by Secretary of Commission)	<u>JH</u> Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

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Date of Commission Decision: 11/26/2013	Date of Application for Rehearing Filed: 12/24/2013	Date Application for Rehearing Ruled On: 1/15/2014	

DIRECTIONS TO COMMISSION

A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on 2/14/2014 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.
see attached

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Appellant or Attorney for Appellant

EU-2012-0027 NOTICE OF APPEAL

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EU-2012-0027 NOTICE OF APPEAL

STATEMENT OF THE ISSUE

Whether the Commission's decision to grant Ameren Missouri's application for an Accounting Authority Order and to allow Ameren Missouri to create a regulatory asset representing unearned potential additional profits is unlawful, unreasonable, arbitrary and capricious, and unsupported by competent and substantial evidence.

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 15th day of
January, 2014.

In the Matter of the Application of)	
Union Electric Company d/b/a Ameren Missouri)	File No. EU-2012-0027
for the Issuance of an Accounting Authority)	
Order Relating to its Electrical Operations.)	

ORDER DENYING REHEARING

Issue Date: January 15, 2014

Effective Date: January 15, 2014

The Missouri Public Service Commission is denying *The MIEC's Application for Rehearing*¹ and *Public Counsel's Application for Rehearing*² (together, the "motions"). The motions were filed on December 24, 2013. On January 9, 2014,³ the Commission received *Ameren Missouri's Suggestions in Opposition to Applications for Rehearing*.⁴ The Commission may grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear."⁵ The Commission concludes that the motions do not show sufficient reason for a rehearing, so the Commission will deny the motion. That ruling, and absence of any just reason for delay, constitutes good cause to make this order effective less than 30 days from issuance.⁶

¹ Electronic Filing and Information System ("EFIS") No. 168, filed by the Missouri Industrial Energy Consumers.

² EFIS No. 170.

³ The deadline for filing a response to the motions. EFIS No. 169, *Order Setting Filing Date* issued on December 24, 2013; and EFIS No. 171, *Order Setting Filing Date* issued on December 30, 2013.

⁴ EFIS No. 175.

⁵ Section 386.500.1, RSMo 2000.

⁶ Section 393.140(11), RSMo 2000.

THE COMMISSION ORDERS THAT:

1. *The MIEC's Application for Rehearing* is denied.
2. *The Public Counsel's Application for Rehearing* is denied.
3. This order shall be effective immediately upon issuance.



BY THE COMMISSION

Morris L. Woodruff

Morris L. Woodruff
Secretary

Stoll, W. Kenney, and Hall, CC., concur;
R. Kenney, Chm., dissents.

Jordan, Senior Regulatory Law Judge

**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)	<u>Case No. EU-2012-0027</u>
Of an Accounting Authority Order Relating to its)	
Electrical Operations.)	

PUBLIC COUNSEL’S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states that the Commission’s November 26, 2013 Report and Order is unlawful, unjust and unreasonable, is arbitrary and capricious, and is an abuse of discretion for the following reasons:

1. The Commission should not have granted Union Electric Company’s d/b/a Ameren Missouri (Ameren) request for an accounting authority order (AAO) because there was literally nothing to defer. During the relevant period, Ameren recovered all of its fixed costs and earned a profit. The amounts at issue in this case simply constitute additional profits that Ameren might have earned had the ice storm not occurred and nothing else changed. The most accurate description of the amounts at issue might be “unearned potential additional profits,” and nothing in the Uniform System of Accounts (USOA) allows for such to be deferred.

2. The Report and Order is arbitrary and capricious because it is in direct conflict with the Commission’s decision in Case No. GU-2011-0392, involving an AAO request by the Southern Union Company. In that case, Southern Union requested an AAO to defer “unearned potential additional profits” that it might have made if the May 2011 Joplin tornado had not reduced sales. Although it was the exact same request that Ameren makes here, the Commission denied Southern Union’s request, holding that the USOA does not allow the Commission to create an item to be deferred. That was, and is, the correct reading of the USOA and it was arbitrary and capricious for the Commission to hold otherwise here without any explanation.

3. Even if “unearned potential additional profits” could under some circumstances be deferred pursuant to an AAO, Ameren’s request must be denied because it seeks to defer an item from a past period. An AAO serves only to preserve items from a current period to be considered in a future period. It cannot “resurrect” an item from a past period for consideration in a future period. This is clear from the Commission’s discussion of the USOA at pages 12-14 of the Report and Order in Case No. GU-2011-0392 (a similar discussion is markedly absent in the Report and Order in this case). It is also clear from Missouri case law: “The whole idea of AAOs is to defer a final decision on **current** extraordinary costs until a rate case is in order.” (Missouri Gas Energy v. PSC, 978 S.W.2d 434, 438 (Mo. Ct. App. 1998); emphasis added.)

4. The Commission abused the discretion it has to grant AAOs because, in this case, recovery of deferred amounts in rates in a future rate case would be unlawful retroactive ratemaking. Retroactive ratemaking is the recovery in a subsequent case of revenue that a utility failed to generate in a prior period.¹ UCCM describes retroactive ratemaking as follows:

The utilities take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established.²

While UCCM did not address the type of “unearned potential additional profits” at issue here, the prohibition against retroactive ratemaking would clearly extend to them as well. Because UCCM prohibits the recovery of such amounts from future ratepayers in a subsequent rate case,

¹ State ex rel. Utility Consumers Council, Inc. v. Public Service Com., 585 S.W.2d 41, (Mo 1979), referred to herein as UCCM.

² *Ibid.*

it was unlawful and an abuse of discretion for the Commission to allow the deferral of such amounts.

5. The Commission entirely failed to address the critical distinction between this case and every other AAO granted by the Commission: in this case, the Commission twice established just and reasonable rates in rate cases (considering all relevant factors) **after** the alleged extraordinary event and **before** granting the AAO.

6. The opinion of the Western District Court of Appeals handed down on May 14, 2013 is instructive and reinforces why the requested AAO is illegal and unreasonable. The Court, at page 27 of the Slip Opinion, refers to the monies at issue here as “lost retail revenues [Ameren Missouri] had assumed it would receive when setting its rates in the 2008 general rate case.” The Court repeatedly refers to “lost revenues” or “revenue loss”³ while repeatedly noting that Ameren Missouri refers to “fixed costs.”⁴ The Court, at page 39, concludes that:

[T]he risk of a dramatic loss of retail revenue is a business risk every utility faces.... [T]he risk of lost revenue is simply not a risk a utility is authorized to remediate with a fuel adjustment clause.

Similarly, “the risk of lost revenue is simply not a risk a utility is authorized to remediate with” an AAO. The Court thus has already addressed one of the critical issues that the Commission got wrong in its Report and Order: what Ameren seeks to defer is lost or ungenerated retail revenue, not unrecovered fixed costs. Because it is ungenerated revenue, there is nothing to be deferred; no item that can be recorded.

³ See, e.g., pages 6, 26, 38, 39.

⁴ See, e.g., pages 36, 32, 37.

WHEREFORE, Public Counsel respectfully requests that the Commission rehear and reconsider its Report and Order and upon such rehearing and reconsideration, vacate the Report and Order and deny the application for an Accounting Authority Order.

Respectfully submitted,
By: /s/ Lewis R. Mills, Jr.

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ATTORNEY FOR OFFICE OF THE
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was mailed, electronically, to all counsel of record on December 24, 2013.

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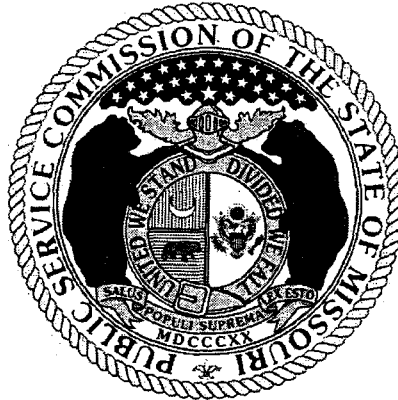
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/s/ Lewis R. Mills, Jr.

**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

REPORT AND ORDER

Issue Date: November 26, 2013

Effective Date: December 26, 2013

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

REPORT AND ORDER

Issued: November 26, 2013

Effective: December 26, 2013

The Missouri Public Service Commission is granting the application for an accounting authority order ("AAO").¹ The AAO accounts for unexpected lost revenue to recover fixed costs. The AAO only allows for deferred recording, does not guarantee recovery, and does not in any way bind the Commission as to future rate making treatment.

Procedure

The Commission has jurisdiction to decide the application.² Union Electric Company ("Ameren") has the burden of proof³ by a preponderance of the evidence⁴ and reasonable inferences.⁵ On that basis, the Commission finds the facts as follows.

¹ Electronic Filing and Information System ("EFIS") No. 1, *Verified Application for Accounting Authority Order*, filed on July 25, 2011. EFIS is accessible at <http://psc.mo.gov/default.aspx>.

² 4 CSR 240-20.030(1); 18 CFR 101, Account 182.3.B (emphasis added). The parties adverse to the application seek denial of the application based on late filing of the application, but they make no persuasive argument supporting a calculation of the deadline for filing an application for an AAO.

³ *State ex rel. Tel-Central of Jefferson City, Inc. v. Pub. Serv. Comm'n of Missouri*, 806 S.W.2d 432, 435 (Mo. App., W.D. 1991).

⁴ *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).

⁵ *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

Findings of Fact

1. Union Electric Company is a Missouri corporation doing business as “Ameren Missouri” to provide electric service for gain.⁶

2. Costs of providing electric service include fixed costs.⁷ Fixed costs are expenses that Ameren incurs to be capable of delivering electricity at full capacity at any given time, even though customers may not need that entire capacity at any given time. Fixed costs do not fluctuate with the amount of electricity sold.⁸

3. In January 2008, an ice storm struck southeast Missouri,⁹ cutting power to Ameren’s largest customer Noranda Aluminum, damaging Noranda’s operations, and reducing Noranda’s purchases of electricity for 14 months.¹⁰ As a result, Ameren collected less revenue than expected from Noranda.¹¹ The amount of unrecovered fixed costs attributable to serving Noranda during those 14 months is \$35,561,503.¹²

4. The \$35,561,503 of unrecovered fixed costs attributed to serving Noranda represented nearly 8.5% of the Company’s net income in 2009.¹³

⁶ EFIS No. 87, *Transcript* volume 2, page 177, Ins. 12 through 16.

⁷ EFIS No. 87, *Transcript* volume 2, page 176, Ins. 10 through 14.

⁸ EFIS No. 87, *Transcript* volume 2, page 108, Ins. 11 through 16.

⁹ EFIS No. 101, Ameren Exhibit No. 2, *Direct Testimony of Lynn M. Barnes*, page 3, line 3 through 12.

¹⁰ EFIS No. 100, Ameren Exhibit No. 1, *Surrebuttal Testimony of David N. Wakeman*, page 17, Ins. 5 through 12.

¹¹ EFIS No. 103, Ameren Exhibit No. 4, *Direct Testimony of Steven M. Wills*, page 3, Ins. 1 through 6.

¹² EFIS No. 87, *Transcript* volume 2, page 17, line 2 through 20; for Ameren, \$35,561,503 before taxes represents \$21,909,940 after taxes, *Id.* p. 50. Ins. 15 – 17.

¹³ EFIS No. 102, Ameren Exhibit 3, *Surrebuttal Testimony of Lynn M. Barnes*, page 6, Ins. 8 – 14.

Conclusions of Law

1. The Commission must always report its conclusions.¹⁴

2. An AAO is a mechanism to “defer” an item, which means to record an item to a period outside of a test year for consideration in a later rate action. Items eligible for deferral include an “extraordinary item”, an item that pertains to an event that is extraordinary, unusual and infrequent,¹⁵ and not recurring.¹⁶

3. Revenue not collected by a utility to recover its fixed costs, under some circumstances, is an “item” that may be deferred and considered for later rate making. This is consistent with Commission regulations regarding certain energy conservation programs which specify that lost revenue may constitute an item for recording.¹⁷ It is also analogous to the Cold Weather Rule, created by the Commission under its statutory authority,¹⁸ which expressly allowed for recovery of lost revenues.¹⁹ Such a deferral under this rule does not constitute illegal retro-active ratemaking because there is no rate being set for it is merely an accounting deferral.²⁰

¹⁴ Section 386.420.2, RSMo 2000.

¹⁵ Uniform System of Accounts (“USoA”) General Instruction 7, Account 434, and Account 435.

¹⁶ USoA, General Instruction 7.

¹⁷ 4 CSR 240-3.164(1)(M), which relates to certain conservation programs.

¹⁸ See 4 CSR 240-13.055, Cold Weather Maintenance of Service: Provision of Residential Heat-Related Utility Service During Cold Weather; Sections 386.250, 393.140, RSMo 2000 and 393.130, RSMo Supp. 2012.

¹⁹ State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n, 210 S.W.3d 330, 335-36 (Mo. App., W.D. 2006).

²⁰ State ex rel. Office of Public Counsel v. Missouri Public Service Comm’n, 301 S.W.3d 556, 571 (Mo. App., W.D. 2009).

4. Ameren has shown that its loss of \$35,561,503, which constitutes 8.5% of its net income, is extraordinary and material.²¹ Extraordinary items are deferred by recording them in Uniform System of Accounts ("USoA")²² Accounts 182.3 and 254, regulatory assets and liabilities, respectively.²³

5. Recording in these accounts is in the public interest because it preserves an item for consideration when setting just and reasonable rates. But deferred recording does not guarantee recovery in any later rate action; recovery may be granted in whole, partially, or not at all.²⁴

For those reasons, the Commission makes its rulings as follows, subject to rehearing under Section 386.500, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The *Verified Application for Accounting Authority Order* is granted.²⁵
2. This order shall become effective December 26, 2013.

²¹ To be considered an extraordinary item, the item should be more than approximately 5 percent of income, computed before extraordinary items. USoA, General Instruction 7.

²² 18 CFR Part 101, as incorporated to this Commission's regulations at 4 CSR 240-20.030(1).

²³ USoA 407.4, "Regulatory Credits" sets forth that this account shall also be credited when appropriate, with the amounts debited to Account 182.3.

²⁴ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 336 (Mo. App., W.D. 2006). *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 438 (Mo. App., W.D. 1998); EFIS No. 91, Staff Exhibit No. 3, *Rebuttal Testimony of Mark L. Oligschlaeger*, page 6, ln 11 - 16.

²⁵ The Court of Appeals expressly acknowledged this possibility: "Ameren had other remedies available to it to address its unexpected retail revenue loss. [An Ameren witness] testified that Ameren could have sought an accounting authority relating to the lost revenue in a subsequent rate case." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State*, 399 S.W.3d 467, 489-90 (Mo. App., W.D. 2013) (footnotes omitted).

3. This file shall close on December 27, 2013.

BY THE COMMISSION



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Stoll, W. Kenney, and Hall, CC, concur,
R. Kenney, Chm., dissents;
and certify compliance with the provisions of
Section 536.080, RSMo.

Jordan, Senior Regulatory Law Judge

FORM 1. CIVIL CASE INFORMATION FORM SUPPLEMENT

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

No. WD _____

List every party involved in the case, indicate the position of the party in the circuit court (e.g., plaintiff, defendant, intervenor) and in the Court of Appeals (e.g., appellant, respondent) and the name of the attorney of record, if any, for each party. Attach additional sheets to identify all parties and attorneys if necessary.

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The Record on Appeal will consist of a:

 X Legal File Only or _____ Transcript and Legal File.
(This will include records filed pursuant to Rules 81.13 and 81.16)

FACTUAL BACKGROUND: (Events Giving Rise to Cause of Action)

Judicial Review of the Missouri Public Service Commission's November 26, 2013 *Report and Order* issued in Case Number EU-2012-0027, 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.

ISSUE(S):

(Anticipated to be Presented by the Appeal; Appellant is Not Bound by this Designation)

Whether the Commission's decision to grant Ameren Missouri's application for an Accounting Authority Order and to allow Ameren Missouri to create a regulatory asset representing unearned potential additional profits is unlawful, unreasonable, arbitrary and capricious, and unsupported by competent and substantial evidence.