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**

STAFF'S REPLY POST-HEARING BRIEF

Introduction

Except in a few instances, such as the next section, the organization of the Staff's Reply Post-Hearing Brief corresponds to Ameren Missouri's Initial Post-Hearing Brief. If the Staff does not respond to a particular argument, it is not because the Staff has conceded anything. The Staff has probably addressed the argument in its Initial Post-Hearing Brief or else time and the requirements of other Commission cases have not permitted a response.

***State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 520 So.2d 1355, 1363 (Miss. 1987; *Reh'g denied* 1988) and *Re Citizens Utilities Co., Kauai Electric Division*, Docket Nos. 94-0097 and 94-0308, *Decision And Order* No. 14857, Hawaii Public Utilities Commission, 1996 WL 497174 (August 7, 1996)**

A relevant 1987 decision of the Mississippi Supreme Court, *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 520 So.2d 1355, 1363 (Miss. 1987; *Reh'g denied* 1988) has indirectly been brought to the Staff's attention by Ameren Missouri's citation to a 1992 Hawaii Public Utilities Commission case in its Initial Post-Hearing Brief. The Mississippi Supreme Court decision is referred to in a footnote in the 1994-1996 follow-up rate case to the 1992 Hawaii Public Utilities Commission case cited by Ameren Missouri. The Mississippi Supreme Court held in 1987, "The [Mississippi Public Service] Commission does not have the authority to grant a rate increase for power never delivered." (*Id.*). The Mississippi Commission had authorized the Mississippi Power Company to recover $8,793,422.00 in storm related expenses and to recoup $1,200,713.00 in profits "'lost'" because Mississippi Power Company was unable

to sell electricity during and immediately after Hurricane Elena. (*Id*. at 1357). More fully, the Court reasoned as follows:

> 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.
>
> The Commission does not have the authority to grant a rate increase for power never delivered.

(*Id*. at 1363).

Ameren Missouri cites at pages 30-31 of its Initial Post-Hearing Brief *Re Citizens Utilities Co., Kauai Electric Division* ("KED"), Docket No. 7517, *Decision and Order* No. 12064, Hawaii Public Utilities Commission, 138 PUR4th 589, 1992 WL 421312 (December 9, 1992) as a reported regulatory commission decision dealing with a deferral request similar to Ameren Missouri's in that the Hawaii Commission authorized KED to defer a portion of the revenues it lost following Hurricane Iniki in 1992. Ameren Missouri noted that this Commission addressed the 1992 KED *Decision and Order* in the Commission's January 25, 2012 *Southern Union* AAO case *Report and Order*, this Commission stating at page 6: "In the Hawaii decision, the relief, facts, and procedure were significantly different from this case. . . . The Hawaii decision merely approved a settlement just seven weeks after the filing of an application. It cites no controlling authority." Ameren Missouri argues that this Commission's *Southern Union* AAO case *Report and Order* ignores "recognition by a state utility regulatory commission that it

has the authority, should it decide to use it, to authorize a utility to defer rate revenue lost as a result of an extraordinary event."

The facts in the Hawaii Commission case that this Commission found significantly different in its January 25, 2012 *Southern Union* AAO case *Report and Order* are as follows. On September 11, 1992, Hurricane Iniki fell upon the island of Kauai, and 39 days later on October 21, 1992, KED filed an application requesting Hawaii Commission authority to modify its accounting practices. The hurricane destroyed approximately 32% of KED's transmission system and 30-35% of its distribution system. KED believed that emergency rate relief would have been justified at the time, but determined that customers would be benefitted from deferring a large rate increase at a time when customers were attempting to recover from the effects of the hurricane. On November 25, 1992, the parties filed a stipulation settling all matters in the case, conditioned upon the Hawaii Commission approving the stipulation as a whole. The Hawaii Commission's *Decision and Order* stated that the parties generally agreed that KED could take the following actions: defer earnings on restoration investment; defer depreciation of restoration plant; defer hurricane related non-capital expenses; accrue lost gross margin amounts, plus earnings on these amounts; and preserve for the ratepayer the entire benefit of any low interest loans and grants KED might obtain.

The reported December 9, 1992 *Decision and Order* of the Hawaii Commission does not include a copy of the November 25, 1992 Stipulation. The Staff obtained a copy of the Stipulation from the Hawaii Commission and a copy is attached to the Staff's Reply Post-Hearing Brief. Counsel for Citizens Utilities Company is shown as L. Russell Mitten. Page 2, the third and fifth "Whereas" paragraphs of the stipulation and page 7 of the stipulation state, in relevant part, that, absent the stipulation, the circumstances would cause KED to file general and

temporary general rate increase applications immediately, but KED agreed not to file its next general rate increase application until 1994 for rates to be effective no earlier than January 1, 1995:

> WHEREAS, the unusually large investment required to replace plant destroyed by Hurricane Iniki, coupled with the significant drop in sales and increased expenses from depreciation expenses and customer service operations, would normally cause KE [Kauai Electric Division] to file general and temporary general rate increase applications immediately;
>
> * * * *
>
> WHEREAS, the economy of the Island of Kauai and KE's customers would be better served if such rate increase applications could be deferred for a few years after Hurricane Iniki;

(Stipulation, p. 2).

> In consideration of the foregoing accounting practice modifications, KE will not file its next general rate increase application until 1994 for rates to be effective no earlier than January 1, 1995.

(Stipulation, p. 7). The section on lost gross margin at page 6 in the stipulation states that "the parties are free to make their positions to the Commission in the Deferred Rate Case concerning the recoverability, amount of recovery, if any, and the period of recovery by KE."

In the deferred rate case, *Re Citizens Utilities Co., Kauai Electric Division*, Docket Nos. 94-0097 and 94-0308, *Decision and Order* No. 14857, Hawaii Public Utilities Commission, 1996 WL 497174 (August 7, 1996), the Hawaii Commission denied KED lost gross margin recovery finding, among other things, that "it appears that no jurisdiction has allowed a utility to increase its rates for a lost gross margin claim associated with a natural disaster:"

> The recoverability by KE of lost gross margin must be based on its own merits. KE has failed to meet its burden of demonstrating that the recovery of lost gross margin is reasonable in this case. 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.[46] Thus, we decline to approve the recovery by KE of lost gross margin in this rate proceeding.
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> ---
>
> [46] *See State ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 520 So.2d 1355 (1988) (public service commission did not have authority to grant rate increase to electric utility in order to recoup profits 'lost' because utility was unable to sell electricity during and immediately after hurricane).

Ameren Missouri's Initial Post-Hearing Brief: II. Introduction And Background

At page 4, Footnote 8 of its Initial Post-Hearing Brief, Ameren Missouri contends, "At the commencement of the hearing in this case, the parties announced a stipulation and agreement regarding the amount of *fixed costs* that are at issue in this case." (Emphasis added). Ameren Missouri will not even acknowledge in its Footnote 8 the neutral terms in which Joint Ex. 1, the "stipulation and agreement," was phrased by the Staff. The stipulation and agreement refers to "'fixed costs' (Ameren Missouri) / 'lost revenues / profit' (Staff)." The stipulation and agreement does not use solely Ameren Missouri's term "fixed costs" as if the Ameren Missouri term has been agreed to in the stipulation and agreement as the correct characterization of the issue between Ameren Missouri and the other parties. See Joint Ex. 1.

At page 7, first paragraph, last sentence, of its Initial Post-Hearing Brief, Ameren Missouri asserts, "Because Noranda is the only customer in that rate class, that meant the Commission expected that the Company would recover those fixed costs from Noranda." Ameren Missouri provides no citation for this statement regarding what the Commission expected. At least in this particular instance when Ameren Missouri has made an unsupported statement in its Initial Post-Hearing Brief, it has not invented a citation to the record when it has none.

Ameren Missouri's Initial Post-Hearing Brief: III. Argument A. The Provisions of the USoA Give the Commission the Authority to Grant Ameren Missouri's Application

At page 8, first full paragraph, second and third sentences, of its Initial Post-Hearing Brief, Ameren Missouri states:

> . . . Section 393.140(4) and (8), RSMo, respectively, authorize the Commission on a case-by-case basis and at its discretion, to "prescribe, by order, forms of accounts, records and books, and memoranda" to be kept by utilities or "after hearing, to prescribe, by order the accounts to which particular outlays and receipts shall be entered, charged or credited." In addition, §393.140(4) generally vests the Commission with the authority to "prescribe uniform methods of keeping accounts, records and books" of utilities subject to its jurisdiction. . . .

(Footnotes omitted.) Section 393.140(4) and (8) do not mandate the USoA for keeping accounts, records, books, or memoranda, nor do §393.140(4) and (8) mandate any particular form of ratemaking.

At pages 11 and 12 of its Initial Post-Hearing Brief, Ameren Missouri quotes, in part, USoA Account 182.3, Other Regulatory Assets; Definition No. 30, Regulatory Assets and Liabilities; and General Instruction No. 7, Extraordinary Items. In doing so it does not highlight the language: "those charges which would have been included in net income determinations in *the current period*" in the Account 182.3 quotation on page 11; the language: regulatory assets and liabilities arise from specific revenues, expenses, gains, or losses "that would have been included in net income determinations *in one period*" in the Definition No. 30, Regulatory Assets and Liabilities quotation on page 11; and the language: events and transactions "which have occurred during *the current period*" language in the General Instruction No. 7, Extraordinary Items quotation on page 12. (Emphasis added). The financial effects of the January 2009 ice storm have already been reflected in net income determinations in prior periods. Accordingly,

under the USoA, there are no January 2009 ice storm effects to defer. (Staff Ex. 3, Oligschlaeger Reb., p. 8, lns. 13-23).

In Ameren Missouri's Initial Post-Hearing Brief the following characterizations of Mr. Oligschlaeger's testimony appears at page 13, third to last sentence and second to last sentence:

> . . . During the hearing Mr. Oligschlaeger also testified in support of the proposition that the USOA gives the Commission the authority to defer revenues that it was unable to collect as a result of an extraordinary event.[30] In fact, Mr. Oligschlaeger specifically stated that Staff has never taken the position that it is unlawful for the Commission to defer lost revenues to Account 182.3.[31]. . .
>
> ---
>
> [30] Transcript p. 165, lns. 16-23.
> [31] *Id*. p. 158, lns 20-24.

A review of the transcript citations reveals that Ameren Missouri's Initial Post-Hearing Brief first sentence characterization of Mr. Oligschlaeger's testimony is wholly inaccurate. In fact, the Ameren Missouri's Initial Post-Hearing Brief second sentence characterization is the accurate characterization of what Mr. Oligschlaeger indicated at both points in the transcript cited by Ameren Missouri.

> Vol. 2, Transcript p. 158, lns. 20-24:
> **Q. [Mr. Mitten]:** And during your deposition, you told me that Staff has never challenged that lost revenues can be deferred to Account 182.3; is that correct?
>
> **A. [Mr. Oligschlaeger]:** We have not taken a position that it is inherently unlawful or -- well, unlawful to do so.
>
> * * * *
>
> Vol. 2, Transcript p. 165, lns. 16-23:
> **Q. [Mr. Mitten]:** And before we leave the Uniform System of Accounts, you also told me during your deposition that the USOA gives the Commission the authority to allow a utility to defer revenues that were not collected as a result of an extraordinary event even if the Commission so chooses to do so?
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> **A. [Mr. Oligschlaeger]:** Again, we have not challenged in a legal sense the Commission's ability to do so if it saw fit.

Ameren Missouri's Initial Post-Hearing Brief: III. Argument D. The Fixed Costs that Ameren Missouri Was Unable to Collect from Noranda as a Result of the January 2009 Ice Storm Represents the Type of Financial Loss that Can and Should Be Deferred Under the USoA

At page 18, second paragraph, of its Initial Post-Hearing Brief, Ameren Missouri refers to the "regulatory compact" concept of utility regulation whereby, among other things, utilities are to be given a reasonable opportunity to earn a fair rate of return. Ameren Missouri's lost revenues proposal for AAOs stands the regulatory compact concept on its head because it eliminates appropriate risk for the shareholders / utility and inequitably shifts it to the ratepayers. For example, there is risk from weather, such as ice storms, and risk from adverse Commission or judicial decisions. Ameren Missouri's lost revenues proposal for AAOs moves the regulatory compact's opportunity to earn a fair rate of return, closer to a guarantee. "[A] reduced opportunity for profit" is what Ameren Missouri states at page 22, first full paragraph, last sentence, of its Initial Post-Hearing Brief, that it is attempting to avoid with its AAO request. Ameren Missouri is attempting to go well beyond the bounds set by the Missouri Legislature in either Chapter 386 or Chapter 392. Most recently, the Missouri Legislature made FACs lawful in passing Senate Bill No. 179 in Laws 2005, but even then the Missouri Legislature limited FACs to being "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity," but that must be done in a rate case "after considering all relevant factors which may affect the costs or overall rates and charges of the corporation." Section 386.266.4(1) RSMo. 2000.

Ameren Missouri's Initial Post-Hearing Brief: III. Argument E. Ameren Missouri Timely Filed Its Request for an AAO

In Ameren Missouri's Initial Post-Hearing Brief at page 26, last paragraph, including the last sentence on the page which carries over onto page 27, Ameren Missouri argues that in its 2007-2008 AAO case, Case No. EU-2008-0141, the Commission's issuance of the AAO ran afoul of Mr. Oligschlaeger's interpretation of the term "current period" which term appears in USoA General Instruction No. 7 and Account 182.3. Ameren Missouri does not mention that the Case No. EU-2008-0141 does not run afoul of the Staff's retroactive ratemaking argument while File No. EU-2012-0027 does. Ameren Missouri apparently does not understand the Staff's retroactive ratemaking argument. While regarding Case No. EU-2008-0141, there are no multiple intervening AmerenUE / Ameren Missouri rate cases in the years between the occurrence of the ice storm and the time the AAO is applied for or the date when it would be awarded, regarding File No. EU-2012-0027 there are multiple intervening AmerenUE / Ameren Missouri rate cases in the years between the occurrence of the ice storm and the time the AAO is applied for or the date when it would be awarded as can be seen below:

Case No. EU-2008-0141:

Ice storm occurs: January 2007.

Case No. ER-2007-0002 *Report and Order* became effective on June 1, 2007; tariff sheets approved effective on and after June 4, 2007.

AmerenUE files AAO application creating Case No. EU-2008-0141: November 2007.

Commission approves AAO application in Case No. EU-2008-0141: May 2008.

Case No. ER-2008-0318 *Report and Order* became effective on February 6, 2009; tariff sheets approved effective on and after March 1, 2009.

File No. EU-2012-0027:

Southeast Missouri ice storm starts: January 26, 2009.

Noranda partial outage starts: January 27, 2009 (Staff Ex. 1, Carter Reb., Sched. JDC-1)

Case No. ER-2008-0318 *Report and Order* became effective on February 6, 2009; tariff sheets approved effective on and after March 1, 2009.

Noranda back to full load: April 9, 2010 (Staff Ex. 1, Carter Reb., Sched. JDC-1).

Case No. ER-20010-0036 *Report and Order* became effective on June 7, 2010; tariff sheets approved effective on and after June 21, 2010.

File No. EO-2010-0255 Staff Prudence Report and Recommendation filed: August 31, 2010

File No. EO-2010-0255 *Report and Order* issued: April 27, 2011

File No. ER-20011-0028 *Report and Order* became effective on July 23, 2011; tariff sheets approved effective on and after July 31, 2011.

AmerenUE files AAO application, File No. EU-2012-0027: July 25, 2012.

At page 27, second paragraph, second to last and last sentences, of its Initial Post-Hearing Brief, Ameren Missouri argues that Ms. Barnes confirmed that entries made in Ameren Missouri's books in 2011 and 2012 as a result of the Commission's *Report and Order* in File No. EO-2010-0255 relate to the loss of Noranda's "fixed costs" in 2009 and 2010, and that if the Commission orders further flow-through to ratepayers of the AEP and Wabash contract revenues at the conclusion of the second Ameren Missouri FAC prudence review in File No. EO-2012-0074, the financial effects will be recorded on Ameren Missouri's books even further into the future. With this argument, Ameren Missouri wants to be rewarded for (1) conduct found by the Commission in its *Report and Order* in File No. EO-2010-0255 to be imprudent, improper, and unlawful (*See Re Union Electric Co.*, Case Nos. EC-87-114 and EC-87-115, *Report and Order*, 29 Mo.P.S.C.(N.S.) 313, 327-28 (1987)) and (2) an adverse ruling, which is a matter found by

the Commission in its *Report and Order on Remand* in Re KCP&L Greater Missouri Operations Co., Case No. EO-2008-0216, page 21 (August 30, 2011) not to be an unusual, infrequent, abnormal, or extraordinary event.

At page 27, first two complete sentences at the top of the page of its Initial Post-Hearing Brief, Ameren Missouri notes that in the *Southern Union* AAO case the Joplin tornado occurred in May 2011 and Ameren Missouri incorrectly states:

> . . . but the Commission did not issue its order granting the application until late February 2012.[91]
> ---
> [91] MGE Order pp. 7-8, 27.

The Commission issued its *Report and Order* in File No. GU-2011-0392 on January 25, 2012 with an effective date of February 24, 2012. Also, Ameren Missouri fails to mention in its Initial Brief that Ms. Barnes testified that Ameren Missouri closes its books for the calendar year, the first quarter of the subsequent year:

> **Q. [Mr. Roam]:** Ms. Barnes, do you know when Ameren Missouri closed the books in 2011, approximately?
>
> **A. [Ms. Barnes]:** For 2011?
>
> **Q. [Mr. Roam]:** For 2011.
>
> **A. [Ms. Barnes]:** It would have been in the first quarter of 2012.
>
> **Q. [Mr. Roam]:** And that would have been the same for 2010 and 2009, it would have been in the first quarter of the subsequent year?
>
> **A. [Ms. Barnes]:** Yes.

(Vol. 2, Tr. 90, ln. 25 - Tr. 91, ln. 9). Utilities closing their books for the calendar year during the first quarter of the subsequent year is the normal practice.

Ameren Missouri's Initial Post-Hearing Brief: III. Argument F. Miscellaneous Objections to Ameren Missouri's AAO Application Made by Staff, MIEC, and OPC are Unfounded and Invalid

Objection 1: An AAO Cannot Be Granted for Rate Revenues that a Utility is Unable to Collect from Its Customers

At page 30, first full sentence, of its Initial Post-Hearing Brief, Ameren Missouri states that "Commission rule, 4 CSR 240-13.055, which prescribes standards governing discontinuance of service during cold weather, allows gas utilities to defer revenue losses that are incurred to comply with that rule.[99]" Ameren Missouri's Footnote 99 specifically cites 4 CSR 240-13.055(14)(F)4. Rule 4 CSR 240-13.055(14)(F)4 refers to the Commission's January 1, 2006, emergency amendment to Commission rule 4 CSR 240-13.055, the "Cold Weather Rule." It has been asserted that the permanent amendment of Rule 4 CSR 240-13.055(14)(F)4 in *In the Matter of Proposed Amendments to Commission Rule 4 CSR 240-13.055*, Case No. GX-2006-0434, *Final Order of Rulemaking* (August 11, 2006) authorizes gas utilities to continue to calculate and defer costs under the emergency amendment upon the same terms as those set forth in the permanent amendment.

Ameren Missouri did not cite Rule 4 CSR 240-13.055(14)(G) which is highly specific as to timing regarding of all events and makes specific reference to "incremental revenues" in Rule 4 CSR 240-13.055(14)(G)1. Rule 4 CSR 240-13.055(14)(G) has its own general timing limitation:

> (G) A gas utility shall be permitted to defer and recover the costs of complying with this rule through a one (1)-term Accounting Authority Order until such time as the compliance costs are included in rates as part of the next general rate proceeding or for a period of two (2) years following the effective date of this amendment

In *Re Laclede Gas Co.*, Case No. GU-2007-0137, *Order Granting Accounting Authority Order Relating To The Costs Of Complying With The Emergency Amendment To The Cold Weather Rule*, 15 Mo.P.S.C.3d 91, 92 (2006), the Commission stated, in part, "Commission Rule 4 CSR 240-13.055(14)(G) provides that a gas utility is allowed to defer and recover the costs of complying with the emergency amendment to the cold weather rule through a 1-term AAO until the compliance costs are included in rates in a general rate case, or for a period of two years following the effective date of the 2006 amendment to the cold weather rule."

Objection 2: The Accounting Rules and Standards for the Deferral of Expenses Don't Apply to Requests to Defer Revenues

At page 31, first sentence of the last paragraph, of its Initial Post-Hearing Brief, Ameren Missouri asserts that the Staff and MIEC argue that "as long as a utility has any amount of positive net income it does not qualify to defer lost rate revenues." There is no citation by Ameren Missouri to Staff rebuttal testimony, cross-surrebuttal testimony, or evidentiary hearing testimony because there is no such Staff testimony and in this particular instance Ameren Missouri has not invented a citation.

At page 32, first sentence of the first complete paragraph, of its Initial Post-Hearing Brief, Ameren Missouri makes the tentative claim that the "Staff also appears to suggest that Ameren Missouri's Application is deficient because it does not allege that the Company's financial viability or its ability to provide safe and adequate service was placed in jeopardy as a result of the loss of fixed cost support provided by Noranda's rate revenues.[106]" In this particular instance, Ameren Missouri does offer a citation - Footnote 106: Staff Ex. 3, p. 18, lns. 7-13. Thus, Ameren Missouri specifically cites Mr. Oligschlaeger's Rebuttal Testimony. At page 32, first sentence of the very next paragraph, of its Initial Post-Hearing Brief, Ameren Missouri

makes the claim that the "Staff's argument that a utility should be required to show that its financial viability is in jeopardy before it can be authorized to defer revenues is related to another Staff argument: that in lieu of an AAO, Ameren Missouri should be forced to seek emergency, interim rate relief to remedy the financial consequences of unrecovered fixed costs.[109]" Ameren Missouri's Footnote 109 cites Staff Ex. 3, p. 18, lns. 4-13, which is similar to Ameren Missouri's Footnote 106 that cites an answer of Mr. Oligschlaeger to a question, but Footnote 109 cites both the question and the answer.

At the evidentiary hearing, despite Ameren Missouri's efforts to leave a record from which it could make unchallenged misstatements, Mr. Oligschlaeger refuted the assertions of Ameren Missouri that appear at pages 31 and 32 of its Initial Post-Hearing Brief:

> **Q. [Mr. Dottheim]:** I think Mr. Mitten asked you a number of questions regarding whether it's Staff's position that an AAO should not be granted if a utility has a positive rate of return, if the AAO should not be granted for lost deferrals or fixed costs, and you were responding, I believe, to that question and were cut off. Could you --
>
> **A. [Mr. Oligschlaeger]:** Yes.
>
> **Q. [Mr. Dottheim]:** Could you please finish your answer as you were going to provide a response?
>
> **A. [Mr. Oligschlaeger]:** Sure. The Staff's criteria for recommending approval of deferral requests through Accounting Authority Orders for either expenses, capital items or lost revenues is in no way dependent upon whether the company can demonstrate it is not recovering its fixed costs or is otherwise earning a negative or minimal rate of return.
>
> For expenses and capital items, the criteria we would recommend the Commission use is that which appears in the USOA under General Instruction No. 7. Under the heading of lost revenues, or ungenerated revenues or even lost fixed cost recovery, we would not recommend, with the one exception previously noted by me, that deferrals be allowed under any circumstances for these items.
>
> **Q. [Mr. Dottheim]:** Okay. And Mr. Mitten I believe referred you to page 18 of your rebuttal testimony, if you have your copy there.

A. [Mr. Oligschlaeger]: I do.

Q. [Mr. Dottheim]: Okay. The portion, your response that is at line 7 to 13, and I think he referred you in your deposition also to your responses to questions that he asked you regarding page 18. Was the explanation that you just gave in part relating to page 18, line 7 to 13?

A. [Mr. Oligschlaeger]: Yes. My explanation on page 18, that specific question and answer is not -- does not relate to the criteria for acceptance of Accounting Authority Orders. It was part of an explanation of why the company's claim that it has incurred -- or that it has failed to recover all of its fixed costs due to the Noranda reduction in sales is, from our perspective, a false one.

(Vol. 2, Tr. 194, ln. 13 - Tr. 196, ln. 3).

Objection 3: There Were Regulatory Alternatives to an AAO that Ameren Missouri Could Have Pursued

Starting at page 32 of Ameren Missouri's Initial Post-Hearing Brief, Ameren Missouri treats another party's mentioning of an "alternative" to the AAO Application Ameren Missouri filed as if the mere mention of an "alternative" by the other party should be a guarantee by the other party that the other party would or should support the alternative approach if Ameren Missouri takes or would have taken that "alternative" approach. The regulatory compact does not offer the guarantees that Ameren Missouri is seeking from the Commission or the other parties.

Ameren Missouri at page 36, last paragraph, first sentence, of its Initial Post-Hearing Brief makes a point of arguing to the Commissioners "how *punitive* Ms. Mantle's proposal is" regarding her Rebuttal Testimony that Ameren Missouri could have avoided the lost revenues from the Noranda partial outage by withdrawing its FAC tariffs in 2009. (Emphasis added). Ameren Missouri also refers to Ms. Mantle's Rebuttal Testimony as "a Catch - 22." The Staff suggests that in viewing and considering Ameren Missouri's AAO proposal, the Commissioners

need to be "The Catchers of the Wry." As previously noted, Ameren Missouri's proposal to the Commission is to eliminate shareholder / company risk and guarantee return on common equity. Ameren Missouri also accuses the Staff of being "punitive" at page 28, first complete sentence, of its Initial Post-Hearing Brief, and in addition at page 7, first sentence of the last paragraph, of its Initial Post-Hearing Brief, Ameren Missouri refers to the Staff as one of "the Company's adversaries."

Objection 4: Ameren Missouri Should Not Be Granted an AAO Because the Financial Impacts of the Loss of Noranda's Fixed Costs Was Booked in 2009 and 2010

The arguments made on pages 37 and 38 of Ameren Missouri's Initial Post-Hearing Brief have been addressed above and/or in the Staff's Initial Post-Hearing Brief, except in one instance, and will not be repeated. At page 38, first full paragraph, first and second sentences, of its Initial Post-Hearing Brief, Ameren Missouri states that the Staff and MIEC "selectively apply their principle that once a fiscal year's books are closed they cannot be reopened" and the Staff and MIEC do not "object or find fault with the fact that off-system sales revenues that were booked in 2009 and 2010 were returned to customers in 2011, 2012, and that additional revenues may be returned even further into the future." What Ameren Missouri seeks to accuse the Staff for as engaging in an inconsistency is nothing more than the operation of the specifics of Section 386.266 RSMo. 2000, Laws 2005, and Rules 4 CSR 240-3.161 and 4 CSR 240-20.090 implementing Section 386.266. The Staff did not propose that the Commission authorize a FAC for Ameren Missouri in Case No. ER-2008-0318, it was Ameren Missouri that sought a FAC. Now for purposes of argument against the Staff in its Initial Post-Hearing Brief, Ameren Missouri applies Staff's interpretation of General Instruction No. 7 of the USoA to the specific provisions of Section 386.266 and Rules 4 CSR 240-3.161 and 4 CSR 240-20.090, which

provides for FACs, prudence reviews, and true-ups. For example, Section 386.266.4(4) RSMo. 2000 provides for "prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen-month intervals."

Objection 5: Granting Ameren Missouri's Request for an AAO Would Constitute Unlawful Retroactive Ratemaking.

The Staff has addressed above and in Staff's Initial Post-Hearing Brief how Staff believes Ameren Missouri misapprehends Staff's retroactive ratemaking argument. The Staff will apply its argument of intervening rate cases (intervening replacement / superseding of general tariffs) and also closing of books to the cases that Ameren Missouri cites in its Initial Post-Hearing Brief. The Staff's ability to do so is mixed because as Staff has noted, Ameren Missouri misunderstands the Staff's argument.

Case Nos. EO-91-358 and EO-91-360 (*State ex rel. Office of Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806 (Mo.App. W.D. 1993)).

Case Nos. ER-90-101, ER-88-167, and ER-90-268, *Report and Order* became effective on October 17, 1990; tariff sheets to be filed pursuant to the *Report and Order*, directed by the *Report and Order*, to become effective for service rendered on and after October 17, 1990.

Missouri Public Service (MPS) files applications for AAOs establishing cases on May 10, 1991.

Commission issued *Report and Order* authorizing AAOs on December 20, 1991

Case No. ER-93-37, *Report and Order* became effective on June 29, 1993; tariff sheets to be filed pursuant to the *Report and Order*, directed by the *Report and Order*, to become effective for service on and after June 29, 1993.

***Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434 (Mo.App. W.D. 1998).**

The Western District Court of Appeals summarized the relevant facts as the case emanating from a series of Gas Line Safety Rules promulgated by the Commission in response to Federal legislation. The Rules required gas utilities to substantially replace their older service lines and mains. The Court explained in

its decision that Allowance For Funds Used During Construction ("AFUDC") is designed to address the period when a construction project is in progress but there is a timing problem between when a construction project is completed and when there is a rate case by which the utility may place the completed projected in rates. The Court further explained that the Commission had authorized AAOs prior to 1994, but the 1994 AAOs granted to MGE were at issue:

> In this case there was a substantial time lag following construction. Also complicating matters, the utility underwent changes in ownership during this period, and as part of gaining approval of the transfers, the new owners agreed to put off any rate request. During this period the PSC granted two AAOs authorizing a 10.54% rate of return for MGE. When MGE's 1996 rate request was made, the PSC only allowed MGE a rate of return of 4% for 1994 and 6% for 1995 and 1996 on its carrying costs. These figures, which according to PSC equate to MGE's AFUDC rates, will allow less recovery than MGE anticipated.

(978 S.W.2d at 436). The Court identified what it characterized as the relevant events, but again it was the 1994 AAOs granted to MGE that were at issue:

> The relevant events in the case at bar are as follows: (1) in 1989 the PSC granted MGE's predecessor, KP Western, an AAO which authorized a carrying cost rate of 10.96%; (2) in a 1991 rate case the PSC lowered the figure to 10.54%; (3) in 1992 a second AAO was granted which purported to keep the same figure until the next rate case which came in 1993; (4) the 1993 rate case, which was approved by the PSC in 1994, was concluded in a "negotiated settlement" since ownership of this utility was being changed from KP Western to Southern Union; in early 1994 KP Western applied for a third AAO, which was ultimately approved with the 10.54% figure; (5) in 1996 MGE filed the rate case now under review, and the PSC lowered the rate of return to 4% for 1994 and 6% for 1995 and 1996. . . .

(*Id*. at 437). There was no rate case / were no rate cases intervening between the completion of the construction projects giving rise to the AAOs, and then the utility seeking the AAOs from the Commission, and the Commission granting the AAOs so that the construction projects could be reflected in rates.

Case No. GX-2006-0181 (*State ex rel. Missouri Gas Energy v. Public Serv. Comm'n*, 210 S.W.3d 330 (Mo.App. W.D. 2006)).

State ex rel. Missouri Gas Energy v. Public Serv. Comm'n, 210 S.W.3d 330 (Mo.App. W.D. 2006) is the appeal of *In the Matter of Proposed Emergency Amendment to Commission Rule 4 CSR 240-13.055*, Case No. GX-2006-0181, *Order Approving Emergency Amendment* (December 13, 2005), which is the Commission's January 1, 2006, emergency amendment to Rule 4 CSR 240-13.055, the Cold Weather Rule.

***State ex rel. Aquila, Inc. v. Public Serv. Comm'n*, 326 S.W.3d 20 (Mo.App. W.D. 2010).**

Public Counsel appealed the Commission's decision in *Re Aquila, Inc.*, 15 Mo.P.S.C.3d 416, 451-53, 257 P.U.R.4th 424, *Report and Order* Case No. ER-2007-0004 (2007) to allow rate base treatment of the unamortized deferred expenses related to the Sibley rebuild and western coal conversion capital construction projects, which had been the subject of AAOs in Case Nos. EO-91-358 and EO-91-360**.** 326 S.W.3d at 27-32.

Finally, the Staff would note that *State ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 520 So.2d 1355, 1363 (Miss. 1987; *Reh'g denied* 1988) is cited by, and thereby brought to the Staff's, attention a Colorado Supreme Court opinion respecting retroactive ratemaking concerning the Colorado Public Utilities Commission, *Office of Consumer Counsel v. Public Service Co. of Colorado*, 877 P.2d 867 (Co. banc 1994). The case before the Colorado Supreme Court was an appeal by Public Service Company of Colorado ("Public Service of Colorado") from an Order of the Denver District Court finding that the Colorado Commission engaged in unlawful retroactive ratemaking by awarding a bonus to Public Service of Colorado for successfully pursuing litigation against a natural gas supplier to recover excessive charges for natural gas. The District Court also held that the granting of the bonus was unjust and unreasonable. The Colorado Supreme Court affirmed the decision of the District Court. The Colorado Commission did not join Public Service of Colorado in the appeal. (877 P.2d at 869.)

The Colorado Supreme Court held as follows:

> We conclude that the $3.27 million bonus awarded to Public Service constituted unlawful retroactive ratemaking. By not returning all of the CIG [Colorado Interstate Gas Company] refund money to Public Service's customers and allowing Public Service to keep as a bonus a portion of the amounts unlawfully charged by CIG, the PUC is, in effect, retroactively raising the rates paid by the ratepayers during the 1982-1988 period by $3.27 million. The relevant tariff in effect during the 1982-1988 period authorized Public Service to collect only fuel costs from ratepayers. . . .

(*Id*. at 870).

* * * *

> Footnote 6: The decision of the PUC is also inconsistent with its earlier decision, *In the Matter of the Investigation of Moon Lake Electric Association, Inc., for Failure to Distribute Refund,* Case No. 6308, Decision No. C83-1268 (1983) (noting in a factually similar case that "[t]o allow a utility to retain refunds and apply them to past losses sets the stage for retroactive ratemaking").

(*Id*. at 871).

* * * *

> The amount of the bonus payment rightly belongs to the customers of Public Service. The facts of this case are similar to those in *Citizens Utilities Co. v. City of La Junta*, 121 Colo. 261, 215 P.2d 332 (1950). There, we held that a fund, which contained monies representing overcharges of utility customers, was held in trust for the customers, and the utility company had no title or ownership interest in it. The utility serves merely "as a conduit through which the refunded moneys should flow from the wholesalers to the consumers." *Public Serv. Co. v. City and County of Denver*, 153 Colo. 396, 400, 387 P.2d 33, 35 (1963). It would be unjust and unreasonable to withhold $3.27 million from those to whom it rightfully belongs.

(*Id*. at 873).

* * * *

> Because the $3.27 million bonus awarded to Public Service rightfully belongs to the customers of Public Service, and was not part of the tariff in place at the time, and was improperly awarded by the Commission, we find that the decision of the PUC to award the bonus was unjust and unreasonable, and that the PUC abused its discretion.

(*Id*. at 874).

Objection 6: Ameren Missouri's Request for an AAO is an Attempt to Circumvent or Overturn the Commission's Decision in Case No. EO-2010-0255.

Starting at page 40 of Ameren Missouri's Initial Post-Hearing Brief, Ameren Missouri asserts that File No. EU-2012-0027 is truly about the January 2009 Southeast Missouri ice storm and the Noranda partial loss of load. Ameren Missouri at page 27 of Its Initial Post-Hearing Brief states that entries will be made in Ameren Missouri's books in 2011 and 2012 as a result of the Commission's *Report and Order* in File No. EO-2010-0255 and that if the Commission orders further flow-through to ratepayers of the AEP and Wabash contract revenues at the conclusion of the second Ameren Missouri FAC prudence review in File No. EO-2012-0074, the financial effects will be recorded on Ameren Missouri's books even further into the future. Ameren Missouri witness Ms. Barnes testified that Ameren Missouri's financial statements for calendar years 2011 and 2012 do not reflect any reduction in the normal level of sales made to Noranda due to the January 2009 ice storm. (Vol. 2, Tr. 96, ln. 20 - Tr. 97, ln. 5). The financial effects of the January 2009 ice storm have already been reflected in net income determinations in prior periods. Accordingly, under the USoA, there are no January 2009 ice storm effects to defer. (Staff Ex. 3, Oligschlaeger Reb., p. 8, lns. 13-23). What is reflected in Ameren Missouri's 2011 and 2012 financial statements is the flow-through to customers of 95% of the net proceeds of the AEP and Wabash contracts through Ameren Missouri's FAC. The Commission ordered a refund to ratepayers of $17,169,838 by an adjustment to Ameren Missouri's FAC charge to correct an overcollection of revenues for the period of March 1, 2009 to September 30, 2009.

At page 42, first full paragraph of its Initial Post-Hearing Brief, Ameren Missouri claims that Mr. Oligschlaeger's testimony is not accurate that the dollar amount of the issues in this case and Case No. EO-2010-0255 are similar. Ameren Missouri compares the amount at issue in Case No. EO-2010-0255 of "slightly more than $17 million in off-system sales revenues" to "slightly less than $36 million in fixed costs" in this case, File No. EU-2012-0027. Ms. Mantle in her Rebuttal Testimony, Ex. 2, page 13, line 17 quantified the amount at issue in Ameren Missouri's second FAC prudence review case, File No. EO-2012-0074, as $26,342,791. Case No. EO-2010-0255 covered the period March 1, 2009 through September 30, 2009 of the AEP and Wabash contracts and File No. EO-2012-0074 covers the period October 1, 2009 through June 20, 2010 of the AEP and Wabash contracts. The issues relating to the AEP and Wabash contracts in File No. EO-2012-0074 are the same as in Case No. EO-2010-0255. Adding the approximately $17 million in off-system sales at issue in Case No. EO-2010-0255 to the approximately $26 million in off-system sales at issue in File No. EO-2012-0074 totals to approximately $43 million in off-system sales. Approximately $43 million in off-system sales from the AEP and Wabash contracts more than compares to approximately $36 million in lost revenues at issue in the instant case. Thus, as Ms. Mantle testified, Ameren Missouri through the AEP and Wabash contracts recovered more than the approximate $36 million in lost revenues due to the curtailment in the Noranda load as a result of the January 2009 ice storm. (Vol. 2, Tr. 146, ln. 24 - Tr. 147, ln. 4).

Objection 7: Ameren Missouri's Request for an AAO is the Same as the AAO Request that the Commission Denied in Case No. GU-2011-0392.

The Staff in its Initial Post-Hearing Brief addressed the grounds on which Ameren Missouri attempts to distinguish the Commission's decision in File No. GU-2011-0392. Ameren

Missouri has not addressed *State ex rel. Union Electric Co. v. Public Serv. Comm'n*, 765 S.W2d 618 (Mo.App. W.D. 1988) and the underlying Commission case, *Re Union Electric Co.*, 28 Mo.P.S.C.(N.S.) 189, Case No. ER-83-163 on remand, *Report And Order On Remand* (April 8, 1986) regarding the Commission's disallowance of recovery of the cancellation costs of Callaway II. The Western District Court of Appeals stated in its 1988 decision regarding regulation, risk, and earnings shortfall:

> It is a well-accepted principle of regulation that common stockholders contribute what is known as "risk capital" to the utility company for which they receive a compensatory rate of return. Among the uncertainties that common stockholders accept in return for this added compensation is the danger of earnings shortfall, for whatever reason. Colton, *Excess Capacity supra*,[*Who Gets the Charge From the Power Plant*?, 34 Hastings L.J. 1133 (1983)] at 1147.

(765 S.W.2d at 622). The Court further related regarding economic risk:

> The Commission adopted the view of the Vermont Supreme Court in *In re Central Vermont Public Service Corporation*, 144 Vt. 46, 473 A.2d 1155 (1984), which held that economic risks are part of the utility business and that even the risk of economic catastrophe may be properly assigned to owners of the utility rather than to its customers.
>
> We believe that the Commission's decision was supported by the record. Judgment affirmed.

(*Id*. at 626).

Conclusion

For the foregoing reasons, the Staff asserts that it would be inappropriate to grant Ameren Missouri an AAO in File No. EU-2012-0027 and requests that the Commission not do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document, *Staff's Reply Post-Hearing Brief*, was served via e-mail on all counsel of record this 12th day of June, 2012.

/s/ Steven Dottheim