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**

MISSOURI INDUSTRIAL ENERGY CONSUMERS' POST-HEARING REPLY BRIEF

The Missouri Industrial Energy Consumers ("MIEC") respectfully submits its Post-Hearing Reply Brief in accordance with the Commission's Order Setting Procedural Schedule in this case.

I. INTRODUCTION

Union Electric Company d/b/a Ameren Missouri ("Ameren") filed a 44-page tome as its Initial Post-Hearing Brief in this case, seeking an accounting authority order to defer purported "lost fixed costs" that were assigned to Noranda Aluminum's ("Noranda") rate class in Case No. ER-2008-0318. Ameren's request should be denied for the following reasons:

- the "costs" to which it refers did not arise as a result of an extraordinary event;
- the "costs" to which it refers have already been recovered;
- the Uniform System of Accounts ("USoA") does not contemplate the deferral of un-generated revenues;
- Ameren's application is more than two years out of time; and
- granting the AAO would prove legally futile in light of Missouri's prohibition against retroactive ratemaking.

As will be demonstrated below, Ameren's Initial Post Hearing Brief in this case offers a feast of words, but a famine of coherent reasoning in support of its request. The

brief presents, with mind-numbing repetition, a dizzying array of flagrant misrepresentations and distortions of the law, the USoA and the testimony in this case. Among the truly confounding aspects of Ameren's brief is Ameren's equivocation with respect to what it actually wants this Commission to defer for later ratemaking treatment. On one hand, Ameren seeks to defer "fixed costs" that were assigned to Noranda in Case No. ER-2008-0318. However, Ameren faces a series of problems with this request. Specifically, (1) those fixed costs are not attributable to the 2009 ice storm, the so-called "extraordinary event" in this case. Rather they are costs that Ameren would have incurred regardless of whether or not the 2009 ice storm ever occurred. Accordingly, those costs are not attributable to an extraordinary event, and thus not subject to deferral under an accounting authority order ("AAO"); (2) Ameren has already recovered in rates the fixed costs for which it now seeks deferral. In other words, Ameren completely recovered all of the fixed costs it now seeks to defer by revenues generated from Ameren's customers. Allowing Ameren to defer costs that it has already recovered for possible recovery again, would be absurd and unprecedented; and (3) Ameren's witness, Ms. Lynn Barnes admitted unequivocally that Ameren did not incur any additional fixed costs as a result of the 2009 ice storm.[1/] Ms. Barnes also admitted that any incremental costs it incurred as a result of the storm were recovered in base rates;[2/] thus, there is literally nothing to defer in this case. Ameren seeks to defer a figment of its imagination.

Faced with the absurdity of its request to recover non-extraordinary fixed costs that it already recovered in rates, Ameren alternatively asserts on page 6 of its brief that it seeks to recover lost revenues, arguing that revenues and costs are "two sides of the same

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1/ Transcript, p. 201, ll. 4-25.

2/ *Id.*

coin." In an effort to prevail on this alternative theory, Ameren repeatedly misquotes the USoA, and misrepresents the testimony of Staff witnesses, arguing that "revenues" constitute a "regulatory asset" under the USoA. As will be demonstrated below, this argument is propped up only by Ameren's linguistic sleight of hand (specifically Ameren's repeated omission of the word "liabilities" from the relevant definition of the USoA). Indeed, no jurisdiction interprets the USoA to contemplate the recovery of un-generated revenue as a regulatory asset. Thus, Ameren's request, while certainly creative, lacks any cognizable authority.

For the reasons stated above, and described more fully below, the Commission should deny Ameren's AAO application in this case.

II. ARGUMENT

In the following pages, the MIEC will (A) respond to the divergent and contradictory characterizations of Ameren's AAO request, as presented in Initial Post-Hearing Brief; and (B) unravel the knots of legal and factual misrepresentations made by Ameren in its Initial Post-Hearing Brief. Based on the facts, reasoning, and law presented in the following sections, the MIEC will demonstrate that Ameren's AAO request in this case lacks merit, and is held together by little more than the creative imaginations of its advocates.

A. Ameren seeks to defer a fiction.

1) The Fixed Costs Ameren Seeks to Defer Bear No Relationship to the 2009 Ice Storm.

Ameren's Initial Brief provides divergent and contradictory accounts (sometimes on the same page) regarding precisely what item Ameren seeks to defer in this case. For

instance, on page 1 of its Initial Brief, Ameren's request is "limited to the fixed cost portion of Ameren Missouri's overall cost of service that the Commission assigned to Noranda's rate class in Case No. ER-2008-0318." However, the costs assigned to Noranda's rate class in Case No. ER-2008-0318 bear absolutely no relationship with the 2009 ice storm, the so-called "extraordinary event" in this case. Ameren would have incurred the costs at issue regardless of whether or not the 2009 ice storm ever occurred. Ameren's own brief admits on page 21 that fixed costs "do not vary in amount with the amount of energy an electric utility sells. . . . [They] are not directly attributable to a particular customer or class, but instead, represent the utility's overall cost of providing service to customers." In other words, the costs assigned to Noranda in ER-2008-0318 are in no way attributable to the 2009 ice storm, because even if the ice storm had never happened, Ameren would have still incurred those exact same fixed costs. Thus, if Ameren is truly seeking to recover the "fixed costs" assigned to Noranda in Case No. ER-2008-0318, the request must be denied because the costs did not arise as a result of an extraordinary event; and it is undisputed that an AAO is designed only to defer unanticipated costs that result from an extraordinary event.[3/]

2) The Non-Extraordinary Fixed Costs Ameren Seeks to Defer Have Already Been Recovered in Rates.

In addition to the fact that the fixed costs assigned to Noranda were not unanticipated and did not arise as a result of an extraordinary event, Ameren has already recovered its fixed costs from revenues generated by Ameren's customers. Ameren's assertion that the costs assigned to Noranda were not recovered in rates is demonstrably false. All of Ameren's costs in 2009 were recovered; and Ameren had profits exceeding

[3/] Brubaker Rebuttal, MIEC Ex. 1, p. 5, lns. 1-4.

$200 million.[4/] At the hearing, Staff Witness Mr. Oligschlaeger testified unequivocally that Ameren recovered all of its fixed costs for the period at issue:

> Q. I just have a couple of accounting questions for you. If a utility has a positive net income in a given period, has it recovered all of its fixed costs for that period?
>
> A. By definition, yes.
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> . . .
>
> Q. So all of its operations and management costs would have been covered if it has a positive net income; is that correct?
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> A. That is correct.
>
> Q. And also depreciation expenses would have?
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> A. Yes.
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> Q. And taxes as well?
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> A. Yes.
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> Q. So in this case, is it your position that there are, in fact, no lost fixed costs for Ameren Missouri to defer or for this Commission to defer?
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> . . .
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> A. [I]t is our position . . . that Ameren fully recovered all of its costs, both fixed and variable, during the period of time in which the load to Noranda would have been affected by the January 2009 ice storm.[5/]

Similarly, MIEC witness, Mr. Brubaker confirmed that Ameren has already recovered all of the fixed costs it incurred during the subject period in this case:

"Typically . . . you look at the results for the overall enterprise without trying to discern what class may have had increased sales or what classes may have had diminished sales . . . when you look at the overall results of the enterprise, all of the fixed costs were recovered. So they came from one place or the other. What really happened was there was a failure to achieve the anticipated return on equity."[6/]

Additionally, Mr. Brubaker testified that, in case No. ER-2012-0166, Ameren presented a table "which shows Ameren Missouri's actual returns on equity from June

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4/ Brubaker Rebuttal, MIEC Ex. 1, p. 7, lns. 15-20 and Gary Weiss Testimony and Workpapers, Case No. ER-2012-0166.

5/ Transcript, p. 154, l. 24 through p. 155, l. 25.

6/ Transcript, p. 201, ll. 4-25.

2007 – October 2011. During the entire period included in this table, Ameren Missouri reported positive returns on equity. To the extent that Ameren Missouri is reporting positive returns, it is recovering its fixed costs."[7/] Furthermore, in 2009, not only did Ameren recover its fixed costs, it generated profits exceeding $200 million.[8/] Accordingly, even though Ameren's profits may have been disappointing in 2009, partly as a result of its inability to provide service to Noranda, Ameren's assertion that it did not recover its fixed costs is simply not true. While the recovery of the costs may not have been generated by revenues from Noranda, it is an indisputable accounting fact that the costs were recovered.[9/] Accordingly, if indeed Ameren is seeking to defer the costs assigned to Noranda in ER-2008-0318, then it is seeking to defer non-extraordinary costs that it has already recovered in rates. Allowing Ameren to defer for possible subsequent recovery non-extraordinary costs that it has already recovered from revenues generated in prior periods would be unprecedented and improper. Therefore, Ameren's request should be denied.

3) Ameren incurred no additional fixed costs as a result of the 2009 ice storm; and all incremental costs were recovered in rates.

On cross-examination, Ameren's own witness, Ms. Lynn Barnes, admitted that the 2009 ice storm did not result in any **additional** fixed costs (or incremental costs) that were not already included in rates:

> A. We incurred O&M costs as a part of the storm restoration. However, they were not in excess of what storm costs that are built into base rates already were. So we recovered those through our base rates just because we automatically have a level of storm costs expected built into rates.

7/ Brubaker Rebuttal, MIEC Ex. 1, p. 6, lns. 5-12.
8/ Gary Weiss Testimony and Workpapers, Case No. ER-2012-0166.
9/ Transcript, p. 154, l. 24 through p. 155, l. 25.

. . .

Q. And the company did not incur any additional fixed costs that were not already included in rates as a result of the 2009 ice storm, correct?

A. Correct.[10/]

So, if the Commission takes Ameren's request, as described on page 1 of its Initial Brief at face value, the Commission cannot grant the request, because the request seeks to defer for possible subsequent recovery non-extraordinary costs that have already been recovered in rates. Therefore, Ameren's request should be denied.

4) Ungenerated revenues cannot be deferred.

Sensing perhaps the futility of seeking the deferral of non-extraordinary costs that it has already recovered, Ameren hedges its request on page 6 of its Initial Post-Hearing Brief by arguing that "fixed costs and lost revenues are two sides of the same coin." Ameren follows up by arguing that the USoA contemplates the deferral of lost revenues. However, to make this argument work, Ameren must find a way to convince the Commission that "revenues" constitute "regulatory assets" within the definition provided by the USoA. The only way Ameren can argue that "revenues" constitute "regulatory assets" within the meaning of the USoA is to misquote the definition of Regulatory Assets and Liabilities provided in the USoA. Accordingly, Ameren <u>repeatedly</u> misquotes (in depositions, at the hearing and in its initial brief) Definition No. 31 of the USoA by omitting the word "liabilities" as part of the definition. The most overt example of the Company's dubious tactic (and there are many) was performed during the hearing, when Ameren's counsel misquoted the definition by omitting the word "liabilities" while cross-examining Staff Witness Mr. Oligschlaeger:

10/ Transcript, p. 93, lns. 7-21.

Q: That definition specifically states that a regulatory asset can arise from revenues and expenses; is that correct?

MR. ROAM: Judge, may I object to that statement, that question?

JUDGE JORDAN: You may.

MR. ROAM: In the sense that that actually misstates the exhibit. I believe the exhibit says regulatory assets and liabilities.

JUDGE JORDAN: Any response to that objection?

MR. MITTEN: The witness can answer the question. If he thinks I've misrepresented it, he can say so.

JUDGE JORDAN: Well, I can read it also, and that's not a quotation of the language.

MR. MITTEN: Let me rephrase the question.

Q: Mr. Oligschlaeger, would you agree that the definition of regulatory assets and liabilities that appears in the Uniform System of Accounts specifically states that regulatory assets and liabilities arise from specific revenues; is that correct?

A. That is accurate. That's part of what's in the definition.[11/]

Ameren's repeated mischaracterization of the USoA is important because Ameren seeks to classify "revenues" as a "regulatory asset" in order to seek recovery. However, revenues are not a "regulatory asset" that can be deferred to benefit a utility – they are a regulatory "liability," that under certain circumstances (where a utility over-earns), can be deferred to compensate utility customers.[12/] By repeatedly omitting the word "liability" from definition No. 31, as in the above example, Ameren attempts to set forth the fallacious argument that the revenues Ameren failed to generate after the 2009 ice storm constitute a "regulatory asset" that can be deferred for later ratemaking treatment. Ameren's argument is belied by its repeated misrepresentation of the USoA, and by the fact that no jurisdiction interprets the USoA in a way that supports Ameren's argument that un-generated revenues constitute a regulatory asset for purposes of deferral. Indeed, the only case Ameren could cite in support of its novel interpretation of the USoA was a

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11/ Transcript p. 9, l. 13 through p. 10, l. 12.

12/ *See, eg.*, File No. EU-2012-0027.

case that this Commission has already reviewed and rejected as irrelevant to these issues in Case No. Case No. GU-2011-0392. In that case, the Commission disposed of a similar request to defer ungenerated revenues by the Southern Union Company ("Southern Union"). Southern Union sought an AAO to defer ungenerated profits that it potentially could have generated if the Joplin tornadoes had not destroyed it's ability to provide service to residential customers. The Commission held that, "AAOs do not create an item for recording."[13/] The Commission further explained in that case that even the term "Lost Revenue . . . is misleading because it suggests that the Company had the money and then lost it, which is untrue. . . . 'Ungenerated [revenue]' fully expresses the characteristic determinative of the claim."[14/] The Commission will not create an accounting item by "layering fiction upon fiction" because "to issue an AAO for ungenerated revenue would create a phantom loss."[15/]

In sum, Ameren's request must be denied, because: (1) the fixed costs it seeks to recover did not arise as a result of an extraordinary event; (2) the fixed costs it seeks to recover have already been recovered; and (3) un-generated revenues do not constitute an item for deferral under the USoA.

B. Unraveling the knots.

Ameren's brief presents several misquotes, misrepresentations and distortions of the testimony, the law and the USoA that confound and confuse the issues in this case. Accordingly, in this section, MIEC will attempt to point out and unravel several of the most egregious examples of Ameren's misrepresentations:

13/ Report and Order, Case No. GU-2011-0392, p. 2.

14/ *Id.*

15/ Report and Order, Case No. GU-2011-0392, p. 25.

- **Recovery of fixed costs:** Page 1 of Ameren's brief states, "Because of . . . drop in demand, Ameren Missouri was unable to recover the fixed costs that in Case No. ER-2008-0318 the Commission determined should be paid by Noranda." This statement is false and misleading. As demonstrated in section A above, Ameren recovered all of its fixed costs in 2009, including those costs incurred during the period at issue. While it may be true that some of the costs were not recovered from revenues specifically generated by Noranda, it is false and misleading to assert that the costs were not recovered at all. Ameren repeats variations of this false and misleading statement literally dozens of times throughout its brief.
- **The first link in the chain of events:** Page 3 of Ameren's brief states that the January 2009 ice storm was the "first link" in the chain of events that preceded Ameren's filing for an AAO. This statement is false and misleading. The first link in the chain of events that preceded Ameren's AAO application was the Stipulation and Agreement between the parties at issue in Case No. 2008-0318. Had Ameren not sought and received a fuel adjustment clause ("FAC") in that case, Ameren could have simply entered into off-system sales agreements with other parties after the 2009 ice storm to offset any potential decrease in revenues from its curtailment of service to Noranda, obviating any alleged need to file for an AAO.[16/] Thus, Ameren's statement that the ice storm was the first link in the chain of events preceding its AAO request is false and misleading.
- **Reasonable opportunity to earn a fair rate of return:** Page 3 of Ameren's brief repeats the false statement that Ameren "was unable to recover fixed costs

[16/] Brubaker Rebuttal, MIEC Ex. 1, p. 8, lns. 14-20.

that had been assigned to Noranda," and adds the misleading statement that the "inability to collect those fixed costs . . . threatened [Ameren's] ability to earn a fair rate of return." The second part of Ameren's statement is false and misleading because it conflates two distinct concepts. The Commission is required to set rates in a way that provides a utility "a *reasonable opportunity* to earn a fair rate of return."[17/] However, the Commission is not required to guarantee that a utility actually earn any particular rate of return. Ameren can provide no evidence that the rates set in ER-2008-0318 failed to provide Ameren a *reasonable opportunity* to earn a fair rate of return. Therefore, Ameren's statement regarding its ability to earn a fair rate of return is false and misleading.

- **Purportedly "lost" costs:** Page 6 of Ameren's brief states, "Ameren Missouri quickly concluded that unless it acted quickly the nearly $36 million in fixed costs that were assigned to Noranda in Case No. ER-2008-0318 would be lost forever." This statement is false and misleading. As demonstrated above, the fixed costs assigned to Noranda were fully recovered by revenues generated by Ameren customers. Furthermore to say that the costs are "lost" simply makes no sense. The costs existed before the storm, and they were recovered in rates. Thus, Ameren's assertion that the costs were "lost" is false and misleading.
- **Timeliness of an AAO:** Page 6 states that, "it wasn't until the Commission's May 7, 2011 order that Ameren Missouri first learned that its efforts to mitigate the adverse financial effects of the January 2009 ice storm . . . would not be successful." While this statement may not be false exactly, it is misleading and absurd. The Commission found in Case No. EO-2010-0255 that Ameren's failure

17/ Transcript, p. 172, lns. 5-12.

to flow revenues from the AEP and Wabash contracts through the FAC was illegal, imprudent and improper. Ameren is now trying to use the Commission's Order in EO-2010-0255 to re-set the time period during which it can timely file for an AAO. By Ameren's logic, its misconduct tolled the period for it to timely file an AAO by nearly three years. Ameren's argument that its own misconduct somehow prolonged the period available to it to file for an AAO is false, misleading and legally indefensible. Ameren offers variations of this same argument throughout its brief.

- **Costs and Revenues:** Page 6 of Ameren's brief states that "to draw a sharp distinction between fixed costs and lost revenues is a false controversy based on a distinction without a difference." This statement is false and misleading. It is axiomatic that costs and revenues are not the same thing. Fixed costs are those costs incurred by a utility whether or not it provides service to a particular customer. Lost revenues (or more properly "ungenerated revenues") are a non-item. Ungenerated revenues represent an expectancy that Ameren could have potentially, but did not actually generate. Accordingly, Ameren's statement regarding the lack of a sharp distinction between fixed costs and lost revenues is false and misleading.
- **Costs and financial effects:** Page 10 of Ameren's brief states that Staff witness Mark Oligschlaeger testified that the second criterion that must be satisfied for a utility to qualify for an AAO is that the "financial effects of the extraordinary event are material." This statement is false and misleading, and misquotes Mr. Oligschlaeger. Mr. Oligschlaeger actually said the second standard for granting

an AAO is "that the costs associated with the event are material"[18/] "Financial effects" and "costs" are completely different concepts. Costs are a subset of "financial effects." In this case, as demonstrated above, the 2009 ice storm did not result in Ameren incurring any extraordinary costs (fixed or incremental), though it may have had some "financial effect." By misquoting and misusing Mr. Oligschlaeger's testimony throughout the brief, Ameren falsely attempts to argue that Staff's definition of an AAO supports Ameren's position. Ameren's misrepresentation of Mr. Oligschlaeger's testimony is false and misleading. Unfortunately, Ameren's brief is replete with similar examples of statements falsely attributed to Staff's witnesses. (See for example an identical misrepresentation of Staff's testimony on page 17 of Ameren's brief.)

- **Staff's Position:** Page 13 of Ameren's brief states that Mr. Oligschlaeger "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." This statement is false and misleading. Mr. Oligschlaeger actually testified that the staff has "not challenged in a legal sense the Commission's ability to [defer revenues that were not collected as a result of an extraordinary event] if it saw fit." That the Staff has not issued a legal challenge to the deferral of revenues under any circumstances is not the same thing as the Staff testifying in support of the proposition. There may be a number of considerations (statutory exceptions for example) at play in Staff's decision to not mount a wholesale legal challenge to the practice of the deferral of revenues. However, for Ameren to construe Mr. Oligschlaeger's statement as testimony in

[18/] Oligschlaeger Rebuttal, Staff Exhibit 3, p. 6, lns. 7-10.

support of its position is false and misleading. Again, such misrepresentations are ubiquitous throughout the brief.

- **Extraordinary Event:** Ameren's Brief provides a three-page discussion of the effects of the 2009 ice storm. While many of the statements made in this section may not be false, they are misleading, because they imply that Ameren is seeking to recover costs incurred as a result of the 2009 ice storm. As demonstrated above, the 2009 ice storm did not result in Ameren incurring any costs that were not fully recovered in base rates. Therefore, Ameren's extended discussion of the damage wrought by the 2009 ice storm is irrelevant and misleading in this case.
- **Revenues and regulatory assets:** Page 18 of Ameren's brief presents the same misquote of the USoA that counsel for Ameren was required to restate during the hearing. Ameren's brief states that "the definition of Regulatory Assets and Liabilities specifically states that such <u>assets</u> can arise from 'revenues, expenses, gains, or losses.'" This statement is false and misleading. The USoA actually says that such "<u>assets **and liabilities"**</u> can arise from 'revenues, expenses, gains, or losses.'" As was demonstrated above, Ameren repeatedly omits the term "liabilities" from its definition of Regulatory Assets and Liabilities, because Ameren must characterize revenues as a regulatory asset for purposes of deferral. However, revenues are not a regulatory asset – they are a regulatory "liability," that under certain circumstances (where a utility over-earns, for example) can be deferred to compensate utility customers.[19/] Ameren's repeated and flagrant omission of the word "liabilities" from the USoA's definition of Regulatory Assets and Liabilities is false and misleading. Like many of the above misleading

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statements, Ameren's mischaracterization of the USoA definition is ubiquitous throughout its brief.

- **Covering Costs:** Page 18 of Ameren's brief states that because Ameren "was unable to shift that fixed cost burden [(costs assigned to Noranda)] to other customers, no other customers paid those costs on Noranda's behalf." This statement is false and misleading. Ameren can present no evidence that it failed to pay its costs in 2009. On the contrary, MIEC witness Maurice Brubaker testified with respect to Ameren's alleged failure to recover fixed costs from a particular rate class as follows: "Typically . . . you look at the results for the overall enterprise without trying to discern what class may have had increased sales or what classes may have had diminished sales . . . when you look at the overall results of the enterprise, all of the fixed costs were recovered. So they came from one place or the other. What really happened was there was a failure to achieve the anticipated return on equity."[20/] Accordingly, Ameren's assertion that no customers paid the fixed costs assigned to Noranda in Case No. ER-2008-0318 is false and misleading.
- **The purpose of an AAO:** Page 22 of Ameren's brief states that this Commission observed in Case No. EU-2011-0387, that "the purpose of an AAO is to protect a utility from earnings shortfalls attributable to extraordinary events." This statement is false and misleading. The actual quote from that case is as follows: "Missouri courts have recognized the Commission's regulatory authority to grant a form of relief to a utility in the form of an AAO which allows the utility to defer and capitalize certain expenses until the time it files its next rate case. The AAO

[20/] Transcript, p. 201, lns. 4-25.

technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs."[21/] (emphasis added). By misquoting the case and omitting the references to the extraordinary incremental expenses referenced in that case, Ameren's characterization of the Commission's holding in that case serves only to mislead and confuse the issues in this case. Ameren repeats its misleading characterization of the Commission's Orders throughout its brief (see for example page 29).

- **Current Period:** Pages 27-28 of Ameren's brief state, "The only interpretation of 'current period' that is consistent with [the provisions of the USoA] is the interpretation proposed by Ameren Missouri." This statement is false and misleading. Ameren ignores the Commission's Order in Case No. GU-2011-0392, ignores the testimony of Maurice Brubaker, and builds a straw man with selective phrases from Staff's witness, Mr. Oligschlaeger. The USoA defines extraordinary items as "those items related to the effects of events and transactions which have occurred during the current period."[22/] The Commission held in GU-2011-0392 that the timeliness of an application rests on a determination of whether the request was "during [the] current period," noting that the application in that case was filed during the same period as the event (tornado) occurred.[23/] Mr. Brubaker testified that an application is untimely if it is not filed within the same period as the event in which the extraordinary event occurred – in other words, before the utility has closed its book for that particular

21/ Report and Order, File No. EU-2011-0387, at p. 3.
22/ Brubaker Rebuttal, MIEC Ex. 3, p. 4, lns. 1-9.
23/ *Id.*

fiscal period.[24/] Similarly, Mr. Oligschlaeger testified that a "period" for Ameren Missouri constitutes a calendar year.[25/] So in this case, the period during which the purported "extraordinary event" took place ended in December, 2009, nearly 12 months after the ice storm. Ameren's brief confuses the issues of (1) the filing date for an AAO; and (2) the date of the order granting/denying the application. Both of the cases cited on pages 26 and 27 of Ameren's brief support Mr. Brubaker's position (not Ameren's), that an AAO application must be *filed* (though not necessarily granted) before a utility closes its book for the fiscal period during which the extraordinary event occurred. Accordingly, Ameren's glaring omissions of Mr. Brubaker's testimony and of the relevant case law render its statement regarding the timing of an AAO application false and misleading.

- **Similar Request in other Jurisdictions:** Page 30 of Ameren's brief states that the "Hawaii Public Utilities Commission authorized the Kauai Electric Division to defer a portion of the revenues it lost following Hurricane Iniki." While this statement is not strictly false, it is misleading and incomplete. As this Commission pointed out in Case No. GU-2011-0392, the circumstances in the 1992 Kauai case involved a stipulation between the parties. Moreover, when Kauai Electric Division sought recovery of the deferred amounts, the Commission held: "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. Thus, we decline to approve the recovery

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24/ *Id.*

25/ Transcript, p. 153, l. 24 through p.154, l. 15.

by KE of lost gross margins in this rate proceeding."[26/] Accordingly, to the extent Ameren seeks to imply that any other jurisdiction allows for deferral or recovery under circumstances similar to this case, its reference to the Kauai Electric Division case is misleading and incomplete.

- **Statutory Exceptions:** Page 30 of Ameren's brief states that, "it seems obvious that if it was inappropriate to defer lost revenue, . . . the Commission would not have provided for such deferrals in its own rules." This statement refers to the Commission's rules regarding Demand Side Investment Mechanisms and Cold Weather Rules. These rules bear absolutely no relevance to the issues in this case. They constitute statutory and regulatory exceptions to standard regulatory practice, under a narrowly defined set of circumstances. To that end, the invocation of these exceptions actually support MIEC's position that without explicit regulatory or statutory authorization, the Commission cannot defer ungenerated revenues for later ratemaking treatment. Accordingly, Ameren's argument attempting to analogize these rules to the instant case is misleading.
- **Any amount of Net Income:** Page 31 of Ameren's brief states that, MIEC argues that "as long as a utility has any amount of net income it does not qualify to defer lost rate revenues." This statement is false and misleading. Ameren fails to cite any testimony to support this obvious distortion of MIEC's position. Accordingly, Ameren's patently absurd characterization of MIEC's position is false and misleading.

[26/] 1996 WL 497174, at p. 25.

- **Retroactive ratemaking:** Page 38 of Ameren's Brief states that "the rebuttal testimonies of witnesses for both Staff and MIEC claim that if the (sic) Ameren Missouri's request for an AAO is granted the Commission will be engaging in unlawful retroactive ratemaking." This statement is false and misleading. Neither Staff nor MIEC testified that the granting of an AAO would constitute retroactive ratemaking. Rather, they testified that incorporation of any deferral into rates in a subsequent rate case may constitute retroactive ratemaking.[27/] Accordingly, deferring the amount requested in this case would prove legally futile. Once again, Ameren's brief ignores MIEC's and Staff's actual arguments and replaces them with straw arguments, which it then attacks. As demonstrated here, Ameren's characterization of Staff's and MIEC's retroactive ratemaking argument is false and misleading.

In sum, while the above list is not exhaustive of the distortions, mischaracterizations, and misquotes provided in Ameren's Initial Brief, it should provide some indication of the lack of reliability and veracity of Ameren's assertions and arguments in this case. Ameren's position is simply indefensible. Based on Ameren's Initial Brief, its AAO application appears to be held together by little more than artifice, innuendo, and quasi-legal flimflam.

III. Conclusion

For the reasons stated above, and in MIEC's Initial Post-Hearing Brief, Ameren's AAO request should be denied, because:

- the "costs" to which it refers did not arise as a result of an extraordinary event;

[27/] Staff Ex. 3, p. 11, l 23 through p. 12, l. 6; MIEC Ex. 1, p. 9, l. 9 through p. 10, l. 3.

- the "costs" to which it refers have already been recovered;
- the Uniform System of Accounts ("USoA") does not contemplate the deferral of un-generated revenues;
- Ameren's application is more than two years out of time; and
- granting the AAO would prove legally futile in light of Missouri's prohibition against retroactive ratemaking.

Submitted June 12, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail this 12th day of June, 2012, to the parties on the Commission's service list in this case.

/s/ Brent Roam