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 INITIAL POST-HEARING BRIEF

Introduction

This accounting authority order ("AAO") case actually began when Ameren Missouri received authorization to implement a fuel adjustment clause ("FAC") it sought and an FAC rate design to which it agreed in *Re Union Electric Co. d/b/a AmerenUE*, Case No. ER-2008-0318. The FAC authorized by the Commission permitted Ameren Missouri to track and collect from rate payers 95% of the difference in fuel costs included in base rates and those actually experienced, net of off system sales revenue. Thus, the FAC is designed not exclusively for the benefit of shareholders, but is designed to balance the interests of shareholders and ratepayers. In this case, for the third time, Ameren Missouri is attempting to rewrite the FAC it requested and received to secure retroactively all protections and benefits for its shareholders, and to put any and all risk from its original FAC on its ratepayers. This time Ameren Missouri is seeking to take the first steps toward recovery of "lost revenues / profits" through an AAO to inappropriately guarantee a higher return closer to its authorized return by eliminating some risk. For all the reasons addressed by the Staff, MIEC, and Public Counsel, and as the Commission recently found regarding Missouri Gas Energy's request for an AAO to book "lost revenues" in the Missouri Gas Energy, File No. GU-2011-0392, proceeding relating to the Joplin tornado of May 2011, an AAO is not an appropriate mechanism for the purposes for which Ameren Missouri wants to use it.

On July 25, 2011, Ameren Missouri filed a Verified Application for an accounting authority order.[1] Ameren Missouri contends that it entered into contracts with AEP Operating Companies ("AEP") and Wabash Valley Power Association, Inc. ("Wabash") to mitigate the material financial loss it was facing because of drastically lower sales to / revenue contribution from Noranda Aluminum, Inc. without an accompanying reduction in the fixed costs allocated to Noranda. (Ameren Missouri Verified Application For Accounting Authority Order, p. 4, para. 7). Ameren Missouri asserts it believed these two contracts involved long-term partial requirements sales and therefore revenues derived therefrom were excluded from the Ameren Missouri FAC. (*Id*. at p. 4, para. 8). On April 27, 2011 the Commission issued its *Report And Order* in Case No. EO-2010-0255 deciding that the AEP and Wabash transactions are not long-term partial requirements sales and are not exempt from the operation of the Ameren Missouri FAC. Ameren Missouri claims that as a consequence of the Commission's decision in Case No. EO-2010-0255, it has now experienced an extraordinary, unanticipated, and nonrecurring loss of sales due to the January 2009 ice storm, without experiencing an accompanying reduction in fixed costs allocated to Noranda. (*Id*. at p. 5, para. 9). Staff witness Mr. Oligschlaeger testified that by granting Ameren Missouri an AAO to defer Noranda "lost revenues," Ameren Missouri would be allowed to offset on its financial statements, in approximate terms, the consequences of

[1] On August 29, 2011, Missouri Industrial Energy Consumers, Inc. ("MIEC") filed MIEC's Motion To Dismiss stating that under the doctrine of *res judicata* Ameren Missouri is precluded from seeking an AAO relating to losses it incurred as a result of the 2009 ice storm. On August 30, 2011, the Commission issued an Order allowing any party to file a response to MIEC's Motion to Dismiss by no later than September 8, 2011 and allowing any party to file a reply to any such response no later than September 15, 2011. On September 8, 2011, the Office of the Public Counsel ("Public Counsel") filed Public Counsel's Response To Motion To Dismiss in support of MIEC's Motion To Dismiss, the Staff filed Staff Motion To Dismiss Application Of Ameren Missouri For Accounting Authority Order on *res judicata* grounds, and Ameren Missouri filed Ameren Missouri's Response To MIEC's Motion To Dismiss. On September 15, 2011, MIEC, Ameren Missouri, and the Staff made further responsive filings. On September 26, 2011, Ameren Missouri made one last reply. On October 26, 2011, the Commission issued an Order Denying Motions To Dismiss denying MIEC's and the Staff's motions to dismiss on the grounds of *res judicata*.

the Commission's *Report And Order* in Case No. EO-2010-0255, which is an inappropriate basis for seeking an AAO. (Staff Ex. 3, Oligschlaeger Reb., p. 9, lns. 16-18; p. 19, ln. 16 - p. 20, ln. 1).

Ameren Missouri is not seeking a deferral of "lost fixed costs" as it contends; it is seeking a deferral of "lost revenues" in order to allow it an opportunity to obtain in the true-up portion of its pending rate case, File No. ER-2012-0166, higher profit levels, a higher return, to offset lower profit levels / lower return in the past, due to the effect of (1) the January 2009 ice storm in Southeast Missouri, (2) its Case No. ER-2008-0318[2] FAC rate design stipulation and agreement to which it was a party, and (3) the Commission's April 27, 2011 *Report And Order* in Case No. EO-2010-0255[3] respecting Ameren Missouri's treatment of its contracts with AEP and Wabash. (Staff Ex. 3, Oligschlaeger Reb., p. 17, lns. 3-12; Vol. 2, Byrne Opening Statement, Tr. 21, lns. 7-11).

Although on May 21, 2012, Cole County Circuit Court issued a Judgment reversing the Commission's *Report And Order* in Case No. EO-2012-0255 in Ameren Missouri's Writ of Review action against the Commission, *State ex rel. Union Electric Co. d/b/a Ameren Missouri v. Public Serv. Comm'n*, Case No. 11AC-CC00336, Mo. Rule of Civ. Pro. 75.01 empowers the trial court to retain control over judgments "during the thirty-day period after entry of judgment" and permits the trial court to "vacate, reopen, correct, amend, or modify its judgment within that time" for good cause. (*State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385, 389

[2] *Re Union Electric Co., d/b/a AmerenUE*, Case No. ER-2008-0318, rate case filed by Ameren Missouri on April 4, 2008; on December 30, 2008 the Commission issued in Case No. ER-2008-0318: (1) an *Order Approving Stipulation And Agreement As To All FAC Tariff Rate Design Issues*, and (2) an *Order Approving Stipulation And Agreement As To Off-System Sales Related Issues*.

[3] *Re Union Electric Co. d/b/a AmerenUE*, Case No. EO-2010-0255, prudence review of the costs and revenues associated with Ameren Missouri's first FAC, authorized in Case No. ER-2008-0318, covering the period of March 1, 2009 - September 30, 2009. Staff's Notice of Start of Prudence Audit was filed on March 11, 2010.

(Mo.banc 1990)). Moreover, the Commission's *Report And Order* in Case No. EO-2012-0255 remains in force and is *prima facie* lawful until found otherwise by the ultimate ruling of a court at the conclusion of the appeal process.[4] The Commission and MIEC may appeal.

Ameren Missouri witness Ms. Lynn M. Barnes addressed in her Surrebuttal Testimony, at page 2, footnote 1, Ameren Ex. 3, Ameren Missouri's judicial challenge of the Commission's *Report And Order* in Case No. EO-2010-0255 stating that if Ameren Missouri is successful with its court challenge, "the Company would not seek recovery of sums deferred via the AAO requested in this case." Ameren Missouri also addresses this matter in footnote 1 at page 5 of its Verified Application For Accounting Authority Order filed July 25, 2011. In this same footnote, Ameren Missouri indicates that there are post September 30, 2009 revenues under the AEP and Wabash contracts, which is beyond the period covered by Case No. EO-2010-0255. Staff witness Ms. Mantle in her Surrebuttal Testimony, Staff Ex. 2, p. 13, lns. 3-18, relates that the Staff's pending second prudence review of Ameren Missouri's FAC in File No. EO-2012-0074

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[4] Section 386.270 RSMo. 2000 provides that all rates, charges, and schedules fixed by the Commission shall be in force and shall be *prima facie* lawful until found otherwise in a suit brought for that purpose. The Western District Court of Appeals held in *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356, 369, 370 (Mo.App. W.D. 1992):

> Considering the intent of the legislature to enact a statutory design which promotes orderly setting of rates and review of the rates as set, the most reasonable construction of §386.270 requires the finding that the legislature intended the orders of the Commission to remain in force and be *prima facie* lawful until found otherwise by the ultimate ruling of a court at the conclusion of the appeal process.

Id. at 367.

* * * *

> . . . this court rules that an adverse ruling on the Commission's order by the circuit court does not invalidate the order of the Commission while the appeal continues. The effect of this ruling on the parties contesting the Commission's orders by court review, is that said parties are protected through the same avenues allowing them to obtain a stay of such orders as were available prior to the circuit court, with additional provision for a stay pursuant to §386.540.3.

Id. at 368.

covers the period of October 1, 2009 to June 20, 2010 of the AEP and Wabash contracts, and involves additional millions of dollars.

Ameren Missouri Application Is Request For Recovery Of Lost Revenues

In this jurisdiction, AAOs have been used to allow utilities to defer incremental costs incurred to repair and restore the utilities' infrastructure from significant damage caused by abnormal weather events, including severe ice storms. (Staff Ex. 3, Oligschlaeger Reb., p. 6, lns. 19-21). However, Ameren Missouri's witness Ms. Barnes testified that Ameren Missouri is not seeking in its application to recover replacement or repair costs associated with the poles, transformers, miles of cable that were damaged / downed in the January 2009 ice storm because those costs and investment were otherwise addressed in subsequent rate cases. (Vol. 2, Tr. 92, ln. 5 - Tr. 93, ln. 4). She further testified as follows regarding O&M costs and capital restoration costs:

> **Q. [Mr. Roam]:** Did the company -- so the company did not incur any additional incremental costs that were not included in rates as a result of the 2009 ice storm, correct?
>
> **A. [Ms. Barnes]:** 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.
>
> **Q. [Mr. Roam]:** So the storm costs from the 2009 storm did not rise past the amount that were expected?
>
> **A. [Ms. Barnes]:** For O&M that's correct. Because of the nature of the damage, it was all predominantly capital expense in nature.
>
> **Q. [Mr. Roam]:** Right. 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. [Ms. Barnes]:** Correct.

(*Id*. at Tr. 93, lns. 7-25).

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> **Q. [Commissioner Kenney]** . . . Mr. Roam asked you about the O&M costs from the storm, and I think you said that they didn't exceed what was already included in base rates?
>
> **A. [Ms. Barnes]:** That's correct.
>
> **Q. [Commissioner Kenney]:** So Ameren has a tracker for recovery of storm costs, correct?
>
> **A. [Ms. Barnes]:** No. We actually don't have a tracker, but there is an amount as part of the cost of service built into our base rates for storm costs, storm restoration costs.
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> **Q. [Commissioner Kenney]:** And the O&M associated with that ice storm didn't exceed those costs. Do you know what the differential was between what was included in base rates already and what the actual costs were?
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> **A. [Ms. Barnes]:** No, I'm sorry, I don't recall what was built into that at that period. We've had a few rate cases since then. I've lost track.
>
> **Q. [Commissioner Kenney]:** And then with regard to other capital costs like poles and wires, you said those would have already been included in rate base in subsequent rate cases --
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> **A. [Ms. Barnes]:** That's correct.
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> **Q. [Commissioner Kenney]:** -- is that correct?
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> **A. [Ms. Barnes]:** Uh-huh.

(*Id*. at Tr. 102, ln. 18 - Tr. 103, ln. 16).

Ameren Missouri's witness David N. Wakeman testified in his Surrebuttal Testimony, Ameren Ex. 1 at page 14, lines 11-13, that the $36 million Ameren Missouri is seeking, is not "storm restoration cost" but "lost revenue:"

> . . . Ameren Missouri's total restoration cost following the January 2009 ice storm was $82 million, which includes $71 million in capital costs. Lost revenue from Noranda is not included in this cost.

Mr. Wakeman stated in his Surrebuttal Testimony, Ameren Ex. 1 at page 14, lines 16-19 and Vol. 2, Tr. 72, ln. 25 - Tr. 73, ln. 4, that "[a]s a result of that outage, Ameren Missouri was unable to collect approximately $36 million in revenue to cover fixed costs that had been assigned to Noranda's rate class during the period Noranda was out of service." In response to questions from Public Counsel Mr. Mills, Ms. Barnes stated that this approximately $36 million that Ameren Missouri is seeking recovery of now by an AAO "represents the portion of the fixed costs that were allocated to the rate class that Noranda's in that were unrecovered because we did not sell power to Noranda." She said that "it's a portion of the revenues" that would come from Noranda, "not the entire amount of the revenues" that would come from Noranda: "It's just the fixed cost allocation piece." (Vol. 2, Tr. 87, ln. 24 - Tr. 88, ln. 2).

Ms. Barnes identified Noranda as the only customer of the large transmission service rate class. (Vol. 2, Tr. 100, lns. 14-16). Since Noranda is the sole customer in its rate class, and accordingly has its rates designed to recover a specific level of costs, Ameren Missouri believes it is significant to assert that it failed to recover all of the fixed costs associated with service to Noranda following the January 2009 ice storm. (Staff Ex. 3, Oligschlaeger Reb., p. 19, lns. 3-6). Regulatory Law Judge Daniel Jordan asked Ms. Barnes whether the Ameren Missouri customer class tariffs identify the allocation of the categories of costs and she replied, "no," "it's the whole cost of service," as shown in the hearing transcript as follows:

> **Q. [Judge Jordan]:** You referred to an allocation and rate design. Are those matters that are reflected in the tariffs?
>
> **A. [Ms. Barnes]:** Yes. That's how the tariffs would be set. So the rate that's determined in the tariffs for the rate class are billed based on the allocation of the cost of service to each of the rate classes.

Q. [Judge Jordan]: When I say reflected, what I mean is are they set forth, that this cost comes from this customer?

A. [Ms. Barnes]: It's not that clear because it's the whole cost of service.

Q. [Judge Jordan]: Okay. When you say that it's not clear, the answer is no, it doesn't say that; is that correct?

A. [Ms. Barnes]: Yes. No is the right answer.

(Vol. 2, Tr. 101, ln. 21 - Tr. 102, ln. 9).

MIEC's witness Maurice Brubaker submitted Rebuttal Testimony in opposition to Ameren Missouri's request for an AAO similar to that of the Staff's witness Mr. Oligschlaeger. Mr. Brubaker has a Bachelor's Degree in Electrical Engineering. He also has a Degree of Master of Business Administration, and his major field was finance. (MIEC Ex. 1, Brubaker Reb., App. A, p. 1, lns. 9-16). Mr. Brubaker testified that he is familiar with the process by which, in a rate case, costs are allocated to particular customer classes through rate design, and rates are then set based upon those allocations and a number of other factors. He further stated that rarely do the revenues that are produced by a particular class equal the costs that anybody allocated to them. He related that if a utility reduced cost to a class, all other things being equal relative to other classes, this reduction in cost would help increase the utility's return. Mr. Brubaker testified there is no requirement that a utility recover the fixed costs that are allocated to a class only from that class, and once rates are set, the results are looked at on an overall basis, not on a class basis. He said that he had never seen recovery of fixed costs tracked on a rate / customer class basis. (Vol. 2, Tr. 199, ln. 15 - Tr. 201, ln. 1). Mr. Brubaker said that he wanted to avoid being misinterpreted in his testimony regarding Ameren Missouri. He stated that "when you look at the overall results of the enterprise, all the fixed costs were recovered. . . .What really happened was there was a failure to achieve the anticipated return on equity." (*Id*. at Tr. 201, lns. 21-25).

Mr. Oligschlaeger also submitted testimony that it is inappropriate to base an AAO request on financial results for a single customer or a single rate class. Any deficiency in earnings of a single customer or a single rate class that in isolation might trigger an AAO may be offset by an excess in earnings of another or other customers or another or other rate classes. Thus, any decision by the Commission to authorize an AAO should be based on an examination of the total utility's financial results at the time in question. (Staff Ex. 3, Oligschlaeger Reb., p. 19, lns. 3-13).

Staff witness Lena M. Mantle testified that respecting the curtailment of load at Noranda, Ameren Missouri understood the consequences of the FAC rate design to which it had agreed because on February 5, 2009, nine days after Noranda's load was affected by the ice storm, Ameren Missouri filed its Application For Rehearing And Motion For Expedited Treatment[5]

[5] Ameren Missouri seeking last minute rate relief from the effect of the January 2009 southeast Missouri ice storm on Noranda has similarities to the last minute Taum Sauk regulatory capacity sale issue raised by the Office of the Public Counsel (Public Counsel), adopted by the State of Missouri, appropriately opposed by Ameren Missouri, and rejected by the Commission in Ameren Missouri's immediately preceding rate case, Case No. ER-2007-0002, to Case No. ER-2008-0318. Public Counsel did not raise the issue until after the evidentiary hearings.

The first time the Public Counsel "raised" the $10,320,000 Taum Sauk regulatory capacity sale issue was in the Staff's filing of the Revised True-Up Reconciliation, on April 20, 2007, one day before the date for the filing of post-hearing briefs in the case and twenty-one days after the end of the evidentiary hearings in the case asserting that the issue arose for the first time at the hearing, based on information learned for the first time at the hearing. After Public Counsel "raised" the issue in its Post-Hearing Brief, the Commission issued an Order Establishing Time To Respond To Issue Raised In Public Counsel's Brief. Ameren Missouri filed Union Electric Company d/b/a AmerenUE's Response To Order Establishing Time To Respond To Issue Raised In Public Counsel's Brief And Motion To Strike. The Commission issued its Report And Order on May 22, 2007 with an effective date of June 1, 2007 stating in part as follows:

> At this point, very late in this proceeding it is far too late for the Commission to gather the evidence needed to make any findings of fact or conclusions of law regarding these questions. . . .
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> * * * *
>
> While the Commission cannot make that adjustment in this case because of insufficient evidence in the record, it will direct its Staff to investigate whether ratepayers are being held harmless from the Taum Sauk disaster, especially with regard to lost capacity sales. If Staff finds that such regulatory capacity sales have been lost, it shall propose an appropriate adjustment in AmerenUE's next rate case or other action as it believes appropriate.

Public Counsel and the State of Missouri appealed the Commission's rejection of the Taum Sauk regulatory capacity sales issue. The Commission's rejection of the Taum Sauk regulatory capacity sales issue was affirmed by

relating to the curtailment of load at Noranda. Ameren Missouri attempted to avoid realizing a revenue shortfall due to lost production capacity at Noranda by requesting a rehearing to modify the FAC rate design to exclude revenue from off-system sales contracts to be used as offsets to the "lost sales" to Noranda. The Commission on February 19, 2009 issued an *Order Denying AmerenUE's Application For Rehearing*, finding that AmerenUE had requested that it substantially modify the FAC approved in its January 27, 2009 *Report And Order* and that it could not modify the FAC tariff in the manner AmerenUE requested without setting aside the December 30, 2008 *Order Approving Stipulation And Agreement As To All FAC Tariff Rate Design Issues* it had issued, reopening the record to take evidence on the appropriateness of the proposed change, and making a decision before the March 1, 2009 operation-of-law date for the ER-2008-0318 rate case. The Commission stated, "Such action is obviously impossible." (Staff Ex. 2, Mantle Reb., p. 9, ln. 7 - p. 11, ln. 4).

It should be clear that Ameren Missouri did in fact earn a profit during the 2009-2010 period in question. The amounts at issue in this case constitute "lost revenues / profits" which Ameren Missouri failed to realize because of the Commission's *Report and Order* in Case No. EO-2010-0255 respecting Ameren Missouri's off-system sales of power to AEP and Wabash. The revenues from Ameren Missouri's transactions with AEP and Wabash were more than

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the Western District Court of Appeals in *State ex rel. Public Counsel v. Public Serv. Comm'n*, 274 S.W.3d 569, 583-84 (Mo.App. W.D. 2009). The Western District Court of Appeals stated, in part, as follows:

> Nevertheless, Public Counsel and the State claim that their failure to raise the issue in a timely fashion should not matter because the record contained sufficient evidence for the commission to decide the issue. Public Counsel and the State, however, apparently, miss the point of the commission's order: to force the parties to outline the issues in advance so all parties would have time to file testimony to rebut their opponent's positions. Hence, even if the record does contain sufficient evidence, UE did not have an opportunity to present rebuttal testimony on the issue. The commission did not err in refusing to consider the issue.

274 S.W.3d at 584.

sufficient to replace the revenues not received from Noranda due to the January 2009 ice storm. (Staff Ex. 3, Oligschlaeger Reb., p. 7, lns. 10-15; Staff Ex. 2, Mantle Reb., p. 12, ln. 6 - p. 14, ln. 5). The Noranda partial outage commenced January 27, 2009 and Noranda did not return to full load until April 9, 2010. (Staff Ex. 1, Carter Reb., Sched. JDC-1).

Historically, the Commission has most often granted utilities authority to defer incremental costs to repair and restore utilities' infrastructure from (1) significant damage from extraordinary natural events; (2) extraordinary mechanical failure not involving operator negligence; and (3) costs associated with Commission or other governmental mandates. (Staff Ex. 3, Oligschlaeger Reb., p. 6, lns. 19-23). The Commission has also used AAOs to address extraordinary construction programs. (*See infra*, p. 18, second to last para.). The Commission has never authorized an AAO for the recovery of "lost revenues / profits." Mr. Oligschlaeger testified that "extraordinary construction programs" and "lost revenues" are different financial items. (Vol. 2, Tr. 191, ln. 24 - Tr. 193, ln. 14). He further stated that the Staff's criteria for recommending approval of deferral requests through AAOs is in no way dependent upon whether a company can demonstrate it is not recovering its fixed costs or is otherwise earning a negative minimal rate of return. (*Id*. at Tr. 194, ln. 22 - Tr. Tr. 195, ln. 3). The Staff's criteria for deferral of expenses and capital items is the Uniform System of Accounts ("USoA") General Instruction No. 7. (Mr. Oligschlaeger noted, as does Rule 4 CSR 240-20.030(4) Uniform System of Accounts - Electrical Corporations, that in prescribing the USoA, the Commission does not commit itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining other matters before the Commission. (*Id*. at Tr. 194, lns. 9-12)).

The Staff's one exception for considering "lost revenues" / "ungenerated revenues" / "lost fixed costs" for potential deferral is Section 393.1075 RSMo. Cum. Supp. 2010 Missouri

Energy Efficiency Investment Act ("MEEIA") and 4 CSR 240-20.093 Demand-Side Programs Investment Mechanisms and 4 CSR 240-20.094 Demand-Side Programs. (*Id*. at Tr. 195, ln. 4-11; Tr. 160, ln. 25 - Tr. 161, ln. 15). Mr. Oligschlaeger indicated that although as a general principle it is the Staff's position that a deferral of lost revenues is never appropriate, cost recovery relating to demand-side programs is an exception. He testified that the Staff's position on this exception is not based on the USoA. (Vol. 2, Tr. 160, ln. 25 - Tr. 161, ln. 15). In 2009, the Missouri General Assembly passed the Missouri Energy Efficiency Investment Act ("MEEIA"), Senate Bill No. 376, Section 393.1075 RSMo. Cum. Supp. 2010. Section 393.1075.3 provides:

> It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs. In support of this policy, the commission shall:
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> (1) Provide timely cost recovery for utilities;
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> (2) Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and
>
> (3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.

Section 393.1075.5 states in part that to comply with Section 393.1075 the Commission may develop cost recovery mechanisms to further encourage investments in demand-side programs.

Section 393.1075.11 states in part that the Commission shall provide oversight and may adopt rules and procedures and approve corporation specific settlements and tariff provisions, as necessary, to ensure that electrical corporations can achieve the goals of Section 393.1075. The Commission promulgated Rules 4 CSR 240-20.093 Demand-Side Programs Investment Mechanisms and 4 CSR 240-20.094 Demand-Side Programs under the authority of Section

393.1075.11. Rule 4 CSR 240-20.093(1)(M) and Rule 4 CSR 240-20.094(1)(J) define the term "demand-side programs investment mechanism" or "DSIM" as including, in combination and without limitation: "4. Recovery of lost revenues." Rule 4 CSR 240-20.093(1)(Y) and Rule 4 CSR 240-20.094(1)(U) define the term "lost revenues." The Staff's position on the deferral of lost revenues relating to demand-side programs is based on the Missouri General Assembly's adoption of MEEIA in Laws 2009 in the form that it did.

Timeliness / Current Period Requirement OF USoA General Instruction No. 7

Ameren Missouri's instant request for an AAO is also inappropriate because the dollars / event giving rise to the deferral request are not eligible for deferral by the very terms of General Instruction No. 7 of the USoA: "Those items related to the effects of events and transactions *which have occurred during the current period* and which are of unusual nature and infrequent occurrence shall be considered extraordinary items." (Staff Ex. 5, p. 8). Ms. Barnes admitted that Ameren Missouri's financial statements for 2011 and 2012 do not reflect any effect of the reduction in sales to Noranda due to the January 2009 ice storm. (Vol. 2, Tr. 96, ln. 20 - Tr. 97, ln. 5). Therefore, Ameren Missouri's deferral request must fail under its own terms because there are no costs for the periods under with Ameren Missouri's Application was filed and is being processed that are eligible for deferral under the Commission's rules governing utility accounting for revenues, expenses and investment.

The financial impacts of the January 2009 ice storm sought to be deferred by Ameren Missouri have already been fully reflected in Ameren Missouri's 2009 and 2010 published financial statements and are no longer eligible for deferral. Without a timely request to defer extraordinary costs, those costs will be charged to net income on the utility's income statement in the period incurred. Once recorded on "closed" final annual financial statements, nonrecurring

costs of an extraordinary nature should not be included in rates set prospectively. (Staff Ex. 3, Oligschlaeger Reb., p. 8, ln. 13-23; p. 19, ln. 16 - p. 20, ln. 1). Ms. Barnes testified that Ameren Missouri closed its books for 2009, 2010, and 2011, in the first quarter of 2010, the first quarter of 2011, and the first quarter of 2012, respectively. (Vol. 2, Tr. 90, ln. 25 - Tr. 91, ln. 9).

Mr. Brubaker testified that, historically, when a utility has filed for an AAO it has done so prior to the closing of its books for the period in which the extraordinary event occurred. He noted that this practice is reflected in the language of the USoA itself and referred to the Commission's *Report And Order* in *Re Southern Union Co*., File No. GU-2011-0392 (2012), the *Southern Union* Joplin tornado case, where the Commission cited the USoA to define the "'timeliness'" requirement for an AAO request as being during the current period relating to the occurrence of the extraordinary event or transaction. The Commission in File No. GU-2011-0392 found that the tornado occurred in the current period of the application for the AAO. (*Re Southern Union Co*., *Report And Order*, p. 14, File No. GU-2011-0392 (2012)). The *Report And Order* notes that "the record shows that the standard amortizations are (i) five years for O&M [operations and maintenance costs], and (ii) twenty years for capital [investment]." (*Id*. at 15). The costs that Ameren Missouri is seeking recovery of in the instant case are neither O&M costs nor capital investment.

Ms. Barnes cites at page 10, lines 3-13 of her Surrebuttal Testimony that Ameren Missouri filed for and received an AAO in Case No. EU-2008-0141 with the regulatory asset created in a different fiscal year than the year of the extraordinary event. She provided no details in her Surrebuttal Testimony. Ameren Missouri filed on November 5, 2007, an application for an AAO for costs relating to an ice storm that destroyed Ameren Missouri property and equipment on January 13, 2007 approximately ten months after the event. Ameren Missouri

requested in its application that the Commission permit the deferral of incremental O&M costs directly related to the January 2007 ice storm, including, but not limited to, labor costs, material purchases and repairs. Ameren Missouri stated in its application that it would maintain adequate records supporting the incremental expenses deferred, including detail of outside contractor food and lodging costs, labor and material costs. On January 8, 2008, approximately two months after Ameren Missouri filed its application, the Staff filed its recommendation that the Commission grant Ameren Missouri an AAO subject to five conditions. Ten days later, Ameren Missouri filed a response stating it agreed with four of the Staff's five conditions, disagreeing with the Staff regarding the date the Staff proposed that the amortization of O&M expenses should start. The subject matter of the deferral was not in dispute, incremental O&M expenses, and was identified in the conditions to which Ameren Missouri agreed.

The Staff condition in File No. EU-2008-0141 regarding necessary records supporting the incremental expenses deferred, which is not the condition that Ameren Missouri took issue with, is instructive regarding further identifying the nature of the items that the Staff deems appropriate to be covered by an ice storm AAO:

> . . . Such records shall include, but not be limited to, listing of *outside contractors, agreement with third parties for goods and services*, controls in place to ensure all expenditures were reasonable and not utilized to take advantage of the situation, detailing *food and lodging costs, labor and material costs*, procedures and verification for expense versus capitalization determinations, and determination of *incremental levels of such costs versus normal ongoing levels of costs*. . . .

Re Union Electric Co. d/b/a AmerenUE, File No. EU-2008-0141, p. 2, *Order Approving Stipulation And Agreement* (2008).

Unable to agree on a start-date for the amortization, the Staff and Ameren Missouri agreed that the Commission should take this issue up for determination in the then pending rate

case, Case No. ER-2008-0318, and the Staff and Ameren Missouri otherwise entered into a Non-unanimous Stipulation And Agreement on April 8, 2008. *Re Union Electric Co. d/b/a AmerenUE*, File No. EU-2008-0141, p. 2, *Order Approving Stipulation And Agreement* (2008). The Commission issued an *Order Approving Stipulation And Agreement* on April 30, 2008.

"Ungenerated Revenue" And "Earnings Shortfalls"

In the recent *Southern Union* AAO case, Southern Union argued that the Commission must allow deferral of revenues because the Commission allowed deferral of costs in the Sibley decision and USoA applies equally to both. (*Re Southern Union Co., Report And Order*, p. 24, File No. GU-2011-0392 (2012)). The deferral of costs referred to respecting the Sibley decision noted by Southern Union, *State ex rel. Office of Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806, 808 (Mo.App. W.D. 1993), involved two construction projects in the early 1990's at the Sibley Generating Station of Missouri Public Service, then a division of UtiliCorp United, Inc. (subsequently renamed Aquila, Inc.). The two construction projects involved (1) a life extension rebuild of generating units 1 and 2, and (2) a coal conversion project to burn low-sulfur western coal to achieve standards mandated by the 1990 Federal Clean Air Act Amendments. (*Id*.).

The Commission held in the *Southern Union* AAO case that the Sibley decision dealt with "actual expenditures" of expenses and capital whereas Southern Union's claim dealt with the "phantom loss" of revenues:

> The Company's claim is different. Ungenerated revenue never has existed, never does exist, and never will exist. Revenue not generated, from service not provided, represents no exchange of value. There is neither revenue nor cost to record, in the current period nor in any other.
>
> The Company showed no instance when service not provided resulted in recording any revenue or cost, lost or generated, on a deferred or current basis.

> That is because the Company cannot have an item of profit or loss when it provides no service, whether the cause of no service is ordinary or extraordinary. Services not provided and revenues not generated are mere expectancies, are things that simply did not happen, and are not items at all.
>
> C. Summary as to Ungenerated Revenue
>
> An AAO only determines the period for recording an item but the Company seeks an AAO to create the item itself by layering fiction upon fiction. To issue an AAO for ungenerated revenue would create a phantom loss, and an unearned windfall, for the Company. Therefore, the Commission will deny the AAO as to ungenerated revenue.

(*Re Southern Union Co.*, *Report And Order*, p. 25, File No. GU-2011-0392 (2012)).

The Staff notes that the Commission in its *Report And Order* in the *Southern Union* AAO case addressed that there was no drop in revenue. The *Southern Union* AAO case cannot be distinguished from the instant Ameren Missouri case on that basis. The Commission stated as follows in its January 25, 2012, File No. GU-2011-0392, *Report And Order*:

> The Company hypothecates a loss by isolating a drop in revenue in the tornado area. No authority makes that area relevant to exclusion of the rest of the Company's service territory. On the contrary, Staff and OPC showed that Company revenue is up.
>
> * * * *
>
> Even if there were a drop in revenue, it would not prevent recovery of fixed costs. . . .

(*Re Southern Union Co.*, *Report And Order*, p. 22, File No. GU-2011-0392 (2012)).

> . . . the rates that the Company is collecting throughout the State include amounts for the fixed costs throughout the State. The absence of any real loss makes the case for rejection of ungenerated revenues even stronger than in State of Missouri ex rel. Union Elec. Co. [765 S.W.2d 618 (Mo.App. W.D. 1988]. In that case, the item rejected was money actually spent on the aborted Callaway II power plant ("cancellation costs"). The utility claimed recovery of cancellation costs, the Commission rejected that claim, and the Court of Appeals affirmed on that point. Reasons for allocating the loss to the utility included the compensation for business risk that the utility receives in its rates. The Commission need not guarantee the Company's profit, nor shift the risk of disappointing profits to

> ratepayers, especially when the source of disappointment is the provision of no service.

(*Id*. at 23; Content of footnote in original, appears *supra* in brackets.)

Just as "ungenerated revenue" is a fiction, a phantom loss, an unearned windfall, Ameren Missouri with its "earnings shortfall" argument premised on "ungenerated revenue" wants the Commission to grant it an AAO so it can seek to bring to fruition the creation of a loss and a windfall in the true-up portion of its pending rate case, File No. ER-2012-0166.

In *Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434 (Mo.App. W.D. 1998), the other Missouri court case cited in the *Southern Union* AAO case, the use of AAOs was in respect to Missouri Gas Energy ("MGE," a division of Southern Energy) replacing older service lines and mains pursuant to Gas Line Safety Rules promulgated by the Commission in 1989 in response to Federal legislation. MGE's predecessor and MGE incurred a new and substantial expense not envisioned by them and previously addressed in rates. The Western District Court of Appeals states in its opinion: "The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs." (*Id*. at 436). This same sentence appears at page 3 in the Commission's November 30, 2011 *Order Approving And Incorporating Unanimous Stipulation And Agreement* in File No. EU-2011-0387, which cites *State ex rel Aquila, Inc. v. Public Serv. Comm'n*, 326 S.W.3d 20, 27 (Mo.App. W.D. 2010), which quotes *Missouri Gas Energy v. Public Serv. Comm'n*, 978 S.W.2d 434, 436 (Mo.App. W.D. 1998).

Ms. Barnes cited in her Surrebuttal Testimony at page 11, lines 5-10 that the Commission granted an AAO to The Empire District Electric Company ("Empire") in File No. EU-2011-0387 and quoted from the Commission's Order that "[t]he AAO technique protects the utility from

earnings shortfalls," but she failed to quote the remainder of the sentence from the Commission's Order that the AAO technique "softens the blow which results from extraordinary construction programs." Counsel for Ameren Missouri in his Opening Statement and counsel for Ameren Missouri in his cross-examination of Staff witness Mark Oligschlaeger quoted this same sentence as incompletely as did Ms. Barnes in her Surrebuttal Testimony, deleting that part of the sentence that references the "extraordinary construction programs" which identifies capital items as the subject matter covered by the AAO, not "lost revenues." (Vol. 2, Byrne Opening Statement, Tr. 30, lns. 20-24; Mitten Cross-Ex., Tr. 166, lns. 19-24).

While Ms. Barnes cites in her Surrebuttal Testimony that the Commission granted Empire an AAO in File No. EU-2011-0387, she does not identify for what the Commission granted Empire an AAO respecting the tornado that set down in Joplin on May 22, 2011. The parties to the case reached a stipulation and agreement approved by the Commission that permitted Empire to defer actual incremental O&M expenses associated with repair, restoration, and rebuild activities related to the May 22, 2011 tornado, and depreciation and carrying charges equal to its ongoing AFUDC rates associated tornado-related capital expenditures to Account 182.3. Empire filed a pleading in File No. EU-2011-0387 withdrawing, without prejudice, that portion of its application that sought authority to defer the "lost fixed cost" components of its original request. *Re The Empire District Electric Co.*, File No. EU-2011-0387, *Order Approving And Incorporating Unanimous Stipulation And Agreement* (2011).

Ameren Missouri Recovered All Of Its Fixed Costs And A Profit

Ameren Missouri's is asserting that the amount of fixed costs it incurred to serve Noranda did not change as a result of the January 2009 ice storm, but the amount of revenues it received from Noranda decreased for a fourteen-month period between 2009 and 20010.

Ameren Missouri's fixed costs argument assumes that each dollar of revenue it receives from customers is intended to recover a portion of its fixed costs and thus any reduction in revenues results in a failure to recover all of its fixed costs. Mr. Oligschlaeger testified that any reduction in a utility's revenues is first measured against the utility's earned return on equity ("ROE") results, and then against its overall earned rate of return ("ROR") results. A utility that is earning a positive rate of return is fully recovering all of its expenses, both fixed and variable. A utility that is earning a positive return on equity is fully recovering all of its expenses, both fixed and variable, as well as its required interest payments to debt holders. Equity holders are last in line behind the utility's employees, vendors, and debt holders. (Staff Ex. 3, Oligschlaeger Reb., p. 14, ln. 6 - p.15, ln. 3). Mr. Oligschlaeger illustrated his point by means of an example at pages 15-16 of his Rebuttal Testimony, Staff Ex. 3. He noted that a utility's ROE can generally be thought of as equivalent to the concept of "profit" as measured for non-regulated business entities. (*Id*. at p. 13, lns. 20-21).

Exhibit B to Ameren Missouri's Verified Application shows Ameren Missouri experienced a positive ROE in all months affected by the reduced sales from Noranda. By data request, the Staff asked Ameren Missouri to restate its earnings analysis contained in Exhibit B by eliminating 95% of the margin booked in relation to the AEP and Wabash transactions in those months, as if Ameren Missouri had assumed at the time that the margin from the AEP and Wabash transactions would flow through the FAC. Ameren Missouri's response to the Staff data request showed a positive ROE for the same months in 2009 and 2010. Ameren was recovering all of its fixed costs, variable costs, and interest expenses, during the entire period the Noranda load was reduced on account of the January 2009 ice storm. (Staff Ex. 3, Oligschlaeger Reb., p. 16, ln. 12 - p. 17, ln. 1).

Necessity For And Significance Of After-Tax Quantification Of AAO Issue

Both the Staff and MIEC contend that the proper calculation of the quantification of the effect on Ameren Missouri of the loss of Noranda load in 2009 and 2010 is an after-tax calculation because Ameren Missouri is seeking permission in this case to defer "lost revenues / profits," not "fixed costs" or expenses of any kind. (MIEC Ex. 1, Brubaker Reb., p. 7, lns. 12-14; Staff Ex. 4, Oligschlaeger Cross-Sur., pp. 2-3). Any revenues ultimately received by Ameren Missouri as a result of the Commission authorizing Ameren Missouri's deferral request will be fully taxable to Ameren Missouri. Ameren Missouri must receive from its customers $35,561,503 to retain approximately $21,909,940 after income taxes. This fact that there is a pre-tax / after-tax facet to Ameren Missouri's AAO request is significant in itself. When the Commission has allowed Missouri utilities to defer extraordinary expenses in past AAO requests, the amounts were not required to be grossed up for income taxes. The extraordinary events that the Commission has allowed utilities to reflect with AAO deferrals in the past were fully tax-deductible, unlike Ameren Missouri's proposal in this proceeding.

Ameren Missouri witness Ms. Barnes acknowledges in her Surrebuttal Testimony that the approximately $36 million that Ameren Missouri is seeking in its AAO deferral request will be fully taxable to Ameren Missouri and is approximately $22 million after-tax[6]:

> . . . The $36 million of unrecovered fixed costs (approximately $22.5 million after-tax) represented nearly 8.5 percent of the Company's net income in 2009 even when including the revenues from the AEP and Wabash contracts that were put in place to mitigate this loss in net income. . . .

(Ameren Ex. 3, Barnes Sur., p. 6, lns. 11-14).

[6] Ms. Barnes' numbers are prior to the line loss charge adjustment settlement between the Staff and Ameren Missouri.

On May 2, 2012 counsel for the Staff sent an e-mail, Joint Ex. 1, to Regulatory Law Judge Daniel Jordan and copied counsel of record that the Staff and Ameren Missouri have agreed to a dollar settlement of the Staff's line loss charge adjustment. The e-mail stated that the Staff and Ameren Missouri thus agree that the pre-tax quantification of the "fixed costs" (Ameren Missouri) / "lost revenues / profit" (Staff) amount which Ameren Missouri was unable to recover from Noranda due to the effects on Noranda's load of the January 2009 ice storm was $35,561,503, pre-tax, and assuming a composite income tax rate of 38.3886%, the after-tax number is $21,909,940.[7] This information also appears in the transcript for the May 3, 2012 hearing. (Vol. 2, Tr. 16, ln. 12 - Tr. 17, ln. 20).

Ameren Missouri's Misuse Of The "N Factor"

Ameren Missouri witness Ms. Barnes states in a footnote in her Surrebuttal Testimony that in Ameren Missouri's rate case after the January 2009 ice storm, Case No. ER-2010-0036, not only the parties, but the Commissioners themselves acknowledged that it was inappropriate for Ameren Missouri to "suffer a loss:"

> . . . the parties in the case agreed to and the Commission approved the addition of the 'N' Factor to the FAC calculation, which allows the Company to retain revenues from off-system sales in an amount equal to the fixed costs not recovered from Noranda in the event a significant reduction in usage would occur similar to the drop that occurred February 2009-May 2010. In adopting that

[7] The May 2, 2012 e-mail states:

> In the Staff's Statement of Positions for Issue 4, the Staff identified an issue between Staff witness Jason D. Carter and Ameren Missouri witness Steven Wills characterized by the Staff as a line loss charge adjustment. Mr. Carter quantified the adjustment as amounting to $428,250. The Staff and Ameren Missouri have agreed to a dollar settlement of this matter for the purposes of the pending case with no ratemaking or rate design principles being set. The dollar settlement is a positive adjustment of $214,125 to Staff's pre-tax number and a negative adjustment of $214,125 to Ameren Missouri's pre-tax number. Thus, the Staff and Ameren Missouri agree that the pre-tax quantification of the "fixed costs" (Ameren Missouri) / "lost revenues / profit" (Staff) amount which Ameren Missouri was unable to recover from Noranda due to the effects on Noranda's load of the January 2009 ice storm was $35,561,503. Assuming a composite income tax rate of 38.3886%, the after-tax number is $21,909,940.

> provision, the parties and the Commission implicitly acknowledged that it is not appropriate for the Company to suffer a loss in this situation.

(Ameren Ex. 3, Barnes Sur., p. 8, n. 2). Ms. Barnes improperly used the First Nonunanimous Stipulation And Agreement from Ameren Missouri's first rate case, Case No. ER-2010-0036, subsequent to the January 2009 Southeast Missouri ice storm. The First Nonunanimous Stipulation And Agreement from Case No. ER-2010-0036 addressed the following issues, including an "N Factor" applicable to Ameren Missouri's FAC as it applied to the Noranda load under certain conditions: LTS Rate Schedule "Take-Or-Pay" Modification, Fuel Costs, Environmental Cost Recovery Mechanism ("ECRM"), AFUDC On Sioux Scrubbers, Bank Credit Facility Fees, Pension and OPEB Tracker, Payment Period For Non-Residential Customers, Un-Metered Customers--Cable Rates, Demand Side Management ("DSM") Regulatory Asset, Pure Power Program, Demand-Side Management Programs, Municipal Lighting, and Miscellaneous. Although the Staff and MIEC were signatories to the First Nonunanimous Stipulation And Agreement ("Stipulation"), Public Counsel was not. The Stipulation contained a section entitled General Provisions, the first ("a.") and fifth ("e.") subsections of which state, in whole or in part, that none of the signatories shall be deemed to have approved or acquiesced to any ratemaking principle and none of the signatories shall be prejudiced or bound in any manner by the terms of this Stipulation in this or any other proceeding, other than a proceeding limited to enforce the terms of this Stipulation, and the Stipulation is not a contract with the Commission, which is not a signatory:

> a. This Stipulation is being entered into for the purpose of disposing of the issues that are specifically addressed in this Stipulation. In presenting this Stipulation, none of the signatories shall be deemed to have approved, accepted, agreed, consented or acquiesced to any ratemaking principle or procedural principle, including, without limitation, any method of cost or revenue determination or cost allocation or revenue related methodology, and none of the

> signatories shall be prejudiced or bound in any manner by the terms of this Stipulation (whether it is approved or not) in this or any other proceeding, other than a proceeding limited to enforce the terms of this Stipulation, except as otherwise expressly specified herein.
>
> * * * *
>
> e. This Stipulation does not constitute a contract with the Commission. . . .

(Staff Ex. 6, *Re Union Electric Co. d/b/a AmerenUE*, Case No. ER-2010-0036, *Order Approving First Stipulation And Agreement*, Attach. *First Nonunanimous Stipulation And Agreement*, pp. 10, 11). The Commission's March 24, 2010 *Order Approving First Stipulation And Agreement* itself states at page 2: "The Commission is not endorsing any particular position regarding these issues and its approval of this stipulation and agreement should not be interpreted as such an endorsement in any future case." (Staff Ex. 6, *Re Union Electric Co. d/b/a AmerenUE*, Case No. ER-2010-0036, *Order Approving First Stipulation And Agreement*, p. 2).

Staff witness Ms. Mantle noted the N Factor in her Surrebuttal Testimony and counsel for Ameren Missouri gave her the opportunity to further address the N Factor at the evidentiary hearing and correct Ms. Barnes' testimony on the N Factor:

> **Q. [Mr. Mitten]:** Ms. Mantle, were you present in the hearing room earlier today when Ms. Barnes talked about the N factor tariff?
>
> **A. [Ms. Mantle]:** Yes.
>
> **Q. [Mr. Mitten]:** And as she described it, under the N factor tariff, if usuage for Noranda's rate class is reduced by more than 40,000 kilowatt hours in a particular month, Ameren Missouri gets to keep all of the revenues it derives from off-system sales; is that correct?
>
> **A. [Ms. Mantle]:** No, that's not correct.
>
> **Q. [Mr. Mitten]:** How does the N factor tariff work?
>
> **A. [Ms. Mantle]:** The N factor says, if Noranda's load is 40 million kilowatt hours lower than the set in the billing units used in the last rate case, then Ameren

gets to keep the revenues for the amount of the reduction that Noranda's load has been reduced. Anything over that then does flow through the fuel adjustment clause back to the ratepayers, 95 percent of what is above what was already in permanent rates.

Q. [Mr. Mitten]: If you meet the threshold that's in the N factor tariff, Ameren Missouri gets to keep all of the off-system sales revenues, is that correct, up to the point that the company is made whole? Excuse me.

A. [Ms. Mantle]: Actually, I think it -- I don't -- let me find the tariff to really answer, please. The tariff says all off-system sales revenue [OSSR] derived from all kilowatt hour of energy sold off-system due to the entire reduction shall be excluded from OSSR. It does not say anything about matching the revenues that would have been achieved from Noranda.

(Vol. 2, Tr. 141, ln. 19 - Tr. 142, ln. 23).

* * * *

Q. [Mr. Mitten]: By keeping the off-system sales revenues that it is allowed to keep under the N factor tariff, does Ameren, in fact, mitigate the financial impact of losing a significant portion of its Noranda load?

A. [Ms. Mantle]: The way I read it, it can mitigate or even exceed the revenues it receives from its Noranda load.

Q. [Mr. Mitten]: And the financial impacts that the N factor allows Ameren Missouri to mitigate, are those the same financial impacts that Ameren Missouri is seeking to defer in this case?

A. [Ms. Mantle]: Yes.

(*Id*. at Tr. 144, ln. 20 - Tr. 145, ln. 5).

Ms. Barnes testified that there were entries in Ameren Missouri's books in 2011 that indirectly related to the loss of load / power to Noranda in 2009-2010. She identified these entries as relating to the Commission's decision respecting the AEP and Wabash contracts in the Ameren Missouri FAC prudence case, Case No. EO-2010-0255. She stated that Ameren Missouri recorded a charge of $17 million in April 2011 and would have to record a $26 million charge on its 2012 books if the Commission made a similar determination regarding the AEP and

Wabash contracts being flowed through the FAC in the pending Ameren Missouri FAC prudence case. (Vol. 2, Tr. 112, ln. 12 - Tr. 113, ln. 2). Contrary to being punished, as Ms. Barnes asserts in her Surrebuttal Testimony, at page 10, line 23, Ameren Ex. 3, Ameren Missouri wants to be rewarded with an AAO for conduct for which the Commission held in its *Report And Order* in Case No. EO-2010-0255 that "Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenue when calculating the rates charged under its fuel adjustment charge." *Re Union Electric Co. d/b/a Ameren Missouri*, *Report And Order*, p. 2 (2011). Ameren Missouri should not be permitted to use an AAO to effectively offset the Commission's *Report And Order* in Case No. EO-2010-0255. (Staff Ex. 3, Oligschlaeger Reb., p. 10, lns. 11-13; p. 19, lns, 16-18). Also, the Commission's issuance of its *Report And Order* in Case No. EO-2010-0255 on April 27, 2011, should not be considered an extraordinary event justifying the issuance of an AAO. (*Id*. at p. 10, lns. 4-7). Ameren Missouri's proposal for the Commission's authorization of an AAO is inappropriate.

In the remand of the Commission's *Report And Order* in File No. EO-2008-0216, as a result of the Western District Court of Appeals' Opinion, *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 311 S.W.3d 361 (Mo.App. W.D. 2010), KCP&L Greater Missouri Operations Company sought an AAO from the Commission to record the adjustment that the Commission was to order as a result of the Western District Court of Appeals' Opinion. "GMO alleges that the over-collected amount constitutes an extraordinary item that justifies a departure from the Commission's standards for utility accounting." (*Re KCP&L Greater Missouri Operations Company*, File No. EO-2008-0216, *Report And Order On Remand*, p. 20 (August 30, 2011)). The Commission denied GMO's request for an AAO stating, "An adverse ruling is not

an unusual, infrequent, abnormal, or extraordinary event," and "nothing prevents GMO from monitoring the amounts at issue through the FAC process, as the FAC statute and GMO's tariff provide . . ." (*Id*. at p. 21).

Retroactive Ratemaking

An AAO itself is not ratemaking but authorization for accounting treatment that permits a utility to later seek ratemaking treatment. Ameren Missouri's AAO proposal is not appropriate for an AAO, and if authorized by the Commission, would permit Ameren Missouri to seek in a ratemaking proceeding unlawful retroactive ratemaking treatment. Although it can be argued that Issue 5, the issue of retroactive ratemaking, is not ripe or justiciable in this proceeding, counsel for Ameren Missouri announced in his Opening Statement that if the Commission grants Ameren Missouri an AAO, Ameren Missouri will seek ratemaking treatment in the true-up portion of its pending rate case, File No. ER-2012-0166. (Vol. 2, Byrne Opening Statement, Tr. 21, lns. 7-11). The Staff believes that at a minimum this retroactive ratemaking issue should be raised for the Commission's information at this stage. The Staff is not arguing that ratemaking resulting from a proper AAO constitutes unlawful retroactive ratemaking.

The Staff's retroactive ratemaking argument is based on the fact that before the Commission even decides this AAO case or the rate case where ratemaking, i.e., amortization, might be authorized, if an AAO is granted in this case, there have already been two rate cases, Case No. ER-2010-0036 and Case No. ER-2011-0028, involving two sets of general tariffs, beyond the event in question. (*State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 58-60 (Mo.banc 1979); *See State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 884-85 (Mo.App. W.D. 1981)). Again, this is before the possibility of an AAO has even been heard by the Commission. The January 2009 ice storm

occurred just as Case No. ER-2008-0318 concluded, but Ameren Missouri proposed and was authorized new general rate tariffs in Case No. ER-2010-0036 and Case No. ER-2011-0028 since then. Besides violating USoA General Instruction No. 7 for not having occurred in the current period, Ameren Missouri now wants to unlawfully retroactively address revenues by means of an AAO for a period in 2009-2010. Mr. Oligschlaeger testified that without a timely request to defer extraordinary costs (not "lost revenues"), those costs will then be charged to net income on the utility's income statement in the period incurred. He further stated that once recorded on "closed" / final annual financial statements, non-recurring costs of an extraordinary nature should not be in included in rates prospectively. (Staff Ex. 3, Oligschlaeger Reb., p. 11, lns. 18-23).

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 Initial Post-Hearing Brief*, was served via e-mail on all counsel of record this 30th day of May, 2012.

/s/ Steven Dottheim