

**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 RESPONSE TO COMMISSION ORDER DIRECTING NOTICE AND FILINGS

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the July 26, 2011 *Order Directing Notice and Filings* of the Missouri Public Service Commission (Commission) and recommends that the Commission schedule a prehearing conference for the purpose of setting a procedural schedule in this matter. In support thereof, the Staff states as follows:

1. On July 25, 2011, Union Electric Company d/b/a/ Ameren Missouri (Ameren Missouri) filed a Verified Application For Accounting Authority Order (Application). Ameren Missouri asserted in its opening paragraph its filing for an Accounting Authority Order (AAO) was pursuant to Section 393.140(4) and 4 CSR 240-2.060 “addressing the Company’s accounting for fixed costs it has been unable to recover due to an extraordinary, unanticipated, and devastating **ice storm** that struck Southeast Missouri in **late January, 2009.**” (Emphasis supplied). At paragraph 9 on page 5, Ameren Missouri stated it “has now experienced an extraordinary, unanticipated, and non-recurring **loss of sales** due to the ice storm, without experiencing an accompanying reduction in the fixed costs allocated to Noranda in Case No. ER-2007-0002 (**for the months of January and February 2009**) and Case No. ER-2008-0318 (**for the months of March 2009 through April, 2010.**)” (Emphasis

supplied; thus, Ameren Missouri's Application for an AAO, which is intended to recover "lost revenues," is filed 30 months after the January 28, 2009 Southeast Missouri ice storm).

2. Ameren Missouri's request for an AAO is not a timely request for a traditional AAO for which the Staff has recommended approval in the past. Though many prior natural disasters in Missouri (e.g., floods, wind, and ice storms) have resulted in a loss of customer load by the affected utility for a period of time, not until just recently have any utilities in Missouri included "lost revenues" ("loss of fixed cost components of rates") as a financial item for which deferral treatment has been requested.¹ Ameren Missouri is seeking "lost revenues," which is different from traditional out-of-pocket expenditures for extraordinary repair and restoration costs, construction accounting, or life extension construction and coal conversion project costs for which the Staff has recommended AAO treatment in the past.

3. On July 26, 2011, the Commission issued its *Order Directing Notice and Filings* directing the Staff to file a recommendation on the Application by August 18, 2011. It is the Staff's recommendation that the Commission should schedule a prehearing conference for the purpose of setting a procedural schedule. The Staff believes that part of the subject matter of the prehearing conference should be the question of whether an evidentiary hearing is even required to be scheduled and whether the Commission should first take up legal issues, such as collateral estoppel, respecting Ameren Missouri's Application. The Staff believes that a Commission ruling on a motion to dismiss on the basis of collateral estoppel could obviate the need for any evidentiary hearing.

¹ *Re The Empire District Electric Company*, File No. EU-2011-0387, and *Re Southern Union Company d/b/a Missouri Gas Energy*, File No. GU-2011-0392. In these two instances, the extraordinary events addressed are recent, not 30 months in the past.

4. As the Commissioners are aware, the events respecting the subject matter of Ameren Missouri's Application are not new and have been brought to the Commission twice before, first in February 2009 in Case No. ER-2008-0318 and most recently in File No. EO-2010-0255, where the Commission decided for the second time against Ameren Missouri.

5. Ameren Missouri states in its July 25, 2011 Application that it is making the File No. EU-2012-0027 filing because of the Commission's decision in File No. EO-2010-0255. See paragraph 9 on page 5 of Ameren Missouri's Application. On April 27, 2011 in File No. EO-2010-0255, the Commission determined that "Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from the power sales agreements with AEP [American Electric Power Operating Companies] and Wabash [Wabash Valley Power Association, Inc.] from off-system sales revenue when calculating rates charged under its fuel adjustment clause."² In actuality, Ameren Missouri in its instant filing is doing nothing more than engaging, in violation of Section 386.550 RSMo. 2000, in a collateral attack on the Commission's December 30, 2008 *Order Approving Stipulation and Agreement As To All FAC Tariff Rate Design Issues* and the Commission's February 19, 2009 *Order Denying AmerenUE's Application For Rehearing* in Case No. ER-2008-0318.³

² *Re Union Electric Co. d/b/a Ameren Missouri*, File No. EO-2010-0255, *Report and Order*, p. 2 (April 27, 2011).

³ There might be an argument that not only is Ameren Missouri engaging in a collateral attack, but it is proposing retroactive ratemaking and single issue ratemaking, both of which are unlawful, by filing an Application for an AAO to recover "lost revenues" 30 months after the January 28, 2009 Southeast Missouri ice storm. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 56-59 (Mo.banc 1979). But these arguments may run afoul of *State ex rel. Office of the Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806, 812-14 (Mo.App. W.D. 1993) in that no rates are being proposed to be set in File No. EU-2011-0027; File No. EU-2011-0027 is merely an AAO proceeding.

6. In Ameren Missouri's 2007 rate increase case, ER-2007-0002, Ameren Missouri was not authorized a fuel adjustment clause (FAC), but Ameren Missouri sought that the Commission authorize it a FAC in its subsequent rate increase case, ER-2008-0318. Various parties opposed the authorization of a FAC in Case No. ER-2008-0318, but on December 12, 2008 AmerenUE, the Staff, Public Counsel, Missouri Industrial Energy Consumers, Inc. (MIEC), and Noranda Aluminum, Inc. (Noranda) filed a *Stipulation and Agreement As To All FAC Tariff Rate Design Issues*, which specified that the *Stipulation and Agreement As To All FAC Tariff Rate Design Issues* was to be operative only if the Commission determined that AmerenUE should be permitted to use a FAC. The last paragraph on page 1 continuing onto the top of page 2 of the *Stipulation and Agreement As To All FAC Tariff Rate Design Issues* states:

Issues Settled. If, but only if, the Commission determines that the Company should be permitted to use an FAC, this Stipulation and Agreement settles all known rate design issues relating to the Company's request to implement an FAC and the terms and conditions of the FAC tariff (except that the sharing percentage to be inserted into the $FPA_{(RP)}$ formula in the revised FAC tariff attached hereto and incorporated herein by this reference as Appendix A will depend on whether an FAC is approved and what sharing percentage is approved by the Commission and with the exceptions stated in paragraph 8).

(Paragraph 8 of the *Stipulation and Agreement As To All FAC Tariff Rate Design Issues* deals with rights reserved by the Public Counsel.) The Commission on December 30, 2008 in Case No. ER-2008-0318 issued an *Order Approving Stipulation and Agreement As To All FAC Tariff Rate Design Issues* and issued its *Report and Order* on January 27, 2009 with a February 6, 2009 effective date.⁴ AmerenUE requested relief on February 5, 2009 from what it

⁴ The operation-of-law date in Case No. ER-2008-0318 was March 1, 2009.

called in its *Application For Rehearing and Motion For Expedited Treatment* “an act of God—the recent ice storm in Southeast Missouri.”⁵ Ameren Missouri was seeking intervention from the Commission for relief from a failure in its own drafting of the FAC. Ameren Missouri in its *Application For Rehearing and Motion For Expedited Treatment* requested rehearing of what it referred to as one aspect of the FAC issue, and it proposed a modification to the FAC tariff. Ameren Missouri did not propose an AAO.

7. The Staff noted on February 11, 2009 in *Staff's Response In Opposition To AmerenUE's Application For Rehearing* that the law provided AmerenUE options, but AmerenUE did not find those options acceptable because they did not provide AmerenUE a means of not experiencing some “lost revenues” from Noranda. The options which the Staff identified as potential remedies for AmerenUE’s consideration, neither of which was an AAO, were as follows:

- (a) After March 1, 2009, file a new permanent rate case with the Modified FAC Tariff/tariff sheets previously filed on February 5, 2009, or with whatever Modified FAC Tariff/tariff sheets AmerenUE deemed appropriate, and request an expedited procedural schedule. Also, file an interim rate case and request an expedited procedural schedule. There must be a permanent rate case filed in order for there to be an interim rate case because an interim rate case is ancillary to a permanent rate case.⁶
- (b) Alternatively or additionally, even before March 1, 2009, negotiate with the parties to Case No. ER-2008-0318, about amending the Stipulation And Agreement As To All FAC Tariff Rate Design Issues to permit withdrawing

⁵ Case No. ER-2008-0318, AmerenUE February 5, 2009 *Application For Rehearing and Motion For Expedited Treatment*, page 2, lines 2-3.

⁶ *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo.App. K.C.Dist. 1976); *State ex rel. Fischer v. Public Service Comm'n*, 670 S.W.2d 24, 26-27 (Mo.App. W.D. 1984). See *Re Kansas City Power & Light Co.*, Case No. ER-81-42, *Order Dismissing Motion For Interim Rate Relief*, 24 Mo.P.S.C.(N.S.) 50 (1980).

the tariff sheets filed on January 30, 2009 which effectuate the FAC authorized by the Commission, replacing the FAC tariff sheets with non-FAC tariff sheets that collect the increased revenue requirement authorized by the Commission in Case No. ER-2008-0318.

8. On February 19, 2009, the Commission denied Ameren Missouri's request, *Order Denying AmerenUE's Application For Rehearing* in Case No. ER-2008-0318, correctly identifying the issue as a "lost revenues" issue, stating, in part, as follows:

AmerenUE asks the Commission to revise the approved fuel adjustment clause to allow the company to retain a portion of its off-system sales revenue that would otherwise be passed through the fuel adjustment clause. That would allow AmerenUE to recoup the revenue it expects to lose because of decreased sales of electricity to Noranda's aluminum smelting plant due to damage to the plant resulting from the recent severe ice storm.

* * * *

If the Commission were to grant AmerenUE's application for rehearing it would have to set aside the approved stipulation and agreement regarding the fuel adjustment clause, reopen the record to take evidence on the appropriateness of the proposed change, and make a decision before the March 1, 2009 operation of law date. Such action is obviously impossible.

. . . AmerenUE has not shown sufficient reason to rehear the Report and Order. The Commission will deny AmerenUE's application for rehearing.

9. Finally, the Staff notes for the Commission that it commenced submitting data requests to Ameren Missouri in this matter on August 1, 2011.

Wherefore, the Staff in response to the Commission's July 26, 2011 *Order Directing Notice and Filings*, recommends that the Commission schedule a prehearing conference for the purpose of setting a procedural schedule in this matter.

Respectfully submitted,

/s/ Steven Dottheim

Steven Dottheim

Chief Deputy Staff Counsel

Missouri Bar No. 29149

(573) 751-7489 (Telephone)

(573) 751-9285 (Fax)

e-mail: steve.dottheim@psc.state.mo.us

Jennifer Hernandez

Associate Staff Counsel

Missouri Bar No. 59814

(573) 751-8706 (Telephone)

(573) 751-9285 (Fax)

e-mail: jennifer.hernandez@psc.mo.gov

Attorneys for the Staff of the

Missouri Public Service Commission

P. O. Box 360

Jefferson City, MO 65102

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Staff Response To Commission Order Directing Notice and Filings* have been transmitted by electronic mail to all counsel of record this 18th day of August, 2011.

/s/ Steven Dottheim