BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for the Issuance Of an Accounting Authority Order relating to their Electrical Operations and for a Contingent Waiver Of the Notice Requirement of 4 CSR 240-4.020(2)	)))))))	**Case No. EU-2014-0077**

REPLY BRIEF OF MIDWEST ENERGY CONSUMERS' GROUP, MISSOURI INDUSTRIAL ENERGY CONSUMERS, AND THE OFFICE OF THE PUBLIC COUNSEL

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ATTORNEYS FOR MISSOURI INDUSTRIAL ENERGY CONSUMERS

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COME NOW the Midwest Energy Consumers' Group ("MECG"), the Missouri Industrial Energy Consumers ("MIEC"),[1] and the Office of the Public Counsel (collectively referred to herein as "Consumers"), and hereby submit their post-hearing Reply Brief.

In this brief, Consumers will respond to the initial briefs filed by Kansas City Power & Light Company ("KCPL") and KCP&L – Greater Missouri Operations Company ("GMO") (collectively referred to as "the Companies"), as well as to the initial brief filed by the Empire District Electric Company ("Empire"). This brief will not address the initial brief filed by the Staff of the Commission except to note here that Consumers agree with the arguments presented by the Staff. Nothing in the initial briefs of the Companies or Empire alters Consumers' position that the use of an extraordinary ratemaking tool like a tracker or an AAO for recurring costs constitutes poor ratemaking policy, is contrary to the proper method for establishing rates, violates the doctrine against retroactive ratemaking, and is decidedly anti-consumer, especially given the fact that the Companies are both earning in excess of their authorized return on equity. For these reasons, the Commission should simply reject the Companies' request.

[1] Bayer CropScience, Boehringer Ingelheim, Corn Products and Ford Motor Company.

I. Introduction

A. The Companies' Requests in Perspective

As explained in detail below, and in Consumers' initial brief, the Companies fail to meet the legal standard for obtaining an accounting authority order (""AAO") or tracker. Their recourse is to seek a rate increase in a rate case, provided that after consideration of all relevant factors (rather than one isolated cost), they can show that they will under-earn without a rate increase.

To put the Companies' requests for extraordinary accounting treatment in perspective, it is best to look at the requests in the context of the Companies' overall operations. The Companies have chosen to focus on the forecasted increases in transmission costs in isolation, and presented their case accordingly. This presentation is seen in the intentionally dramatic graphs contained in the Companies' witness John R. Carlson's testimony.[2] But what does the expected increase in this one category of cost mean to the Companies' earnings? Not much at all.

Transmission costs have increased since rates were established in Case Nos. ER-2012-0174 and ER-2012-0175. In fact, they have increased to date at a faster pace than they are projected to increase in the future. But this increase has not caused a significant decline in the Companies' earnings. By definition, the fact that the Companies are not seeking rate increases in a rate case (and have no definite plans to file such a case in the near future (Tr. 184)) establishes that they are not under-earning. But there is considerable – and unrefuted – evidence that the Companies are over-earning.

The Companies' plea for extraordinary treatment is based on notions of general fairness and equity; the Companies assert that the transmission costs are rising, and it is only fair to allow

[2] Carlson Direct Testimony, KCPL Exhibit 2.

them the opportunity to later recover the increases in those costs. But what is missing from that picture is the required "all relevant factors" analysis. It could be (here it is likely) some other costs are declining or revenues are increasing by an amount that at least offsets the increase in transmission costs. What is the justification for singling out one particular cost for extraordinary treatment, when the overall financial picture looks so good? Not surprisingly, the Companies fail to answer that question. If the Companies are doing so well now, where is the impetus for the Commission to authorize extraordinary accounting treatment now with the expectation that extraordinary ratemaking treatment will follow? By the Companies' own admission, the transmission expenses are forecasted to rise evenly and steadily for the next several years. If the transmission expense increases pose a problem in the future, the Companies can seek extraordinary ratemaking treatment then. The Commission's authority to implement emergency interim rate increases to protect utilities' financial health is well-established.[3]

II. The Commission Must Judge the Companies' Request by Applying Established Standards

The Companies begin their brief (at page 1) by attempting to rewrite history, specifically, the Commission's denial of the Companies' requests for transmission trackers in their last rate cases. As discussed extensively in Consumers' initial brief, the Commission found that the transmission costs were not extraordinary, and therefore not appropriately the subject of a tracker. In their initial brief, the Companies make much of this latter finding, essentially seeking reconsideration of the now-final Report and Order in Case Numbers ER-2012-0174 and ER-2012-0175. But that

[3] It seems unlikely, however, that the Companies would qualify for emergency rate relief based on the projected increases in transmission costs. For some of the same reasons that extraordinary accounting treatment is not appropriate here (because the projected increases in transmission costs are really not significant compared to Missouri jurisdictional revenues, because the increases will occur over a number of years, and because the amount and timing of the increases are generally known), emergency rate relief will probably not be appropriate. But if other factors combine with the transmission cost increases to threaten the Companies' financial health, the Commission will have options to deal with such a situation.

finding is correct as well as final. What the Companies really have an issue with is their ability to get buy-in from their external auditors if they were to defer transmission costs without explicit Commission authority. Although the Companies assert (at page 2) that "the Commission's *Report and Order* in File Nos. ER-2012-0174 and ER-2012-0175 was an incorrect application of the accounting principles contained in the USOA," the only authority they cite is page 224 of the transcript. But that cite simply establishes the Companies' position that "without a specific Commission authority to defer we can't defer, our accountants won't agree with that and our external accountants won't agree with that." In other words, the Companies are not truly asserting that the Commission's Report and Order was an incorrect application of accounting principles, but rather that the Commission did not contemplate the position that the Companies' external auditors might take if the Companies chose to defer costs (as they clearly could under the USOA if the costs are material) without explicit Commission authorization. As Staff witness Oligschlaeger succinctly put it, although the Companies could defer transmission costs without explicit authorization from the Commission, "they cannot reflect such on their published financial statements." (Tr. 258).

The Companies incorrectly assert (at page 2) that General Instruction No. 7 does not provide guidance to the Companies about what costs can be deferred as a regulatory asset. Staff witness Oligschlaeger addressed this point. He noted that "this Commission has established over the long term a policy by which the criteria of extraordinary which is laid out and defined in general instruction number 7 should generally guide whether deferrals should be allowed into account 182.3." (Tr. 255). Contrary to the Companies' assertion, the testimony of a Staff witness with thirty years of experience is that "instruction number 7 should generally guide" the Commission's decisions regarding deferrals.

The Companies assert (at page 3) that "the Commission should find and conclude that these transmission costs are extraordinary (Tr. 213-214)[.]" What is extraordinary here is that the best evidence that the Companies can cite for the proposal that these transmission costs are extraordinary is from Companies' witness Ives. But his testimony was equivocal at best: "So **extraordinary I don't know**, but certainly a very different operating environment." (Tr. 214; emphasis added). If the Companies' main witness can't just unequivocally say "Yes, these costs are extraordinary," then how can the Commission find them to be extraordinary, especially in view of the mountain of testimony to the contrary?

Just as the Companies had to concede that the costs are not extraordinary, they also had to concede that the costs are not non-recurring. The following exchange between Commissioner Kenney and the Companies' attorney clearly established this concession:

> COMMISSIONER KENNEY: Next is how do you describe these costs that they're nonrecurring?
>
> MR. FISCHER: They're nonrecurring in the sense that we're experiencing an unprecedented build-out of the transmission system at this time and in history. Now we certainly have had transmission costs in the past and to that extent you can say yeah, there's been recurring costs but they've never been at this level, never been projected to be a build-out like this.
>
> COMMISSIONER KENNEY: But they're going to continue in the future, right? These costs are just going to continue.
>
> MR. FISCHER: They will continue in the future and they'll continue to be an issue of how do we deal with those increases. I mean at some point you could include them in a fuel adjustment clause like Ameren has but that will continue to be an issue down the road.

Nothing in the Companies' initial brief effectively rehabilitated their case for seeking AAOs under the traditional "extraordinary, unique, non-recurring and material" standard. They have conceded that the costs are neither extraordinary nor non-recurring. As a result, they are left to argue only that the Commission has discretion to allow deferral, and they proffer no limits on this discretion. Indeed, they suggest (at page 4) that "the Commission has broad regulatory

discretion to grant AAOs" and that this discretion is not guided by any "statute or Commission rule that specifically mentions utility applications for AAOs or that describes legal or regulatory principles governing such applications."

But the Companies' focus on only "statute[s] or Commission rule[s]" specifically addressing AAOs is too narrow. The Missouri Court of Appeals, Western District has addressed AAOs in no uncertain terms. According to that Court: "Because rates are set to recover continuing operating expenses plus a reasonable return on investment, **only an extraordinary event** should be permitted to adjust the balance to permit costs to be deferred for consideration in a later period."[4] The Missouri appellate court has clearly stated that "only … extraordinary" costs should be subject to deferrals. Given witness Ives' admission ("extraordinary I don't know"), and the mountain of testimony against the AAO request, there should be little doubt how the appellate court would view this request.

The only authority that the Companies cite to counter this appellate decision is a bit of *dicta* from a recent Commission order approving a non-unanimous settlement that the Companies cite – incompletely – at page 5. In that case (EU-2012-0131), the Companies filed an application for an AAO to defer and record certain incremental costs associated with their compliance with section 393.1020 *et seq*. RSMo. The Commission's Staff and the Companies reached an agreement and filed a Non-Unanimous Stipulation and Agreement. Neither the Office of the Public Counsel nor the Missouri Energy Group entered into the settlement (although they did not affirmatively oppose it). In approving that non-unanimous agreement, the Commission included the following sentence: "Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, there

[4] State ex rel. Office of Public Counsel v. Public Service Commission, 858 S.W.2d 806 (Mo App. 1993).

is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances." Taken out of context (as the Companies do by citing the sentence and omitting the footnote), this sentence would seem to hint that the Commission might believe that it could grant an AAO in any particular set of circumstances. But the footnote that the Companies omit from their initial brief refers not only to the "extraordinary" standard, but also to the "unusual" standard:

> Section 393.140, RSMo 2000. Extraordinary has been defined as meaning of a nonrecurring nature, and unusual has been defined as meaning a substantial cost. Missouri Gas Energy v. Public Service Comm'n, 978 S.W.2d 434, 437 (Mo. App. 1998); State ex rel. Office of Public Counsel v. Public Service Comm'n, 858 S.W.2d 806, 811 (Mo. App. 1993).

Clearly, the Commission did not mean to indicate that it could arbitrarily grant or deny AAO requests without any reference to any standards. Rather, it meant that neither statutes nor rules explicitly define "extraordinary" and "unusual." By including the footnote that the Companies omitted, it becomes clear that the Commission acknowledged that it needed to follow the standards of extraordinary and unusual set forth in case law, even though those terms are not defined in statutes and rules.

The Companies return to the misleading argument about the Commission's decision in Case No. EU-2012-0131 in their conclusion to this section of their initial brief at page 7. As noted above, it is clear that the Commission was acknowledging the lack of specific statutory or regulatory language defining "extraordinary" and "unusual." But the Commission did not conclude that those standards no longer applied. Rather it was explaining that they apply through case law (and specifically the two cases cited in the footnote that the Companies omitted) instead of through specific statutory or regulatory language.

More broadly, in that same conclusion, the Companies argue that "the Commission has wisely adopted AAOs and trackers for a varied set of circumstances" and implies that such adoption has been independent of the "extraordinary" standard. But this implication is entirely without support in the record. The Companies insist on citing to a laundry list of cases, even though the record is clear that no witness for the Companies bothered to actually read the Commission decisions in those cases. Despite the Companies' initial and admittedly inaccurate list, and the supposedly corrected list,[5] the only competent and credible evidence about past Commission practice with regard to what costs have been subject to deferral is from Staff witness Oligschlaeger who testified that: "I believe **in one way or the other the Commission found that they were extraordinary in nature** but I would agree that they were not all the classical acts of God type situation." (Tr. 262).

[5] There is no competent evidence in the case to support the revised list. There is simply an unverified and unverifiable statement by the Companies' attorneys that the list has been corrected. No witness has attested to the "corrections," described the process of correcting the list, or subjected himself to cross-examination about the necessary details of each case. As is readily apparent from the Companies' incomplete citation to one of these cases (EU-2012-0131), the details do matter. The Commission cannot rely on the revised list any more than it could rely on the admittedly inaccurate initial list because there is no foundation whatsoever to explain the alleged corrections.

A. The Proposed "Discretionary" Standard is Unlawful and Contrary to the Uniform System of Accounts

In their Initial Brief, the Consumers detailed how the Commission had steadfastly applied an "extraordinary" standard to requests for the deferral of costs. In every decision in which it applied a standard,[6] the Commission, without fail, applied an "extraordinary" standard.[7]

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[6] In several cases, the utilities request for deferral treatment was followed by a Stipulation and Agreement between the parties to approve the deferral accounting treatment. As such, the Commission was not asked to expressly apply the extraordinary standard, but instead was simply asked to approve the Stipulation. *See*, Kansas City Power & Light Company, Case No. EO-90-126, issued February 6, 1990; Kansas City Power & Light Company, EO-91-305, issued July 30, 1991; United Cities Gas Company, Case No. GO-92-57, issued March 18, 1992; Empire District Electric Company, Case No. EO-93-35, issued February 2, 1993; Missouri-American Water Company, Case No. WO-93-154, issued December 28, 1994; Missouri-American Water Company, Case No. WO-93-155, issued December 28, 1994; Western Resources, Inc., Case No. GO-93-201; Western Resources, Inc., Case No. GO-94-133, issued January 26, 1994; Missouri Gas Energy, Case No. GO-94-234, issued September 28, 1994; Missouri Gas Energy, Case No. GO-94-255, issued September 28, 1994; Orchard Farm Telephone Company, Case No. TO-95-175, issued May 2, 1995; Laclede Gas Company, Case No. GR-96-193, issued August 28, 1996; United Cities Gas Company, Case No. GR-99-315, issued December 14, 1999; Missouri Gas Energy, Case No. GR-2001-292, issued July 5, 2001; Kansas City Power & Light Company, Case No. EU-2002-1048, issued July 30, 2002; Laclede Gas Company, Case No. GU-2007-0137, issued December 7, 2006; Laclede Gas Company, Case No. GU-2007-0138, issued April 17, 2008; Union Electric Company, Case No. EU-2008-0141, issued April 30, 2008; Missouri Gas Energy, Case No. GR-2009-0355; KCP&L Greater Missouri Operations Company, Case No. EU-2011-0034, issued September 28, 2010; and Kansas City Power & Light Company, Case No. EU-2012-0131, issued April 19, 2012

[7] *See*, Kansas City Power & Light Company, Case No. EO-85-185, issued April 23, 1986; Missouri Public Service, Case No. GO-90-115, issued January 12, 1990; United Cities Gas Company, Case No. GO-90-215, issued July 18, 1990; St. Joseph Light & Power Company, Case No. EO-91-247, issued June 14, 1991; Missouri Public Service, Case No. EO-91-358, issued December 20, 1991; Missouri Public Service, Case No. EO-91-359, issued January 17, 1992; Missouri Public Service, Case No. EO-91-360, issued December 20, 1991; Union Electric Company, Case No. EO-92-179, issued June 12, 1992; Kansas Power and Light Company, Case No. GO-92-185, issued April 10, 1992; St. Joseph Light & Power Company, Case No. EO-94-35, issued October 15, 1993; Empire District Electric Company, Case No. EO-94-149, issued March 8, 1994; St. Louis County Water Company, Case No. WO-94-195, issued February 25, 1994; Laclede Gas Company, Case No. GR-94-220, issued August 22, 1994; St. Louis County Water Company, Case No. WR-95-145, issued September 19, 1995; St. Joseph Light & Power Company, Case No. EO-95-193, issued January 13, 1995; St. Louis County Water Company, Case No. WO-96-234, issued May 29, 1996; St. Louis County Water Company, Case No. WR-

Despite the steadfast adherence to the "extraordinary" standard, for over 30 years, the Companies now desperately latch on to *dicta* in a recent Commission decision[8] and claim that the Commission should instead apply the vague "discretionary" standard. "Thus, the Commission has broad regulatory discretion to grant AAO applications under various sets of circumstances for various types of costs when the Commission believes the granting of an AAO is appropriate."[9]

Contrary to KCPL and GMO's current assertions, as well as the *dicta* relied upon from the recent Commission decision, case law and the Uniform System of Accounts adopted pursuant

96-263, issued March 7, 1997; Kansas City Power & Light Company, Case No. EO-97-224, issued February 13, 1997; Missouri Gas Energy, Case No. GO-97-301, issued June 13, 1997; St. Louis County Water Company, Case No. WO-97-319, issued June 20, 1997; Missouri Gas Energy, Case No. GR-98-140, issued October 10, 2000; United Water Missouri, Inc., Case No. WA-98-187, issued May 18, 1999; St. Louis County Water Company, Case No. WO-98-223; Missouri Gas Energy, Case No. GO-99-258, issued March 2, 2000; St. Louis County Water Company, Case No. WR-2000-844, issued May 3, 2001; St. Joseph Light & Power Company, Case No. EO-2000-845, issued December 14, 2000; Missouri Public Service and St. Joseph Light & Power Company, Case No. GO-2002-175, issued November 14, 2002; Missouri American Water Company, Case No WO-2002-273, issued November 10, 2004; Aquila, Inc., Case No. EU-2005-0041, issued October 7, 2004; Missouri Gas Energy, Case No. GU-2005-0095, issued September 8, 2005; Missouri Gas Energy, Case No. GU-2007-0480, issued December 17, 2008; Aquila, Inc., Case No. EU-2008-0233, issued March 20, 2008; Empire District Electric Company, Case No. EU-2011-0387, issued November 30, 2011; Missouri Gas Energy, Case No. GU-2011-0392, issued January 25, 2012; and Union Electric Company, Case No. EU-2012-0027.

[8] Kansas City Power & Light Company, Case No. EU-2012-0131, issued April 19, 2012. ("Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, there is nothing in the Public Service Commission Law of the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances."). Interestingly, the issue as to the scope of the Commission's authority to defer costs was not an issue in that case. As such, this issue was never tried or legal argument made on this issue. Instead, this statement was unilaterally inserted in the Commission's order without the benefit of any legal briefing from the parties. Interestingly, the Commission provided no legal basis for this unsupported claim that it had broad authority to implement deferrals of costs. Similarly, KCPL has now latched on to this *dicta* and also fails to provide any legal support for this notion of broad authority for deferral accounting.

[9] *KCPL and GMO Initial Brief* at page 4.

to Commission regulation does limit the grant of an Accounting Authority Order solely to extraordinary items.

1. Case Law

Repeatedly throughout this case, the Consumers have referred the Commission's attention to the doctrine against retroactive ratemaking. As reflected in the Supreme Court's UCCM decision, the Commission is precluded from engaging in retroactive ratemaking.

> The Companies take the risk that rates filed by them will be inadequate, or excessive, each time they seek rate approval. To permit them to collect additional amounts simply because they had additional past expenses not covered by either clause is ***retroactive rate making, i.e., the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established***. Past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses, but under the prospective language of the statutes, *§§ 393.270(3)* and 393.140(5) they cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses.[10]

Thus, there is a general prohibition against the Commission utilizing deferral accounting to allow a utility to recover past losses (although, here, there are and were no losses).

Despite this prohibition, the Court of Appeals has recognized the utilization of deferral accounting for "only an extraordinary event."

> The Commission's decision to grant authority to defer the costs associated with the Sibley reconstruction and coal conversion projects by recording the costs in Account No. 186 was the result of the Commission's determination that the construction projects were unusual and nonrecurring, and therefore, extraordinary. The Commission determined the projects to be unusual because of their size and substantial cost. The Commission expressed that deferral of costs just to support the current financial status distorts the balancing process utilized by the Commission to establish just and reasonable rates. Because rates are set to recover continuing operating expenses plus a reasonable return on investment,

[10] State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 59 (Mo. banc 1979) (emphasis added). ("UCCM").

> ***only an extraordinary event should be permitted to adjust the balance to permit costs to be deferred for consideration in a later period***.[11]

Thus, despite KCPL and GMO's contention that the Commission could utilize a "discretionary" standard such that the Commission could allow for deferral of increased transmission costs, the Court of Appeals has indicated that deferrals are permitted for "only an extraordinary event."

2. Uniform System of Accounts

The Court of Appeals decision to limit deferrals for "only an extraordinary event" is consistent with the Uniform System of Accounts. As the Commission has previously found, the Uniform System of Accounts mandates that all items of profit and loss be recorded in the year in which the item occurred.[12] All items of "profit and loss recognized during the year ***shall be included in the determination of net income for that year***."[13]

Despite this general requirement that all items of profit and loss be recorded in the current period, the Uniform System of Accounts ("USOA") provides an exception for the recording of costs associated with "extraordinary" events.

> It is the intent that net income shall reflect all items of profit and loss during the period with the exception of prior period adjustments as described in paragraph 7.1 and long-term debt as described in paragraph 17 below. ***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. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future***.[14]

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[11] *Ibid.*, at page 811 (emphasis added).

[12] Southern Union Company, Case No. GU-2011-0392, issued January 25, 2012, at pages 11-12 (citing to General Instruction 7 of the Uniform System of Accounts).

[13] General Instruction No. 7 (emphasis added).

[14] *Ibid.*

Thus, the Court of Appeals authorization to allow deferral accounting for "extraordinary" items is consistent with the instruction contained in the Uniform System of Accounts.

The guidance of the Uniform System of Accounts is absolutely clear. Despite the Companies' current protests that General Instruction No. 7 and its limitation of deferral accounting to extraordinary items, other Missouri utilities have not agreed with the Companies' current position. In fact, these Missouri utilities have expressly pointed out that deferral accounting, as provided by the Uniform System of Accounts, is limited to "extraordinary" items.

Recently, Intervenor Ameren Missouri sought an Accounting Authority Order in Case No. EU-2102-0027. In its initial brief in that case, Ameren provided a thorough discussion of the requirements for deferral accounting under the Uniform System of Accounts.[15] In that brief, Ameren set forth USOA Section 182.3 (regarding the establishment of regulatory assets); Definition No. 30 (defining a regulatory asset); and General Instruction No. 7 (limiting the creation of regulatory assets to "extraordinary" items). Contrary to the Companies' current claim that General Instruction No. 7 is not applicable to all deferral accounting, Ameren clearly disagreed.

> ***Interpreted together – as they must be – these three provisions reveal several important principles regarding the mechanism the USOA has created for the deferral of extraordinary items***. Those principles must be clearly understood in order to properly evaluate and rule on Ameren Missouri's request for an AAO, including the following:
>
> • Although the general rule is that items of profit and loss that occur in the same period, must, for accounting and regulatory purposes, be reflected in that period for purposes of determining earnings, ***the USOA has created an exception to that rule for extraordinary items and has created a special accounting mechanism for dealing with such items***.

[15] MECG Exhibit No. 6 (*Ameren Missouri Initial Brief*, Case No. EU-2012-0027, filed May 30, 2012, at pages 8-13).

- ***The USOA created a mechanism to defer extraordinary items so that they can be considered for possible inclusion in rates in a future period with one purpose in mind: to enable a utility to protect its earnings from the effects of extraordinary events. If that were not the purpose then there would be no reason for the USOA to include General Instruction No. 7, which specifically carves-out from the general rule an exception for the financial impacts of extraordinary event***.[16]

Thus, contrary to the Companies' current assertion that General Instruction No. 7, and its limitation of deferral accounting to "extraordinary" items, does not apply, Ameren has asserted that the guidance of Instruction No. 7 does in fact apply. Specifically, Ameren pointed out that Account No. 182.3 and General Instruction No. 7 must be "interpreted together." Furthermore, Ameren pointed out that "[i]f that were not the purpose then there would be no reason for the USOA to include General Instruction No. 7." Therefore, as the Commission and the Courts have previously held, deferral accounting is absolutely limited to "extraordinary" events.

B. The Commission Has Never Utilized the "Material, Expected to Change Significantly in the Near Future, and were Primarily Outside the Control of the Public Utility" Standard Now Offered by the Companies

As indicated, the Commission has steadfastly adhered to the extraordinary standard for over 30 years. As the previous section indicates, despite the Companies' current assertions, case law and the USOA reveals that the Commission cannot simply ignore the time-honored "extraordinary" standard. Nevertheless, in their initial brief, the Companies attempt to have the Commission allow an AAO where costs "were material, expected to change significantly in the near future, and were primarily outside the control of the public utility."[17] In fact, relying on

[16] *Ibid.*, at page 12 (emphasis added).
[17] KCPL / GMO Initial Brief at page 6.

several cases, the Companies wrongly imply that the Commission has already applied such a standard.[18]

The Companies' assertion is patently false. A review of the cases relied upon by the Companies readily indicate that the Commission has never applied this standard. In fact, the words now used by the Companies were never even included in the referenced Commission orders. Rather, this false standard is simply the Companies' own characterization of the costs addressed by the AAO request. In no instance did the Commission actually apply such a faulty standard to a request for an Accounting Authority Order. Clearly, the Companies' new standard has no basis in Commission orders, statutes, regulations, case law or the Uniform System of Accounts.

Actually, KCPL and GMO's faulty standard is adopted, at least in part, from the standard utilized by the Commission in determining whether to implement a fuel adjustment clause. Even then, KCPL and GMO unilaterally modify the fuel adjustment clause standard to fit their particular needs. Specifically, where KCPL and GMO now seek to simply require that the costs be "expected to change significantly in the near future," the Commission has in the past required that the costs be "volatile. . . causing significant swings in income and cash flows if not tracked."[19] This requirement that costs be "volatile" is not insignificant.

> Markets in which prices are volatile tend to go up and down in an unpredictable manner. When a utility's fuel and purchased power costs are swinging in that way, the time consuming ratemaking process cannot possibly keep up with the swings. As a result, in those circumstances, a fuel adjustment clause may be needed to protect both the utility and its ratepayers from inappropriately low or high rates. Because AmerenUE's costs are simply rising, that sort of protection is not needed. As Brosch explains, rising, but known, fuel costs are the worst reason

[18] *Id.*

[19] Ameren Missouri, Case No. ER-2007-0002, issued May 22, 2007, at page 21. See also, Aquila, Inc., Case No. ER-2007-0004, issued May 17, 2007, at pages 34-35.

> to implement a fuel adjustment clause because such a fuel adjustment clause allows the utility to recover a single known rising cost while avoiding a rate case in which all its other expenses and revenue, which are changing in the background, will be examined and perhaps used to offset all or part of the rising fuel cost to avoid an unnecessary rate increase. . . . [T]he Commission concludes that AmerenUE's fuel and purchased power costs are not volatile enough [to] justify the implementation of a fuel adjustment clause at this time. . . . Without a fuel adjustment clause, AmerenUE may need to file another rate case sooner rather than later. A future rate case, not a fuel adjustment clause, is the proper means by which AmerenUE should recover its rising fuel costs.[20]

Thus, while AmerenUE's fuel costs were increasing, they were not volatile. For this reason, a fuel adjustment clause was not appropriate for AmerenUE at that time. For similar reasons, if this standard was applied to the Companies' transmission costs, while the costs may be increasing, they are not volatile. As such, if this standard were applied to an AAO request, the Companies would not meet it. Given this, as the Commission has previously stated, "a future rate case, not an [AAO] is the proper means by which [the Companies] should recover … [their] rising [transmission] costs."

Clearly then, the application of the fuel adjustment clause standard is not appropriate. Nevertheless, in the event that the Companies seek to implement or modify a fuel adjustment clause, the statute mandates that such a change be made in the context of a "general rate proceeding."[21]

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[20] Ameren Missouri, Case No. ER-2007-0002, issued May 22, 2007, at pages 23 and 26. The Commission later granted Ameren Missouri an FAC largely because certain off-system sales, a component of fuel costs, were "very volatile" and "net fuel costs" were very uncertain. Ameren Missouri, Case No. ER-2008-0318, issued February 6, 20097, at page 64.

[21] Section 386.266.4

C. **The Types of Costs Addressed in Past AAO Proceedings Readily Indicate That the Companies' Application Should Be Denied**

At pages 7-8, the Companies attempt to avoid the "extraordinary" standard and instead ask that the Commission simply focus on the types of costs addressed by past Accounting Authority Orders. Included as Exhibit B to the Companies' initial brief is a list of cases in which the Companies assert that the Commission has previously granted Accounting Authority Orders.[22]

Despite the Companies' assertions, the types of costs subject to previous Accounting Authority Orders are consistent with the Commission's requirement that only "extraordinary" costs be subject to deferral. Generally, extraordinary costs are either: (1) Acts of God or (2) Acts of Government that impose costs not already reflected in rates. Thus, related to Acts of God, the Commission has granted AAOs for costs related to floods,[23] tornadoes,[24] ice storms[25] and other storms.[26] In each of these cases, since costs associated with such non-recurring events are not

[22] Originally, the Companies offered a different list of cases. Attached as Schedule DRI-1 to Mr. Ives' surrebuttal testimony, the Companies offered a list of cases in which the Companies alleged that the Commission had "approved" Accounting Authority Orders. During cross-examination, KCPL and GMO admit that the list attached as Schedule DRI-1 was incorrect and included cases in which an accounting authority order was denied. Conveniently, the Companies now claim that such misinformation was the result of a "clerical error." (the Companies' initial brief at page 6). Whatever the cause, in their Brief, the Companies seek to correct this "clerical error" and offer Exhibit B, which allegedly "removes the AAO cases that were denied. Research reveals, however, that Exhibit B still includes cases in which the Commission did not approve Accounting Authority Orders. For instance, in Case No. GR-91-291, the Commission did not approve an Accounting Authority Order. *See*, *Report and Order*, at page 5. *See also*, Case No. ER-93-37, *Report and Order*, at pages 6-12 in which the Commission addressed an AAO, but never implemented an Accounting Authority Order; Case No. WR-2000-844, *Report and Order*, at page 25 ("Because these costs are not extraordinary, they should not be afforded extraordinary treatment."); Case No. IU-2010-0164 in which the Commission addressed a request to increase depreciation rates, not to defer and recover costs in a later period.

[23] *See*, Case Nos. EO-94-35; EO-94-149 and WO-94-195.

[24] *See*, Case Nos. EU-2011-0387 and GU-2011-0392.

[25] *See*, Case Nos. EU-2008-0138, EU-2002-1048.

[26] *See*, Case Nos. EO-95-193 and EO-97-224.

reflected in rates, the Commission extended AAO protection to allow deferral and subsequent recovery of such costs. Similarly, related to Acts of Government, the Commission has granted AAOs for costs related to gas service line replacement undertaken pursuant to the Commission's new gas safety rule[27] and the closely related water main replacement,[28] the Commission's new cold weather rule,[29] new financial accounting standards for pensions,[30] new financial accounting standards for OPEBs,[31] new property tax statutes,[32] new renewable energy standards statutes,[33] projects undertaken pursuant to environmental statutes,[34] and security changes as a result of 9-11.[35]

Contrary to the Commission's previous authorization of Accounting Authority Orders for newly imposed costs associated with "extraordinary" events related to Acts of God and Acts of Government, the costs to be recovered pursuant to the Companies' requested AAO are neither newly imposed costs, nor have they been imposed by an Act of God or an Act of Government.

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[27] *See*, Case Nos. GO-90-51, GO-90-115, GO-90-215, GO-91-359, GO-92-67, GO-92-185, GO-94-133, GR-94-220, GO-94-234, GR-96-163, GO-97-301, GR-98-149, GR-99-315, and GR-2001-292.

[28] *See*, Case Nos. WR-95-145 and WO-96-234.

[29] *See*, Case Nos. GU-2007-0137 and GU-2007-0138.

[30] *See*, Case Nos. EO-90-132, WO-93-154, and GR-96-163.

[31] *See*, Case Nos. EO-92-179, EO-93-35, WO-93-155, GO-93-201, GO-94-255, and TO-95-175.

[32] *See*, Case Nos. GU-2005-0095 and GU-2010-0015.

[33] *See*, Case No. EU-2012-0131.

[34] *See*, Case Nos. EO-90-114, EO-90-126, EO-91-305, EO-91-358, GR-94-220, GR-96-163, and GA-98-464.

[35] *See*, Case No. WO-2002-273.

As a result, the Companies' repeated reliance on the types of costs previously addressed by Accounting Authority Orders is misplaced.

III. The Companies' Request Violates Section 386.266.4 as well as KCPL's Commitment Not to Seek a Fuel Adjustment Clause until June 2015

Section 386.266.4 provides that "[t]he commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section only after providing the opportunity for a full hearing in a general rate proceeding, including a general rate proceeding initiated by complaint." Based upon the authority provided in section 386.266, the Commission approved the inclusion of transmission costs in the AmerenUE fuel adjustment clause.[36]

Rather than file a rate case as required by section 386.266.4 to seek approval[37] or modification[38] of its fuel adjustment clause to include recovery of transmission costs, the Companies seek to skirt this statutory requirement by asking the Commission to approve their AAO / tracker application.

The problem with the Companies' request for implementation of an AAO / tracker extends beyond the questionable legality of the Commission's authority to implement such a mechanism. In implementing fuel adjustment clauses, the Commission has typically attached certain customer protections. For instance, the Commission has implemented a 95% / 5%

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[36] *See*, *Report and Order*, Case No. ER-2012-0166, at pages 83-91. *See also*, State ex rel. Office of Public Counsel v. Public Service Commission, Western District Court of Appeals Case No. 75980, opinion issued October 15, 2013.

[37] KCPL does not have a fuel adjustment clause. Instead, KCPL voluntarily waived its ability to seek a fuel adjustment clause until June of 2015. *See*, *Report and Order*, Case No. EO-2005-0329, issued July 28, 2005, at page 15.

[38] The Commission approved GMO's implementation of a fuel adjustment clause in 2007. *See*, *Report and Order*, Case No. ER-2007-0004, issued May 27, 2007, at pages 18-55.

sharing mechanism by which the utility is provided some financial interest in minimizing the cost increases that flow through the fuel adjustment clause.[39] Furthermore, the Commission has required the inclusion of all off-system sales margins in the fuel adjustment clause.[40] Finally, the Commission has required the inclusion of all transmission revenues.[41]

Therefore, given the Commission's holding that transmission costs should be included in a fuel adjustment clause, the Companies seek to skirt the requirement that they seek to implement or adopt a fuel adjustment clause in a "general rate proceeding."[42] Instead, the Companies seek to avail themselves of many of the benefits of such a mechanism without the need of filing a rate case and subjecting their current earnings to scrutiny. In addition, KCPL and GMO seek to pick and choose the aspects of the fuel adjustment clause that they find desirable. Specifically, the Companies want to be allowed to recover all changes in transmission costs, but avoid the customer protections that are attendant to a fuel adjustment mechanism. Specifically, the Companies want to avoid the recognition of transmission revenues or the 95 / 5 sharing that comes with inclusion of transmission costs in the fuel adjustment clauses. Furthermore, KCPL wants to avoid the recognition of off-system sales margins as an offset to the transmission costs.

In effect, the Companies seek a new and improved version of the fuel adjustment clause. They seek to pick and choose the aspects of a fuel adjustment clause that favor them. Further,

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[39] *Id.* at page 54. See also, Report and Order, Case No. ER-2007-0002, issued May 22, 2007, at page 17.

[40] *See*, *Report and Order*, Case No. ER-2007-0002, issued May 22, 2007, at page 16.

[41] *See*, *Report and Order*, Case No. ER-2012-0166, issued December 12, 2012, at page 87.

[42] However, not all transmission costs are eligible for inclusion in an FAC. The cost of transmitting power that the Companies generate is not a cost of "purchased power."

the Companies seek to avoid the express statutory requirement that fuel adjustment clauses, or in this case, aspects of that clause, be implemented in a general rate proceeding. The Commission should reject the Companies' request until such time as they file a general rate proceeding.

IV. The Commission's Previous Holding that the Companies Could Unilaterally Implement a Deferral of these Costs Was Appropriate and Correct

In its Report and Order in the Companies' last rate cases, the Commission made several findings. First, the Commission held that the Companies had not met their burden of proof to defer transmission costs.[43] Second, the Commission found that the deferral of transmission costs did not meet the well-established standard that such costs be extraordinary.[44] Finally, the Commission held that the Companies' request for deferral treatment was "moot" because the utilities already had the ability to unilaterally defer such costs.

> The Applicants ask the Commission to order deferred recording (a "tracker") for transmission costs. But that matter is moot because the Commission can grant no practical relief. No practical relief is possible because Applicants can already "track" transmission cost increases under the plain language of the only authority that any party cites for a tracker [the Uniform System of Accounts].[45]

In their Initial Brief, the Companies argue that the Commission's holding that the Companies could already implement such deferral treatment was "incorrect".[46] Relying on nothing other than their own self-serving testimony, and without any reference to statutes, accounting standards or case law, the Companies assert that the "Commission's *Report and*

[43] Report and Order, Case No. ER-2012-0174 and 0175, issued January 9, 2013, at page 28.

[44] *Id.* at pages 30—32 ("Transmission is an ordinary and typical, not an abnormal and significantly different, part of Applicant's activities. Also, Applicants showed that paying more for transmission than in the previous year is a foreseeably recurring event, not an unusual and infrequent event. Thus, "items related to the effects of" transmission cost increases are not rare and, therefore, are not extraordinary."

[45] *Id.* at page 29 (footnote omitted).

[46] KCPL and GMO Initial Brief at page 2.

Order erred when it suggested that the Companies did not need the prior approval of the Commission to defer these transmission expenses."[47] As the following Federal Energy Regulatory Commission ("FERC") decision indicates, however, the Commission's Report and Order was correct.

As the Commission is well aware, the Uniform System of Accounts was promulgated by the FERC. The USOA was subsequently adopted by most, if not all, state public utility commissions. As the agency responsible for drafting and implementing the USOA, pronouncements of FERC regarding the interpretation and application of the USOA should be deemed conclusive.

In 2005, FERC addressed this exact point, a utility's ability to unilaterally defer costs within the guidelines of the Uniform System of Accounts.

> ***These regulations require that Dominion, not the Commission, make the determination based on generally accepted accounting principles***. This means that Dominion must support its determination with relevant, reliable evidence demonstrating that it indeed meets the criteria for recognition of a regulatory asset discussed *supra* at the time it makes the initial determination, each accounting period thereafter, and when it makes its section 205 [rate case] filing. . . . Our accounting rules require "a utility to recognize a regulatory asset where it [the utility] determines it is probable that a cost that would otherwise be charged to expense in one period will be recovered in rates in another.[48]

Thus, as this Commission determined in its Report and Order in the most recent rate cases filed by the Companies, the FERC has held that the utility, not the regulatory commission, is responsible for making the determination of whether deferral is appropriate under the generally accepted accounting principles.

Undoubtedly, the Companies continue to hesitate to make such a unilateral deferral decision because they realize that such a deferral would not be approved by its external auditors

[47] *Id.* at page 3.
[48] PJM Interconnection, L.L.C. and Virginia Electric and Power Company, *Order on Rehearing*, Docket Nos. ER04-829-002, issued March 4, 2005, at paragraphs 40-41.

"based on generally accepted accounting principles." Similar to the Commission's determination in its last Report and Order, the Companies must undoubtedly concede that a decision to defer such costs would run afoul of the USOA because such costs are not "extraordinary" as required by USOA General Instruction No. 7. Given that such a unilateral decision would not survive the scrutiny of external auditors, the Companies again ask this Commission to relieve them of this decision and to implement the deferral that it cannot implement under the USOA. For the same reason that two current commissioners rejected the tracker mechanism in the Report and Order,[49] and three current commissioners rejected these arguments on rehearing,[50] the Commission should once again refuse to allow the Companies to violate the express directives of the Uniform System of Accounts and book a deferral for these non-extraordinary transmission costs.

[49] The Report and Order was unanimously approved by the Commission including Chairman Kenney and Commissioner Stoll.

[50] Chairman Kenney and Commissioner Stoll were joined by recently appointed Commissioner W. Kenney in a unanimous decision to deny KCPL and GMO's application for rehearing on the deferral of transmission costs.

The Commission Can Only Authorize Deferral in a Ratemaking Case

Empire concedes at page 2 that the Uniform System of Accounts (USOA) governs "the deferred treatment of 'extraordinary' costs."[51] The Companies have continually emphasized that this case does not involve the setting of rates.[52] Companies' witness Darrin Ives agreed that "if the commission were to grant your request in this case that would not be a rate making action…." (Tr. 171). The USOA only allows "amounts of regulatory-created assets, not includable in other accounts, **resulting from the ratemaking actions** of regulatory agencies."[53] Account 182.3(a) also refers to Definition 31, which provides that: "Regulatory Assets and Liabilities are assets and liabilities **that result from rate actions** of regulatory agencies." (Emphasis added.) By the Companies' own admission, an order in this case would not be a ratemaking action, and thus an order in this case cannot create a regulatory asset pursuant to the USOA.

Empire opines that the Commission can *sua sponte* waive the provisions of the USOA, despite the Commission's regulations adopting the USOA. Empire arrives at this dubious conclusion from a single sentence in a 2009 Western District Court of Appeals decision.[54] In that case, the Court denied Public Counsel's point that a duly promulgated revision to the Commission's cold weather rule was invalid because it conflicted with certain requirements of

[51] Although Empire cites to 4 CSR 240-40.040, that regulation applies to gas utilities. The comparable regulation for electric utilities is 4 CSR 240-20.030.

[52] See, *e.g.*, Companies' Initial Brief, pages 2, 3, 7, 8.

[53] 18 CFR 367.1823 - Account 182.3(a), Other regulatory assets; emphasis added. Account 254 (regulatory liabilities) contains similar language.

[54] State ex rel. Office of the Pub. Counsel v. Mo. PSC, 301 S.W.3d 556 (Mo. App. 2009).

the USOA applicable to gas utilities. The Court began its denial of Public Counsel's point by noting that the point was an impermissible collateral attack on a final order of rulemaking:

> The Public Counsel also claims that the accrual accounting basis that Laclede is required to follow by the Uniform System of Accounts is inconsistent with the cash accounting basis that appears in the eligible cost provision in 4 CSR 240-13.055(14)(F)(4). To the extent that the Public Counsel is challenging the language of the rule itself, such a challenge is not properly before this court. The Commission's order adopting this language in its rule is a final order of rulemaking, and, pursuant to section 386.550, RSMo 2000, it is not subject to collateral attack in this appeal.[55]

Only after noting that the point was not properly before the Court did the Court offer the following statement by way of *dicta*:

> Moreover, assuming that an inconsistency exists, it is obvious from the Commission's inclusion of 4 CSR 240-13.055(14)(F)4 that the Commission wanted to include as a cost eligible for recovery the differences in initial payments. The Public Counsel acknowledges that a utility company does not have to keep its accounts in accordance with the Uniform System of Accounts if the company seeks and receives a waiver from the Commission. See 4 CSR 240-40.040(5). Given that the Commission can grant a utility company a waiver from following the Uniform System of Accounts, we see no reason why the Commission, through a regulation, cannot allow a utility company to recover costs under the cold weather rule which may be inconsistent with the Uniform System of Accounts.

Because this statement is merely *dicta*, it is not binding upon this Commission. Moreover, it is not applicable to the current case. The Court opined that the Commission can allow exceptions to the USOA that it adopted by regulation through another duly promulgated regulation in which public notice is given and public comments allowed. That is clearly not the case here. The regulation itself provides that: "The commission may waive or grant a variance from the provisions of this rule, in whole or in part, for good cause shown, upon a utility's written

[55] *Ibid*., at 566.

application."[56] That also is clearly not the case here. The Companies have not even sought waiver of the provisions of the USOA, much less demonstrated good cause for such a waiver.

The Commission adopted the USOA by its promulgation of 4 CSR 240-20.030, and like any regulation it has the force and effect of law.[57] "The rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them." The Commission can change a regulation by revising it or duly promulgating a new regulation (as the Court recognized in the 2009 Public Counsel case cited by Empire), but it cannot simply choose to not follow its own regulations. Here there has been no new regulation, and there has been no waiver requested, and so the USOA – and its 182.3 requirement that a regulatory asset can only be created in a ratemaking action – is binding upon the Commission.

VI. The Companies' Claims that they will be Unable to Recover these Costs without an AAO are Unsupported by the Record

The Companies claim that "Absent the Commission's authorization of an AAO or a tracker, the companies will be deprived of an opportunity to fully recover these expenses through rates."[58] This statement fundamentally misrepresents the way in which regulated utilities recover costs. Utility rates are set based upon the expenses, revenues and rate base in a historical test period (normalized, annualized, and adjusted as necessary). Thereafter, utilities try to manage their business operations so that the rates set in the rate case allow them to pay their bills and provide a profit to their shareholders. Utilities do not submit receipts to the Commission for

[56] 4 CSR 240-20.030(5)

[57] Farrow v. St. Francis Med. Ctr., 407 S.W.3d 579, 588 (Mo. 2013), citing State ex rel. Martin-Erb v. Missouri Com'n on Human Rights, 77 S.W.3d 600, 607 (Mo. banc 2002).

[58] *Companies' Initial Brief*, page 13.

reimbursement of specific expenditures. Rather, they look to the overall earnings to determine if rates are adequate. It is expected that some costs will go up and some will go down. In some months, revenues will be higher than anticipated, and in other months they will be lower than anticipated. So long as a utility is earning at least some return, it is fully recovering all of its expenses through rates.

And the evidence in this case clearly shows that both Companies are currently recovering all of their expenses and providing returns to shareholders. Indeed, credible, competent and substantial evidence shows that both Companies are earning above their authorized level of return, despite what they claim to be significant increases (Tr. 223) in transmission expense since rates were last adjusted. MECG/MIEC witness Greg Meyer testified that his analysis shows "that the revenues that are being collected from ratepayers is sufficient to cover all their operating expense currently and to provide a return that's in excess of their authorized." (Tr. 302). And Meyer's excessive return calculation included the "pretty significant" increase in transmission expenses for which the Companies are seeking AAOs. (Tr. 223, 303). The evidence provided by Mr. Meyer is unrefuted; the Companies made no attempt whatsoever to quantitatively counter his conclusions that the Companies are earning in excess of their authorized returns. In such circumstances, the companies not only have "an **opportunity** to fully recover transmission expenses through rates," but are **actually** fully recovering all their transmission expenses through rates and earning large profits to boot.

VII. The Commission Should be Allowed to Consider The Statements Included in the Ameren Brief filed in Case No. EU-2012-0027

At pages 28-30, the Companies seek to prevent the Commission from considering the positions advanced by Ameren in its initial brief in Case No EU-2012-0027. As reflected in the previous motion for reconsideration, the rules of evidence allow for the inclusion of judicial admissions. Specifically, as a judicial admission, the statements advanced by Ameren in that brief are not hearsay.

The case law regarding judicial admissions is well established in both Missouri and nationwide.

> Judicial admissions of a party are admissible in evidence even though not against the declarant's interest when made or afterward, and may be used either to attack his or her credibility of as affirmative substantive proof against him or her. Any deliberate, clear, and unequivocal statement, either written or oral, made in the course of a judicial proceeding, qualifies as a judicial admission. . . . Judicial admissions may occur at any time during the litigation process, and are not limited to a statement made in a particular motion or application proceeding.[59]

Importantly, as here, judicial admissions are not required to be made in the context of the immediate case. Rather, a judicial admission may occur in another judicial proceeding.

> So far as its competency in evidence is concerned, the admission may be made either in the case in which it is sought to be used, such as on a former trial of the case, or it may be made in some other action or judicial proceeding, the record of the former action being admissible for the purpose of establishing the admission. . . . However, with respect to conclusiveness, an admission made in another case does not have the same force as a judicial admission in the same case, but is regarded as being in the nature of an ordinary, extrajudicial, or quasi admission. . . . Availability of other evidence of the fact does not affect the admissibility of a judicial admission, but it may be received, although declarant is an available witness or even present in court. . . . An admission contained in a pleading in one action may, however, be received in evidence against the pleader on the trial of another action, even though the former action involved a stranger to the subsequent one. . . For prior pleadings to be admissible such pleadings must

[59] C.J.S. Evidence §542.

> indicate that the party against whom they are admitted has adopted a position inconsistent with that in the earlier litigation.[60]

The doctrine which allows for the admissibility of statements made in other judicial proceedings is also recognized by Wigmore.

> That the statements of the pleadings are *not those of the party himself* must be immaterial, since they are those of his authorized attorney. The appointment of attorney and counsel makes them agents to manage the cause in all of its parts, including unquestionably the pleading. The agent's utterances for the principal in the pleadings bind the party as solemn judicial admissions; much more, then, may the agency suffice to admit them as informal quasi admissions.[61]

Still again, McCormick points out that the statements of an authorized attorney made in another proceeding are judicial admissions that can be offered against the party.

> If an attorney is employed to manage a party's conduct of a lawsuit, the attorney has *prima facie* authority to make relevant judicial admissions by pleadings, by oral or written stipulations, or by formal opening statement, which unless allowed to be withdrawn are conclusive in the case. Such formal and conclusive admissions, which are usually framed with care and circumspection, are sometimes contrasted with an attorney's oral out-of-court statements, which have been characterized as "merely a loose conversation."[62]

As far back as 1874, Missouri Courts have allowed for the judicial admission of an attorney contained in another case.

> It was perfectly competent for plaintiffs to offer in evidence the petition which the attorney of Rawlings, at the latter's instance, had filed in the suit against Pennison [another case]; and this wholly regardless of the question, whether Rawlings had even seen the petition after it was drawn up, or not?[63]

Similarly, in Mitchell Engineering Co. v. Summit Realty, the Court expressly acknowledged that the doctrine regarding judicial admissions should extend to briefs in previous

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[60] C.J.S. Evidence § 542 and § 547.

[61] IV Wigmore, Evidence §1066 (Chadbourn rev. 1972).

[62] McCormick on Evidence, 7th Edition, § 259.

[63] Dowzelot v. Rawlings, 58 Mo. 75 (1874).

cases. "What we now decide and rule is that briefs from prior appellate proceedings are permissible sources of admissions against interest and as such, if not otherwise prohibited by policy or rule of law, are admissible as competent and substantial evidence in subsequent trials or hearings."[64]

In its previous brief in Case No EU-2012-0027, Ameren has made statements that are contradictory to its statements in the immediate case. While not a conclusive judicial admission since it was in another case, it may be offered to show Ameren's contradictions. Specifically, in the current case, Ameren claims that the USOA does not impose any particular standard for a request to defer certain costs under an Accounting Authority Order.

> EU-2014-0077: "There are no "standards" that limit the Commission's discretion in ruling upon a request for an Accounting Authority Order ("AAO"). As the Commission has long stated, decisions on AAO requests are "best performed on a case by case basis." *In re: Missouri Public Service,* Report and Order, 1 Mo. P.S.C. 3d 200 (Dec. 20, 1991). While the Commission has examined various factors in the past – most notably whether the AAO request involves something "extraordinary" (which the Commission has in the past defined as "unusual and nonrecurring" (*Id.*)) -- the Commission is not bound to any one standard or factor and has broad discretion to determine each AAO request based upon the particular circumstances of the request at issue. *In re: KCP&L*, Order Approving Stipulation and Agreement, File No. EU-2012-0131 (Eff. Apr. 30, 2012) ("there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to a particular set of circumstances.")."[65]

In contrast, in its initial brief in Case No. EU-2012-0027, Ameren clearly indicated that the USOA allows for the deferral of only extraordinary items.

> EU-2012-0027: "Interpreted together – as they must be – these three provisions [Definition No. 30, Account 182.3 and General Instruction 7] reveal several important principles regarding the mechanism the USOA has created for

[64] Mitchell Engineering Co., a Division of CECO Corp. v. Summit Realty Co., Inc., 647 S.W.2d 130 (Mo. App. 1982). *See also*, Kansas City v. Keene Corporation, 855 S.W.2d 360 (Mo. 1993) ("Facts stated in a brief filed in a prior appellate proceeding in a case constitute ordinary admissions against interest, which are admissible in subsequent trials or hearings").

[65] *Ameren Position Statement,* Case No. EO-2014-0077, filed January 14, 2014, at page 1.

the deferral of extraordinary items. Those principles must be clearly understood in order to properly evaluate and rule on Ameren Missouri's request for an AAO including the following:

• Although the general rule is that items of profit and loss that occur in the same period must, for accounting and regulatory purposes, be reflected in that period for purposes of determining earnings, the USOA has created an exception to that rule for extraordinary items and has created a special accounting mechanism for dealing with such items.

• The USOA created a mechanism to defer extraordinary items so that they can be considered for possible inclusion in rates in a future period with one purpose in mind: to enable a utility to protect its earnings from the effects of extraordinary events. If that were not the purpose then there would be no reason for the USOA to include General Instruction No. 7, which specifically carves-out from the general rule an exception for the financial impacts of extraordinary events.

• In order to qualify as "extraordinary" under the USOA an event or transaction must satisfy each of the four criteria specified in General Instruction No. 7. The event or transaction must be: (1) of unusual nature and infrequent occurrence; (2) significant events; (3) abnormal and significantly different from the ordinary and typical activities of the utility; and (4) not reasonably be expected to recur in the foreseeable future.[66]

Contrary to its statements in the immediate case that there is no standard for deferrals under the USOA, in its previous brief, Ameren has indicated that the only exception to the USOA policy regarding current recording of costs is in the case of an extraordinary event. Certainly, as permitted by Federal Rule of Evidence 801(d)(2) and the guidance provided by the Mitchell Engineering Court, MECG should be permitted to use these statements as a judicial admission.

In its initial brief, KCPL and GMO attempt to exclude the Ameren brief on the basis that the Ameren case "dealt with different facts and circumstances."[67] KCPL and GMO's argument is irrelevant. As reflected in this brief where the Ameren brief was considered, the Consumers are not arguing the facts of the Ameren proceeding. In fact, the sections of the brief relied upon

[66] *Ameren Initial Post-Hearing Brief*, Case No. EU-2012-0027, filed May 30, 2012, at pages 12-13.

[67] *KCPL and GMO Initial Brief* at page 29.

herein is limited solely to Ameren's interpretation and application of the Uniform System of Accounts. In this regard, the portion of the Ameren brief that applies the facts in that case to Ameren's interpretation and application of the USOA is not relied upon.[68]

Ultimately, the Commission needs to be aware that it is not bound by the same considerations that would apply in a jury trial. For this reason, given its expertise and ability to weigh the evidence, the Commission has taken a liberal approach to the inclusion of evidence. Related to this expertise, the Commission is not bound by the technical rules of evidence,[69] but is permitted to consider and weigh all such evidence. It is unquestioned that the positions advanced in the Ameren brief are relevant. As such, the Commission should allow inclusion of the Ameren brief in Case No. EU-2012-0027 and recognize that the positions advanced therein directly contradict the Companies' current interpretation and application of the Uniform System of Accounts.

VIII. Conclusion

Consumers have shown, in this brief and in their initial brief, that the Commission's discretion to grant AAOs is limited, by statute, regulation and case law, to deferral of extraordinary expenses. Moreover, Consumers have shown, in this brief and in their initial brief, that the transmission expenses for which the Companies seek deferral authority are clearly not extraordinary but usual and recurring.

In addition, Consumers have shown that the Companies are currently overearning despite increases in transmission expenses since their rates were last set. It would be fundamentally unfair, and a gross distortion of the ratemaking process, to authorize extraordinary accounting

[68] While MECG offered the entirety of the brief for purposes of thoroughness, MECG only seeks to have admitted pages 8-13 of the Ameren brief that addresses Ameren's interpretation and application of the USOA.

[69] Section 386.410.

treatment (with the presumption that extraordinary ratemaking treatment will follow) under such circumstances.

For all of the foregoing reasons, the Consumers respectfully request that the Commission deny the Companies' request for deferral accounting for their recurring, non-extraordinary transmission costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been transmitted electronically to all counsel of record this 11th day of March, 2014.

/s/ Lewis R. Mills