BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company, d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	Case No. ER-2012-0166

MOTION TO STRIKE PORTIONS OF INITIAL POST-HEARING BRIEF

In accordance with 4 CSR 240-2.080, Union Electric Company, d/b/a Ameren Missouri (Ameren Missouri or the Company), moves to strike three passages from the *Post-Hearing Brief of Natural Resources Defense Council, Renew Missouri and Sierra Club* ("the Brief"), which was filed on November 5, 2012. As described below, through each of those passages the Natural Resources Defense Council (NRDC) and its affiliated parties attempt to improperly introduce new evidence through the Brief. In support of its motion, Ameren Missouri states as follows:

1. The first passage where the NRDC and its affiliated parties attempt to introduce new evidence appears at page 5 of the Brief, and states as follows:

> On this point, overwhelming evidence has been marshaled in recent years by the National Research Council of the National Academy of Sciences, the Congress's Office of Technology Assessment, the National Association of Regulatory Utility Commissioners, and the National laboratories, among many others. Although "[t]he efficiency of practically every end use of energy can be improved relatively inexpensively,"[1] customers are generally not motivated to undertake investments in end-use efficiency unless the payback time is very short, six months to three years . . . The phenomenon is not only independent of the customer sector, but also is found irrespective of the particular end uses and technologies involved."[2]
> . . .
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> [1] U.S. National Academy of Sciences Committee on Science, Engineering and Public Policy, Policy Implications of Greenhouse Warming, p. 74 (1991). More recent reviews of energy-efficiency opportunities and barriers appear in National Research Council, Energy Research at DOE: Was it Worth It? (September 2001) and World Business Council for Sustainable Development, Energy Efficiency in Buildings: Transforming the Market, pp. 12 & 20 (2010).
> [2] National Association of Regulatory Utility Commissioners, Least Cost Utility Planning Handbook, Vol. II, p. II-9 (December 1988).

2. Neither the information from the National Academy of Sciences, the congressional Office of Technology Assessment, the National Association of Regulatory Utility Commissioners, and the "National laboratories," which is summarized in text of the Brief, nor the information contained in the articles and other works that are cited in the footnotes related to that text, appears anywhere in the pre-filed or oral testimony of any witness in this case. Therefore, the facts and opinions expressed in the text of the Brief, as well as the facts and opinions expressed in the publications cited in the footnotes related to that text, constitute extra-record evidence that the NRDC and its affiliated parties are improperly presenting to the Commission – and to all other parties to this case – for the first time in the Brief.

3. The second passage where the NRDC and its affiliated parties attempt to introduce new evidence appears at page 6 of the Brief, and states as follows:

> First, the Commission-approved lost-revenue mechanism does allow Ameren to recover lost revenues from some non-utility energy efficiency efforts. Specifically, it does so by allowing the company to assume a net-to-gross value of 1.0, which means that it will assume that 100% of the savings from participant-installed measures is fully attributable to Ameren's programs. (Unanimous Stipulation, p. 4 footnote 7 and p. 9, fn.8).

4. Although several witnesses in this case mentioned the *Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing*, which the Commission approved in Case No. EO-2012-0142, and a copy of that stipulation was attached to the rebuttal testimony of the Company's witness William R. Davis as Schedule WRD-ER1, no witness provided written or oral testimony that purported to go beyond the four corners of that stipulation to explain (i) how the "lost revenue mechanism" (a phrase used nowhere in the stipulation) works, or (ii) the significance or meaning of "a net-to-gross value of 1.0," as used in the stipulation. Because the text quoted above attempts to explain the substance of those portions of the MEEIA stipulation – explanations that were not offered or addressed by any witness in this case – that portion of the

Brief also constitutes extra-record evidence that the NRDC and its affiliated parties are presenting to the Commission and the other parties for the first time in the Brief.

5. The final passage where the NRDC and its affiliated parties attempt to introduce new evidence also appears at page 6 of the Brief, and states as follows:

> Savings estimates by independent evaluators studying similar programs in many other states, including Ameren Illinois programs, are significantly discounted to account for free-ridership, or the extent to which some program participants would have installed the measure even without the contribution from Ameren's programs. By not accounting for free-ridership, the lost-revenue mechanism allows for recovery of revenues that might have been lost as a result of efficiency from third-party policies or programs.

6. As was the case with the previous two passages, the information presented in this excerpt appears nowhere in the written or oral testimony of any witness in this case. In fact, no witness used the phrase "free ridership," or discussed or described that concept, in any written or oral testimony presented in this case. The text quoted above, which introduces the issue/concept of "free ridership" into this case for the first time through the Brief, is yet another example of the attempt by the NRDC and its affiliated parties to introduce new, extra-record evidence into this case through the Brief.

7. Section 536.070, RSMo, and 4 CSR 240-2.130 govern the presentation of evidence by parties to a contested case. Taken together, those provisions are designed to ensure that evidence in contested case hearings is presented in a manner that allows all parties the opportunity to test that evidence through cross-examination and to offer contravening testimony or evidence. Accordingly, there is no provision in either the statute or the Commission's rule that allows a party to present evidence through the party's post-hearing brief. And although Ameren Missouri has not been able to find any case law that specifically addresses the issue in the context of a post-hearing brief in an administrative proceeding, the remedy that applies to court-filed briefs is clear: courts cannot consider evidence presented for the first time in a brief, and

when such evidence is presented in that manner the appropriate remedy is to strike the offending passages. *See, Daniels v. Mo. Div. of Employment Security*, 248 S.W.3d 630, 633 (Mo. App. 2008). Because it similarly would be improper for the Commission to consider extra-record evidence in this case, the same remedy should be imposed here.

WHEREFORE, for the reasons stated, Ameren Missouri asks the Commission to issue an order striking each of the three passages identified in this motion from the *Post-Hearing Brief of Natural Resources Defense Council, Renew Missouri and Sierra Club*, and providing the Company such other relief as the Commission deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, on the following parties on the 9th day of November, 2012:

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