BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariffs to Increase its Revenues for Electric Service	)))	**Case No. ER-2012-0166**

POST-HEARING REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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I. INTRODUCTION

This brief will address the same issues addressed in Public Counsel's Initial Brief. Those issues, as identified in the List of Issues, are:

1. Plant in Service Accounting
2. Rate Case Expense
3. Return on Equity (including Regulatory Policy and Economic Considerations)
4. Class Cost of Service, Revenue Allocation and Rate Design

II. PLANT IN SERVICE ACCOUNTING

As it did in its opening statement on this issue at the evidentiary hearing, Ameren Missouri leads off the discussion in its brief (at pages 36-37) of its Plant in Service Accounting proposal with a reproduction of its Exhibit 49. Because there is no scale that is meant to equate to a period of time, that exhibit is quite misleading.

Whether intentional or not, Ameren Missouri's failure to draw its diagram to scale certainly has the effect of exaggerating the issue. Shown below is the line from Ameren Missouri's diagram, only here it is drawn to scale, using reasonable assumptions. The blue portion at the left represents the construction period during which AFUDC is accrued and depreciation has not begun. For the purposes of this illustration, the construction period is five years. The small red section – which in Ameren Missouri's diagram is the largest piece! – is the period between the time the plant goes into service and the time it is reflected in rates. For the purposes of this illustration, the plant goes into service fifteen months before it is reflected in rates, or about four months before a rate case is filed.[1] The long blue section to the right is the

[1] Fifteen months has been the approximate interval between Ameren Missouri rate increases in

period in which the plant is in rate base, depreciating and earning a return. For purposes of this illustration, the plant is in service for thirty-five years.

Use of a proper scale clearly illustrates that the "red zone" is just a small blip in the life cycle of a piece of plant. Putting things in perspective shows why normal ratemaking is adequate for most plant additions, and why Plant in Service Accounting (a.k.a. Construction Accounting) should be reserved as an extraordinary remedy for ordinary expenditures.

Ameren Missouri claims that Plant in Service Accounting is needed because, during that brief red blip, a "utility receives absolutely no compensation … for the cost of capital that it has invested in the plant. (Ameren Missouri Brief, page 37) This statement is only true if one views a particular piece of plant in pristine isolation. But such isolation is antithetical to the regulatory paradigm. Matching revenues, expenses and rate base during a representative period is at the heart of the regulatory paradigm. A particular item or items, like the ones Ameren Missouri seeks to include in its Plant in Service Accounting scheme, may move the balance in one direction, but without looking at all factors one cannot know what other items may move the balance in the other direction. As MIEC witness Brosch stated:

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recent years. (Transcript, page 867) For significant plant additions, this period would be even shorter. For significant plant additions like a scrubber or a generating unit, utilities generally try to time rate cases so that the plant goes into service very close to the true-up cut-off date (only five months before being reflected in rates). In that situation, the red section is only a third as long as the one shown above:

> There can be incremental expenses. There can be cost savings. There can be -- there often is in a replacement scenario the retirement of an existing asset, the capitalization of a new asset, the cessation of depreciation on the old asset, the commencement of depreciation on the new asset.
>
> The elegance of the traditional model is, we provide an opportunity, indeed an obligation to quantify and update all of those things instead of looking in isolation at this one known increase in costs and picking it out for preferential or extraordinary rate treatment, and that's why it's objectionable. (Transcript, page 797)

Utility regulation is not intended to be, nor should it be, a mechanism for actual cost recovery.

As it did in its testimony, Ameren Missouri in its brief seeks to penalize Public Counsel (and other parties) for "doing the right thing" by agreeing to Construction Accounting for certain large projects. Public Counsel (and others) recently agreed to Construction Accounting for the Sioux scrubbers because that was an unusually large project. But the types of construction activities that Ameren Missouri seeks to include in its Plant in Service Accounting mechanism are neither large nor unusual. Indeed, they are the types of projects that Ameren Missouri has been building pretty much on a daily basis for 100 years. The logic that allows for extraordinary accounting for extraordinary projects simply does not extend to the everyday routine business activities of an electric utility.

At page 39 of its brief, Ameren Missouri cites to a list of three items from witness Lynn Barnes' "cheat sheet" (Transcript, page 701) that Ameren Missouri would like to invest more money in. Bear in mind that a vertically-integrated electric utility like Ameren Missouri has literally millions of pieces of plant, so it is not very compelling that the main witness on Plant in Service Accounting could only come up with three items even when using a cheat sheet. Moreover, she was unable to provide any evidence of particular benefit to customers that would justify spending additional money on any of the three. In fact, with respect to the one item out of the three on which there is the most evidence, that mobile substations, the record does not reflect:

1) how many Ameren Missouri currently has (perhaps "one or two;" Transcript, page 719); 2) how they would affect restoration times; or 3) how many more would be cost effective. There is even less evidence about the cost-effectiveness of investing more quickly in stationary substations and downtown underground facilities. Ameren Missouri's premise that authorizing Plant in Service Accounting will create additional incentive for Ameren Missouri to more quickly and more heavily invest in its system may very well be accurate, but there is no evidence in the record in this case that Ameren Missouri needs to increase its rate of spend. In fact, all of the evidence from all of the local public hearings is that Ameren Missouri is already spending at a rate that is pushing its customer base to the breaking point.

Ameren Missouri concludes its discussion of Plant in Service Accounting (at page 45) by doing a 180 degree turn and arguing that Plant in Service Accounting really won't make Ameren Missouri better off. For example, at page 39 of its brief, Ameren Missouri claims that the alleged problem that Plant in Service Accounting is designed to address is "a significant contributor" to what Ameren Missouri believes to be insufficient profit. That is, after all, the only way that Ameren Missouri can support such a huge change to the regulatory paradigm: by proving both a huge problem and a mechanism that solves it. But Ameren Missouri president and CEO Warner Baxter testified that Plant in Service Accounting would not substantially reduce the Company's risk. (Transcript, pages 274-275) And Ameren Missouri concludes its argument in its brief by echoing this notion, stating that "it would be inappropriate to make a downward adjustment to Ameren Missouri's ROE if the Commission elects to authorize Plant-in-Service Accounting." If this radical departure from traditional ratemaking that no other Commission in the nation has allowed will not substantially reduce Ameren Missouri's risk, why inflict it upon ratepayers?

III. RATE CASE EXPENSE

Ameren Missouri, at page 113 of its brief, attempts to deflect Public Counsel's criticism of its level of rate case expense by noting that it is a tiny bit lower in this case than in the last case. While that may be true, Ameren Missouri is still spending on this one case approximately $2,000,000 that it wants customers to cover. Just because Ameren Missouri's case this time is slightly less elaborate than last time does not mean that it is prudent or reasonable. And the Company concedes that the amount it will spend on this case "is comparable to the expense the Company incurred in the last two rate cases." (Exhibit 13, Barnes Surrebuttal, page 8)

Ameren Missouri notes at page 114 that Public Counsel discussed rate case expense at local public hearings and "elicited" comments opposing the recovery of rate case expense. It fails to mention that Ameren Missouri itself discussed – sometimes at stultifying length – the reasons it wants to raise rates, but failed utterly to "elicit" any supporting comments. The real reason that there were comments opposing recovery of rate case expense is because it is obvious that this expense is different than other utility expenses. The real reason that it just **feels wrong** to force ratepayers to pay millions of dollars for high-priced lawyers and experts whose sole purpose is to raise rates is that it **is wrong**. Paying in rates for the salary of a lineman who is working to ensure reliable service is entirely different from paying the outrageous fees of an expert hired solely to try to convince this Commission to actually **raise** Ameren Missouri's return on equity above the level last authorized. There is no benefit whatsoever to ratepayers from the services of the ROE expert; there is a clear, tangible benefit from the work of the lineman. The Company argues at page 127 that it would not be logical to treat the multi-hundred thousand dollar fees of some experts differently than routine vegetation management costs. Public

Counsel submits that it would not be logical to treat them the same. They are not just different in scale; they are different in kind. A ratepayer does not get any benefit from the work performed by a high-priced ROE witness. A ratepayer does not get any benefit from the Company hiring outside experts simply to bolster the testimony of in-house personnel whose salaries are already in rates.

Throughout its brief, Ameren Missouri emphasizes that it can find no rationale for Public Counsel's proposed 50/50 split of reasonable rate case expense.[2] While it is true that there is no mathematical formula that creates this split, the Commission is well within its discretion and expertise to determine a fair allocation. Just as it did when it determined (arbitrarily) to allow a 95% pass-through of fuel cost increase in the Fuel Adjustment Clauses, and just as it does when it decides rate design issues without exactly following Class Cost of Service Studies, the Commission can reasonably determine how to split rate case expenses between shareholders and ratepayers. The Commission could even decide **not** to split the reasonable costs of the rate case. It could agree with Public Counsel that the costs of outside experts and attorneys should not be borne by ratepayers, but disagree that the remaining costs should be split.

The Company states that: "While the Company acknowledges that it should not 'automatically' be able to recover rate case expenses, the Commission has always recognized that 'such costs are routinely accepted as a cost of doing business.'"[3] But the MGE case does not stand for that proposition at all. In context, the quote that Ameren Missouri provides in its brief

[2] As discussed in Public Counsel witness Robertson's testimony, reasonable rate case expenses consist of expenses associated with in-house personnel charged to the rate case, travel expense, administrative support, etc. They do not include the fees charged by outside experts and outside attorneys.

[3] Ameren Missouri brief at pages 114-115, citing to the September 21, 2004 Report and Order in a Missouri Gas Energy (MGE) rate case, Case No. GR-2004-0209.

is "MGE is entitled to recover **its reasonable and prudently incurred cost** of presenting this rate case to the Commission. Such costs are routinely accepted as a cost of doing business…."[4] And the Commission in that case found that a large portion of the company's rate case expense should not be recovered from ratepayers, partly because the outside attorneys' fees were too high, and partly because the work done by some of those attorneys was duplicative of other attorneys' work. The Commission stated:

> The Commission is hesitant to disallow expenses incurred by MGE in prosecuting its rate case. The company is entitled to present its case as it sees fit and the Commission will not lightly intrude into the company's decisions about how best to present its case**. However, the Commission has a responsibility to ensure that the expenses that the company submits to its ratepayers are reasonably and prudently incurred.** Otherwise, the company could take a cost-is-no-object approach to its rate case presentation, secure in the knowledge that the ratepayers would be required to pay for any cost that the company might incur.
>
> …
>
> Eric Herschmann and Michael Fay of the Kasowitz firm did a good job of representing their client at the hearing. But the firm charged up to $690 per hour for its work. That rate is far higher than the typical rates charged by lawyers appearing before this Commission. **The company is certainly entitled to hire lawyers with whom it is comfortable, but it would not be fair to require ratepayers to pay such high rates.**[5]

With respect to another outside counsel's work, the Commission accepted Public Counsel's position that that counsel's fees should be entirely disallowed because that counsel's work was duplicative of another's:

> Public Counsel urges the Commission to disallow $47,522 in fees charged by the Austin Texas firm of Watson Bishop London and Brophy. Public Counsel contends that the work done by that firm did was duplicative of the work done by Kasowitz, Benson, Torres & Friedman and MGE's Missouri counsel, Brydon, Swearengen & England. MGE explained that Christine Dodds, an attorney with Watson Bishop, served as second chair for Eric Herschmann at the hearing. She assisted Herschmann in preparation of witnesses, issues, and cross-examination questions. The Commission does not wish to disparage the work done by the

[4] *Ibid*., at page 72; emphasis added.

[5] *Ibid*., at pages 74-75; emphasis added.

> Watson Bishop firm, but $47,522 is more than ratepayers should pay for the services performed by the firm. The fees charged by Watson Bishop will be disallowed in their entirety.[6]

The disallowances made by the Commission in the MGE case are entirely consistent the ones proposed by Public Counsel in this case. Here, Public Counsel asserts that fees of outside counsel and outside experts should be disallowed because other attorneys and witnesses (in-house) could do the same work at a much lower cost, and because the work done by several of the outside experts is duplicative of the work done by the in-house experts.

The question of whether some rate case expense should be disallowed does not hinge on whether the Company succeeds in getting a rate increase, as the Company suggests at footnote 274 on page 115. Rather it hinges on whether the Company wisely and prudently expended the amounts it seeks to recover in rates. Of course, if a utility entirely fails to convince the Commission to allow any rate increase, it could be argued that the entire cost of prosecuting a failed rate request was imprudent. But the converse is not true: just because an increase is granted does not mean that any and all costs incurred were prudent and of benefit to ratepayers.

At page 116, Ameren Missouri asserts that Public Counsel has the burden of proving exactly how the Company's in-house personnel could have gone about prosecuting the rate case. As the case concerning advertising expense[7] cited in Public Counsel's Initial Brief makes clear, that is not the proper assignment of burden. Indeed this is consistent with the general rule regarding allegations of imprudence[8]: Public Counsel has raised serious doubts about the

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[6] *Ibid*., at page 75.

[7] State ex rel. Laclede Gas Co. v. Public Service Com., 600 S.W.2d 222, 228-229 (Mo. Ct. App. 1980), in which the Court concluded that "the Commission may disallow any institutional advertising expenditures from operating expenses for ratemaking purposes **unless the utility establishes** such expenditures benefit all ratepayers." (Emphasis added.)

[8] See, *e.g.*, State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri, 954 S. W.2d 520, 528 (Mo. App. 1997).

prudence of spending almost $2,000,000 on outside experts and outside witnesses when there is a huge number of qualified in-house personnel that could do the work, and thus Ameren Missouri has to show that it acted prudently in passing those employees over and instead hiring outside counsel and outside experts.

Regarding Public Counsel witness Robertson's allegations that the testimony of several outside experts was duplicative of testimony offered by in-house personnel, the Company alleges that: "Mr. Robertson was wholly unable to cite even one specific instance where the outside consultant provided testimony that duplicated the testimony of a Company witness." But the Company fails to tell the whole story. When allowed to expand on the question, Mr. Robertson testified that he could in fact do that:

> Q. And with respect to the question of going through line by line and page by page, is that something you could do if you had time?
> A. It's something I could do. It's something I'm not going to do. (Transcript, page 952)

The Company asserts that Public Counsel witness Robertson acknowledged that there are ways to control costs other than competitive bidding. But the problem here is that there is precious little evidence that Ameren Missouri utilized **any** of those ways. The only evidence of cost control cited in Ameren Missouri's initial brief, and the only evidence in the case about cost control, is that Ameren Missouri claims to have negotiated lower-than-normal rates for outside counsel. (Exhibit 13, Barnes Surrebuttal, pages 8-9) There is not a scintilla of evidence that Ameren Missouri took any steps – not competitive bidding, not negotiating lower rates, not anything – to control the costs of outside experts. There is not even a bald assertion, much less actual evidence. And with respect to lawyers' fees, the evidence is simply that "the Company has negotiated multi-year rates with Smith Lewis that remain flat for a period of years as part of its cost-containment efforts. The Company also negotiated a specific, lower-than-normal rate for

Brydon Swearengen's work on this case." Nothing in the record indicates the degree to which this lone cost-control effort actually lowered rate case expense.

IV. RETURN ON EQUITY

In its Initial Brief, Ameren asks the Commission to afford the Company a more reasonable chance to earn a fair return. To this end, Ameren tries to make the Commission believe that any other return on equity (ROE) besides the one Ameren recommends is somehow "on the edge of confiscatory." On page 36, Ameren states: "Surely the Commission does not believe that setting an authorized ROE at the edge of Constitutional confiscation reflects the appropriate balance that the Commission is charged with maintaining between the interests of customers and utilities. In fact, setting an authorized ROE at such a level is in no one's interest." However, the rule set out by the U.S. Supreme Court is not one party's biased opinion of a ROE being somehow "on the edge of confiscatory" but that a reasonable return on equity, as developed by in the Bluefield and Hope[9] cases, is: (1) adequate to attract capital at reasonable terms, thereby enabling Ameren to provide safe and reliable electric service; (2) sufficient to ensure Ameren's financial integrity; and (3) commensurate with returns on investments in enterprises having corresponding risks. It is this standard the Commission must use to determine a reasonable ROE range for Ameren.

Each expert gave testimony on what their calculations show to be a reasonable return on equity per the Bluefield and Hope standard. Mr. Hevert's range for ROE is from 10.25% to 11.00%. (Transcript, pages 1629-1630) MIEC witness Mr. Gorman states that his calculations

[9] Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679 (1923); Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944).

show that a ROE anywhere between 9.2% and 9.4% would be reasonable for Ameren. (Transcript, pages 1699, 1711) Similarly, Staff witness Mr. Murray has calculated a reasonable range for ROE anywhere between 8.00% and 9.00%. (Transcript, page 1972). Therefore, the Commission has before it expert testimony showing that Ameren's recommendation is definitely not the only ROE that would give Ameren a reasonable chance to earn a fair return.

It is Public Counsel's position that once the Commission has determined a just and reasonable ROE range, it should order that rates be set based on the low end of the range in this case to promote affordability for Ameren's customers. If the Commission approves the bottom of Staff's recommended range of ROE, or 8.00%, the Company's revenue requirement would be reduced saving the customers $147,341,010 (approximately 43%). (Exhibit 409) In its argument against this potential savings for customers, on page 10 of its Initial Brief Ameren erroneously refers to a ROE of 8.00% as "unsupported." However on page 28 of that same brief, Ameren states "Staff witness David Murray has recommended a ROE range for Ameren Missouri in this case of 8-9%, with a specific point recommendation at the high end of the range, 9%." While a ROE of 8.00% may not be the specific point recommendation of Mr. Murray, Ameren admits that Mr. Murray includes a ROE of 8.00% in his recommendation for use by the Commission in this case. Therefore, the reasonableness of a ROE of 8.00% is most certainly supported through expert testimony, and the Commission can order its use in this case for purposes of affordability.

V. CLASS COST OF SERVICE AND RATE DESIGN

The Company did not address in much detail Public Counsel's position on the issue of raising customer charges; it focused its argument on NRDC witness Morgan's rather simple (and

irrefutable) position that increasing fixed charges and decreasing volumetric charges dilutes the incentive to conserve. Accordingly, this response will be short.[10]

The Company discusses its Class Cost of Service Study (CCOS) at page 139, but fails to even mention that the Company's is only one of three CCOSs, and the other two do not support its proposed increase. The Staff's CCOS appears to support a modest increase in the customer charge, but Staff's inclusion of all bad debts (ignoring the fact that bad debt is primarily driven by energy-related costs rather than customer-related costs) means that Staff's calculation of customer charges is overstated.

Ameren Missouri asserts at page 140 that total energy costs will decrease for approximately half of residential customers and for almost 60 percent of LIHEAP customers. But the real problem with such statements is that the Company did not present any evidence about how the customers that do not benefit will fare. Some customers will be slightly better off, some will be slightly worse off, but some others will have greater beneficial or detrimental impacts. There is no evidence that the benefits are sufficient to outweigh the detriments. Concern over this lack of evidence is magnified by the fact that any increases from customer charge increases would be in addition to a significant overall increase.

At page 141, the Company cites to an MGE general rate case (GR-2006-0422) in which the Commission significantly raised MGE's customer charge. As the Commission is well aware, that increase caused a huge customer outcry. The Commission's docket system shows 22 pages of comments (over 200 comments) in that case, and most of them state opposition to the increased customer charge. That outcry was certainly not short-lived. In MGE's next rate case, the Commission's docket system shows **1215 pages** of customer comments (over **12,000**

[10] Staff's initial brief on this issue was even shorter, consisting only of a position statement, and will not be addressed at all herein.

comments), and most of those still stated opposition to the large customer charge. The Commission should not raise Ameren Missouri's customer charge on the slight evidence in this case.

WHEREFORE, Public Counsel respectfully offers this Initial Post-hearing Brief and prays that the Commission conform its decision in this case to the arguments contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 15th day of November 2012.