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MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. ER-2012-0166

REBUTTAL TESTIMONY

OF

JAMES I. WARREN

ON

BEHALF OF

**UNION ELECTRIC COMPANY
d/b/a Ameren Missouri**

**St. Louis, Missouri
August, 2012**

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1 **REBUTTAL TESTIMONY**

2 **OF**

3 **JAMES I. WARREN**

4 **CASE NO. ER-2012-0166**

5 **I. Introduction**

6 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

7 A. My name is James I. Warren. My business address is 655 Fifteenth Street, N.W.,
8 Washington, D.C. 20005.

9 **Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?**

10 A. I am a member of the law firm of Miller & Chevalier Chartered (“Miller”).

11 **Q. PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES AT MILLER.**

12 A. I am engaged in the general practice of tax law. I specialize in the taxation of and the tax
13 issues relating to regulated public utilities. Included in this area of specialization is the
14 treatment of taxes in regulation.

15 **Q. ON WHOSE BEHALF ARE YOU SUBMITTING THIS TESTIMONY?**

16 A. I am submitting this testimony on behalf of Union Electric Company d/b/a Ameren
17 Missouri (“UE” or “Company”).

18 **Q. PLEASE DESCRIBE YOUR PROFESSIONAL BACKGROUND.**

19 A. For more than 20 years, I have been involved in the provision of tax services almost
20 exclusively to companies in various segments of the utility industry. I joined Miller in
21 February of 2012. For the three years prior, I was a partner in the law firm Winston &
22 Strawn and for the five years prior to that, I was a partner in the law firm of Thelen Reid
23 Brown Raysman & Steiner LLP. Before that, I was affiliated with the international
24 accounting firms of Deloitte LLP (October 2000 – September 2003),

1 PricewaterhouseCoopers LLP (January 1998 – September 2000) and Coopers & Lybrand
2 (March 1979 – June 1991) and the law firm Reid & Priest LLP (July 1991 – December
3 1997). At each of these professional services firms, I provided tax services primarily to
4 electric, gas, telephone and water industry clients. My practice has included tax planning
5 for the acquisition and transfer of business assets, operational tax planning and the
6 representation of clients in tax controversies with the Internal Revenue Service (“IRS”) at
7 the audit and appeals levels. I have often been involved in procuring private letter rulings
8 or technical advice from the IRS National Office. On several occasions, I have
9 represented one or more segments of the utility industry before the IRS and/or the
10 Department of Treasury regarding certain tax positions adopted by the federal
11 government. I have testified before several Congressional committees and
12 subcommittees and at Department of Treasury hearings regarding legislative and
13 administrative tax issues of significance to the utility industry. I am a member of the
14 New York, New Jersey and District of Columbia Bars and also am licensed as a Certified
15 Public Accountant in New York and New Jersey. I am a member of the American Bar
16 Association, Section of Taxation where I am a past chair of the Committee on Regulated
17 Public Utilities.

18 **Q. HAVE YOU PREVIOUSLY TESTIFIED IN ANY REGULATORY**
19 **PROCEEDINGS?**

20 A. Yes I have. I have testified regarding tax, tax accounting and regulatory tax matters
21 before a number of regulatory bodies including the Federal Energy Regulatory
22 Commission and the utility commissions in Florida, Arkansas, Louisiana, Nevada,
23 Delaware, West Virginia, New Jersey, the District of Columbia, the City of New Orleans,

1 New York, Connecticut, Ohio, California, Maryland, Pennsylvania, Missouri, Illinois,
2 Kentucky, Vermont, Tennessee, Indiana and Texas.

3 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.**

4 A. I earned a B.A. (Political Science) from Stanford University, a law degree (J.D.) from
5 New York University School of Law, a Master of Laws (LL.M.) in Taxation from New
6 York University School of Law and a Master of Science (M.S.) in Accounting from New
7 York University Graduate School of Business Administration.

8 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

9 A. The purpose of my testimony is to respond to two aspects of the direct testimony of
10 Michael L. Brosch filed on behalf of the Missouri Industrial Energy Consumers. I shall
11 address his proposals: (1) to reflect in UE's federal income tax expense the effect of tax
12 deductions claimed by Ameren Corporation ("Ameren") that are attributable to the
13 payment of dividends by Ameren with respect to Ameren stock held by Ameren's
14 qualified Employee Stock Ownership Plan ("ESOP") and (2) to reduce UE's rate base by
15 certain Accumulated Deferred Income Tax ("ADIT") balances that are attributable to
16 construction projects that remain in Construction Work in Process ("CWIP") as of the
17 end of the test period.

18 **Q. PLEASE SUMMARIZE YOUR CONCLUSIONS AS TO THESE TWO ISSUES.**

19 A. As for the ESOP issue, the tax benefit attributable to Ameren's dividends paid with
20 respect to ESOP stock relates to the disposition not of customer resources and not even of
21 UE shareholder resources but of Ameren shareholder resources. It is, therefore,
22 completely unrelated to the provision of UE's regulated service and is properly ignored in
23 the calculation of its cost of service. As for the ADIT issue, ADIT balances produced by

expenditures that are reflected in CWIP as of the end of the test period are properly excluded from UE's rate base calculation until and unless those expenditures are themselves included in rate base.

II. The ESOP Dividends Paid Deduction

Q. WHAT IS AN ESOP?

A. An ESOP is one of a number of types of tax-qualified employee benefit plans that must meet a complex set of requirements established by the Internal Revenue Code ("Code"). Where the requirements are met, there are certain tax advantages that follow.

Q. DOES UE MAINTAIN AN ESOP?

A. UE does not itself maintain an ESOP. However, its parent, Ameren, does maintain an ESOP as a component of its 401(k) plan (again, a type of tax-qualified benefit plan). All eligible employees of all of the corporations in the Ameren group – including those of UE - can, if they wish, participate in the Ameren 401(k) plan.

Q. GENERALLY, HOW DOES THE AMEREN ESOP WORK?

A. Each year, each eligible employee has the discretion to have a designated percentage (up to a limit) of his or her salary withheld and contributed to the Ameren 401(k) plan. The employee's employer will then match a percentage of that contribution, also up to a limit. The employee has the right to select into which one of more than 21 investment funds his or her contribution (including the match) will be placed. One of the investment fund options is the Ameren ESOP. Thus, each employee who decides to participate in the 401(k) plan can make a decision to invest none, some or all of his or her contribution (including the match) in Ameren stock. This investment decision can be changed periodically.

1 **Q. GENERALLY, WHAT ARE THE TAX BENEFITS ASSOCIATED WITH A TAX-**
2 **QUALIFIED BENEFIT PLAN?**

3 A. The employer gets a tax deduction for the compensation paid to its employee, including
4 the amount of compensation that the employee contributes to the 401(k) plan. The
5 employer also gets a tax deduction for the amount of the match that it contributes to the
6 plan. The employee reports neither his contribution to the plan nor his portion of the
7 employer's match as taxable income until he or she receives distributions from the plan.
8 The fact that the employer can claim a deduction while, in the same year, the employee
9 does not report taxable income is unusual in the tax law and is a clear benefit intended to
10 be supportive of the creation of qualified benefit plans.

11 **Q. WHAT ARE THE ADDITIONAL TAX BENEFITS ASSOCIATED WITH ESOPS?**

12 A. Of particular relevance to this proceeding, the Code permits a deduction in the amount of
13 the dividend paid to any corporation that pays a dividend on its stock to the extent that
14 such stock is held by an ESOP. This is generally referred to as a Dividends Paid
15 Deduction.

16 **Q. WHICH CORPORATION IS ENTITLED TO THE DIVIDENDS PAID TAX**
17 **DEDUCTION PROVIDED FOR BY THE CODE?**

18 A. The Code provides that a deduction is available to a corporation that pays a dividend with
19 respect to "applicable employer securities." It further provides that "applicable employer
20 securities" include common stock issued by the employer or a member of the group of
21 corporations of which the employer is a member that are held in an ESOP. Obviously it
22 is Ameren, not UE or any other Ameren subsidiary, which pays the dividends with

1 respect to “applicable employer securities.” It is Ameren, therefore, that is entitled to the
2 dividends paid tax deduction under the Code.

3 **Q. HOW HAS UE TREATED THE TAX BENEFITS OF ITS 401(k) QUALIFIED**
4 **PLAN FOR RATEMAKING PURPOSES?**

5 A. UE funds both its employees’ salaries as well as the 401(k) matches for its employees.
6 These amounts are included in UE’s cost of service. Consequently, UE has claimed tax
7 deductions for these expenditures on its tax returns. Since these are expenditures
8 included in UE’s cost of service that produce a tax benefit, it is appropriate and necessary
9 to reflect that tax benefit in establishing UE’s tax expense for ratemaking purposes, and
10 UE has done so. By contrast, UE does not pay dividends with respect to “applicable
11 employer securities,” nor has it included any such dividend payments in its cost of
12 service. Further, it has not claimed a tax deduction for dividends paid with respect to
13 such stock. Its parent, Ameren, has. It would, therefore, be inappropriate for UE to
14 reflect the benefit of the tax deduction available to Ameren in establishing its tax expense
15 for ratemaking purposes and UE has not done so.

16 **Q. YOU STATE THAT UE HAS NOT INCLUDED ANY OF THE DIVIDENDS**
17 **AMEREN PAYS IN ITS COST OF SERVICE. PLEASE ELABORATE.**

18 A. UE’s cost of service does not include dividends paid by Ameren on a number of levels.
19 First, and most obviously, whether or not Ameren pays a dividend is completely
20 unrelated to UE’s “pre-tax” cost of service. Customers pay not a nickel more or less
21 because of Ameren’s dividend policy – though Mr. Brosch’s proposal would change this.

22 **Q. ON PAGE 28, LINES 29 THROUGH PAGE 29, LINE 4 OF HIS TESTIMONY,**
23 **MR. BROSCH SPECULATES THAT UE INCLUDES THE COSTS OF**

1 **ADMINISTERING THE ESOP IN ITS COST OF SERVICE. BASED ON THIS**
2 **SPECULATION, HE ASSERTS THAT THE TAX BENEFITS OF THE PLAN**
3 **SHOULD LIKEWISE BE REFLECTED IN UE'S COST OF SERVICE. IS HE**
4 **CORRECT?**

5 A. He is not. My inquiries have disclosed that the direct costs of administering the ESOP
6 are funded by the plan itself – not by UE or by any other company within the Ameren
7 group or by UE's ratepayers. Consequently, Mr. Brosch's premise is wrong – as is his
8 conclusion.

9 **Q. WHAT APPEARS TO BE MR. BROSCH'S RATIONALE FOR HIS CLAIM**
10 **THAT A PORTION OF AMEREN'S ESOP-RELATED TAX DEDUCTIONS**
11 **BELONGS TO UE CUSTOMERS?**

12 A. In his testimony, Mr. Brosch offers two separate, but analytically related, statements in
13 support of his proposal. On page 27, lines 5-10, he reasons that, since the dividends
14 Ameren pays to its shareholders are partially funded by the dividends that UE pays to
15 Ameren; and since UE's dividends are funded from the cash flow provided by customers
16 paying UE its equity return; then UE's customers are the source of the tax benefit
17 produced by the payment of dividends to Ameren's shareholders. More explicitly, on
18 page 29, lines 13-23 of his testimony, Mr. Brosch states that UE's retained earnings out
19 of which it pays dividends to Ameren are "...part of Ameren Missouri's cost of service."
20 Again, his premise is that UE's return on equity is what enables UE to pay dividends to
21 Ameren which, in turn, fund Ameren's dividends to its shareholders – including its
22 ESOP.

1 **Q. IS AMEREN'S PAYMENT OF DIVIDENDS NECESSARILY RELATED TO UE'S**
2 **OPERATIONS?**

3 A. No it is not. Any dividend paid by Ameren is paid at the sole discretion of Ameren's
4 Board of Directors. The Board's decision in this regard is not legally dependent on
5 anything that occurs at UE. Ameren has numerous sources of funds out of which it can
6 pay dividends. It has other subsidiaries that provide cash. But, it is not even necessary
7 that it receive a single dollar from its subsidiaries in order for it to pay dividends.
8 Ameren could, if it wished, simply borrow any money it needs to pay a dividend. In
9 other words, the Dividends Paid Deduction can be generated with or without distributions
10 from UE.

11 **Q. IS THE FACT THAT THE DIVIDENDS PAID DEDUCTION IS**
12 **ATTRIBUTABLE TO THE PAYMENT OF DIVIDENDS SIGNIFICANT?**

13 A. Very significant. Dividends are paid out of a corporation's retained earnings. Retained
14 earnings represent a component of the investment shareholders have in the company. A
15 utility's retained earnings belong to the utility and its shareholders – not its customers. In
16 fact, the Missouri Supreme Court has stated as much. *See, Straube v. Bowling Green*,
17 227 S.W.2d 666, 671 (Mo. 1950) (“When the established rate of a utility has been
18 followed, the amount so collected becomes the property of the utility, of which it cannot
19 be deprived by either legislative or judicial action without violating the due process
20 provisions of the state and federal constitutions.”). What this means is that UE is free to
21 do what it wants with the money it has earned including dividending it to its shareholder,
22 Ameren. Consequently, Mr. Brosch’s observation that UE’s profit is derived from its
23 customers is both absolutely true and completely irrelevant. Of course the profit of

1 virtually every business that has customers is derived from those customers. Otherwise it
2 could not stay in business. However, it is the business owners who earn and are entitled
3 to the profit – not the customers. As the *Straube* decision demonstrates, this is just as
4 true for a regulated utility as it is for any other business. The disposition of a utility's
5 retained earnings is a matter of relevance to shareholders only and should have no impact
6 on the utility's cost of service.

7 **Q. IS THIS PRINCIPLE GENERALLY RECOGNIZED IN THE REGULATORY**
8 **COMMUNITY?**

9 A. Yes it is. For example, if a utility makes a charitable contribution that is not permitted to
10 be included in its cost of service (either by statute, regulation or regulatory order), the
11 contribution is shouldered by the company's shareholders. In every jurisdiction of which
12 I am aware, the benefit of the tax deduction produced by such a "disallowed" contribution
13 is likewise excluded from cost of service. Since shareholders fund the contribution, they
14 are allocated the tax benefit of the contribution. This same treatment is afforded all
15 disallowed and non-included costs. The underlying principle, sometimes referred to as
16 the "benefits follows burdens" or "cost responsibility" principle, is, in my experience,
17 universal in the case of such expenditures.

18 **Q. HOW DOES THIS PRINCIPLE IMPACT THE ESOP DIVIDENDS PAID**
19 **DEDUCTION?**

20 A. An expenditure for a charitable contribution that is not included in cost of service
21 represents a disposition of shareholder, not customer, funds. The same is true of the
22 payment of a dividend. This is so notwithstanding that the funds used to make the
23 contribution on the one hand and to pay the dividend on the other may come from

1 revenues paid by customers. The regulatory treatment of the tax consequences of both
2 expenditures (the disallowed contribution and the dividend) should be the same.

3 **Q. IS THE TAX BENEFIT IN THIS CASE EVEN MORE REMOTE FROM UE'S**
4 **CUSTOMERS?**

5 A. Yes it is. The charitable contribution example above addresses the disposition of a
6 utility's (*e.g.*, UE's) retained earnings. However, the dividends that produce the tax
7 benefit in this case are not those paid by UE – the utility. Thus, we are talking not about
8 the disposition of retained earnings owned by UE's shareholder - Ameren. We are talking
9 about the disposition of retained earnings owned by the shareholders of UE's shareholder
10 – by the public shareholders of Ameren stock. The relationship between the tax benefit
11 of the Dividends Paid Deduction and UE's customers is attenuated in the extreme.

12 **Q IS THE DISCRETION EXERCISED BY UE EMPLOYEES RELEVANT TO**
13 **YOUR CONCLUSION?**

14 A. Yes it is. As I indicated above, employees who elect to participate in the Ameren 401(k)
15 have 21 investment options available to them. One of them is to invest their earnings in
16 the Ameren ESOP. It is only with respect to those investments that a Dividends Paid
17 Deduction is possible. Consequently, the source of that deduction is, in one sense, an
18 investment decision made by UE employees with respect to money they have earned –
19 after they have earned it. In other words, the deduction does not flow from compensating
20 them. It flows from the way they choose to invest their earnings *after* they are
21 compensated. In this way, too, the tax benefit is unrelated to the customers' cost of
22 service.

1 **Q. WHAT, THEN, DO YOU CONCLUDE WITH REGARD TO THE COMPANY'S**
2 **TREATMENT OF THE TAX BENEFIT PRODUCED BY THE ESOP**
3 **DIVIDENDS PAID DEDUCTION?**

4 A. In my opinion, the Company's exclusion of the tax benefit from its tax expense
5 calculation was entirely appropriate. Otherwise, UE's ratepayers would receive a benefit
6 from the discretionary disposition by Ameren of *Ameren shareholder* property, which
7 would be inappropriate.

8 **III. The Inclusion of CWIP-Related ADIT Balances in UE's Rate Base Calculation**

9 **Q. WHAT GIVES RISE TO THE TYPE OF CWIP-RELATED ADIT THAT IS AT**
10 **ISSUE HERE?**

11 A. The tax law (hereafter, "Tax") and the financial and regulatory accounting rules
12 (hereafter, "Book") differ significantly in the way they require many items of revenue
13 and expense to be treated. The type of ADIT that is at issue in this case is created when
14 Tax permits a company undertaking a construction project to deduct costs that, for Book
15 purposes, must be capitalized and depreciated over a period of time. For decades there
16 have been differences between the Book and Tax treatment of certain construction-
17 related expenses (particularly with regard to the amount of interest required to be
18 capitalized). However, until recently, the amounts involved were generally modest.
19 Within the relatively recent past, developments in the tax law have greatly increased the
20 quantity of dollars that can be treated differently. Consequently, the quantity of ADIT
21 produced by construction-related expenditures has increased markedly. Of particular
22 note are the expansion of the ability to deduct for Tax purposes certain indirect
23 construction-related overhead costs that are capitalized for Book purposes and, most

1 dramatically, the ability to characterize as deductible repairs for Tax purposes projects
2 that are treated as capital projects for Book purposes. The ADIT balances Mr. Brosch
3 and I address are those construction-related ADIT balances that are produced by
4 expenditures that, as of the end of the test period, remain in CWIP.

5 **Q. HOW DOES THE COMPANY BELIEVE THAT THIS CWIP-RELATED ADIT**
6 **SHOULD BE REFLECTED IN RATEMAKING?**

7 A. The Company does not include its investment in CWIP in rate base. As a consequence,
8 current customers provide neither a return on nor a return of that investment. In fact, they
9 are in no way burdened by it. The Company's filing in this case reflects its position that
10 it is theoretically inappropriate to reduce the rates of current customers on account of
11 expenditures that will be entirely borne by a later "generation" of ratepayers. In short,
12 the Company's position is that current customers' rates should be precisely the same with
13 or without CWIP. Consistent with this view, the Company has eliminated its CWIP-
14 related ADIT balances from its rate base calculation.

15 **Q. WHAT DO YOU UNDERSTAND TO BE MR. BROSCH'S POSITION WITH**
16 **RESPECT TO THESE ADIT BALANCES?**

17 A. Mr. Brosch proposes to reduce the Company's rate base by all of the CWIP-related ADIT
18 balances. He appears to make no distinction between current and future customers in this
19 regard. Neither does he make a distinction between the Company's earning a current
20 versus a future cash return. In his view, apparently, AFUDC is as good as cash.
21 Unfortunately, all the AFUDC in the world cannot pay the Company's bills.

22 **Q. IS IT THE COMPANY'S GENERAL PRACTICE TO EXCLUDE FROM ITS**
23 **RATE BASE CALCULATION ADIT BALANCES THAT ARE ASSOCIATED**

**WITH UNDERLYING COSTS THAT ARE, THEMSELVES, NOT INCLUDED IN
RATE BASE?**

A. Yes it is. In fact, Mr. Brosch essentially recognizes this practice – and its propriety – on page 33, line 1 through page 34, line 12 of his testimony. While he describes the Company’s general practice in this regard, he only takes issue with two exclusions – CWIP and Taum Sauk (which I shall address a little later).

**Q. DID THE COMPANY INCLUDE CWIP-RELATED ADIT BALANCES IN ITS
RATE BASE CALCULATIONS IN PRIOR MISSOURI AND ILLINOIS RATE
PROCEEDINGS?**

A. It did. As I indicated above, for many years, the quantity of ADIT of this type was small. The Company simply ignored it. When it first became significant, the Company simply missed focusing on the situation. However, the resolution of the issue in this proceeding should not hinge on what the Company did in the past, but what the proper treatment is once all the facts are recognized and the issue has been confronted.

**Q. IS THE COMPANY CONSISTENT IN THE APPLICATION OF ITS POSITION
REGARDING ADIT BALANCES?**

A. It is attempting to be consistent. For example, the Company agrees with Mr. Brosch’s position that ADIT balances associated with the Commission-approved continuation of construction accounting for the Company’s investment in its Sioux scrubbers should be included in rate base since the capitalized costs related to the continuation of construction accounting are also included in rate base.¹ Further, the Company also agrees with Mr. Brosch’s position that the Company has improperly included ADIT balances arising

¹ Note that, prior to the inclusion in rate base of the Company’s investment in its Sioux scrubbers, none of the ADIT balances associated with that investment were included in rate base.

1 from unrecovered costs associated with the Taum Sauk incident in rate base insofar as the
2 related asset, namely the unrecovered costs associated with that incident, are not in rate
3 base.

4 **Q. DOES THE COMPANY EARN AN AFUDC RETURN ON ITS INVESTMENT IN**
5 **CWIP?**

6 A. Yes, it does.

7 **Q. DOES AFUDC EARNED ON CWIP PROVIDE A CASH RETURN TO THE**
8 **COMPANY DURING CONSTRUCTION?**

9 A. No, it does not. AFUDC is an accounting entry that increases non-cash income during
10 the construction period of the asset. This entry has no effect on revenue requirement
11 during the construction period and does not result in a cash return on or the return of the
12 CWIP investment during construction.

13 **Q. WHEN DOES THE COMPANY BEGIN TO EARN A CASH RETURN ON ITS**
14 **CWIP INVESTMENT?**

15 A. When the construction of the project is complete and the asset is Plant in Service, the
16 project balance is transferred from CWIP (FERC Account 107) to Plant in Service
17 (FERC Account 101). The plant (including the related AFUDC) will be included in rate
18 base, if allowed by the Commission, in the Company's next rate case. It is only at this
19 time, when rates are adjusted to reflect the plant that has been placed in service (and not
20 before), that the ADIT related to Plant in Service' book and tax basis differences should
21 also be included in rate base as a liability that offsets rate base.

22 **Q. IF, AS MR. BROSCH PROPOSES, CWIP-RELATED ADIT WERE TO REDUCE**
23 **RATE BASE, WHAT WOULD BE THE CONSEQUENCE?**

1 A. Customer rates today would be reduced on account of expenditures which they have not
2 yet funded and which they do not yet support (*i.e.*, which are not reflected in the rate base
3 which was used to set their rates). This rate reduction would serve to reduce the
4 Company's current cash flow precisely at a time when the funds are most in need – when
5 it is investing in the assets under construction. To me, this makes little sense.

6 **Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?**

7 A. Yes, it does.

