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 Annual Revenues for Electric Service.	)))	**<u>Case No. ER-2014-0258</u>**

POST-HEARING BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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COMES NOW the Office of the Public Counsel ("OPC" or "Public Counsel") and presents its post-hearing brief as follows:

Introduction

Ratemaking is not an exact science and the complexities inherent in a rate determination necessarily require that the Commission be granted considerable discretion. *State ex rel. Office of the Pub. Counsel v. PSC*, 367 S.W.3d 91, 108 (Mo. Ct. App. 2012). However, there is an outer limit to the Commission's discretion, and that limit is found in the statutes empowering the Commission and the court cases interpreting those statutes. *State ex rel KCPL v. Buzard,* 168 S.W.2d 1044, 1046 (Mo. 1943). Moreover, to avoid the taint of arbitrariness or capriciousness, the Commission's own rules can provide additional contours defining the scope of the Commission's authority to act in a given manner. In this general rate proceeding, the Commission is directed to follow the law, evaluate the record before it and set rates consistent with the law and supported by the record. *See* Mo Rev. Stat. §393.150; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 328 S.W.3d 316, 318 (Mo. Ct. App. 2010).

The law permits the Commission only to set "just and reasonable rates." *See* Mo. Rev. Stat. §§ 393.130, 393.140. What is just and reasonable is determined through the consideration of "all relevant factors." *State ex rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv.*

Comm'n, 585 S.W.2d 41, 48 (Mo. 1979) ("UCCM"). What factors are relevant in a particular rate case are determined based upon the facts and circumstances in that case. Looking at all relevant factors, OPC offers that the remaining requests of Union Electric d/b/a Ameren Missouri ("Ameren Missouri" or "Ameren") in this case, if granted in whole or in part by the Commission, will lead to impermissibly unjust or unreasonable rates, and so, should be rejected.

Regulatory Policy and Economic Considerations

Economic Considerations

The enabling statutes of the Commission state that "provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." Mo. Rev. Stat. § 386.610 (2000 & Supp. 2013). Consistent with this declaration, the courts interpret "the Commission's principle purpose [as] to serve and protect ratepayers." *State ex rel. Capital City Water Co. v. PSC*, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993) (citing *State ex rel. Crown Coach Co. v. Public Service Commission*, 179 S.W.2d 123 (Mo. App. 1944)). In vindicating the Commission's principle purpose, the Commission requires utilities to provide safe and adequate service at just and reasonable rates. Mo. Rev. Stat. §§ 393.130, 393.140. And in setting just and reasonable rates in this case, macro-economic factors, rate impact, affordability, value of service and other similar criteria are all proper considerations and have been recognized as such by Commissions in the past. (*See In the Matter of KCP&L GMO Operations Company for Approval to make Certain Changes in its Charges for Electric Service*, Case No. ER-2010-0356, Report and Order, p. 199 ("…the Commission … cannot…ignore the immediate effect on those customer's rates. It is undisputed that economic conditions are tough and the rate impact of adding 100 MW to L&P customers will not be easy for many of its customers."); *In the Matter of Kansas City Power & Light*

Company's Request for Authority to Implement a General Rate Increase for Electric Service, File No. ER-2012-0175, Report and Order, p. 40 ("… the slow recovery from economic woes, on which the Commission heard much testimony during local public hearings, supports no more increase in residential rates than the Commission has already reluctantly ordered. Therefore, the Commission will rule in favor of OPC and against the … residential increase that OPC opposes.").

Here, Ameren Missouri's rate request does not demonstrate an appreciation for the Commission's role as protector of ratepayers, nor, if granted, would it lead to just and reasonable rates. In this case, the record is clear - the people of Missouri continue to suffer from the economic hardship wrought by the Great Recession. At the same time businesses and residents struggle to recover, Ameren Missouri seeks to secure its 6th rate increase and, yet again, seeks this Commission's permission to raise its authorized return - its profit - by millions of dollars (*See* Ex. 28, p. 5; Ex. 16, 17, 18).

In addition to the testimony at local public hearings, the Commission's Staff and Public Counsel both provided testimony regarding the economic conditions in Missouri. Staff witness Michael Stahlman testified that Missouri, specifically within the counties which compose the service area of Ameren Missouri, continues to experience challenges in the wake of the recession from December 2007 to June 2009 (Ex. 202 HC, p. 2). OPC witness Dr. Marke provided additional testimony that, as a whole, Ameren Missouri's residential rate class has not recovered to pre-recession level metrics in: jobs recovered, unemployment rate recovered, GDP recovered, and home prices recovered (Ex. 405, p. 3). Unemployment levels are still above pre-recession levels (Ex. 202 HC, p. 3, l. 9). Indeed, employment data from the US Department of Labor - Bureau of Labor and Statistics show that the number of jobs in Ameren Missouri's service territory, which peaked in 2007, is still below 2004 levels (Ex. 202 HC, p. 3), and even that employment data may not reflect the actual level of unemployment. Dr. Marke testified that the unemployment data in counties where Ameren Missouri operates likely understates joblessness faced by many residential ratepayers (Ex. 405, p. 13).

Further coloring this picture is that average wages of residential customers have not kept up with Ameren's rate increases (Ex. 404, p. 22). From 2007 to 2013, the counties in the Ameren Missouri service area collectively experienced a 10.51% increase in average weekly wages (Ex. 202, p. 5). During the same time period, the electric rates for Ameren Missouri customers increased by a cumulative 43.16% (Ex. 202, p. 5). If Ameren's filed rate increase were granted in this case, the increase in average weekly wages would be less than one-fifth of the increase in electric rates (Ex. 202, p. 5). In fact, even if no increase at all were granted in this case, residential customers still would experience an increase to their bill as a result of the multiple risk-shifting surcharges currently in place (Ex. 404, p. 20). When looking at the totality of the economic situation the customers face, the reasonableness of a rate increase at this time is necessarily called into question, especially when the company has earned persistently millions of dollars in excess of its authorized rate of return since August 1, 2012 (Ex. 513, p 7).

Yet, despite having persistently and consistently over-earned since its last rate case, Ameren is back asking for another increase (Ex. 513, p. 10). This inequity is not lost on the public. One customer testified about the obvious disconnect between the customers' struggles and the company's request as follows:

> I think the rate of return that's allowed is ridiculously high compared to how life is for the rest of us in society…our wages have not been going up … and our retirement accounts for our Seniors have not been going up… and so for utility companies to be able to get 9, 10, 11 percent … it does not compare to the way the rest of our society lives, and - they ought to - to be a little more on par with us.

(Tr. Vol. 11, p. 53). Missouri ratepayers constantly confront Hobbesian, existential choices, as a result of their utility bills. As an example, one customer posited at a local public hearing, "[D]o I go without heat, or do I go without medication?" (Tr. Vol. 12 p. 19). The gravity of the often-impossible choices that ratepayers face today under existing rates - and the financial hardship they suggest - is only illuminated and exacerbated by increases to those rates (Ex. 404, p. 22). Public Counsel continues to urge that the Commission strongly consider the substantial and competent evidence in the record before it on affordability of service, rate impacts, rate continuity, and ability of customers to pay when setting rates that are fair to both the customers and the utility.

Ameren Missouri and its ratepayers are partners in the regulatory compact. In return for protected monopoly status - a status which divests Ameren of most fundamental business risks inherent in the free-market system, such as competing in the marketplace for willing customers - the utility is provided a reasonable opportunity to recover its costs and earn a fair and reasonable return on investment. *See Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923). In a partnership, one expects the parties will share the partnership's benefits as well as its detriments – the partners' fortunes are necessarily linked. Yet, the facts in this case tell a different story – a tale of two cities. In one "city" are the ratepayers who continue to endure economic hardship, are expected to pay rising rates for utility service inflated by excessive returns, and accept additional shifts in future price risk. Meanwhile, Ameren Missouri shareholders find themselves comfortably in the other "city," persistently over-earning since the last rate case (Ex. 513, p 7), seeking to shift exposure to additional business risks onto ratepayers despite operating a business that already is protected substantially from market forces, and asking for millions more in authorized returns (Ex. 513, p. 10). When looking at all the relevant factors in this case, and assessing the proper balance of those factors, the reasonableness of *any* rate increase is necessarily called into question.

Regulatory Policy

When a company files a request for a rate increase, the parties will conduct an audit to determine and calculate the revenue requirement for that utility. *Id* at 48; Mo. Rev. Stat. § 393.140. In order to facilitate the auditing process, the Commission has prescribed certain accounting practices to which the utility must adhere. The Commission's authority to prescribe accounting practices comes from two statutes, Mo. Rev. Stat. §§ 393.140(4) and 393.140(8). Section 393.140(4) grants the Commission discretion to prescribe the uniform methods of keeping accounts, records and books, which must be observed by electric corporations within its jurisdiction. Consistent with that authority, the Commission has promulgated Commission Rule 4 CSR 240-20.030(1) (citing 18 CFR Part 101 (1992)), directing electric companies within the Commission's jurisdiction to use the Uniform System of Accounts ("USOA") prescribed by the Federal Energy Regulatory Commission ("FERC"). The USOA is a set of regulations that governs utilities' recording of financial events, revenues and expenditures. Separately, the Commission has statutory authority to make determinations and issue orders on particular financial items. Mo. Rev. Stat. § 393.140(8). Acting together, these statutory authorities offer the Commission the tools necessary to examine all relevant factors surrounding the accounts of a utility.

In performing and explaining Staff's audit in this case, Staff witness John Cassidy testified that "proper determination of revenue requirement is dependent upon matching the rate base, return on investment, revenues, and operating costs components at the same point in time

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… [t]his … is commonly referred to as the "matching principle" (Ex. 209, p. 4). The Commission recently explained the matching principle:

> The *matching principle* is simply that rates should be based on a measurement of costs and revenues at a single point in time. Updating some costs or revenues at a different time than other costs and revenues risks throwing the measurements out of balance and creating a single-issue ratemaking problem. For example, updating only a falling cost in one area might miss a corresponding rising cost in another area, thereby showing a false picture of the company's overall level of costs.

(Case No. SR-2013-0016, *In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company*, Report and Order, pp. 32-33 (July 20, 2013)). To violate the matching principle is then to base rates on a false or skewed picture of the company's overall level of costs.

Any mechanism that creates a timing distortion between costs and revenues, given the potential to show a false picture of the utility's financial position, should be examined with a healthy skepticism in order to protect ratepayers from being overcharged.[1] One such mechanism is the accounting authority order ("AAO"). In general, the USOA rules require that any item of profit or loss be recorded in the year in which the item occurred, as set forth in the General Instructions:

> [N]et income shall reflect all items of profit and loss during the period with the exception of [certain items].

(18 C.F.R. Pt. 101, General Instruction No. 7). And:

> All other items of profit and loss recognized during the year shall be included in the determination of net income for that year.

(*Id*). Thus, as indicated in the general instructions of the USOA, the default for accounting for profit and loss is current recording. This mirrors the matching principle. However, there is an

[1] Indeed, such a practice risks running afoul of the statutory prohibition on retroactive rate-making.

exception to this default method for certain items. The USOA allows deferral for "extraordinary items" which are defined in its General Instruction No. 7 as follows:

> Extraordinary Items. . . . 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 <u>occurred during the current period</u> and which are of <u>unusual nature and infrequent occurrence</u> <u>shall be</u> considered extraordinary items. Accordingly, they will be events and transactions of <u>significant effect which are abnormal and significantly different from the ordinary and typical activities of the company</u>, and which would not reasonably be expected to recur in the forseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate. To be considered as extraordinary under the above guidelines, an item should be more than approximately 5 percent of income, computed before extraordinary items. Commission approval must be obtained to treat an item of less than 5 percent, as extraordinary. (See accounts 434 and 435.)(emphasis added).

(18 C.F.R. Pt. 101, General Instruction No. 7) Though the Commission has adopted the USOA pursuant to statutory authority, OPC asserts that deferring an "item" that is "not reasonably expected to recur" runs afoul of state law requiring the Commission's to set rates prospectively only. Mo Rev. Stat. § 393.270; *State* ex rel. *Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979). *But see State* ex rel. *Office of Pub. Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. Ct. App. W.D. 1993).

<u>Noranda AAO</u>

In 2013, the Commission authorized Ameren Missouri's request for an AAO to defer lost revenues related to events surrounding an ice storm that occurred in 2009 (Report and Order, Case No. EU-2012-0027). When the Commission granted an AAO to allow the deferral of revenue that Ameren did not earn, its decision made clear that deferred recording "does not guarantee recovery in any later rate action; recovery may be granted in whole, partially, or not at all." (Report and Order, Case No. EU-2012-0027, p. 4). Now that the Company has sought to recover the deferred amount, the Commission must consider all relevant factors when determining whether or not to allow recovery. *State* ex rel. *Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979). Examining the facts of this particular AAO, the Commission should not allow recovery of this deferred amount in rates.

In the past, the Commission has not allowed full recovery of amounts deferred pursuant to certain AAO's (*See* Ex. 412, Report and Order, Case No. GR-98-140; Tr. Vol. 20, p. 757). In Case No. GR-98-140 the Commission examined two AAO's granted to Missouri Gas Energy ("MGE") and stated that the "…grant of an AAO does not have any effect for the purposes of ratemaking." (*See* Ex. 412, p. 8, Report and Order, Case No. GR-98-140). The Western District Court of Appeals affirmed the Commission's decision. *Mo. Gas Energy v. Pub. Serv. Comm'n*, 978 S.W.2d 434 (Mo. Ct. App. W.D. 1998). The underlying AAO's at issue in that case were issued in Case Nos. GO-94-234 and GO-97-301. Those orders allowed the company to defer the costs of improvements and the carrying costs of those investments that it made through its safety line replacement program ("SLRP") pursuant to a Commission rule. (Ex. 412, p. 7). In GO-94-234, the Commission had authorized the company to defer an amount and included 10.54% as the carrying cost rate (*Id*. at 7). Similarly, the order in GO-97-301 set the cost of capital as 9.46% (*Id*). Despite the orders authorizing the respective AAOs for deferral, the Commission in the general rate case determined that the actual financing cost rate should be used for each (*Id*. at 8). In addition to determining that the amount recovered should be determined at a different rate, the Commission entirely denied recovery of the amount of SLRP costs deferred pursuant to the AAO's during a "stub period" for the expense balance that was carried over from the last ratemaking case (*Id*. at 9). By using a different rate for purposes of ratemaking, even though the

Commission's order in each AAO case appeared to set a specific rate, and by denying recovery in the "stub period," the Commission reviewed the relevant factors prior to setting rates[2] and made the changes it determined appropriate given the record before it.

Indeed, consistent with its broad review of the record in the general rate case, the Commission changed the amortization rate for the SLRP costs from 20 years to 10 years (*Id*. at 8). Even though the longer time period, already authorized by a previous order, arguably was supported by evidence that a 20-year period more closely matched the expected useful life of the plant, the Commission determined that it was not necessary to relate the amortization period for the deferral or carrying costs to the life of the plant (*Id*).

The Commission also examined the issue of whether or not the unamortized balance of the SLRP deferrals should be included in the rate base – to do so would allow the company to earn a "return on" the balance (*Id*). In denying approval to allow a "return on" the unamortized balance, the Commission reasoned:

> AAO's are not intended to eliminate regulatory lag but are intended to mitigate the cost incurred by the Company because of regulatory lag.
> …
> All of the parties agree that it is the purpose of the AAO to lessen the effect of the regulatory lag, not to eliminate it nor to protect the Company completely from risk.

(*Id*. at 10). This is a strong and accurate statement about the limited exception AAOs must be - if they are even legal at all - to traditional regulatory ratemaking. When extraordinary circumstance gives rise to a deferral, AAOs are to *mitigate* the costs incurred by the Company because of regulatory lag not to *eliminate* that lag entirely.

[2] Despite what counsel for Ameren appears to have argued at hearing (Tr. Vol. 18, pp 648-50), the standard to be applied by the Commission is not a "prudence" review standard. Rather, the Commission must examine "all relevant factors" necessary to set "just and reasonable rates," which is no different as to this issue as it is to any other rate issue in a general rate case.

Importantly, the Commission's order in that case also makes clear that it reviewed a number of interrelated issues when determining what, if any, amount from the deferrals should be added to rates in that case. That is to say, it was not just the changed factual circumstances regarding the deferred amounts that the Commission considered in its "all relevant factors" analysis, i.e. actual carrying costs, but also the treatment that the Commission was planning to give to other issues. In doing so, the Commission necessarily applied its all relevant factors analysis broadly, and examined the AAO deferral holistically within the context of the overall rate proceeding in order to ensure the overall rates it set in the case were "just and reasonable."

In the present case, the Commission also should consider broadly all relevant factors when deciding what ratemaking treatment, if any, to allow for the lost revenues. Although the Commission's order in EO-2012-0027 allowed Ameren to defer $35,561,503, this amount can be changed or, preferably, can be rejected entirely. Staff witness John Cassidy testified that the amount should not be recovered in rates. In a response to a Commissioner question, Mr. Cassidy explained:

> The 2009 ice storm that struck southeast Missouri is not what triggered Ameren Missouri's request to defer accounting for these lost fixed costs or ungenerated revenues. It was the adverse Commission decision in both of the FAC prudence reviews that triggered that. As a result of that, Ameren Missouri had to record and reflect those amounts in its financial statements in 2011and 2012. And **those costs are now expired** and they're not really eligible for recovery in this case, because of that outcome.

(Tr. Vol. 20, pp. 768-769) (emphasis added). Additionally, Mr. Cassidy testified:

> …to come back in here, you know, after that outcome to come in here and try to get an AAO for costs that have already been reflected in their financial statements and prior periods, 2011 and '12. Those are expired costs and not really eligible for recovery.

(Tr. Vol. 20, p. 775). Deferral is separate from ratemaking treatment, and requires different considerations. The standards relevant to the decision to defer an item are found in the USOA general instruction No. 7 defining "extraordinary items." For ratemaking, however, the Commission must consider all relevant factors. Not only does this include accounting standards, but also proper calculation of the amount and other concurrent factors (*See* Ex. 412, Report and Order, Case No. GR-98-140).

MIEC witness Greg Meyer's testimony shows that the deferred amount is inaccurate. In 2008, prior to the ice storm, the Commission authorized Ameren to receive a certain level of revenue requirement. Mr. Meyer testified that if the Commission agrees with Ameren Missouri's characterization of the amount deferred in the AAO to be recovery of "fixed costs," those costs were built into rates prior to the ice storm (Tr. Vol. 20, p. 788). Since those fixed costs were already built into rates, they were recovered in full by the revenues that Ameren received when the company earned a positive return on equity during that time period (Tr. Vol. 20, pp. 788-89). Thus, if the amount in question represents "fixed costs" to serve Noranda, then Ameren should be entitled to no rate recovery for the deferred amount, the costs already have been recovered and the amount deferred is not accurate. The fact that Ameren earned a positive return during the time period for which the AAO deferral was in effect means that it recovered its fixed costs in total. Logically, then, if the amount represents fixed costs, the proper amount to place in rates is zero, rather than the amount requested by the Company.

The testimony during the evidentiary hearing and questions from the Commissioners about the amount deferred shows that considerable uncertainty surrounds how to define the deferred amount. In part, this confusion is because this AAO is different than other ice storm AAO's. In prior ice storm cases, the costs authorized for deferral were related directly to repairing infrastructure that actually was damaged (Ex. 406, pp 13-14). Not so here. The company did not incur any infrastructure damage to its system pursuant to the ice storm (Ex. 406, p. 13). The storm damage that actually occurred was to transmission lines operated by Associated Electric Cooperative – not Ameren (*Id*). Ameren witness Ms. Barnes testified that the deferred amount does not include additional costs that the company spent as a result of the ice storm (Tr. Vol. 18, p. 714). None of the purported "expenses" deferred with the Noranda Ice Storm AAO represent costs traditionally deferred in an ice storm AAO.

Instead, the contested amount is revenue Ameren did not generate from one customer class but that it, nevertheless, successfully recovered from all other customers in the relevant period. This request to recover in rates from all future customers - not just the LTS class - ungenerated revenue is similar in character to the request for ungenerated revenue sought by MGE in Case No. GU-2011-0392. In that case, a tornado in MGE's service territory caused the company to replace infrastructure and otherwise incur substantial unanticipated expenses (*See* Case No. GU-2011-0392). The company sought an AAO to defer not only the costs incurred, but also ungenerated revenue in an amount equal to the fixed cost (customer charge) revenues it would have received from the customers who lost service due to the tornado (Report and Order, Case No. GU-2011-0392, p. 21). In its Order, the Commission granted the AAO for the actual costs associated with repair and restoration activities but denied the AAO as to ungenerated revenues (*Id* at 26). In denying the ungenerated revenue portion, the Commission reasoned that there was no drop in revenue; in fact, revenue for the Company was up, as is the case here (*Id* at 22). The Commission further explained its rejection of the ungenerated revenue portion as follows, "[t]he Commission need not guarantee the Company's profit, nor shift the risk of disappointing profits to ratepayers, especially when the source of disappointment is the provision of no service." (*Id* at 23).

Even if the Company failed to recover some portion of the costs it incurred to serve one or more classes of ratepayers, there are policy reasons to allocate the loss to the utility, including that the company is already compensated for normal business risk (including the loss of customers) through the return it receives on its investment. The evidence in the record shows that during the relevant period the company earned millions more than that which is required to meet the amount deferred for this AAO. Ameren witness Ms. Barnes testified that the company had positive earnings in the period the purported "loss" occurred (Ex. No. 3, p.67). The positive earnings of Ameren are dismissed immediately by Ms. Barnes as being irrelevant (*Id*). Ms. Barnes is wrong. Even though the Commission allowed deferral, now that the amount is being sought in rates, the Commission must consider all relevant factors. That a company would claim not to have recovered fixed costs while at the same time admitting that it had positive earnings is audacious. That the company would seek all future customers to pay again for costs that they and their predecessors already have paid for is wrong, unjust and entirely unreasonable.

Finally, and importantly, the Company has not met its burden to prove the amount is justified. Ms. Barnes testified that the amount was stipulated in the AAO case and that stipulated amount is the sole basis for the Company's request in this case. The Company has not provided any evidence that the amount from the AAO case is the appropriate amount for ratemaking in this case (*Id*). Mere reliance on the record from the prior case does not meet the company's burden. As the MGE cases demonstrate, material facts can change with regard to the amount of the deferral between cases. Indeed, the only substantial and competent evidence in the record in this case with respect to the amount to be deferred shows that the amount is not accurate, it should be zero. Rather than allowing recovery of an unproved "cost," the Commission should deny the Company's request. An AAO simply provides that an "item" may be deferred on the

Company's books, the deferral is not a guarantee of recovery.

Return on Common Equity ("ROE")

The evidence shows that the Commission should accept Public Counsel's recommendation of Ameren Missouri's required return on common equity of 9.01%. Using Public Counsel's recommended return on equity of 9.01% as the cost of common equity and the Company's capital structure and embedded costs of long-term debt, short-term debt and preferred equity, a reasonable level of Ameren Missouri's weighted average cost of capital is 7.327% (Ex. 409, 410, 411).

In determining the rates Ameren Missouri may charge its customers, the Commission is required to determine that the proposed rates are just and reasonable. Section 393.150.2, RSMo 2000. Quoting the U.S. Supreme Court in *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985), the Missouri Court of Appeals said:

> [T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' … Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. **It is not theory but the impact of the rate order which counts**. [emphasis added]

So, it is clear that the Commission is not bound to apply any particular formula in the determination of a just and reasonable rate. The U.S. Supreme Court in *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923), has provided guidance on what is a just and reasonable rate:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.

Similarly, the Missouri Supreme Court in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979), has determined that the appropriate level of rates must be determined based upon a consideration of all relevant factors.

Section 393.270, RSMo., states that in determining the price to be charged for utility service, the Commission may consider all facts which in its judgment have any bearing upon a proper determination with regard to, among other things, a reasonable average return upon capital actually expended. The U.S. Supreme Court has provided guidance in *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923), on what is a just and reasonable rate of return for a regulated utility:

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

The U.S. Supreme Court in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944), has further stated:

> '[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be

> sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. [citations omitted]

Determining return on equity is one of the most contentious issues in this case, as it has been in most of Ameren Missouri's previous rate cases. On the issue of setting a return on equity for Ameren Missouri, the Commission previously stated on page 15 of the *Report & Order* in Case No. ER-2008-0318:

> Determining an appropriate return on equity is without a doubt the most difficult part of determining a rate of return. The cost of long-term debt and the cost of preferred stock are relatively easy to determine because their rate of return is specified within the instruments that create them. In contrast, in determining a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in AmerenUE rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a "correct" rate does not exist. Instead, **the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors' dollar in the capital market, without permitting an excessive rate of return on equity that would drive up rates for AmerenUE's ratepayers**. In order to obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses. [emphasis added]

With these statements, the Commission acknowledged the requirement that, in determining whether the rates proposed by Ameren Missouri are just and reasonable, the Commission must equally balance the interests of the investor and the consumer.

A Return on Equity of 9.01% Reasonably Balances the Interests of Ameren Missouri

A reasonable return on equity, as developed by the U.S. Supreme Court is: (1) adequate to attract capital at reasonable terms, thereby enabling the utility to provide safe and reliable electric service; (2) sufficient to ensure the Companies' financial integrity; and (3) commensurate with returns on investments in enterprises having corresponding risks. (*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); Tr. Vol. 21 p. 1126, 1197) Such a return on equity would meet the interests of Ameren Missouri.

It is important for the Commission to note that three of the four experts have return on equity recommendations in the low 9% area. Public Counsel witness, Mr. Schafer, recommends a return on equity of 9.01% (Ex. 409, 410 & 411). This recommendation is the average of the three estimates Mr. Schafer calculates based on a Constant Growth Discounted Cash Flow (DCF) analysis, a Risk Premium analysis and the Capital Asset Pricing Model study, which show that a ROE between 8.74% to 9.22% would be reasonable (Ex. 409, 410 & 411).

Similarly, MIEC witness, Mr. Gorman recommends a return on common equity of 9.30%, which is at the midpoint of his recommended range of 9.00% to 9.60% (Ex. 510, 511, 512; Tr. Vol. 21 p. 1196). This reasonable ROE range encompasses Mr. Schafer's recommended 9.10% ROE (Tr. Vol. 21 p. 1198). Mr. Gorman's ROE range is based on his expert analysis of market-driven data through his use of a Constant Growth Discounted Cash Flow (DCF) analysis, a Risk Premium analysis and the Capital Asset Pricing Model (Ex. 510, Tr. Pg. 1196-1197). However, Mr. Gorman's results are higher than necessary due to inappropriate rounding (Ex. 410). Also, his CAPM result is too high due to an improperly formed measure of the market risk premium (Ex. 410). Correcting for these two factors, Mr. Gorman's recommendation would be slightly lower at 9.20% (Ex. 410).

Staff witness Mr. Murray presented a return on equity in the range 9.00% to 9.50%, with a recommendation of 9.25% (Ex. 202; Tr. Vol. 21 p. 1340-1341). This range also encompasses Mr. Schafer's recommended 9.01% ROE (Tr. Vol. 21 p. 1343). Mr. Murray states that his determination is based on his expert analysis of market-driven data using traditional analytical tools (Tr. Vol. 21 p. 1341). However, Mr. Murray's final recommendation relies on an inappropriate and rather arbitrary adjustment (Ex. 410). In this case, Mr. Murray stated his belief that the actual cost of equity for Ameren Missouri is substantially less than his recommended ROE of 9.25 percent in this case (Ex. 202, Tr. Vol. 21 p. 1347). Based on his models, Mr. Murray actually concluded that the current cost of common equity is in the range of 6% to 8%. (Ex. 202, 410) But, instead of recommending a result calculated directly from his financial models, Mr. Murray calculated his final recommended return on equity by just reducing Ameren Missouri's 2012 authorized ROE by 50 basis points (Ex. 202, 410).

Apparently, Mr. Murray is concerned that since in 2012 the Commission found the result of his financial models too low, it is possible that the Commission will also find the result of his 2014 financial models too low (Ex. 202, 410). Essentially, Mr. Murray is recommending a revenue-requirement increase of $49,236,132 from the midpoint of the results of his financial calculations based on his speculative "concern" that the Commission might not like the actual results of his financial modeling (Ex. 202, 410). The Commission should require that an adjustment of this magnitude be based on more quantifiable information. However, if the Commission wishes to accept Mr. Murray's final recommendation, it should be adjusted downward by 7 basis points to 9.18% in order to reflect that the 9.75% figure from 2012 should not be reduced by 50 basis points, but rather should be reduced by the percentage decrease in Mr. Murray's results from 2012 to 2014 (Ex. 202, 410). In this way, the application of Mr. Murray's technique will avoid the error of conflated scale (Ex. 202, 410).

While the other three experts have return on equity recommendations in the low 9% range, Mr. Hevert somehow recommends 10.4% based on a range of 10.16% to 10.77% (Ex. 16, 17, 18). Mr. Hevert's analysis is based on his use of a Constant Growth Discounted Cash Flow (DCF) analysis, a multi-stage DCF analysis, the Capital Asset Pricing Model, and a Bond Yield

Plus Risk Premium model (Ex. 16, 17, 18). However, the Company's recommendation does not reflect today's market reality. An ROE of 10.4% is significantly higher than the 9.8% ROE Ameren Missouri was awarded in its last rate case (Tr. Vol. 21 p. 1288). This is surprising because capital market costs are lower now than in Ameren Missouri's last rate case (Tr. Vol. 21, p. 1195). The cost of equity also has gone down (Tr. Vol. 21 p. 1346). As a result of the capital market decline, average ROE awards for electric companies throughout the country have declined (Tr. Vol. 21 p. 1195, 1273). But still, Ameren Missouri requests an ROE that exceeds the ROE it was awarded in the last case.

One of the main faults Mr. Hevert finds with the financial models of the other experts is that the growth rates they use, he believes, are too low (Ex. 17). However, Mr. Hevert relies on long-term sustainable growth rate estimates in his DCF models that are higher than consensus growth rate outlooks of the economy as a whole (Ex. 410, 511). Mr. Hevert also calculates two of the three growth rates that are used in his analysis in a way that distorts the consensus of the estimates that he obtains from three different sources, a distortion which greatly affects his ROE recommendation (Ex. 410). Indeed, Mr. Hevert's estimation of a GDP growth rate is excessive and out of line with a consensus of expert forecasters (Ex. 410. 511). It is not reasonable to expect that growth rates will exceed nominal GDP in the long term (Tr. Vol. 21 p. 1130-1331). Ameren Missouri, as a regulated monopoly utility, is no Apple or Home Depot, and it is not reasonable to expect the Commission to treat it as such when setting ROE (Tr. Vol. 21 p. 1331-1332).

Additionally, forward-looking economic growth in this country is not projected to be commensurate with past experience (Tr. Vol. 21 p. 1314). Mr. Hevert's estimated growth rate gives no weight to what the current economic conditions are and does not reflect the widely known sentiment that we are expected to be in a low-growth, relatively low-inflation environment for the near future (Ex. 410; 511; Tr. Vol. 21 p. 1298-1300).

Expert testimony was provided showing that capital market costs are much lower now than in Ameren Missouri's last rate case (Tr. Vol. 21 p. 1195). Evidence was also provided that overall yields have declined since Ameren Missouri’s last rate case and continue to decline (Tr. Vol. 21 p. 1288). For example, testimony was provided at the evidentiary hearing that the Treasury rate was 3.2 when the experts filed their direct testimony analysis, but had dropped to 2.6 at the time of the evidentiary hearing (Tr. Vol. 21 p. 1329). In fact, even the Company’s ROE recommendations appear to recognize this fact when they come in lower in this case compared to the last case, though only slightly so. In the previous rate case, Mr. Hevert recommended for Ameren Missouri an ROE of 10.5% (down from his original recommendation of 10.75%) based on a range of 10.25% to 11.00% (Case No. ER-2012-0166, Ex. 20, 21, 22).

As a result of the capital market decline, average ROE awards for electric companies throughout the country have declined (Ex. 409, 510). In fact, between 2012 and 2014 authorized returns on equity for electric utilities dropped by about 25 basis points (Tr. Vol. 21 p. 1273). ROE is just one of many variables that investors would take into account when evaluating whether or not to invest in a company (Tr. Vol. 21 p. 1280). The evidence shows that if potential Ameren Missouri investors look to what other utility Commissions have been awarding electric utilities based on litigated findings, which are based on explicit findings of what the current market cost of equity is for utility companies, such investors would expect an ROE around 9.63% (Tr. Vol. 21 p. 1277). But still, Ameren Missouri requests a ROE that far exceeds the ROE of 9.8% awarded in the last case (Tr. Vol. 21 p. 1288).

Ameren Missouri would have the Commission believe that it would somehow be seen as riskier and less able to attract capital at more favorable rates if the ROE it receives is not the same or greater than that which Ameren Missouri received in its previous rate case. That is to say, Ameren Missouri would be required to pay higher interest on bonds for debt financing and sweeten terms for shareholders in equity investments without receiving what it determines in its sole judgment to be a sufficient ROE. But investors understand that just as fluctuations in the economy are a normal part of business (Tr. Vol. 21, p. 1195) - which just as often as not benefits utility investments changes to authorized ROE are also a part of doing business that is understood and even anticipated by investors. Missouri's regulatory framework is balanced and supports the development of just and reasonable rates that provide a reasonable opportunity for the companies to earn their authorized return on equity The evidence shows that it is possible under the current regulatory environment for Ameren Missouri to earn its authorized ROE (Tr. Vol. 21 p. 1285). In fact, evidence provided in this and a previous complaint case indicate that Ameren Missouri has routinely exceeded its authorized ROE (Tr. Vol. 21 p. 1285; Case No. EC-2014-0223). In that context, what is relevant in this case is what the current market cost of equity is for a regulated utility, not what its last authorized return on equity was.

From a consumer perspective, electric utilities have received a large number of concessions including regular rate increases, reduced risk as a result of trackers and more extensive use of surcharges and other rate-making mechanisms that enhance the profit of shareholders. Ameren Missouri also has a fuel adjustment clause which adjusts regularly to alleviate the risk on the company due to changes in fuel prices and off-system sales. (Tr. Vol. 21 p. 1209, 1250, 1290) Even the Commission has previously stated on page 29 of the Report & Order, for Ameren Missouri's previous rate case, No. ER-2008-0318: "There is no dispute that the implementation of a fuel adjustment clause will reduce the level of operating risk AmerenUE will face." So, the reality is that Missouri is far from a risky regulatory environment for Ameren.

As a result, the evidence shows that Public Counsel's recommendation of Ameren Missouri's required return on common equity of 9.01% reasonably reflects the interests of Ameren Missouri. Mr. Hevert's recommended ROE of 10.4% is excessive and should be rejected by the Commission.

A Return on Equity of 9.01% Reasonably Balances the Interests of the Customers

If the utility has a right to expect the Commission to increase its return on equity in a rate case if reasonable to do so, then customers have the right to expect the Commission to decrease the return on equity in a rate case if the evidence suggests it is the just and reasonable thing to do. As stated above, the charge of the Commission is to set rates that are just and reasonable for the customers (Tr. Vol. 21 p. 1341). The Commission cannot arrive at an appropriate rate of return on equity without considering the point of view of the ratepayers. In addition to cost of service, other relevant factors to consider in setting just and reasonable rates include the value of a service, the affordability of service, rate impacts, and rate continuity. In order to balance the interests of the customers, the Commission should focus on ensuring rate affordability and fairness for consumers. The Commission's decision on this issue must, therefore, be reflective of the specific economic considerations Ameren Missouri's customers are currently facing.

Public Counsel urges the Commission to decide issues in a manner that recognizes the economic challenges faced by households in the Companies' service areas and reasonably minimizes the rate impact on consumers (Ex. 403). During the local public hearings held throughout the state, there was substantial customer concern regarding the affordability of rates (Tr. Vol. 2 – 13, *passim*). The devastating result of ever increasing utility rates continues to be a common theme (Tr. Vol. 2 – 13; EFIS Customer Comments, *passim*). Customers testifying in public hearings and customers submitting comments to the Commission regularly have voiced frustration and concern about the burden of additional rate increases given the state of the economy (Tr. Vol. 2 – 13; EFIS Customer Comments, *passim*). Many Missouri communities, including several within Ameren Missouri's service territory, have declining population and are considered "distressed communities" indicating that many customers already are having trouble making ends meet (Ex. 403). As reported in the 2014 MERIC Population Data Series - New Population Projections Released (See Ex. 403), the affect of ever increasing rates is felt even deeper by Missouri's increasingly aging population:

> According to the population projections, Missouri is expected to approach 6.8 million people in 2030, a growth of roughly 1.2 million people from the year 2000, or a 21% increase to the state's population. Even though Missouri's overall population is expected to increase, demographic trends suggest that the make-up will reflect nation-wide trends of an aging population where 1 out of 5 citizens will be seniors.

The Commission has the authority to set rates in such a way as to recognize the economic challenges faced by customers and to limit the negative impact on ratepayers. In a recent gas case, the Commission stated specifically that facts cited by parties including Public Counsel in support of mitigating rate shock were within the Commission's jurisdiction or authority in that they relate to the public interest and, therefore, the Commission could consider the issue of rate shock in setting just and reasonable rates (See Report *& Order*, p. 5, Case No. GR-2014-0086). The Missouri Legislature also has provided clear guidance to the Commission that the economic effect of rates on customers must be considered. For example, Section 393.155.1, RSMo 2000 specifically provides the Commission the authority to phase-in rates if just and reasonable:

> If, after hearing, the commission determines that any electrical corporation should be allowed a total increase in revenue that is primarily due to an

> unusually large increase in the corporation's rate base, the commission, in its discretion, need not allow the full amount of such increase to take effect at one time, but may instead phase in such increase over a reasonable number of years

Utilizing this authority, the Commission approved a plan for Kansas City Power & Light in Case No. ER-2010-0355, which called for the phase-in of rate increases designed to ease customer rate shock when Iatan 2 began generating power. Therefore, the Commission has the discretion to recognize the economic challenges faced by households in Ameren Missouri's service areas and take steps to reasonably minimize the rate impact on consumers. One way to do that is to specifically set a return on equity that reasonably balances both customer and utility interests.

The U.S. Supreme Court in *Bluefield* and *Hope* determined that ROE should be a reflection of the risk that the utility faces (Tr. Vol. 21 p. 1196). That means that the Commission should take into account factors that increase utility risk as well as factors that decrease utility risk when setting a reasonable ROE. From a consumer perspective, Ameren Missouri has received a large number of concessions including regular rate increases, reduced risk as a result of a fuel adjustment clause (FAC) and extensive use of surcharges, trackers, and other extraordinary rate-making mechanisms that de-risk Ameren Missouri's enterprise and enhance the profit of shareholders (Tr. Vol. 21 p. 1290-1291). Regulatory mechanisms such as these provide a financial safety net for the utility because they allow the utility to recover expenses outside of test periods and reduce regulatory lag, among other benefits. Often, in so doing, the deviations from traditional ratemaking have allowed the company to exceed its authorized return (Tr. Vol. 21 p. 1203). As a result, risk from the investors' standpoint goes down with the implementation of each new regulatory mechanism because investors have been given even greater assurance of revenue and cash flow (Tr. Vol. 21 p. 1196) - an assurance that non-regulated businesses cannot offer their investors. In fact, the record shows that with the regulatory mechanisms that are available to Ameren Missouri, it has been able to earn millions more than its authorized return on equity in the last two years (Tr. Vol. 21 p. 1285). Ameren Missouri's approved regulatory mechanisms have been quite successful in reducing the utility or investors' risk and transferring that risk to Ameren Missouri's customers (Tr. Vol. 21 p. 1196).

The Commission has the authority to take into consideration the lowering of risk that is inherent to Ameren Missouri when it receives rate adjustment mechanisms such as an FAC. In fact, this authority has been cited by the Commission on page 31 of the Report & Order, for Ameren Missouri's previous rate case, No. ER-2008-0318:

> Section 386.266, RSMo (Supp. 2008), the statute that allows the Commission to order AmerenUE to implement a fuel adjustment clause, allows the Commission to modify a company's allowed return on equity to reflect the implementation of a fuel adjustment clause. Specifically, subsection 7 of that statute provides that the Commission may:
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>> take into account any change in business risk to the corporation resulting from implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to any other changes in business risk experienced by the corporation.

The Commission should take Ameren Missouri's decreased risk in account and actively seek to approve the lowest reasonable ROE supported by the evidence before it.

The Commission has substantial discretion when setting what it believes is a just and reasonable ROE. While recommended ROE's have been provided, each expert also has provided a range for ROE, and each has stated that any ROE within that range meets the requirements of a reasonable return on equity as developed by the U.S. Supreme Court decisions in *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); and *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944). Mr. Schafer stated that a ROE between 8.74% to 9.22% would be reasonable (Ex. 409, 410 &

411). Mr. Gorman states that his calculations show that a ROE anywhere between 9.00% to 9.60% would be reasonable (Ex. 510; Tr. Vol. 21 p. 1196). Similarly, Staff witness Mr. Murray supported a reasonable range for ROE anywhere between 9.00% to 9.50% (Ex.202; Tr. Vol. 21 p. 1341). While his range may be unreasonably high, even Mr. Hevert admits that the lower end of his ROE range could be reasonable (it is not), thus satisfying the *Bluefield* and *Hope* standards set by the U.S. Supreme Court for a reasonable ROE (Tr. Vol. 21 p. 1124). Therefore, all experts agree that an awarded ROE that is anywhere within a just and reasonable range which satisfies *Bluefield* and *Hope* is neither excessive nor confiscatory. As a result, the Commission can be assured that rates set at the low end of the ROE range presented in this case are still just and reasonable for Ameren Missouri's customers. Just because the experts may have recommended a specific ROE does not mean the entire range they have supported is not reasonable.

Inherent in setting a just and reasonable rate is a requirement for the Commission to make rates as affordable as possible for the ratepayers without causing detriment to the utility. To accomplish this, it is crucial that the Commission keep ROE as low as reasonably possible. Because the Commission must balance the interests of the customers and the utility, an ROE that awards shareholders one dollar more than that minimum amount which is required to provide a fair opportunity to earn a reasonable return on investment is an unjust and unreasonable ROE. The effect of ROE on the customers and the affordability of rates in this case is staggering.

Again, three of the four experts have return on equity recommendations in the low 9% range. According to Staff's February 20, 2015, Reconciliation, the Revenue Requirement expressed by the Company at its recommendation of 10.4% ROE is $200.5 million per year (EFIS No. 398; Tr. Vol. 21 p. 1342-1343). According to that reconciliation, if the Commission approves MIEC's recommended ROE of 9.30%, the Company's revenue requirement for

Ameren Missouri would be reduced significantly, saving the customers $65.4 million per year (approximately 33%). The reconciliation also shows that if the Commission approves Staff's recommended ROE of 9.25%, customers would save $69.1 million per year (over 34%) (EFIS No. 398; Tr. Vol. 21 p. 1342-1343). Similarly, if the Commission approves an ROE of 9.01%, which reflects Public Counsel's proven-reasonable recommendation, the savings to the customers would be $82.0 million, or approximately 41%, each year (EFIS No. 398; Tr. Vol. 21 p. 1342-1343). Staff's final reconciliation filed on March 28, 2015, reflects a slightly reduced revenue requirement for Ameren Missouri of approximately $181.3 million, but similarly staggering customer impacts result from the ROE recommendations of MIEC, Staff and OPC (EFIS No. 687). Based on this updated Staff reconciliation, if the Commission approves Public Counsel's recommended ROE of 9.01%, which falls within the range three experts agree would be a just and reasonable ROE for Ameren Missouri, **customers would save $81.7 million, or over 45% of Ameren Missouri's total revenue requirement** (EFIS No. 687; Tr. Vol. 21 p. 1198, 1343).

As a result, the evidence shows that Public Counsel's recommendation of Ameren Missouri's required return on common equity of 9.01% reasonably balances the interest of the customers. Mr. Hevert's recommended ROE of 10.4% is excessive and should be rejected by the Commission.

Vegetation Management and Infrastructure Inspection Trackers

No vegetation management and infrastructure inspection costs tracker should be re-authorized in the current case. Trackers are another regulatory mechanism that causes out-of-period shifting of costs by allowing revenues or expenses incurred in one period to be recorded and recovered from customers in another time period. As explained in the regulatory policy section above, any deviation from the matching principle creates a false or skewed picture of a company's overall costs (Case No. SR-2013-0016, *In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company*, Report and Order, pp. 32-33 (July 20, 2013)). A tracker mechanism causes costs incurred in one time period to be collected from ratepayers in a later period – indeed, from ratepayers that may not have even been taking utility service when the cost was incurred - and so, generally, should be avoided.

Further, the Commission should reject Ameren's request for continuation of these trackers because they no longer are needed to serve the purpose identified when authorized by the Commission (Ex. 406, pp. 30-31). In Case No. ER-2008-0318, the Commission authorized trackers for the expenses related to both vegetation management and infrastructure inspection. In the Report and Order from that case, the Commission recounted that in 2006 AmerenUE experienced extensive service outages (Report and Order, Case No. ER-2008-0318, p. 32). The Commission explained that in response to concerns that electric utilities had failed to maintain their electric distribution systems properly, it had promulgated new rules, Commission Rules 4 CSR 240-23.020 and 4 CSR 240.030, designed to compel electric utilities to do a better job maintaining their distribution systems (Report and Order, Case No. ER-2008-0318, p. 32). Those rules became effective on June 30, 2008. In its 2008 Report and Order, the Commission stated about the vegetation management tracker:

> The Commission does not intend to allow the overuse of tracking mechanisms in this case, or in future rate cases. However, the tracker proposed by AmerenUE in this case is appropriate. This is a limited tracker that will have only a limited effect on AmerenUE's business risk. With the cap proposed by Staff, the tracker can increase AmerenUE's vegetation management costs by no more than approximately five million dollars. Furthermore, because the vegetation management rule is still very new, no one can know with any certainty how much AmerenUE will need to spend to comply with the rule's provisions.

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(Report and Order, Case No. ER-2008-0318, p. 41). Thus, when it authorized the tracker for vegetation management, the Commission recognized that in this limited instance because of the unknown costs associated with a new rule, the tracker was appropriate, but the Commission reiterated that it would avoid "overuse." (*Id*.)

In addition, the Commission authorized the infrastructure management tracker, stating "The Commission has previously approved a tracker for vegetation management expenses and for the same reasons, will approve the tracking mechanism to also apply to infrastructure inspection expenses as previously described." (*Id*. at pp. 46-47). Thus, the policy rationale underlying an infrastructure management tracker was that new Commission rules caused the company to incur an unknown amount of costs for which there was no historical reference point.

In Ameren's most recent rate case, ER-2012-0166, the Commission indicated that the policy for the trackers was based on the limited uncertainty in costs caused by the new rules. The Commission decided:

> Although Ameren Missouri now has more experience in complying with the rules, it still has not completed a single cycle on inspections for its rural circuits. The Commission finds that because of that remaining uncertainty the tracker is still needed. However, as the Commission has indicated in previous rate cases, it does not intend for this tracker to become permanent.

(Report and Order, ER-2012-0166, pp. 106-07). In its discussion of the issue, the Commission explained its 2008 decision to allow the trackers,"…since the rules were new …Ameren Missouri had too little experience to know how much it would need to spend to comply with the …rules …[b]ecause of that uncertainty, the Commission established [the trackers]." (*Id*. at 103). The Commission further explained that it renewed the tracking mechanism in Ameren Missouri's next two rate cases, ER-2010-0036 and ER-2011-0028, because Ameren Missouri's costs to comply with the vegetation management and infrastructure inspection rules were still uncertain, as the company had not yet completed a full four/six year vegetation management cycle on its entire system (*Id*. at 104). The Commission has made it clear that the reason for the tracker was not because the vegetation management and infrastructure inspection costs themselves were variable, but because the cost of complying with the rules was unknown. This distinction is important because it follows, then, that once an appropriate level of historical costs could be determined, the trackers should be discontinued. Once Ameren has completed a full four/six-year-vegetation-management cycle on its entire system, under the Commission's long-standing rationale, enough historical cost information will exist on which to base rates, and the cost uncertainly stemming from the Commission's rules ceases to exist (*Id*. at 106-07).

As of the operation of law date of the current case, there will be nearly seven (7) years of experience upon which the Company can rely for setting a base level of these tracked costs in rates (Ex. 406, pp. 30-31). The Company has completed the full cycles for both the vegetation and infrastructure trackers (Ex. 217, p. 8). Public Counsel witness Ted Robertson testified that a sufficient database of historical actual costs exists upon which to determine an annualized level of costs for each of these expenses to include in the development of rates (Ex. 408, pp. 15-16). The reasons why the Commission allowed the trackers to continue no longer exist.

There is an additional policy reason to discontinue the tracker mechanisms. Staff witness Lisa Hanneken testified that a tracker creates a disincentive for the company to control costs (Tr. Vol. 20, p. 933). Instead of incentivizing the company to seek efficiencies and manage costs effectively to the financial benefit of ratepayers, a tracker mechanism simply shifts risk properly borne by the company onto those ratepayers. With no risk comes no financial incentive for efficiency. Moreover, Ms. Hanneken testified that a tracker reduces the risk on the company and that there should be some accounting for that reduction of risk (Tr. Vol. 20, p. 932-933). Rather than allowing a tracker, the Commission should include an amount in base rates and end the mechanisms going forward.

The tracker mechanism was never meant to be permanent. Its continued use instead of proper historical cost of service regulatory ratemaking merely continues to shift risk off of shareholders and onto ratepayers (Ex. 406, pp. 30 – 31). The annual costs for compliance for the vegetation management activities are fluctuating up and down, as is normal with many costs under the control of the utility's management, while those of the infrastructure inspection program have dropped significantly (Ex. 406, pp. 29-31). There is no longer any need to continue allowing either of these abnormal tracker mechanisms.

It is Public Counsel’s position that the base amount of non-labor O&M vegetation management and infrastructure inspection costs authorized in rates should be $53,114,501 and $6,149,077, respectively. To develop the recommendation for the vegetation management costs, Public Counsel witness Mr. Robertson used the entire data base of historical costs that the company provided (Tr. Vol. 20, p. 945). The entire time period represents the most reasonable universe of data for the purpose of determining an annualized level of expense on a going-forward basis (Ex. 406, p. 23). Because these costs did not show any definitive trend either up or down, the use of a longer time period permits a smoothing of the costs to be recovered by the utility (*Id*). Mr. Robertson testified that, based on his statistical training, using the entire population of historical data was the most appropriate method (Tr. Vol. 20, p. 952).

When determining the annual expense level going forward, the best regulatory ratemaking methodology to utilize is to normalize the costs based on an average of actual historical costs (Ex. 408, p. 10). Ameren’s proposal to use the test year data, rather than a normalization of the known universe of costs, is insufficient in this instance because it does not take into account changes in the actual expenses from year to year (Ex. 408, p. 13). That is why Public Counsel recommends that if we have a tracker and we have the history of cost data that the tracker has provided over the multi-year cycles, the Commission should use that data, and accordingly, the annual level of expense to be put into rates should be based on a normalization of the known universe of historical costs (Ex. 408, pp. 13-14).

Public Counsel's recommendation for the infrastructure inspection cost is based on a two-year average of expenses booked during the twelve months ended March 2013 and March 2014 (Ex. 406, p. 23). This method is different than the method used to develop the appropriate vegetation management cost level. As stated above, the expenses for vegetation management activities did not show any discernible trending of costs incurred. The exact opposite is true for infrastructure inspection costs (Ex. 406, p. 23). Beginning with the first full year of expenses booked on a twelve-month-ended-March basis, these costs have shown a steady and significant decrease (*Id*). Mr. Robertson testified that the costs for infrastructure inspections have reached a plateau or level that can be utilized reasonably to develop an annualized amount on a going-forward basis (Ex. 406, p. 24). It is clear that the particular facts surrounding these two cost items are different. Applying Mr. Robertson's selected methods for determining a reasonable level of cost to be included in rates going forward is warranted under a review of all the relevant factors.

Storm Expense and Two-Way Storm Costs Tracker

Public Counsel, along with MIEC and the Commission's Staff, opposes the continuation of a storm restoration cost tracker. For many of the same reasons articulated in Public Counsel's opposition to the vegetation management and infrastructure inspection trackers it also opposes the storm tracker. Continuing the storm expense tracker is bad public policy. The tracker reduces the company's incentive to control costs and infringes on the matching principle. Additionally, this particular tracker is not needed.

The Commission has issued some guidance on storm trackers specific to Ameren. In Case No. ER-2010-0036, Ameren requested to establish a storm-cost tracking mechanism (Report and Order, ER-2010-0036, p. 66). The Commission denied the request, stating:

> The Commission is unwilling to implement another tracker. As the Commission has previously indicated, **trackers should be used sparingly because they tend to limit a utility's incentive to prudently manage its costs**. If all such costs can simply be passed on to ratepayers, there is a natural incentive for the company to simply incur the cost. If the company must consider whether it will be able to recover a cost, it is more likely to think before it spends and maximize any possible cost savings.

(Report and Order, ER-2010-0036, p. 68) (emphasis added). In reaching this decision, the Commission reasoned that the storm cost recovery method used in the past has worked and maintains a strong incentive for the Company to manage costs. Further, the Commission has suggested that it would consider recovery of extraordinary costs resulting from severe weather through the accounting authority order mechanism (Report and Order, ER-2010-0036, p. 68). In denying the storm cost tracker, the Commission continued to caution that trackers should be used sparingly (*Id.*).

In 2012, Ameren Missouri again requested authorization for a storm cost tracker. In Case No. ER-2012-0166, the Commission authorized such a tracker, but reaffirmed its skepticism of tracking mechanisms:

> In general, the Commission remains skeptical of proposed tracking mechanisms. There is a legitimate concern that a tracker can reduce a company's incentive to aggressively control costs. However, that concern is reduced for major storm restoration costs. When faced with a massive power outage, the company's first priority must be to quickly restore electric service to its customers.

(Report and Order, ER-2012-0166, p. 96). In addition to emphasizing the importance of the incentive to control costs, the Commission – for storm expense – specifically identified its concern that the company needs to quickly restore service to customers after a major storm (*Id*). Additionally in its decision, the Commission explained that storm costs can have a significant impact on the company's overall costs and ability to earn a reasonable return on investment (*Id* at 96).

While the Commission may have found the record in that case supported authorization of the tracker considering the three above-cited factors, it should not be so in this case. The record shows that there is no reason to continue the storm cost tracker. Looking first at the company's incentive to control costs, Staff Witness Kofi Boateng testified that a tracker reduces the Company's incentive to control costs (Tr. Vol. 20, p. 852). Although not evidence itself, Counsel for Ameren succinctly explained that, absent a tracker, the company has an incentive to control costs, stating: "… if the company is forced to live within the confines of the amount of storm restoration costs that the Commission has included in base rates, then it will do everything it can to manage those costs to stay within that limitation." (Tr. Vol. 20, p 817, ll. 12 – 16). It is true that storm restoration costs have varied from year to year. Equally true, the company certainly has no control over when storms occur. However, storms should be considered a normal and ongoing expense for an electric utility (Ex. 206, p. 4). The fact that some level of variation in storm cost levels exists is not unlike many other costs that the Company regularly incurs (Ex. 408, p. 8). Traditional ratemaking tools already exist to permit the company to recover the storm costs adequately (Tr. Vol. 20, p. 850). One of those tools, the preferred method, is to use historical data to develop an annualization of the costs (Ex. 406, p. 20; Tr. Vol. 20, p. 850). Here, there is enough historical information available to the parties to develop a base level that should be included in rates; storms have been happening since long before Ameren started providing electric service (Tr. Vol. 20, p. 851).[3]

Moreover, the company does not need an exception to the traditional ratemaking process. Prior to having a tracker in place Ameren has been able to recover storm restoration costs through a variety of means (Tr. Vol. 20, p. 851). In fact, Ameren witness Mr. Wakeman testified that the Company has never had any expense disallowed during major storms (Tr. Vol. 20, p. 839). Further, Wakeman testified that even if a storm tracker is eliminated, the company will continue to be aggressive in responding to storm damage and that the company's services would not be affected (Tr. Vol. 20, pp. 839-43). This is true because if the company does not sell electricity, it does not make money; it has an inherent financial incentive to restore expeditiously service to customers - all the financial incentive it needs. The other considerations used by the Commission in 2012 to justify a departure from traditional ratemaking are not supported by the record in the present case.

Finally, it is now clear that the storm cost is not large enough to merit authorizing a tracker on the basis of the financial impact to the company. In the first instance, as indicated above, Ameren has recovered all storm restoration costs prior to having a tracker mechanism. Second, the annual amount for the storm costs represents less than 2/10ths of 1% of the company's total operating expenses (Ex. 408, p. 10). This amount, though not insignificant standing alone, when evaluated against the Company as a whole, does not justify a special tracker mechanism. The company has failed to justify its request for a special cost tracker. It is

[3] In contrast to other trackers, there is no new regulatory or other imposed cost that might require assessment before determining an annualized amount to be included in rates. Storms are not new.

Public Counsel's recommendation that the base amount of non-labor O&M major storm cost allowed in this case be $4,600,000.

Class Cost of Service, Revenue Allocation and Rate Design

On March 10, 2014, Public Counsel, the Missouri Retailers Association, the Missouri Industrial Energy Consumers ("MEIC"), Noranda Aluminum, Inc. ("Noranda"), and Consumers Council of Missouri ("Consumers Council"), filed a Non-unanimous Stipulation and Agreement ("Stipulation") regarding economic development, class cost of service, revenue allocation and rate design (EFIS No. 436). The Missouri Department of Economic Development – Division of Energy filed a statement of support for the stipulation shortly thereafter (EFIS No. 437). Public Counsel entered into the Stipulation believing the terms to be a fair and reasonable compromise to resolve the rate design issues in this case (EFIS No. 436). The terms of that agreement resolved issues 19 (Class Cost of Service, Revenue Allocation and Rate Design), 21 (Economic Development Rate Design Mechanisms), 22 (MEEIA Low Income Exemption) and 31 (Noranda Rate Proposal) and all of their subparts as set forth in the First Amended Joint List of Issues, List and Order of Witnesses, Order of Cross-Examination, and Order of Opening Statements dated February 19, 2015 (EFIS No. 436 and EFIS No. 382). Several parties filed objections to the Stipulation, therefore Public Counsel adopts the terms of the Stipulation as its position for the issues listen therein.

These terms are a just and reasonable compromise between the parties. Public Counsel witness Lena Mantle testified that the total package of the Stipulation and Agreement was in the public interest (Tr. Vol. 35, p. 3042). Mr. Brubaker testified that, in this unique circumstance, the rates outlined in the stipulation are appropriate (Tr. Vol. 35, p. 2688-89). Indeed, Mr. Brubaker prepared a schedule calculating the increase in rates to other customer classes if Noranda left the system compared to if Noranda stayed on the system at a $34 /MWh rate – with the stipulated conditions (Ex. No. 534). Under the stipulated terms, residential customers would see a 1.15% rate increase (Ex. No. 534; Tr. Vol. 33, p. 2668). If Noranda were to leave the system, residential customers would experience an increase of 2.16% (Ex. 534, Schedule MEB-COS-8). On behalf of industrial customers, Mr. Steven Spinner testified that if Noranda left the system entirely, his company would see rates increase about 2.1% (Tr. Vol. 33, p. 2584). However, if Noranda were to stay on the system under the stipulated rate and terms his company would see rates increase by a lower 1.5% (*Id*).

As the Stipulation was meant to resolve those issues, it included several terms that affected the class cost of service, revenue allocation, and rate design. For Noranda, the terms would provide temporary rate relief and some measure of rate stability. For other customers, they receive Noranda's continued contributions to fixed costs reflected in the stipulated rate, and Noranda's acceptance of certain other terms and conditions.

Residential Customer Charge

Consistent with the non-unanimous stipulation and agreement regarding economic development, class cost of service, revenue allocation and rate design. Public Counsel believes the residential class customer charge should remain $8.00 per month (EFIS No. 436, p. 2). In this case, Staff's Class Cost of Service ("CCOS") study showed cost causation recoverable through a residential customer charge to be $8.11 per customer (Ex. 201, P. 43). Yet, Staff recommended that the residential customer charge remain $8.00 per month based on rate design principles regarding rate simplicity, stability, and other factors (Ex. 201, p. 43). Importantly, there is no evidence in the record to show that the $0.11 difference between Staff's recommendation and the results of its cost causation analysis on this charge will play any role in a customer's decision to conserve energy. To that point, Staff's witness testified that $0.11 is a small enough amount to be considered *de minimis* (Tr. Vol. 23, p. 1538). At such a small increment, a change to the customer charge is not relevant to the conservation incentive at all. Moreover, it is not at all clear that even under Ameren Missouri's proposal - a customer charge in the neighborhood of $8.50 depending on the revenue requirement outcome in this case - the change in the customer charge would have any impact on the conservation price signals sent to residential ratepayers. Rather, such a change to the charge is a rather unremarkable continuation of the Company's long-held stance of shifting risk off of shareholders and onto the backs of residential customers. For the reasons set forth in Staff's analysis of the customer charge, Public Counsel wholly concurs and supports continuation of the customer charge at its current level, but further suggests that the range of potential increases suggested in this case do not rise to the level of impacting energy conservation policy and, rather, fall squarely within the traditional regulatory ambit of allocating risk between shareholders and ratepayers.

Revenue-Neutral Inter-Class Cost Shifting

Because this is a general rate proceeding, the revenue requirement must be allocated among the ratepayers, not the shareholders. The aforementioned stipulation accepts Ameren Missouri's proposal to apply equal percentage system average increases to each class based on the revenue requirement increase ordered in this case (Ex. 7, p. 17).

A total of seven CCOS studies were conducted in this case. Staff conducted three CCOS studies (See Ex. 201, p. 34; Ex. 215, p. 4). Ameren Missouri conducted one CCOS study (See Ex. 7, p. 15). Public Counsel conducted two CCOS studies (See Ex. 403, p. 23). Mr. Maurice Brubaker filed one CCOS study (See Ex. 503, Schedule MEB-COS-4). These CCOS studies provide only the starting point for rate design in this, or any, rate case. During the hearing, Staff witness Sarah Kliethermes explained that these CCOS studies are a general guide in determining what classes are or are not meeting fully embedded costs and meeting their allocated expense (Tr. Vol. 35, p. 3021). She further explained,"[t]hey're good for what they're good for, but to look at them as an element of utmost precision is a misuse of what a class cost of service study is." (Tr. Vol. 35, p. 3022-23). Mr. Brad Fortson also provided testimony that a CCOS should only be used as a guide for designing rates because bill impacts, rate riders, and economic development need to be considered (Ex. 215, pp. 4-5). Even Ameren Missouri's witness Mr. Davis agreed that, in addition to the results from a CCOS, other factors should be considered when designing rates (Tr. Vol. 23, p. 1485). Applying different policy considerations can result in differences in the proposed rate design from each of the parties. It is up to the Commission to consider all relevant factors and determine a just and reasonable allocation.

In exchange for certain conditions, the stipulating parties have agreed that Noranda's class should receive different rate treatment. With Noranda purchasing power at a reduced rate, the signatories agreed to apply the resulting deficiency in retail base rate revenue associated with the creation of the Industrial Aluminum Smelter (IAS) class among all remaining classes paying for Ameren Missouri's electric service by changing base rate revenue in proportion to current base rate revenue minus LTS base rate revenue. Additionally, any change in FAC revenues associated with subpart (8) of the stipulation will flow automatically through the FAC to all remaining classes paying for Ameren's electric service. The agreement is based on various policy considerations including economic impact of Noranda and is supported by the record.

Noranda Rate Proposal

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** (Ex. 612 HC, pp. 7-8). Noranda also has offered evidence that high electric rates have caused other aluminum smelters to close (Tr. Vol. 33, pp. 2629-30). Noranda presented further testimony that **

** (Ex. 604 HC, pp. 3-4). Dr. Schwartz testified that Noranda was ** **(Ex. 610 HC, p. 10). Dr. Schwartz explained the timing related to Noranda's finances, **

** (Id at 19). The conclusion Dr. Schwartz draws from his analysis is that Noranda's filed price proposal allows Noranda to survive. **

** (*Id*).

The record in this case provides a basis on which the Commission can determine that, but for a timely rate reduction to the stipulated retail rate in this proceeding, Noranda's ability to provide any benefit to Ameren Missouri's system and other ratepayers will be in substantial jeopardy, if not certain to vanish. Indeed, Noranda has offered the testimony of Layle "Kip" Smith on the financial issues threatening the viability of Noranda (Ex. 612 NP and 612 HC); Dale Boyles on the viability of Noranda at current electric rates (Ex. 600 NP, 600 NP, 601 NP, and 601 HC); Henry Fayne on the importance of electric rates to the operation of aluminum smelters (Ex. 602 NP, 602 HC, 603 NP, and 603 HC); Thomas Harris on the ability of Noranda to attract capital (Ex. 604 NP, 604 HC, and 605); Steven Schwartz on the financial viability of Noranda (Ex. 610 NP, 610 HC, 611 NP, and 611 HC); and Colin Pratt on the volatility of aluminum prices (Ex. 608 and 609).

And at the stipulated rate, the public is better off with Noranda on the system than without Noranda. Whether the public is better off asks the Commission to make a determination - like it does in every case - regarding what is in the public's interest. The public interest is a matter of policy to be determined by the Commission. *State ex rel. Public Water Supply Dist. v. Public Service Comm'n*, 600 S.W.2d 147, 157 (Mo. App. 1980). When making such a decision, it is within the discretion of the Commission to determine when the evidence indicates the public interest would be served. *State* ex. rel. *Intercon Gas, Inc. v. Public Service Comm'n*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993).

The terms of the non-unanimous stipulation and agreement put forward a position, supported by the record, that benefits both Noranda and the other ratepayers. Those terms include the creation of a new rate class for Industrial Aluminum Smelters (IAS), of which Noranda will be a member. The Stipulation provides that the IAS class will: receive an effective base rate of $34.00/MWh; be exempt from paying the Rider FAC; and be subject to 100% of any new surcharge, adjustment mechanism or any other mechanism that seeks to change or impose new rates between rate cases that takes effect during the term as the result of any new Missouri legislation (EFIS No. 436).

Staff witness Sarah Kliethermes testified that Staff's dedication to traditional cost of service ratemaking in this case is tempered by a willingness to accept a reasonable solution on reasonable terms if the Commission believes that Noranda is on the verge of going out of business (Tr. Vol. 35, p 3013). Ms. Kliethermes testified that it was Staff's position that if the Commission believes that without rate relief Noranda will close down, the Commission should mitigate the loss (Tr. Vol 35, p. 3002). Ms. Kliethermes testified that the incremental cost to serve Noranda is $31.50 (Tr. Vol. 35, p. 3003). At that rate, there is no contribution to fixed costs

(*Id*. at 3015). However, for every additional dollar added, Noranda would make a contribution of approximately $4.2 million (*Id*). That marginal amount, according to Staff's calculations, is what Noranda would contribute to the costs that other customers of Ameren otherwise would have to pay (*Id*). The $34.00 /MWh rate included in the stipulation and agreement, even under Staff's calculations, contributes to fixed costs.

During the hearing, Mr. Dauphinais also testified that a $34 dollar rate would ensure that Noranda makes a positive contribution to fixed costs (Tr. Vol. 35, p. 2800). Moreover, he testified that if an escalator were applied – as is included in the terms of the Stipulation and agreement - then Noranda would continue to make positive contributions to fixed costs in the future (Tr. Vol. 35, p. 2801). The existence of the escalator, a base rate adjustment of 50% of the system average increase, ensures that other ratepayers still will benefit more with Noranda taking service at a reduced rate should future commissions continue to recognize the stipulation adopted in this case. In fact, it may even have the impact of causing Noranda to share in a greater portion of future rate increases than it has experienced in previous rate cases. Public Counsel witness Ms. Lena Mantle testified that the overall total increase in Ameren's rates since 2007 is over 40% (Tr. Vol. 35, p. 3068). Over that same time period, Noranda's rates increased by 12.67% (*Id*). Had the proposed 50% escalator been in effect during that time period, Noranda's increase would have been approximately 21% (*Id*). Based on what would have occurred in the past, it is reasonable for the Commission to determine that, with an escalator, Noranda paying a larger portion of any future rate increase than it historically has may benefit other ratepayers. Mr. Brubaker, witness for MIEC, explained in his testimony that if the Commission were to adopt a rate of $34 for Noranda, then other ratepayers would be better off than if Noranda were to leave the system (Tr. Vol. 33, p. 2683). Mr. Brubaker testified that he believed the stipulated rate of

$34 and conditions attending that rate to be fair and reasonable outcome for ratepayers (Tr. Vol. 33, p. 2684).

There is substantial evidence that, at the rate of $34.00/MWh with no FAC, all other ratepayers will be better off with Noranda on the system. The Commission's public interest examination need not end there. Ms. Mantle testified that the total package of the Stipulation and Agreement was in the public interest (Tr. Vol. 35, p. 3042). Dr. Joseph Haslag presented testimony on the impact that Noranda has on the economy of the State of Missouri (Ex. 606 NP, 606 HC, and 607). In his direct testimony, Dr. Haslag summarized the devastating impact of closure of the Noranda smelter on the Missouri economy:

> The impact to the Missouri economy from the shutdown and closure is significant. I treated the case in which the physical capital employed by Noranda vanishes. For the twenty-five year period after the smelter stops operating and vanishes, the discounted sum of lost state GDP is $10.08 billion. Over a ten-year period, the discounted sum of lost state GDP is $4.806 billion. In addition, state and local government revenues are not paid. The discounted sum of lost net general revenue paid to the state is $383.06 million over the twenty-five year period. Between ** ** and ** **, the discounted sum of lost net general revenue is $182.63 million. Personal property taxes plus real estate taxes would also be reduced by $62.49 million over the period ** **-** **. If we focus on the period ** ** through ** **, the discounted sum of personal property taxes would decline by $28.82 million without Noranda operating. Finally, the state would incur costs as a result of the payment of unemployment insurance benefits. Based on the median duration for unemployment spells during the current business cycle, the state would expect to pay nearly $3.6 million in unemployment insurance benefits if the smelter were shutdown. If, however, the smelter shutdown occurred and one uses the sample mean duration for the unemployment spell based on the current business cycle, the state would expect to pay over $9.4 million in unemployment insurance benefits.

(Ex. 606 HC, pp. 16-17). The closure of Noranda's New Madrid smelter would be a devastating blow to many Missourians already facing the economic hardship as described above. But the Stipulation, if enacted, will help avoid that outcome. The Stipulation requires $35 million in annual capital investment in the New Madrid smelter for the term of the reduced rate, and

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perhaps most importantly, guarantees 850 jobs at the New Madrid smelter for as long as the rate reduction is in effect.

Through these conditions, the Commission can ensure that the other ratepayers share the benefit of maintaining Noranda on the system and in the community. Additionally, because of past concerns and because the other ratepayers want to stabilize Noranda in order to keep it on Ameren's system, and not enrich Noranda, the stipulation calls for the Commission to require that Noranda not issue special dividends during the term the reduced rate is in effect. As further protection against enrichment, to the extent future commission recognize this stipulation in years 6-10 after its implementation, and in the event that Noranda's liquidity exceeds $250 million at the end of any quarter, any signatory can begin the process of petitioning the Commission to roll back the rate reduction.

And to ensure the agreement is enforceable, as a term of the IAS tariff, the stipulation calls for the Commission to eliminate the reduced tariff structure altogether where Noranda materially fails to adhere to any term of the agreement.

Ameren's Wholesale Proposal

It is not appropriate to remove Noranda as a retail customer as proposed by Ameren. First, Ameren Missouri's proposal is unreasonable because the revenues that Ameren Missouri would receive from Noranda under Ameren Missouri's proposal would not cover its cost of providing service to Noranda, resulting in higher bills for its other customers both immediately and in the future (Ex. 402, p. 3).

Second, removing Ameren as a retail customer would violate the *Unanimous Stipulation and Agreement* that resolved Ameren Missouri's request for a certificate of convenience and necessity (CCN) to serve Noranda.[4] Public Counsel and other parties to the CCN case agreed to the CCN under certain public interest conditions to ensure that Noranda would contribute towards the cost of service, including the cost of additional combustion turbines that were acquired to support Noranda's load (Tr. Vol. 35, pp. 3069-71). Moreover, the parties to the CCN case also agreed to transfer certain large Metro East customers to Ameren's Illinois affiliate, and, therefore, lose their important contributions towards the cost of service, in exchange for Noranda entering the system and contributing towards the cost of service. Violating the *Unanimous Stipulation and Agreement* would in turn violate the Commission order approving the agreement, and would rob customers of the public interest benefits received from the bargain. These benefits include Noranda's contributions towards Ameren Missouri's fixed costs, which under the agreement, revenues received from Noranda would contribute towards fixed costs for a period of fifteen-years, which Ameren proposes to cut short by 5 years.

Third, there is no legal authority by which the Commission can force Noranda to switch from being a retail customer to being a wholesale customer. Ameren Missouri's witness Mr. Matt Michels concurred with this when he testified that the Commission cannot require Noranda to switch to a wholesale contract (Ex. 26, p.33). The lawfulness of Ameren Missouri's proposal is addressed below in greater detail.

Fourth, Ameren Missouri's "alternative pricing proposal" for Noranda is to end the current retail contract with Noranda by "mutual agreement," however, Noranda opposes Ameren Missouri's proposal (MIEC Statement of Position, EFIS No. 384, p. 16) and removing Noranda

[4] *In the Matter of the Application of Union Electric Company for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain Electric Plant, as Defined in Section 386.020(14), RSMo, to Provide Electric Service in a Portion of New Madrid County, Missouri, as an Extension of Its Existing Certificated Area*, Case No. EA-2005-0180, Order Approving Stipulation and Agreement, March 10, 2005.

as a retail customer would not be by mutual agreement. Ameren Missouri's proposal should be rejected because a primary condition upon which the proposal is predicated, that is, mutual agreement between Ameren Missouri and Noranda, has not been satisfied. Public Counsel was also a signatory to the Stipulation that allowed Ameren to serve Noranda and is similarly opposed.

Fifth, Ameren Missouri's proposal does not include any specificity as to the rate that Ameren would charge Noranda, or how the rate would change over the five years of the contract (Ex. 402, p.3). Approving Ameren Missouri's proposal would be an open-ended approval that likely would not resolve the issue because it would involve continued negotiation, and likely continued disagreement, over the rate to be charged and possible other issues regarding the terms under which Noranda would receive service.

Finally, the "wholesale" option is not actually a wholesale deal at all. Ameren's Mr. Michels testified that retail sale would be directly to a customer. A wholesale sale would be to another party for resale (Tr. Vol. 35, p. 2950). He further testified that a "wholesale" deal between Ameren and Noranda would have to have an intermediary (*Id*). Even though he acknowledged this fact during the hearing, Mr. Michels' prefiled testimony describing the wholesale deal did not mention the intermediary. (*Id*; Ex. 26). After being questioned by the Chairman on this, Mr. Michels admitted that this was not actually a wholesale deal (Tr. Vol. 35, p. 2951). Further, when asked who the intermediary for a wholesale transaction would be, Mr. Michels testified: "It could be an affiliate of Noranda. It could be an affiliate of Ameren Missouri. It could be another third party." (Tr. Vol. 35, p. 2951). And so, the question regarding the logistics of a "wholesale" deal between Ameren and Noranda is reminiscent of the Shakespeare's dialogue in Romeo and Juliet: "what's in a name? that which we call a rose by any other name would smell as sweet." This deal may be enticing for Ameren Missouri, but for ratepayers, it smacks of something far more putrid. Though this deal may be denominated a wholesale deal, in reality it is a retail deal that shifts the risk of a bad contract onto the backs of captive ratepayers. Ameren's own preference is to have Noranda remain a retail cost-based customer (Tr. Vol 35, p. 2972). Mr. Michels agreed with the Chairman that part of the rationale for approving the CCN was that Ameren had to acquire CTG gas-fired units (Tr. Vol. 35, p. 2952). Michels testified that those assets are in Ameren Missouri's rate base (Id). Michels aptly summarized one risk inherent in moving Noranda to a wholesale contract:

> If Noranda is no longer a retail customer of Ameren Missouri, then they would not be paying cost of service based rates which reflect those assets in rate base.

(Tr. Vol. 35, p. 2952). This is important to note because a wholesale rate is a market-based rate (Tr. Vol 35, p. 2978). Staff's Sarah Kliethermes testified that a risk involved with a wholesale contract is that the price would be wrong (Tr. Vol. 35, p. 3001). In the case of the proposal by Ameren, the consequence of the price being wrong is borne by the captive ratepayers (Id). Further exacerbating the risk to ratepayers while insulating Ameren is the operation of wholesale contracts in the company's FAC. Mr. Dauphinais testified that one of the conditions to Ameren's wholesale proposal was that revenues received as a result of the contract would run through the FAC (Tr. Vol. 35, p. 2795). Dauphinais testified that any price differential between the wholesale rate and the retail rate would be paid by neither Noranda nor Ameren – instead it would be paid other customers (Tr. Vol. 35, pp. 2797-98). It is true that this allocation to other customers may or may not occur in the normal rate case process. However, under a wholesale contract, none of the other customers would participate in negotiating the deal (*Id*). And so, the wholesale proposal offered by Ameren deprives customers from the process and unfairly places risk on captive ratepayers.

CCN

The Commission does not have the statutory authority to cancel or "suspend" a Certificate of Convenience and Necessity ("CCN"). In *State of Missouri ex rel. City of Sikeston v. P.S.C.*, 82 S.W.2d 105 (Mo. 1935) (*Sikeston*), the Supreme Court considered the question, "Does the commission have any authority to determine that there no longer exists any public necessity for the continuance of the business on electrical corporation in a certain city or area, or to order it, against its wishes, to cease and desist from its operations?" *Sikeston*, 82 S.W.2d at 109. The Court concluded that "no machinery or procedure has been provided by which this Commission can put an end to such a situation," and that, "If the Legislature had intended that this Commission could terminate the authority of either of such utilities it would have conferred appropriate powers upon the Commission, provided it had constitutional authority for such an act. But the Legislature made no such provision." (*Id).* The Court ultimately held that the Commission lacks the authority to cancel a CCN.

The Legislature has not changed the statute since 1935 to allow for such cancellations. According to the Supreme Court, the only time the Commission may cancel a CCN is "to permit one company to buy the capital stock, franchises, and property of another." (*Id).* 82 S.W.2d at 110. Since the issues in this case do not involve a transfer of stock, franchises, or property, the Commission lacks the authority to cancel Ameren's CCN.

Moreover, canceling the CCN granted for Ameren Missouri to serve Noranda is detrimental to the public interest (Ex. 402, p. 4). First, it would increase rates for all other customer rate classes because the revenues Ameren Missouri would receive from Noranda would be less and would need to be made up elsewhere by other classes (*Id).* In addition, it would create "long-term uncertainty for Noranda regarding provision of electric service to its New Madrid smelter" and would remove the requirement "to provide service for any future owner of this 345 acres in Southeast Missouri." (*Id*). Ameren Missouri's own witness, Mr. Matt Michels, testified that the revenue that Ameren Missouri would receive from the contract would be less than the cost to serve Noranda (*Id.* at 10).

Lastly, revoking Ameren Missouri's CCN would deny the general public of the benefit of the bargain reached under the *Unanimous Stipulation and Agreement* approved by the Commission in the original CCN case for the area that includes Noranda. *Id* at 5. That bargain included Ameren's purchase of combustion turbines that Ameren Missouri claimed were necessary to retain sufficient capacity to serve Noranda (*Id*). Ameren Missouri customers are currently paying for those turbines and would continue to pay for those turbines under Ameren Missouri's proposal (*Id*). In addition, customers also benefited by the *Unanimous Stipulation and Agreement* in that Ameren Missouri transferred certain customers to Ameren's Illinois affiliate in exchange for Noranda. Without Noranda, Ameren Missouri customers would lose out on the benefit that allowed customers with large demand to be transferred to Illinois (*Id*). Under Ameren Missouri's proposal, neither Noranda nor the industrial customers that transferred to Ameren Illinois would contribute towards the cost of service, and Ameren Missouri's customers would lose out on the benefit of that bargain which is contrary to the public interest.

Without a CCN in place and under a wholesale agreement, the Commission might abdicate its authority if the wholesale contract was determined to be an interstate transaction and therefore under the jurisdiction of FERC. 16 U.S.C §824 (c)(d). Mr. Michels testified that generally the rights and obligations under a wholesale sale are limited to whatever is included in the contract, whereas a retail sale is governed by the laws of the state and rules of the

Commission (Tr. Vol. 35, p. 2950). However, after testifying that a wholesale contract between Ameren and Noranda would require an intermediary, Mr. Michels did not know for certain who that would be (Tr. Vol. 35, p. 2951). This arrangement calls into question the Commission's authority over the contract especially if the intermediate entity is outside of Missouri.

Adequate Notice

Section 393.140(7) RSMo. 2000 provides that "… unless the commission otherwise orders no change shall be made in any rate or charge … except after thirty day's notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect." Ameren's proposed wholesale contract was not submitted until January 16, 2015, in its rebuttal testimony in response to Noranda's rate design request (*See* EFIS No. 239). It is important to consider that Noranda's energy requirement is 11.4% of Ameren Missouri's total normalized, annualized energy in the test year for this case (Ex. 402, pp. 11-12). A change as proposed by Ameren on January 16, 2015 would have significant impact on the rates and issues about which customers would care. This wholesale proposal by Ameren was not noticed when Ameren filed its rate case on July 3, 2014 (*See* EFIS No. 9). Nor was it published or otherwise provided to customers in a bill insert (Ex. 402, p. 10). Five of the local public hearings in this case were held before this proposal was filed and the remaining seven were not held before giving the thirty days notice to the Commission or customers (*See* EFIS No. 77). There is no evidence of the wholesale proposal having been discussed at any of the local public hearings, likely because it was not discussed in any of the "commercial" presentations that Ameren gives before the Commission takes testimony. Given the company's lengthy presentations to customers, it is reasonable to expect its representatives to have mentioned this significant proposal to the public.

It is unreasonable to grant Ameren's proposal. Since no notice was provided, customers were not properly notified of the impact of losing Noranda's revenue contributions, which would need to be recovered from all other customers if Noranda were no longer contributing towards the retail costs of service. Approving this proposal without prior notice to customers of the rate increase that would accompany the proposal is unreasonable because it would deny customers an opportunity to respond.

FAC

Noranda is very different from Ameren Missouri's current wholesale customers and cost recovery and revenues received through the FAC and should not be treated as Ameren Missouri's current wholesale customers are treated. As explained above, flowing wholesale revenues through the FAC places the consequence of a bad contract onto captive ratepayers.

Further, the statute enabling the Commission to use an FAC provides that imprudently incurred costs shall be refunded through the mechanism. Mo. Rev. Stat. §383.266.4(4). Ms Kliethermes testified that the company's proposal essentially asks that the Commission make a determination prior to an FAC prudence review that the contract was prudent (Tr. Vol. 35, p. 3000). This pre-approval that this contract could be included in the FAC would be beyond the Commissions statutory authority to approve the use of an FAC.

2005 CCN

The parties to the *Unanimous Stipulation and Agreement* are legally bound by the terms of that agreement. The terms of that Stipulation were largely reflected in tariff sheets – in effect to this day – and each operating together were essential to the agreement by the Commission Staff, Public Counsel, Missouri Industrial Energy Consumers, and Missouri Energy Group regarding the Noranda CCN. These parties based their agreement in good faith on the fifteen-year current contract between Noranda and Ameren Missouri. Among other factors, the parties weighed the benefit of Noranda as a retail customer contributing to the increased fixed costs incurred by Ameren Missouri in the next fifteen years against the detriment of off-system sales that Ameren Missouri would not be able to make given the massive amounts of energy that Noranda would consume and the additional need for additional capacity due to Noranda's large load. In the end, the parties came to an agreement that balanced, for the next fifteen years, their interests. Even if legal, ending the contract after ten years upsets that balance.

Any attempt to overturn the Commission's order granting Ameren Missouri a CCN to serve Noranda would also be a collateral attack on the Commission's 2005 order granting Ameren Missouri a CCN. Section 386.550, RSMo 2000, states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." Accordingly, Ameren's proposal should be rejected as a collateral attack on the 2005 CCN order.

<u>Economic Development Rider</u>

Public Counsel entered into the non-unanimous stipulation and agreement regarding rate design believing the terms to be a fair and reasonable compromise to resolve this issue (EFIS No. 436). Public Counsel supports replacing Ameren Missouri's currently effective economic development rider with revised tariff sheets consistent with the exemplar economic development rider included as Attachment A filed with the stipulation and agreement (EFIS No. 436). An Economic Development Rider designed to encourage business development in areas where population has declined or is projected to decline could act, if properly designed, as a preventive measure against existing and/or future economic hardship (Ex. 403, p. 16).

Considering testimony offered by Staff and Public Counsel regarding the economic hardship faced by many Ameren Missouri customers, a rider that encourages economic development is a step on the path towards recovery.

Ameren Missouri's Economic Development and Retention Rider (EDRR) has been unsuccessful. Only one customer has signed up for the EDRR since its inception (Ex. 403 HC, p. 19). In Case No. ER-2014-0031, Kansas City Power & Light Company (KCP&L) and KCP&L Greater Missouri Operations Company (GMO) submitted revised economic development riders to the Commission. Public Counsel requested a hearing citing concerns about the availability, applicability, and incentive provisions (Case No. ER-2014-0031, EFIS No. 1, p. 1). After extensive negotiations, the Parties entered into a Stipulation and Agreement that included exemplar tariff sheets that included negotiated terms for availability, applicability, and incentive provisions that would encourage economic development but reduce the potential burden borne by ratepayers if the tariff sheets were too broad (*See* Case. No. ER-2014-0031, EFIS No. 11). Since the tariffs were approved in 2013, there have been four applications approved for an EDR for both KCP&L and GMO (Ex. 403, p. 21).

Rather than starting over in a working docket, the successful tariff sheets created for Case No. ER-2014-0031 can be modified to fit the facts and circumstances particular to Ameren's service territory. Attachment A, filed with Public Counsel's non-unanimous stipulation and agreement regarding rate design incorporated may of the lessons learned from the KCP&L case and provides the basis for creating workable economic development rider tariff sheets for Ameren Missouri (EFIS No. 436).

No working docket is necessary. The Commission has an ample evidentiary basis upon which to determine a need exists for an enhanced economic development rider in Ameren

Missouri's service territory (*See* Ex 403, p. 3-23). In October 2014, the Commission issued an order seeking responses to questions regarding rate design mechanisms (EFIS No. 86). The Order made clear that any party wishing to respond could do soon December 19, 2014 (EFIS No. 86). The parties then had additional opportunities to respond in rebuttal and surrebuttal testimony. Public Counsel believes that the opportunity to file testimony on the questions was intended to develop a record in this case so that the Commission could order the implementation of a new, effective economic development rider. Through the testimony of Dr. Geoff Marke, Public Counsel addressed the questions posed by the Commission and provided relevant facts for the record (Ex. 403, 404, and 405, *passim*).

At the hearing, Counsel for Ameren also offered that the company supports opening a docket to explore the issues instead of ordering the implementation of new EDR tariff sheets in this case (Tr. Vol. 24, pp. 1600-04). In pre-filed testimony, rather than responding to the questions asked by the Commission in this case Ameren Missouri offered testimony that merely explained the current rider (Ex. 8). The company had the opportunity to contribute meaningfully and constructively to the discussion of the questions asked by the Commission in October. It chose not to do so. It is audacious for the Company to fail to answer the Commission's questions in pre-filed testimony in this case, and then at hearing foster an argument that the Commission needs a working docket in order to develop a better record before it can make a determination on this issue. The record in this case is sufficient, if the Commission so desires, to modify Ameren Missouri's EDR to the benefit of the ratepayers in Ameren's service territory and consistent with the lessons learned by the parties in developing KCP&L's EDR.

WHEREFORE, Public Counsel respectfully submits its post-hearing brief.

Respectfully submitted,

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