BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for the Issuance of an Accounting Authority Order Relating to its Electrical Operations.	))))	**File No. EU-2012-0027**

REPLY TO AMEREN MISSOURI'S RESPONSE TO
MIEC'S MOTION TO DISMISS

1. Comes now the Missouri Industrial Energy Consumers ("MIEC"), and for its Reply to Union Electric Company d/b/a Ameren Missouri's ("Ameren Missouri") Response to MIEC's Motion to Dismiss, states as follows:

2. Ameren Missouri offers one argument against MIEC's Motion to Dismiss as follows: "[N]one of the cases cited by MIEC involved any consideration of whether Ameren Missouri should be granted an AAO to allow it to defer the costs it had been unable to recover due to the ice storm." Therefore, according to Ameren Missouri, the adjudication of that particular issue is not precluded by *res judicata*.

3. Ameren Missouri's argument fails for the reasons stated in MIEC's Motion to Dismiss, Staff's Motion to Dismiss, Public Counsel's Response to Motion to Dismiss, and for the following reasons.

4. Incomprehensibly, Ameren Missouri cites *Phelps v. Dir. of Revenue*, 47 S.W.3d 395 (Mo. App. E.D. 2001), to support its extraordinary interpretation of *res judicata*. A summary review of *Phelps* reveals that it is an overturned drunk-driving case that does not discuss the issue of *res judicata*, and does not contain language even remotely similar to the quote that is attributed to it by Ameren Missouri. It appears that Ameren Missouri may have meant to cite *Prentzler v. Schneider*, 411 S.W.2d 135, 139 (Mo. 1966), another case that does not support Ameren Missouri's position. In *Prentzler*, the party to the second suit

was not a party to the first suit, and thus, *res judicata* was inapplicable. These facts are not present here, as Ameren Missouri has been a party to the relevant suits in this case.

5. Contrary to Ameren Missouri's unsupported interpretation of *res judicata*, the doctrine of *res judicata* does not rest on whether a particular *issue* has been litigated in a prior proceeding. That doctrine is called collateral estoppel or *issue* preclusion.

6. The doctrine of *res judicata* (or *claim* preclusion) is thoroughly described in *Chesterfield Vill., Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318-319 (Mo. 2002):

> The common-law doctrine of res judicata precludes relitigation of a claim formerly made. . . . A claim is the aggregate of operative facts giving rise to a right enforceable by a court. . . . The doctrine precludes not only those issues on which the court in the former case was required to pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

See also King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495 (Mo. banc 1991), and *Norval v. Whitesell*, 605 S.W.2d 789, 790 (Mo. banc 1980); *Grue v. Hensley*, 357 Mo. 592, 210 S.W.2d 7, 10 (Mo. 1948).

7. In this case, the relevant "claim" or "aggregate of operative facts giving rise to a right enforceable by a court" have already been fully adjudicated before this Commission as discussed in MIEC's, Staff's, and Public Counsel's earlier pleadings.

8. The following illustration may be useful: two parties, Bill and Betty, enter a contract. Betty allegedly (1) breaches the contract, (2) unjustly retains a benefit from the agreement, and (3) commits fraud against Bill. Bill then sues Betty for breach of contract and fraudulent inducement. The jury finds that Betty did not breach the contract and did not commit fraud. Bill then files a second suit for "unjust enrichment," arguing that the prior case involved no consideration of whether Betty unjustly retained a benefit from the

agreement. The doctrine of *res judicata* prohibits the second law suit, despite the fact that the issue of unjust enrichment was not raised in first lawsuit. Bill is barred from bringing the second lawsuit because Bill, exercising reasonable diligence, could have raised the "unjust enrichment" issue in his first lawsuit, and failed to do so.

9. Similarly, the doctrine of *res judicata* prohibits Ameren Missouri from seeking an AAO now, because the aggregate of facts surrounding the losses incurred by Ameren Missouri as a result of the 2009 ice storm have already been fully and fairly adjudicated on the merits.

10. Ameren Missouri's argument that it should be allowed to file for an AAO on the grounds that none of the prior cases "involved any consideration of whether Ameren Missouri should be granted an AAO" lacks any merit, and is contrary to every Missouri case on the subject.

11. Moreover, the policies underlying the doctrine of res judicata of relieving parties of the cost and vexation of multiple lawsuits, serving judicial resources, encouraging reliance on adjudication and bringing litigation to an end apply in this case.

WHEREFORE, MIEC respectfully requests that the Commission dismiss Ameren Missouri's Application for Accounting Authority Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail this 15th day of September, 2011, to the parties on the Commission's service list in this case.

/s/ Brent Roam