

**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)	Case No. EU-2012-0027
Of an Accounting Authority Order Relating to its)	
Electrical Operations.)	
)	

**AMEREN MISSOURI’S RESPONSE TO STAFF’S MOTION TO DISMISS
APPLICATION OF AMEREN MISSOURI FOR ACCOUNTING AUTHORITY
ORDER AND PUBLIC COUNSEL’S RESPONSE TO MOTION TO DISMISS**

COMES NOW Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and in response to Staff’s Motion to Dismiss Application of Ameren Missouri for Accounting Authority Order (“Staff’s Motion”) and Public Counsel’s Response to Motion to Dismiss (“OPC’s Response to Motion to Dismiss”) filed in this proceeding on September 8, 2011 respectfully states as follows:

a. Response to Staff’s Motion

1. Staff’s Motion, like MIEC’s Motion to Dismiss filed earlier in this proceeding, asserts that Ameren Missouri is barred by the doctrine of *res judicata* from requesting an Accounting Authority Order (“AAO”) addressing the significant amount of fixed costs that it failed to recover as the result of the ice storm that struck Southeast Missouri in January, 2009. As the quotation from *Administrative Law* contained in the Staff’s Motion explains, the doctrine of *res judicata* prohibits parties from re-litigating issues once they have been decided. The quotation provides in relevant part:

The interest of parties and of the public in ending litigation normally bars a party who has had his day in court from further pressing ***the same claims or the same defenses.*** (*emphasis added*).

Staff’s Motion, p. 6.

2. In this case the Staff asserts that *res judicata* applies because the *events* respecting the subject matter of Ameren Missouri's Application have been addressed by the Commission twice before—in Case No. ER-2008-0318 and in Case No. EO-2010-0255. Staff's Motion pp. 2-3. But *res judicata* does not address the reporting of events; it deals with the assertion of claims or defenses. In this case, it is crystal clear that the "claim" asserted in the Application—Ameren Missouri's request for an AAO to account for fixed costs that it failed to recover—is completely different from the claims and defenses that the Commission addressed in Case Nos. ER-2008-0318 and EO-2010-0255. In Case No. ER-2008-0318, the Commission denied Ameren Missouri's application for rehearing of a rate case order requesting a modification to the Company's fuel adjustment clause tariff, relief which is completely different from the relief sought in this case. In Case No. ER-2008-0318, the Commission denied the relief sought, in part because there was no time to conduct a hearing on the merits of the Company's request prior to the operation of law date for the case. Ameren Missouri did not get its "day in court" with regard to even that very different claim. As Staff admits, the Commission later acknowledged: "[t]he Commission's order did not make any decision or ruling on the merits of Ameren Missouri's proposal, nor did the Commission take any evidence on the merits of that proposal." The decision in Case No. ER-2008-0318 was not even a decision on the merits of a very different request for relief, and it can provide no basis whatsoever for invocation of the doctrine of *res judicata*.

3. The Commission's decision in Case No. EO-2010-0255 likewise provides no basis for the application of *res judicata* to bar the relief requested in this case. In Case No. EO-2010-0255, an FAC prudence review proceeding, the Staff and other parties argued that the Company had misclassified power sales to AEP Operating Companies, Inc. ("AEP") and

Wabash Valley Power Association, Inc. (“Wabash”) as long-term requirements sales that were excluded from the Company’s fuel adjustment clause. Because the sales to Wabash and AEP were sales that replaced the load to Noranda Aluminum, Inc. (“Noranda”) that was lost during the January 2009 ice storm, the *facts* of the loss of Noranda’s load and the January 2009 ice storm were addressed in the case. But the *claims and defenses* asserted in that case were completely different from, and completely unrelated to the claim asserted by Ameren Missouri in this case. Case No. EO-2010-0255 involved *revenues* derived from sales to AEP and Wabash, not *fixed costs* allocated to Noranda. It involved a completely different amount of money—the revenues derived from the AEP and Wabash sales—not the fixed costs allocated to Noranda. It involved a completely different type of proceeding—an FAC prudence review, whose scope was limited to considering issues directly related to the operation of the Company’s FAC during the period in question. By no stretch of the imagination can the claims and defenses asserted in that proceeding be said to bear any resemblance to the relief requested in this case.

4. The Staff may argue that the request for an AAO *could have been asserted* in Case No. EO-2010-0255, but again this is demonstrably false. The scope of Case No. EO-2010-0255 was limited to review of the prudence of costs and revenues flowing through the FAC during the period covered by the prudence review. That case did not provide a vehicle where a request for an AAO could conceivably have been pursued or granted. Perhaps even more significantly, the fact that Ameren Missouri excluded the AEP and Wabash revenues from its FAC meant that there was no basis for the Company to request an AAO because its fixed costs were being fully recovered by revenues from the AEP and Wabash sales. Only after the Commission determined that those sales were required to be included in the FAC

did it become necessary for Ameren Missouri to request an AAO to recover the fixed costs that it failed to recover due to the ice storm. There was simply no basis for Ameren Missouri to request an AAO until the Commission reached that decision.

5. Staff's assertion that the Company's filing in this case is precluded by the doctrine of *res judicata* is completely meritless and should be rejected.

b. OPC's Response to Motion to Dismiss

6. The Office of the Public Counsel's ("OPC") Response to Motion to Dismiss ("OPC's Response") asserts two arguments. First, OPC asserts that this case should be dismissed based on the principle that the Commission "need not repeatedly conduct hearings on the same or related issues" as held in *Envtl. Utils., LLC v. PSC of Mo.*, 219 S.W.3d 256 (Mo. App. 2007). In that case, the Missouri Court of Appeals found that once the Commission had held a hearing and ruled on dispositive legal issues in a proceeding, it was not required to hold a second evidentiary hearing in that proceeding on matters "irrelevant or repetitious." The striking difference between *Envtl. Utils., LLC* and this case is obvious. Here the Commission has never held a hearing of any kind addressing whether the issuance of an AAO is warranted in this circumstance. The Commission has never even considered this issue, much less ruled on a "dispositive legal issue" after a hearing. As a consequence, *Env. Utils., LLC* provides no basis whatsoever to dismiss Ameren Missouri's application.

7. Second, OPC argues that the Commission's decision on remand in Case No. EO-2008-0216, involving Kansas City Power & Light—Greater Missouri Operations Company ("GMO"), suggests that an AAO should not be granted in this case on policy grounds. Specifically, OPC asserts that the Commission ruled in that case that "An adverse ruling is not an unusual, infrequent, abnormal, or extraordinary event" that would warrant the

granting of an AAO. In that case the Commission was referring to its decision determining the starting date for accumulation period 1 under GMO's FAC. OPC argues that the situation in this case is exactly analogous because Ameren Missouri seeks to have the Commission treat the adverse ruling against it in Case No. EO-2010-0255 as an extraordinary event. Of course this is not Ameren Missouri's position. The Company's position is that the once-in-a-century 2009 ice storm, which caused Noranda to lose service, which caused molten aluminum to freeze in its works, and which ultimately caused Ameren Missouri to be unable to recover approximately \$36 million in fixed costs that had been allocated to Noranda was an unusual, infrequent, abnormal and extraordinary series of events, which it clearly was. It is unreasonable that Ameren Missouri should have to absorb the costs caused by this very extraordinary and unpreventable chain of events, and that the issuance of an AAO is warranted so that the Company can pursue recovery of these costs in its next rate case.

WHEREFORE, for the reasons stated herein the Commission should deny the Staff's Motion to Dismiss Application of Ameren Missouri for Accounting Authority Order, deny OPC's request that the Commission dismiss the Company's application, and summarily grant the AAO requested by the Company.

Respectfully submitted,

UNION ELECTRIC COMPANY,
d/b/a Ameren Missouri

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 15th day of September, 2011.

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