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.	)))))	Case No. EU-2012-0027

AMEREN MISSOURI'S SUR-REPLY TO STAFF'S REPLY TO AMEREN MISSOURI'S RESPONSE TO STAFF'S MOTION TO DISMISS APPLICATION OF AMEREN MISSOURI FOR ACCOUNTING AUTHORITY ORDER, AND SUR-REPLY TO MIEC'S REPLY TO AMEREN MISSOURI'S RESPONSE TO MIEC'S MOTION TO DISMISS

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company"), and in sur-reply to Staff's and MIEC's above-identified replies filed in this proceeding on September 16, 2011, respectfully states as follows:

a. Elements of Doctrine of Res Judicata

1. Staff and MIEC correctly point out that Ameren Missouri provided an errant and incorrect case cite for the four elements of the doctrine of *res judicata*. Ameren Missouri apologizes for the confusion. Neither of them, however, claim that the Company failed to accurately state what those four elements are, and indeed the four elements are well-established under Missouri law.

2. To reiterate: *Res judicata* bars a claim *if* all of the following four elements are satisfied: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or status of the person for

or against whom the claim is made. ***Williams v. Fin. Plaza***, ***Inc.***, 78 S.W.3d 175, 183-84 (Mo. App. W.D. 2002).[1]

b. Neither the Cause of Action nor the Thing Sued For are the Same

3. In Staff's Reply, Staff focuses on the second element of the doctrine of *res judicata*, identity of the cause of action, and seems to conclude that since the second element requires that a claim must have arisen out of the same act, contract or transaction as another claim, then if a claim arises out of the same act as another claim there is *necessarily* identity of the cause of action between the two claims. This is faulty logic, as the ***Williams*** case demonstrates. In that case, although two claims were involved (one for fraudulent misrepresentation and one for federal odometer fraud), both of which were related to same conduct (a car dealership's representation to plaintiff regarding mileage of the purchased vehicle), where the car dealership prevailed on the fraudulent misrepresentation claim in a prior suit, *res judicata* did not bar retrial of the federal odometer fraud claim (necessary because of instructional error) because the elements of the two causes of action (as well as the types of damages sued for) were not identical. The fraudulent misrepresentation claim required proof of nine elements, only one of which (injury/damages) was common to the federal odometer fraud claim, and judgment in its favor on that claim did not bar the second claim. ***Williams*****,** 78 S.W.3d at 183.[2] ***Williams*** also demonstrates that the mere fact that

[1] See also, ***Patrick v. Koepke Constr., Inc. v. Woodsage Constr., Co.***, 119 S.W.3d 551, 555 (Mo. App. E.D. 2003); ***Romeo v. Jones***, 86 S.W.3d 428, 432 (Mo. App. E.D. 2002); ***Lomax v. Sewell***, 50 S.W.3d 804, 809 (Mo. App. W.D. 2001); ***Felling v. Giles***, 47 S.W.3d 390, 394 (Mo. App. E.D. 2001); ***Bolz v. Hatfield***, 41 S.W.3d 566, 570 (Mo. App. S.D. 2001); ***Creative Walking, Inc. v. American States Ins. Co.***, 25 S.W.3d 682, 686-87 (Mo. App. E.D. 2000); ***Missouri Real Estate & Ins. Agency v. St. Louis County***, 959 S.W.2d 847, 850 (Mo. App. E.D.1997); ***Kennedy v. Missouri Atty. Gen.***, 920 S.W.2d 619, 621 (Mo. App. W.D. 1996).

[2] Similarly, *see* ***State ex rel. Division of Family Servs. v. White***, 952 S.W.2d 716, 718 (Mo. App. E.D. 1997), where paternity was involved in two actions, but *res judicata* did not bar the second action. In an action before an administrative hearing officer, a Division of Child Support Enforcement child support notice against a putative father was reversed, because there was not sufficient evidence to create a presumption of paternity. In

there may be facts in common (i.e., the same misrepresentation under-lied both claims) does not mean that resolution of one claim on the merits precludes litigation of the second claim. Thus MIEC's hyper-focus on the fact that the ice storm happened and that those facts have been discussed in prior Commission cases misses the mark.[3]

4. In this AAO case, the "claim" is for lost-fixed costs arising from the unusual and extraordinary ice storm that substantially reduced Noranda's production for an extended period of time. Ameren Missouri had no "claim" for such lost fixed costs in any prior case. Indeed, in the fuel adjustment clause (FAC) prudence case, on which the Staff and MIEC principally rely for their *res judicata* arguments, the Company had no "claim" at all. Rather, if anything the Company had a defense; that is, that the act or transaction at issue there (entering into the two contracts at issue there and classification of them as long-term partial requirements sales) was proper. It is that defense the under-lied the Company's contention that there was no imprudence, that an adjustment to its FAC was improper, and that the revenues it realized under the two contracts at issue belonged to it.

5. As set out in detail in *Ameren Missouri's Response to Staff's Motion to Dismiss and to Public Counsel's Response to Motion to Dismiss*, while the January 2009 ice storm has been addressed by the Commission in ER-2008-0318 and EO-2010-0255, Ameren Missouri is now asserting a claim the operative facts of which are completely unrelated to its prior defense.[4] The transaction that under-lies the Company's request for an AAO in this

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a subsequent circuit court action, Division of Family Services sought a determination of paternity, and child support. The putative father filed a motion to dismiss on grounds of *res judicata*, which the trial court granted. The court of appeals reversed, because the child support action was based on a *presumption* of paternity, but there was no *determination* of paternity, so the two causes of action were not the same.

[3] This, together with the fact that the thing sued for is different (as discussed *infra)* demonstrates the inapplicability of MIEC's "Bill and Betty" example.

[4] Nor is there any authority for the notion that in a prudence review of an FAC the utility can make some kind of "claim" in any event.

case is the storm itself and the fact that it was unusual and extraordinary and caused an unusual and extraordinary loss. The fact that the storm occurred, that it was unusual and extraordinary, and that it caused an unusual and extraordinary loss were *not* elements of the Company's prior defense in a different case involving a different claim by the Staff. If the Company had been correct that the FAC tariff allowed it to enter into the two contracts and treat them outside the FAC it would not have mattered *why* the Company entered into them; that is, the storm was *not an operative fact* with regard to whether the FAC tariff allowed the particular treatment of the contracts. Facts relating to the ice storm and Noranda's production loss were discussed in that case because they provided *background* for why the Company entered into the contracts, but those facts were not dispositive of the defense nor did they enter into the Commission's basis for making its decision in that case on the merits.

6. Indeed, not only is the claim in this AAO case different than the prior defense (which involved the legal issue of what did the tariff language mean and did the contracts fit it) but the thing sued for is also totally different. There in effect the Staff "sued" the Company for *revenues* under those two contracts. Here the Company is in effect asking for an AAO so it later will have the opportunity to "sue" for recognition in the revenue requirement in a future rate case of the *lost fixed costs* arising from the ice storm and Noranda's production loss. *Cf.,* ***Williams***, 78 S.W.3d at 183-84 (Recognizing that the thing sued for was different where the remedy sought under the fraudulent misrepresentation claim was for actual damages reflecting the benefit of the bargain on the sale of the car, which is a different remedy (and in a different amount) than the three times the actual damages remedy, plus attorneys' fees, available under the Federal Odometer Act claim).

7. Put another way, the "thing sued for" in this AAO case is authority to account for lost fixed costs on the Company's books in a manner that will give it the opportunity to seek rate recognition later of approximately $36 million in lost fixed costs. The "thing defended against" in the FAC prudence case were revenues under the two contracts which over those contracts' entire terms reflected margins in a different amount – approximately $42 million.

WHEREFORE, for the reasons stated herein the Commission should deny the Staff's, MIEC's and OPC's request that the Commission dismiss Ameren Missouri's AAO request without consideration of the same on the merits.

Respectfully submitted,

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d/b/a Ameren Missouri

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Dated: September 26, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via e-mail, to the following parties on the 26th day of September, 2011.

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