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**

STAFF MOTION TO DISMISS APPLICATION OF AMEREN MISSOURI FOR ACCOUNTING AUTHORITY ORDER

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the Missouri Public Service Commission's (Commission) August 30, 2011 *Order Setting Dates* and files *Staff's Motion To Dismiss Application Of Ameren Missouri For Accounting Authority Order* on the grounds that Union Electric Company d/b/a/ Ameren Missouri's (Ameren Missouri) *Verified Application For Accounting Authority Order* (*Application*) is barred on the basis of *res judicata*. In support, the Staff states:

1. On July 25, 2011, Ameren Missouri filed its *Application* for an Accounting Authority Order (AAO). Ameren Missouri asserted in its opening paragraph that its filing for an AAO was pursuant to Section 393.140(4) and 4 CSR 240-2.060, "addressing the Company's accounting for fixed costs it has been unable to recover due to an extraordinary, unanticipated, and devastating ice storm that struck Southeast Missouri in late January, 2009."

2. Ameren Missouri states in paragraph 9 on page 5 of its July 25, 2011 *Application* that it is making the filing because of the Commission's decision in Case No. EO-2010-0255. On April 27, 2011 in Case No. EO-2010-0255, the Commission determined that "Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from the power sales agreements with AEP [American Electric Power Operating Companies] and

Wabash [Wabash Valley Power Association, Inc.] from off-system sales revenue when calculating rates charged under its fuel adjustment clause."[1]

3. Ameren Missouri continues to seek intervention from the Commission for relief from a failure in its own drafting of its fuel adjustment clause (FAC) in Case No. ER-2008-0318. On August 18, 2011, the Staff filed in this docket *Staff Response To Commission Order Directing Notice And Filings* in which the Staff proposed that the Commission schedule a prehearing conference for the purpose of setting a procedural schedule. The Staff stated in its August 18, 2011 filing that part of the subject matter of the prehearing conference should be the question of whether an evidentiary hearing is even necessary and whether the Commission should first take up legal issues, respecting Ameren Missouri's *Application*.

4. On August 29, 2011, the Missouri Industrial Energy Consumers' (MIEC) filed its *Motion To Dismiss* on the basis of the common law doctrine of *res judicata*, otherwise known as "claim preclusion."

5. On August 30, 2011, the Commission issued its *Order Setting Dates* in which, among other things, it directed any party wishing to respond to MIEC's August 29, 2011 *Motion To Dismiss* to file a response by September 8, 2011. The Staff believes that *res judicata* is applicable. All of the relevant matters raised or that could have been raised by Ameren Missouri in Case No. ER-2008-0318 and Case No. EO-2010-0255 are the same and have not changed: facts, time, accounting, statutes, rules, and legal principles. None of the relevant circumstances have changed.

6. The events respecting the subject matter of Ameren Missouri's July 25, 2011 *Application* are not new and actually have been brought to the Commission for determination

[1] *Re Union Electric Co. d/b/a Ameren Missouri*, Case No. EO-2010-0255, *Report and Order*, p. 2 (April 27, 2011).

twice before, first in February 2009 in Case No. ER-2008-0318 and second in Case No. EO-2010-0255. Both times the Commission decided against Ameren Missouri.

7. After having been authorized a FAC in Case No. ER-2008-0318, Ameren Missouri first requested relief on February 5, 2009 in Case No. ER-2008-0318, from what it called in its *Application For Rehearing and Motion For Expedited Treatment* "an act of God—the recent ice storm in Southeast Missouri."[2] Various parties opposed the authorization of a FAC in Case No. ER-2008-0318, but on December 12, 2008 Ameren Missouri, the Staff, Public Counsel, MIEC, and Noranda Aluminum, Inc. (Noranda) filed a *Stipulation and Agreement As To All FAC Tariff Rate Design Issues*, which specified that the *Stipulation and Agreement As To All FAC Tariff Rate Design Issues* was to be operative only if the Commission determined that Ameren Missouri should be permitted to use a FAC.

8. The Commission on December 30, 2008 in Case No. ER-2008-0318 issued an *Order Approving Stipulation and Agreement As To All FAC Tariff Rate Design Issues* and issued its *Report and Order* on January 27, 2009 with a February 6, 2009 effective date.[3]

9. Ameren Missouri's February 5, 2009 *Application For Rehearing and Motion For Expedited Treatment* sought intervention from the Commission for relief from Ameren Missouri's failure in its drafting of its FAC. Ameren Missouri requested rehearing of what it referred to as one aspect of the FAC issue, and it proposed a modification to the FAC tariff. Ameren Missouri did not propose an AAO then or any time thereafter, until July 25, 2011, approximately 30 months after the January 2009 ice storm in Southeast Missouri.

[2] Case No. ER-2008-0318, Ameren Missouri's February 5, 2009 *Application For Rehearing and Motion For Expedited Treatment*, page 2, lines 2-3.

[3] The operation-of-law date in Case No. ER-2008-0318 was March 1, 2009.

10. On February 19, 2009, the Commission denied Ameren Missouri's request, *Order Denying AmerenUE's Application For Rehearing* in Case No. ER-2008-0318, correctly identifying at page 1 the AmerenUE issue as a "lost revenues" issue. The Commission stated that Ameren Missouri was asking the Commission to revise the approved FAC tariff rate design to allow Ameren Missouri to retain a portion of its off-system sales revenue that would otherwise be passed through its FAC. Ameren Missouri intended the revision to allow it to recoup the revenue it expected to lose because of decreased sales of electricity to Noranda due to damage to the Noranda plant resulting from the recent ice storm. The Commission found at page 2 of its *Order Denying AmerenUE's Application For Rehearing*: "AmerenUE has not shown sufficient reason to rehear the Report and Order. The Commission will deny AmerenUE's application for rehearing."

11. Ameren Missouri's revenue from Noranda is not subject to the sharing mechanism of the FAC. Therefore, after the Commission denied Ameren Missouri's *Application For Rehearing and Motion For Expedited Treatment*, Ameren Missouri entered into the contracts with AEP and Wabash which were the subject of the Staff's prudence review in Case No. EO-2010-0255. Ameren Missouri asserted that its contracts with AEP and Wabash were long-term partial requirements contracts and as such fell within the exclusion in the FAC tariff for long-term full and partial requirements sales. The Commission stated in its April 27, 2011 *Report and Order* in Case No. EO-2010-0255 that in denying Ameren Missouri's February 5, 2009 *Application For Rehearing and Motion For Expedited Treatment* in Case No. ER-2008-0318, "[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."[4]

[4] *Re Union Electric Co. d/b/a Ameren Missouri*, Case No. EO-2010-0255, *Report and Order*, p. 7 (April 27, 2011).

Nonetheless, the Commission's April 27, 2010 *Report and Order* in Case No. EO-2010-0255 is on the merits.

12. On August 29, 2011, Ameren Missouri filed in the instant docket *Ameren Missouri's Reply To Staff's Response*. At page 5 in paragraph 7 of its August 29, 2011 *Response*, Ameren Missouri selectively quotes from *Re Southwestern Bell Telephone Co.*, Case No. TO-90-144, *Report and Order*, 30 Mo.P.S.C.(N.S.) 416, 418 (1990). Although the Commission does state in its 1990 Southwestern Bell *Report and Order*, "[T]he Commission is not strictly bound by the principles of stare decisis, res judicata or collateral estoppel," the Commission goes on to state that there is not sufficient identity of parties or issues to invoke the doctrine of "the law of the case," and, "thus, the Commission's past rulings do not mandate a specific result in this case." *Id*. The Western District Court of Appeals decision, *State ex rel. Churchill Truck Lines, Inc. v. Public Serv. Comm'n*, 734 S.W.2d 586, 593 (Mo.App. W.D. 1987), which is cited by the Commission in its 1990 *Report and Order*, merely states that an administrative agency is not bound by the doctrine of *stare decisis*.

13. Rather than a radio common carrier tariff issue in a 1990 Southwestern Bell case, Ameren Missouri could have chosen a Hawthorn 5 forced outage issue in a 1985-86 Kansas City Power & Light Company (KCPL) case to quote a Commission *Report and Order* where the Commission stated that it is not strictly bound by the principles of *res judicata* or *collateral estoppel*. But Ameren Missouri may not have done so because the Commission held in *Re Kansas City Power & Light Co.*, Case Nos. EO-85-185 and EO-85-224, *Report and Order*, 28 Mo.P.S.C.(N.S.) 228, 376-77 (1986) that the application of *res judicata* and *collateral estoppel* was appropriate regarding the Hawthorn 5 forced outage which had been decided by the Commission in the preceding KCPL general rate increase case. The Commission commented on

and quoted Kenneth Culp Davis on *res judicata* and *collateral estoppel* in its *Report and Order* as follows:

> Kenneth Culp Davis explains the application of the doctrine of res judicata and its distinction from collateral estoppel in his hornbook, " *Administrative Law,*" West Publishing Co. 1978, p. 432:
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> > The traditional doctrine of res judicata as applied in the judicial system is inexorable in making a judgment binding so as to shut off further inquiry no matter how clear the mistake of fact or how obvious the misunderstanding of law or how unfortunate the choice of policy or how unjust the practical consequences or how inadequate the evidence in the record or how poorly prepared the briefs and arguments. 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. Under the principles of bar and merger a judgment for the defendant bars the plaintiff from again asserting the same claim and a judgment for the plaintiff prevents the plaintiff from trying to get more, the theory being that the cause of action has merged in the judgment. When a cause of action is merged in or barred by a judgment, the judgment is binding no matter what issues were or were not actually litigated; it is binding even as to matters which might have been but were not actually litigated. The doctrine of collateral estoppel is different from merger and bar in that instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of the same issues between the same parties even in connection with a different claim or cause of action.

Id.

14. Regarding more recent pronouncements on *res judicata* and the distinction between *res judicata* and *collateral estoppel*, the Staff first notes the discussion in *Chesterfield Village, Inc. v. City of Chesterfield,* 64 S.W.3d 315 (Mo. 2002), a case cited by MIEC in its August 29, 2011 *Motion To Dismiss*:

> . . . The common-law doctrine of *res judicata* precludes relitigation of a claim formerly made. *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).

> The key question is what is the "thing"—the claim or cause of action—that has previously been litigated? A claim is "[t]he aggregate of operative facts giving rise to a right enforceable by a court." The definition of a cause of action is nearly the same: "a group of operative facts giving rise to one or more bases for suing." Whether referring to the traditional phrase "cause of action" or the modern terms "claim" and "claim for relief" used in pleading rules such as Rule 55.05, the definition centers on "facts" that form or could form the basis of the previous adjudication.
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> . . . 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." *King General Contractors, Inc.*, 821 S.W.2d at 501.

Id. at 318; Footnotes omitted.

> . . . Claims that could have been raised by a prevailing party in the first action are merged into, and are thus barred by, the first judgment.[5]

[5] . . . *Heins Implement Co. v. Missouri Highway & Transp. Comm'n*, 859 S.W.2d at 684, n. 1 (Mo. banc 1993), observes that *res judicata* is "[s]ometimes also referred to as claim preclusion." Modern scholars advocate the term "claim preclusion" instead of *res judicata*. *See* Allen Vestal, *Rationale of Preclusion*, 9 St. Louis U. L.J. 29 (1964), (quoted in Charles Alan Wright, *The Law of Federal Courts*, section 100A at 722 23 (5th ed.1994) and *Black's Law Dictionary* 1312 (7th ed.1999)). One author explains the terms as follows: "[C]ourts sometimes use an older set of terminology to refer to these concepts. They refer to claim preclusion as *res judicata* and to issue preclusion as *collateral estoppel*. They also use 'res judicata' to refer to the entire topic of former adjudication. The underlying ideas are identical; only the terminology varies." Stephen C. Yeazell, *Civil Procedure* 798 (5th ed.2000). Claim preclusion includes the traditional *res judicata* concepts of "merger" and "bar." *See* Fleming James Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *Civil Procedure* section 11.3 and 11.8 (5th ed.2001).

Id. at 318-19.

> . . . Claim preclusion "prevents reassertion of the same claim even though additional or different evidence or legal theories might be advanced to support it." James, Hazard & Leubsdorf, *supra* note 5, section 11.8, p. 684.

Id. at 320.

15. Missouri courts have held that application of the doctrine of *res judicata* requires the concurrence of four elements:

> (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the person or parties to the cause of action, and (4) identity of the quality of the person for or against whom a claim is made.

Prentzler v. Schneider, 411 S.W.2d 135, 138 (Mo. banc 1966). The phrase "quality of the person" apparently refers to the status in which the person sues or is sued. *Lewis v. Barnes Hosp*., 685 S.W.2d 591, 594 n.1 (Mo.App. E.D. 1985).

16. The Staff notes that at page 8 in the concluding paragraph of Ameren Missouri's August 29, 2011 *Reply To Staff Response* Ameren Missouri requests that "the Commission **summarily** grant it the Accounting Authority it has requested." (Emphasis added.) At page 1 in footnote 1 of its August 29, 2011 *Reply To Staff Response,* Ameren Missouri states: "While Missouri courts have not definitively ruled on the issue, the Commission has previously rejected the argument that a hearing is required in an AAO case. *See In re: Missouri Public Serv. Co*., Report and Order, 1 Mo.P.S.C.3d 200, 204 (Dec. 20, 1991)." Ameren Missouri elsewhere in its August 29, 2011 *Response* cites to the 1993 Western District Court of Appeals decision respecting this Commission *Report and Order*: *State ex rel. Office of the Public Counsel v. Public Serv. Comm'n*, 858 S.W.2d 806, 812-14 (Mo.App. W.D. 1993) (*Office of the Public Counsel*). Ameren Missouri cites *Office of the Public Counsel* only when that opinion supports an assertion it wants to make. In the underlying Commission cases, Missouri Public Service Company (MPS), a division of UtiliCorp United, Inc., argued that it was proceeding pursuant to Section 393.140(4), which does not require a hearing, and the Office of the Public Counsel (Public Counsel) argued that the Commission had to proceed pursuant to Section 393.140(8), which does require a hearing. Although the Commission held that it was proceeding pursuant to Section 393.140(4) and was not required to hold a hearing, the Commission held an evidentiary hearing regardless. One of Public Counsel's points on *writ* of review, and then on appeal, was

that MPS's application for an AAO was controlled by Section 393.140(8) and not Section 393.140(4). The Western District Court of Appeals held that the issue was moot because Public Counsel received the hearing that Section 393.140(8) would have provided and Public Counsel was not prejudiced if the Commission erroneously determined that its authority was under Section 393.140(4) and not Section 393.140(8). Further, the Court decided that the issue should not be ruled on regardless of being moot because not to rule would not preclude determination of the issue should it be contested in another case, nor violate the general public interest. 858 S.W.2d at 809-10.

17. Finally, the Staff comments that Ameren Missouri is asking the Commission for an AAO that the Staff believes ultimately is likely to run afoul of retroactive ratemaking and single issue ratemaking challenges.[5] Ameren Missouri is asking the Commission now for an AAO for which in a future proceeding Ameren Missouri will ask the Commission to set rates to cover a ratemaking period which has been superseded by periods for which rates have been set in later rate cases, Case Nos. ER-2010-0036 and ER-2011-0028. See *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 56-9 (Mo.banc 1979).

Wherefore, the Staff submits its response to the Commission's August 30, 2011 *Order Setting Dates* and moves the Commission to dismiss Ameren Missouri's *Verified Application For Accounting Authority Order* on the grounds that the relief requested is barred on the grounds of *res judicata*.

[5] The Staff noted in its responsive filing on August 18, 2011 that the AAO requested by Ameren Missouri is unlike other AAOs recommended for approval by the Staff. Ameren Missouri is seeking "lost revenues" ("loss of fixed cost components of rates"), which is different from traditional out-of-pocket expenditures for extraordinary repair and restoration costs, construction accounting, or life extension construction and coal conversion project costs for which the Staff has recommended AAO treatment in the past.

Respectfully submitted,

/s/ Steven Dottheim
Steven Dottheim
Chief Deputy Staff Counsel
Missouri Bar No. 29149
(573) 751-7489 (Telephone)
(573) 751-9285 (Fax)
e-mail: steve.dottheim@psc.state.mo.us

Jennifer Hernandez
Associate Staff Counsel
Missouri Bar No. 59814
(573) 751-8706 (Telephone)
(573) 751-9285 (Fax)
e-mail: jennifer.hernandez@psc.mo.gov

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Staff Motion To Dismiss Application Of Ameren Missouri For Accounting Authority Order* have been transmitted by electronic mail to all counsel of record this 8th day of September, 2011.

/s/ Steven Dottheim