

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of the Second Prudence Review of	)	
Costs Subject to the Commission-Approved Fuel	)	Case No. EO-2012-0074
Adjustment Clause for Union Electric Company	)	
d/b/a Ameren Missouri.	)	

**MIEC'S RESPONSE TO AMEREN MISSOURI'S  
EARLY REQUEST FOR HEARING**

Comes now the Missouri Industrial Energy Consumers ("MIEC"), and for its response to Union Electric d/b/a Ameren Missouri's ("Ameren Missouri") Early Request for Hearing, states as follows:

1. On October 28, 2011, the Missouri Public Service Commission Staff ("Staff") filed its Prudence Report and Recommendation Regarding Wabash and AEP Contracts, wherein it concluded that Ameren Missouri was imprudent for not including all costs and revenues associated with certain sales of energy to Wabash and to AEP during the period of October 1, 2009 to June 20, 2010, as off-system sales in determining the associated FAC charges that are billed to its customers. The Wabash and AEP contracts at issue are the same contracts that were at issue in Case No. EO-2010-0255. Ameren Missouri's treatment of those contracts during the period reflected in this case was exactly the same as Ameren Missouri's treatment of those contracts in the period at issue in Case No. EO-2010-0255.

2. On November 7, 2011, Ameren Missouri filed a motion requesting a hearing in this case. In its motion, Ameren Missouri appears to indicate that it disputes the Commission's finding of imprudence regarding the Wabash and AEP contracts in the Commission's Report and Order in Case No. EO-02010-0255. It is unclear from Ameren Missouri's motion whether it is asking the Commission to re-hear the Commission's

finding of imprudence. However, if Ameren Missouri *is* asking the Commission to rehear the Commission's finding of imprudence, such a request is impermissible under Missouri law.

3. In Case No. EO-2010-0255, the Commission determined that Ameren Missouri acted imprudently by failing to flow the revenues associated with the Wabash and AEP contracts through the FAC. Accordingly, because the contracts, their treatment by Ameren Missouri, and all relevant facts regarding Ameren Missouri's imprudence in this case are precisely the same as those litigated in EO-02010-0255, Ameren Missouri is barred by the doctrines of collateral estoppel and res judicata from re-litigating the issue of whether it acted imprudently by failing to flow the off-system revenues associated with the Wabash and AEP contracts through the FAC:

Collateral estoppel has played an important role in lending stability to prior administrative determinations in Missouri. As a result, it has aided the efficiency of the administrative as well as the judicial process by reducing to one the number of "bites at the apple," or "trips to the well," on the same issue. The collateral estoppel doctrine, designed to further judicial economy by avoiding continual trials on the same issue, precludes parties from relitigating issues that have been previously adjudicated. The same claim is not to be relitigated if it once has reached final judgment on the merits. Unappealed unambiguous awards are res judicata and are not subject to collateral attack.

*In the matter of an Investigation into the Provision of Community Optional Calling Service in Missouri*, (Mo. PSC 1997); see also *Lee v. Missouri American Water Co.*, File No. EO-2009-0126 (Mo. PSC 2009); *Staff v. Universal Utilities, Inc.*, Case No. WC-2008-0331 (Mo. PSC 2008); *Staff v. Time Warner Cable LLC*, Case No. TC-2007-0413 (Mo. PSC 2007); *In the Matter of the Release of Staff's Audit Report*, Case No. WO-2006-0361 (Mo. PSC 2006); *In the Matter of the Tariff Filing of Aquila, Inc.*, 2006 Mo. PSC LEXIS 22 (Mo. PSC 2006); *Tari Christ v. Southwestern Bell*, Case No. TC-2003-

0066 (Mo. PSC 2003); *In the matter of International Telecharge, Inc.*, 1989 Mo. PSC LEXIS 26 (July 14, 1989).

4. Moreover, Missouri Revised Statute 386.550 bars Ameren Missouri from collaterally attacking the Commission's Final Report and Order in Case No. EO-2010-0255, and states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." See e.g., *Christ v. Southwestern Bell Telephone Co.*, 2003 Mo. PSC LEXIS 37, 40-41 (January 9, 2003) (Commission barred litigating the Complaint because a prior order already adjudicated the claims of the Complaint.); *In the Matter of an Investigation into the Provision of Community Optional Callinger Service. in Missouri*, 1997 Mo. PSC LEXIS 97 (December 30, 1997)(Commission denied the Petition in this case because it was considered a collateral attack on the Commission's earlier report and order.); *In the Matter of the Application of Kansas City Power & Light Co.*, 2008 Mo. PSC LEXIS 569, \*6-8 (May 29, 2008)(Party's application to the Commission sought the same relief as in a prior case and used the same arguments as in a prior case so the Commission declined to consider it based on the prohibition against collateral attack.).

5. It would be unprecedented and in contravention of all Missouri law for the Commission to re-hear the issue of Ameren Missouri's imprudence with respect to the Wabash and AEP contracts. Accordingly, Ameren Missouri is barred in this case from re-litigating the prudence of its failure to flow the revenues associated with the Wabash and AEP contracts through the FAC.

6. With respect to Ameren Missouri's dispute of the *amount* of the proposed refund, MIEC respectfully submits that Ameren Missouri's dispute is baseless, and asks the Commission to order Ameren Missouri to refund the amount recommended by Staff.

MIEC further respectfully requests that the Commission direct Ameren Missouri to file an expedited pleading in this case describing the grounds for its dispute of the amount recommended by Staff. If there appears to be an error in Staff's calculation, such an error could be easily discovered and corrected without the need for a hearing.

7. Finally, with respect to Ameren Missouri's dispute of Staff's bifurcated prudence review proceeding, MIEC respectfully requests that rather than hold a hearing on the issue at this time, the Commission direct Ameren Missouri to file an expedited pleading stating plainly the grounds for its objection. As Ameren Missouri's dispute appears to be a simple dispute over Staff's interpretation of a Commission Rule, this issue should be easily and quickly resolvable on the pleadings.

WHEREFORE, MIEC respectfully requests that the Commission deny Ameren Missouri's Early Request for Hearing, and direct Ameren Missouri to provide the legal grounds for its dispute in pleading form, as the issues raised by Ameren Missouri's Request appear to be simple and easily resolved.

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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 23rd day of November, 2011, to the parties on the Commission's service list in this case.

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