BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company, d/b/a Ameren Missouri's Filing to Adjust Rates Under Its Approved Fuel and Purchased Power Cost Recovery Mechanism Pursuant to 4 CSR 240-20.090(4)	)	**File No. ER-2012-0028** Tariff No. YE-2012-0038

MIEC'S REVISED REPLY TO AMEREN MISSOURI'S AND STAFF'S RESPONSES TO AUGUST 24, 2011 ORDER DIRECTING FILING

Comes now the Missouri Industrial Energy Consumers ("MIEC"), and for its response to Union Electric d/b/a Ameren Missouri's ("Ameren Missouri") and Staff's Response to the Commission's August 24, 2011 Order Directing Filing, states as follows:

1. Ameren Missouri offers the three following arguments for denying MIEC's motion in this case: (1) Case No. EO-2010-0255 is under appeal and the Commission should wait for the outcome of the appeal before crediting Missouri ratepayers for Ameren Missouri's over-collection; (2) the Commission is not bound by the doctrines of collateral estoppel or res judicata and the Commission should re-hear all of the evidence that was heard in Case No. EO-2010-0255 to determine whether the AEP and Wabash contracts constitute long-term full or partial requirements for accumulation periods three through five; and (3) the "R" factor precludes the Commission from issuing to Missouri ratepayers the credit to which they are entitled in this case.

2. Ameren Missouri's arguments are incredible.

3. That Case No. EO-2010-0255 is currently being appealed by Ameren Missouri bears no relevance on the issues in this case. There is simply no legal precedent supporting the notion that the Commission should await appellate review before enforcing its standing orders. The Report and Order in Case No. EO-2010-0255 is

binding immediately, and will remain binding unless it is overturned by a higher court. Thus the "appeal" argument is a red herring and should be ignored.

4. Next, Ameren Missouri's contention that the Commission is not bound by the doctrines of collateral estoppel and res judicata is demonstrably false as demonstrated by the literally dozens of Commission cases over several decades where the Commission expressly relies on these doctrines to aid it in the efficiency of the administrative and judicial process:[1]

> 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); *Tari Christ v. Southwestern Bell*, Case No. TC-2003-0066 (Mo. PSC 2003).

[1] The case offered by Ameren Missouri to stand for the proposition that the Commission is not bound by the most basic legal doctrines of res judicata and collateral estoppel is inapposite. 1990 Mo. PSC LEXIS 52, 6-7 (Mo. PSC 1990). In that case, the Commission expressly states that neither the issues nor the parties were the same, thus collateral estoppel did not apply.

5. Finally, Ameren Missouri argues that the Commission cannot immediately order the credit for its over-collection of revenues for accumulation periods three through five, because of the "R" factor. The definition of the "R" factor is presented in its entirety here:

> Under/over recovery (if any) from currently active and prior Recovery Periods as determined for the annual FAC true-up adjustments, **and modifications due to adjustments ordered by the Commission** (other than the adjustment for Taum Sauk as already reflected in the TS factor), as a result of required prudence reviews **or other disallowances and reconciliations**, with interest as defined in item I.

6. The "R" factor expressly contemplates that standing Commission Orders will be factored into Ameren Missouri's FAC filings. Ameren Missouri's argument to the contrary is belied by the Commission's Report and Order in File No. ER-2010-0274 where Ameren Missouri benefitted (without objection) by receiving corrected NBFC rates for the current and future true-ups.

7. Ameren Missouri's argument is further belied by its Response to MIEC's Motion for Reconsideration in File No. ER-2011-0317, ¶ 3, where it stated "[h]ad the Commission's order in Case No. ER-2010-0255 been final and in effect before the Company made the FAC adjustment filing that will be implemented starting May 25, then the Company would have included the prudence adjustment in that filing." The Commission's Order necessitates a finding that Ameren Missouri over-collected $24,866,885 for accumulation periods three through five (October, 2009 through September 2010). This over collection should be reflected in this case, because the Order necessitating that conclusion was final and in effect before Ameren Missouri filed in this case.

8. With respect, Staff's August 29, 2011 Response to the Commission's August 24, 2011 Order Directing Filing demonstrates a complete misapprehension of the Commission's Report and Order in Case No. EO-2010-0255.

9. As demonstrated above, all of the evidence regarding the nature of the AEP and Wabash contracts, i.e., whether or not they constitute long-term full or partial requirements contracts, was thoroughly adjudicated to a final judgment on the merits in Case No. EO-2010-0255.

10. In Case No. EO-2010-0255, after a full and fair hearing on the issue, the Commission found unequivocally that the Wabash Valley Power Associations ("Wabash") and American Electric Power Operating Companies ("AEP") contracts did **not** constitute long term full or partial requirements contracts:

> The Commission concludes that the Wabash and AEP contracts are not long-term full or partial requirements contracts as defined by Ameren Missouri's tariff. They simply do not have the characteristics to qualify as such contracts. Ameren Missouri calls them such, but it must stretch the definition beyond the breaking point to do so.

Report and Order, Case No. EO-2010-0255.

11. Staff's assertion that "the Commission could reach a different result on the issue of whether the Wabash and AEP contracts constitute "'long-term full or partial requirements contracts'" during periods three through five makes no sense. The nature of the contracts did not change at midnight on September 30, 2009.

12. As support for the proposition that the Commission may find that the AEP and Wabash contracts do constitute long-term full or partial requirements contracts in a subsequent prudence review, Staff points to the June 1, 2010 change to the tariff limiting the FAC exclusion to "long-term full and partial requirements sales to Missouri municipalities. . . ." This more restrictive language in the tariff does <u>not</u> raise the

possibility that the AEP and Wabash contracts will be excluded from the FAC as Staff implies. On the contrary, the change to the FAC tariff further establishes that the AEP and Wabash contracts do *not* fall within the FAC exclusion, because the change establishes that the "long-term full or partial requirements sales" must be with "Missouri municipalities." Indeed the Report and Order in Case No. EO-2010-0255 expressly states that the AEP and Wabash contracts do not fit within the exclusionary language of the revised tariff:

> When Ameren Missouri's fuel adjustment tariff was once again before the Commission in Ameren Missouri's next rate case, ER-2010-0036, the parties, including Ameren Missouri, stipulated that the tariff's definition of off-system sales would be changed to specifically exclude long-term full and partial requirements sales to Missouri municipalities. As a result, under the revised tariff, revenue from both the Wabash and AEP contracts would be treated as off-system sales and would be flowed through the fuel adjustment clause.

Report and Order, Case No. EO-2010-0255, ¶ 19.

13. Thus, Staff's intimation that the revised tariff language may cause the Commission to re-evaluate the issue of whether the contracts should be excluded from the FAC is demonstrably false. The Commission has already concluded that the contracts should not be excluded from the FAC under the original tariff language because the contracts are not long-term full and partial requirements sales contracts. Under the revised tariff language, the contracts should not be excluded from the FAC for the same reason. In addition, the Commission and all the parties, including the MIEC, agree that the contracts should not be excluded under the revised tariff language because they are not contracts "with Missouri municipalities."

14. As a result of the Company's failure to flow the revenues from the AEP and Wabash contracts through the FAC, it is undisputed that the Company over-collected

not only $17,169,838 for accumulation periods one and two, but also over-collected an additional $24,866,885 for accumulation periods three through five (October, 2009 through September 2010). This amount (a total of **$42,036,723**) was admitted by the Company in the Surrebuttal Testimony of Ameren Missouri's Controller, Ms. Lynn Barnes in Case No. EO-2010-0255.[2]

15. All of the evidence necessary to demonstrate the Company's over-collection during accumulation periods three through five was presented before the Commission in Case No. EO-2010-0255, because the Company's over-collection for periods three through five resulted from the same operative facts that were at issue in Case No. EO-2010-0255. Specifically, the Company's over-collection during accumulation periods three through five resulted from its failure to flow the revenues from the AEP and Wabash contracts through the FAC.

16. This Commission has already heard, analyzed and rendered its opinion regarding the Company's failure to flow the revenues from the AEP and Wabash contracts through the FAC. It would be a waste of the Commission's and the parties' time and resources to present all of the same testimony for accumulation periods three through five as was presented for accumulation periods one and two.

17. The only issue that was not fully and fairly adjudicated in Case No. EO-2010-0255 is the amount that Ameren Missouri over-collected for accumulation periods three through five. However, the amount ($24,866,885), is uncontested. *See* note 2. This amount represents customer-supplied funds that this Commission has already determined constituted a wrongful over-collection by Ameren Missouri. There is simply

[2] Barnes Surrebuttal, Page 1, Line 22 through Page 2, Line 4.

no basis in law or otherwise to defer or delay the refund to which Missouri ratepayers are entitled.

18. As a result of the Commission's Report and Order in Case No. EO-2010-0255, effective May 7, 2011, Ameren's new FAC rates should be reduced to reflect the total amount of revenues that were over-collected as a result of Ameren's contracts with AEP and Wabash for accumulation periods one through five.

WHEREFORE, MIEC respectfully requests that the Commission order Ameren to credit its current customers, through use of the FAC adjustment applied over 8 months commencing at the beginning of the October, 2011 revenue month, $24,866.885 (for the amount it over-collected in accumulation periods three through five); and applicable accrued interest at Ameren Missouri's short-term borrowing rate.

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 1st day of September, 2011, to the parties on the Commission's service list in this case.

/s/ Brent Roam