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 Adjustment Clause of Union Electric Company d/b/a Ameren Missouri.	))))	Case No. EO-2012-0074

INITIAL POST-HEARING BRIEF OF
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") hereby respectfully submits its Initial Post-Hearing Brief.

INTRODUCTION

This case arises from the consequences of an unusual, unanticipated and extended interruption in electric service to Ameren Missouri's largest customer, Noranda Aluminum, Inc. ("Noranda"). The interruption in service, and the severe and negative financial consequences that the interruption potentially posed for the Company and its shareholders, were occasioned by a catastrophic ice storm that struck southeast Missouri in January, 2009. This ice storm took down the electric transmission lines owned by Associated Electric Cooperative, Inc. ("Associated") that deliver the power Ameren Missouri sells to Noranda for consumption at Noranda's huge aluminum smelting plant located near New Madrid, Missouri, which in turn caused Noranda to lose power for an extended period of time. Noranda is Ameren Missouri's largest customer by far and its electric requirements are considerable—in fact, Noranda typically uses 9-10% of all of the electricity Ameren Missouri sells to its customers in a year. Noranda's usage is approximately equal to all of the usage of all of the Company's other industrial customers combined. Moreover, Noranda's electric usage is steady. It varies only minimally from day to day and hour to hour.

The Commission-approved rates that Ameren Missouri charges to Noranda provide a significant amount of the revenues that pay for the fixed costs (i.e., those that do not vary with electricity consumption) the Company incurs in providing service to its customers. Specifically, at the time of the ice storm, Noranda rates contributed approximately $139 million per year of revenue which was used to pay Ameren Missouri's costs.

When the 2009 ice storm struck Southeast Missouri and took down the Associated transmission lines, it abruptly interrupted electric service to the Noranda smelter, causing severe damage to approximately two-thirds of Noranda's production equipment. That damage was not expected to be repaired (if it could be repaired at all) for a long and at the time indefinite period, which Noranda estimated to be at least one year. The severe damage to the smelter meant that Noranda's electricity consumption was drastically cut, as were the sums it would have otherwise paid to Ameren Missouri. There was not, however, a concomitant reduction in the Company's fixed costs, which as noted do not vary even if consumption drops precipitously. The damage to Noranda's operation occurred because when electric service was lost the molten aluminum in Noranda's smelter "froze," thereby damaging the production equipment. Because repairing the equipment literally required Noranda to jackhammer the frozen aluminum out of pots that are used in aluminum production, it ultimately took approximately 15 months for Noranda's electricity consumption to return to its pre-ice storm levels, meaning that Noranda's payments to Ameren Missouri for electric service were substantially reduced over an extended period of time, just as was expected in the immediate aftermath of the ice storm.

In the wake of this natural disaster, Ameren Missouri took the prudent step of selling the power that would otherwise have been consumed by Noranda to other customers. The Company pursued replacement transactions with customers who had characteristics similar to Noranda, and whose revenues would be treated exactly the same by the Commission as the revenues Noranda would have paid but for the ice storm. By doing so, Ameren Missouri sought to place its shareholders and its customers in exactly the same position with regard to the payment and recovery of fuel costs that they would have been in had the ice storm never occurred. Specifically, Ameren Missouri entered into two contracts that reflected long-term partial requirements sales of the power, one with the AEP Operating Companies, Inc. ("AEP"), and one with Wabash Valley Power Association, Inc. ("WVPA"). These contracts were long-term because each had a term of more than one year, which is the standard demarcation between long and short-term contracts used in the power industry. The contracts also reflected "requirements sales" because they provided firm energy and capacity needed to satisfy the purchasers' load-serving requirements, which is also the standard definition used in the power business.

The other active parties to this case, the Commission Staff ("Staff"), the Missouri Industrial Energy Consumers ("MIEC") and Barnes-Jewish Hospital do not dispute that it was prudent for Ameren Missouri to have entered into the replacement contracts with AEP and WVPA, but argue that Ameren Missouri was "imprudent" in classifying these contracts as long-term partial requirements sales under its Fuel Adjustment Clause ("FAC") tariff. They argue that even if the replacement contracts would reflect long-term requirements sales pursuant to commonly used definitions in the power industry, these contracts do not reflect long-term requirements sales in the "regulatory context," evidenced primarily by 20-plus-year-old reporting instructions contained in the fine print of page 310 of Federal Energy Regulatory Commission ("FERC") Form 1. If the arguments these parties advance prevail, 95% of the margins from the replacement contracts will have to be flowed through the FAC as a windfall to customers, and

Ameren Missouri will have to absorb tens of millions of dollars in fixed costs it incurred that it will be unable to recover either from Noranda or through the replacement contracts.

This unfair result is not required, or even permitted by the language in Ameren Missouri's FAC tariff. The meaning of the phrase "long-term full or partial requirements sales" as contained in the Company's FAC tariff was not informed by the obscure and outdated reporting instructions contained in FERC Form 1 that are cited by Staff and MIEC witnesses. In fact, when Ameren Missouri proposed the FAC tariff language, and when the Commission approved it, no one ever even mentioned the FERC Form 1 definitions that they cite as controlling. Moreover, definitions of the terms in question that are used in other more relevant "regulatory contexts," such as modern-day FERC cases and Commission cases, suggest that the "regulatory" definitions of these terms are exactly the same as the "real world" definitions, used every day in the power markets. Finally, the evidence in this case has shown that the FERC Form 1 definitions could not apply to Ameren Missouri's FAC tariff, or else several contracts with municipalities, which all parties concede were properly excluded from the FAC, would also fail to qualify as "long-term requirements sales" and would have to be included in the FAC as well. For these reasons, the Commission must find that the AEP and WVPA contracts reflect "long-term requirements sales" pursuant to the terms of the Company's FAC tariff in effect during the relevant period, and that the margins derived from those contracts are excluded from the FAC by the tariff's terms.[1]

[1] In a May 21, 2012, Judgment involving the same legal issues that are before the Commission in this case (arising from the first prudence review relating to the Company's FAC), the Cole County Circuit Court in fact ruled that the AEP and WVPA contracts do reflect long-term partial requirements sales and that the revenues under those contracts must, therefore, be excluded from the FAC. Cole County Circuit Court Case No. 11AC-CC00336. The Circuit Court's Judgment is currently being appealed to the Missouri Court of Appeals – Western District.

STATEMENT OF FACTS

1. Background Regarding the FAC

On April 4, 2008, Ameren Missouri filed tariff sheets and supporting testimony with the Commission that initiated a general rate increase case (Case No. ER-2008-0318). The Commission suspended the effective date of the tariff sheets for the maximum suspension period allowed by law, and set the matter for formal evidentiary hearing in late 2008. Five of the tariff sheets Ameren Missouri filed (Sheet Nos. 98.1 to 98.5) consisted of "Rider FAC," which contained the terms and conditions of an FAC that the Company asked the Commission to approve as part of the rate case. As the Commission knows, an FAC is a mechanism that allows rates to be periodically changed between rate cases to account for changes in net fuel costs (i.e., the cost of fuel and purchased power, offset by certain revenues) compared to the level of net fuel costs used to determine the "base rates" established as part of a general rate proceeding. The FAC Ameren Missouri proposed contemplated that a base level of such net fuel costs would be used to set base rates and that 95% of the difference between the net fuel costs actually experienced by the Company and the net fuel costs built into base rates would be passed on to customers in the form of a surcharge or a credit through periodic FAC adjustments.

On January 27, 2009, the Commission issued its Report and Order in Case No. ER-2008-0318. That Report and Order approved an FAC for Ameren Missouri and set the Company's base rates based upon cost of service studies that allocated the Company's total cost of service among the various customer classes, including to the customer class under which Noranda takes service (the Large Transmission Service rate class). The terms in Rider FAC (sometimes referred to herein as the "FAC tariff") as it was approved by the Commission in that case were, with regard to all of the issues that are relevant to the proposed prudence disallowance proposed in this case, precisely the same as the terms contained in the FAC tariff Ameren Missouri filed at the initiation of Case No. ER-2008-0318. The FAC tariff, as well as the new base rates, was contemplated to take effect on the operation of law date at the end of the rate case, which was March 1, 2009, and they did take effect on that date.

2. <u>The Ice Storm</u>

Immediately following the issuance of the rate case order, on January 28-29, 2009, Southeast Missouri was struck by one of the most devastating ice storms in the history of the state. Ameren Missouri lost service to 95% of its customers in a six-county area. Approximately 3,800 of Ameren Missouri's electric poles were destroyed – the most it has ever lost in a single storm. Governor Nixon declared a state of emergency for the area, and it was many days before service could be restored to all of Ameren Missouri's customers, despite the Company's best efforts.[2]

As noted earlier, one of the customers directly affected by the ice storm was Noranda. An interruption of power for Noranda's smelter is extremely harmful to its operations because it depends on a continuous supply of power to keep the aluminum being produced from literally "freezing" in the pots that hold molten aluminum as part of the production process. Because of the power interruption, aluminum froze in the production lines operated by Noranda (in particular in two of the three lines), and the only way to restore the production lines was to jack-hammer the hardened aluminum out of the pots one-by-one. At that point, immediately following the ice storm, there was no way to know when or if Noranda would in fact return to

[2] Ex. 1 (Barnes Direct), p. 8, l. 6-15.

full production, but at a minimum it was clear it would be many months (estimated at the time to be at least one year) before Noranda could conceivably do so.[3]

Because Noranda lost approximately two-thirds of its production, its electricity consumption (also referred to as its "load") also dropped by approximately the same amount.[4] Because Noranda's load was approximately 9 to 10%[5] of Ameren Missouri's total load (Noranda's load is approximately 490 megawatts[6] at an approximately 98% load factor[7]), the severe reduction in Noranda's load meant that Ameren Missouri stood to lose an extremely large sum of revenue.[8] Had the loss of such revenues been accompanied by a concomitant reduction in costs, Ameren Missouri would not have suffered harm, but that was not the case. This is because providing electric service requires a utility to incur a large level of fixed costs that do not vary whether load goes up or down. Consequently, the facts facing Ameren Missouri were that its largest customer by far had suffered a roughly two-thirds reduction in load that might be permanent, but that in any event was unlikely to be completely restored for a year; that its fixed costs of providing service had not been reduced at all; and that base rates had just been set on the assumption that a very large stream of revenues from Noranda would be received to cover the share of fixed costs that had been allocated to service to Noranda as part of the ratemaking process, yet it was clear that those revenues would not be received.

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[3] Ex. 1, p. 8, l. 16-23.
[4] *Id.*, p. 9, l. 1-2.
[5] Case No. EO-2010-0255 Transcript ("*0255 Tr.*") p. 505, l. 6-7.
[6] Ex. 3 (Haro Direct), p. 7, l. 4-12.
[7] A customer's "load factor" reflects the percentage of its maximum load that it uses during a given period. Noranda's extremely high load factor shows that its use is extremely steady under normal operating conditions.
[8] Ameren Missouri estimated that on an annual basis this loss of revenue would total approximately $90 million. Ex. 1, p. 8, l. 23 - p. 9, l. 8.

Faced with these facts, Ameren Missouri took two steps, each of which was grounded on the principle of restoring the financial circumstances of all concerned to essentially the same position all would have been in if the ice storm had not occurred.

First, Ameren Missouri filed a Request for Rehearing in Case No. ER-2008-0318, asking the Commission to approve a modification to its FAC tariff that would have excluded from off-system sales the revenues derived from the sale of power that Noranda no longer could use as a result of the ice storm. If the Commission had approved this modification, those revenues would have been treated just like the revenues Noranda would have paid if its service had not been interrupted.[9] In other words, this would exactly mimic what would have happened if the ice storm had not occurred – customers would have paid not a dime more, or less, for fuel costs than if the ice storm had not occurred, and Ameren Missouri would have had the opportunity to recover the fixed costs that Noranda revenues were intended to cover from sales of the power to other customers.[10] However, because other parties in the rate case opposed the change, and because there was a very short time between when Ameren Missouri made this request and operation of law date applicable to the rate case (March 1, 2009), the Commission concluded that it was "obviously impossible" for it to grant the relief the Company sought because it believed it would have had to reopen the record in the rate case and hold additional hearings, among other things.[11]

Next, Ameren Missouri considered what it could do within the confines of the FAC tariff that was approved by the Commission to bring the Company's generation portfolio balance back

[9] Ex. 1, p. 9, l. 17-24.
[10] *Id.*
[11] *Re: Union Electric Company d/b/a AmerenUE*, Case No. ER-2008-0318, *Order Denying AmerenUE's Application for Rehearing* (effective Feb. 19, 2009).

to what it was expected to be when base rates were set, and to mitigate the revenue loss, and the corresponding shortfall in the recovery of fixed costs, that resulted from the Noranda outage.

3. **The Sales At Issue**

The solution was to enter into contracts that reflected long-term full or partial requirements sales with entities that had load-serving requirements of their own. Such sales were similar to sales to Noranda in that they were excluded from the operation of the FAC, just as the sales to Noranda had been.[12] Entering into long-term requirements contracts would protect Ameren Missouri against the credit risk associated with making additional off-system sales to energy traders, which was a real concern given the state of the economy at the time; it would allow Ameren Missouri to collect the fixed costs Noranda revenues would otherwise have provided since long-term requirements sales were also excluded from the FAC; it would lock in sales at fixed prices at a time when power prices were falling due to the 2008 financial crisis;[13] and it would leave all concerned in essentially the same financial position they would have been in if the ice storm had not occurred, with respect to FAC revenues and costs.[14]

Consequently, in the Spring of 2009, Ameren Missouri entered into the aforementioned AEP and WVPA contracts. AEP is an integrated electric utility serving retail customers in eleven states.[15] WVPA is a generation and transmission cooperative that procures power for its distribution cooperative members who serve retail customers, including Citizens Electric Corporation, which serves retail customers in Missouri.[16] The AEP contract called for the sale of 100 megawatts of capacity and the associated energy for a term of 15 months, and specifically provided that the sale by Ameren Missouri would "enable AEP to partially meet load serving

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[12] Ex. 1, p. 11, l. 3-14.
[13] Ex. 3, p. 5, l. 7-9.
[14] Ex. 1, p. 11, l. 9-14.
[15] Ex. 4 (Haro Surrebuttal), p. 4, l. 10-12.
[16] *Id.*, p. 4, l. 5-8.

requirements."[17] The WVPA contract called for sales of 150 megawatts of capacity and the associated energy for a term of 18 months, and specifically provided that WVPA would "use the [electricity] to partially meet the requirements of Citizens Electric Corporation in Missouri."[18] The fixed price of the sales to AEP and WVPA was the market price of power at the time the contracts were entered into and coincidentally was close to the price Noranda would have paid if it had not lost production due to the ice storm.[19]

4. <u>The FAC Exclusion</u>

As noted, long-term requirements sales are explicitly excluded from off-system sales revenues that are addressed by the FAC because of the following provision in the FAC tariff:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), *excluding Missouri retail sales and long-term full and partial requirements sales*, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission (emphasis added).[20]

5. <u>Case No. EO-2010-0255</u>

In Case No. EO-2010-0255 (the prudence review applicable to the initial period that the AEP and WVPA contracts were in effect), the Commission found that these contracts did not constitute "long-term requirements contracts" for purposes of Ameren Missouri's FAC tariff. As a consequence, the Commission required Ameren Missouri to refund 95% of the margins from these contracts that it received during that initial period through the FAC. However, the Company appealed the Commission's decision, and on May 21, 2012, the Cole County Circuit

[17] *Id.*, p. 3, l. 6-8; Schedule JH-S1.
[18] *Id.*, p. 3, l. 4-5; Schedule JH-S2.
[19] *0255 Tr.*, p. 304, l. 11 - p. 305, l. 14.
[20] Ex. 1, p. 6, l. 6-2 0; Schedule LMB-1.

Court ruled that the Commission's decision was incorrect in several respects, including that the Commission unlawfully failed to apply the FAC tariff when it concluded that the AEP and WVPA contracts did not reflect long-term partial requirements sales.[21] The Circuit Court also concluded, among other things, that the Commission unlawfully rewrote the FAC tariff by effectively limiting the application of the phrase "long-term partial requirements sales" to sales to municipalities when the FAC tariff's terms contained no such limitation, and that the Commission unlawfully ordered a "prudence" disallowance even though it was undisputed that Ameren Missouri was prudent in entering into the subject contracts and that even if there had been imprudence, such imprudence had caused no harm to customers.[22]

6. <u>The Staff's Prudence Review in this Case</u>

On October 28, 2011, the Staff filed its *Prudence Review of Costs and Revenues in the Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri Related to Ameren Missouri's Contracts With Wabash Valley Power Association and American Electric Power Operating Companies* (the *"2011 Prudence Report"*).[23] The Staff's *2011Prudence Report* was submitted pursuant to the requirement of § 386.266.4(4), RSMo. (Cum. Supp. 2011), which is the statute that authorizes FACs and which requires that all FAC tariffs contain provisions for prudence reviews no less frequently than every 18 months. The Staff's *2011 Prudence Report* does not allege that Ameren Missouri's decision to enter into the AEP and WVPA contracts was imprudent, and in fact Staff has never made that claim.[24] However, the Staff alleged that Ameren Missouri was imprudent for treating the sales to AEP and WVPA as long-term partial

[21] Ex. 2 (Barnes Surrebuttal), p. 1, l. 21 – p. 2, l. 10; Sch. LMB S-1.
[22] The Circuit Court also concluded that the Commission's decision was unreasonable and constituted an abuse of discretion in certain other respects.
[23] The Staff later filed a second prudence report that found no other prudence issues for the periods being examined.
[24] Ex. 8 (Eaves, Direct/Rebuttal), p. 19, l. 19-23.

requirements sales.[25] Consequently, the Staff seeks an order from the Commission requiring that such sales be treated as off-system sales, which as noted earlier would mean that 95% of the margins on such sales would be credited to customers through FAC adjustments, which in turn would mean that as a consequence of the ice storm, customers would receive a large windfall relating to the net fuel costs they pay for while Ameren Missouri would suffer an equivalent loss of revenue. The only "harm" the Staff has alleged if this adjustment was not made is that customers would see higher rate adjustments in the FAC due to higher fuel and purchased power costs because the revenues derived from the two contracts (that only the ice storm made possible) would not provide an offset for the Company's legitimate fuel and purchased power costs.[26]

7. The Key Tariff Language

The FAC tariff at issue was first filed on April 4, 2008, as part of Ameren Missouri's direct case filing in Case No. ER-2008-0318. Changes not relevant to any of the issues in this case were made pursuant to a Stipulation and Agreement among some of the parties to the rate case, which was approved by the Commission. Those other parties opposed approval of a FAC, but agreed that if the Commission were to approve a FAC the terms should be those reflected in the FAC tariff agreed upon via the Stipulation.[27] After the Commission approved the FAC, Ameren Missouri filed a compliance FAC tariff which was identical to the tariff agreed upon via the Stipulation, except that it listed the sharing percentage at 95%, as approved by the Commission.

[25] *Id*.
[26] *0255 Tr.*, p. 31, l. 13-17.
[27] The only issue which the parties did not agree to was what the sharing percentage should be, meaning that issue was left to the Commission to resolve in the event the Commission approved an FAC.

The uncontroverted evidence presented in this case was that as of the time the FAC tariff was initially proposed and when it was approved, the phrase "long-term" in the power industry had a clear meaning that was universally used – it meant "one year or more."[28] In addition, as of the time the FAC tariff was initially proposed and when it was approved, the phrase "requirements sales" in the power industry meant power and capacity needed to meet the purchaser's load serving obligations.[29]

Prior to that time and over many years Ameren Missouri made sales under contracts with terms of one year or more to a number of parties that had load serving obligations, such as municipal utilities, electric cooperatives, or other utilities, including Arkansas Power and Light Company, Citizens Electric Corporation, Show-Me Power Corporation, and Illinois Power.[30] For ratemaking purposes, the costs and revenues from those sales were not allocated to Missouri retail customers.[31] Some of the sales that had historically been made were partial requirements sales (they met only part of the purchaser's load serving obligations) and some of them were full requirements sales. In Case No. ER-2008-0318, there were four long-term requirements sales to municipal customers ranging in term from 29 months to five years. All such sales were excluded from off-system sales in the development of base rates set in that case. After the FAC was implemented, all such sales were excluded from the operation of the FAC under the exclusion appearing in the italicized language set forth above, just as Ameren Missouri proposed to exclude the AEP and WVPA sales. Since Case No. ER-2008-0318, Ameren Missouri has also entered into another contract that reflects a long-term requirements sale to another municipality,

[28] Ex. 4, p. 1, l. 17 - p. 2, l. 15.
[29] *Id*.
[30] Ex. 6 (Weiss Surrebuttal), p. 2, l. 17 – p. 3, l. 8; Tr. p. 95, l. 19 – p. 96, l. 9.
[31] Ex. 6, p. 2, l. 17 – p. 3, 1. 8.

the City of California, and its revenues were also excluded from the FAC, although it too had a term of less than five years (41months).[32]

Staff auditor and witness Dana Eaves authored the *2011Prudence Report* that deals with the issue in this case. Mr. Eaves also authored the relevant portions of a similar report submitted in Case No. EO-2010-0255.[33] Mr. Eaves' allegation that the Company was imprudent with regard to how it "classified" the AEP and WVPA contracts is based on two arguments, both of which depend entirely on whether the meaning of "long-term" and "partial requirements sales" in the Company's FAC tariff was based on reporting instructions contained in the fine print on page 310 of a report filed annually by public utilities with the FERC Form 1.[34]

The FERC Form 1 instructions were adopted at least 20 years ago, before electric power markets were deregulated and modern energy markets came into being.[35] Notwithstanding the 20-plus-year-old reporting instructions contained in Form 1, the FERC itself (the agency that authored Form 1) has consistently held that any power contract with a term of one year or more is "long-term," as evidenced by the FERC's own statements regarding what it calls its "longstanding practice" with respect to short-term versus long-term power contracts:

> Additionally, the Commission at the time of enactment of EPAct 2005 had for years defined long-term contracts under the OATT as one year or longer. Similarly, the Commission has treated power sales with a contract term of greater than one year to be "long-term" for reporting purposes. [citations omitted]. ***We thus believe it is reasonable to use the convention of treating contracts of a year or more as "long-term" consistent with our longstanding practice.*** (emphasis added)[36]

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[32] Tr. p. 92, l. 16 – p. 93, l. 13.
[33] Tr. p. 171, l. 5- 24.
[34] Ex. 4, See Schedule JH-S3. Part of the FERC Form 1 report is also reproduced and submitted to the Commission as part of the Commission's annual reporting requirements for utilities under its jurisdiction, including the parts referred to by Mr. Eaves.
[35] Ex. 4, p. 5, l. 9 - p. 6, l. 9.
[36] *Re: New PURPA 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* 119 FERC ¶ 61,305 (2007) footnote 17, pp. 18-19 (cited to in Ex. 4, p. 7, l. 12-21).

This Commission has also consistently used one year as the demarcation between long-term and short-term contracts. For example, for ratemaking purposes, the Commission considers any utility debt of one year or more to be long-term debt.[37] In other cases *dealing with FACs*, the Commission considered a generation capacity contract of more than one year to be "long-term."[38] Prior to the statutory authorization of FACs in 2005, the Commission considered telephone service contracts of more than one year to be "long-term" contracts.[39] Mr. Eaves claimed that the sales were not "long-term" because the FERC Form 1 instructions defined long-term as more than five years. Mr. Eaves also claimed the sales were not partial requirements sales because Ameren Missouri had not listed them as "RQ," which stands for "requirements service," according to the FERC Form 1 instructions.

Mr. Eaves listed in the prudence report submitted in Case No. EO-2010-0255 (*2010 Prudence Report)*[40] (which was submitted August 31, 2010, and which was the product of the Staff's prudence audit which had commenced in March 2010) a list of documents he reviewed as part of its preparation.[41] Although central to the issues in that case, he did not list either the AEP and WVPA contracts or the FAC tariff itself,[42] nor did he list the FERC Form 1 instructions.[43] In addition, Mr. Eaves presented no evidence that the Commission was even aware of the obscure FERC Form 1 instructions at the time the Commission approved the Company's FAC tariff. In fact, Mr. Eaves did not cite the FERC Form 1 definitions as the basis for Staff's

[37] Ex. 2, p. 12, l. 11-14.
[38] *Id.*, p. 11, l. 8-20.
[39] *Id.*, p. 12, l. 11-17.
[40] Ex. 18
[41] Ex. 18, p. 19
[42] *Id.*
[43] *Id.* In this case, Mr. Eaves continues to rely on the FERC Form 1 instructions, citing to them in his direct/rebuttal testimony, although a review of his testimony and the *2011 Prudence Report* strongly suggests that his over-arching basis for claiming "imprudence" is based on the same rationale he used in Case No. EO-2010-0255, and also on the fact that the prior Commission accepted his arguments in that case.

position until more than two years after the FAC was approved and almost three months after Staff filed its *2010 Prudence Report*. The *2010 Prudence Report* listed as justification for his conclusion that the AEP and WVPA sales were not long-term requirements sales *only* the fact that the Commission had previously declined to modify the FAC in the immediate aftermath of the storm in its order on rehearing in Case No. ER-2008-0318 and made no mention of the FERC Form 1.[44] Mr. Eaves claimed during the evidentiary hearings in Case No. EO-2010-0255 that he had reviewed the FAC tariff and the FERC Form 1 instructions before the *2010 Prudence Report* was prepared.[45] He had no explanation for why he did not list those important documents (which are *central* to the issues in both that case and this one) as documents that he reviewed in preparing the report. Mr. Eaves also had no explanation for why the *2010 Prudence Report* provided only the following basis for the Staff's claim that the AEP and WVPA contract revenues should be treated as though they were off-system sales:

> Given *the Commission's February 19, 2009 decision to not modify AmerenUE's FAC* due to the loss of Noranda's load, it would be imprudent not to treat the revenues from the sales of energy that became available due to the loss of the Noranda load as off-system sales revenues under AmerenUE's FAC. Therefore, AmerenUE was imprudent in not including the costs and revenues associated with the AEP and WVPS [sic] contract in the FPA calculations. . . (emphasis added).[46]

Notably, the FERC Form 1 is not mentioned.

Mr. Eaves admitted that he has never bought or sold electricity and has never been involved in the negotiation of a power contract.[47] Mr. Eaves had no involvement in Case No. ER-2008-0318, including no involvement with the Commission's initial consideration and approval of the FAC tariff.[48]

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[44] Ex. 18.
[45] 0*255 Tr.*, p. 326, l. 16-22.
[46] Ex. 18, p. 18.
[47] 0*255 Tr.*, p. 321, l. 13-19.
[48] *Id.*, p. 324, l. 23 to p. 325, l. 3.

The only other Staff witness who presented testimony in this case is the Manager of the Commission's Energy Department, Lena Mantle. Ms. Mantle disagrees with Mr. Eaves in that she testified that under her definition of "requirements," the AEP and WVPA contracts do reflect requirements sales.[49] From Ms. Mantle's perspective, the issue of whether the sales to AEP and WVPA fit the exclusion in the FAC tariff boils down to whether or not they are long-term.[50] Ms. Mantle has offered no less than four different opinions about what "long-term" means – none of which are consistent with the Commission's own application of the phrase in other regulatory proceedings, including those involving FACs, and none of which are consistent with the universally accepted understanding of the term in the power industry (one year or more). At times she testified (like Mr. Eaves) that the FERC Form 1 instructions provided the meaning of long-term. At other times she opined that "long-term" must be three years or more, which is at odds with the FERC Form 1 reporting instructions.[51] She also opined that four years should be used, which is also at odds with FERC Form 1.[52] Finally, in Case No. ER-2010-0036,[53] Ms. Mantle testified that the WVPA and AEP contracts were actually long-term partial requirements contracts,[54] which means she had to believe at that time that a contract with a 15-month term was long-term.[55]

Intervenor MIEC tendered two witnesses, Maurice Brubaker and Greg Meyer. MIEC supports the *result* Staff advocated for, but does not entirely agree with the *basis* of Staff's position. Mr. Brubaker, who conceded that he is not an expert in either energy marketing or

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[49] *Id.*, p. 380, l. 13-17.
[50] *Id.*, p. 387, l. 1-4.
[51] *Id.*, p. 378, l. 8-11.
[52] *Id.*, p. 423, l. 3-11.
[53] This was Ameren Missouri's next general rate case after the rate case where the FAC at issue here was approved.
[54] *0255 Tr.*, p. 385, l. 6-15.
[55] As noted, the contracts at issue here have terms of 15 and 18 months, respectively.

trading,[56] took no issue with Ameren Missouri's contention that the sales to AEP and Wabash were long-term sales.[57] Mr. Brubaker's contention was that the sales were not for "requirements service." In making that argument, Mr. Brubaker pointed to the same FERC Form 1 instructions relied upon by Mr. Eaves, as well as other industry definitions of "requirements service" that were based on the FERC Form 1 instructions. Mr. Brubaker drew a distinction between what "requirements" means in what he referred to as the "regulated context" and what it means in the power markets, contending that it means something different in the regulated context.[58] He argued that only the regulated context (as grounded in the FERC Form 1, which was not even mentioned when the FAC tariff was approved) is pertinent to the meaning of the FAC tariff.[59] He never testified to what a "requirements sale" was, nor did any of his testimony shed any light on the intention of Ameren Missouri or the Commission when the FAC tariff was approved.

In the prior case, MIEC also presented another witness, Henry Fayne. In that case, Mr. Fayne took a somewhat different approach than taken by Mr. Brubaker, which one could conclude explains his absence here. Mr. Fayne agreed that he was not an expert in requirements contracts[60] and conceded that he had never been directly involved in negotiating a power supply contract.[61] Mr. Fayne had only reviewed about ten power contracts throughout his career, and he did so in his role as a fiduciary, more interested in the financial terms of the contracts than the substance of their structure and operation.[62] Mr. Fayne was only marginally familiar with Case No. ER-2008-0318, when the FAC was approved.[63] Mr. Fayne did not even bother to read the

[56] *0255 Tr.,* p. 501, l. 8-13.
[57] *Id.*, p. 501, l. 14-18.
[58] Ex. 10 (Brubaker Rebuttal), p. 9, l. 4-12.
[59] *0255 Tr.,* p. 510, l. 11-20.
[60] *0255 Tr.,* p. 475, l. 22-25.
[61] *Id.*, p. 476, l. 1-8.
[62] *Id.*, p. 476, l. 9 to p. 477, l. 2.
[63] *Id.*, p. 479, l. 20-24.

AEP and WVPA contracts before he filed testimony in Case No EO-2011-0255.[64] His theory was that the sales to AEP and WVPA could only be requirements sales if they were listed in a utility's resource plan, or if the specific contracts had been treated as requirements sales for ratemaking purposes (i.e., if their costs and revenues had been allocated away from retail customers).[65] He gave his opinions regarding the importance of such sales being included in the utility's resource planning, but he did not review Ameren Missouri's resource plan.[66] Indeed, the other MIEC witness in that case, Mr. Brubaker, disagreed with Mr. Fayne, stating that whether the contracts are listed in the resource plan is *not* determinative of whether they reflect requirements sales.[67] Mr. Fayne also testified that "any transaction to a load-serving entity is at least a partial requirements contract regardless of duration,"[68] which means that both the AEP and WVPA contracts would qualify as partial requirements contracts.

Ameren Missouri's resource plan is prepared only once every three years.[69] A specific contract entered into after its preparation but before the next plan is prepared three years later obviously cannot possibly be included in the plan since it didn't exist at the time the plan was prepared. The megawatt-hours sold to AEP and WVPA were included in Ameren Missouri's 2008 resource plan, as it was assumed these megawatt-hours would be sold to Noranda.[70] Moreover, the AEP and WVPA loads were also accounted for in the only IRP prepared when they were in effect – the 2011 IRP developed in 2010-2011 and filed in February 2011.[71]

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[64] *Id.*, p. 493, l. 14-16.
[65] *Id.*, p. 489, l. 12-17.
[66] *Id.*, p. 489, l. 18-22.
[67] *Id.*, p. 502, l. 12-18; 23 to p. 503, l. 6.
[68] *0255 Tr.*, p. 491, l. 1-15.
[69] Ex. 7 (Wills Surrebuttal), pp. 3–7, l. 28; 4 CSR 240-22.080(1).
[70] *Id.*, p. 4, l. 7-18.
[71] *Id.*, p. 4, l. 3-13.

At the time Ameren Missouri proposed the FAC, and when the Commission considered and approved it, Ameren Missouri had four long-term requirements sale contracts with four municipal utilities.[72] Only one of them would qualify for the exclusion from the FAC that is at issue in this case if the FERC Form 1 instructions are applied as advocated by Mr. Eaves. This is because the FERC Form 1 instructions define "long-term" as a contract with a term of five years or more, yet all but one of the municipal contracts have a term of less than five years (29 months, 36 months, and 36 months).[73] Some of these contracts also fail to qualify for the exclusion under three of Ms. Mantle's four different views of what "long-term" means.

However, the revenues from all of these municipal contracts were excluded from the operation of the FAC, and neither the Staff nor any other party has ever claimed that those sales did not fit the exclusion in the FAC tariff; i.e., no one claims that those contracts were misclassified by Ameren Missouri. Because these municipal contracts were excluded from operation of the FAC, "long-term" cannot be as defined by the FERC Form 1 instructions or as variously defined by Ms. Mantle.

In the rate case following Case No. ER-2008-0318, the words "to Missouri municipalities" were added to the exclusion in the original FAC tariff, so that the exclusion thereafter read as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), *excluding Missouri retail sales and long-term full and partial requirements sales <u>to Missouri municipalities</u>*, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve

[72] Ex. 4, p. 10, l. 6 – p. 11, l. 3.
[73] *Id.* Ameren Missouri has since entered into another municipal contract with the City of California that has a term of 41 months and that is also excluded from the FAC.

> Missouri retail load, and (3) any related transmission (emphasis added – new language <u>underlined</u>).[74]

The subsequent inclusion of this language in the tariff indicates that the tariff was not so limited before the change.

Finally, none of the four witnesses for the other parties (only one of which had any involvement with the FAC when it was adopted in Case No. ER-2008-0318) bothered to ask anyone from Ameren Missouri what the Company intended when it filed the FAC tariff containing the subject exclusion. Rather, they all have developed after-the-fact positions about what they claim the exclusion means.[75]

<u>ARGUMENT</u>

When the Commission decided Case No. EO-2010-0255, it correctly recognized that when it approves a tariff the tariff becomes Missouri law and, as such, has the same force and effect as a statute. (*Report and Order*, Case No. EO-2010-0255 (*0255 Order*), p. 17, ¶ 7, *citing* ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005), *quoting* ***All-States Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.***, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996)). The Commission also correctly recognized that a tariff is to be interpreted in the same manner as a statute is interpreted. ***Id.***[76] The foregoing legal principles mean that the FAC tariff is binding on the Commission, Ameren Missouri, and its customers. Stated differently, the FAC tariff cannot be retroactively modified to accomplish a different result or policy objective than what was expressly provided for by the FAC tariff at the time of

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[74] *0255 Tr.*, p. 356, l. 20-21; p. 347, l. 1-11.
[75] As discussed below, the intentions of parties other than Ameren Missouri and the Commission is irrelevant.
[76] As discussed in connection with Point 1, *infra*, in the prior case the Commission failed to apply the appropriate statutory construction standards that apply to its interpretation of the FAC tariff. Because construction of a statute is a question of law, the court on review examined the Commission's determination *de novo* and, as noted, disagreed with the Commission. *See, e.g.*, ***Delta Airlines v. Dir. of Revenue***, 908 S.W.2d 353, 355 (Mo. *banc* 1995) (construction of a statute (tariff here) is a question of law).

the events giving rise to this case took place. *See* ***State ex rel. Utility Consumers' Council of Missouri v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 58 (Mo. *banc* 1978) (an FAC tariff cannot be modified retroactively even if surcharges under it would not have been charged had the lawfulness of those charges been determined before the tariff took effect); ***Arkansas Louisiana Gas Co. v. Hall***, 452 U.S. 571, 577-78 (1981).

Applicable law also requires that a tariff be interpreted in a manner that is consistent with the statute it was intended to implement. *See* ***Foremost-McKesson, Inc. v. Davis***, 488 S.W.2d 193, 201 (Mo. *banc* 1972). Because the tariff at issue in this case is an FAC, that means that the language of that tariff must be interpreted in a way that is consistent with Section 386.266, RSMo., the statute that authorizes the Commission to approve FACs for Missouri electric utilities and that dictates the parameters that must be contained in any FAC.[77] As discussed in more detail in Point 4, *infra*, only the interpretation advanced by Ameren Missouri is consistent with that statute.

For the reasons discussed below, the Commission's prior "interpretation" of the FAC tariff – which the parties in this case urge the Commission to in effect blindly follow now – (specifically its interpretation of the exclusion from the definition of off-system sales outlined above), fails to comply with the foregoing standards, and would indeed be tantamount to an unlawful and unreasonable modification of the FAC tariff itself.

1. **<u>Proper Application of Statutory Construction Principles Demonstrates that the AEP and WVPA Contract Margins Are Excluded from Factor OSSR in the FAC Tariff .</u>**

The guiding star of determining what a statute means is to ascertain the intent of the legislature. In the context of tariff interpretation, the intent of the "legislature" is found by

[77] Section 386.266(4)(1), RSMo., provides that an FAC must be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity."

determining the intention of the subject utility and the Commission at the time of the tariff's approval. ***Laclede Gas Co.***, 156 S.W.3d at 521. The uncontroverted evidence of record is that Ameren Missouri's intent was that a long-term requirements sale was a sale under a contract that had a term of one year or more, to counterparties who themselves had load-serving requirements. Ameren Missouri possessed that intent because it applied the operative phrase and its components – "long-term" and "requirements sales" – in the manner in which they are universally applied in the power sales and purchases business. The evidence of record in this case is overwhelming and uncontroverted that among those who operate in (and who regulate) that business a long-term sale is one with a term of one year or more. Similarly, the evidence is overwhelming and uncontroverted that a requirements sale is a sale of power to an entity buying the power to meet its load-serving requirements and, in the case of a partial requirements sale, to meet a part of those requirements. The AEP and WVPA contracts fit squarely within the meaning of those terms; moreover, they explicitly state that they are intended by the parties to reflect requirements sales.

While the meaning of the phrase "long-term" does not have one distinct plain and ordinary meaning and is thus ambiguous, "requirements" and "sale" do have such a meaning and are not ambiguous.[78] Moreover, the interpretation advanced by Ameren Missouri of those terms is completely consistent with the plain and ordinary meaning of those terms, as defined in the dictionary.[79] *Webster's Collegiate Dictionary* defines "requirement" as "something required; something wanted or needed; necessity; something essential to the existence or occurrence of

[78] While the *0255 Order* was not clear on this point, the Commission must have thought the operative terms were ambiguous because it looked to extrinsic evidence to find their meaning. As noted earlier, however, whether a term is ambiguous is a question of law which is subject to *de novo* review.
[79] If there is a question regarding the "plain meaning" of a word used in a tariff that is not otherwise defined, the law requires that the first place the Court look to find the meaning is in the dictionary. *See* ***Collins v. Dep't. of Soc. Servs***., 141 S.W.3d 501, 505 (Mo. App. S.D. 2004).

something else."[80] AEP and WVPA have load-serving obligations; they undoubtedly need power; the power is undoubtedly essential to their ability to serve that load. *Webster's Collegiate Dictionary* defines "sale" as "the transfer of ownership of and title to property from one person to another for a price." There is no question that the power sold was owned by Ameren Missouri, and that Ameren Missouri transferred title to it to AEP and WVPA for a price.

With respect to the meaning of "long-term," the meaning of both phrases in the markets where the business of buying and selling power takes place is important because under Missouri law, an ambiguous technical term in a statute must be construed according to its technical meaning, and its technical meaning (where a business is involved) is found by reference to how the term is used in that business. ***City of St. Louis v. Triangle Fuel Co.***, 193 S.W.2d 914, 915 (Mo. App. St. L. 1946).[81] In fact, courts may ascertain that technical meaning by reference to persons who have knowledge on the subject or by consulting books of reference containing information thereon. ***Rose v. Franklin Life Ins. Co.***, 132 S.W. 613 (Mo. App. St. L. 1910).

The *only* evidence of record regarding the meaning of the phrases "long-term" and "requirements sale" as used in their technical sense came from the only two witnesses in this case who actually have knowledge about and experience in the power sale business. Those witnesses are Jaime Haro, Ameren's Director of Asset Management and Trading, and Duane Highley, the Director of Power Production for AECI. [82] Both Mr. Haro and Mr. Highly provided uncontroverted testimony that a "long-term" contract in the wholesale power marketplace where sales and purchases of power occur is a contract with a term of one year or more. Both Mr. Haro and Mr. Highly provided uncontroverted testimony that a "requirements sale" is a sale of power

[80] Ex. 4, p. 12, l. 5-10.
[81] Technical terms are those which pertain to arts, science, business, profession, sports or the like. ***Bell v. Poplar Bluff Physicians Group***, 879 S.W.2d 618, 621 (Mo. App. S.D. 1994).
[82] The Commission has taken administrative notice of Mr. Highley's evidentiary hearing testimony in the 0255 Case.

under a contract that requires the seller to provide firm capacity and energy that will be used to meet the load requirements of the purchaser. The following summarizes the uncontroverted evidence on both of these points:

- Mr. Haro: "In the electric marketplace, the demarcation point between long-term and short-term is one year."[83] Mr. Highley agreed.[84]

- The FERC, which is the agency that regulates the wholesale electricity marketplace, where the business of buying and selling power takes place, (and which is also the agency that authored FERC Form 1) consistently treats power contracts with a term of one year or more as "long-term" contracts: Specifically, in defining when a power sales or purchase contract is long- or short-term the FERC stated:

  > Additionally, the Commission at the time of enactment of EPAct 2005 had for years defined long-term contracts under the OATT as one year or longer. Similarly, the Commission has treated power sales with a contract term of greater than one year to be "long-term" for reporting purposes. [citations omitted]. ***We thus believe it is reasonable to use the convention of treating contracts of a year or more as "long-term" consistent with our longstanding practice.***
  > (emphasis added.)[85]

- FERC has also cited the one-year demarcation between short- and long-term contracts in numerous other cases. For example, in the often-cited *Mountainview Power* case, the FERC stated:

  > While we are conditionally accepting the PPA on the basis that it is consistent with the Commission's current policy, we will henceforth require that all affiliate ***long-term (one year or longer) power purchase agreements,*** whether at cost or market, be subject to conditions set forth in Edgar.
  > (emphasis added).[86]

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[83] Ex. 4, p. 2, l. 5.
[84] Ex. 4, p. 2, l. 5-9 (citing Mr. Highley's testimony).
[85] *Re: New PURPA 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,305 (2007) footnote 17, pp. 18-19 (cited to by Mr. Haro, Ex. 4, p. 7, l. 10-21).
[86] Ex. 2, p. 8, l. 3-10 (Appx. A-119), citing *Re: Southern California Edison Company, On Behalf of Mountainview Power Company, LLC*, "Order Conditionally Accepting Proposed Rate Schedule and Revising Affiliate Policy," 106 FERC ¶ 61,183, ¶ 58 (2004). *See also In Re Wholesale Competition in Regions with Organized Electric Markets*, 73 FR 64100, ¶ 301 (FERC 2008).

- "Mr. Haro: "[A] contract reflects a long-term partial requirements sale if it calls for the sale of firm power (and capacity) to a purchasing entity with an obligation to serve load during the term of the agreement."[87] Mr. Highley also agreed with this point.[88]

Not a single witness, indeed, not a single exhibit of record, refutes Mr. Haro's and Mr. Highley's testimony that a sale of power under a contract where the seller is providing the buyer resources (capacity and energy) to meet a part of the buyer's load serving obligations is a requirements sale. Instead, as we will discuss in greater detail in Point 2 below, others have come up with an after-the fact *argument* that the sales at issue here do not reflect the provision of requirements *service* (based upon the fine print reporting instructions on page 310 of the FERC Form 1 referenced earlier),but (a) there is no evidence that their argument supplants the meaning of a requirement *sale* as used in the Company's FAC tariff, and (b) the source of their misused "requirements service" definition – the FERC Form 1 – cannot possibly underlie the intention of the phrase "long-term partial requirements sale" in the Company's FAC tariff, because if it did there are other sales to municipal customers that all agree *do* fit the exclusion but which do not qualify as "long-term" under the FERC Form 1 instructions.

Aside from the fact that the other parties argue that the FERC Form 1 instructions control because the AEP and WVPA contracts did not have a term of more than five years (which as noted makes no sense at all – four municipal contracts don't either), the other parties also argue that the municipal contracts reflect "requirements service" within the meaning of the FERC Form 1 instructions because the Company serves them on an "ongoing" basis – i.e., that the Company has had an "ongoing relationship" with the municipalities – but that the Company had no "ongoing relationship" with AEP and WVPA. Putting aside for the moment the fact that the

[87] Ex. 4, p. 2, l. 1-3.
[88] Ex. 4, p. 2, l. 5-9 (citing Mr. Highley's testimony).

FERC Form 1 instructions simply can't apply (because if they did four of the Company's five municipal contracts would not qualify as long-term), the plain language of the FERC Form 1 instructions fail to support the other parties' views that the Company's service to AEP and Wabash doesn't qualify as "requirements service." This is because the AEP and WVPA contracts were unquestionably "ongoing," as the FERC Form 1 instructions define the term.

The FERC Form 1's definition of "requirements service" reads as follows:

> RQ – for requirements service. Requirements service is service which the supplier plans to provide on an ongoing basis (i.e., the supplier includes projected load for this service in its system resource planning). In addition, the reliability of requirements service must be the same as, or second only to, the supplier's service to its ultimate consumers.

The AEP and WVPA contracts were included in each and every aspect of Ameren Missouri's system resource planning – in the 2011 IRP,[89] in Ameren Missouri's Module E filings at MISO, in its monthly and annual capacity position calculations, in its load forecasting, in its fuel budgeting, and in its risk management position calculation.[90] Consequently, under the FERC Form 1 definition, the AEP and WVPA contracts were "ongoing."[91]

Not only does all of the substantial and competent evidence of record regarding what a long-term partial requirements sale is support the conclusion that the AEP and WVPA contracts were, in substance, long-term partial requirements sales, but so do the express terms of the contracts themselves. The WVPA contract states: "The Buyer shall use the Product [electric capacity and energy] to meet the requirements of Citizens Electric Corporation in Missouri."[92]

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[89] Ex. 7, p. 4, l. 19 - p. 6, l. 2. This is a difference between the instant case and the *0255 Case*. In the *0255 Case*, although the Noranda volumes, which were subsequently sold to AEP and Wabash, were included in the previous (2008) IRP filing, the AEP and Wabash contracts, which did not even exist at the time that filing was made, obviously could not be included.
[90] Ex. 4, p. 15, l. 22 - p. 16, l. 19.
[91] And because the contracts called for firm energy and capacity, the reliability of the power provided was the same as, or second only to, the reliability provided to Ameren Missouri's own customers. Ex. 4, p. 17, l. 1-13.
[92] Ex. 4, Sch. JH-S2, p. 2.

Similarly, the AEP contract states: "The Capacity and Energy provided by AmerenUE herein will enable AEP to partially meet load serving requirements."[93]

While there is no *direct* evidence of the Commission's intent regarding the subject exclusion – regarding what "long-term partial requirements sales" in the FAC tariff means – there is evidence that the Commission's intent could not have been based upon the FERC Form 1 instructions.

First, as noted previously: (a) neither Staff nor any of the intervenors in the case under review offered any evidence that either Ameren Missouri or the Commission was aware of the FERC Form 1 definitions or relied on those definitions at the time the Commission approved the Company's FAC, and (b) Staff did not introduce the FERC definitions into the discussion regarding the meaning of terms used in the FAC until two years after it was adopted and nearly three months after Staff filed its *2010 Prudence Report*.

Second, the *0255 Order* contains a finding by the PSC that "it would be inappropriate" to flow through to customers via the FAC revenues associated with power that is sold *where the costs associated with that power are in fact borne by Ameren Missouri*. *0255 Order*, pp. 9-10, ¶ 18.[94] The power that was sold to AEP and WVPA was power that Ameren Missouri and the Commission expected to be sold to Noranda; that is until an act of God shut down two-thirds of Noranda's smelter. And it was expected that the revenue from the power Noranda was expected to consume would cover fixed costs outside the FAC. But the minute Noranda's load dropped by approximately two-thirds, suddenly a huge sum of revenues the Company and the Commission expected to come from Noranda were no longer being paid by Noranda, but

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[93] Ex. 4, Sch. JH-S1 (last page).

[94] The Commission made this finding in the context of discussing certain long-term requirements sales made by Ameren Missouri to municipalities, some of which, as discussed below, also cannot logically qualify for the exclusion at issue, but which all agree do qualify. As discussed further below, this logical inconsistency demonstrates that the other parties' contentions as to what a long-term partial requirements sale is are simply wrong.

Ameren Missouri's fixed costs did not drop at all. This created a situation where absent action by Ameren Missouri, the megawatt-hours that it is undisputed were destined to be consumed and paid for by Noranda would instead be sold as off-system sales. In other words, an inappropriate circumstance arose – Ameren Missouri still bore the costs, but Ameren Missouri no longer was receiving the revenues that were designed to cover those fixed costs.

By making long-term sales to AEP and WVPA to meet their load-serving requirements, Ameren Missouri did nothing more than keep the sale of the power outside the operation of the FAC, just as it would have been if Noranda had been the purchaser. This in turn would have achieved the "appropriate" result of Ameren Missouri receiving revenues necessary to cover the fixed costs that it was bearing. Avoiding that inappropriate result is *consistent* with Ameren Missouri's and the Commission's intended meaning of the phrase "long-term partial requirements sale" as of the time the FAC tariff was approved.

Finally, when the FAC tariff and the subject exclusion were approved, there existed four contracts with municipal customers that were treated as long-term requirements contracts for purposes of applying the exclusion at issue here. All but one of those contracts had terms of less than five years, meaning they could *not* qualify for the exclusion in the FAC tariff under the FERC Form 1 instruction relied on by the other parties, yet all agree they do qualify. Indeed, in setting the base rates in Case No. ER-2008-0318, the Commission treated them as qualifying for the exclusion, and the other parties and the Commission have continued to treat them as qualifying for the exclusion. There is yet another long-term requirements sales contract with a municipality (the City of California) that under the other parties' interpretation would also not qualify for the exclusion, but all agree that it has been (and should have been) excluded.[95]

[95] Tr. p. 92, l. 16 to p. 93, l. 13.

These undisputed facts reveal the fatal flaw in the other parties' position that the obscure, outdated instructions on page 310 of the FERC Form 1 were in the Company's (or the Commission's) mind when the FAC tariff was approved. They could not possibly be the basis for the Company's or the Commission's intention because had they been, the municipal contracts would not have been treated as within the exclusion.[96] Also, the obscure instructions in FERC Form 1 were never mentioned by the Commission or Ameren Missouri or anybody else when the tariff was initially approved. They first came to light when Staff auditor Dana Eaves was casting about more than two years after the fact for a way to justify an argument to pass these revenues through to customers via the FAC. Indeed, had Ameren Missouri and the Commission intended for the FERC Form 1 instructions to apply when the FAC tariff was approved, such that those municipal contracts could not qualify for the subject exclusion, the Commission would have treated the municipal contracts as *not* falling within the exclusion in the FAC, and thus would have treated revenues under those contracts as off-system sales within operation of the FAC.

The bottom line is that it is *impossible* for the meaning of "requirements sale" to be found by reference to the FERC Form 1 instructions because it is undisputed that applying the FERC Form 1's definition of "long-term" (more than five years) – a definition that is found on the very same page 310 of the FERC Form 1 – means that three of the four municipal contracts in effect at the time of case No. ER-2008-0318, *plus* the City of California contract, in fact *cannot possibly reflect long-term requirements* sales because those four municipal contracts have terms of less than five years in length. If, as our opponents argue, the definitions in the relevant "regulatory context" are supplied by the FERC Form 1, then they have to take the FERC Form 1

[96] There is no evidence whatsoever that the Company or the Commission was considering the FERC Form 1 instructions when the FAC tariff was approved. Moreover, while the "intent" of other parties is not relevant to what the tariff means as a matter of law (*Laclede, supra)*, there is no evidence that any other party had in mind those FERC Form 1 instructions either.

in toto. They can't gerrymander the result by cherry-picking a definition from the FERC Form 1 that they say suits their argument (the FERC Form 1 definition of "requirements service," which as noted earlier does *not* support their argument in any event) while ignoring definitions in that same FERC Form 1 (the FERC Form 1 definition of "long-term") that don't.

This brings us full circle. Because the Commission must interpret the ambiguous phrase "long-term" according to its and Ameren Missouri's intent at the time the FAC tariff was approved, and because it must give any ambiguous technical terms contained in that subject exclusion the meaning ascribed to them in the real world in the relevant business, the Commission cannot arrive at an interpretation that is supported by the obscure FERC Form 1 instruction upon which neither it nor Ameren Missouri could possibly have relied.[97]

2. <u>The "Regulatory Context" Discussion Raised by Others is Either Irrelevant, or it in fact Supports Ameren Missouri's Position.</u>

The other parties acknowledge that in the power sales and purchases business (where the technical meaning of the key terms must be found), the AEP and WVPA sales fit the exclusion in the FAC tariff.[98] But then they attempt to shift the discussion away from that "real world" meaning, contending that it must define the subject term in something called the "regulatory context."[99] Neither the parties nor the Commission (in the *0255 Order*) cite to any support for the conclusion that the Commission is supposed to look to whatever the "regulatory context" is, instead of (as the cases require) looking to the plain meaning of unambiguous terms or the technical meaning of ambiguous terms as used in the real world—in the *business* of buying and

[97] And given that "requirements" and "sales" are not ambiguous, the PSC should have given them their plain dictionary-definition meaning, which also demonstrates that the Order is in error.
[98] The Commission expressly acknowledged this regarding the meaning of "long-term." *0255 Order*, pp. 10-11, ¶¶ 21-22. The Commission implicitly acknowledged this regarding the meaning of "requirements sale." *0255 Order*, pp. 11-12, ¶ 23.
[99] *See, e.g.*, Mr. Brubaker's testimony (Ex. 10) at p. 9, l. 4-12. *See also* the *0255 Order*, p. 11, ¶ 22, where the Commission bought into the same theory.

selling power. And we have already established that the after-the-fact (indeed two years later) reliance on the source of this so-called "regulatory context," the FERC Form 1, cannot apply.

But even if the Commission can or should consider the "regulatory context" as of the time the FAC tariff was approved, an examination of the regulatory context at that time and an examination that is *most relevant to what an FAC tariff for a Missouri utility means* contradicts the Commission's conclusion. In the very rate case where the FAC tariff at issue here was approved, the Commission approved a weighted average cost of capital for Ameren Missouri based upon a capital structure that split out long-term debt from short-term debt. What period demarcated long- and short-term for this purpose? *One year*.[100]

In the FAC tariff itself, if Ameren Missouri purchases capacity and if that capacity purchase is for a term of *more than one year*, the capacity purchase costs are outside the operation of the FAC.[101] This mirrors excluding long-term (greater than one year) requirements *sales* (where capacity and energy are sold) from the FAC under the exclusion at issue in this case. This is particularly instructive of what the Commission intended when it approved the FAC tariff at issue here because less than a year b*efore* it approved the FAC tariff, the Commission decided the very first case where it approved an FAC.[102]

In that case, there was a dispute between the utility (Aquila) and the Commission's Staff regarding whether costs for capacity purchased by the utility should be within, or without, the FAC. The Commission determined that if the capacity purchase was one year or less, the capacity purchase costs should be *within* the FAC, but if the capacity purchase was for more than

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[100] Ex. 2, p. 12, l. 11-17.
[101] Ex. 2, p. 11, l. 21 – p. 12, l. 10.
[102] In the 1970s, the Commission also approved FACs, but it was unable to do so after the ***Utility Consumers' Council*** decision in 1978 until the General Assembly gave it statutory authority to do so in 2005 when §386.266 was enacted. The ***Aquila*** case, cited *infra,* was the first case where an FAC was approved post- the enactment of §386.266.

one year, it should be *outside* the FAC. In reaching that conclusion, the Commission set the demarcation line between short- and long-term at *one year*. *See* ***In re: Aquila, Inc.***, 257 P.U.R.4th 424, 445-46 (Mo. P.S.C. 2007) (A capacity purchase of *one year or less as "short-term.")*.[103] Consequently, we know that in the context of an FAC where capacity contracts are at issue, the capacity contract is "long-term" if it is for a term of more than one year. It makes no sense for capacity purchases by Ameren Missouri of greater than a year to be *outside* the FAC, which is precisely the circumstance under Ameren's Missouri's FAC tariff, while capacity sales (as part of the sale of capacity and energy under a requirements contract) of more than one year would be *inside* the FAC.

What the foregoing demonstrates is that what is a "requirements sale" under the Company's FAC tariff is not controlled by the FERC Form 1 instructions. And once that demonstration is made, the Commission's "finding of fact" in the *0255 Order* to the effect that it "must" define the subject terms in the "regulatory context" as the Staff and Mr. Brubaker urged it to do (and as they attempt to define it, using their after-the-fact reliance on the FERC Form 1) falls apart. Why? Because the "regulatory context" used by the other parties is grounded in the FERC Form 1 instructions that we have demonstrated can't possibly be the source of the Commission's or Ameren Missouri's intent.[104] To summarize the foregoing, the evidence is undisputed that under the technical meaning of the subject terms (long-term; requirements sales), as used in the real world – the business of buying and selling power – these sales unquestionably

[103] This case is discussed by Ms. Barnes in her testimony. Ex. 2, p. 11, l. 8-20. The Commission has also decided the "long-term," "short-term" issue in other decisions unrelated to this case and has determined in what undoubtedly is the "regulatory context," since these are decisions of the Commission whose sole purpose is to regulate public utilities that a long-term contract is a contract with a term of one year or more. *See, e.g.,* ***In re: Southwestern Bell Tel. Co.***, 218 P.U.R.4th 429, 430 (Mo. P.S.C. 2002) (characterizing a contract of more than one year in length as "long-term").

[104] As is Mr. Brubaker's citation to the identical "requirements service" definition from the Edison Electric Institute.

are long-term requirements sales.[105] Moreover, it is undisputed that rates were set in Case No. ER-2008-0318 with the expectation that Noranda would consume and pay for the megawatt-hours that ended up being sold to AEP and WVPA, and that Ameren Missouri would bear the costs associated with those megawatt-hours and receive the associated revenues, all outside the FAC. And in the *0255 Order*, the Commission itself concluded that a situation where Ameren Missouri bears the costs but doesn't get the associated revenues is "inappropriate." Finally, the Commission itself in the clearest "regulatory context" of all – its *own* regulation of public utilities; indeed in the context of FACT tariffs – has consistently used one year as the demarcation between long- and short-term.

3. **The Other Parties Urge the Commission to Unlawfully and Unreasonably Rewrite the FAC Tariff.**

The Commission (in the first instance) must construe the subject FAC tariff terms as a statute is construed, which requires a determination of what Ameren Missouri and the Commission intended. We've demonstrated what that intent was, and we've demonstrated that it can't be based upon the obscure instructions in a form that Mr. Eaves found two years after-the-fact. Having properly applied statutory construction principles as discussed above, we know that if the sale at issue is reflected in a contract with a term of one year or more and if it is to a counterparty buying the energy and capacity to serve its load requirements, then it is a requirements sale.

What the other parties urge the Commission to do to avoid this result is to effectively rewrite the language because doing so would (in this case) take approximately $23 million to $26 million away from the Company and put it into ratepayers' pockets. The *0255 Order* implicitly

[105] And in the case of "requirements" and "sales," the sales reflected in the contracts also meet those terms' plain and ordinary meaning.

admits that this was the object, as evidenced by the Commission's discussion on pages 21-22 of that order where it rejected Ameren Missouri's argument that entering into the AEP and WVPA contracts did not harm ratepayers given that ratepayers are left in the same position respecting charges for net fuel costs under the FAC as they would have been in if the ice storm had never occurred. But the fact is that ratepayers *are* left in exactly the same position – if the ice storm had not occurred Noranda would have bought the power, the fixed costs would have been covered by the revenues paid by Noranda, and the customers would not have received a serendipitous reduction in net fuel costs solely because of the ice storm.

The other parties argue that there was a "bargain" implicit in the FAC that if a single megawatt-hour of power beyond the power under contract when the FAC was approved could be sold as an off-system sale then it must be sold as an off-system sale because customers will pay lower rates, regardless of the terms of the tariff, and regardless of the fact that Ameren Missouri might be unable to recover a significant portion of its fixed costs, while customers receive a windfall.

Approval of a tariff by the Commission is not approval of a "bargain." Rather, it is the enactment of a rule of law that binds Ameren Missouri, the Commission and ratepayers. Applying the tariff as written, as it must be applied as a matter of law, does not cause "harm" to ratepayers.

Again, the language, *as written*, is as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units,

> (2) power purchases made to serve Missouri retail load, and (3) any related transmission (emphasis added).

But the language, *as our opponents advocate*, effectively would now read as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and *sales that reflect* long-term full and partial requirements ~~sales~~ *service to Missouri municipalities*, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission (italicized words added).

"Provisions not plainly written in the law, or necessarily implied from what is written, should not be added by . . . [the Commission] under the guise of construction to accomplish an end that the . . . [the Commission] deems beneficial." ***Wilson v. McNeal et al.***, 575 S.W.2d 802, 809 (Mo. App. St. L. 1978), *citing* ***Missouri Pub. Serv. Co. v. Platte-Clay Elec. Coop.***, 407 S.W.2d 883 (Mo. 1966). Upon review, the courts will be "'guided by what . . . [Ameren Missouri and the Commission] sa[id] [in the FAC tariff], not by what [the court] thinks [they] meant to say.'" ***Id.***, *quoting* ***United Air Lines v. State Tax Comm'n.***, 377 S.W.2d 444, 448 (Mo. *banc* 1964).

Other evidence before the Commission when the FAC tariff was approved – and which is necessarily relevant to determining Ameren Missouri's and the Commission's intent at the time the tariff was approved – also demonstrates that there was no limitation on the types of requirements contracts that would fit the subject exclusion.

The FAC that Ameren Missouri proposed in Case No. ER-2008-0318 was presented and explained in the pre-filed direct testimony of Martin J. Lyons, Jr. In his testimony Mr. Lyons explained how the Company intended to define off-system sales revenues as used in the formula for calculating net fuel costs to be recovered through the FAC.[106] For example, in response to the question "What costs are included in the FAC?," Mr. Lyons responded that "the FAC would include all fuel and purchased power costs *incurred to support sales to retail customers and that portion of off-system sales allocated to Missouri retail customers*."[107] (emphasis added). Additional information regarding the types of revenues that would – and would not – be flowed-through the FAC as an offset to fuel and purchased power costs is found in Mr. Lyons' Schedule MJL-E4, which contains information required by 4 CSR 240-3.161(2). Page 7 of that schedule contains a section that both identifies and describes each category of revenues to be considered in determining net energy costs under the proposed FAC. One such category, off-system sales, is described as follows:

> All sales transactions (excluding retail sales or long-term full or partial requirements sales to non-jurisdictional customers) that are associated with (1) AmerenUE Missouri jurisdictional generating units and (2) power purchases made to serve Missouri retail including any associated transmission.

These excerpts from Mr. Lyons' testimony reveal two things about the meaning Ameren Missouri intended for the definition of "OSSR" that the Company proposed and the Commission ultimately adopted. First, the definition excludes sales to Missouri jurisdictional customers and off-system sales that are not allocated to the Missouri retail jurisdiction. Second, the definition excluded *all* long-term full or partial requirements sales to non-jurisdictional customers, not just those to certain *types* of wholesale customers such as municipalities.

In summary, there is no basis to engraft onto the FAC tariff a limitation on the subject exclusion such that only requirements sales to municipalities can qualify for the exclusion.

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[106] The Commission took administrative notice of the entirety of Mr. Lyons' pre-filed direct testimony in Case No. ER-2008-0318. Tr. p. 12, l. 11-24.

[107] Pre-filed direct testimony of Martin J. Lyons, Jr. in Case No. ER-2008-0318, p. 4, l. 21 to p. 5, l. 1.

There was nothing in the record before the Commission when it approved the FAC tariff that could support such an intention, and indeed there was evidence that refutes the existence of such an intention. The tariff must be applied according to what it *says*, not according to what others now may *think* it should have said. ***Wilson v. McNeal, et al.***, 575 S.W.2d at 809.

4. **The Company's Interpretation of the Exclusion is the Only Interpretation that Gives Effect to the Intention of the Legislature in Enacting §386.266, RSMo., the FAC Statute.**

Applicable law also requires that a tariff be interpreted in a manner that is consistent with the statute it was intended to implement. ***Foremost-McKesson, Inc.***, 488 S.W.2d 193 at 201. Because the tariff at issue in this case is an FAC, that means that the language of that tariff must be interpreted in a way that is consistent with Section 386.266, RSMo, and its requirement that an FAC must be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity."

Only one of the interpretations of the FAC tariff that have been proposed in this case will satisfy that requirement: the interpretation advocated by Ameren Missouri. The alternate interpretations – those advocated by Staff, MIEC, and/or Barnes-Jewish Hospital – do not satisfy the statute because, if adopted, those interpretations will require the Company to pass through to customers 95 percent of the revenues received from the WVPA and AEP contracts during the two accumulation periods at issue in this case. The uncontested surrebuttal testimony of Ameren Missouri witness Lynn Barnes shows that the Company's earnings already were well below the level authorized by the Commission in Case No. ER-2008-0318 during those periods. Refunding revenues from the power sales to Wabash and AEP will reduce that return even further, with the final result being an actual, earned rate of return for the Company that is anything but the fair return on equity that Section 386.266, RSMo, requires.

5. <u>Absent a Legitimate Finding of Imprudence, the Commission Lacks Authority to Require Refunds in this Case.</u>

Section 386.266.4(4) requires any FAC tariff approved by the Commission to contain a provision requiring that the Commission review the FAC's operation for prudence no less frequently than every 18 months. Ameren Missouri's FAC tariff contains such a provision, which reads in pertinent part as follows:

> Prudence reviews of the costs subject to this Fuel and Purchased Power Adjustment Clause shall occur no less frequently than every eighteen months, and any such costs which are determined by the Missouri Public Service Commission to have been imprudently incurred shall be returned to customers with interest . . ..

"Imprudence" by a utility in the incurrence of the costs needed to provide service[108] is a legal concept with a long and well-established meaning. A utility acts "prudently" if its conduct was "reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight." ***State ex rel. Assoc. Natural Gas v. Pub. Serv. Comm'n***, 954 S.W.2d 521, 528-29 (Mo. App. W.D. 1997). The Commission's task in determining whether the utility was imprudent is to "determine how reasonable people would have performed the tasks that confronted the company." ***Id.*** Put another way: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" ***In the Matter of Union Electric Co.,*** 27 Mo.P.S.C. (N.S.) 183, 193 (1985), *quoting* ***Anaheim, Riverside, etc. v. Federal Energy Regulatory Comm'n***, 669 F.2d 779 (D.C. Cir. 1981) (citations omitted).

[108] And here, in whether it was prudent in obtaining revenues that offset costs in the FAC.

There is not a single allegation in this case that the Company's decision to enter into the AEP and WVPA contracts was imprudent under the standards outlined above. Indeed, the Staff's *Prudence Report* explicitly acknowledged that the Company acted prudently in entering into the contracts. The only allegation of "imprudence" was that the Company was "imprudent" in how it *classified* the contracts.[109] But the contracts "are what they are." They either reflect long-term partial requirements sales within the meaning of the FAC tariff, or they do not. And we have already demonstrated that given the language of the FAC tariff, properly construed under applicable statutory construction principles, the contracts do reflect such sales. Consequently, there is no imprudence.

Even if a utility acts imprudently, the utility is not to suffer consequences from that imprudent act *unless it causes ratepayers harm*. This is similar to the principle that even if a person acts negligently in, for example, driving his car, there is no liability unless that negligence was the proximate cause of damage to another. The Commission conceded as much at page 16, ¶ 4 of the *0255 Order*, where it cited ***Associated Natural Gas*** for that very proposition. There was no harm to ratepayers here. But for the ice storm, the dollars collected by Ameren Missouri under the requirements sales to AEP and WVPA would have been paid by Noranda for the very same power that AEP and WVPA took, and the charges under the FAC would have been exactly what those charges were before the PSC ordered refunds under the Order. The idea that there was harm because Ameren Missouri legitimately entered into long-term requirement sales the FAC tariff specifically excludes is like saying it is "harmful" if Ameren Missouri prudently buys

[109] MIEC argues that it is "imprudent" to violate the law (the tariff). Certainly knowingly violating the law is very likely imprudent in all cases, but there are two flaws in MIEC's overly-simplistic prudence argument. First, MIEC assumes it is right about what the tariff means, resulting in a circular argument (if we are right then Ameren Missouri violated the law and therefore Ameren Missouri was "imprudent.") Second, it is not necessarily the case that unknowingly breaking a law is imprudent. If my speedometer isn't working correctly but I get a ticket for speeding am I automatically "imprudent" for having sped? Of course not.

coal and customers have to pay for it, or it is "harmful" if prices for off-system sales fall resulting in a lower offset to fuel and purchased power costs customers must pay for via the FAC. In either circumstance, customer charges are higher under the FAC, but that is not "harm." Rather, it is the legitimate, lawful payment customers owe for the electric service they receive.

6. <u>The Staff's Calculation of the Sums at Issue is Incorrect.</u>

Given that the Company properly treated the margins under the AEP and WVPA contracts as falling outside the FAC (as demonstrated above) the Commission need not reach the question of the amount of margins that should be refunded through the FAC via future FAC rate adjustments. But had the Commission needed to reach that question the record in this case demonstrates that the Staff's calculation of that sum over-states the sum by approximately $3.3 million. In Case No. EO-2010-0255, $17,169,838 of margins were ordered refunded to customers via the FAC. In this case the Staff seeks an additional refund of $26,342,791.[110] However, $3.3 million of margins arising from the AEP and WVPA contracts have already been flowed back to customers (in addition to the $17,169,838) via the FAC because of the "W" factor included in the FAC tariff as a result of the *Second Non-Unanimous Stipulation and Agreement* in Case No. EO-2010-0036.[111] That the "W" factor reflects AEP and WVPA margins is made clear by the terms of that Stipulation and the fact that the factor is contained in the discrete, stand-alone "AEP and Wabash Contracts" section of the Stipulation.[112] Therefore, if the Staff's $26.3 million figure were used (and if the Company were required to refund those sums as it was ordered to refund the $17.16 million in Case No. EO-2010-0255) the total refunds of AEP and WVPA margins would be approximately $47.8 million ($17.16 + $26.3 + $3.3) yet the actual,

[110] This discussion ignores the impact of interest on these sums.
[111] Ex. 5 (Weiss Direct), p. 3, l. 20 – p. 4, l. 20.
[112] Ex. 6, p. 7, l. 13 – p. 8, l. 13.

total margins realized under the two contracts totaled just approximately $43.5 million.[113] Consequently, even if our opponents were right about what the FAC tariff requires, they are wrong about the sums that should be refunded.

CONCLUSION

The other parties fail to interpret the subject exclusion in the FAC tariff in the manner that it must be interpreted as matter of law; that is, the Commission must ascertain Ameren Missouri's and the Commission's (as it was composed at that time) intention as of the time the FAC tariff was approved, based upon applicable principles of statutory construction. The other parties ignore these principles. The other parties' positions, which depend on the FERC Form 1 instructions, can't be squared with the fact that the FERC Form 1 instructions cannot possibly have anything to do with what Ameren Missouri and the Commission intended because if they do four municipal contracts have been "misclassified"; no one claims that this is the case, however.

The other parties' positions reflect a results-oriented approach that if adopted would mean that Ameren Missouri will inappropriately bear the fixed costs that the revenues from the sale of power that Noranda was expected to take were supposed to cover, while customers (including ironically, Noranda) will receive 95% of the revenues under the AEP and WVPA contracts, all because of an act of God over which Ameren Missouri had no control. Stated another way, but for the ice storm, Ameren Missouri would have received the revenues, its fixed costs would have been recovered, and customers would have received no windfall. Given the ice storm and under the other parties' unlawful and unreasonable construction of the FAC tariff,

[113] Ex. 5, p. 4.

Ameren Missouri would not receive the revenues, would not cover its fixed costs, and customers would receive a huge windfall.

For these reasons, as argued more fully in this brief, Ameren Missouri requests that this Commission apply the FAC tariff faithful to its terms by determining that the AEP and WVPA contracts reflect long-term partial requirements sales.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief of Union Electric Company d/b/a Ameren Missouri was served via e-mail, on counsel for each of parties of record on the 20th day of July, 2012:

/s/ James B. Lowery