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

POST-HEARING REPLY 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 Reply Brief.

INTRODUCTION/SUMMARY

The Staff and MIEC have made little attempt to rebut the facts, and the application of the law to those facts, that demonstrate that the sales under the AEP and Wabash contracts indeed do reflect long-term partial requirements sales within the meaning of the Company's FAC tariff. In fact, their initial briefs are largely a regurgitation of arguments they made in the first prudence review case involving the Company's FAC (Case No. EO-2010-0255),[1] which in large part rely upon the Commission's decision in that case.[2] Put another way, one can characterize their arguments as saying to the Commission: "You decided against the Company once; therefore, you should do so again." But this is a different case with different evidence; the additional evidence presented in this case shows that the basis for and logic behind the Commission's decision in the first case is not supported by the record.[3]

During the early moments of the evidentiary hearing in this case, Commissioner Jarrett specifically asked counsel for all of the parties whether there were differences in this case

[1] In this Reply Brief, we will sometimes refer to Case No. ER-2010-0255 as the "first case."
[2] A decision which has been reversed by the Cole County Circuit Court (Case No. 11AC-CC00336), which rejected the same arguments the Staff and MIEC are making now.
[3] And as the Commission itself has recognized, it is not bound by its prior decision, particularly where the evidence of record supports a different result.

compared to the first case. The answer to Commissioner Jarrett's question is, unequivocally, yes, there are some significant differences.

There were two key bases for the Commission's adverse (to the Company) decision in the first case. First, the Commission, in reliance on the definition of the term "requirements service" in the FERC Form 1 instructions, accepted an argument made by Staff and MIEC to the effect that a requirement sale could not be "ongoing" (and thus they claimed could not meet the FERC Form 1 definition) unless the Company had had an ongoing "relationship" with the counterparty. Second, the Commission concluded that if the exclusion from OSSR in the FAC tariff meant what the Company said it meant, then the Company could, in theory, enter into long-term requirements sales for unlimited volumes and thus drastically reduce the off-system sales margins that flow through the FAC.

However, the uncontroverted evidence submitted by the Company in this case unequivocally rebuts both conclusions. The following summarizes how the record in this case demonstrates that the bases of the Commission's decision in the first case are not supported by the facts:

- ***The sales to AEP and Wabash do reflect "requirements service" within the meaning of the FERC Form 1 instructions because they were made on an "ongoing basis" as the FERC Form 1 instructions themselves define that phrase.***

The FERC Form 1 instructions define "requirements service" as follows:

> Requirements service is service which the supplier plans to provide on an ongoing basis (i.e., the supplier includes the 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 own ultimate consumers.

Under the plain terms of that definition, there is only *one* condition that must be satisfied in order for the service to be on an "ongoing basis": the "the supplier [Ameren Missouri] includes the projected load for this service in its system resource planning." How do we know that there is only one condition that must be satisfied? Because of the FERC's use of "i.e.," in the parenthetical, which means "that is."[4] Consequently, a supplier is providing requirements service if "the supplier includes the projected load . . . in its system resource planning."[5] Even the Staff agrees, as demonstrated by this testimony of Staff witness Dana Eaves at the hearing:

> *Q. And I want to focus on the sentence that talks about providing service on an ongoing basis. Do you see that?*
>
> *A. Yes, I do.*
>
> *Q. And it says, you know, plans to provide on an ongoing basis, i.e. the supplier includes projected load for the service in its system resource planning. And isn't it true, Mr. Eaves, that i.e. means that is?*
>
> *A. I think so.*
>
> *Q. So if you substituted that is for i.e. it would say, requirements service is service which the supplier plans to provide on an ongoing basis, that is, supplier includes projected load for this service in its system resource planning; is that correct?*
>
> *A. Yes, you could read it that way.*
>
> *Q. And isn't it true that by saying i.e. or that is, the FERC Form 1 is actually defining what ongoing basis means? Ongoing basis, that is the supplier includes projected load for this service in its system resource planning.*
>
> A. *I would agree.*[6]

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[4] *Webster's Collegiate Dictionary* (4th ed.) ("*i.e. abbrev. [[L id est]] that is (to say)").*
[5] The second sentence of the definition also requires that the reliability of the service be the same as, or only second to, the reliability of the service to the supplier's own customers. There is not, nor has there ever been, any debate about whether the second sentence is satisfied by the AEP and Wabash contracts. The contracts themselves specifically provide that Wabash and AEP are to receive this level of service.
[6] Tr., p. 192, l. 18 to p. 193, l. 13.

- ***<u>It is also completely uncontroverted that the AEP and Wabash loads were included in all aspects of the Company's system resource planning.</u>***

If the Commission searches every word of the record in this case (and the first case), it will find that only one witness testified as to what system resource planning is: Company witness Jaime Haro. And it will find that Mr. Haro explained that the AEP and Wabash loads were included in *every* aspect of system resource planning that exists, including in the Company's MISO "Module E" compliance report (because the AEP and Wabash contracts called for the sale of firm capacity); in its annual and monthly capacity position calculations; in its load forecasting, fuel budgeting and risk management position calculations; and, in the only IRP prepared when these contracts existed.[7] Thus, it is beyond debate – the AEP and Wabash contracts were included in all aspects of Ameren Missouri's system resource planning.

This conclusively proves that the sales under the contracts *were made on an "ongoing basis" within the meaning of the FERC Form 1 instructions*, and therefore they qualify as "requirements service" under the FERC Form 1 instructions' definition of that term. While it is true that in the first case the Company had not yet included the Wabash and AEP contracts in its IRP, it is also true that it was *impossible* to have done so at that time since the prior IRP (filed in February 2008) had been prepared more than one year before the contracts even existed. But now that these contracts have been included in the Company's 2011 IRP filing, that new evidence presented in this case removes any doubt that the Commission may have had in the previous case that these contracts are included in all aspects of system resource planning. Now there is absolutely no basis to conclude that the sales under these contracts are not made on an

[7] It was not possible for loads to be supplied to AEP and Wabash to have been included in the Company's 2008 IRP, which was the last IRP filed prior to the evidentiary hearings in the first case, because the AEP and Wabash contracts did not exist when the 2008 IRP was prepared. However, the Noranda load, which represented the same power sold to AEP and Wabash, was included in the 2008 IRP.

"ongoing basis" as that term is defined by the FERC Form 1 instructions, and that they do not represent "requirements service" under the terms of Form 1.[8]

- **<u>The Commission's conclusion in the first case that if the AEP and Wabash contracts qualified as long-term requirements sales, an unlimited amount of the Company's off-system sales could be converted to long-term requirements sales, which would render the exclusion meaningless to the detriment of customers, is also refuted by the evidence in this case.</u>**

The undisputed evidence in this case is that the Company could *not* have sold all of its excess generation under long-term requirements sales contracts, meaning that the exclusion is far from "meaningless." This is because first, the Company's excess generation is only available certain times of the day or certain times of the month or year, and because of the unpredictability of native load some generation has to be held back to meet changing native load requirements. Moreover, the vast majority of the excess megawatt-hours ("MWh") are only available in the shoulder months, which would preclude entering into long-term (one year) firm contracts for those volumes.[9] In fact, absent a catastrophic loss of a firm customer (which is what happened when the ice storm damaged Noranda's plant), the Company would essentially have no excess capacity available for sale on peak days.[10] These undisputed facts prove that the Commission's prior conclusion that the Company's position "would render the tariff's definition of off-system sales nearly meaningless . . ." is simply wrong.[11] Since the Company essentially has no excess generation that can be sold on a firm basis long-term (i.e., all year long), it would be impossible for the Company to shift any significant amount of off-system sales to long-term requirements contracts.

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[8]In Case No. EO-2010-0255, MIEC witness Brubaker conceded that the fact that the contracts were not reflected in the 2008 IRP did not preclude the contracts from qualifying as "requirements service" under the FERC Form 1 instructions' definition. First Case Tr., p. 502, l. 12 to p. 503, l. 6. And, of course, it could not preclude them from so qualifying; otherwise, any contract entered into *between* the preparation of the triennial IRP filings could never qualify as "requirements service" simply because of the timing of when the contracts were entered into.
[9] Tr., p. 86, l. 10 to p. 87, l. 22.
[10] *Id*.
[11] First Case Report and Order, p. 21.

Moreover, even if the Company did have excess generation all year long and could shift off-system sales to long-term requirements contracts, it would be imprudent to do so in normal circumstances. Only where there is a catastrophic loss of a firm baseload customer would it make sense and be prudent for the Company to replace the sales to that customer with similar sales to a long-term requirements customer.[12] In other words, wholesale shifting of off-system sales to long-term requirements sales, even if it was possible to do, would almost certainly result in a legitimate prudence disallowance in the Company's next prudence review.

Aside from the additional evidence adduced in this case that addresses these points, there are several key (and in some cases, dispositive) arguments, all supported in the Company's initial brief by authority and citations to the record, as applicable, that the Staff and MIEC completely failed to address, including:

- Even if the subject contracts did not constitute "requirements service" (they do, as explained above), the Staff and MIEC have totally failed to address the argument that what is meant by the phrase "requirements sale" under the FAC tariff cannot be determined by reference to the definition of "requirements service" in the FERC Form 1 instructions because the record in this case demonstrates that those instructions' definitions could not possibly apply. They don't (and can't) explain how those instructions could possibly apply because if they did apply, four of the five municipal contracts that all parties agree do reflect long-term requirements sales and thus *do* fit within the exception in the FAC tariff would not so qualify because their terms are too short to qualify as "long-term" under those very same FERC Form 1 instructions. If part of the FERC Form 1 instructions can't apply (the definition of "long-term"), then it is illogical that other parts of those same instruction would apply (the definition of "requirements service"). The parties cannot cherry-pick portions of those instructions; they must take the instructions as they find them, *in toto*.

- They failed to address the argument that even if the Commission should apply a "regulatory context" (rather than a "real world context") to determine what the language at issue means, the proper context cannot be found in FERC Form 1 instructions because there is no evidence that those instructions were in the Company's or the Commission's minds when the FAC tariff was approved, and because they were not even mentioned until well after the Staff claimed "imprudence" in how Ameren Missouri classified the subject contracts. Assuming

[12] The Staff in fact agrees it was prudent for the Company to have done so when it entered into the AEP and Wabash contracts.

for argument's sake that some "regulatory context" informs what the Company and the Commission intended, the only relevant "regulatory context" has to be the context wherein *the Commission sets rates and approves FAC tariffs*; that is, *in a Commission rate case*, which is where the subject FAC tariff language was approved here. In that context, the FERC Form 1 and its instructions could not possibly have had anything to do with Ameren Missouri's and the Commission's intent when the FAC tariff was approved because they were not cited, raised, discussed, or otherwise at issue. Indeed, in *that* context, it is clear that the Commission consistently declares a term of one year to be long-term, further debunking the myth created by the Staff and MIEC that the FERC Form 1 instructions have anything to do with this case. Moreover, not even FERC, the agency that authored the Form 1 instructions, uses those instructions in determining which power contracts are long-term. Like the Commission, FERC uses one year as the demarcation between long-term and short-term contracts.

- They failed to explain how one can reconcile the completely contradictory opinions from the MIEC and Staff witnesses. For example, Staff witness Mantle disagreed with Staff witness Eaves regarding whether the contracts reflected "requirements sales" – Ms. Mantle said they fit her definition of a "requirements sale";[13] Ms. Mantle also disagreed at least in part with Mr. Eaves about when a sale is "long-term" (Ms. Mantle inconsistently opining at various times that long-term has no less than four different possible meanings,[14] whereas Mr. Eaves stuck to his assertion that "long-term" must mean five years or more based upon the discredited FERC Form 1 instructions);[15] MIEC witness Brubaker didn't disagree with the Company's contention that a sale is long-term if it had a duration of one year or more – thus contradicting both Mr. Eaves and Ms. Mantle; and, in the first case MIEC witness Fayne said that a contract can only reflect requirements service if it were included in the utility's resource plan, but his fellow MIEC witness Brubaker disagreed with him on that very point.[16]

- They completely failed to address the argument (and the case law supporting it) that when technical terms in a statute (the FAC tariff here) are at issue, the Commission in the first instance and ultimately the courts must look to how those terms are used in the relevant business (i.e., in the real world) – the power sales business – to discern their meaning. The evidence is uncontested that in the power sales business a long-term requirements sale is a sale of the type reflected in the two contracts at issue in this case; that is, a sale of firm power and capacity to a buyer with the need (requirement) to serve its load.[17]

[13] First Case Tr., p. 380, l. 13-17.
[14] First Case Tr., p. 378, l. 8-11; p. 423, l. 3-11.
[15] Tr., p. 170, l. 6-10.
[16] First Case Tr., p. 502, l. 12 to p. 503, l. 6.
[17] Ex. 4 (Haro Surrebuttal), p. 2, l. 1-3.

REPLY ARGUMENT

A. REPLY TO THE STAFF'S INITIAL BRIEF

1. <u>The Staff's Summary of the Operation of the FAC, While Generally Accurate, Has Little, if Anything, to do with the Question Before the Commission in This Case.</u>

The Staff spends about four pages of its initial brief (pages 5 to 8) explaining how the FAC works, and with limited exceptions, the Company agrees with the Staff's description.[18] Having said that, the question in this case is one of law: what does the following provision of the FAC tariff mean, and require:

> 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).[19]

Clearly this provision recognizes that not all MWhs sold by Ameren Missouri reflect off-system sales because there is an express exclusion (italicized above) from OSSR. That exclusion provides that if the sale is to a Missouri retail customer or if it reflects a long-term full or partial requirements sale, then it is not an off-system sale, and it is thus not tracked in the FAC. Staff's lengthy description of the FAC completely ignores this fact, as evidenced by statements like those appearing at page 9 of its initial brief, to wit: the "FAC meant that Ameren Missouri would only retain 5% of any revenues from selling that power [the power Noranda would have taken but for the ice storm] off-system, *that is, to <u>anyone</u> other than its Missouri retail*

[18] The Staff's description of the FAC includes information regarding the period of time over which under- or over-collections are charged/returned to customers, describing that period as 12 months. That was correct until July 31, 2011, but the period was changed to eight months (at MIEC's urging, as agreed upon by the Staff and the Company), in the Company's last rate case.

[19] Ex. 1 (Barnes Direct), p. 6, l. 6-20; Sch. LMB-1.

customers" (emphasis added).[20] Staff goes on to claim that both of its witnesses, and Mr. Brubaker for MIEC, testified that "these contracts are indisputably off-system sales *because they are not sold to Ameren Missouri's Missouri retail customers*" (emphasis added).[21]

Both of those statements are demonstrably false, because, as the express terms of the italicized exclusion quoted above provide, there are sales that are not to Missouri retail customers that are *also* not off-system sales (i.e., long-term full or partial requirements sales) and those sales, like sales to retail customers, are also not tracked in the FAC. To repeat: the issue in this case is whether the AEP and Wabash sales fit the exclusion, and that question is purely one of law because it is purely a matter of interpreting a tariff, which itself has the force and effect of law.

2. <u>The Staff's Discussion of Other Wholesale Contracts is Inaccurate.</u>

There is one substantive part of the Staff's description of the FAC with which the Company disagrees. The Staff claims that wholesale customers that fit the exclusion "are entered into as part of a long-term relationship . . . ."[22] The evidence of record directly rebuts the Staff's contention in this regard.

The Company has a contract that reflects a long-term requirements sale (no one disagrees) with the City of California, which commenced January 1, 2010.[23] When that contract started, the Company had not had a contract (or any "relationship") with the City of California for *eight years.*[24] While, as already explained, "ongoing basis" in the FERC Form 1 instructions has nothing to do with a seller's "relationship" with the buyer as the Staff and MIEC argue, we

[20] Staff's Initial Brief, p. 9.
[21] Staff's Initial Brief, p. 10.
[22] Staff's Initial Brief, p. 7.
[23] The City of California contract, which all agree is a long-term requirements sale, has a term of 41 months – clearly more than one year, and also clearly less than the five years that, if the FERC Form 1 instructions applied, would be required to be "long-term" under those instructions. Tr., p. 92, l. 16 to p. 93, l. 15.
[24] Tr., p. 92, l. 11 to p. 93, l. 15.

would also point out that there is no definition of the term "ongoing" that one could stretch sufficiently to make a contract that ended eight years ago and a new one entered into eight years later constitute an "ongoing relationship."

The Staff's initial brief then goes on to make additional statements that are directly rebutted by the record. The Staff claims that the relationships with the cities were "so long-standing that Ameren Missouri actually plans for these sales in its integrated resource planning."[25] Although that is true if a particular contract is in place and has a remaining term when the IRP is prepared, that is *just as true* with respect to the AEP and Wabash contracts. As Ameren Missouri witness Steven Wills explained, the contracts with the municipalities accounted for in the 2008 IRP were accounted for in the IRP *only for the remaining terms of those contracts,* which ended December 31, 2008.[26] This evidence is completely uncontroverted. In fact, the Staff didn't ask Mr. Wills a single question on cross-examination and no one provided any rebuttal to these facts. As Mr. Wills also explained, in the 2011 IRP – the only IRP for which it was physically possible to account for the AEP and Wabash contracts – the AEP and Wabash contracts were accounted for in the IRP, also *for their remaining term* just as was the case for the municipal contracts.[27]

The bottom line is that the Staff's "ongoing relationship" theory (which the language in the FERC Form 1 instructions in any event debunks) fails to hold water.

3. Following the Tariff Cannot Be "Imprudent," or Cause "Harm."

The Staff urges the Commission to find, as "it has already done for the prior audit period," that the Company "acted imprudently, improperly and unlawfully."[28] The Staff argues

[25] Staff's Initial Brief, p. 7.
[26] Ex. 7 (Wills Surrebuttal), p. 5, l. 3 to p. 7, l. 28.
[27] *Id*.
[28] *See generally* Staff's Initial Brief, p. 5.

that by not including the AEP and Wabash margins in the FAC, the Company was "imprudent" and that its imprudence caused "harm" to customers.[29] But the Staff's argument that there was "imprudence" and "harm" simply begs the ultimate legal question at issue here: what do "long-term" and "requirements sale" mean in the Company's FAC tariff?[30] Because if the answer to that legal question is that a long-term sale is one with a term of one year or more, and that a "requirements sale" is a sale of firm power and capacity to meet some or all of the buyer's load serving obligation (as contended by Ameren Missouri and as applied in the power sales business), then not only did the Company act lawfully and prudently in following its own tariff by excluding the contract revenues from the FAC, but the Company was *required to do so as a matter of law*.[31] The Commission cannot, in the name of avoiding "harm" (i.e., to avoid having customers pay the charges the tariff requires them to pay for the service they receive), now change the tariff or the result it dictates after-the-fact even if the Staff would like to see customers pay approximately $23-26 million less for their electric service.[32]

4. <u>The Record Rebuts the Staff's Contention (and the Commission's conclusion in the first case) that Ameren Missouri's Interpretation of the Exclusion Would Render it Meaningless.</u>

As outlined earlier, it is simply not true that Ameren Missouri could in effect eliminate all off-system sales by selling all power not sold to Missouri retail customers under contracts that reflect long-term partial requirements sales.[33] Similarly, the Commission's prior conclusion to

[29] Staff's Initial Brief, pp. 11-12.
[30] As explained in our initial brief, that determination is a legal one subject to *de novo* review by the courts. *See, e.g.,* ***Delta Air Lines, Inc. v. Dir. of Revenue***, 908 S.W.2d 353, 355 (Mo. *banc* 1995) (construction of a statute (tariff here) is a question of law).
[31] Because a utility tariff has the force and effect of law, and is binding on the Commission, the Company and its customers the same as if it were enacted as a statute. Ameren Missouri's Initial Brief, p. 21.
[32] As discussed in our initial brief and below, even if the Staff were correct the sum at issue is approximately $23 million.
[33] The Staff cites Mr. Brubaker's testimony (Ex. 10) to support its claim that the tariff exclusion would be rendered meaningless. Mr. Brubaker's testimony contains no facts that would support the conclusion that all or even a

the effect that the Company "would be able to choose to unilaterally define an off-system sale out of the fuel adjustment clause . . ." is also directly rebutted by the record.[34] The only evidence of record on this point is the following testimony of Ameren Missouri witness Barnes:

> *Q. You know, why couldn't Ameren Missouri enter into -- basically sell all of its additional off-system sales power under long-term requirements contracts?*
>
> *A. Well, first of all, it's not available 24/7. Those excess generation that are available come at certain times of the day or certain times of the month even or year. And because of the unpredictability of things like weather and other demands on the system, we have to maintain some of our generation and keep it available in the event that we need it for native load. In the event that we don't need it for native load, then we can sell it on a short-term basis, and those constitute off-system sales. So those are generally the types of sales that we are running through the fuel adjustment clause, but we don't lock up and can't frankly commit all of our generation on a long-term basis or we would be forced to buy power in the event that we needed it to serve native load customers. And that could be deemed to be imprudent if the cost of that power was in excess of what it cost us to generate it.*
>
> *Q. Mr. Roam cited you to the 10 million megawatt figure that's on that Appendix B, and I think the perhaps implication was we could have sold 10 million megawatt hours. Could we have sold anything close to that even if we wanted to?*
>
> *A. I don't believe so, but I'm actually not the expert on who buys and sells power. So that might be a question for --*
>
> *Q. Is most of our off-system sales on the peak day of the year?*
>
> *A. No, they're not. They're in shoulder months generally, which are the spring and fall typically.*
>
> *Q. Okay. And I'm assuming would that preclude you from entering into long-term year-long contracts if the capacity's only available, the energy's only available in the shoulder months?*
>
> *A. Yes.*[35]

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substantial quantity of MWhs ordinarily sold as off-system sales could be sold under contracts reflecting long-term requirements sales.

[34] First Case Report and Order, p. 21.

[35] Tr., p. 86, l. 10 to p. 87, l. 22.

It is also undisputed that by entering into the contracts at issue in this case Ameren Missouri only sought to sell the power that Noranda was no longer taking for approximately the period that Noranda was expected to have a reduced electric load.[36] It is further undisputed that the price under those contracts was quite close to the price Noranda was being charged for that power.[37] It is undisputed that Ameren Missouri did not sell the approximately 10 million MWhs that it ordinarily sells as off-system sales under long-term requirements contracts because (a) it had no intention of doing so; and (b) for the reasons documented in the record it had no ability to do so. The tariff provision is not rendered meaningless by applying it as written, the Staff's unsupported contention to the contrary notwithstanding.[38]

5. <u>The Staff's Claim that Customers Have not Already Been Credited with $3.3 Million of Margins from The AEP and Wabash Contracts Through FAC Adjustments is Simply Not True</u>.

As Ameren Missouri witness Gary Weiss explained, the Staff, the Company, MIEC and the Office of the Public Counsel entered into a Stipulation and Agreement ("Stipulation") in Case No. ER-2010-0036 that contained two, stand-alone provisions entitled "**AEP AND WABASH CONTRACTS"** <u>and</u> **"OTHER ISSUES."**[39] The "AEP and Wabash Contracts" section of the Stipulation provided for a change to the FAC rate formula which added a "W" factor crediting to customers $300,000 per month for 12 months after the new rates set in that rate case took effect. This section of the Stipulation also reflected the parties' agreement that once rates were reset in that rate case all future margins on the AEP and Wabash contracts would

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[36] Ex. 1, p. 11, l. 21-22.
[37] First Case Tr., p. 304, l. 11 to p. 305, l. 14.
[38] Staff says that the FAC would be "oddly inequitable if Ameren Missouri's customers bear the burden of increases in fuel costs less off-system sales revenue but do not receive the benefits of decreasing fuel costs less off-system sales revenue." Staff's Initial Brief, p. 12. No such result has occurred, or can occur. This contention is also based upon the same flawed assumption: that Ameren Missouri can make large or unlimited sales of power under long-term requirements contracts – it can't.
[39] Ex. 6 (Weiss Surrebuttal), Sch. GSW-1.

be tracked in the FAC. The latter agreement was accomplished by *changing* the FAC tariff so as to limit the exclusion for long-term full or partial requirements sales after the change to such sales with Missouri municipalities only.

Incredibly, the Staff claims that the "W" factor and the associated $300,000 per month credit to customers had nothing to do with margins under these contracts. But prior to Ameren Missouri raising the issue, in this case,[40] the Staff witness who now claims that the "W" factor did not reflect margins under the AEP and Wabash contracts already flowed back to customers answered a data request that indicates *just the opposite.* In the first case, Ms. Mantle provided the italicized response set forth below to the following Company data request:

> Please list, by document (paper or electronic) type, date, and author/recipient (if shown by the document) all documents reviewed (whether relied upon by Ms. Mantle or not) by Ms. Mantle in arriving at the opinions expressed in Ms. Mantle's testimony in this docket.
>
> - Proposed tariff sheets filed in direct by AmerenUE witness Marty Lyons in ER-2008-0318 on April 4, 2008
> - Order Denying AmerenUE's Application for Rehearing issued on February 19, 2009
> - *AmerenUE ER-2010-0036 settlement document [the Stipulation] showing Noranda load loss* ***and AEP and Wabash <u>offset</u>*** . . . (emphasis added).[41]

It is obvious that Ms. Mantle recognized – and under the Commission's discovery rules, attested as to the truthfulness and correctness of her answer – that the settlement agreement attached as Schedule GSW-1 to Exhibit 6 in this case reflected *an offset for AEP and Wabash.* Try as one might, no one can credibly read the "AEP and Wabash Contract" section of the Stipulation and find any "offset" other than the $300,000 per month to be reflected in the "W" factor. And when confronted with this obvious fact, instead of simply admitting that if the $26.3

[40] The issue did not come up in the first case, because that case dealt with FAC periods concluded before the "W" factor took effect. While the Company disagreed with any adjustment being made at all in that case, the Company did not disagree with the Staff's calculation of the approximately $17 million that was at issue in that case.
[41] Page 4 of Ex. 17.

million figure were used in this case (if Staff otherwise prevailed) the Company would in fact end up giving back to customers $3.3 million more in margins *than the Company even received* from the AEP and Wabash contracts, Ms. Mantle's testimony took an absurd turn when she said "[t]hat is the only monetary offset, yes" and that "it offsets the fact that – of taking the issue to the Commission."[42] Ms. Mantle's creative use of the English language notwithstanding, agreeing not to "take an issue to the Commission," while it may certainly have been a "compromise" of a position, it cannot possibly be mistaken for an "offset." Ms. Mantle can't run from the words she used in her data request response. The *only* issue resolved by the "AEP and Wabash Contracts" section of the Stipulation was, obviously, the ratemaking treatment of the margins under those contracts, and it is obvious on its face what the $300,000 per month credited through the "W" factor was for.

One other point on this issue bears noting. It is true that the Stipulation contains language (cited by the Staff at page 14 of its initial brief) to the effect that the Stipulation preserves all parties' ability to take whatever position they want to take in a future case regarding how the margins under these contracts should be treated for ratemaking purposes. The specific language of that provision simply preserves the parties' ability to take any position they wish regarding how these contracts should be treated, "including the position that these AEP and Wabash contracts . . . should be treated as off-system sales . . ." during the period when the prior FAC tariff was in effect. And all parties *have* taken those positions in the first case and this case. Nothing in Ameren Missouri's argument about the fact that the calculation of the sum at issue

[42] Tr., p. 154, l. 4; l. 10-11.

should be changed by $3.3 million in any way can or has precluded any party from taking positions about how those contracts should be treated in the FAC or in ratemaking generally.[43]

The point is that the plain terms of the Stipulation – coupled with Ms. Mantle's admission in her data request response – make it obvious that $3.3 million of the AEP and Wabash margins have already been flowed through to customers. The sum at issue in this case is approximately $23 million, not approximately $26.3 million.

B. REPLY TO MIEC'S INITIAL BRIEF

1. MIEC is Ignoring the Record in this Case.

As we have already shown, MIEC's statement that "[a]ll of the issues, all of the claims, [and] all of the material facts . . . have been thoroughly analyzed and decided,"[44] is simply not true. *See* the Introduction/Summary portion of this Reply Brief. There is new evidence provided in this case that shows that the Commission's decision in the first case is not supported by the facts. Similarly, MIEC's statements that this "is precisely the same case" and that "Ameren Missouri failed to provide any evidence that any of the operative facts . . . in the instant case were different from the operative facts . . . in the prior case" are simply not true for the same reason.

2. MIEC is Also Ignoring the Law Governing this Case.

MIEC states that the issue in this case is what is the meaning of the phrase "long-term full or partial requirements sales as that phrase was intended and understood by the Commission

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[43] In her testimony, Ms. Mantle also makes the weak point that there was another stipulation in Case No. ER-2010-0036, where there was a black-box settlement amount, implying that the "W" factor was also a "black-box" settlement. The problem for Ms. Mantle is, however, that the other stipulation expressly stated that indeed the amount at issue *was a blackbox figure.* In the Stipulation at issue here, the "W" factor stands alone in the "AEP and Wabash Contracts" section of the Stipulation; it was a settlement of the AEP and Wabash issue alone, not a "black box" compromise of numerous issues.
[44] MIEC's Initial Brief, p. 1.

and the parties . . ..”[45] MIEC misstates the law. As we explained in our initial brief, a tariff is construed like a statute, with the intent of the Commission *and the utility*, and no one else, determining what the tariff means. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n,*** 156 S.W.3d 513, 521 (Mo. App. W.D. 2005). MIEC's citations to cases addressing tariff interpretation under federal law do not change the law in Missouri.

MIEC then says that what the phrase means should be found in what it calls the “regulatory context,” and it urges the Commission to find that “regulatory context” in the FERC Form 1 instructions' definition (or in identical Edison Electric Institute or RUS definitions) of “requirements service.” And MIEC makes the same mistake Mr. Eaves made by arguing that “ongoing basis” means “ongoing relationship, past and future,” when as we explained earlier the instructions tell us that “ongoing basis” means something totally different: that is, a sale is made on an “ongoing basis” if it is included in system resource planning. MIEC then says it is only this “regulatory context” that can inform what the key phrase means, and then claims that the “market definition” doesn't matter. But MIEC's strained discussion of its so-called “regulatory context” is completely at odds with the law.

As explained in our initial brief, an ambiguous technical term *must* be construed according to its technical meaning found by reference to how that term is used in the relevant business. ***City of St. Louis v. Triangle Fuel Co.***, 193 S.W.2d 914, 915 (Mo. App. St. L. 1946).[46] Put another way, the terms at issue in this case must be construed according to how those terms

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[45] *Id.*, p. 2.

[46] MIEC completely ignores the law in general in this regard, and this case in particular. ***Rose v. Franklin Life Ins. Co.***, 132 S.W.613 (Mo. App. St. L. 1910) also teaches that the technical meaning can be found by reference to the testimony of persons with knowledge of the subject – neither Messrs. Brubaker nor Mr. Eaves, nor Ms. Mantle, have any expertise in the power sales business or markets that would allow them to opine about what the technical meanings of the operative terms are in the power sales business. *See* pages 24-26 of our initial brief.

are used in the business of buying and selling power – in the *market*. The evidence in this case is undisputed: the FERC Form 1 instructions' definitions are irrelevant to those markets.

MIEC's third legal mistake is its claim that if there is ambiguity in the FAC tariff, it must be construed against the drafter, which it says was Ameren Missouri. Putting aside the fact that all parties signed onto a stipulation where all of them (represented by counsel) jointly proposed this precise language to the Commission (and thus the *contract* construction principle of "construe against the drafter" wouldn't apply), MIEC flatly misstates Missouri law. The ***Laclede*** case tells us what principles are to be applied in resolving ambiguities in a tariff. Those principles have nothing to do with contract construction principles. In fact, every case cited by MIEC is a federal case involving construction of federal tariffs, which are construed according to contract construction principles. But under Missouri law – see ***Laclede*** – that is simply not the case.

3. <u>MIEC Effectively Relies on Only One "Regulatory Source," which is a Source That Cannot Apply.</u>

Aside from MIEC's patently incorrect legal arguments, MIEC's first substantive argument is that there are "three official regulatory sources" that it claims support its position.[47] The contention that these sources support its position is not true because the "regulatory sources" that MIEC relies on would require that four of the five municipal contracts that all parties agree are long-term requirements sales would then have to be re-classified as off-system sales.[48] The linchpin of MIEC's main argument in this case is that the FERC Form 1 instructions' 20-year-

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[47] MIEC's Initial Brief, p. 7.

[48] The Edison Electric Institute is not a "regulatory source" at all; rather, it is a trade association of utilities. Its definition of "requirements service" is nothing more than a word-for-word reproduction of the FERC Form 1 instructions. The Rural Utilities Services ("RUS") Glossary may be a "regulatory source" *for rural electric cooperatives*, but again, it merely contains an exact reproduction of the same definition in the FERC Form 1 instructions. In fact, the RUS form was developed from the FERC Form 1. First Case Tr., p. 264, l. 25 to p. 265, l. 5. The truth is, there is only one regulatory "source"; that is, the outdated and inapplicable FERC Form 1 reporting instructions, that do not apply for the reasons discussed herein.

old definition of "requirements service," provides the "regulatory context" that "proves" what Ameren Missouri and the Commission intended when the FAC tariff was proposed and approved.[49] There are several obvious problems with that argument.

First, there is no evidence the Company or the Commission had the FERC Form 1 instructions in mind when the FAC tariff was approved. These instructions were never cited or mentioned anywhere by anyone until Mr. Eaves discovered them and cited them in his report filed in the prudence proceeding many months later.

Second, as noted, MIEC can't pick and choose those parts of the FERC Form 1 instructions that it *says* support its case (its "requirements service" definition, which doesn't support its case anyway) and disregard those parts that do not (its "long-term" definition). We are dealing with a tariff here; something akin to a statute that has the force and effect of law and must be followed. If MIEC is right, that is, if the FERC Form 1 instructions control, then, as noted, revenues from four of five municipal contracts also must be included in the FAC. Yet no one contends that this should be done; indeed, all parties agree it should not be done. This conclusively shows that neither the Company nor the Commission intended that the definitions from the FERC Form 1 instructions were to be applied when the tariff was adopted, because if those definitions applied, then revenues from those municipal contracts would have *had* to be included in the FAC. Consequently, the FERC Form 1 provides no support for MIEC's argument in this case or for the Commission's decision in the first case.

Third, even it were appropriate to apply a "regulatory context" in determining the definition of terms in a Missouri utility's tariff, the most relevant regulatory context is a Commission rate case – where FAC tariffs are approved. In *that* context, long-term is consistently defined as one-year or more, as discussed at pages 32 to 34 of our initial brief.

[49] See generally, MIEC Brief, pp. 7-12.

Fourth, as discussed at pages 25 to 26 of the Company's initial brief, even if the FERC (the author of the FERC Form 1) were a proper resource for determining the definition of the terms in Ameren's Missouri FAC tariff, the FERC itself has not applied the definitions found in its own obscure and outdated Form 1 reporting instructions in cases that determine the rights and obligations of parties to long-term requirements contracts. As pointed out in our initial brief, FERC has consistently determined that long-term power sales contracts are for a period of one year or longer.[50] If FERC itself does not rely on the definitions in the Form 1 reporting instructions, there is certainly no basis for the Commission to do so.

Fifth, since MIEC takes no issue with Ameren Missouri's contention that "long-term" means one year or more (which itself is totally at odds with the FERC Form 1 instructions), then we know that MIEC is relying only on the FERC Form 1 instructions' definition of "requirements service."[51] But as we have shown above, the AEP and Wabash contracts *do* reflect requirements service within the meaning of the FERC Form 1 instructions. This makes MIEC's recitation of hypothetical questions about "ongoing basis" (and answers to those hypotheticals during cross-examination of Company witness Jaime Haro in the first case) completely irrelevant; the FERC has told us exactly what "ongoing basis" means—included in the supplier's system resource planning. What Mr. Haro or Mr. Roam think the phrase means doesn't matter.[52]

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[50] *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. 12-21).

[51] Ms. Mantle takes no issue with the fact that the sales at issue are requirements sales, yet she does take issue with what constitutes "long-term." She can't decide, however, whether that means one, three, four or five years, and she has no explanation for how her varying durations can be reconciled with the fact that some of the municipal contracts she agrees are long-term wouldn't fit any of her long-term "definitions." And, in the meantime, she contradicts her Staff colleague, Mr. Eaves, who contends that long-term means five years or more, although he, too, can't square that view with everyone's agreement that there are three municipal contracts with terms of less than five years that reflect "long-term . . . requirements sales."

[52] MIEC's contention that Ameren Missouri was claiming that every contract is on an "ongoing basis" concurrent with the contract term, is also irrelevant, both for the reasons already discussed and because merely qualifying as

Finally, as already noted, any ambiguity in the terms of the tariff should be resolved by reference to the usage of those terms in the real world, not a made-up "regulatory context." Here we are dealing with technical terms – what do "long-term" and "requirements sale" mean in the power sales business. As earlier noted, if those technical terms are ambiguous, their meaning is to be found by reference to how the terms are used in that business. ***Triangle Fuel***, 193 S.W.2d at 915. Their meaning is not to be "found" in obscure, 20-year old instructions in the fine print on page 310 of a federal reporting form that, based on the evidence of record in this case, cannot possibly apply.[53]

4. <u>A "Requirements Sale" is Not Necessarily the Same as "Requirements Service," But it Doesn't Matter.</u>

MIEC's next argument (see pages 14 to 15 of MIEC's initial brief) is that it is "axiomatic" that the phrase "requirements sale" in the FAC tariff means "requirements service" in the FERC Form 1. Although that may be "self-evident" to MIEC's counsel, it wasn't to any witness in this case – not even MIEC's experts said as much; nor does it matter. In the marketplace – where the law tells us it does matter (*see* ***Triangle)*** – a requirements sale is not precisely the same as "requirements service." A "requirements sale" is a sale of firm energy and capacity to an entity that itself has load-serving obligations.[54] Under the FERC Form 1 instructions, there are other conditions that must be satisfied to constitute "requirements service," namely the requirement that it be on an "ongoing basis" (included in system resource planning) and a level of reliability that is the same as, or only second to, the level of reliability provided to the seller's own consumers. Regardless, in this case, both of the sales at issue squarely fit *both*

"requirements service" alone is insufficient for a contract to fit the FAC exclusion. In addition, the contract has to be long-term. Consequently, not "every contract" as MIEC implies, could somehow fit the exclusion.

[53] It is undisputed that the power sales business was much different in 2009 when the FAC tariff was approved than it was in 1990 or earlier when the FERC Form 1 instructions were issued. That's why it makes no sense at all to conclude that the Commission and the Company had those 20-year old instructions in mind when the FAC tariff was approved in 2009.

[54] Ex. 4, p. 1, l. 17 to p. 2, l. 15.

definitions. So we can argue about this point – MIEC's counsel can claim it is "axiomatic" – but it doesn't matter. Either way, the AEP and Wabash contracts qualify for the exclusion from the FAC.

5. <u>MIEC's Attempt to Bootstrap what the Commission Said in the First Case – More Than Two Years after the FAC Tariff was Approved – Can't Be Used to Divine What a Different Commission Intended Two Years Earlier.</u>

MIEC claims that when the Commission in the first case discussed its (mistaken) view that Ameren Missouri's construction of the exclusion would render it meaningless that this somehow shows what a different Commission intended more than two years earlier. What the Commission intended more than two years earlier has to be divined from the language of the tariff itself and if ambiguous, from the record before the Commission *at that time*.[55] We've already shown that that record does not support reliance on the FERC Form 1 instructions. Moreover, we've already shown that the Commission was incorrect in the first case in concluding that the Company's construction would render the exclusion meaningless.

MIEC also grossly overstates its point when it claims that "all of the evidence" demonstrates that neither Ameren Missouri nor the Commission intended contracts like the AEP and Wabash contracts to fit the exclusion. The record belies this point. If the FERC Form 1 instructions' definitions apply, then we have established that the contracts reflect requirements service because the sales were made on an ongoing basis. And if, as we've shown (see our initial brief, p. 15; pp. 31-33), in the ratemaking context the Commission routinely sets one year as the demarcation between short- and long-term, then the FERC Form 1 cannot apply. The point is it is simply not true that "all" of the evidence makes the demonstration claimed by MIEC. There is not only evidence that directly rebuts the claim, but as outlined in our initial brief and herein,

[55] A tariff cannot be retroactively modified to accomplish a different result than what was expressly provided for at the time it was approved. ***State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 58 (Mo. *banc* 1978).

there is a mountain of uncontroverted evidence that shows that MIEC's theory of this case cannot possibly be correct.

This contention is just one of many other unequivocal (and unsupported) statements in MIEC's initial brief that are either contrary to the law or to the facts.

6. MIEC's Reliance on Ms. Mantle's Assumption that the FAC Exclusion was Limited to Long-term Requirements Sales with Municipalities Fails to Withstand Scrutiny.

Ms. Mantle claims that someone – she can't remember who – told her that the phrase "long-term full or partial requirements sales" was *a* description of wholesale contracts with municipal customers.[56] She admits that no one told her that this phrase *only* applied to sales to municipalities.[57] She admits that she made an *assumption* that the language was limited to sales to municipalities, and she admits she never asked anyone to confirm that her assumption was correct.[58] She admits she does not know what Ameren Missouri intended (she can't read the mind of the person she attributes the statement to), nor can she say that anyone at Ameren Missouri knew about the assumption she was making.[59] Ms. Mantle even testified under oath the AEP and Wabash contracts *are requirements sales.*[60] Given these admissions, the only way Ms. Mantle's claim that the exclusion was limited to requirements sales to municipal customers could be right is if one inserts two words into the tariff *that were simply not there*: "Missouri municipalities."[61] Moreover, it makes no sense to assume that the Company would have intended any such limitation. The Company has made long-term requirements sales to non-

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[56] Tr., p. 124, l. 11-18.
[57] *Id*. p. 125, l. 11-16.
[58] *Id. p. 126, l. 5-17.*
[59] *Id.*, p. 127, l. 3-13.
[60] First Case Tr., p. 380, l. 13-17.
[61] As discussed in section 7 immediately below, the Commission cannot add words that are not there.

municipal buyers before and has itself been a requirements customer as a buyer with a non-municipal seller.[62]

The bottom line is that all Ms. Mantle's testimony proves is that in *her* mind the exclusion was limited to long-term requirements sales to municipalities – her testimony does not establish what Ameren Missouri or the Commission thought when the FAC tariff was approved. Even her Staff colleague, Mr. Eaves – *in direct contradiction to her position* – agreed that a requirements sale does not have to be limited to a municipal contract.[63] So while Ms. Mantle can argue that she thought the language "long-term full or partial requirements sales" in fact meant "long-term full or partial requirements sales *to Missouri municipalities,"* her subjective belief cannot change the language of the tariff.

MIEC is also wrong when it claims that the Commission would have to deem Ms. Mantle's claim about what was said "completely fictitious" to rule against it.[64] The Commission can easily believe that Ms. Mantle was told that the exclusion *included* municipal contracts (at the time the FAC tariff was being approved, those were the only long-term full or partial requirements sales that existed), but that doesn't mean the language only applied to contracts with municipalities, or that Ms. Mantle's assumption to that effect was correct. As noted, the record evidence demonstrates the Company has had contracts reflecting long-term requirements sales with non-municipalities. That an unidentified Ameren Missouri employee and Ms. Mantle may have "spoken past each other," even if the Commission believes the statement was made, tells us nothing more than that Ms. Mantle made an assumption that was wrong.

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[62] Tr., p. 94, l. 3-13 (AP&L); p. 94, l. 25 to p. 96, l. 9 (Illinois Power).

[63] First Case Tr., p. 339, l. 19 to p. 340, l. 1. And even Mr. Brubaker concedes that his so-called "regulatory concept" of "requirements service" is not limited to municipalities – even he conceded that sometimes it applied to rural electric cooperatives. Ex. 10 (Brubaker Direct), p. 5, l. 4-8. The bottom line is that our opponents are all over the map – Eaves says requirements service is *not* limited to municipal contracts; Brubaker says the same, at least as to rural electric cooperatives; and Mantle says the AEP and Wabash contracts are "requirements sales."

[64] MIEC's Initial Brief, p. 17.

7. <u>MIEC's Reliance on the Later Amendment of the FAC Tariff to Limit the Exclusion to Sales to Missouri Municipalities Supports the Company's Position</u>.

As earlier noted, a tariff is like a statute; i.e., it is the law. As we explained in our initial brief, "[p]rovisions not plainly written in the law, or necessarily implied from what is written, should not be added . . ." regardless of the ends the Commission's Staff or the Commission may want to accomplish. ***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). Moreover, when a statute (or a tariff here) is changed, "such change is deemed to have an intended effect, and the legislature [the Commission and the Company here] will not be charged with having done a meaningless act." *See, e.g.,* ***Lombardo v. Lombardo***, 35 S.W.3d 386, 390 (Mo. App. W.D. 2000) (Holding that when a child support statute was amended to add the words "and complete" to the requirement that a child enroll in 12 hours of classes the additional words had to be given effect – the same is true here; otherwise, adding the language "to Missouri municipalities" to the FAC tariff would have been a "meaningless act").

MIEC points to just two items in support of its contention that when the FAC tariff was amended in a later rate case to add "to Missouri municipalities" to the exclusion at issue here that the amendment was merely a clarification and not a change: first, to Ms. Mantle's assumption (which has nothing to do with what the Commission or Ameren Missouri intended, nor does it comport with the language of the tariff), and second to a small *portion* of an exchange between MIEC's counsel and Company witness Haro at the hearing in the first case. The entire exchange, however, tells a much different story. The entire exchange with Mr. Haro was as follows:

> *Q. Now you state that Ameren never intended to limit the section of the fuel adjustment clause tariff; is that correct?*
>
> *A. Yes.*

Q.	*Is it your position that they never intended to limit the section?*

A.	*My position is that if they [meaning the Company and the Commission in 2009 when the original tariff was adopted] wanted to limit it, they would have included the words [to Missouri municipalities] in there.*

Q.	*Okay. But I'm – ever. So when they didn't include it, they never intended to limit it – the exclusion section of that tariff?*

A.	*Yeah, at the time they wrote it, I don't think that was an intention to exclude it.*

Q.	*Do you know if that was changed going forward?*

A.	*Yes. We changed it into the next rate case.*

Q.	*And what word did you add into that?*

A.	*"Municipalities." We clarified it because if that was the intention, then it was very simple to just limit it to municipalities, so –*

At that point Mr. Haro's testimony was cut off by MIEC's counsel.[65]

When given the chance to finish his answer, Mr. Haro testified as follows:

Q.	*Can you tell me, when we added the word "municipal"? Can you tell me what happened?*

A.	*Yeah, I think when we added the word, it was a change to the tariff, it was a change that came with other changes in the – in the tariff itself.*

Q.	*So it was not a clarification?*

A.	*It was not a clarification. It was a change.*[66]

In an attempt to salvage its use of a small portion of the additional exchange, MIEC in effect claims that Mr. Haro changed his story on redirect after the exchange with Staff's counsel, but the record shows that during cross-examination by counsel for the Missouri Energy Group (*before* his redirect examination), Mr. Haro indicated that adding the words "to Missouri municipalities" in fact was a change: *"Q. And do you believe that the difference of adding the*

[65] First Case Tr., p. 62, l. 16 to p. 63, l. 10.
[66] First Case Tr., p. 142, l. 8-14.

term "municipalities" has changed the definition of that? A. I do. I believe it changed."[67] Consequently, MIEC's attempt to undermine Mr. Haro's credibility by implying that he embellished his testimony on redirect is simply not borne out by the record.

Only when one takes a tiny part of the entire exchange (during which Mr. Haro's answer was cut off by counsel) and ignores both Mr. Haro's exchange with the Missouri Energy Group's counsel and his testimony on redirect can one make the argument that Mr. Haro "admitted" there was no change to the tariff. But when that tiny part of the record is put into context, it becomes clear that Mr. Haro made no such admission. Moreover, Company witness Steven Wills also specifically testified that the tariff had changed: "the Stipulation and Agreement also changed the definition to specifically exclude anything but Missouri municipalities *going forward* from this off-system sales definition. Municipals would be the only things subject to the exclusion *going forward"* (emphasis added).[68]

The bottom line is that adding the provision "to Missouri municipalities" in a subsequent rate case wasn't a mere clarification. The obvious truth is that a change was made so that going forward (i.e., after the change) only a requirements sale to a municipal utility would be excluded from the FAC. Prior to that change being made, however, a requirements sale could be to any customer, including AEP and Wabash.

8. <u>Contract Construction Principles Do Not Apply.</u>

MIEC's next argument is that a *contract* construction principle (construe ambiguous language in a contract against the drafter) should or must be applied when construing the tariff (which is the equivalent of a statute*)* in this case.[69] For its support, MIEC cites a federal court

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[67] First Case Tr., p. 82, l. 12-15.
[68] Tr., p. 109 (answering Judge Pridgin's question), l. 13-17.
[69] MIEC's Initial Brief, pp. 20-22. We addressed this point above in connection with the Staff's initial brief; we will briefly expand on that discussion here.

case construing federal principles regarding a railroad's tariff approved by the United States Interstate Commerce Commission.[70] It appears that federal law views a carrier's tariffs to be "no different from any contract," which causes those courts to construe such tariffs strictly against the carrier that drafted them.[71] But as we have already stated (and in fact as the Commission itself stated in its Report and Order in the first case), Missouri state law governing the interpretation of tariffs is much different than the federal law cited in MIEC's brief. Missouri's courts do not equate tariffs with contracts. Instead, because a tariff, once approved, has the same force and effect as a statute adopted by the legislature, Missouri state courts consistently have held that tariffs should be interpreted in the same manner as statutes. ***Laclede Gas***, 156 S.W.3d at 521.

9. MIEC's Arguments About the $3.3 Million of Margins Customers Were Already Credited Through the "W" Factor are No More Availing Than the Staff's Arguments.

Consistent with much of its initial brief, MIEC makes another claim that is rebutted by the record when it says "there is *no* evidence that the amount was to be used as a reduction to the actual margins collected from the AEP and Wabash contracts (emphasis added)."[72] Perhaps MIEC forgot about Ms. Mantle's data request response, discussed earlier. MIEC then latches onto the word "additional" in the Stipulation claiming that it "clearly implies" that the reduction

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[70] ***Penn Cent. Co. v. General Mills, Inc.***, 439 F.2d 1338, 1340 (8th Cir. 1971). Incredibly, MIEC claims that this case arose "Under Missouri law." But none of the cases involved Missouri law at all. Instead, they all involved federal tariffs governed by federal law.
[71] ***Id.*** at 1340-41. A review of the court's decision shows that strict interpretation against the drafter is but one of several principles that federal courts employ when interpreting an ambiguous tariff. Other legal principles that govern the interpretation of tariffs include: (1) that terms used in a tariff "must be taken in the sense in which they are generally used and accepted"; (2) a finding of ambiguity "must be a reasonable one and should not be the result of a straining of the language"; and (3) "there must be a substantial and not a mere arguable basis in order to justify resolving doubt against the carrier." ***Id.***
[72] MIEC's Initial Brief, pp. 23-24.

reflected in the "W" factor is in addition to what it calls "mandatory reductions from the margins associated with AEP and Wabash."[73]

The fundamental flaw in MIEC's argument is that the margins that would be flowed through the FAC from AEP and Wabash when the revised tariff took effect (which occurred starting June 21, 2010 when new rates took effect) were, by definition, margins realized *from and after* the effective date of the tariff change – from and after June 21, 2010. In other words, the reference relied upon by MIEC relates to 100% of those post-June 21, 2010 margins. But when one examines how the FAC rate formula works (from and after that date), one sees that Factor OSSR would already reflect 100% of those post-June 21, 2010 margins. This means that the phrase "in addition" in the Stipulation has to refer to other margins not covered by the OSSR factor in the FAC tariff – pre-June 21, 2010 margins – reflected by the $300,000 per month. So those other margins would further reduce (to use Ms. Mantle's word, would "offset") net fuel costs. MIEC's argument would only hold water if Factor OSSR was somehow not already capturing *all* of the post-June 21, 2010 margins from the contracts, but it was capturing all of them; i.e., the "W" factor *has* to reflect pre-June 21, 2010 AEP and Wabash margins.

The math also doesn't work for MIEC. If the $300,000 was an "AEP and Wabash offset," as Ms. Mantle has conceded, then if MIEC prevailed in this case, the Company would have credited customers for $46.3 million through the FAC for AEP and Wabash margins but would have only received $43 million.

CONCLUSION

The Staff and MIEC are wrong when they assert that the margins from the AEP and Wabash contracts must flow through the FAC because:

[73] MIEC's Initial Brief, p. 24.

- Additional evidence adduced in this case shows that the bases for the Commission's decision in the first case are not supported by the facts. Specifically, the evidence in this case shows that the AEP and Wabash contracts were included in the 2011 IRP and all other aspects of system resource planning. The sales under those contracts were therefore made on an "ongoing basis" under the FERC Form 1 definition of that term. Therefore, they also qualify as "requirements service" under FERC Form 1, contrary to the Commission's finding in the first case.
- Additional evidence adduced in this case also shows that if the AEP and Wabash contracts are recognized as long-term requirements sales, it will not render the exclusion from the FAC meaningless (because it would invite wholesale conversion of off-system sales to long-term requirements sales). Ameren Missouri does not have year round excess power that would make such a conversion possible. Moreover, conversion in the absence of unusual circumstances would result in a legitimate prudence disallowance.
- The evidence also shows that FERC Form 1 definitions should not apply in this case. There is no evidence that these definitions were ever considered by the Commission or the Company when the FAC tariff was first approved. Instead, they were "discovered" by Staff long after the fact. Even if a "regulatory context" should be used to interpret the tariff, the appropriate regulatory context is not outdated FERC Form 1 definitions that even the FERC does not use. The appropriate regulatory context is Commission cases, which support the Company's position.

- The most compelling reason that FERC Form 1 definitions cannot apply is that they would exclude several municipal contracts that are less than five years in length, but which all parties agree should be excluded from the FAC.

For the reasons set forth herein, as well as those set forth in Ameren Missouri's initial brief, the Company respectfully requests that the Commission take the following steps:

1. Rule in this case that the AEP and Wabash contracts constitute long-term requirements sales under the Company's FAC tariff;
2. Dismiss the Commission's appeal of the first case; and
3. Continue to hold the Company's request for an accounting authority order in abeyance, pending the resolution of the appeal of the first case by MIEC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Reply 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 24th day of August, 2012:

/s/ James B. Lowery