BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

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

COMES NOW Union Electric Company d/b/a Ameren Missouri (hereinafter "Ameren Missouri" or the "Company"), and for its Reply and Surreply to the above-referenced Staff Response and MIEC Reply, states as follows:

1. The Staff agrees that the Commission's determination in Case No. EO-2010-0255 could be reversed on appeal, and that the Commission could reach a different result on the issue presented in that case relating to a period for which a prudence review has not yet occurred; that is, the period from October 1, 2009 through June 20, 2010 (covering the third through fifth Accumulation Periods under the Company's FAC).[1] Nevertheless, the Staff indicates that it would support the Missouri Industrial Energy Consumers' ("MIEC") request made in MIEC's

[1] As the Staff points out, the language in Rider FAC that was at issue in Case No. EO-2010-0255 was changed effective June 21, 2010. Contrary to the argument made in MIEC's Revised Reply, that change indicates that the FAC tariff language that will control the treatment of the AEP and Wabash revenues after completion of a prudence review respecting Accumulation Periods three through five was broader – i.e., was not limited to long-term requirements sales with Missouri municipalities – prior to the tariff change being made. Otherwise, the change would have no effect. Because a tariff is interpreted like a statute, basic statutory construction principles indicate that the Company and the Commission, in changing the tariff, intended to in fact effectuate a change in the operation of the tariff, i.e., a narrowing of the exclusion of long-term requirements sales from off-system sales. *See 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) (Tariffs are to be interpreted like a statute according to the intention of the utility and the Commission). *See e.g., City of Willow Springs v. Missouri State Librarian*, 596 S.W. 2d 441, 444-45 (Mo. *banc* 1980) (It is presumed that the "legislature" (the Company and the Commission here) intended to make a substantive change by amending the tariff here).

Motion for FAC Credits from Off-System Sales Margins, to which the Company responded on August 26, 2011, "if it can be done expeditiously in this case, similarly to how the Commission addressed NBFC rates in Ameren Missouri's first true-up amount filing under its fuel adjustment clause, File No. ER-2010-0274." Staff's "support" and its reference to File No. ER-2010-0274 overlook the express terms of the Commission's FAC rules and of the Company's FAC tariff.

2. 4 CSR 240-20.080(4) specifically provides that if "the FAC rate adjustment is in accordance with the [FAC rules, the FAC statute, and the FAC tariff] . . . the Commission shall either . . ." approve an interim rate adjustment by order or if the Commission doesn't act, "the adjustment shall take effective automatically." There is no allegation by anyone that the FAC rate adjustment before the Commission in this case is not in full compliance with the Commission's FAC rules, the FAC statute, and the FAC tariff. Indeed, in the *Staff Recommendation to Approve Tariff Sheet* filed in this case by the Staff on August 24, 2011, the Staff recommends that the adjustment filing (which includes the $17,169,838 which has been ordered to be refunded by the Commission) be approved. The Staff's recommendation reflects the obvious fact that the Company's filing in fact is in compliance with the FAC rules, the FAC statute, and the FAC tariff.

3. In suggesting that the Commission "take evidence" in this case regarding FAC charges for which no prudence review has even started, the Staff overlooks the express terms of the Company's FAC tariff. As discussed in the Company's August 24, 2011 Response to MIEC's above-referenced Motion, the FAC tariff expressly dictates that the only sums to be included in factor "R" are true-up amounts (i.e., "Under/over recovery (if any) from currently active and prior Recovery Periods as determined for the FAC true-up adjustments"), and "modifications due to adjustments *ordered* by the Commission . . . as a result of required

prudence reviews . . .” (emphasis added). The FAC tariff expressly does *not* require a prior Commission order for a true-up adjustment to be included in factor R, but expressly *does* require a prior Commission order for a prudence disallowance to be included in factor R. And because the FAC adjustment filing itself *must* be approved by the Commission (or allowed to take effect) if the *filing – when it was made* – was in compliance with the FAC rules, the FAC statute, and the FAC tariff, any Commission order requiring a prudence disallowance be included in factor “R” must have pre-dated the FAC adjustment filing as a matter of law.

4. For these reasons, the Staff’s attempt to equate a possible future prudence disallowance relating to the long-term partial requirements sales issue for a period that will be the subject of a future prudence review to the NBFC issue determined in the Company’s first true-up filing docket is misplaced. Unlike prudence disallowances, which are only to be included in factor “R” based upon a Commission *order* from a prudence review, the Company did not need a Commission order to include what it contended was the proper true-up amount in its first true-up filing, nor did it need a Commission order to do so in future true-up filings because the FAC tariff (and the FAC rules), as the Staff itself contends in its recommendation in Case No. ER-2012-0029, allow true-up amounts to be included in the contemporaneous adjustment filing. The Company, however, chose not to inject the disputed issue in its first true-up filing and sought an order to resolve its dispute with the Staff about the proper NBFC rates. The Staff took no issue with the fact that the Company chose to seek a Commission order that would apply to periods affected by the NBFC mistake (except of course for the Staff’s substantive disagreement with the disputed legal issue in that case, which the Commission ultimately resolved in the Company’s favor).[2]

[2] That docket, although processed based upon a Stipulation of Facts and briefs, took approximately seven months to resolve.

5. MIEC's Revised Reply[3] similarly urges the Commission to disregard the binding provisions of the FAC tariff and the Commission's FAC rules and resorts to hyperbole in its continuing attempt to obtain refunds not ordered by the Commission when the adjustment at issue in this case was made.

6. MIEC claims that it is "incredible" to point out that the courts on review may disagree with the Commission's ruling in Case No. ER-2010-0255, which would presumably have a direct impact on the Commission's future ruling regarding the AEP and Wabash contracts in a future prudence review respecting Accumulation Periods three through five. Staff itself acknowledges that the Commission could be reversed. Staff Response, ¶ 4. MIEC may *hope* that it is unlikely that the court will reverse the Commission, but it certainly isn't "incredible" to think that this may occur, particularly given that the Commission's determination of what the exclusion in the FAC tariff means was a determination of a *question of law* which is subject to *de novo* review by the courts. *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). MIEC asserts that the Company has made assertions that are "demonstrably false" regarding collateral estoppel. MIEC Revised Reply, ¶ 4. To the contrary, what the Company said, which is demonstrably true, is that (to use the *Commission's own* words) the Commission is not *bound by* the doctrine of collateral estoppel. Has the Commission chosen to apply the doctrine? Yes, it has, but it is not required (as MIEC itself implies in its prior filings) to do so.

7. More importantly, this docket does not properly raise the issue of whether the Commission can, or should, rely on collateral estoppel to require additional refunds regarding the

[3] Indeed, MIEC has now made four separate filings (two in the FAC adjustment docket initiated on March 25, 2011 respecting Accumulation Period 6, and two more filings in this docket) that ask this Commission to disregard the law – the tariff and the rules.

AEP and Wabash revenues from Accumulation Periods three through five. Indeed, that question is for another day in another docket – the next prudence review docket. We state again: first, the FAC adjustment filing was in full compliance with the FAC rules and the FAC tariff when it was filed – Staff agrees; no one disputes this; and second, at the time that filing was made there was no order *other than* an order to refund the $17,169,838 arising from the first prudence review at issue in Case No. ER-2010-0255.

8. MIEC also argues that the Company's argument is "belied" by a filing the Company made in Case No. ER-2011-0317, which was the docket where the FAC adjustment for the sixth Accumulation Period was made. MIEC misstates or misreads the Company's prior statement, which is entirely consistent with the arguments the Company made then, with the arguments the Company makes now, and with the terms of the FAC rules and the FAC tariff itself. It was and is true that *had* the Commission's Report and Order in Case No. ER-2010-0255 been final and in effect prior to the filing of the FAC adjustment for the sixth Accumulation Period, then there would have been a Commission *order* regarding the $17,169,838 prior to the filing of that adjustment, and in that case the $17,169,838 would have therefore been included in that adjustment. Prior to the filing of the FAC adjustment for the seventh Accumulation Period (the adjustment at issue here), the Commission *had ordered* that adjustment, and it was (as required) included and will start flowing to customers when the seventh adjustment takes effect later this month. But the Commission had ordered nothing regarding the $24,866,885 (that will be the subject of a future prudence review) when the Company made its fully-in-compliance FAC adjustment filing for the seventh Accumulation Period.

9. We reiterate: the only issue in this adjustment filing docket is whether the FAC adjustment filed in this docket complies with the statute, the FAC rules, and the FAC tariff itself

– and there is no dispute about that issue. The statute, rules and tariff reflect a systematic process, prescribed as a matter of law, that has been followed. The Company is entitled to approval of the fully-in-compliance FAC adjustment filing or, if the Commission prefers not act – which is the Commission's prerogative – the adjustment will simply take effect.

Dated: September 6, 2011

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply and Surreply was served upon counsel of record for all parties on the Commission's service list for this case via e-mail on this 6th day of September, 2011.

/s/ James B. Lowery