

**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)	Case No. ER-2012-0028
Purchased Power Cost Recovery)	
Mechanism Pursuant to 4 CSR)	
240-20.090(4).)	

RESPONSE TO MIEC'S MOTION FOR RECONSIDERATION

COMES NOW Union Electric Company d/b/a Ameren Missouri (hereinafter "Ameren Missouri" or the "Company"), and for its response to the *MIEC Motion for FAC Credits From Off-System Sales Margins*, filed by the Missouri Industrial Energy Consumers ("MIEC") on August 16, 2011, states as follows:

1. MIEC argues that because the Commission issued an order in Case No. ER-2010-0255 requiring that the Company credit \$17,169,838 to customers as a result of the Commission's prudence review of accumulation periods one and two under the Company's fuel adjustment clause ("FAC"), the Company is also required as a matter of law to credit an additional \$24,866,885 attributable to accumulation periods for which no prudence review has yet occurred and for which no order has been issued. MIEC misapprehends both the operation of the Company's fuel adjustment clause ("FAC") tariff and the Commission's FAC rules, both of which have the force and effect of law, and both of which are binding not only on the Company, but on the Commission and MIEC as well.

2. Under the FAC tariff and the Commission's FAC rules, any adjustments to previously charged rates under the FAC that arise from a prudence review respecting a particular period are to be included in the first adjustment filing occurring *after* the prudence review order

is issued. That this is true is borne out not only by the Commission's FAC rules, but also by the express terms of the Company's FAC tariff.

3. 4 CSR 240-20.090(4) provides that an FAC adjustment filing will take effect without any action of the Commission 60 days after it is filed so long as it is in accordance with the FAC tariff and the FAC rules at the time it is filed.¹ Indeed, the rule is quite specific: if the filing is in compliance with the FAC rules, Section 386.266, RSMo. and the FAC tariff, the Commission "shall" either issue an interim rate order approving the adjustment that has been filed or, absent such an order, the adjustment shall simply take effect after sixty days. The FAC rules provide no authority for the Commission to *change* the Company's FAC adjustment filing because of events taking place subsequent to that filing. Indeed, the rules prohibit that result by making it mandatory that the adjustment take effect after 60 days so long as the adjustment was in accordance with the FAC rules, Section 386.266 and the FAC tariff itself at the time the adjustment filing was made. MIEC makes no allegation that the adjustment filing failed to comply with applicable law when it was made.

4. Moreover, the FAC tariff, which, again, has the force and effect of law, also requires that a sum be included in the "R" factor if there are prudence review-related adjustments that were "ordered [past tense] by the Commission." The "R" factor is part of the formula used to calculate the FAC adjustment. When the formula was applied to the accumulation period at issue, there had been no prudence review-related adjustment "ordered by the Commission" *other than* the \$17,169,838. The existence of *that* order necessarily dictated that the *ordered prudence review adjustment* value in the "R" factor in the formula was to be \$17,169,838. There is no

¹ The Commission's routine practice has become to approve the adjustment filing by delegation after the Staff confirms that the filing is in compliance with the FAC tariff and the FAC rules, but the Commission could simply allow the adjustment to take effect. 4 CSR 240-20.090(4) ("[I]f no such [interim rate adjustment] order is issued, the tariff schedules shall take effect sixty (60) days after the tariff schedules were filed.").

choice in the matter; the only prudence related adjustments that can and must be included in the R factor are those that have been ordered by the Commission—nothing more or less. It is undisputed that the “R” factor in the formula used to calculate the rate filed with the adjustment indeed is \$17,169,838.²

5. The Company has followed the Commission’s Report and Order in Case No. EO-2010-0255, and has followed the FAC statute, the FAC rules, and the FAC tariff. Interest has been applied to the \$17,169,838 and in accordance with the FAC tariff formula interest will also continue to accrue on that part of the sums disallowed as a result of the prudence review that have not been returned to customers until the last dollar is returned to them. Consequently, ratepayers will be made entirely whole and the Commission’s order in Case No. ER-2010-0255 will be entirely implemented when that October 2011 adjustment filing is made.

6. MIEC ignores the foregoing principles of law that bind it, the Company and the Commission, and in the interest of expediency asks the Commission to take an unlawful action – to disregard its own rules and the FAC tariff – presumably so MIEC’s members can more quickly get their share of *other* dollars that will be the subject of a *different* prudence review and about which no order has been made, and certainly no order having been made prior to the time the Company filed the FAC adjustment at issue. MIEC’s efforts presume two things that may or may not turn out to be true. First, MIEC presumes that the result of a subsequent prudence review on these issues will be the same as the result in Case No. EO-2010-0255. That case is on review before the Circuit Court of Cole County (Case No. 11AC-CC00336). The Court could reverse the Commission’s decision in Case No. EO-2010-0255, which may lead the Commission

² Interest has been properly applied, as required by the statute, the rules, the FAC tariff, and the Commission’s Order Approving Stipulation and Agreement to Clarify Report and Order in Case No. EO-2010-0255, issued May 26, 2011.

to reach a different result in a subsequent prudence review. There may be additional facts adduced during the Staff's audit, or additional evidence presented by a party to the subsequent prudence proceeding that also could lead to a different result. For those or other reasons, the Commission may or may not enter a similar order after a future prudence review.³ Moreover, while MIEC will be free to *argue* in a future prudence review proceeding that the Commission *should* apply principles of collateral estoppel, it is not true (as MIEC suggests) that the Commission *must* do so because the Commission is not bound by the doctrine of collateral estoppel. *See, e.g., In Re: The matter of Southwestern Bell Telephone Co.'s Proposed Radio Common Carrier Tariff*, 1990 Mo. PSC LEXIS 52 ("The Commission is not strictly bound by the principles of stare decisis, res judicata or collateral estoppel.").

7. The Commission has previously rejected MIEC's arguments. In two Motions for Reconsideration filed in the Company's prior FAC adjustment filing (Case No. ER-2011-0317), MIEC argued that collateral estoppel⁴ dictated that the Commission require inclusion of an amount not ordered prior to the FAC adjustment filing at issue having been made (the \$17,169,838 to be credited as the result of the Commission's Report and Order in Case No. EO-2010-0255) in the previously made adjustment filing. In other words, MIEC asked for the same relief it is asking for here; that is, a Commission order changing an adjustment filing that was in compliance with the FAC rules and FAC tariff when made. The Commission rejected MIEC's request, and concluded that "MIEC has not shown that the Commission's order [which approved the first FAC adjustment filing without requiring a credit of \$17,169,838] is in violation of the

³ If a similar order is issued, the Company will owe interest as required by the applicable statute, FAC rules, and its FAC tariff on all such sums, again until the last dollar is credited to customers.

⁴ *See MIEC's Motion for Expedited Treatment Regarding FAC Credits From Off-System Sales Margins During Accumulation Periods Three Through Five*, Case No. ER-2011-0317 (May 18, 2011), ¶ 13, and *MIEC's Motion for Expedited Treatment and Reconsideration of the Commission's Order*, Case No. ER-2011-0317 (May 23, 2011), ¶ 16.

relevant law: Section 386.266, RSMO (Cum. Supp. 2010), and Commission rule 4 CSR 240.20.090.” There still has been no order issued requiring a credit of anything *other than* the \$17,169,838, nor has a prudence review of any periods other than those that gave rise to the \$17,169,838 even begun. Stated another way, when the FAC adjustment was filed the only sum ordered to be credited was \$17,169,838; that is, the prudence review-related adjustments in factor “R” had to be \$17,169,838, and factor “R” indeed was \$17,169,838, with interest.

8. In summary, the only issue here is whether the adjustment filing reflecting the \$17,169,838, plus interest, complies with the statute, the FAC rules, and the FAC tariff itself.⁵ The statute, rules and FAC tariff reflect a systematic process, prescribed as a matter of law that the Company has followed. MIEC asks the Commission to ignore that prescribed systematic process, which the Commission cannot do.

WHEREFORE, for the reasons stated herein, Ameren Missouri respectfully requests the Commission deny MIEC’s Motion.

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⁵ On August 24, 2011, the Staff filed a *Staff Recommendation to Approve Tariff Sheet*, in which the Staff indicates its recommendation that the FAC adjustment filed by the Company be approved. Appendix A to the *Staff Recommendation* provides that the FAC adjustment complies with prior applicable Commission Reports and Orders, with the applicable Commission FAC rules, and with the terms of the Company’s FAC tariff. See Appendix A, page 6, under the heading “Staff Recommendation.”

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response was served upon counsel of record for all parties on the Commission's service list for this case via e-mail on this 26th day of August, 2011.

/s/ James B. Lowery