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**

MISSOURI INDUSTRIAL ENERGY CONSUMERS' INITIAL POST-HEARING BRIEF

The Missouri Industrial Energy Consumers ("MIEC") respectfully submits its Post-Hearing Brief in accordance with the Commission's Order Setting Procedural Schedule in this case.

INTRODUCTION

"It's like déjà vu all over again." Yogi Berra

All of the issues, all of the claims, all of the material facts, and all of the law presented in this case have already been thoroughly analyzed and decided by the Missouri Public Service Commission ("Commission") in Case No. EO-2010-0255. To be clear, this case is not analogous to Case No. EO-2010-0255. It is not similar to that case. It is precisely the same case. This case has already been fully and fairly adjudicated to a final judgment on the merits by the Commission. The only relevant difference between the former case and this case is that the two cases relate to different accumulation periods. Otherwise, the facts and the law are the same.

The central question in both cases is as follows: Did the contracts into which Ameren Missouri enter with American Electric Power Operating Companies ("AEP") and Wabash Valley Power Association, Inc. ("Wabash"), constitute "**long-term partial**

requirements sales" as that phrase was intended and understood by the Commission and the parties (including Ameren Missouri) to the Fuel Adjustment Clause ("FAC") at the time that phrase was drafted and approved in Tariff Sheet No. 98.3. The answer in this case is the same as the answer in the previous case: No.

The evidence from both cases demonstrates that Ameren Missouri imprudently, improperly and unlawfully excluded the revenues it collected under the AEP and Wabash power sale agreements[1] from its calculation of the FAC for the time period of October 1, 2009 through June 20, 2010, by attempting to characterize these contracts as long-term partial requirements sales, when, in fact, they are not. This Commission should once again find that the subject contracts are <u>not</u> "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, and thus not excluded from the FAC for the following reasons:

1. The phrase "requirements sales," which has a particular meaning in the regulatory context as defined by multiple sources, does not contemplate the types of agreements into which Ameren Missouri entered with AEP and Wabash. Additionally, a regulatory definition should be used to interpret the subject phrase rather than a supposed "market" definition, because the phrase was drafted and adopted in the regulatory context of a rate case, not in the context of the marketplace;
2. Neither the Commission, nor the parties (including Ameren Missouri) to Tariff Sheet 98.3 *intended* at the time of the drafting and subsequent approval that the

[1] Ameren Missouri entered into off-system power sales agreements with AEP on 2/27/09 and Wabash Valley on 4/28/09.

phrase at issue would include the types of agreements exemplified by the AEP and Wabash sales; and

3. The phrase "requirements sales" is ambiguous because it may have at least two meanings—one meaning in the regulatory context and another possible meaning in the marketplace—and therefore must be construed against the drafter (Ameren Missouri) as a matter of law.

Additionally, the Commission should find, as it did in Case No. EO-2010-0255, that Ameren Missouri's misbranding of the AEP and Wabash contracts harmed Missouri ratepayers, because Ameren Missouri's conduct deprived Missouri ratepayers of the benefit of their bargain with Ameren Missouri when they entered into the Stipulation and Agreement that included the FAC. Specifically, Ameren Missouri's misbranding of the AEP and Wabash contracts deprived Missouri ratepayers of a $26,342,791 decrease in rates to which they are entitled under the FAC.

And finally, Missouri ratepayers should be refunded the entire amount of $26,342,791, as that amount reflects Ameren Missouri's over-collection during the accumulation periods at issue in this case, and should not be reduced by any amounts contemplated in the black-box agreement between the parties in the Second Nonunanimous Stipulation and Agreement approved in Case No. ER-2010-0036.

Consequently, this Commission should order the revenues and associated fuel expense generated by the AEP and Wabash agreements to be included in the calculation of the FAC such that the margins from these sales will be used to reduce the fuel cost of Ameren Missouri's rate payers as was contemplated by the FAC Tariff.

HISTORY

A brief history of the facts that led to this action may prove instructive. The Company first sought an FAC in 2007, but its request was denied. In 2008 it again approached the Commission with an FAC request. At that time, the interested parties entered into a stipulation and agreement as to all FAC tariff rate design issues—no party objected to it—and this Commission approved it on January 8, 2009. The relevant language of the tariff to which the parties agreed states:

Tariff Sheet 98.3

> **Off-System Sales shall include all sales transactions . . . excluding Missouri retail sales and long-term full and partial requirements sales . . . .**[2]

Less than a month after drafting and adopting the above language, Ameren Missouri returned to the Commission asking the Commission "to revise the approved fuel adjustment clause to allow Ameren Missouri to retain a portion of its off-system sales revenue that would otherwise be passed through the fuel adjustment clause."[3] The proposed revisions to the FAC "would allow Ameren Missouri to recoup the revenue it

[2] Tariff Sheet 98.03.
[3] Order Denying Ameren's Application for Rehearing, Case No. ER-2008-0318.

expect[ed] to lose because of decreased sales of electricity to Noranda's aluminum smelting plant due to damage to the plant resulting from the recent severe ice storm."[4]

On February 19, 2009, this Commission denied Ameren Missouri's application for rehearing, finding that "'in its judgment' . . . Ameren Missouri has not shown sufficient reason to rehear the Report and Order."[5] Within six weeks of the Commission's denial of Ameren Missouri's application for rehearing, Ameren Missouri entered into an off-system power sale agreement with AEP, and two months after that, it entered into a similar agreement with Wabash. In a not-so-subtle attempt to thwart the Commission's Order denying Ameren Missouri's application for rehearing, Ameren Missouri simply mischaracterized these two contracts as "long term partial requirements sales" and maintained that these contracts fit within the exclusionary language of Tariff Sheet 98.3.

On August 31, 2010, the Commission's Staff filed a Prudence Report and Recommendation regarding its first prudence review of Ameren Missouri's costs related to its FAC. In its Report, Staff concluded that Ameren Missouri acted imprudently in not including certain costs and revenues in calculating the FAC rate it billed to its customers. The costs and revenues Staff contended were improperly excluded from the FAC are associated with Ameren Missouri's sales of energy to AEP and Wabash. Staff advised the Commission to order Ameren Missouri to refund approximately $17,169,838 to its

[4] *Id.*
[5] *Id.*

customers by an adjustment to its FAC charge for accumulation periods 1-2 (March 1, 2009 through September 30, 2009).[6]

The MIEC intervened in the case in support of Staff's recommendation, and an evidentiary hearing was held on January 10 and 11, 2011. On April 27, 2011, the Commission issued its Report and Order, finding that Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from the AEP and Wabash contracts from off-system sales revenue when calculating the rates charged under its FAC.[7] Accordingly, the Commission ordered Ameren Missouri to refund $17,169,838 to its ratepayers by an adjustment to its FAC charge to correct an over collection of revenues for accumulation periods 1-2.[8]

On October 28, 2011, Staff filed another Prudence Report and Recommendation related to Ameren Missouri's FAC.[9] In its Report, Staff found that Ameren Missouri acted imprudently in not including from the FAC those costs and revenues associated with the AEP and Wabash contracts for accumulation periods 3-5 (October 1, 2009 through June 20, 2010).[10] Staff advised the Commission to order Ameren Missouri to refund approximately $26,342,791 to its customers for these periods. The MIEC intervened in the case in support of Staff's recommendation, and an evidentiary hearing was held on June 21, 2012.

At the hearing, Ameren Missouri failed to provide any evidence that any of the operative facts or law in the instant case were different from the operative facts and law

[6] Report and Order, Case No. EO-2010-0255.
[7] *Id.*
[8] *Id.*
[9] Staff's Second Prudence Report and Recommendation in EO-2012-0744.
[10] *Id.*

in the prior case. Accordingly, this Commission should rule the same way in this case as it did in the prior one.

ARGUMENT

1. The Wabash and AEP contracts are <u>not</u> "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because that phrase—which has a particular meaning in the regulatory context as defined by multiple sources—does not contemplate the types of agreements Ameren Missouri entered into with AEP and Wabash.

At least three official regulatory sources—the FERC Form 1, the Edison Electric Institute ("EEI") Glossary and the Rural Utilities Service ("RUS") Glossary—provide a unanimous definition of "requirements service" that does not contemplate the types of contracts Ameren Missouri entered into with AEP and Wabash.[11] All three of these regulatory sources define "requirements service" as follows:

> **<u>Requirements Service:</u> Service that the supplier plans to provide on an ongoing basis (i.e., the supplier includes projected load for this service in its system resource planning).**[12]

Ameren Missouri attempts to characterize the Wabash and AEP contracts as "partial requirements sales," using three alternative theories: 1) the Wabash and AEP contracts actually fit within the regulatory definition above; 2) the above regulatory definition should be disregarded as antiquated and irrelevant, and a "market" definition of requirements sales should instead be used to interpret Tariff Sheet 98.3; or 3) the

[11] Brubaker Direct, MIEC Ex. 10, Page 5, Line 1 through Page 6, Line 23; Transcript of EO-2010-0255, Page 263, Lines 2-25. (Hereinafter Transcript I). In this case, the Commission took judicial notice of the transcript of EO-2010-0255. See Transcript, Page 11, Line 11 through Page 12, Line 8.
[12] *Id.*

definition of "requirements service" should not be used to define a "requirements sale." All of these theories fail because the contracts do not qualify as requirements sales under the "regulatory" definition above, and a "market" definition of that phrase is inapplicable to the interpretation of the Tariff. Moreover, Ameren Missouri's argument that the definition of a "Requirements Sale" does not require an understanding of the phrase "Requirements Service" is analogous to arguing that the definition of a car maintenance agreement does not require an understanding of the word "maintenance." It is axiomatic that "Requirements Service" is precisely that which is provided in a "Requirements Sale," just as a lease is that which is provided in a lease agreement. Accordingly, all of Ameren Missouri's alternative theories fail, and Ameren Missouri should not be allowed to rely on them to avoid upholding its end of the bargain it struck with Missouri ratepayers in Case No. ER-2008-0316.

Ameren Missouri Theory # 1:

Ameren Missouri's attempt to characterize the AEP and Wabash contracts as "requirements sales" as that phrase is understood in the regulatory context quickly unravels into linguistic absurdity. In Case No. EO-2010-0255, Ameren Missouri witness Jaime Haro testified that he "agree[d] with the EEI glossary definition of requirements service[13]," which requires suppliers to plan to provide service to the buyer on "an ongoing basis."[14] However, to maintain that the AEP and Wabash contracts fit within the regulatory definition, Mr. Haro was forced to define the phrase "ongoing basis" in such a way as to render it completely meaningless. According to Mr. Haro, "ongoing basis"

[13] The definitions of "requirements service" found in FERC Form 1, the EEI glossary and RUS are indistinguishable.
[14] Transcript I, Page 93, Line 21 through Page 94, Line 21.

could simply mean "the term of the contract."[15] Indeed, when pressed, Mr. Haro conceded that under his definition, "ongoing basis", could mean as little as a month or even a day.

> Q. And when you were asked to define "ongoing basis," you said that to you, that term could mean just for the extent or length or the duration of the contract; isn't that right?
>
> A. Yeah, that's right.
>
> . . .
>
> Q. Okay. If the contract is 30 days, would you still apply that definition "ongoing basis" to 30 days?
>
> A. Yeah. . . .
>
> . . .
>
> Q. So a day-long contract constitutes or could be construed as service on an ongoing basis . . . ?
>
> . . .
>
> A. Well, you – the way I understood is you're asking the word "ongoing," what does it mean. . . .

[15] Transcript I, Page 68, Lines 1-11.

Q. And I'm saying so if you have a one-day contract, ongoing basis under your understanding would mean for the duration of that day?

A. Yeah.[16]

Only after Mr. Haro was confronted with the logical conclusion that his definition of "ongoing basis" could mean "one hour," that he acquiesced, stating, "that may be a stretch."[17]

It is frankly inconceivable that the term "ongoing basis" means nothing more than "the term of the contract" because such a definition would include *every* contract for any duration between every supplier and every buyer. Presumably every supplier plans to provide service to its buyers for the life of the contracts (even stop-gap temporary contracts) into which they enter with their buyers. Failure to do so would constitute breach and possibly fraud. So, it simply makes no sense to interpret the phrase "ongoing basis" as meaning "for the term of the contract" as does Mr. Haro.

It is clear from Ameren Missouri's testimony and the facts surrounding the AEP and Wabash contracts that Ameren Missouri never intended to supply service to these counter-parties on an ongoing basis. Rather, Ameren Missouri entered into the AEP and Wabash contracts as merely a stop-gap solution to the anticipated loss of the Noranda load and did not renew these contracts after Noranda was back at full operation.[18] As such, the AEP and Wabash contracts are not "requirements sales" as that phrase is understood in the regulatory context, because the evidence demonstrates that

[16] Transcript I, Page 86, Line 15 through Page 89, Line 10.
[17] Transcript I, Page 88, Lines 1-4.
[18] Transcript I, Page 67, Lines 11-25; *see also* Transcript I, Page 119, Line 16 through Page 120, Line 1.

Ameren Missouri did not plan to provide service to AEP and Wabash on an ongoing basis. Indeed the temporary service provided to AEP and Wabash stands in stark contrast to the more than twenty years of service Ameren Missouri has provided to its municipal customers.[19]

Ameren Missouri Theory # 2:

Ameren Missouri's second theory appears to be that this Commission should ignore the regulatory definition of "requirements service" provided in the FERC Form 1, the EEI Glossary and the RUS Glossary as antiquated and irrelevant,[20] and adopt the amorphous and self-serving "market" definition of "requirements service" for which there is no authority. This theory fails because the so-called "market" definition lacks any authority or tangible source. Moreover, the document to be interpreted, Tariff Sheet 98.3, is expressly a regulatory document, drafted and adopted within the regulatory context of a rate case.

Company Witness Mr. Haro was unable to point to any authority for his "market" definition of requirements service, except the EEI glossary, which clearly contradicts Ameren Missouri's position as demonstrated above.[21] And Company Witness Ms. Barnes simply relies on Mr. Haro's definition of requirements service to inform her view, and admits that the meaning of the term "partial requirements sales" is "outside [her] area of expertise."[22] As such, Ameren Missouri failed to provide a single source or authority

[19] Transcript, Page 90, Line 23 through Page 91, Line 18.
[20] Haro Surrebuttal, Ameren Missouri Ex. 4, Page 5, Lines 9 through Page 17.
[21] Transcript I, Page 50, Lines 7-22.
[22] Transcript I, Page 175, Lines 3-13; Transcript I, Page 195, Lines 22-25.

other than Mr. Haro's own testimony as to the "market" definition of partial requirements sales.

On the other hand, MIEC Witnesses pointed to long-established regulatory documents (namely FERC Form 1, the EEI Glossary and the RUS Glossary) to support the regulatory definition of the phrase as it is used in Tariff Sheet 98.3. For instance, MIEC witness, Maurice Brubaker, cites FERC and the Edison Electric Institute in support of his position that requirements contracts are for service that a supplier plans to provide on an ongoing basis. Moreover, Mr. Brubaker provided extensive testimony as to what the term requirements sale means in the regulatory context: "The commonly understood regulatory concept of 'requirements service' is, and for many years has typically been, the provision of power to municipal customers, and sometimes rural electric cooperatives, on a basis whereby the selling utility incorporates the requirements of these customers (who typically have little or no generation of their own) into its resource planning."[23/]

In contrast to the types of service provided by Ameren Missouri in its actual requirements sales to Missouri municipalities, the "bilateral contracts between Ameren Missouri and AEP and Ameren Missouri and Wabash both provide only electric capacity and energy service. Ameren Missouri is not providing any of the RTO or OATT services that are needed to complete a transaction."[24/] Notably, the "services provided to the municipalities include the capacity and energy service as well as all, or many, of the RTO and OATT charges. . . . These service characteristics are typical of requirements service

[23/] Brubaker Direct, Ex. 10, Page 5, Lines 4-8.
[24/] Brubaker Direct, Ex. 10, Page 7, Lines 5-8.

provided by utilities."[25/] In sum, based on the regulatory definitions and traditional regulatory practice, the AEP and Wabash contracts simply do not possess the characteristics of "requirements sales," because they do not provide "requirements service" as that phrase is defined and understood in the regulatory context.

Furthermore, the regulatory definition described above, rather than a "market" definition should govern the interpretation of Tariff Sheet 98.3, because the tariff was adopted within the *regulatory* context of a rate case between regulatory participants, not by traders in the marketplace.[26] The Company failed to provide any rationale to explain why their "market" definition should govern a phrase that was drafted and adopted in the regulatory context. In contrast, MIEC Witnesses offered compelling testimony to support the common-sense position that a *regulatory* definition should be used to interpret a phrase that was drafted and adopted in the regulatory context. For instance, Mr. Brubaker testified as follows:

> A. [W]hat we're doing here, what the Commission does, is to regulate Ameren Missouri, and in so doing, it has to understand what the context is and what requirements contracts . . . have traditionally been and how they have been treated in jurisdictional allocations in rate cases. And that's a whole different matter than what may be taking place among power traders in the wholesale market. There's certain allocation paradigms that are followed and certain conventions and treatments of contracts and undertakings of obligations that affect retail rates. And because we have both base rates and fuel adjustment clauses adjusting what customers pay, it's important to . . . keep a clean distinction and to understand the implications of the contracting process. . . . I think what's more relevant is how [the AEP and Wabash contracts] are traditionally treated in retail rate cases because that's what we're doing here is setting retail rates. And the definition of "requirements contracts" that contemplates including [them] in the resource plan and planning to provide service on an ongoing basis . .

[25/] Brubaker Direct, Ex. 10, Page 7, Lines 15-21.
[26] Transcript I, Page 355, Lines 13-19.

. is the more compelling argument and reason for deciding how to treat them.[27]

Accordingly, the Commission should adopt the long-standing regulatory definition of the phrase "requirements sale," and disregard the self-serving and unsupported "market definition offered by Ameren Missouri.

Ameren Missouri Theory # 3:

Ameren Missouri appears to have introduced a new and even more attenuated argument into this case, namely that the phrase "requirements service" should not be used to provide an understanding of the phrase "requirements sale." This argument is baseless. First, it is axiomatic and obvious that a "requirements sale" is the sale of "requirements service." And second, MIEC witness Mr. Brubaker provided testimony that "Requirements contracts (or requirements sales) are those wherein 'requirements service' is provided."[28/] Ameren Missouri's new and novel argument that the definition of "requirements service" should not be used to describe the service provided in a "requirements sale" provides just another example of the linguistic contortions required by Ameren Missouri's position in this case.

In sum, the phrase "requirements sales" in Tariff sheet 98.3 holds a particular meaning (as defined by FERC Form 1, the EEI Glossary and the RUS Glossary) in the regulatory context that is unique from its meaning in the marketplace. The evidence demonstrates that the AEP and Wabash contracts do not qualify as requirements sales as that phrase is understood in the regulatory context. Further, the evidence supports the

[27] Transcript I, Page 510, Line 13 through Page 511, Line 14.
[28/] Brubaker Direct, Ex. 10, Page 5, Line 3.

position that this Commission should apply a "regulatory" rather than a "market" definition to that phrase in the tariff, because the phrase was drafted and adopted within the regulatory context of a rate case, not as between energy traders in the marketplace.

2. The Wabash and AEP contracts are not long-term "partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because neither the Commission, nor the parties (including Ameren Missouri) to the Tariff, intended that phrase to apply to the types of contracts exemplified by the AEP and Wabash sales.

Under Missouri Law, when interpreting a tariff, the court will look at the intent of the utility and the intent of the Commission to ascertain the meaning of the phrases in the tariff. *State ex rel. Laclede Gas Co. v. PSC of Mo.*, 156 S.W.3d 513, 521 (Mo. Ct. App. 2005). In this case, all of the evidence demonstrates that neither the utility nor the Commission intended the phrase "long term partial requirements sales" to include the kind of stop-gap bilateral opportunity contracts represented by the AEP and Wabash agreements at the time the Tariff was drafted and confirmed.

On page 21 of the Commission's Report and Order in Case No. EO-2010-0255, the Commission held as follows:

> If Ameren Missouri's definition were accepted, nearly any sales contract of over one-year duration would qualify as a long-term full or partial requirements contract that could be excluded from the fuel adjustment clause. Ameren Missouri would be able to choose unilaterally to define an off-system sale out of the fuel adjustment clause and thereby increase its profits at the expense of its ratepayers. Such a broad definition would render the tariff's definition of off-system sales nearly meaningless and would make the fuel adjustment clause extremely one-sided in a way that was not intended by the Commission or by the parties to the stipulation and agreement that presented that tariff language to the Commission for approval. (emphasis added).

Moreover, the only testimony related to Ameren Missouri's intent as to the meaning of requirements sales in Tariff Sheet 98.3 at the time of the stipulation and agreement was provided by Staff Witness Lena Mantle. In the first prudence review, Ms. Mantle testified under oath as follows:

> Q. Can you tell this Commission how you interpreted the phrase long-term partial requirement service found in tariff sheet 98.3 at the time the parties entered into the FAC agreement?
>
> A. When I first read Marty lines' (sic) testimony and looked at the exemplar tariff . . . that definition was one that I was concerned about because I wasn't for sure what it meant. And for that reason, I had asked AmerenUE during the settlement technical conference exactly what that meant. At that time that I was given the answer, well, that's our wholesale municipal customers. No one else in the room seemed to disagree with them. It seemed like everybody else thought it was obvious, so that is the definition that I gave to OSSR when the stip and agreement was entered into.[29]

In the second prudence review, despite protracted and aggressive cross-examination by Ameren Missouri's counsel, Ms. Mantle maintained her unequivocal position that she was told by an Ameren Missouri representative at a technical conference

[29] Transcript I, Page 352, Lines 9-24.

"that the phrase long-term full and partial requirements sales was a description of the wholesale contracts Ameren Missouri had with municipal customers."[30]

Not only is Ms. Mantle's testimony clear and unequivocal on this point, but also Ameren Missouri failed to produce a shred of evidence to rebut it. While Mr. Weiss denied recalling the above exchange (though he did not attend all of the conferences), his testimony provides no evidence of any alternative meaning Ameren Missouri may have had in mind when it drafted that phrase. Mr. Weiss testified that he was "in attendance at almost all of the meetings between Ameren Missouri and Staff concerning the FAC tariff,"[31] and yet remains conspicuously silent on the issue of what Ameren Missouri could have actually meant by the phrase "partial requirements sales" at the time it drafted the phrase. Mr. Weiss' silence on the issue, and Ameren Missouri's failure to produce any other witnesses that were present at the stipulation meetings (Marty Lyons, for example) to testify as to what Ameren Missouri meant when it drafted the phrase at issue leaves this Commission with little choice but to accept Ms. Mantle's testimony that Ameren Missouri's stated intention with respect to the subject phrase referred to its wholesale municipal customers.

Interestingly, Ameren Missouri's two principal witnesses on the issue of the meaning of the phrase, Mr. Haro and Ms. Barnes, were not present during the meetings at issue, and as such, can offer no evidence as to what Ameren Missouri meant by the term "partial requirements sales" in the Tariff. Indeed, unless Ms. Mantle's above account is deemed completely fictitious by this Commission, it provides the sole evidence as to

[30] Transcript, Page 122, Line 14 through Page 126, Line 13.
[31] Weiss Direct, Ex. 5, Page 6, Lines 6-19.

Ameren Missouri's intended meaning of the phrase "long-term partial requirements sales" at the time of the stipulation and agreement.

The 2010 revision of the tariff language further supports Ms. Mantle's testimony that the phrase was intended to mean only Ameren Missouri's municipal customers. When the Tariff was revised in the 2010 rate case, the phrase "to Municipal customers" was merely inserted after the phrase "long-term full and partial requirements sales," so that the entire passage reads "Off-system sales shall include all sales transactions . . . excluding Missouri retail sales and long-term full and partial requirements sales *to Missouri municipalities*."[32] During cross-examination, Mr. Haro was afforded the opportunity to explain the revision to the tariff. His response (before a break was taken) wholly supports Ms. Mantle's position that the 2010 revision to the tariff was merely a "clarification" of the meaning of the prior tariff. His testimony is notable for the stark difference between his admission before the break and the opposite position he took after a break afforded him the opportunity to confer with Company counsel. His testimony *before* the break:

> A. We changed [the clause] in the next rate case.
>
> Q. And what word did you add. . . ?
>
> A. "Municipalities." <u>We clarified it because if that was the intention, then it was very simple to just limit it to municipalities</u>. . . .[33]

[32] Transcript I, Page 357, Lines 1-16 (emphasis added).
[33] Transcript I, Page 63, Lines 4-9.

Moments later, after, the break, Company counsel led Mr. Haro's testimony to the exact opposite position than the one he had taken before the break, namely that the change was *not* a clarification of the drafter's intent:

> 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.[34]

In light of the surrounding circumstances, Mr. Haro's subsequent attempt to characterize the 2010 revision as a substantive "change" to the Tariff rather than a mere "clarification" (per Ms. Mantle's testimony and Mr. Haro's prior testimony)[35] seems simply incredible.

Therefore, this Commission should adopt Ms. Mantle's testimony as to the intention of Ameren Missouri with respect to the phrase "partial requirements sales" because Ameren Missouri has failed to offer any alternative explanation of its intention at the time it drafted the phrase, and subsequent revisions to the tariff support Ms. Mantle's recollection of Ameren Missouri's intent at the time the tariff was adopted.

[34] Transcript I, Page 142, Lines 8-14.
[35] Transcript I, Page 357, Line 12 through Page 358, Line 5; *see also Id.*

3. The Wabash and AEP contracts are not "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because the phrase is ambiguous in that it has at least two meanings—one meaning in the regulatory context and another meaning in the market—and thus, must be construed against the drafter (Ameren Missouri) as a matter of law.

It is undisputed that Ameren Missouri drafted the tariff that is the subject of this proceeding. Both company witnesses affirmed unequivocally that Ameren Missouri was responsible for drafting the tariff's phrase "long term full and partial requirements sales." Company witness Ms. Barnes, for example admitted, "we wrote the tariff."[36] Mr. Haro similarly admitted that Ameren Missouri was responsible for drafting the tariff.[37]

It is also undisputed that the phrase is ambiguous in that it may have at least two meanings—one meaning in the regulatory context and possibly another in the marketplace. Indeed, Ameren Missouri's own witness in Case No. EO-2010-0255 testified that that the term "requirements" within the phrase "partial requirements contracts" was vague and ambiguous:

> "part of the purpose of my testimony was to illustrate the vagueness of the word 'requirements' . . . [W]ith respect to partial requirements, there are ambiguities as to what those requirements are . . . . [T]he word 'requirements' is not specific enough in industry to tell you precisely what it means."[38]

Also, MIEC witnesses Mr. Brubaker testified extensively regarding the two definitions ("regulatory" and "market") of the phrase, advocating the adoption of the regulatory definition. The FERC Form 1, the EEI Glossary and the RUS Glossary provide the regulatory definition, while Mr. Haro's surrebuttal testimony appears to

[36] Transcript I, Page 188, Line 17.
[37] Transcript I, Page 62, Line 15 through Page 63, Line 3.
[38] Transcript, Page 276, Lines 7-22.

represent the "market" definition that is advocated by Ameren Missouri.[39] That the phrase at issue has at least two seemingly reasonable definitions renders it inherently ambiguous. Further, both staff witnesses Lena Mantle and Dana Eaves testified that the term was ambiguous or unclear to them.[40] And while Mr. Haro testified that the phrase was "not ambiguous" he based his position on the fact that he and the AEP/Wabash counter-parties (all energy traders) understood the meaning of the phrase as it is used in the marketplace.[41] Mr. Haro's testimony merely supports the fact that while traders in the marketplace may share a definition of the phrase at issue, it is not a definition shared in the regulatory context. Thus, it is indisputable that the phrase at issue has two distinct definitions, and as such, is ambiguous.

Under Missouri law, it has long been held that any ambiguity in the language of a tariff is to be strictly construed against the drafter. See, for example, *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. Minn. 1971) ("[T]he tariff should be strictly construed against the carrier since the carrier drafted the tariff; and consequently, any ambiguity or doubt should be decided in favor of the shipper."); *Union Wire Rope Corp. v. Atchison, T. & S. F. R. Co.*, 66 F.2d 965, 967 (8th Cir. Mo. 1933) ("Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. . . .[T]his [is] an application of the general rule as to construction of written contracts and instruments. . . ."). *Kansas City S. R. Co. v. Kansas City Power & Light Co.*, 430 F. Supp. 722 (W.D. Mo. 1976) ("Where an ambiguous tariff is drafted by the carrier, and construction of the tariff is in doubt, such construction must be in favor of the shipper and against the carrier.").

[39] Haro Surrebuttal, Ex. 2, Page 13, Lines 11-13.
[40] Transcript, Page 326, Lines 1-8; Transcript, Page 414, Lines 5-14.
[41] Transcript, Page 83, Lines 10-22.

It is clear from the testimony in this case that reasonable people can disagree about the meaning of the phrase "partial requirements sales" as that phrase is used in Tariff Sheet 98.3. It is also clear from the testimony that Ameren Missouri drafted the ambiguous language of Tariff Sheet 98.3. Therefore, this Commission should apply the long-standing rule of Missouri law that requires any ambiguity or doubt in a tariff to be construed against the drafter, and should adopt the regulatory definition of the phrase "partial requirements sales" that is advocated by Staff and MIEC.

4. The Company's actions harmed the utility's ratepayers because the Company's violation of the FAC deprived Missouri ratepayers of the benefit of the bargain into which they entered with Ameren Missouri in the Stipulation and Agreement that was approved by the Commission in ER-2008-0318.

Ameren Missouri attempts to argue that its violation of the FAC was not imprudent because it did not harm the utility's ratepayers. This argument is patently false, and begs the question it purports to answer. The bargain implicit in the approved FAC is that ratepayers will pay more in rates when Ameren Missouri's fuel costs rise or offsetting revenue from off-system sales drop. On the other hand, ratepayers will benefit from decreased rates if fuel costs drop or offsetting revenue from off-system sales increase. In this case, offsetting revenue from off-system sales, as those revenues were defined in the tariff, increased as a result of Ameren Missouri entering into the AEP and Wabash agreements. Accordingly, Missouri ratepayers should have benefited in the amount of $26,342,791. However, Ameren Missouri's mischaracterization of the Wabash and AEP contracts as long-term partial requirements contracts and Ameren Missouri's failure to flow the revenues from those contracts through the FAC deprived ratepayers of the benefit of their bargain with Ameren Missouri. Ameren Missouri

cannot be allowed to enjoy the benefits of the FAC if it refuses to accept the potential risks associated with it. As such, the Company's argument that it's violation of the Tariff caused no harm to its ratepayers is demonstrably false.

5. The amount at issue in this case, $26,342.791, should not be decreased by the amount referenced in the testimony of Ameren Missouri' Witness Gary Weiss.

Ameren Missouri's witness Gary Weiss testified that margins collected from the AEP and Wabash contracts during the relevant period should be reduced by $3.3 million to reflect amounts he claims have already been reimbursed to Missouri ratepayers as a result of the Second Nonunanimous Stipulation and Agreement approved by the Commission in Case No. ER-2010-0036. Mr. Weiss' testimony is factually incorrect. Nothing in the Stipulation and Agreement suggests that the $3.3 million should be used to reduce the actual margins collected from the AEP and Wabash contracts. On the contrary, the language of the Stipulation and Agreement implicitly contemplates that the $3.3 million is in "addition" to the amounts collected under the AEP and Wabash contracts.[42]

Ameren Missouri seems to ground its position on the fact that the $3.3 million in the FPA factor appears under the heading "AEP and Wabash Contracts" rather than under a heading that reads "Black Box." This is a straw argument. No one disputes that the $3.3 million reflects an amount agreed to by the parties to settle their disagreement with respect to the handling of the AEP and Wabash contracts in Case No. ER-2010-0036. So, it makes sense that this provision would appear under the heading of AEP and Wabash Contracts. However, there is *no* evidence that the amount was to be used as a reduction

[42] Stipulation and Agreement, Case No. ER-2010-0036.

to the actual margins collected from the AEP and Wabash contracts. Mr. Weiss' adjustment does not reflect the agreement by the parties, nor does it reflect the conversations among the parties to the settlement in ER-2010-0036. Mr. Weiss' adjustment is strictly fiction.

There are six paragraphs of stipulations under the AEP and Wabash Contracts heading in the Stipulation and Agreement, which in their totality make up the parties' agreement with respect to the handling of the AEP and Wabash Contracts in Case No. ER-2010-0036. None of the language in those six paragraphs imply in any way that the $300,000.00 monthly reduction in the numerator of the FPA factor replaces the percentage of the margins from the AEP and Wabash contracts to which Missouri ratepayers are entitled. In fact, the paragraph at issue states, "The fuel adjustment clause tariff sheets shall also be revised to include an additional reduction in the . . . amount of $300,000 per month . . . ."[43] This language clearly implies that the reduction contemplated in the Stipulation and Agreement is in addition to the reductions already contemplated in the tariff sheets, namely the mandatory reductions from the margins associated with AEP and Wabash.

Furthermore, those individuals intimately involved with the Stipulation and Agreement in ER-2010-0036 unanimously agree that Mr. Weiss has misrepresented the nature of the FPA factor in Paragraph 5 of the Stipulation and Agreement. For instance, MIEC witness Mr. Greg Meyer, who participated extensively in the negotiations testified that "Mr. Weiss has fundamentally misrepresented the Stipulation"[44] by alleging that the proper levels of sales margins from the AEP and Wabash contracts should be reduced by

[43] *Id.* (emphasis added).
[44] Meyer Direct, Ex. No. 11, Page 3, Lines 4-6.

the FPA factor. According to Mr. Meyer, "Ameren has mischaracterized the conditions of the Stipulation. Mr. Weiss has a complete misunderstanding of the events which lead to the establishment of Paragraph 5 of the Stipulation."[45] Similarly, Staff Witness Lena Mantle testified as follows:

> The parties, including Ameren Missouri, agreed that Ameren Missouri would reduce fuel cost by $300,000 a month for twelve months in order to settle the disagreement between the parties regarding how to handle the AEP and Wabash contracts in Case No. ER-2010-0036. If the parties to the stipulation had intended for it to offset the AEP and Wabash margins that had not been passed through the FAC, then the parties would have stated so in their written agreement filed with the Commission. Instead they included language that specifically allowed them to take any position in a subsequent case regarding the AEP and Wabash contracts.[46]

And finally, the Stipulation itself states that "[i]n presenting this Stipulation, none of the signatories shall be deemed to have approved, accepted, agreed, consented or acquiesced to any ratemaking principle or procedural principle, including, without limitation, any method of cost or revenue determination or cost allocation or revenue related methodology, and none of the signatories shall be prejudiced or bound in any manner by the terms of this Stipulation . . . in this or any other proceeding, other than a proceeding limited to enforce the terms of this Stipulation."[47] Accordingly, Ameren Missouri's attempt to use the language in the Stipulation and Agreement to prejudice the non-Ameren parties in this case is inappropriate and prohibited by the express language of the Stipulation itself. Therefore, the Commission should not reduce that amount at issue in this case by the amount referenced in Paragraph 5 of the Stipulation and Agreement in Case No. ER-2010-0036.

[45] Meyer Direct, Ex. No. 11, Page 4, Lines 1-5.
[46] Mantle Direct, Ex. No. 9, Page 12, Lines 3-10.
[47] Stipulation and Agreement, Case No. ER-2010-0036.

6. A prudence review is the appropriate mechanism for considering Ameren Missouri's application of the FAC Tariff.

During the hearing in this case, Commissioner Jarrett asked counsel to address whether a prudence review is the appropriate mechanism for reviewing Ameren Missouri's treatment of the FAC Tariff. The answer is yes. According to the Purpose statement in 4 CSR 240-20.090, the rule sets forth definitions, structure, operation, and procedures relevant to the filing and processing of applications to reflect prudently incurred fuel and purchased power costs through a . . . fuel adjustment clause. . . ." Section 2(C) of the same rule states that the "FAC may or may not include off-system sales revenues and associated costs." Read together, it is clear from this Rule, and clear from Staff's comments at the hearing that for Staff to perform a meaningful audit of the costs associated with the FAC, it must review Ameren Missouri's treatment of the FAC's Tariff, including whether or not Ameren Missouri appropriately designates contracts subject to the FAC. Additionally, the timeline established for prudence reviews (180 days) provides an adequate period to address allegations of imprudent treatment of contracts subject to the FAC, whereas if the parties were required to file a complaint outside of a prudence review, resolution of the issue would be unnecessarily delayed. Further, prudence reviews directly result from the Commission's establishment of the FAC. It would make little sense to require the Staff to review Ameren Missouri's conduct under the FAC, but not allow imprudent conduct (such as mischaracterizing off-system sales that are subject to the FAC) to be addressed in a prudence audit. Accordingly, a prudence review is precisely the correct mechanism to address Ameren Missouri's mis-branding of the FAC and Wabash contracts in an effort to exclude them from the FAC.

Conclusion

The words of Tariff Sheet 98.3 have a particular meaning in the regulatory context, and cannot mean something different just because Ameren Missouri wants them to mean something else. The MIEC is asking this Commission to interpret the language of Tariff Sheet 98.3 according to its regulatory meaning, according to the meaning that was intended by Ameren Missouri and the Commission at its adoption, and according to the meaning that is required by Missouri law. This Commission should find that the AEP and Wabash contracts at issue are not "long term partial requirements sales" as that phrase is used in Tariff Sheet 98.3. This Commission should further find that Ameren Missouri acted imprudently, improperly and unlawfully by excluding the revenues it collected under two off-system power sale agreements from its calculation of FAC for the time period of October 1, 2009 through June 20, 2010, because it did so in contravention of the terms of the governing FAC. The phrase "requirements service," which has a particular meaning in the regulatory context as defined by multiple sources, does not contemplate the types of agreements Ameren Missouri entered into with AEP and Wabash. Further, a regulatory definition of the subject phrase should be used to interpret the phrase rather than a "market" definition because the phrase was drafted and adopted in a regulatory context during a rate case, not in a market context among energy traders. Additionally, the parties to Tariff Sheet 98.3 did not intend at the time of the drafting that it would include the types of agreements Ameren Missouri entered into with AEP and Wabash. Rather, the intended meaning of the subject phrase at the time of its adoptions contemplated only Ameren Missouri's wholesale municipal customers. Furthermore, because the phrase "partial requirements sales" may have two meanings—one meaning in

the regulatory context and another possible meaning in the market—it is ambiguous, and must be interpreted as against the drafter (Ameren Missouri) as a matter of Missouri law. Finally, the Commission correctly decided these precise issues in Case No. EO-2010-0255, and should rule the same way in the present case.

Consequently, this Commission should order the revenues and associated fuel expense generated by the AEP and Wabash agreements to be included in the calculation of the FAC such that the margins from these sales of $26,346,791 will be used to reduce the fuel cost of Ameren Missouri's rate payers as was contemplated by the FAC Tariff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 20th day of July, 2012, to all parties on the Commission's service list in this case.

/s/ Diana Vuylsteke