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.	))))	**File No. EO-2012-0074**

STAFF'S REPLY BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and for its *Reply Brief*, states as follows:

Argument

In its *Initial Post-Hearing Brief*, Ameren Missouri asserts these points, to which Staff herein replies:

- Proper application of statutory construction principles demonstrates that the AEP Operating Companies, Inc. ("AEP"), and Wabash Valley Power Association ("WVPA") contract margins are excluded from factor OSSR in the Fuel Adjustment Clause ("FAC") tariff.
- The "regulatory context" discussion raised by others is either irrelevant, or it in fact supports Ameren Missouri's position.
- The other parties urge the Commission to unlawfully and unreasonably rewrite the FAC tariff.
- The Company's interpretation of the exclusion is the only interpretation that gives effect to the intention of the legislature in enacting §386.266, RSMo., the FAC statute.
- Absent a "legitimate" finding of imprudence, the Commission lacks authority to require refunds in this case.
- The Staff's calculation of the sums at issue is incorrect.

Point 1: The Commission properly construed Ameren Missouri's FAC tariff in Case No. EO-2010-0255 and it should apply the same construction in this case.

Ameren Missouri's power sale contracts with WVPA and AEP were off-system sales ("OSS") such that 95% of the associated revenues were required to be included in the calculation of Ameren Missouri's FAC as an offset to the fuel and purchased power ("F&PP") expense charged to the ratepayers. The Commission has already decided this issue against Ameren Missouri once before, in Case No. EO-2010-0255, Ameren Missouri's first FAC prudence review.[1] In this second bite at the apple, Ameren Missouri has presented nothing new. Staff witnesses Lena Mantle[2] and Dana Eaves[3] and Missouri Industrial Energy Consumers ("MIEC") witness Maurice Brubaker[4] testified that these contracts were OSS. Staff urges the Commission to determine here, as it did in Case No. EO-2010-0255, that Ameren Missouri was imprudent for not including in its FAC the revenues associated with the sales of energy to WVPA and AEP and to direct Ameren Missouri to refund to its customers **_____** plus interest.[5]

Ameren Missouri argues that its *intent* was to enter into long-term requirements sales with WVPA and AEP such that the associated revenue would not flow through the FAC as an

[1] ***In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company, doing business as Ameren Missouri,*** Case No. EO-2010-0255 (***Report & Order,*** issued April 27, 2011) ("R&O").

[2] Ex. 9, Mantle Direct/Rebuttal Testimony, pp. 5-8.

[3] Ex. 8, Eaves Direct/Rebuttal Testimony, pp. 15-19.

[4] Ex. 10, Brubaker Direct Testimony, pp. 4-9.

[5] ***In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company, doing business as Ameren Missouri,*** Case No. EO-2012-0074 (***Staff's Prudence Report and Recommendation Regarding Wabash and AEP Contracts,*** filed October 8, 2011) ("*Staff Report*").

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offset to the F&PP expense. Staff agrees that evasion of the FAC was indeed Ameren Missouri's intent. But that doesn't mean that Ameren Missouri successfully accomplished its intent.

This matter is governed by the language of Ameren Missouri's FAC tariff, as follows:

> 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.)

This case turns on whether or not the AEP and WVPA transactions were "long-term full [or] partial requirements sales." Per the tariff, retail sales and long-term full or partial requirements sales are not considered OSS and are excluded from the FAC calculations. To qualify for the tariff exclusion, the WVPA and AEP sales must be *both* long-term and full or partial requirements sales. In its task of interpreting this phrase, the Commission as fact-finder is entitled to believe some, all or none of the evidence adduced.[6] The Commission chose to not believe the evidence presented by Ameren Missouri the first time this issue was tried and should do so again, now.

Ameren Missouri asserts that the rules of statutory construction, properly applied to its tariff, require a decision in its favor. That position is without merit. The Commission held in Case No. EO-2010-0255:[7]

> The parties presented arguments about the tariff language as if there were two provisions to be interpreted, "long-term" and "full and partial requirement sales". However, the tariff language can best be understood as a single provision, a description of a type of sale that is to be excluded from the definition of off-system sales.

[6] ***State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission,*** 116 S.W.3d 680, 690 (Mo. App., W.D. 2003) ("evaluation of expert testimony is left to the Commission which may adopt or reject any or all of any witnesses' [sic] testimony").

[7] *R&O,* p. 19.

The Commission went on to conclude:[8]

> The type of sale to be excluded is described in the Edison Electric Institute and FERC Form 1 definitions as "requirements service". That is the type of sales contract that Ameren Missouri had entered into with municipal utilities, cooperatives, and other investor owned utilities over the years. It is also a type of sales contract that has become much less common in recent years, as the wholesale electric market has become less regulated.

In the present case, Ameren Missouri again seeks to split the phrase "long-term full or partial requirements sales" into two parts and to parse each separately. Ameren Missouri contends, as it did the first time this issue was tried, that by industry practice, a "long-term" contract is understood to be one with a term of a year or more. Ameren Missouri also argues, as it did before, that a "requirements sale" is one in which the buyer seeks to obtain power to meet its load-serving obligation, in full or in part. Ameren Missouri thus makes exactly the same arguments it did the first time around and depends upon exactly the analytical method that the Commission explicitly rejected.

Point 2: Ameren Missouri's contracts with AEP and WVPA were so unlike its ongoing sales to municipalities that they cannot be classified together.

The key to interpreting the tariff language in question, as the Commission correctly pointed out in Case No. EO-2010-0255, is to identify the class of transactions that the tariff intended to exclude from the FAC. The excluded class, without question, encompasses Ameren Missouri's sales to municipalities. The question, therefore, is whether the sales to AEP and WVPA are similar enough to the municipal sales to be considered part of the same class. In fact, they are not.

[8] *Id.*

In the EO-2010-0255 case, the Commission noted:[9]

> The key phrase in the definition of "requirements service" is the requirement that the supplier plans to provide such service "on an ongoing basis (i.e. the supplier included projected load for this service in its system planning)." As the wholesale electric market has changed in recent years, Ameren Missouri has moved away from requirements service contracts, leaving only the remnant municipal requirements contracts, which Ameren Missouri intends to not renew when their terms expire.

The evidence in this case is overwhelming and undeniable that the AEP and WVPA contracts were *not* ongoing in nature and were merely a temporary expedient intended to replace the lost Noranda sales until such time as the aluminum smelter resumed normal operations.[10] The AEP contract had a duration of only 15 months; the WVPA contract a duration of only 18 months.[11] They were a matter of short-term expediency for Ameren Missouri, not a new, long-term, ongoing commitment.

MIEC witness Brubaker testified that requirements sales are those in which "requirements service" is provided.[12] "Requirements service," in turn, is "commonly understood" to mean "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."[13] Mr. Brubaker pointed out that this is the definition provided by the Federal Energy Regulatory Commission ("FERC") in the instructions to completing the "Sales for Resale" pages in the FERC Form 1 Report.[14] Mr. Brubaker quoted FERC's definition of "requirements service":[15]

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[9] *R&O,* p. 20.

[10] *See* Ameren Missouri's *Initial Post-Hearing Brief,* pp. 6-10 (describing the ice-storm, the loss of two-third's of Noranda's load, and the subsequent AEP and WVPA contracts that are at issue herein).

[11] *Id.,* at pp. 9-10.

[12] Ex. 10, p. 5.

[13] *Id.*

[14] *Id.*

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

Mr. Brubaker also pointed out the definition of "requirements service" set out in the *Glossary of Electric Industry* Terms published by the Edison Electric Institute ("EEI"), which is identical in every respect to the definition found in the instruction for FERC Form 1.[16] He testified that these definitions express the commonly understood meaning of "requirements service" in the electric industry.[17]

Mr. Brubaker then examined the particulars of the services provided by Ameren Missouri to AEP and WVPA. Unlike the undisputed "requirements service" provided by Ameren Missouri to its municipal customers, the sales to AEP and WVPA did not include RTO or OATT services or transmission.[18] Similarly, the contracts with AEP and WVPA were shorter in duration than the "requirements service" contracts with municipal customers.[19] Significantly, Mr. Brubaker noted that Ameren Missouri itself had classified the AEP and WVPA sales as "intermediate firm service" and *not* as "requirements service" on its 2009 FERC Form 1 Report.[20] Likewise, Mr. Brubaker testified, Ameren Missouri did not classify these contracts as "requirements service" in the Electronic Quarterly Reports ("EQRs") that it

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[15] *Id.*

[16] *Id.*

[17] *Id.*, p. 7.

[18] *Id.*, pp. 7-8.

[19] *Id.*, at 8.

[20] *Id.*

submitted to the FERC.[21] Based on this evidence, Mr. Brubaker concluded that the sales to AEP and WVPA were simply not "requirements service."[22]

Staff witness Dana Eaves also testified that, in its 2009 FERC Form 1 Report, Ameren Missouri did not classify the AEP and WVPA sales as "requirements service."[23] Mr. Eaves noted that, unlike the transactions with AEP and WVPA, Ameren Missouri's relationship with its municipal customers was "ongoing" -- "[Ameren Missouri witness Jaime Haro] stated that the current contracts were new contracts replacing contracts that had expired. He indicated that these relationships have existed for many years, and the relationships are of such duration that he was unaware if records of initial contracts could be found."[24] Ameren Missouri consistently classified its municipal contracts as "requirements service."[25]

Point 3: Pursuant to the FAC Tariff, the AEP and WVPA contracts are off-system sales.

In its *Report & Order* in EO-2010-0255, the Commission rejected Ameren Missouri's argument that the AEP and Wabash contracts were requirements sales rather than off-system sales.[26] Specifically, the Commission concluded that:

> [T]he Wabash and AEP contracts are not long-term full or partial requirements contracts as defined by Ameren Missouri's tariff. They simply do not have the characteristics to qualify as such contracts. Ameren Missouri calls them such, but it must stretch the definition beyond the breaking point to do so."[27]

[21] *Id.,* p. 6.

[22] *Id.,* at 9.

[23] Ex. 8, p. 16. Mr. Eaves also noted that the sales were classified as "requirements service" in Ameren Missouri's 2010 FERC Form 1 Report.

[24] *Id.,* at 18.

[25] *Id.*

[26] *R&O,* pp. 20-21.

[27] *Id.*

The Commission also reasoned that, if it accepted Ameren Missouri's argument, the FAC tariff's definition of off-system sales would be nearly meaningless.[28] Under Ameren Missouri's interpretation, "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."[29] Clearly it could not have been the intent of the Commission or the parties involved in establishing the FAC that Ameren Missouri would be empowered 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."[30] In short, as the Commission concluded, "calling a dog a duck does not make it quack, and calling Ameren Missouri's contracts with Wabash and AEP long-term full or partial requirements contracts does not make them so."[31]

As the Commission correctly concluded, the FAC tariff properly construed intended to exclude Ameren Missouri's ongoing sales to municipalities from the FAC calculation because the costs incurred to serve municipalities were not included in the retail customer revenue requirement when the tariff was in effect. The AEP and WVPA contracts are not similar to the municipal contracts, particularly in their short duration, temporary nature, and lack of transmission and other necessary services. It is Ameren Missouri, not Staff, that is belatedly trying to re-write the FAC tariff.

Point 4: Section 386.266, RSMo., is irrelevant to the outcome of this case, because the statute governs the design of a FAC, not its application.

Ameren Missouri next argues that Staff's position herein, as well as the Commission's decision in Case No. EO-2010-0255, are contrary to the requirement of § 386.266, RSMo., that a

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

FAC must be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity."

It is startling that Ameren Missouri would make this argument, given that the FAC tariff in question was designed by the Company and approved by the Commission at the Company's urging. In fact, it is not the design or wording of the tariff that Ameren Missouri objects to, but the Commission's construction and application of it in Case No. EO-2010-0255 and Staff's identical position in the present case. Ameren Missouri made the same argument in Case No. EO-2010-0255 and the Commission rejected it then:[32]

> Section 386.266.4(1), RSMo Supp. 2010, gives the Commission authority to approve an electrical corporation's fuel adjustment tariff if it finds that the tariff is "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The Commission has approved such a tariff for Ameren Missouri and no one challenges that tariff in this case. Ameren Missouri argues that this provision also requires the Commission to interpret the language of the previously approved tariff in a manner that protects the utility's ability to earn a fair return on equity. There is no such requirement in the plain language of the statute and the Commission will interpret this tariff in the same manner it would interpret any other tariff.

The tariff language that put Ameren Missouri in this pickle has since been changed and it is a non-issue for periods after May 31, 2011, the close of the seventh accumulation period since Ameren Missouri's FAC first became effective. The fact that the tariff could so easily be changed to avoid this outcome suggests that the Company might well have taken more care in drafting it in the first place.

Point 5: What is a "legitimate" finding of imprudence?

Ameren Missouri next asserts that refunds cannot be ordered in this case because (1) it is not a "classic" imprudence case and (2) there has been no showing of harm to customers.

[32] *R&O,* p. 16.

Ameren Missouri's position is not well-taken. The Commission determined in the EO-2010-0255 case that Ameren Missouri's failure to comply with its FAC tariff constituted both imprudence and harm to its customers.[33]

> Ameren Missouri's argument would however deprive its ratepayers of the benefit of the bargain implicit in the Commission's approval of the fuel adjustment tariff language proposed in the stipulation and agreement among the parties to the rate case, ER-2008-0318. The bargain implicit in the approved fuel adjustment clause is that ratepayers will pay more to help the company when the utility'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. Here offsetting revenue from off-system sales, as those revenues were defined in the tariff, increased and ratepayers should have benefited in the amount of $17,169,838. However, Ameren Missouri sought to deprive ratepayers of that benefit by branding the Wabash and AEP contracts as long-term full or partial requirements contracts when they do not qualify as such under the terms of the company's tariff. In doing so, Ameren Missouri acted contrary to the requirements of its tariff and therefore acted inappropriately.

Mature consideration suggests that any other result would be absurd. The Commission is required to exclude unlawful charges from rates.[34]

It was imprudent for Ameren Missouri to exclude the revenues derived from the power sales agreements with AEP and WVPA from the off-system sales component of Ameren Missouri's FAC calculations for the time period of October 1, 2009, to June 20, 2010.[35] The Commission agreed in its EO-2010-0255 *Report and Order* that, in deciding to exclude the AEP and WVPA contracts from the FAC calculation by redefining these off-system sales as requirements contracts, Ameren Missouri acted "imprudently, improperly, and unlawfully."[36]

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[33] *R&O*, p. 22.

[34] Section 393.130.1, RSMo.

[35] Ex. 8, Sch. DEE – 3-9, p. 7.

[36] *Id*. at p. 2.

Point 6: Staff's calculation of the amount to be refunded is correct.

Ameren Missouri contends that the amount to be refunded was miscalculated by Staff because Staff neglected to subtract therefrom some $3.6 million already refunded via the FAC by the operation of Factor "W." However, MIEC witness Greg Meyer testified that Ameren Missouri has fundamentally misrepresented Paragraph 5 of the *Second Nonunanimous Stipulation and Agreement* ("Stipulation") approved by the Commission in Case No. ER-2010-0036, relating to Factor "W."[37] Meyer notes that he personally participated in the discussions that resulted in the Stipulation and the addition of Factor "W" to the FAC calculation, while Ameren Missouri witness Weiss did not.[38] While Mr. Meyer was not able to disclose the substance of those discussions, he was able to say:[39]

> 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. The Commission should not adopt the adjustment to the level of margins from the AEP and Wabash contracts as proposed by Ameren.

Staff witness Lena Mantle also discussed the "W" Factor:[40]

> As the rate case [i.e., ER-2010-0036] progressed it appeared to Staff that there was some confusion at Ameren Missouri regarding the proper treatment of the AEP and Wabash contracts. It did not become evident to Staff that Ameren Missouri was not including AEP and Wabash contract revenues as off-system sales revenues in Ameren Missouri's FAC until late in that case. Eventually, the parties in that case, File No. ER-2010-0036, signed a *Second Nonunanimous Stipulation and Agreement ("Stipulation") regarding the AEP and Wabash* contracts, but only for the specific limited purpose of resolving the issue for purposes of that rate case. This stipulation and agreement did not resolve the differences of the parties regarding the appropriate treatment of these contracts in

[37] Ex. 11, p. 3.

[38] *Id.*

[39] *Id.*, at 4.

[40] Ex. 9, pp. 9-11.

Ameren Missouri's FAC. As a result, the issue was left to be addressed in prudence reviews of Ameren Missouri's FAC; prudence reviews such as this one.

Ms. Mantle points out that the *Stipulation* nowhere provided that the "W" Factor was intended "to offset the AEP and Wabash margins that had not been passed through the FAC."[41] Instead, the "W" Factor was merely "something that was required to get the parties who joined the stipulation and agreement to join in it and was part of a settlement of how the AEP and Wabash contract revenues should be treated in that rate case."[42] She pointed out that the inclusion of such a factor as a means to achieve settlement was not unusual.[43]

Conclusion

Ameren Missouri has brought nothing new to the Commission in this second prudence review and the result should be identical to that of the first prudence review. The AEP and WVPA sales were brief, temporary expediencies intended to mitigate the financial disaster suffered by Ameren Missouri due to the ice storm and its effect on Noranda. While Ameren Missouri certainly did not intend that 95% of the revenue realized from the AEP and WVPA contracts would offset the ratepayers' responsibility for its F&PP expense, that is the effect of the FAC tariff. The Commission correctly construed the tariff and applied it to the facts in Case No. EO-2010-0255 and it should reach the same result here.

WHEREFORE, because of the foregoing, Staff prays the Commission will (1) find Ameren Missouri acted imprudently in excluding the costs and revenues associated with sales of energy to AEP and Wabash during the period from October 1, 2009, to June 20, 2010, (2) order Ameren Missouri to refund to its customers ***_____ **** plus interest at

[41] *Id.,* p. 12.

[42] *Id.,* p. 10.

[43] *Id.,* at 12, lines 11-15.

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Ameren Missouri's short-term borrowing rate, and (3) grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 24th day of August, 2012.

/s/ Kevin A. Thompson