**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| 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' REPLY BRIEF


Diana M. Vuylsteke, #42419
Brent Roam, #60666
BRYAN CAVE LLP
211 North Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2572 (Telephone)
(314) 259-2020 (Facsimile)
dmvuylsteke@bryancave.com
brent.roam@bryancave.com

**Attorneys for the**
**Missouri Industrial Energy Consumers**

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# MISSOURI INDUSTRIAL ENERGY CONSUMERS' REPLY BRIEF

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

## I. Introduction

Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") acted imprudently, improperly and unlawfully by excluding the revenues it collected under two off-system power sales agreements with American Electric Power Service ("AEP") and Wabash Valley Power Association ("Wabash") from its calculation of the Fuel and Purchased Power Adjustment Clause ("FAC") for the time period of October 1, 2009 through June 20, 2010. In a flagrant violation of the FAC and this Commission's Order Denying Ameren's Application for Rehearing in Case No. ER-2008-0318, Ameren Missouri kept the revenues from the above referenced off-system sales by merely mischaracterizing them "partial requirements sales" as that phrase is used in Tariff Sheet 98.3 (the "tariff").

The contracts at issue are not partial requirements sales under the tariff because (A) defining them as such renders the tariff meaningless; (B) Ameren Missouri's own

preferred data dictionary does not support the notion that the contracts at issue are partial requirements contracts; and (C) the rules of tariff construction dictate that the contracts at issue not be construed as partial requirements contracts. Additionally, (D) Ameren Missouri's violation of the tariff was imprudent, and harmed the utility's ratepayers.

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.

## II. Argument

### A. Ameren Missouri's definition of the phrase "requirements sales" in Tariff Sheet 98.3 is untenable because it renders the phrase completely meaningless.

1. The phrase "requirements sales" is ambiguous, and rendered meaningless if interpreted in the way Ameren Missouri proposes.

In Case No. EO-2010-0255 (the "first prudence review") Ameren Missouri's witness, Duane Highley testified that the purpose of his testimony was to illustrate the vagueness, ambiguity and imprecision of the term "requirements" within the phrase "partial requirements contracts." Specifically, Highley testified as follows:

> "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."[1]

In a bald contradiction to the testimony of its *own* witness, Ameren Missouri now attempts to argue in its brief that the term "requirements" is "*not* ambiguous" within the

[1] Transcript EO-2010-0255 (hereinafter Transcript I), Page 276, Lines 7-22.

context of the tariff.[2] Ameren Missouri argues that one need only look to the "plain and ordinary meaning" in *Webster's Collegiate Dictionary* to define the term "requirements" within the tariff's phrase "requirements sales."[3] Citing the dictionary, Ameren Missouri proposes that the term "requirements sale" in the tariff should be defined as the sale of "something wanted or needed."[4] Accordingly, in Ameren Missouri's view, this Commission should accept the ridiculous proposition that Tariff Sheet 98.3 excludes from the FAC every single Ameren Missouri power contract (with a 1-year or more duration) where the buyer purchased something from Ameren Missouri that the buyer wanted or needed. In other words, according to Ameren Missouri's logic, every time Ameren Missouri sells power to a buyer who wants or needs power, Ameren Missouri and the buyer are transacting a "requirements sale" within the meaning of Tariff Sheet 98.3. This faulty premise forms the linchpin of Ameren Missouri's position in this case.

In considering the ramifications of Ameren Missouri's argument, one must ask: Is it conceivable that *any* of Ameren Missouri's buyers do not want or need the power they purchase? Do not all of Ameren Missouri's customers want or need the power they purchase from Ameren Missouri? Indeed, are there any contracts in any industry where the buyers do not "want" or "need" the products or services they are buying?

Ameren Missouri's argument is untenable, circular, and self-serving. Ameren Missouri's proposed definition of "requirements sale" as every sale where the buyer wants or needs that which is sold is nonsensical, and ultimately renders the tariff meaningless, because it excludes from the FAC every conceivable power contract of a year or longer into which Ameren Missouri could possibly enter. Ameren Missouri's

[2] Ameren Missouri, Initial Brief, p. 23.
[3] *Id.*
[4] *Id.* (emphasis added).

conduct of misbranding the AEP and Wabash Contracts, and its subsequent self-serving and spurious justification of that conduct deprives Missouri ratepayers of the bargain into which they entered when they stipulated and agreed to the conditions of the FAC in ER-2008-0318.

As an alternative to the "wants or needs" argument, Ameren Missouri's witness, Mr. Highley, whose experience lies completely outside of Commission-regulated utility operations,[5] attempted to distinguish requirements sales from other power sales by stating that a "requirements" contract is one that is "going to serve some ultimate load."[6] Like the definition above, this description is also meaningless, because *all* power sales serve some ultimate load.[7] Indeed, where would the power go it if did not serve some ultimate load? Thus, the logical conclusion of Ameren Missouri's various definitions of "requirements sales" render the phrase so vague and amorphous that it simply loses all meaning.

2. Calling the contracts "requirements sales" does not make them requirements sales.

Ameren Missouri alternatively argues that the contracts at issue are requirements sales because Ameren Missouri labeled them requirements sales when they drafted the contracts.[8] Mr. Haro, Ms. Barnes and Mr. Highley all echoed the same circular sentiment that "[i]f . . . [a contract] has the word 'requirements' in it, then it's a requirements contract."[9] Really? Does Ameren Missouri seriously propose that the tariff contemplated that all sales contracts that include the word "requirements" would be

[5] Transcript I, Page 254, Line 24 through Page 257, Line 11.
[6] Transcript I, Page 279, Lines 8-10.
[7] Transcript I, Page 361, Lines 9-11.
[8] See for example, Transcript I, Page 162, Line 23 through Page 163, Line 6.
[9] Transcript I, Page 280, Lines 1-2.

excluded from the FAC? What then would prohibit Ameren Missouri from labeling all of their off-system sales as "requirements sales" and thereby excluding all of them from the FAC? The flimsiness of this argument is obvious. Importantly, Ameren Missouri admitted that it drafted the contracts at issue with the express goal in mind of excluding them from the FAC.[10] It is no wonder the contracts include terms that match the language of the tariff's exclusionary clause. That Ameren Missouri drafted contracts with self-serving terms does not provide evidence of the meaning of those terms as they are used in the tariff. Furthermore, even if Ameren Missouri and the counter-parties to the subject contracts agreed that the contracts at issue were "partial requirements sales," their agreement as to what that phrase may mean as between those parties at the time they entered the agreement provides no insight into how that phrase was understood by the Commission and Ameren Missouri at the time it was drafted and approved in the FAC tariff.

3. The EEI Glossary demonstrates that the AEP and Wabash contracts do **not** constitute partial requirements sales.

Ameren Missouri Witness Mr. Haro cites a portion of the Edison Electric Institute ("EEI") Glossary discussing "Partial Requirements."[11] While that particular entry is helpful in drawing the distinction between the terms "full" and "partial," it does not discuss the meaning of the term "requirements." The term "requirements" is discussed a few pages later under the EEI Glossary's entry for requirements service:

> **Requirements Service: 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]

[10] Transcript I, Page 74, Line 6 through Page 75, Line 6.
[11] Haro Surrebuttal, Ex. 4, JH-S5, p. 115 of the EEI Glossary.
[12] Haro Surrebuttal, Ex. 4, JH-S5, p. 134 of the EEI Glossary.

While Ameren Missouri's witness Jaime Haro purported to agree with the EEI Glossary's definition, he opined that "ongoing basis" in the above definition can simply mean for the life of the contract, which may be as short as "one day."[13] One wonders when hearing such an argument what happened to Ameren Missouri's emphasis on interpreting words according to their plain meaning. Ameren Missouri's selective use of the definitions found in the EEI glossary and it's strained interpretation of the phrase "ongoing basis" only highlights the extent of the linguistic acrobatics required to arrive at Ameren Missouri's position.

Similar to its curious definition of "ongoing basis," Ameren Missouri defines the term "system resource planning" from the above EEI Glossary entry in a way that includes every conceivable Ameren Missouri contract, and as such, renders that phrase ultimately meaningless as well. Specifically, Ameren Missouri alleged that the AEP and Wabash contracts are part of its "system resource planning" because they were included in the company's monthly filings with MISO and in Ameren Missouri's internal "position calculations, load forecasting, fuel budgeting and risk management position calculations."[14] One can hardly conceive of an Ameren Missouri power contract that would *not* be included in its monthly MISO filings and its internal calculations. So again, Ameren Missouri's attempt to force the AEP and Wabash contracts into the definition of a partial requirements contract stretches the meaning of the phrase beyond its breaking point.

Alternatively, Ameren Missouri attempts to argue that the definition of "Requirements Service" in the EEI Glossary should be ignored as not relevant to this

[13] Transcript I, Page 89, Lines 7-10.
[14] Haro Surrebuttal, Ex. 4, Page 16, Lines 9-19.

proceeding. Nonsense. First of all, Ameren Missouri cites one entry of the EEI Glossary to defend its position as demonstrated above. As such, it cannot simply pick and choose the definitions it likes and discard the definitions it does not like. Secondly, Ameren Missouri witness Mr. Haro testified that he agreed with the EEI Glossary definition of Requirements Service.[15] Third, the definition of "Requirements Service" in the EEI Glossary provides a clear definition of one of the key words at issue in this hearing (requirements), a word that Ameren Missouri admits is "vague" and subject to "ambiguities" in the context of partial requirements contracts.[16] Fourth, unlike the allegedly "obscure, arcane and outdated" FERC Form 1 from 1990, the EEI Glossary, with an identical definition to the one in FERC Form 1, was published as recently as April, 2005.[17] As such, the EEI Glossary provides an up-to-date and useful definition of some of the key words in the phrase at issue, and should not be dismissed simply because it is damaging to Ameren Missouri's indefensible position.

In a new twist on its novel argument that the EEI Glossary is irrelevant, Ameren Missouri attempts to assert that the phrase "requirements *service*" is not useful in defining the phrase "requirements *sales*." Indeed Ameren Missouri argues that its opponents seek to re-write the tariff by replacing the phrase "requirements sales" with the purportedly unrelated phrase of "requirements service." This argument is meritless. It is axiomatic that the phrase "requirements service" describes that service which is provided in a "requirements sale." Furthermore, in anticipation of Ameren Missouri's contrived argument, MIEC witness Maurice Brubaker testified that "[r]equirements contracts (or

[15] Transcript I, Page 93, Lines 21-23.
[16] Transcript I, Page 276, Lines 7-15.
[17] Haro Surrebuttal, Ex. 4, JH-S5.

requirements sales) are those wherein "requirements service is provided."[18] Ameren Missouri's "opponents" are not attempting to re-write the tariff. On the contrary, they are attempting to enforce the tariff that Ameren Missouri has flagrantly ignored to the detriment of Missouri ratepayers.

4 The EQR data dictionary demonstrates that the AEP and Wabash contracts do **not** constitute "requirements sales" under the tariff.

According to Ameren Missouri's own preferred data dictionary, the AEP and Wabash contracts do not constitute requirements contracts. Ameren Missouri Witness Mr. Haro offered a glowing review of the definitions found in the FERC's Electronic Quarterly Report ("EQR") data dictionary, stating that "[u]nlike FERC Form 1, the information from EQR reports is regularly reviewed and utilized by wholesale power market participants."[19] However, Ameren Missouri fails to cite the EQR data dictionary's definition of "Requirements Service," which defines requirements service as follows:

> **Requirements Service: Firm, load-following power supply necessary to serve a specified share of customer's aggregate load during the term of the agreement.**[20]

Notably neither the AEP nor Wabash contract fits within this EQR definition of requirements service, because neither of these contracts are "load-following." On the contrary, the AEP contract calls for a set amount of power,[21] and the Wabash contract calls for the buyer to provide a schedule of the amount of energy it seeks to receive on a daily basis.[22] Therefore, even according to Ameren Missouri's own preferred data dictionary, the AEP and Wabash Contracts fail to constitute requirements contracts

[18] Brubaker Direct, Ex. 10, Page 5, Lines 1-4.
[19] Transcript I, Page 106, Lines 4-14.
[20] Order No. 2001-I, Order Revising Electric Quarterly Report Data Dictionary, 125 FERC ¶ 61, 103, Attachment, Page 37.
[21] Haro Surrebuttal, Ex. 4, JH-S1.
[22] Haro Surrebuttal, Ex. 4, JH-S2.

because they lack the requisite quality of supplying "load-following" power. Moreover, despite Ameren Missouri's approval of the EQR Data Dictionary and its admission that "[a]ll public utilities and power marketers must file EQRs for each calendar quarter . . . [that] **must** summarize contractual terms and conditions for market based power sales,[23]" Ameren Missouri has still failed to classify the AEP and Wabash contracts as requirements contracts in its EQR filings.[24] Ameren Missouri's failure to classify the AEP and Wabash contracts as requirements sales, especially in light of the current dispute and the previous prudence review, provides additional evidence that the AEP and Wabash contracts do not constitute requirements sales under the tariff.

### B. The AEP and Wabash contracts do not constitute partial requirements contracts even under Ameren Missouri's internal business practices.

As further evidence that the contracts at issue do not constitute requirements sales, MIEC witness Maurice Brubaker points out (and Ameren Missouri admits) that the AEP and Wabash contracts do not provide the types of service characteristics that are typically associated with Ameren Missouri's actual requirements contracts (the municipal contracts).[25] Specifically, the AEP and Wabash contracts provide only capacity and energy and fail to provide the ancillary services traditionally associated with Ameren Missouri's actual requirements contracts.[26] Mr. Brubaker testified that the "services provided to the municipalities include the capacity and energy service as well as all, or many, of the RTO and OATT charges. . . . Obviously, Ameren Missouri provides substantially more service to these municipal customers than to AEP and Wabash under

[23] Haro Surrebuttal, Ex. 4, Page 8, Lines 4-10.
[24] Transcript I, Page 109, Lines 8-11.
[25] Haro Surrebuttal, Ex. 4, JH-S2.
[26] Brubaker, Ex. 10, Page 7, Line 4 through Page 8, Line 3.

their bilateral one-off contracts. These service characteristics are typical of requirements service provided by utilities."[27] The disparate treatment of ancillary services between the subject contracts and Ameren Missouri's actual requirements contracts provides merely another indication, among many, that the contracts at issue do not constitute requirements contracts even under Ameren Missouri's own internal practices.

1. The lack of cost assignment associated with AEP and Wabash contracts provides further evidence that these contracts do not constitute requirements sales.

On page 13 of Ameren Missouri's initial brief in this case, Ameren Missouri provides several examples of contracts that qualify as requirements sales under the tariff (Arkansas, Power and Light Company, Citizens Electric Corporation, Show-Me Power Corporation, and Illinois Power, as well as several municipal utilities).[28] Ameren Missouri seeks to equate the sales at issue in this case (AEP and Wabash) with the real requirements sales listed above. However, the only comparison that Ameren Missouri can make between the subject contracts and the actual requirements sales is that "they all meet part of the purchaser's load serving obligations."[29] This is an empty comparison because nearly every conceivable power contract meets part of a purchaser's load serving obligations. So again, Ameren Missouri's definition of what constitutes a "requirements sale" renders the phrase meaningless, because the definition includes nearly every conceivable power contract into which Ameren Missouri could possibly enter.

Furthermore, Ameren Missouri failed to point out the important and substantive differences between the subject contracts and the actual requirements contracts listed above. Notably, the costs and revenues from Ameren Missouri's actual requirements

[27] Brubaker, Ex. 10, Page 7, Lines 4-21.
[28] Ameren Missouri Initial Brief, p. 13.
[29] *Id.*

sales (those listed above) have been allocated *away from* Missouri retail customers.[30] However, with respect to the AEP and Wabash contracts, Ameren Missouri proposes to keep the revenues without recognizing the proper assignment of costs away from Missouri retail customers. Ameren Missouri seeks to justify its actions by pointing out that it was only trying to generate revenue that it anticipated losing as a result of the 2009 ice storm. This is a red herring. First, the FAC was not designed to address revenue shortfalls. Second, if the storm had occurred, and the FAC was not in place, Ameren Missouri would have been permitted to keep the revenues from the AEP and Wabash sales. Third, the FAC is not designed to put every party in the place it would have been but for circumstance X. If Ameren Missouri's argument were adopted, any dip in revenue would justify Ameren Missouri manipulating the FAC to make "everyone whole" and to put all parties in the same position they would have been but for the event leading to a dip in Ameren Missouri's revenues. Ameren Missouri seeks to use the FAC in a way that it was never intended. That is, it seeks to enforce it when beneficial to Ameren Missouri, and ignore it when beneficial to Missouri ratepayers.

### C. The AEP and Wabash contracts are not "partial requirements sales" as that phrase is used in the tariff, because the rules of tariff construction.

1. Ameren Missouri's definition of the phrase at issue violates Missouri's long-standing principle that a statute or tariff should be construed so as to avoid an effect which renders the language meaningless or absurd.

It has long been the well-established law in Missouri that when a court or commission is called upon to construe a statute or tariff, "the legislative purpose should be assumed to be a reasonable one" and "laws are presumed to have been passed with a view to the welfare of the community." *In re Estate Tompkins*, 341 S.W.2d 866, 872-873

[30] *Id.*

(Mo. 1960). Further, statutes and tariffs should not be construed in such a way as to "convict the legislature of having enacted 'an absurd law incapable of being intelligently enforced.'" *Id.* Additionally, the Commission "should not construe a legislative enactment in such a manner as to render it wholly meaningless unless no other construction is open to the court." *Id.*

It is indisputable that the phrase "requirements sales" is vague, imprecise and ambiguous. Indeed, the Company's own witness testified 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."[31]

It is also indisputable, as demonstrated above that to interpret the phrase "requirements sales" as Ameren Missouri proposes would render the phrase absurd and meaningless, in that the definition would include nearly every conceivable contract into which Ameren Missouri could possibly enter. Specifically, Ameren Missouri proposes to define the phrase "requirements sale," using the dictionary definition of any sale of "something wanted or needed."[32] This is an untenable reading of the tariff. This reading of the tariff would mean that every Ameren Missouri contract is a requirements contract, because presumably every buyer of power from Ameren Missouri wants or needs the power it purchases. Indeed, every contract in every industry contemplates that the buyer wants or needs the product or service that is the subject of the contract.

Under Ameren Missouri's definition, the tariff would read:

[31] Transcript I, Page 276, Lines 7-22.
[32] Ameren Missouri, Initial Brief, Page 23.

"Off-System Sales shall include all sales transactions . . . . excluding Missouri retail sales and any other sales contracts of at least one-year duration where a buyer purchases power that it wants or needs."

While, Ameren Missouri may wish the tariff was drafted this way, it is simply not reasonable to interpret it this way. So, "requirements sale" cannot reasonably be construed as Ameren Missouri proposes, because such a reading renders the phrase meaningless.

Alternatively, Ameren Missouri proposes that every contract wherein the word "requirements" is found should be construed as a "requirements sale" under the tariff.[33] Again, this approach would render the tariff meaningless, because it would allow Ameren Missouri to unilaterally enter into off-system sales contracts and exclude them from the FAC by merely inserting the word "requirements" into the contract. Neither the Commission nor Ameren Missouri intended the phrase "requirements sale" to have such a broad and amorphous definition at the time the tariff was drafted and approved.[34] Only after Ameren Missouri sought to recover from an unanticipated revenue shortfall did Ameren Missouri begin to interpret the tariff in this self-serving way. Accordingly, Ameren Missouri's definition of the phrase should be disregarded as such a definition renders the phrase meaningless and untenable. *In re Estate Tompkins*, 341 S.W.2d 866, 872-873 (Mo. 1960).

2. For Ameren Missouri the "real-world" **is** the regulatory context.

Ameren Missouri's newest argument attempts to distinguish between the so-called "real world" of buying and selling power and the apparently un-real world of the

[33] See for example, Transcript I, Page 162, Line 23 through Page 163, Line 6.
[34] EO-2010-0255, Report and Order, P. 21.

"regulatory context."[35] Throughout its brief, it advocates for the so-called "real-world" definition of the phrase at issue, and argues that the "real world" is the "business of buying and selling power."[36] Ameren Missouri has apparently forgotten, that "[t]he vast majority of Ameren's revenues are subject to state or federal regulation.[37] Thus, for Ameren Missouri, the real world *is* the regulatory context. That Ameren Missouri may derive a small percentage of its revenues from off-system trading does not qualify its energy traders (i.e. Mr. Haro, who had no role in the drafting, approval or implementation of the tariff) to interpret the tariff in a way that completely undermines the intention of the Commission and all parties to the tariff (including Ameren Missouri). Accordingly, Ameren Missouri's "real-world" argument is baseless, because the real world for Ameren Missouri is inextricably bound to the regulatory context in which it operates.

3. <u>The meaning of the phrase at issue is governed by intent of the Commission when it approved the FAC, and by the utility at the time the tariff was drafted – not by the after-the-fact intent of an energy trader expressly seeking to exclude the contract from the FAC.</u>

A tariff should be construed so as to give effect to the <u>intent</u> of the Commission and the utility at the time the tariff was drafted. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)). All of the evidence in this case indicates that at the time the tariff was drafted and approved, neither the Commission nor Ameren Missouri intended the phrase "partial requirements sales" to mean the types of contracts represented by AEP and Wabash. Ameren Missouri's argument that it intended

[35] Ameren Missouri Initial Brief, p. 31.
[36] *Id.*
[37] Form 10-Q for AMEREN CORP, Quarterly Report, August 8, 2012.

the tariff to exclude from the FAC the types of contracts represented by AEP and Wabash is belied by **all** of the evidence in the case, including the following:

4. Ameren Missouri's Request to Revise Tariff:

After the ice storm, Ameren Missouri sought to revise the tariff in Case No. ER-2008-0318 so that it could enter into the types of contracts represented by AEP and Wabash and legally and prudently exclude the revenues from the FAC.[38] That request was rejected. If Ameren Missouri had genuinely believed that the intent of the tariff language contemplated that it could enter into contracts such as AEP and Wabash and legally and prudently exclude the revenues, it would not have sought revision of the tariff in the first place. It would simply have entered into the contracts and excluded the revenues. That fact that it first sought permission to do so, belies its argument in this case that the intent of the tariff language contemplated such action.

5. Lena Mantle Testifies to Ameren Missouri's Intent:

Staff witness Lena Mantle provided substantial and credible testimony as to what Ameren Missouri intended "requirements sales" to mean in the tariff. She repeatedly and emphatically, in the face of aggressive cross-examination, testified that Ameren Missouri represented to her during negotiations that the phrase at issue referred to Ameren Missouri's municipal customers.[39] Ameren Missouri has failed to rebut her testimony.

6. Jaime Haro Corroborates Lena Mantle's Testimony:

Ms. Mantle's testimony was supported by the corroborating evidence of Ameren Missouri witness Jaime Haro who testified that the insertion of the phrase "municipal customers" was meant to "clarify" the meaning of the tariff, noting, "[w]e clarified it

[38] ER-2008-0318, Application for Rehearing.
[39] Transcript, Page 124, Line 11 through Page 127, Line 13.

because if that was the intention, then it was very simple to just limit it to municipalities. . . ."[40] After a break, Ameren Missouri's counsel futilely attempted to rehabilitate Mr. Haro's damaging testimony by leading him to the exact opposite conclusion than the one he had given moments earlier: "Q. So it was not a clarification? A. It was not a clarification. . . ."[41] However, the Commission (not surprisingly) did not find this subsequent reversal of testimony credible in light of the facts surrounding the insertion of the phrase "municipal customers" and the reasonable unguided explanation of its purpose by both Ms. Mantle and Mr. Haro.

7. Ameren Missouri Fails to Produce Contrary Evidence:

While Ameren Missouri rejects Ms. Mantle's testimony, it provides no testimony of its own describing Ameren Missouri's intent with respect to the phrase at issue. Notably, Mr. Marty Lyons, who sponsored the exemplary tariffs, fails to appear on behalf of Ameren Missouri; and Mr. Weiss, who was present at the meetings concerning the FAC Tariff failed to provide any useful testimony as to the what Ameren Missouri meant by the phrase at issue. While Mr. Haro and Ms. Barnes may speculate as to what was meant by the phrase at issue, they were not in attendance at any of the meetings between Staff and Ameren Missouri during the negotiations of the tariff language, and possess no first-hand knowledge of the intent of the parties at the time the tariff was drafted and adopted.[42] Their testimony on this issue is not useful. Ameren Missouri's failure to provide testimony by Marty Lyons, the sponsor of the tariff language, (or anyone else with knowledge of the tariff formation) further demonstrates Ameren Missouri's inability to provide evidence that the intent of the tariff was to include AEP and Wabash-type

[40] Transcript I, Page 63, Lines 4-9.
[41] Transcript I, Page 142, Lines 8-14.
[42] Transcript I, Page 109, Lines 13-16 and Transcript, Page 189, Lines 6-14.

contracts. In other words, Ameren Missouri could have produced Marty Lyons, as sponsor of the tariff language, to testify regarding Ameren Missouri's intent with respect to the meaning of the subject phrase.[43] However, Ameren Missouri's silence on the issue speaks volumes.

8. The Commission's Intent:

Finally, in its Report and Order in EO-2010-0255, the Commission provided an unequivocal statement as to what it intended with respect to the phrase at issue when it approved the phrase:

> 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. Ameren Missouri describes its contracts with Wabash and AEP as long-term full or partial requirements contracts, but, to paraphrase MIEC's witness, Maurice Brubaker, 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.[44]

Accordingly, under Missouri law, this Commission should reject Ameren Missouri's proposed definition of the phrase at issue, as it does not comport with the meaning intended by Ameren Missouri and the Commission at the time of the tariff's drafting and approval. *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d

[43] In a footnote on page 37 of its Initial Brief, Ameren Missouri falsely states: "The Commission took administrative notice of the entirety of Marty Lyons' pre-filed direct testimony in case No. ER-2008-0318." This is inaccurate. The Commission actually took administrative notice *only* of "a particular schedule" from Mr. Lyons' testimony, not his entire pre-filed direct testimony as Ameren Missouri's counsel represents. Accordingly, the Lyons' testimony upon which Ameren Missouri relies in this case is not evidence. Transcript, P. 12, Lines 11-20.

[44] Report and Order, EO-2010-0255, Page 21.

513, 521 (Mo. App. W.D. 2005) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)).

**D. The Company's actions were imprudent, and harmed the utility's ratepayers because Ameren Missouri violated the FAC, and the ratepayers are entitled to the revenues generated by the AEP and Wabash contracts pursuant to the terms of the FAC.**

The Company continues to argue that its violation of the FAC was not imprudent because the violation was merely an attempt to replace the Noranda load it lost in the ice storm of 2009. However, when pressed, Company witness Lynn Barnes was forced to admit that "the fact of the storm [is not] germane [or] relevant in any way to how this Commission interprets the clause that is at issue in the tariff."[45] In other words, Ameren Missouri's interpretation of the tariff must stand or fall on its own, and cannot be propped up by invoking the "devastating" effects of the ice storm.

Secondly, Ameren Missouri continues 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. Pursuant to the FAC, the utility's ratepayers are entitled to those revenues generated by off-system sales. The Company's denial of those revenues to its ratepayers constitutes harm to the ratepayers, because the ratepayers are deprived of the benefit of the agreement into which they entered with Ameren Missouri. Indeed the Commission has already reasoned to this effect in EO-2010-0255:

> 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-

[45] Transcript I, Page 240, Lines 8-12.

> 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.[46]

For the accumulation period reflected in this case, Missouri ratepayers have been deprived of approximately $26,342,791 to which they are entitled under the terms of the tariff. Notably, Ameren Missouri has benefited to the sum of nearly $200 million it has collected as a result of the FAC through January, 2012.[47] Ameren Missouri incomprehensibly argues that the "approval of a tariff by the Commission is not approval of a bargain."[48] This argument is demonstrably false. The language of the tariff expressly applies to the stipulation and agreement reached by the parties in Case No. ER-2008-0318. The stipulation and agreement resulted from hours of negotiations among the parties to reach a bargain that was acceptable to them. Contrary to Ameren Missouri's unsupportable assertion to the contrary, the language of the tariff provides the linchpin of the bargain among the parties. The Commission's approval of the tariff is an express approval of the bargain among the parties. As such, Ameren Missouri's argument that it's violation of the tariff caused no harm to its ratepayers is meritless. Ameren Missouri's violation of the tariff deprived Missouri ratepayers of $26,342,791 to which they were entitled as a result of the bargain into which they entered with Ameren Missouri in the Stipulation and Agreement in Case No. ER-2008-0318.

[46] Report and Order, EO-2010-0255, Page 22.
[47] Brubaker, Ex. 10, Page 11, Lines 3-6.
[48] Ameren Missouri Initial Brief, p. 35.

## III. Conclusion

The Company acted imprudently, improperly and unlawfully by excluding the revenues it collected under the AEP and Wabash contracts from its calculation of the Fuel and Purchased Power Adjustment Clause ("FAC") for the time period of October 1, 2009 through June 20, 2010. In a flagrant violation of the FAC and this Commission's Order Denying Ameren's Application for Rehearing, Ameren Missouri kept the revenues from the above referenced off-system sales by merely mischaracterizing them "partial requirements sales" as that phrase is used in Tariff Sheet 98.3.

The contracts at issue are not partial requirements sales under the tariff because (A) defining them as such renders the tariff meaningless; (B) Ameren Missouri's own internal business practices and preferred data dictionary do not support the notion that the contracts at issue are partial requirements contracts; and (C) the rules of Tariff Construction dictate that the contracts at issue not be construed as partial requirements contracts. Additionally, (D) Ameren Missouri's violation of the tariff was imprudent, and harmed the utility's ratepayers.

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.

Respectfully submitted,

BRYAN CAVE LLP

*/s/ Brent Roam*
Diana M. Vuylsteke, #42419
Brent Roam, #60666
211 North Broadway, Suite 3600
St. Louis, MO 63102
Phone: (314) 259-2543
Fax: (314) 259-2020
E-mail: dmvuylsteke@bryancave.com

Attorney for the Missouri Industrial Energy Consumers

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail this 24th day of August, 2012, to the parties on the Commission's service list in this case.

*/s/ Brent Roam*