BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a AmerenUE.	))))	Case No. EO-2010-0255

INITIAL BRIEF OF AMEREN MISSOURI

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I. Introduction/Background

The facts of this case are relatively simple, and largely uncontested by the parties:

- On January 27, 2009, the Commission issued its Report and Order in Case No. ER-2008-0318, a general rate case filed by Union Electric Company d/b/a Ameren Missouri. This Report and Order granted Ameren Missouri a rate increase, and allocated approximately $139 million of Ameren Missouri's annual cost of service to Noranda Aluminum Inc. (Noranda), Ameren Missouri's largest customer by far, which operates an aluminum smelter in New Madrid, Missouri.[1] Noranda's load constitutes approximately 9-10% of Ameren Missouri's total retail system output.[2]

- In that same Report and Order, the Commission for the first time approved a fuel adjustment clause (FAC) for Ameren Missouri. The terms of the FAC tariff, other than the sharing percentage, were agreed to by the parties and filed in a Stipulation and Agreement which was approved by the Commission.[3] Pursuant to the stipulated terms of the FAC tariff, although some types of off-system sales were included in the FAC calculation, "long-term full and partial requirements sales" were explicitly excluded from the FAC calculation. These sales were to be addressed in the Company's general rate cases, just like all other non-FAC costs and revenues.

- On January 28-29, 2009, just days after the Commission's Report and Order was issued, Southeast Missouri was struck by one of the most devastating ice storms in the history of the state. Ameren Missouri lost service to 95% of its customers in a 6-county area (a total of 36,500 customers). The Company also lost 3,800 electric poles in the ice storm, the most it has ever lost in any storm. Governor Nixon declared a state of emergency for the area, and it was

[1] Exh. 3 (Barnes Direct), p. 5, lns. 12-16.

[2] Tr. p. 505, lns. 2-7.

[3] *Re: Union Electric Company d/b/a AmerenUE,* Case No. ER-2008-0318, *Order Approving Stipulation and Agreement as to All FAC Tariff Rate Design Issues* (effective January 8, 2009). See Exh. 11 (Eaves direct/rebuttal), Schedule DEE-5 for a complete copy of the FAC tariff.

many days before service could be restored to all of the Company's customers, in spite of its best efforts.[4]

- The ice storm had a particularly severe impact on the Noranda aluminum smelter. Because the storm took down the transmission lines owned by Associated Electric Cooperative Inc. (Associated) which deliver the electricity from Ameren Missouri to Noranda, the plant's operations were abruptly stopped in mid-cycle. Consequently molten aluminum "froze" throughout the plant, and the only way to restore service was to jackhammer out the frozen aluminum. Immediately following the ice storm there was no way to know when or if the Noranda plant would return to full service, but at a minimum, it would be many months before the plant could conceivably do so.[5]

- On February 5, 2009, Ameren Missouri filed is *Application for Rehearing and Motion for Expedited Treatment* in Case No. ER-2008-0318, which asked the Commission to modify the FAC in a manner that would allow the Company to retain off-system sales revenues sufficient to offset the loss of retail margins that would result from the Noranda outage. The Commission denied Ameren Missouri's application because (1) the requested modifications would require the Commission to set aside an approved stipulation and agreement, and (2) there was not sufficient time to reopen the record, take evidence, and make a decision before the March 1, 2009, operation of law date.[6]

- Faced with this catastrophe, in the months that followed Ameren Missouri took steps to replace the lost Noranda load by entering into two power sales contracts with Wabash Valley Power Association, Inc. (Wabash) and AEP Operating Companies (AEP), with terms of 18 months and 15 months respectively. Wabash is a not-for-profit cooperative that is the purchasing agent for Citizens Electric Corporation (Citizens), an electric cooperative serving approximately 20,000 customers in Southeast Missouri.[7] The power sale contract between Wabash and Ameren Missouri specifically provides that the power is to be used to partially serve the requirements of Citizens in Missouri. The AEP Operating Companies consist of electric utilities serving approximately 5 million customers in 11 states. The power sale contract between AEP and Ameren Missouri specifically provides that the power is provided to enable AEP to partially meet its load serving requirements.[8]

[4] Exh. 3 (Barnes Direct), p. 5, ln. 21- p. 6, ln. 3.

[5] Exh. 3 (Barnes Direct), p. 6, lns. 4-10.

[6] *Re: Union Electric Company d/b/a AmerenUE*, Case No. ER-2008-0318, *Order Denying AmerenUE's Application for Rehearing* (effective Feb. 19, 2009).

[7] Ameren Missouri witness Jaime Haro explained that it is no longer possible to sell power directly to Citizens; all power sales to Citizens have to be made through contracts with Wabash. Tr. p. 141, lns. 15-18.

[8] Exh. 2 (Haro Surrebuttal), p. 3, ln. 17-p. 4, ln. 3.

- The prices for the power sold under the Wabash and AEP contracts were negotiated based on analyses of market prices developed by Ameren Missouri witness Steven Wills. Coincidentally, the prices of the power sold under these contracts ended up close to the price of power sold to Noranda.[9]

- Ameren Missouri witnesses testified that the Company entered into the Wabash and AEP contracts for two reasons: First, the Company wanted to maintain the balance in its power sales portfolio between sales backed by load, and off-system sales not backed by load. Maintaining this balance was particularly important to Ameren Missouri in early 2009, when the risk associated with non-load backed counterparties, such as Lehman Brothers, was increasing due to the financial crisis.[10] The Wabash and AEP sales, which were long-term, load-backed sales at a fixed price, enabled the Company to maintain the desired balance because the load used to fulfill those contracts was very similar to the Noranda load that they replaced. In contrast, off-system sales into the daily spot market would not have allowed Ameren Missouri to maintain the balance it desired in its power sales portfolio.

- Second, since sales to Wabash and AEP were long-term partial requirements sales, the ratemaking treatment for those sales would be exactly the same as the ratemaking treatment for the sale to Noranda which they replaced. Just as the Noranda sales were outside the purview of the FAC (because they were addressed in the Company's general rate proceedings), so were the long-term partial requirements sales to Wabash and AEP which replaced the lost Noranda sales.[11]

- Because Noranda's return to service had to be estimated, the amount of revenue Ameren Missouri recovered under the AEP and Wabash contracts came close but did not exactly match the amount of revenue that Ameren Missouri would have recovered from Noranda had no ice storm occurred. Information about that slight mismatch was part of the discussion that led to a settlement in Case No. ER-2010-0036, which addressed the mismatch and several other FAC-related issues involving Ameren Missouri's loss of the Noranda load.[12] Pursuant to that settlement, the FAC formula was adjusted to provide for a "W" factor, which credits customers $300,000 per month from July 1, 2010 through June 30, 2011.[13]

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[9] Tr. p. 304, ln. 8-p. 305, ln. 14.

[10] Exh. 1 (Haro Direct), p. 4, ln. 8-p. 5, ln. 17.

[11] Tr. p. 205, lns. 4-9.

[12] Tr. p. 428, ln. 24-p. 429, ln. 8.

[13] *Re: Union Electric Company d/b/a AmerenUE,* Case No. ER-2010-0036, *Order Approving Second Stipulation and Agreement, Third Stipulation and Agreement, and Market Energy Prices Stipulation and Agreement* (effective April 14, 2010) (Second Stipulation and Agreement).

- The amount of money at issue for the FAC accumulation periods being addressed in this case is $17,169,838, but the same issue applies to a to a total of $42,036,723 over four accumulation periods.[14]

II. Argument

The outcome of this case turns on whether the Wabash and AEP contracts properly qualify as long-term partial requirements sales under the terms of the Company's FAC tariff that was approved in Case No. ER-2008-0318. The overwhelming weight of the competent and substantial evidence adduced in this case makes clear that the Wabash and AEP contracts do in fact constitute long-term partial requirements contracts. Consequently, there is no basis for the Commission to conclude that Ameren Missouri acted imprudently when it excluded costs and revenues associated with those contracts from the calculation of net fuel and purchased power costs recoverable through its approved FAC. Indeed, for the Company to have acted otherwise would have been contrary to the terms of its approved FAC tariff and, therefore, unlawful.

A. The Wabash and AEP Contracts are Long-Term Partial Requirements Contracts.

1. The Meaning of "Long-Term" as Used in Ameren Missouri's FAC Tariff

The Wabash and AEP contracts had terms of 18 months and 15 months respectively, and there is no question that contracts with terms of that length constitute "long-term" sales within the meaning of the Company's FAC tariff. Ameren Missouri witness Jaime Haro, Ameren Missouri's Director, Asset Management and Trading and a power marketer with 12 years of experience, testified that the demarcation between short- and long-term contracts in the electric marketplace has consistently been one year, and that the Wabash and AEP contracts are long-

[14]Exh. 4 (Barnes Surrebuttal), p. 1, ln. 19-p. 2, ln. 4.

term "as the Company has consistently used that term in connection with its activities related to wholesale power marketing."[15] Duane Highley, an executive with Associated Electric Cooperative, Inc., with 27 years of experience in the wholesale power supply business, also testified that in his experience "a 'long-term' power supply agreement would be one which covers a period of one year or more." Conversely, "a short-term agreement is commonly understood to be one with a term of less than one year."[16] Several of the opposing witnesses acknowledged this fact as well. In particular, Missouri Industrial Energy Consumers (MIEC) witness Maurice Brubaker testified that "I just know that in the market today, a lot of people talk of one year as being a dividing point for long-term versus short-term."[17] Consequently, unlike some of the other witnesses, Mr. Brubaker has chosen "not to make an issue" of the meaning of long-term in this proceeding.[18] Henry Fayne, MIEC's other witness, also testified that "I also understand having worked with traders that a year or more is often considered long-term."[19]

The power marketplace is not the only arena where the demarcation between short- and long-term power contracts is deemed to be one year. The Federal Energy Regulatory Commission (FERC), the agency with direct regulatory authority over the wholesale power markets (and the author of Form 1), recently stated that it treats power contracts of one year or longer as long-term consistent with its "longstanding practice." Specifically FERC stated:

> Additionally, the Commission at the time of enactment of EPAct 2005 had for years defined long-term contracts under the OATT as one year or longer. Similarly, the Commission has treated power

[15] Exh. 2 (Haro Surrebuttal), p. 6, ln. 8-9-p. 2, ln. 15-16.

[16] Exh. 7 (Highley Surrebuttal), p. 6, lns. 7-9.

[17] Exh. 2 (Haro Surrebuttal), p. 6, lns. 13-15.

[18] Tr. p. 501, lns. 14-18.

[19] Exh. 2 (Haro Surrebuttal), p. 6, lns. 15-17. It is noteworthy that Mr. Fayne admitted that he did not read the Wabash and AEP contracts prior to filing his direct testimony arguing that these contracts do not qualify as long-term partial requirements contracts. Tr. p. 393, lns. 14-16.

> sales with a contract term of greater than one year to be "long-term" for reporting purposes. [citations omitted]. ***We thus believe it is reasonable to use the convention of treating contracts of a year or more as "long-term" consistent with our longstanding practice.*** (emphasis added.)[20]

FERC has also cited the one-year demarcation between short- and long-term contracts in numerous other cases. For example, in the often-cited *Mountainview Power* case, the FERC stated:

> While we are conditionally accepting the PPA on the basis that it is consistent with the Commission's current policy, we will henceforth require that all affiliate ***long-term (one year or longer) power purchase agreements,*** whether at cost or market, be subject to conditions set forth in Edgar. (emphasis added).[21]

With respect to other types of contracts in the electric industry, the evidence also shows that the normal demarcation between short- and long-term contracts is one year. For example, one year is the demarcation between short- and long-term electric transmission contracts under the Midwest Independent Transmission System Operator, Inc. (MISO) tariff and the FERC Open Access Transmission Tariff (OATT). Moreover, under the very FAC tariff that is at issue in this case, the demarcation between electric *capacity* contracts that are included in the FAC and those that are excluded from the FAC is one year.[22] The fact that a one-year term is the demarcation for electric capacity contracts to be excluded from the FAC logically supports the view that a

[20] *Re: New PURPA 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* 119 FERC ¶ 61,305 (2007) footnote 17, pp. 18-19.

[21] *Re: Southern California Edison Company, On Behalf of Mountainview Power Company, LLC,* "Order Conditionally Accepting Proposed Rate Schedule and Revising Affiliate Policy," 106 FERC ¶61,183, ¶ 58 (2004). *See also In Re Wholesale Competition in Regions with Organized Electric Markets*, 73 FR 64100, ¶301 (FERC 2008).

[22] Exh. 2 (Haro Surrebuttal), p. 9, lns. 3-16.

one-year term is also the appropriate demarcation for requirements contracts to be excluded from the FAC.[23]

In other contexts, a one year term also is generally used as the demarcation between short- and long-term. For example, in developing a utility's capital structure, this Commission uses the demarcation of one year to separate short-term debt from long-term debt.[24] And as Commissioner Gunn pointed out during the hearing, the Internal Revenue Service uses the demarcation of one year to distinguish between long-term and short-term instruments for purposes of assigning tax benefits.[25]

In support of their position that one year is not the demarcation between short- and long-term power contracts, Staff witness Dana Eaves and Missouri Energy Group (MEG) witness Billie Sue LaConte rely primarily on the reporting instructions buried on page 310 of FERC Form 1. For financial and operating reporting purposes only, the FERC Form 1 instructions separate contracts into categories of "short-term" (less than one year), "intermediate term" (1-5 years) and "long-term" (greater than 5 years). The instructions for FERC Form 1 have been unchanged since at least 1990, which means that they pre-date the Energy Policy Act of 1992 and FERC Order 888, which together fundamentally changed the wholesale market for electricity in the United States by providing open access to electric transmission and encouraging the development of competitive markets. The FERC's obscure and out-of-date reporting instructions do not reflect the realities of today's electric market.[26] Moreover they do not even

[23] *See Daly v. Tax Comm'n.*, 120 S.W.2d 262, 267 (Mo. App. 2003) (whenever possible, all provisions of a regulation should be construed so that they are in harmony with one another).

[24] Exh. 5 (Weiss Surrebuttal), p. 7, ln. 19-p. 8, ln. 5.

[25] Tr. p. 202, ln. 18-p. 203, ln. 11.

[26] Ameren Missouri witness Haro testified that in the 12 years he has marketed and traded power he has never heard anyone use the phrase "intermediate term" to describe a contract, nor has he heard anyone reference FERC Form 1 in the context of negotiating wholesale power contracts. Exh. 2 (Haro Surrebuttal), p. 4, ln. 14-p. 6, ln. 9.

reflect the policy of the FERC itself, which has the "longstanding practice" of defining long-term power contracts as having terms of one year or longer. Below is a copy of page 310 of the FERC Form 1 which contains the instructions that Mr. Eaves and Ms. LaConte rely upon.[27]

[27] Exh. 2 (Haro surrebuttal), Sch. JH-S3.

An Original

SALES FOR RESALE (Account 447)

1. Report all sales for resale (i.e. sales to purchasers other than ultimate consumers transacted on a settlement basis other than power exchanges during the year. Do not report exchanges of electricity (i.e., transactions involving a balancing of debits and credits for energy, capacity, etc.) and any settlements for imbalanced exchanges on this schedule. Power exchanges must be reported on the Purchased Power schedule (pages 326-327).
2. Enter the name of the purchaser in column (a). Do not abbreviate or truncate the name or use acronyms. Explain in a footnote any ownership interest or affiliation the respondent has with the purchaser.
3. In column (b), enter a Statistical Classification Code based on the original contractual terms and conditions of the service as follows:

RQ - for requirements service. 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.

LF - for long-term service. "Long-term" means five years or longer and "firm" means that service cannot be interrupted for economic reasons and is intended to remain reliable even under adverse conditions (e.g., the supplier must attempt to buy emergency energy from third parties to maintain deliveries of LF services). This category should not be used for long-term firm service which meets the definition of RQ service. For all transactions identified as LF, provide in a footnote the termination date of the contract defined as the earliest date that either buyer or seller can unilaterally get out of the contract.

IF - for intermediate-term firm service. The same as LF service except that "intermediate-term" means longer than one year but less than five years.

SF - for short-term firm service. Use this category for all firm services where the duration of each period of commitment for service is one year or less.

LU - for long-term service from a designated generating unit. "Long-term" means five years or longer. The availability and reliability of service, aside from transmission constraints, must match the availability and reliability of the designated unit.

IU - for intermediate-term service from a designated generating unit. The same as LU service except that "intermediate-term" means longer than one year but less than five years.

Line No.	Name of Company or Public Authority (Footnote Affiliations)	Statistical Classification	FERC Rate Schedule or Tariff Number *	Actual Demand (MW) Average Monthly Billing Demand (MW)	Average Monthly NCP Demand	Average Monthly CP Demand
	(a)	(b)	(c)	(d)	(e)	(f)
1	Requirements Service					
2	———————					
3						
4	Arkansas Power & Light Co	RQ	W-3	27	27	25
5		RQ	89			
6	California, MO	RQ	46 *			
7	Centralia, MO	RQ	36 *			
8	Citizens Electric Corp.	RQ	37 *			
9	Clarksville, MO	RQ	38 *			
10	Farmington, MO	RQ	39 *			
11		RQ	92			
12	Fredericktown, MO	RQ	40 *			
13	Hannibal, MO	RQ	35 *			
14	Illinois Power Co.	RQ	100			
15	Jackson, MO	RQ	W-4			
16	Kahoka, MO	RQ	48 *	2	2	2
17	Kirkwood, MO	RQ	51 *			
18	Linneus, MO	RQ	43 *	1	1	1
19	Malden, MO	RQ	W-4			
20	Marceline, MO	RQ	50 *			
21						
22						

There is simply no reason to believe that the Company, the Commission or any other party intended for these obscure reporting definitions to be used to define the phrase "long-term" in the Company's FAC tariff. No one at Ameren Missouri ever mentioned FERC Form 1 when the tariff was proposed or was being discussed. None of the filings in Case No. ER-2008-0318, the case in which the tariff was approved, referenced these instructions. But most significantly, it would have been impossible for the parties to have intended the FERC Form 1 definition of "long-term" to apply to the Company's FAC tariff because all but one of the contracts Ameren Missouri has with municipalities – which all parties agree qualify as long-term requirements contracts – had terms of less than five years.[28] And although Staff argues that Ameren Missouri's "relationships" with its municipal customers have extended longer than five years, the evidence shows that the Company's relationships with AEP and Wabash have been many years long as well. In fact, the Company provided requirements service to Citizens, an affiliate of Wabash, as far back as the 1940's.[29] But the FAC tariff is not referring to anything as amorphous as Ameren Missouri's *relationships* with various customers; it refers to "sales," which are embodied in specific sales contracts, each of which has a prescribed term.

In short, the definition of "long-term" contained in the FERC Form 1 reporting instructions was never intended to be – nor can it be – the basis for the definition of that term in the Company's FAC tariff.

Unlike Mr. Eaves, Staff witness Lena Mantle takes a variety of inconsistent positions on what constitutes a long-term power sales contract. In Case No. ER-2010-0036, Ameren Missouri's last general rate proceeding, Ms. Mantle filed 5-6 pages of surrebuttal testimony

[28] The Company's contract with the City of Perry, Missouri has a term of more than 5 years. Contracts with the other municipal customers—Kirkwood (29 months), Marceline (36 months) and Kahoka (36 months)—are all significantly shorter than 5 years. Exh. 2 (Haro Surrebuttal), p. 10, lns. 14-16.

[29] Tr. p. 111, lns. 2-3.

specifically addressing the Wabash and AEP contracts that are at issue in this case.[30] At the hearing in that case, Ms. Mantle testified under oath that these contracts constitute bilateral, long-term, partial requirements contracts. The transcript in that case reflects the following exchange between Ms. Mantle and Ameren Missouri's attorney:

> Q: In your surrebuttal testimony on page 16, at line 7, you have just -- you discussed some bilateral contracts AmerenUE had with American Electric Power Company, Wabash Valley Power Cooperative that we entered into in the wake of the loss of the Noranda load. Do you see that discussion?
>
> A: Yes.
>
> Q: And my understanding is that these two contracts with AEP and Wabash Valley were bilateral, long-term partial requirements contracts. Will you agree with that?
>
> A: Yes.[31]

However, by the time the Staff filed its testimony in this case, Ms. Mantle's opinion appears to have changed. Although she did not file testimony of her own addressing this issue, she did not contradict Staff witness Eaves' reliance on the five-year definition of "long-term" contained in the FERC Form 1 instructions. At the time of Ms. Mantle's deposition, she offered a third opinion that the definition of long-term was evolving, and while long-term may have meant five years at one time, now three years was about the longest power sale contract she had seen.[32] During cross-examination from the Company, Ms. Mantle agreed that "around three years" was the minimum term that an agreement has to be in effect to qualify as a long-term requirement sale.[33] But then later she testified that four years could be an appropriate definition

[30] Tr. p. 383, lns. 12-15.

[31] Tr. p. 384, ln. 24-p. 385, ln. 10; Exh. No. 18.

[32] Exh. 2 (Haro Surrebuttal), p. 11, lns. 8-21.

[33] Tr. p. 377, ln. 11-p. 378, ln. 11. Coincidentally this period would arguably be just long enough to cover the Company's contracts with its municipal customers, but not quite long enough to cover the Wabash and AEP contracts.

of long-term in this case due to the requirement under the FAC to file a rate case every four years.[34]

The bottom line is that the one-year demarcation between long-term and short-term power contracts is consistently used in the marketplace, has consistently been used by Ameren Missouri in wholesale transactions, and is used by the FERC pursuant to its "longstanding practice." That commonly used one-year demarcation is clearly what was intended by the FAC tariff. Neither the obscure and outdated reporting instructions contained in FERC Form 1 as relied on by Mr. Eaves and Ms. LaConte, nor Ms. Mantle's shifting, subjective views about the evolution of the meaning of "long-term" are appropriate for use in interpreting Ameren Missouri's FAC tariff.

2. The Meaning of "Partial Requirements" as Used in Ameren Missouri's FAC Tariff

The evidence in this case also clearly demonstrates that the Wabash and AEP contracts are, in fact, partial requirements contracts based on the plain meaning of that phrase. The contracts themselves explicitly provide that the power supplied is to be used to meet load obligations of the users. The Wabash contract states: "The Buyer shall use the Product [electric capacity and energy] to meet the requirements of Citizens Electric Corporation in Missouri."[35] Similarly, the AEP contract states: "The Capacity and Energy provided by AmerenUE herein will enable AEP to partially meet load serving requirements," and the "Trade Type" listed in the contract is "Physical Capacity and associated Energy (Partial Requirements—baseload)."[36] Moreover, Mr. Haro, the Ameren Missouri employee who negotiated these contracts, testified

[34] Tr. p. 423, lns. 2-11.

[35] Exh. 2 (Haro Surrebuttal), Sch. JH-S2, p. 2.

[36] *Id.*, Sch. JH-S1 last page.

that the parties specifically agreed that the contracts would be partial requirements contracts during their negotiations.[37]

The evidence also shows that these two contracts are *in substance* partial requirements contracts, matching the intent of the parties as expressed during the negotiations as well as the words in the contracts themselves. Mr. Haro, who, again, has over a decade of experience in the wholesale power markets, testified that a partial requirements sale is simply "an agreement where the seller provides resources sufficient to meet part of the purchasing entity's load obligation during the term of the agreement."[38] He also stated that the Wabash and AEP contracts fall within the commonly understood meaning of a "partial requirements sale," and reflect how the Company has consistently used that phrase in connection with its activities related to wholesale power marketing.[39]

Mr. Haro also cited industry definitions, including the Edison Electric Institute (EEI) *Glossary of Industry Terms,* which defines "Partial Requirements" as

> a wholesale customer who purchases, or is committed to purchase, only a portion of its electric power generation need from a particular entity. There often is a specified contractual ceiling on the amount of power that a partial requirements customer can take from the entity. In contrast, a 'requirements' or 'full requirements' customer is committed to purchase all of its needs from a single entity and generally would not have a ceiling on the amount of power it can take.[40]

In addition, Mr. Haro cited the North American Energy Standards Board (NAESB) *Wholesale Electric Quadrant Glossary*, which defines "Partial Requirements" as "a sale of power to a

[37] Tr. p. 52, lns. 7-24.

[38] Exh. 2 (Haro Surrebuttal), p. 2, lns. 1-3.

[39] *Id.*, p. 2, lns. 18-21.

[40] *Id.*, p.12, ln. 17-p.13, ln. 1. See also Sch. JH-S5. It is noteworthy that MIEC witness Brubaker cites the EEI definition of "Requirements Service" in his direct testimony, but ignores this EEI definition of "Partial Requirements Service."

purchaser in which the seller pledges to meet a specified part of the purchaser's requirement."[41] Finally, Mr. Haro cites dictionary definitions of the words "partial" and "requirement" to show that these definitions are consistent with the plain meaning of the phrase "partial requirements." In Webster's Ninth New Collegiate Dictionary the word "partial" is defined as "of or relating to part rather than the whole; not general or total," and the word "requirement" is defined as "something required; something wanted or needed; necessity; something essential to the existence or occurrence of something else."[42] All of these definitions support the fact that the Wabash and AEP contracts are in fact partial requirements contracts.

Mr. Highley, the executive from Associated, also testified that based on his 27 years of experience in the wholesale markets the Wabash and AEP contracts qualify as partial requirements contracts. He stated: "[B]oth contracts constitute partial requirements contracts because they provide both the capacity and energy necessary to meet a portion of the requirements of the counterparties—AEP on its own behalf, and Wabash acting on behalf of Citizens Electric Corporation."[43]

Several of the witnesses representing the opposing parties also provided testimony that supports the position that the Wabash and AEP contracts are partial requirements contracts. Ms. Mantle testified at the hearing that her view was that partial requirements sales "can mean fulfilling part of the purchaser's requirements, not necessarily fulfilling all their needs."[44] She further testified that her definition of partial requirements is based on the plain meaning of the

[41] Exh. 2 (Haro Surrebuttal), p. 13, lns. 1-4; see also Sch. JH-S5.

[42] Exh. 2 (Haro Surrebuttal), p. 13, lns. 6-11.

[43] Exh. 7 (Highley Surrebuttal), p. 5, lns. 13-17.

[44] Tr. p. 380, lns. 3-7.

words in the phrase.[45] Finally, she admitted that the Wabash and AEP contracts qualify as partial requirements contracts:

> Q. And isn't it true that the contracts with AEP and Wabash are also partial requirements contracts under your definition because Ameren Missouri is fulfilling some but not all of their [sic] requirements of AEP and Wabash?
>
> A. That is correct.[46]

MIEC witnesses Brubaker and Fayne also provide testimony that supports the conclusion that the Wabash and AEP contracts are partial requirements sales. When asked what the distinction between full and partial requirements service was, Mr. Brubaker stated: "In general, full requirements service means that the selling party is the sole source of the generation to the seller or to the purchaser. Partial requirements would mean that there is a division of responsibility for generation. It could be either that the purchasing party has some of its own generation or that it has supply contracts with more than one seller." Mr. Brubaker also characterized a partial requirements contract as "something that's more bare-bones where the utility or the customer may purchase a block of power and then do hourly denominations [sic] for the difference."[47]

Mr. Fayne explained his understanding of the term partial requirements in his deposition. He defined partial requirements sales as "sales that are made to another entity that only meet part of that entity's requirements." He also stated that "[r]equirement sales are any sales to either an end user, i.e. to retail customers, or to a wholesale purchaser who will resell that power or has an obligation for that power to its own customers. That is what requirements means. It's an obligation to meet some—it is a requirement to meet some obligation of load." He further stated

[45] Tr. p. 380, lns. 22-25.

[46] Tr. p. 380, ln. 13.

[47] Exh. 2 (Haro Surrebuttal), p. 14, ln. 23-p. 15, ln. 8.

that a requirements sale "could also be a sale to AEP for six months helping them meet some of their pressure [sic] requirements." Finally, Mr. Fayne admitted that "any transaction to a load-serving entity is at least a partial requirements contract regardless of duration."[48]

In an attempt to counter this damaging testimony, which all but confirms that the Wabash and AEP contracts qualify as partial requirements sales, some of the parties fall back on the outdated reporting instructions found in the FERC Form 1. Those reporting instructions contain the following definition, which is relied on by Mr. Eaves, Mr. Brubaker and Ms. LaConte:

> 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 consumers.

There are a couple of points worth making about this definition. First, it is a definition of "requirements service" not "partial requirements sale," and it is the definition of the latter phrase that is at issue in this case. And that is an important distinction. As Mr. Brubaker points out in his direct testimony, EEI has adopted the FERC Form 1 definition of "requirements service."[49] But, as noted earlier in this brief, EEI has also adopted a definition of "Partial Requirements" that is much less restrictive and is completely consistent with the definitions of partial requirements supported by Mr. Haro, Mr. Highley, Ms. Mantle, and, for that matter, Mr. Brubaker and Mr. Fayne as well. Partial requirements are much different than "requirements service," and the Wabash and AEP contracts qualify as partial requirements sales.

Second, even if it were necessary for these contracts to satisfy the definition of "requirements service" from the FERC Form 1 reporting instructions, the evidence indicates that they meet that definition. Mr. Haro testified that Ameren Missouri intended to provide the

[48] Exh. 2 (Haro Surrebuttal), p. 15, ln. 11-23.

[49] Exh. 14 (Brubaker Direct), p. 4, lns. 3-11.

service on an ongoing basis during the terms of the contracts,[50] and load associated with the Wabash and AEP contracts was projected in Ameren Missouri's system resource planning. Although it would have been impossible for Ameren Missouri to include the specific Wabash and AEP contracts in its February 2008 Integrated Resource Plan (IRP), which was filed more than a year before the Noranda load was lost, the evidence shows that Noranda's load was included in that IRP filing.[51] As Mr. Brubaker acknowledged, "whether that particular contract or even that particular customer's load appears in the latest IRP is not necessarily determinative as to whether it is a requirements contract" because "it's a dynamic world that we live in."[52] Ameren Missouri agrees. The "dynamic world that we live in" led Ameren Missouri to replace the Noranda load, which was included in the IRP, with the Wabash and AEP requirements. The fact that the Wabash and AEP contracts were executed after the IRP was filed (which meant they could not possibly have been reflected in the IRP), is of no consequence, since the Noranda loads were included in that filing.

Moreover, as Mr. Haro pointed out, the Company's IRP filing is not the embodiment of system resource planning, but only represents a snapshot of Ameren Missouri's system resource plan at a point in time. He testified that the Wabash and AEP loads were important considerations in the Company's ongoing resource planning process, including its monthly "Module E" filings with MISO in which the Company is required to demonstrate that it has sufficient "Planning Resource Credits" to cover its firm demand (load and sales) plus an applicable reserve margin. In addition, Ameren Missouri included these loads in its annual and

[50] Tr. p. 68, lns. 7-13.

[51] Tr. p. 376, ln. 23-p. 377, ln. 1. It is worth noting that Ameren Missouri's municipal contract loads were not projected in the February 2008 IRP, because all of the then-existing municipal contracts were schedule to expire at the end of the year. So those loads were arguably not included in the IRP planning process at all, even though the customers' names were mentioned in the IRP.

[52] Exh. 2 (Haro surrebuttal), p. 18, lns. 15-22.

monthly capacity position calculations, load forecasting, fuel budgeting and risk management position calculations, which are all elements of system resource planning.[53] In short, the Wabash and AEP loads were fully included in all system resource planning processes once they were in effect.

The Wabash and AEP contracts also have reliability requirements that are the same as, or second only to, Ameren Missouri's service requirements for its own customers. Paragraph 19 of the Wabash contract specifically states:

> Seller agrees that it will consider Buyer equivalent to Seller's native load customers and agrees that the Product that it will provide to Buyer, pursuant to this Agreement, will be System Firm power with the same quality as the electric power that Seller provides to its firm retail customers.

Similarly, the AEP contract provides for the sale of "Firm LD Capacity as that term is defined in the Edison Electric Institute MISO Module E Capacity Transaction Confirmation, Version 1.0—October 20, 2008 incorporated herein by this reference and associated firm LD Energy." Mr. Haro testified that these provisions mean that the level of service required by the Wabash and AEP agreements is the same as, or second only to, the service provided to Ameren Missouri's own customers.[54]

MIEC witness Brubaker argues that the Wabash and AEP contracts cannot qualify as "requirements service" under the FERC Form 1 definition because under each of those contracts the buyers, and not Ameren Missouri, is responsible for paying various regional transmission organization (RTO) and OATT charges. Mr. Brubaker points out that the contracts with Wabash and AEP provide only capacity and energy, leaving it to the buyer to arrange transmission and to

[53] Exh. 2 (Haro Surrebuttal), p. 19, ln. 22-p. 20, ln. 12.

[54] Exh. 2 (Haro Surrebuttal), p. 20, ln. 13-p. 21, ln. 2; see also Sch. JH-S1, last page, and Sch. JH-S2, p. 8.

pay for transmission and for all other services required to accept the power from the seller.[55] Mr. Brubaker's points would be a relevant consideration if Ameren Missouri was alleging that the Wabash and AEP were *full* requirements contracts. Under such contracts the seller is responsible for all services and costs that are ancillary to the power being provided. But the Company is clearly not providing Wabash and AEP full requirements service or with the full gamut of services that go along with such service. However, Ameren Missouri is providing both capacity and energy under each of the contracts, and those are arguably the most important components of electric service. As a consequence, the contracts are properly classified as *partial* requirements contracts even though the Company is not also providing all of the ancillary services referenced in Mr. Brubaker's testimony.

Some of the witnesses also have argued that the Wabash and AEP contracts cannot qualify as requirements sales because they were not reported by the Company as "RQ" in its FERC Form 1 reports. RQ is the abbreviation for "requirements service" in the FERC Form 1. This argument is nothing more than a "strawman" because, as noted previously, the definitions included in the instructions to the FERC Form 1 have nothing to do with Ameren Missouri's FAC tariff and are not dispositive of any of the terms or phrases used in that tariff. In addition, Mr. Haro testified that the Company's decision to report contracts as RQ was based on a simple litmus test employed by the accountants responsible for filling out the form. If the name of a buyer appeared in the last IRP filing the contract was reported as RQ. If the name of the buyer did not appear in the last IRP, the contract would not be reported as RQ.[56] This simple litmus test, while adequate to ensure consistency in reporting data from period to period, does not consider requirements service contracts that may have been executed after an IRP is filed.

[55] Exh. 14 (Brubaker Direct), p. 4, ln. 17-p. 5, ln. 13.

[56] Tr. p. 84, lns. 2-23.

Based on the foregoing, and notwithstanding the way they are reported in Ameren Missouri's FERC Form 1 report, the Wabash and AEP contracts qualify as requirements contracts under the Company's FAC tariff, as Mr. Haro, Mr. Highley and even Ms. Mantle have testified.

B. The FAC Tariff Does Not Limit Excluded Off-System Sales to Sales to Municipalities.

Staff witness Mantle argues that at one of the technical conferences held in Case No. ER-2008-0318 someone from the Company told her that the exclusion from the FAC calculation for long-term full and partial requirements sales was implicitly limited to sales to municipal customers, even though that limitation is not reflected in the tariff language. However, at the hearing it was obvious that Ms. Mantle's recollection of this alleged conversation from 2-3 years ago was anything but clear. She acknowledged that she did not know who the exact person was who had made that representation to her; she acknowledged she never asked for confirmation in writing from the Company about the alleged clarification; she never asked a data request related to the clarification; she never asked whether the person who provided this clarification had authority to bind the Company; she did not ask the Company to amend its tariff to reflect this clarification in Case No. ER-2008-0318; and she has been unable to find any notes that reflect any conversation with the Company about this subject.[57]

In response to Ms. Mantle's testimony, Ameren Missouri witness Gary Weiss testified that he had attended the majority of meetings between the Ameren Missouri and the Staff concerning the FAC tariff and he does not recall the statement to which Ms. Mantle refers. In addition, he stated that he checked with the other Ameren Missouri employees who Ms. Mantle identified as possibly being the source of the alleged statement — specifically, Steve Kidwell

[57] Tr. p. 373, ln. 15-p. 375, ln. 5.

and Wil Cooper — and they also do not recall making the statement or hearing the statement being made by someone else. Mr. Weiss stated that it may have been possible that someone told Ms. Mantle that the current municipal contracts are *examples* of contracts that would be covered by the long-term partial requirements sales exemption, but no employee of the Company ever would have represented that the municipal contracts are the *only* contracts that qualify for that exemption.[58]

In addition, Mr. Haro testified that such a limitation to the tariff language would not have made sense. He noted that Ameren Missouri has a long history of entering into long-term partial requirements contracts with electric cooperatives, such as Citizens, and with investor-owned utilities, such as Arkansas Power & Light Company and Illinois Power Company. Given that history and the prospect that Ameren Missouri could enter into similar long-term requirements contracts with cooperatives or other utilities in the future, it would have made no sense for the Company to have agreed to limit the exclusion included in its FAC to contracts with municipalities.[59]

In the final analysis, there is simply no justification to read into Ameren Missouri's FAC tariff any limitation that isn't there based solely on Ms. Mantle's unsupported – and most likely faulty – recollection from several years ago. As Mr. Weiss testified: "If it had been the intent of the Ameren Missouri FAC Tariff to restrict long-term full and partial requirements sales to the current Ameren Missouri municipal customers, the FAC tariff would have been drafted that way."[60] But even if Ms. Mantle's recollection were correct, tariffs have to mean what they say so that the Commission, customers, the Company, the Staff and other stakeholders can know

[58] Exh. 5 (Weiss surrebuttal), p. 6, ln. 10-p. 7, ln. 2.

[59] Exh. 2 (Haro surrebuttal), p. 24, ln. 21- p. 25, ln. 5.

[60] Exh. 5 (Weiss surrebuttal), p. 6, lns. 16-19.

how they apply now and in the future. They cannot be subject to unwritten amendments or limitations based on undocumented discussions between an individual Staff member and an individual Company employee. Staff members and Company representatives eventually move on, and will not always be around to explain any unwritten amendments to the tariff. Consequently, Ms. Mantle's attempt to read any limitation into the FAC tariff which is not reflected in the tariff language must be rejected.

C. Principles of Tariff Construction Dictate that the Term "OSSR" (Off-System Sales Revenues) in Ameren Missouri's FAC Tariff Should Not Be Interpreted Using Definitions Found in FERC Form 1.

1. The Legal Standards Governing Tariff Interpretation

The standards for construction of Commission-approved tariffs are essentially identical to those that have been established by Missouri courts for review and construction of statutes duly passed by the legislature. In its *Report and Order* issued in Case No. GA-2007-0289, *In re Application of Missouri Gas Energy,* (February 24, 2008), the Commission summarized the process as follows:

> A tariff is a document which lists a public utility [sic] services and the rates for those services." [citing *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W. 2d 569, 575 (Mo. App. 1997)] There can be no dispute that the Commission has the power to approve [utility] tariffs, and once the Commission approves a tariff, it becomes Missouri law. ***Thus, . . . tariffs have "the same force and effect as a statute directly prescribed by the legislature."*** [citing *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n.,* 156 S.W.3d 513, 521 (Mo. App. 2005). ***Tariffs are interpreted in the same manner as state statutes. Consequently, Missouri courts would interpret Commission approved tariffs by trying to "ascertain the intent of [the company and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.***

Id. at 60-61. (emphasis added).

Thus, the primary duty of the Commission in interpreting a tariff is to discern the intent of both the party putting forth the tariff language and of the Commission when it approved the tariff. To accomplish this objective the Commission must give the words of the tariff their "plain and ordinary meaning when possible." *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n.,* 156 S.W.2d 513, 521 (Mo. App. 2005). If there is a question regarding the "plain meaning" of a word used in a tariff that is not otherwise defined, the law requires that the first place the Commission look to find the meaning is in the dictionary. *See Collins v. Dep't. of Soc. Servs.*, 141 S.W.2d 193, 201 (Mo App 2004). In some instances the Commission may go beyond the plain and ordinary meaning of the language used in the tariff, but only when the meaning of that language is ambiguous or would lead to an illogical result that would defeat the purpose of the tariff. *Id. See also Wolff Shoe Co. v. Dir. of Revenue,* 762 S.W.2d 29, 31 (Mo. banc 1988) and *State ex rel. Maryland Heights Fire Protection Dist. v. Campbell,* 736 S.W.2d 383, 387 (Mo. banc 1987).

Applicable law also requires that a tariff be interpreted in a manner that is consistent with the statute it was intended to implement. *See Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 201 (Mo banc 1972). Because the tariff at issue in this case is an FAC, that means that the language of that tariff must be interpreted in a way that is consistent with Section 386.266, RSMo, the statute that authorizes the Commission to approve FACs for Missouri electric utilities.[61]

The definition of "OSSR" (Off-System Sales Revenues) that is at issue in this case was drafted by Ameren Missouri as part of the FAC that the Company proposed in tariff sheets filed in April 2008 in Case No. ER-2008-0318. And the record is clear that *not one word* of that

[61] Section 386.266 (4)(1) RSMo. provides that an FAC must be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity."

definition was changed from the time of the Company's original filing until tariff sheets approved by the Commission went into effect on March 1, 2009.[62] Consequently, to determine the meaning of that definition the Commission must, as a matter of law, begin with an inquiry into what Ameren Missouri intended when it proposed the definition and what the Commission intended when it approved it.

2. Ameren Missouri's Definition of "OSSR"

The FAC that Ameren Missouri proposed in Case No. ER-2008-0318 was presented and explained in the pre-filed direct testimony of Martin J. Lyons, Jr. In his testimony Mr. Lyons explained how the Company intended to define off-system sales revenues as used in the formula for calculating net fuel and purchased power costs to be recovered through the FAC.[63] For example, in response to the question "What costs are included in the FAC?" Mr. Lyons responded that "the FAC would include all fuel and purchased power costs ***incurred to support sales to retail customers and that portion of off-system sales allocated to Missouri retail customers.***"[64] (emphasis added) Additional information regarding the types of off-system sales revenues that would – and would not – be flowed-through the FAC to reduce excess fuel and purchased power costs is found in Mr. Lyons' Schedule MJL-E4, which contains information required by 4 CSR 240-3.161(2). Page 7 of that schedule contains a section that both identifies and describes each category of revenues to be considered in determining net energy costs under the proposed FAC. One such category, off-system sales, is described as follows:

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[62] *Compare* the definition of "OSSR" that appears on Schedule MJL-E1-3 of the prefiled direct testimony of Martin J. Lyons in Case No. ER-2008-0318 *with* the definition of that term found in tariff sheet approved by the Commission in that case, which is included as Schedule DEE-5-3 of Exhibit 11.

[63] The Commission took administrative notice of the entirety of Mr. Lyons' pre-filed direct testimony in Case No. ER-2008-0318. Tr. 468, lns. 4-12.

[64] Pre-filed direct testimony of Martin J. Lyons, Jr. in Case No. ER-2008-0318, p. 4, ln. 21-p. 5, ln. 1.

> All sales transactions (excluding retail sales or long-term full or partial requirements sales to non-jurisdictional customers) that are associated with (1) AmerenUE Missouri jurisdictional generating units and (2) power purchases made to serve Missouri retail including any associated transmission.

These excerpts from Mr. Lyons' testimony reveal two things about the meaning Ameren Missouri intended for the definition of "OSSR" that the Company proposed and the Commission ultimately adopted. First, the definition excludes sales to Missouri jurisdictional customers and off-system sales that are not allocated to the Missouri retail jurisdiction. Second, the definition excluded *all* long-term full or partial requirements sales to non-jurisdictional customers, not just those to certain types of wholesale customers such as municipalities.

One additional thing is clear as well: Ameren Missouri never intended that definitions buried in the FERC Form 1 would – or should – be used to define or interpret any of the provisions of the Company's proposed FAC, including the definition of "OSSR." Mr. Lyons does not mention or discuss anywhere in his testimony or supporting exhibits either the FERC Form 1 or the definitions contained in its instructions. Moreover, there is nothing in the language of the FAC tariff itself that states, or even suggests, any connection between the terms used in that tariff and the definitions in the FERC Form 1.

But that's not surprising because the purpose of Ameren Missouri's FAC tariff and the definitions contained therein is completely different from the purpose of the FERC Form 1 and its definitions. As previously explained, the FERC Form 1 is a form used by FERC-jurisdictional electric utilities subject to report annual financial and operating data, and the definitions included in that form, which were developed more than twenty years ago, are simply conventions whose sole purpose is to ensure that the data are reported in a consistent manner by all utilities. In contrast, the purpose of the FAC tariff, and the definitions included there, is to

allow Ameren Missouri to recover excess fuel and purchased power costs, or flow through reductions in such costs, between rate cases in a manner that is consistent with Section 386.266, RSMo, and other applicable law. It would be unreasonable to expect the definitions used in two document with such diverse and unrelated purposes to be used – or be usable – interchangeably with one another.

As noted above, the evidence in this case clearly establishes that not one word of the definition of "OSSR" found in Ameren Missouri's FAC tariff changed from the time it was first proposed in April 2008 until it was approved by the Commission and became effective on March 1, 2009.[65] Yet none of the parties adverse to the Company saw fit to ask what the Company meant by the phrase "long-term full or partial requirements sales" or any of the other terms used in the definition of "OSSR." MEIC's witness Henry Fayne and MEG's witness Billie Sue LaConte each testified that a good way to clear up questions regarding terms used in a document drafted by someone else is to ask the drafter what he or she meant.[66] Yet neither of those witnesses spoke to anyone at Ameren Missouri to determine what the Company meant when it drafted that phrase.[67] And although Staff's witness Dana Eaves asked two other Staff members for their interpretations of what constitutes a long-term partial requirements contract,[68] he, too, never contacted anyone at Ameren Missouri to determine what the Company meant when it drafted the definition of "OSSR" and included that definition in the FAC.[69]

[65] *Compare* the definition of "OSSR" that appears on Schedule MJL-E1-3, which is appended to Mr. Lyons' pre-filed direct testimony in ER-2008-0318 *with* the definition of that term found in Schedule DEE-5-3 of Exhibit 11 in the present case.

[66] Tr. p. 442, ln. 24-p. 443, ln. 16; Tr. p. 487, ln. 20-p. 489, ln. 11.

[67] *Id.*

[68] Tr. p. 326, ln. 23-p. 328, ln. 8.

[69] Tr. p. 328, lns. 9-14.

Had any of those witnesses asked, this is what they would have been told: Lynn Barnes, the Company's Vice President Business Planning and Controller, would have told them that the phrase "long-term full or partial requirements sales" used in the tariff definition of "OSSR" "was never intended to be interpreted using obscure reporting instructions buried in the FERC's Form 1 report."[70] And Mr. Haro would have told them that: (1) that the Company intended that definitions commonly used in the marketplace apply to the words and phrases used in the definition of "OSSR"; (2) that the definition of terms such as "long-term" and "requirements sales" as used in the power markets differ significantly from the way those terms are defined in the FERC Form 1; and (3) that no one who participates in the electric power markets relies on the FERC Form 1 to define or govern transactions in those markets.[71]

These explanations of Ameren Missouri's intended mean of "OSSR" are fully consistent with Mr. Lyons' testimony in Case No. ER-2008-0218. They also are consistent with the plain meanings of most, if not all, of the key terms used in that definition. As Mr. Haro pointed out in his surrebuttal testimony in this case, Ameren Missouri's use of the terms "partial" and "requirements" comports not only with the way those terms are used in the wholesale energy markets but also with their dictionary definitions.[72] And although there may be no dictionary definition of the phrase "long-term" found in the Company's FAC tariff, Ameren Missouri's use of one year as the demarcation point is consistent with the way that phrase is used and interpreted in numerous regulatory contexts, including FERC's longstanding practice,[73] MISO's

[70] Exh. 4 (Barnes Direct), p. 5, lns. 21-22.

[71] Exh. 2 (Haro Surrebuttal), p. 4, lns. 16-19.

[72] *Id*., p. 13, lns. 6-13.

[73] *Id.*, p. 7, lns. 5-16. *See also In Re Wholesale Competition in Regions with Organized Electric Markets*, 73 FR 64100, ¶301 (FERC 2008); *Re: Southern California Edison Co., on Behalf of Mountainview Power Co.*, 106 FERC ¶61,183 (2004).

Open Access Transmission Tariff,[74] and this Commission's treatment of electric capacity contracts and debt instruments.[75]

3. The Other Parties' Definition of "OSSR"

It's all but impossible to determine from the testimony filed in this case how or why Staff and the other parties adverse to Ameren Missouri decided that obscure, arcane, and outdated definitions -- definitions that are buried deep in the FERC Form 1 reporting instructions and that have nothing to do with the purposes of the FAC – should be used to interpret terms used in the Company's FAC tariff. None of the witnesses ever specifically says how they reached that conclusion or what led them to it. Instead, each witness appears to have come to that conclusion in something akin to a spontaneous revelation. Certainly there is nothing in the language of the Company's FAC tariff that links it in any way to the FERC Form 1. And there is no evidence that anyone from Ameren Missouri ever stated, or even suggested, that the FERC Form 1 definitions should apply.

Staff witness Dana Eaves offers no explanation in his pre-filed testimony as to what caused him to conclude that the definitions used in the FERC Form 1 should apply. He simply states that because Ameren Missouri's FAC tariff did not contain specific definitions for all terms used in the definition of "OSSR" he decided to turn to the FERC Form 1 "for guidance in defining the appropriate definition."[76] Under cross-examination Mr. Eaves admitted that although he never sought clarification from the Company he asked two Staff members about certain definitions used in the FAC tariff. He first asked John Rogers, the Manager of the Commission's Energy Resources Analysis Department, but Mr. Rogers stated that he didn't

[74] Exh. 2 (Haro Surrebuttal), p.9, lns. 4-7.

[75] Exh. 5 (Weiss Surrebuttal), p. 8, lns. 1-5.

[76] Exh. 11 (Eaves Direct/Rebuttal), p. 10, lns. 15-17.

know how the tariff terms should be defined. Mr. Eaves next asked Ms. Mantle, and although she told him that she did not believe either the Wabash or AEP contracts were long-term or partial requirements contracts, she never explained how or why she reached that conclusion.

Whatever caused Staff and the other adverse witnesses to reach their conclusions one thing is certain: the idea that the FERC Form 1 definitions govern the interpretation of Ameren Missouri's FAC tariff did not emerge until well after August 31, 2010, the date on which Staff filed its report (Prudence Report) alleging that the Company acted imprudently when it excluded revenues associated with the Wabash and AEP contracts from the formula used to determine net fuel and purchased power costs recoverable through Ameren Missouri's FAC. That is clear for at least two reasons. First, there is no reference anywhere in the Staff's Prudence Report to either the FERC Form 1, generally, or to the definitions found therein. Second, as stated in Staff's Prudence Report, Staff did not conclude that Ameren Missouri acted imprudently because the Company used the wrong definitions to interpret its FAC tariff; instead, the conclusion that Ameren Missouri acted imprudently was based on Staff's belief that the Company's actions were inconsistent with the Commission's decision denying the Company's *Application for Rehearing and Motion for Expedited Treatment* in Case No. ER-2008-0318. Subpart H of Staff's Prudence Report states Staff's conclusion, and the basis for that conclusion as follows:

> Given the Commission's February 19, 2010 decision to not modify AmerenUE's FAC due to the loss of Noranda's load, it would be imprudent not to treat the revenues from the sales of energy that became available due to the loss of the Noranda load as off-system sales revenues under AmerenUE's FAC. Therefore, AmerenUE was imprudent in not including the costs and revenues associated with the AEP and WVPS contract in the FPA calculations for accumulation periods 1 and 2.[77]

[77] Exh. 8 (Staff's Prudence Report), p. 18.

The Prudence Report never states – or even suggests – that Staff believed key terms in Ameren Missouri's definition of "OSSR" should be interpreted based on the FERC Form 1. That claim was first made on November 24, 2010, a date almost three months after the Prudence Report, when Staff's witness Dana Eaves filed his direct/rebuttal testimony in this case.

Additional evidence that Staff's finding of imprudence was based primarily, if not exclusively, on the Order on Rehearing can be found in the list of documents that Mr. Eaves reviewed prior to drafting Section H of the Staff Report. When listing the documents he reviewed prior to, and as the basis for, his recommendation, Mr. Eaves listed only some monthly reports and monthly outage data submitted by Ameren Missouri, responses to two data requests submitted by Ameren Missouri, Ameren Missouri's *Application for Rehearing and Motion for Expedited Treatment* filed in Case No. ER-2008-0318 (Application for Rehearing), and the Commission's Order on Rehearing in that case. But Mr. Eaves did not list – and therefore did not review – any of the following documents: the Wabash and AEP contracts, Ameren Missouri's FAC tariff, the FERC Form 1, or any other document. In other words, it is clear from the documents that Mr. Eaves reviewed that the primary reason for his disallowance reflected in the Staff Report was the Commission's Order on Rehearing in Case No. ER-2008-0318.

These facts strongly suggest two things about Staff's argument. First, Staff's contention that Ameren Missouri acted imprudently appears to have been motivated primarily by a desire to preserve or effectuate what Staff perceived to have been the Commission's intent when it denied the Company's application for rehearing in Case No. ER-2008-0318. Staff interpreted the Commission's action as a decision to deny Ameren any opportunity to recover any of the revenues the Company lost due to the Noranda outage.[78] Second, Staff chose to rely on the

[78] *See* Exh. 8 (Staff's Prudence Report), p. 18.

definitions in the FERC Form 1 not because they were intended by Ameren Missouri or relate in any way to the purposes for which the FAC was approved but, instead, because those definitions were the only ones available that would allow Staff to argue that the definition of "OSSR" included in Ameren Missouri's FAC tariff barred the Company from excluding from the calculation of off-system sales the revenues from the Wabash and AEP contracts. Thus, Staff's contention that the FERC Form 1 definitions should apply appears to have been motivated more by convenience than by conviction; Staff has provided no evidence that suggests that the tariff was intended by Ameren Missouri, the Commission, or any other party to be interpreted in that way at the time it was approved.

D. Ameren Missouri's Authorized Return On Equity Does Not Compensate It for the Risk of Loss of the Noranda Load.

Staff witness Eaves testified that, notwithstanding other considerations, "[l]oss of customer load is part of the risk included in shareholders [sic] return on equity (ROE)."[79] However, this is simply not true when the load in question is as large in proportion to total load, and as important as the Noranda load is, and was, to Ameren Missouri. The loss of one customer will have a much greater impact on a company that has only ten customers than it will to a company with a million customers. Yet in order accept Mr. Eave's premise, one must be willing to accept that the risk profiles of both those companies is exactly the same.

In addition, although the Company's ROE does compensate it for the normal fluctuations and variations in load, the 2009 ice storm and the resulting loss of Noranda's load is an extremely unusual event that would not normally be considered when a utility's ROE is set. The Commission has recognized the extraordinary nature of large storms by routinely allowing

[79] Exh. 11 (Eaves Direct/Rebuttal) p. 7, ln. 21-p. 8, ln. 2.

electric utilities to amortize the costs associated with such events, and not requiring the utilities to absorb those costs on the grounds that they are compensated for such risks through their returns on equity. The ice storm that led to the loss of Noranda was such a storm, and Ameren Missouri was allowed to amortize its recovery costs.

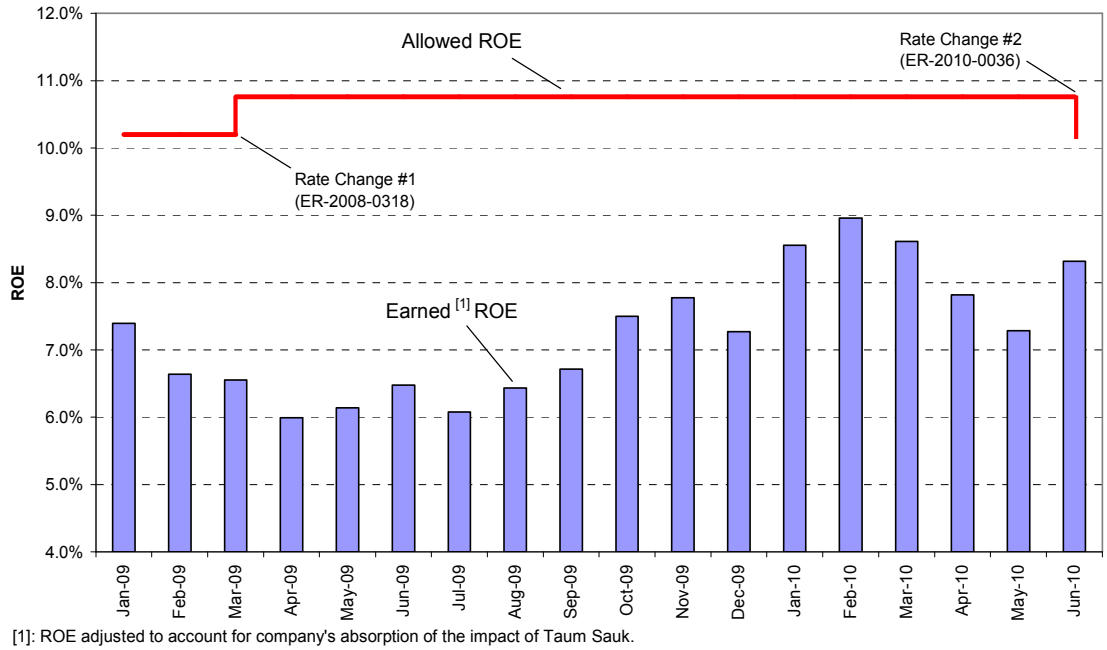
Based on the way the Commission has traditionally treated costs associated with extraordinary storms, it makes no sense for Staff witness Eaves to contend that the ROE that was set in Case No. ER-2008-0318 compensated the Company for the storm-related loss of the Noranda load. Mr. Eaves is an accountant and therefore is totally unqualified to render an opinion as to what types of risks are considered when a utility's ROE is established. When asked during cross-examination about the basis for his contention, Mr. Eaves testified that he relied on the filed testimony of Staff witness David Murray in Case No. ER-2008-0318. Unfortunately for Mr. Eaves, it was pointed out that Mr. Murray did not testify about Ameren Missouri's ROE in that case.[80]

To the extent Ameren Missouri's ROE is relevant at all to this discussion, Ameren Missouri witness Lynn Barnes provided evidence that the Company earned significantly below its authorized ROE during the eighteen-month period from the time that the Noranda plant load was lost in January, 2009, until new rates were set by the Commission in Case No. ER-2010-0036. In support of her testimony, Ms Barnes provided the following graph that compares a rolling 12-month average of Ameren Missouri's earned vs. allowed returns for that period:[81]

[80] Tr. p. 333, lns. 5-14.

[81] Exh. 3 (Barnes Direct), p. 9.

Comparison of AmerenUE Earned[1] ROEs and Allowed ROEs
(With Two Rate Changes)



[1]: ROE adjusted to account for company's absorption of the impact of Taum Sauk.

If Ameren Missouri had not entered into long-term partial requirements contracts with Wabash and AEP to replace the lost Noranda load, or if the Company had included the revenues associated with those contracts in the calculation used to determine net fuel and purchased power costs recoverable through the FAC, Ameren Missouri's financial performance would have been significantly worse.[82]

E. The Commission's Order on Rehearing in Case No. ER-2008-0318 Is Not Relevant to This Case

Some parties have suggested that the Commission's February 19, 2010, Order Denying AmerenUE's Application for Rehearing in Case No. ER-2008-0318 (Order on Rehearing) is relevant, or perhaps even dispositive of the issues raised in this proceeding. For example, as was

[82] Exh. 3 (Barnes Direct) p. 8, ln. 21-p. 9, ln. 7.

previously mentioned, Staff's Prudence Report relies exclusively on that Order as the basis for Staff's contention that Ameren Missouri acted imprudently in the way it administered its FAC.[83]

However, a review of the Commission's *Order Denying AmerenUE's Application Rehearing* shows that it is completely irrelevant to this case, and Staff's reliance on the order is completely misplaced. In its application for rehearing, the Company requested that the Commission substantially modify the FAC that had just been approved to permit Ameren Missouri to retain off-system sales revenues in an amount sufficient to recoup the revenue it expected to lose as a result of the damage to Noranda. The Commission denied the Company's request, stating "[i]f the Commission were to grant AmerenUE's application for rehearing it would have to set aside the approved stipulation and agreement regarding the fuel adjustment clause, reopen the record to take evidence on the appropriateness of the proposed change, and make a decision before the March 1, 2009 operation of law date. Such action is obviously impossible."[84]

Following that order, Ameren Missouri had two options: (1) it could find a way, within the provisions of its FAC tariff, to replace the revenues lost due to the Noranda outage through exempt off-system sales, or (2) it could do nothing and simply absorb the Noranda loss and thereby permit the Company's earnings to be further eroded. Acting as any prudent business would do, the Company's management opted to pursue the first option, and it accomplished that objective by entering into long-term partial requirements sales contracts with Wabash and AEP. In this case Ameren Missouri is not asking the Commission to make any changes to the FAC tariff approved in Case No. ER-2008-0318. Instead, the Company is merely requesting that the

[83] Exh. 8 (Staff's Prudence Report), pp. 16-19.

[84] *Re: Union Electric Company d/b/a AmerenUE,* Case No. ER-2008-0318, *Order Denying AmerenUE's Application for Rehearing* (effective Feb. 19, 2009), p. 2.

FAC tariff be enforced according to its terms, and that revenues from qualifying long-term partial requirements contracts be excluded from the FAC calculation. Therefore, the Company's position is entirely consistent with both the Commission's Report and Order and the Order on Rehearing. To the extent that the Staff relies on the Order on Rehearing to support its finding of imprudence in this case, that reliance is unfounded and misplaced.

F. Ameren Missouri's Actions Were Not Imprudent.

This is a case where Staff contends that Ameren Missouri acted imprudently, and one very important consideration in evaluating that contention is whether the evidence supports a disallowance for imprudence under applicable Missouri law. The law governing prudence cases in Missouri was set out in *State ex rel. Associated Natural Gas Company v. Public Service Commission.*[85] In that case, the court of appeals said that in order to support a disallowance for imprudence the party alleging imprudence must show: (1) that the utility acted imprudently, and (2) that such imprudence resulted in harm to the utility's ratepayers.[86] In this case, neither showing has been made.

With regard to the first prong of the *Associated* test, the evidence establishes that Ameren Missouri acted reasonably and prudently given the circumstances it faced. As noted previously, when faced with a potentially catastrophic loss of load, Ameren Missouri took steps to replace that load with contracts that most closely mimicked the load that was lost. From an operational standpoint, the replacement Wabash and AEP contracts closely mimicked the lost Noranda load because they were long-term, firm, load-backed agreements for capacity and energy at a fixed price. From the standpoint of regulatory treatment, the contracts exactly mimicked the lost Noranda load because the revenues derived from those contracts were outside the FAC formula,

[85] 954 S.W.2d 520 (Mo. App. 1997).

[86] *Id.,* pp. 529-31.

just like the Noranda revenues would have been had the outage not occurred. The contracts with Wabash and AEP were not designed to provide Ameren Missouri with incremental earnings—they were simply designed to replace the Noranda load that was lost due to the ice storm. Mr. Haro testified as follows at the hearing in response to questions from Commissioner Gunn:

> Q. So as far as you know, these were one-time, one-year contracts?
>
> A. They were designed term-wise to mirror what we believed the Noranda loss was going to be as best we could.
>
> Q. And that was the sole purpose of entering into these contracts?
>
> A. Yes.[87]

Ameren Missouri's action was a perfectly reasonable business decision that mitigated risk and kept the Company, and its customers, in the same position that they would have been in had no ice storm occurred. In fact, Staff witness Eaves and MIEC witness Brubaker both agree that Ameren Missouri was prudent in entering into the contracts with Wabash and AEP.[88] Even Staff witness Mantle acknowledged, in response to a question from Chairman Clayton, that she could think of no other realistic options for Ameren Missouri given the circumstances that it faced:

> Q: But if—if Noranda's going to be out, a significant amount of load is going to be taken off the system, what other options would Ameren have than to go out and look for significant contracts to sell power? And maybe I'm just not as familiar with how the trading desk works or how bilateral contracts are signed, but what else could they have done other than to seek these types of contracts?
>
> A: I don't know. I don't know.[89]

[87] Tr. p. 206, lns. 8-14.

[88] *E.g.* Tr. p. 5, lns. 9-19; Exh. 8 (Staff's Prudence Report), p. 18; Tr. p. 500, lns. 9-19.

[89] Tr. p. 400, lns. 1-8.

In short, the evidence shows that Ameren Missouri engaged in no imprudent action at all, much less the type of imprudent action that would be necessary to support a prudence adjustment under *Associated.*

With regard to the second prong of the *Associated* test, the evidence also established that customers were not adversely impacted by Ameren Missouri's decision to enter into the contracts with Wabash and AEP. Again, the revenues from the Noranda load were excluded from the FAC formula (and dealt with in the Company's general rate proceedings) and so were the revenues from long-term partial requirements contracts such as the contracts with Wabash and AEP. Since there is no adverse impact on customers from replacing the Noranda load with load from Wabash and AEP, the second prong of the *Associated* test has not been satisfied.

III. Conclusion

The competent and substantial evidence adduced in this case shows that the Wabash and AEP contracts both constitute long-term partial requirements sales as contemplated in Ameren Missouri's FAC tariff in effect during the time relevant to this case, so revenues from these contracts must be excluded from Ameren Missouri's FAC. This is supported by the standard definitions of the terms "long-term" and "partial requirements" commonly used in the power markets, the definition of "long-term" used by FERC pursuant to its longstanding practice, and the plain meaning of the terms. The evidence further shows that there is no basis to conclude that the Company, the Commission or any other party intended for the obscure and outdated reporting instructions contained in FERC Form 1 to dictate the meaning of these terms when Ameren Missouri's FAC tariff was approved. There was no reference to FERC Form 1 when the tariff was filed or approved, and application of the FERC Form 1 definitions would illogically

exclude contracts involving the Company's municipal customers, which all parties agree constitute long-term requirements sales.

In addition, the evidence shows that there is no basis for any imprudence disallowance under the standards established in the *Associated* case. Given the unusual circumstances Ameren Missouri faced it did absolutely nothing that was imprudent. In addition, the Company's customers were in no way adversely impacted since the Wabash and AEP contracts simply replaced the lost Noranda load, both of which were outside the FAC.

Consequently, the imprudence finding advocated by the Staff and intervenors must be rejected, and Ameren Missouri should be permitted to exclude revenues associated with the Wabash and AEP contracts from its FAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on February 10, 2011, to all parties of record.

/s/ Thomas M. Byrne
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