

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

Roman Dzhurinskiy and	)	
Zinaida Dzhurinskaya,	)	
Complainants,	)	
	)	
vs.	)	Case No: EC-2016-0001
	)	
Union Electric Company, d/b/a	)	
Ameren Missouri,	)	
Respondent.	)	

**AMEREN MISSOURI’S REPLY TO STAFF’S REPORT**

COMES NOW, Union Electric Company, d/b/a Ameren Missouri (“Ameren Missouri” or “Company”), and for its Response to Staff’s Report states as follows.

Procedural Background

1. On July 1, 2015, Mr. Roman Dzhurinskiy and Ms. Zinaida Dzhurinskaya (“Complainants”) filed a Complaint against Company. Complainants receive residential electric utility service from the Company.
2. On July 31, 2015, Ameren Missouri filed its Answer to the Complaint.
3. On August 31, 2015, Staff filed Staff’s Report and Recommendation.
4. On September 1, 2015, the Commission issued its Order Setting Date for Reply, ordering that any reply to Staff’s pleading be filed no later than September 14, 2015.

Reply

5. This Complaint concerns the question of who is entitled to an exemption from the Company’s energy efficiency investment charge. The exemption is addressed in the Company’s Energy Efficiency Investment Charge tariff (the “EEIC tariff”), at MO P.S.C. Schedule No. 6, 1<sup>st</sup> Revised Sheet No. 90.1.

6. On this point, the Company’s EEIC tariff provides:

“Low-Income” customers means those Service Classification 1(M)-Residential customers eligible for the low income exemption provisions contained in Section 393.1075.6, RSMo[....]

7. This definition<sup>1</sup>, then directs the reader to the “low income exemption provisions” of §393.1075.6 RSMo (the “MEEIA statute”) to determine which of the Company’s residential customers are “low-income” for purposes of the EEIC tariff. No detailed definition is found in the MEEIA statute, however. Rather, it informs that “low-income *classes*” which shall be a subclass of residential service, and for which the Commission may reduce or exempt allocation of demand side expenditures, will be defined “in an appropriate rate proceeding.” The proceeding is identified in the remainder of the EEIC tariff “low-income” definition:

...As approved in File No. ER-2014-0258, customers eligible under this definition will be exempt from Rider EEIC charges for 12 billing months following assistance received from either Missouri Energy Assistance (a.k.a. Low Income Home Energy Assistance Program or LIHEAP), Winter Energy Crisis Intervention Program, Summer Energy Crisis Intervention Program, the Company’s Keeping Current Low Income Pilot Program, and/or the Company’s Keeping Cool Low Income Pilot Program.<sup>2</sup>

8. File No. ER-2014-0258 was a general rate case. Mid-proceeding, the Commission issued an Order Approving Non-Unanimous Stipulation and Agreement Regarding MEEIA Low Income Exemption and LED Street Lighting Issues (“Order Approving the Stipulation”). That order itself does not contain any definition of “low-income classes.” It does, however, approve and attach the Nonunanimous Stipulation and Agreement Regarding MEEIA Low Income Exemption and LED Streetlighting Issues entered into on March 19, 2015 by the Company, Staff and the Office of Public Counsel (the “Stipulation”). The Stipulation does not follow the letter of the MEEIA statute and provide a definition of “low-income classes,” but it does define “qualifying low-income customer.”

9. The Stipulation, at paragraph 2, provides:

A qualifying low-income customer will be defined as any residential customer who, in any of the prior 12 billing months, has received assistance from any of the following qualifying low-income programs: [energy assistance].<sup>3</sup>

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<sup>1</sup> At n. 4 of *Appendix B to Staff’s Report and Recommendation*, Staff counsel asserts that this definition, despite being included in the “DEFINITIONS” section of the EEIC tariff that begins, “[a]s used in this Rider EEIC, the following definitions shall apply:” is not a definition. Ameren Missouri disagrees for obvious reasons.

<sup>2</sup> All such programs are referred to generally, hereafter, as “energy assistance.”

<sup>3</sup> At n. 4 of *Appendix B to Staff’s Report and Recommendation*, Staff counsel also argues that the words “assistance received” in the EEIC tariff relate only to the duration of exemption from the EEIC charge, because the words are used in the phrase “12 billing months following assistance received.” Staff seems to argue that this phrase has a meaning different or distinct from the phrase, “received assistance” which is used in the *Stipulation*. Ameren Missouri is somewhat perplexed by this argument since the context of Staff’s preferred phrase is nearly identical: “in any of the prior 12 billing months, has received assistance.”

Notably, paragraph 2 goes on to say:

This low-income exemption will begin with the June 2015 billing month, and Ameren Missouri will file a Rider EEIC rate change request at least sixty (60) days in advance of that date. The Rider EEIC filing to initially implement the rate change will be based on the same data provided in the November 2014 Rider EEIC filing adjusted only to reflect the low-income exemption for the remainder of the tariff effective period. *The reduction in revenues associated with the low-income exemption will be recovered from the remaining residential rate class customers.* (emphasis added).

10. The Company's interpretation of its EEIC tariff, the MEEIA statute, the Order Approving the Stipulation, and the Stipulation, is that its customers who receive energy assistance<sup>4</sup> towards their **Company** residential gas or electric bills will be exempted from Rider EEIC charges for 12 billing months following receipt of that assistance. The Company's interpretation is, rationally, informed by and consistent with the circumstances surrounding the filing of the EEIC tariff and the adoption of the Stipulation, and avoids the absurd result of requiring the Company to exempt customers for whom alleged receipt of energy assistance is completely unknown by the Company or which the Company is legally and contractually prohibited from independently verifying.

11. Staff's interpretation is that any residential customer who has received assistance is eligible for the low-income customer exemption, period.<sup>5</sup> Staff begins with the rule that, "if a tariff is clear and unambiguous, [a tribunal] cannot give it another meaning" and that the Commission can only look beyond plain meaning if language is ambiguous or would lead to an absurd or illogical result.<sup>6</sup> Staff's interpretation hinges on three conclusions. First, that two isolated terms used in the Stipulation, "received" and "assistance", have plain and clear meanings and therefore they cannot be ambiguous.<sup>7</sup> Second, that the tariff's definition of "low-income" customer could not be subject to more than one interpretation (i.e., be ambiguous) about

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<sup>4</sup> The Company understands that it is the customer who receives assistance when a utility receives energy assistance payments to be applied toward the customer's bill.

<sup>5</sup> *Brief from Staff Counsel on Tariff Interpretation ("Staff's Brief")*, Appendix B to *Staff's Report and Recommendation*, p. 3.

<sup>6</sup> *Staff's Brief*, pp. 2-3, citing *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n of State of Mo.* 37 S.W.3d 287, 293 (Mo. App. W.D.2000), *A.C. Jacobs & Co. v. Union Elec. Co.* 17 S.W.3d 579, 584 (Mo. App. E.D. 2000); *Allstates Transworld Vanlines, Inc., v. Southwestern Bell Telephone Co.* 937 S.W. 2d 314, 317 (Mo. App. 1996); *Wolff Show Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) and *Alheim v. F.W. Mullendore*, 714 S.W.2d 173, 176 (Mo. App. 1986).

<sup>7</sup> *Staff's Brief*, pp. 3-4.

who is excluded from the exemption because it definitely excludes certain categories of customers.<sup>8</sup> Third, there is not a “complete contradiction” in the EEIC tariff and it is reasonable and logical because it “creates a functional standard whereby low-income customers are identified as eligible for exemption from the EEIC.”<sup>9</sup> Given that a reader must look to at least four different sources (the EEIC tariff, MEEIA statute, Order Approving Stipulation, and Stipulation) to even determine who qualifies as a “low-income” customer entitled to the exemption, and given that none of those sources even uses or defines the exact terminology the MEEIA statute requires, Staff’s rigidity and insistence that the EEIC tariff simply is not subject to interpretation is unsound. Not only can the Commission interpret the tariff, it must.

12. As to ambiguity, otherwise plain or clear words may still create ambiguity, where there is indistinctness in the meaning of the words used, or where a latent ambiguity arises because a collateral matter makes the meaning of the words uncertain.<sup>10</sup> A latent ambiguity is not apparent on the face of a writing but must be developed by extrinsic evidence.<sup>11</sup> Whenever there is ambiguity, patent or latent, the cardinal principle is to determine the parties’ intent, and in doing so the tribunal may consider the facts and circumstances surrounding a writing’s creation, the practical construction placed on the document by the parties’ acts and deeds, as well as other external circumstances.<sup>12</sup>

13. By focusing so intently on the words “received” and “assistance,” Staff misses the point. In the context of the EEIC tariff and the Stipulation, “assistance received” and “received assistance” are indistinct in one important respect. The time the exemption will apply is clear; twelve billing months after assistance is received. It is clear that mere eligibility is not enough and a Company customer must have received the assistance. It is clear that the assistance must have come from one of the energy assistance programs identified. It is also clear, based on the programs, that the assistance must have been received to pay a utility bill. What remains indistinct, however, is *what* utility bill? Just a Company utility bill? The tariff is a Company tariff after all, and refers to Company customers. Then again, many (but not all) of the listed

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<sup>8</sup> *Staff’s Brief*, pp. 4-5.

<sup>9</sup> *Staff’s Brief*, pp. 5-6.

<sup>10</sup> *Alack v. Vic Tanny Int’l*, 923 S.W.2d 330, 337 (Mo. 1996).

<sup>11</sup> *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359, 352 (Mo. 1991).

<sup>12</sup> *Id.*

programs can benefit other utilities' customers. A latent ambiguity arises when language that appears plain on its face suddenly becomes uncertain or ambiguous when applied.<sup>13</sup>

14. The collateral matter or extrinsic evidence that reveals the ambiguity in the EEIC tariff language and Stipulation about what particular assistance makes a customer exempt is the fact that the Company is only entitled to know about such assistance (whether LIHEAP or ECIP funds) if that energy assistance was applied toward a *Company* bill. In other words, the Company does not receive notice and cannot independently confirm when a customer has received energy assistance towards a Laclede gas bill, or towards a bill for fuel oil, kerosene, or wood. Nor can the Company, as a home energy supplier under an agreement with the Missouri Department of Social Services, share information about its own customers' receipt of energy assistance with any other home energy supplier, so it stands to reason that the reverse applies. The Company made these facts plain to Staff in the Company's responses to Staff's data requests in this Complaint.<sup>14</sup> Staff has made no attempt to dispute them.

15. Given this ambiguity, the Commission may certainly rely on extrinsic evidence of the facts and circumstances surrounding the creation of the EEIC tariff, and evidence of the practical construction the parties placed on the tariff, to resolve the ambiguity about whether a customer must have received assistance towards his Ameren Missouri bill in order to qualify as a "low-income" customer entitled to the exemption from Rider EEIC charges. Not surprisingly, such evidence shows conclusively that Ameren Missouri, as well as OPC, construed the proposed tariff provisions to mean that only Company customers who received energy assistance toward a Company bill were entitled to the Rider EEIC exemption for twelve billing months following receipt of the assistance.

16. This is made even more clear from the fact that the Company was going to rely on data in its own system to verify the receipt of energy assistance.

17. William R. Davis provided direct testimony for the Company on this issue:

**Q. How are you defining low income?**

A. As a practical consideration, Ameren Missouri does not think it is appropriate nor does it currently have the ability to act as the agent to validate its customers' incomes. Ameren Missouri proposes to rely on *existing data in its billing system* to identify customers who already receive credits only available to customers who have met income requirements that are validated externally...

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<sup>13</sup> *Vandever v. Junior College Dist.*, 708 S.W.2d 711, 717 (Mo. App. W.D. 1986).

<sup>14</sup> See Attachments 4 and 5 to Appendix A, *Staff's Recommendation*, to *Staff's Report and Recommendation*.

**Q. How many customers will benefit from this exemption?**

A. I have evaluated participation in the aforementioned programs in 2013 and expect nearly 3% of Ameren Missouri's customers per year could receive the exemption...

**Q. Will eligible customers need to do anything to get the exemption?**

A. No. Any customer who has received a credit from at least one of the five programs identified above within the prior 12 months will automatically be exempted from the MEEIA Rider charges. Each billing period, *Ameren Missouri's billing system will check to see if the customer has received a credit* and if a customer has received a credit within 12 months then the exemption will remain. (emphasis added).<sup>15</sup>

18. OPC's witness, Geoff Marke, explicitly acknowledged this interpretation based on practical considerations, as follows "...Ameren Missouri does not have the ability to act as the agent to validate its customers' income[.]" He further acknowledged that, instead, the Company was, "proposing to rely on existing data in their billing system to identify customers, which is to say, those customers who already receive some form of Missouri energy assistance...[.]"<sup>16</sup>

19. It is notable that when reviewing the testimony and Stipulation in the ER-2014-0258 proceedings, the Commission itself had questions about how the exemption would be applied. If the definition in the Stipulation was so perfectly unambiguous, then why would Commissioner Hall have asked the Company's counsel any questions at all about how it would be applied? Further, Ms. Tatro's explanation to Commissioner Hall, that the exemption would be automatic and the Company's *system* would strip the Rider EEIC charge from qualifying customers' bills, coupled with the undisputed fact that the Company receives no notice about a customer's receipt of energy assistance toward another utility's bill, demonstrates that the tariff exemption applies only to Company customers who have received energy assistance towards a Company bill.

20. As for Staff, it has not identified any act, deed, or even a statement by which its witness, or counsel, etc. previously placed any contrary practical construction on the EEIC tariff or the Stipulation. No witness for Staff offered testimony on how the exemption should be determined or applied by the Company, or advocated the position that Staff is now taking. In fact, Staff did not even appear to have taken a position, one way or another, at the time it

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<sup>15</sup> ER-2014-0258, EFIS No. 23, Dir. Testimony of William R. Davis, p. 20, l. 12-p. 21, l. 13; Schedule WRD-3, p. 2.

<sup>16</sup> ER-2014-0258, EFIS No. 244, Rebuttal Testimony of Geoff Marke, p. 9, l. 1-p. 10, l. 6.

concluded its investigation of Complainant's informal complaint.<sup>17</sup> It is only, "on advice of counsel" that Staff now concludes and recommends that the Commission find that Complainants are exempt from the EEIC tariff.<sup>18</sup>

21. After acknowledging that a tribunal may construe a tariff when its plain meaning would lead to absurd or illogical results<sup>19</sup>, Staff nevertheless insists that there is no absurd result under its interpretation of the EEIC tariff and Stipulation because it "creates a functional standard" and does not "expose Ameren Missouri to an absurd or illogical result."<sup>20</sup> The proposed standard, of requiring the Company to exempt customers from the Rider EEIC charge based on their receipt of energy assistance, where the Company is not aware of it and cannot independently verify it, is illogical, non-functional, and absurd.

22. In the first place, it simply illogical to assert that assistance received toward another utility's bill, that the Company has no knowledge of, could automatically trigger an exemption on a Company bill. Nor does it make sense that the Company is supposed to gain that knowledge directly from customers, since the Stipulation and EEIC tariff contain absolutely no provisions about the procedure by which customers would provide documentation to the Company, or about who might have the final say in determining whether the documentation is sufficient. In contrast, consider the Company's Electric Service Tariff Sheet No. 144, General Rules and Regulations, VII. Disconnection and Reconnection of Service, F. Delay of Disconnection for Medical Reasons, which provides that the Company will postpone a pending residential electric service disconnection that will aggravate a customer's existing medical emergency, but which provides at a minimum that before postponing disconnection, the Company may require the customer to show the Company "satisfactory evidence that a medical emergency exists." Or see the Company's Electric Service Tariff Sheet No. 135, General Rules and Regulations, V. Billing Practices, I. Budget Billing Plan, which lays out the criteria under which a customer may be enrolled in budget billing and the specific procedure the Company will

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<sup>17</sup> *Staff's Report and Recommendation*, Appendix A. *Staff Recommendation* p. 2, "On June 16, 2015, Staff telephoned the Complainant that Ameren Missouri's position is that the LIHEAP would have been applied to an Ameren Missouri account in order for the EEIC to be waived. Consumer is dissatisfied with the response and indicates that he wants to file a formal complaint. Staff concluded its investigation of the informal complaint and mailed a Formal Complaint packet to the Complainant."

<sup>18</sup> *Staff's Report and Recommendation*, Appendix A. *Staff Recommendation* p. 6.

<sup>19</sup> *Staff's Brief*, p. 3.

<sup>20</sup> *Staff's Brief*, pp. 5-6.

use to determine the monthly bill amount. Or see Rider SP, found in the Company’s Electric Service Tariff Sheets 89 through 89.4, which details the circumstances and procedure under which the Company will purchase solar renewable energy credits from a customer-generator.

23. This very Complaint demonstrates that, setting aside that the EEIC tariff contains no such criteria, it is unworkable and inefficient for customers to supply documentation regarding energy assistance they have received toward other utilities’ bills. Complainants attached to their Complaint documentation indicating that they were *eligible* for energy assistance.<sup>21</sup> This documentation did not show that any assistance had actually been *received* towards any utility bill. As the Company discussed in its Answer, there are a variety of circumstances under which customers may be eligible, but home energy suppliers are still not permitted to accept energy assistance payments from them.<sup>22</sup> Next, Complainants provided and Staff relied in its *Report and Recommendation* on other documentation that still did not show that Complainants would qualify for the low-income exemption, even under Staff’s interpretation. Staff, “found that the Complainants received LIHEAP assistance applied towards their gas service provided by Laclede Gas Company in December 2014.”<sup>23</sup> This finding was based on Staff’s conclusion that on December 30, 2014 the Missouri Department of Social Services mailed an energy assistance payment notice to Zinaida Dzhurinskaya advising her that a payment of \$\*\*\*.\*\* was made to Laclede on December 29, 2014.<sup>24</sup> The documentation Staff attached to its Report and Recommendation, however, did not demonstrate that Complainants received assistance in December of 2014, nor, “in any of the prior 12 billing months.” What Staff attached was an energy assistance payment notice from **January** 2014. That notice says, “[o]n January 10, 2014, a payment of \$\*\*\*.\*\* was issued to [Laclede Gas Company] on [Ms. Dzhurinskaya’s] behalf.”<sup>25</sup> The attached notice was issued *seventeen* months prior to June of 2015 when the exemption took effect.

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<sup>21</sup> Complainants attached an “Energy Assistance Eligibility Notice” dated December 10, 2014 which states, “you are eligible to receive energy assistance...The Department of Social Services is waiting for an approval from the listed supplier in order to make payment on your account. You will receive another notice that indicates that the payment has been applied to your account, or your application has been denied...[.]”

<sup>22</sup> See Answer, ¶7. For instance, the supplier cannot accept the energy assistance payment if it will be insufficient to restore the customer’s service.

<sup>23</sup> Staff’s Report and Recommendation, ¶7.

<sup>24</sup> Staff’s Report and Recommendation, Appendix A, Staff’s Recommendation, p. 6.

<sup>25</sup> Staff’s Report and Recommendation, Appendix A, Attachment 6.



24. Perhaps Staff attached different documentation than it intended. If so, Staff's oversight, coupled with the fact that Complainants did not provide an energy assistance payment notice to the Company at all (but only provided an eligibility notice at the time they filed their Complaint), demonstrates how unworkable and inefficient the positions of Staff and Complainants<sup>26</sup> are. It is also illogical to assume that the Company intended that any customers who submitted documentation of receipt of energy assistance toward other utilities' bills would be determined to be exempt. This is because extending the exemption to such customers introduces a number of unknowns that could greatly increase the costs associated with the exemption, which will be borne by other residential customers. These unknowns include: the total number of Company customers who receive energy assistance toward other utilities' bills; the number of customers who would submit documentation to the Company to attempt to obtain the exemption; the number of such customers who would be determined to be entitled to the exemption; and the costs associated with devoting Company resources to reviewing, verifying, and then approving or rejecting the documentation.

25. Staff's final argument, that the Company's interpretation would require the Commission to "impose new language to the tariff"<sup>27</sup> is simply wrong. The Commission may rely on extrinsic evidence to resolve ambiguity in the words actually found in the EEIC tariff and Stipulation—"assistance received" and "received assistance,"—and can do so in a manner that avoids the absurd and illogical result that Staff proposes. Similarly, Staff suggests that the Commission's hands are simply tied because, "[Courts] are without authority to supply or insert words" where terms have been omitted.<sup>28</sup> If Staff thinks the Commission is so bound, however, Ameren Missouri is left to wonder what Staff thinks the Commission must do with the fact that the term used in the MEEIA statute to identify the class that may be exempted, "low income classes" is not even found in the Stipulation or the EEIC tariff. Ameren Missouri suspects Staff would argue that, the above prohibition notwithstanding, the Commission may infer that "low-income classes" is what the parties were defining when they defined "low-income customer."

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<sup>26</sup> See *Complaint*, ¶2, where Complainants argued that the Company should be required to "collect the data (letters) from CAA(s) or customers directly who are eligible participants in the assistance program and remove charges from their bills."

<sup>27</sup> *Staff's Brief*, p. 7.

<sup>28</sup> *Staff's Report and Recommendation*, ¶11.

26. Staff has focused exclusively on telling the Commission what it cannot do. Here, we have a tariff that references a statute (which refers the reader to a rate proceeding) and a rate proceeding which incorporated an order that incorporated a stipulation. Although a tariff is a unique type of order in that it has the force and effect of a statute, where there is ambiguity the Commission may under traditional rules of statutory construction resort to extrinsic evidence and make a factual determination as to the meaning of the tariff.<sup>29</sup> As to Commission orders generally, “[t]he Commission is entitled to interpret its own orders and to ascribe to them a proper meaning, and in so doing, does not act judicially but as a fact-finding agency.”<sup>30</sup> This power of interpretation extends to stipulations approved by the Commission.<sup>31</sup> Especially in this Complaint, addressing the application of a newly-minted tariff, “[d]enial of the power of the commission to ascribe a proper meaning to its orders would result in confusion and deprive it of power to function.”<sup>32</sup>

WHEREFORE, the Company respectfully requests that the Commission set a pre-hearing conference in this Complaint, for the purposes of developing a procedural schedule.

Respectfully submitted:

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<sup>29</sup> *State ex rel. Union Elec. Co. v. PSC*, 399 S.W.3d 467, 477-78 (Mo. App. W.D. 2013).

<sup>30</sup> *State ex rel. Beaufort Transfer Co. v. Public Service Commission*, 610 S.W.2d 96, 100 (Mo. Ct. App. W.D. 1980)

<sup>31</sup> *State ex rel. Laclede Gas Co. v. PSC*, 392 S.W.3d 24, 35 (Mo. App. W.D. 2012).

<sup>32</sup> *State ex rel. Orscheln Bros. Truck Lines, Inc. v. Public Service Com.*, 110 S.W.2d 364, 366 (Mo. App. 1937).

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Reply to Staff's Report and Recommendation was served on all the following parties via electronic mail, and additionally on Complainants via regular mail, this 14<sup>th</sup> day of September, 2015.

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/s/ Sarah E. Giboney \_\_\_\_\_