BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Tariff Filings of Union Electric Company d/b/a Ameren Missouri, to Increase Its Revenues for Retail Electric Service.	)))	Case No. ER-2012-0166

RESPONSE TO THE MIEC'S MOTION TO STRIKE PARTS OF AMEREN MISSOURI WITNESS JAIME HARO'S SUR-SURREBUTTAL TESTIMONY[1]

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri") and hereby responds to the above-referenced Motion to Strike filed by the Missouri Industrial Energy Consumers ("MIEC"). In this regard, the Company states as follows:

1. The MIEC's Motion to Strike is completely without merit because it is the MIEC's and the Staff's failure to comply with this Commission's rules on pre-filed testimony that have placed the MIEC and the Staff in the position about which they now complain.

2. The MIEC continues to advance the argument that Staff witness Lena Mantle's direct testimony merely proposed a "clarification" [2] respecting Midwest ISO[3] transmission charges, apparently because they wish to continue to excuse the fact that they did not support and explain a substantive change to the ratemaking treatment of Midwest ISO transmission charges until they filed surrebuttal testimony. Their contention that only a mere "clarification' was proposed is inaccurate. As Ms. Mantle herself admits, the transmission charges at issue were being incurred by Ameren Missouri not only at the time the fuel adjustment clause ("FAC") was approved effective March 1, 2009, but at the time it was proposed and considered in the rate case where it was approved. *See* Exhibit A hereto. Moreover, the monthly reports required by the Commission's FAC rules specifically identify these very charges. Id. Those reports are submitted to the Staff, and the MIEC has been served with every single one of them as well. As

[1] This pleading also responds to the Staff's concurrence in the MIEC's Motion to Strike.
[2] MIEC Motion to Strike, ¶ 1.
[3] Midwest Independent Transmission System Operator, Inc.

Ms. Mantle also admits, the transmission charges at issue are recorded in FERC Account 565. Id. The FAC tariff specifically authorizes charges in Account 565 to be flowed through the FAC. If Ms. Mantle really believed that her proposal was a mere "clarification," it was only because she had completely failed to pay attention to the express terms of the FAC tariff and had failed to pay attention to the specific FAC reporting the Company submitted to the Staff and served on the MIEC (and other parties).

3. The reason the MIEC (and the Staff) continue to attempt to advance the incorrect theory that Ms. Mantle was only "clarifying" the FAC tariff is because they wish to divert attention from the fact that the Staff, in violation of the Commission's rules governing pre-filed testimony, failed to properly support and explain its case-in-chief. The Staff's case-in-chief was to *substantively change* the ratemaking treatment of Midwest ISO transmission charges that had been in place since March 1, 2009. But the Staff disavowed that this is what it was doing when Ms. Mantle referred to "clean-up" changes that she said would be detailed in the Staff's Rate Design Report to be filed on July 19, 2012, stating that "Staff has been working with all of the electric utilities, including Ameren Missouri, on proposals and hopes to come to consensus on the *terminology* to be used within the electric utility industry in Missouri" (emphasis added).[4] The Staff also disavowed that this is what they were doing when Ms. Mantle stated as follows:

> It is not Staff's intent to change the meaning of different phrases in each utility's FAC tariff sheets, but to help avoid and minimize confusion when discussing the FACs of electric utilities in Missouri.[5]

4. The MIEC also failed to adhere to the Commission's rules governing the filing of pre-filed testimony in at least two ways. First, if the MIEC desired to make a substantive change to the FAC tariff terms that had been in effect for more than three years at the time, it, like the

[4] *Id.* p. 167, l. 26-28.
[5] *Id.* p. 167, 1. 28 to p. 168, 1. 2. Ameren Missouri's Motion to Strike Ms. Mantle's and Mr. Dauphinais' testimonies on these issues contain additional details on the so-called "clarification" the Staff proposed.

Staff, should have made that proposal in its direct testimony (or at least in its direct rate design testimony, since the issue would involve a tariff change) and it should have explained it, as the Commission's rule requires. However, the MIEC made no such proposal and gave no such explanation. Second, even if the MIEC could somehow be excused for not proposing this substantive change in its direct case, it at least should have rebutted the Company's FAC tariff filing in this case by disagreeing with the terms of the FAC tariff as written when the MIEC filed its rebuttal testimony, but it failed to bring up the issue then either.

5. The effect of the Staff and the MIEC's failure to adhere to the Commission's rules for pre-filed testimony was that they, intentionally or not, "sandbagged" the Company by (a) not making any specific proposals for changing the treatment of these Midwest ISO transmission charges until they filed surrebuttal testimony, and (b) not explaining *at all* the basis for the changes they finally got around to proposing until they filed surrebuttal testimony. Absent leave of the Commission to respond, the Company would have faced the prospect of not being able to respond to a proposal that would have moved approximately $25 million[6] of Midwest ISO transmission charges out of the FAC (though such charges had always been included in the FAC). Just as importantly, the Company would not have been able to address another consequence of the proposed change; that is, the fact that the expected substantial increases in those charges in 2013-2017 (outlined at page 8 of Mr. Haro's sur-surrebuttal testimony) would not be tracked anywhere. If that were to happen, then 100% of those cost increases would be borne by the Company as opposed to the treatment that has been in place since March 2009, where five percent of the cost increases would be borne by the Company, with 95% of them to be borne by customers through the sharing mechanism in the FAC.

[6] This is based upon the trued-up test year level in this case through July 31, 2012.

6. The MIEC will probably claim that waiting until surrebuttal to file testimony on this issue was proper because the MIEC was simply responding to Mr. Haro's very short rebuttal testimony on the "clarification" Ms. Mantle proposed. The MIEC would likely argue that because Mr. Dauphinais' position is that these Midwest ISO transmission charges (or most of them) are for "capacity" under contracts with a term of more than one year that these charges have never properly been included in the FAC. Mr. Dauphinais' "capacity" argument is an incorrect interpretation of the FAC tariff, and it appears quite obvious that it has been made as a smokescreen in an attempt to justify waiting until surrebuttal testimony to raise the issue of the proper ratemaking treatment of Midwest ISO transmission charges. As discussed in Mr. Haro's sur-surrebuttal testimony:

> **Q. MIEC witness James Dauphinais points to the exclusion in the tariff language for "capacity" charges associated with contracts with terms in excess of one year, and then argues that any transmission service charges associated with Ameren Missouri's network service must necessarily be excluded, as they are capacity charges associated with a long-term contract. How do you respond to his assertion?**
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> A. Mr. Dauphinais' suggestion is incorrect. "Capacity" is commonly understood – in the markets and in Missouri regulation – as generation capacity. The Commission's rules, most notably 4 CSR 240-3.190(F), require that the Company report its "capacity purchases," which for decades has meant the purchase of *generation* capacity. The Commission has never required that "transmission capacity purchases" be reported. The Commission has had occasion once to discuss what "capacity" means in an FAC tariff. In the case where the first FAC for a Missouri electric utility was approved for Aquila, the Commission specifically addressed essentially the same provision in Aquila's (now KCP&L-GMO's) FAC. In the Report and Order in that case the following discussion appears:
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> > Staff witness Cary Featherstone argues only variable fuel and purchased power costs, including variable transportation costs, should be included in a fuel adjustment clause. Specifically, Mr. Featherstone contends it is inappropriate to include demand charges for any capacity contracts, regardless of their duration, for two reasons. First, Mr. Featherstone points to the fact that demand charges are fixed costs to reserve capacity, and as such are more like plant investment cost than fuel or purchased power cost.

> Second, Staff opposes Aquila's use of short-term contracts *to meet its growing capacity needs*. Staff argues that allowing Aquila to pass on this type of cost would allow Aquila to meet its growing load requirements through short-term capacity, thus *creating another disincentive for it to build generating units* and placing all the risk of future fuel and purchased power cost increases on its customers. [footnote admitted]. Mr. Featherstone's analysis is persuasive (emphasis added).

There is no question that the discussion was in the context of when *generating* capacity ought to be in the FAC. The Commission, in adopting the one-year demarcation for contracts for generating capacity that the Staff was recommending, discussed this in terms of *"demand* charges related to purchased power contracts with terms of one year . . ." (emphasis added). Transmission service charges have nothing to do with demand. Mr. Dauphinais has provided absolutely no evidence that the reference to "capacity charges" in the Company's FAC tariff refers to transmission, and as demonstrated above he is wrong. To borrow one of the MIEC's favorite quotes – just because you call a dog a duck won't make it quack.

Q. You noted that capacity means generation capacity in the markets. What does it mean in MISO?

A. In the MISO currently, capacity charges represent amounts paid for the purchase of planning resource credits to satisfy our generating capacity obligation under MISO's *generation* resource adequacy requirements.[7]

It is obvious, as Mr. Haro explains, that the exclusion for long-term capacity contracts in the FAC tariff is an exclusion for long-term *generation* capacity. The bottom line is that the MIEC should not have waited until surrebuttal testimony to attempt to change the Company's FAC and the ratemaking treatment of tens of millions of dollars of Midwest ISO transmission charges. Had it proposed and properly explained its contention that the ratemaking treatment for these charges should be changed as part of its direct case, then the Company would have had a full and fair opportunity to file the testimony it was forced to file as sur-surrebuttal testimony, and presumably the MIEC would have then been able to file surrebuttal in response.

7. The MIEC also incorrectly claims that its Motion to Strike is "akin to a motion that Ameren Missouri recently filed to strike a portion of the surrebuttal testimony of Staff

[7] Haro sur-surebuttal Testimony, p. 11, l. 1 to p. 12, l. 11.

witness David Murray."[8] In fact, it is not "akin" to that motion at all. In his direct testimony, Mr. Murray accepted the Company's capital structure and used it (including the cost of debt therein). Mr. Murray also filed rebuttal testimony in which he also made no mention of any concern about the cost of the Company's debt. For the very first time when he filed surrebuttal testimony he then "floated" a proposal that the Company's cost of debt be reduced (in effect, that a lower than actual cost of debt be imputed for ratemaking purposes) based on allegations about the impact on Ameren Missouri due to existence of its sister merchant generating company. Mr. Murray's proposal would have lowered the Company's revenue requirement by approximately $19 million per year. And while the Staff promptly agreed to the Company's Motion to Strike Mr. Murray's testimony on this issue, arguing that Mr. Murray had not "changed his position on Ameren Missouri's cost of debt for purposes of this case," and referred only to "possible future action,"[9] the fact of the matter is that Mr. Murray *was* injecting an entirely new issue into this case at the 11th hour, as his now-stricken surrebuttal testimony on this issue proves:

> **Q. Did you make any downward adjustments to Ameren Missouri's cost of debt to take this into consideration?**
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> A. Not for purposes of my *initial recommendation,* but because Ameren Missouri has not allowed Staff to review certain Ameren Board materials that Staff believes discuss credit rating risks from Ameren's merchant generation operations and certain strategies Ameren could take to protect Ameren Missouri's value and credit profile, Staff *has not ruled out* the possibility of making a downward adjustment to Ameren Missouri's cost of debt.
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> **Q. If Ameren Missouri had a better credit rating based on its stand-alone risk profile, would this assist Ameren Missouri in attracting capital and improving its financial integrity?**
>
> A. Yes.
>
> **Q. Assuming Ameren Missouri does not provide the documents that you believe discuss protecting Ameren Missouri's credit rating and value, *what adjustment to the cost of debt would you suggest*?**

[8] MIEC Motion to Strike, ¶ 6.
[9] Staff Response to Ameren Missouri's Motion to Strike Surrebuttal Testimony of David Murray, p. 2..

A. Because Staff believes Ameren Missouri could have a credit rating as high as an 'A-' absent its affiliation with Ameren's other operations, *Staff would likely recommend the Commission reduce Ameren Missouri's embedded cost of debt by 76 basis points, consistent with the spread Mr. Hevert provided in Table 5, on page 23 of his rebuttal testimony. This would result in an embedded cost of debt of 5.12% as compared to Ameren Missouri's actual cost of debt of 5.885%.* (emphasis added).

8. Unlike Mr. Murray, Ameren Missouri did not raise a "new issue" at the 11th hour. The issue that the MIEC and the Staff failed to adequately explain (or even mention) until they filed surrebuttal testimony concerns the proper ratemaking treatment of Midwest ISO transmission charges. Ameren Missouri was not given a full and fair opportunity to respond to the Staff's (and the MIEC's) proposal to change the ratemaking treatment of Midwest ISO transmission charges until after the Staff and MIEC finally got around to proposing a change in that ratemaking treatment in their surrebuttal testimony. Mr. Haro's sur-surrebuttal testimony is in response to the new ratemaking treatment for Midwest ISO transmission charges (base rate treatment) proposed by the Staff and MIEC. Surely the MIEC and the Staff cannot now be heard to complain about Ameren Missouri's response to their 11th hour proposal when they could have (and should have) proposed it as part of their cases-in-chief. "Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief." 4 CSR 240-2.130(7)(A). Their direct testimonies did not include "all testimony" on this issue (none, in fact for the MIEC), nor did it "explain" the issue.

9. While the most appropriate order respecting the MIEC's Motion to Strike is to simply deny it, because it is obvious that the MIEC's chief complaint (and the Staff's) is that they do not feel they can fairly respond to the alternative ratemaking treatment of these Midwest ISO transmission charges discussed in Mr. Haro's sur-surrebuttal testimony, the Company would suggest that if the Commission believes a further opportunity to respond is warranted that it

allow them until Friday, September 28, to file testimony in response to the portion of Mr. Haro's testimony that they seek to have stricken. Allowing them to do so would be more than fair, particularly when one considers that it is the Company that bears the burden of proof in this case, and also when one considers that the dilemma they seem to believe they now have is one of their own making.[10] If the Commission were to allow such additional testimony to be filed, the Commission should also allow the Company, if it so desires, to depose whomever files such additional testimony on behalf of the MIEC and the Staff regarding this limited issue and to do so on less than the seven days' notice ordinarily required; that is, to depose them regarding their response to pages 24 to 29 of Mr. Haro's sur-surrebuttal testimony.[11]

10. In summary, the Company should not be deprived of the ability to fully respond – by arguing that an FAC tariff change should not be made and by addressing an alternative for the Commission to consider in the event the Commission believed these costs are better handled outside the FAC – particularly in light of the fact that the Staff's and MIEC's proposal to totally change the ratemaking treatment of these significant costs should have been made and explained much earlier in this case. If the Commission believes it is warranted, then allowing the MIEC and the Staff to file additional testimony by September 28 and the Company to depose their witnesses regarding that testimony would fairly address the dispute raised by the MIEC's Motion to Strike.

WHEREFORE, the Company prays that the Commission make and enter its Order denying the MIEC's Motion to Strike or, alternatively, allowing the MIEC and the Staff to file additional pre-filed testimony in response to pages 24 to 29 of Mr. Haro's sur-surrebuttal

[10] That will mean they will have had seven business days to review and respond to just six pages of testimony – Mr. Haro's testimony was filed five days ago, on September 19.

[11] This issue is not scheduled to be taken up at the evidentiary hearings until October 9. Thus, the Company, which as noted has the burden of proof, would then have some time to review the testimony and depose the witnesses, if desired, and all parties will have time to prepare for the hearing of this issue.

testimony, and allowing the Company to depose on less than seven days' notice their witnesses who file such testimony, and for such other and further relief as is just and proper under the circumstances.

Dated: September 24, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on all parties of record via electronic mail (e-mail) on this 24th day of September, 2012.

/s/James B. Lowery
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