

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

Roman Dzhurinskiy and)
Zinaida Dzhurinskaya,)
Complainants,)
v.)
Union Electric Company d/b/a)
Ameren Missouri,)
Respondent.)

File No. EC-2016-0001

STAFF’S SURREPLY TO AMEREN MISSOURI’S REPLY

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through the undersigned counsel, and files *Staff’s Surreply to Ameren Missouri’s Reply* with the Missouri Public Service Commission (“Commission”) and respectfully states:

Procedural Background

1. On July 1, 2015, Mr. Roman Dzhurinskiy and Ms. Zinaida Dzhurinskaya (“Complainants”) filed a Complaint against the 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*.¹
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.

¹ Staff requested and received waiver from the Commission Rules to file report advocating a position in a small rate case, as the Respondent’s defense relied on interpretation of its tariff. EC-2016-0001, EFIS No. 15, *Order Granting Waiver* (Aug. 25 2015).

5. On September 14, 2015, Ameren Missouri filed its *Reply to Staff's Report*.
6. On September 14, 2015, the Office of Public Counsel ("OPC") filed its *Motion for Summary Determination*.
7. On September 15, 2015, the Commission issued its *Order to File Proposed Dates* to be filed no later than September 25, 2015.
8. On September 18, 2015, Ameren Missouri filed its *Motion to Continue* to postpone its response deadline to OPC's motion for summary determination.
9. On September 21, 2015, the Commission ordered a pre-hearing conference to be held on October 6, 2015, pursuant to the Parties' *Joint Motion to Schedule a Pre-Hearing Conference*.

Surreply to Ameren Missouri's Filing

10. Staff's objection to Ameren Missouri's initial *Answer* and *Reply to Staff's Report* is based on Ameren Missouri's insistence that it possesses the authority to interpret its tariff without notice or approval by the Commission. Had Mr. Dzhurinskiy not filed a complaint, the Commission would be completely unaware of Ameren Missouri's actions and interpretations. If Ameren Missouri believes that the tariff language filed does not comport with its intent, the proper recourse is to file corrected tariff sheets for the Commission's approval.

11. Ameren Missouri argues that the tariff language establishing its Rider Energy Efficiency Investment Charge (EEIC) qualifying low-income customer exemption intent was "to mean that to be eligible for the low-income exemption, the customer must have received assistance to pay his or her bill from the Company for

utility service provided by the Company.”² Ameren Missouri then attempts to prove their intent through selective quotation of its most recent rate case, ER-2014-0258, stating that the “only evidence” presented was through the testimony of its witness William R. Davis.

11. In its *Brief from Staff Counsel on Tariff Interpretation*, Staff identifies precedent requiring the Commission to determine whether or not a tariff is ambiguous before applying statutory construction for interpretation.³ The threshold question to determine if a tariff is clear and unambiguous is whether the terms are plain and clear to one of ordinary intelligence.⁴ The only way to look beyond the language of the tariff is to show that the language itself is ambiguous. Ameren Missouri’s initial filing failed to argue facts sufficient to meet the standards applied by the Commission and courts. In its *Reply to Staff Brief*, Ameren Missouri attempts to supplement its initial filing, however, it still fails to meet the threshold substantiating the need for interpretation.

12. Ameren Missouri has not argued that the plain language of the tariff would deny the Complainants’ recovery. In fact, Ameren Missouri accuses Staff of “focusing so intently on the words” as to avoid the “context” of the tariff.⁵ Staff has cited to dictionary definitions of the terms within the Stipulation and Agreement defining low-income customer, a practice applied by the courts when interpreting law.⁶ Furthermore, Ameren Missouri concedes that the plain language of the tariff permits the

² EC-2016-0001, EFIS No. 7, *Answer*, p. 2 (Jul. 31 2015).

³ See *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).

⁴ *Id.*

⁵ EC-2016-0001, EFIS No. 20, *Reply to Staff's Report*, p. 4 (Sep. 14 2015).

⁶ EC-2016-0001, EFIS No. 16, *Staff's Report and Recommendation*, Appendix B, p. 3-4 (Aug. 31, 2015).

Complainants' recovery by arguing the existence of a latent ambiguity.⁷ Latent ambiguities exist where there are terms of the tariff are plain or clear.⁸ Ameren Missouri has failed to provide any counter-definitions to the Stipulation and Agreement terms as asserted by Staff, and as such, relies solely on the existence of ambiguity to support its claim for interpretation.

13. Arguing in support of the existence of ambiguity, Ameren Missouri asserts that where there are plain and clear words, ambiguity may exist if there is indistinctness in the meaning of the words used, or where a latent ambiguity arises because of a collateral matter that makes the meaning of the words uncertain.⁹ Ameren Missouri argues that the tariff's terms are indistinct as to "what utility bill" receives payment from a designated assistance fund. Further, it argues that a latent ambiguity exists because Ameren Missouri does not receive notice and cannot independently confirm when a customer has received assistance towards other utilities' bills.

14. The concept of indistinctness applies to contract interpretation,¹⁰ not statutory interpretation. Furthermore, Ameren Missouri fails to apply its asserted standards. When arguing the existence of "indistinctness," Ameren Missouri fails to identify a single meaning of a word from the tariff that creates uncertainty, much less support its interpretation. Ameren Missouri conflates the definition of indistinct and silent – the tariff is ***silent*** on the matter as to what utility the tariff requires to receive

⁷ *Supra* at note 6, p. 5.

⁸ ***Alack v. Vic Tanny Int'l***, 923 S.W.2d 330, 337 (Mo. 1996).

⁹ *Supra* at note 6, p. 4.

¹⁰ *Supra* at note 8.

payment from a designated low-income program, and such new qualification may not be interpreted into existence where there is no ambiguity.¹¹

15. Ameren Missouri then asserts the existence of a latent ambiguity, another concept of contract interpretation,¹² to argue the tariff lacks a method for Ameren Missouri to receive notice or independently verify whether or not a customer has received low-income assistance for service provided by another utility.¹³ Ameren Missouri argues that it is illogical to credit its customers' accounts that have received assistance paid to other utilities' bills.¹⁴ Those are not the facts of this case: the Complainant notified Ameren Missouri of his qualification for exemption, and was denied in-part on the grounds of Ameren Missouri's interpretation.¹⁵ Ameren Missouri has stated that it never intended to validate customers' incomes, a fact evident in the tariff's language as customers' income are determined by whether they receive low-income assistance, and further evidenced from its filed testimony.¹⁶ Ameren Missouri cannot now claim they have no means or are being prevented from independently verifying customers' incomes. Further, the Complainant notified Ameren Missouri of his qualification for the program, so the arguments regarding receipt

¹¹ ***United States v. Union Pac. R. Co.***, 91 U.S. 72, 85, 23 L. Ed. 224 (1875) (“Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist.”)

¹² ***Kast v. Kast***, 361 Mo. 623, 627 (Mo. 1951).

¹³ *Supra* at note 6, p. 5.

¹⁴ *Id.*

¹⁵ *Supra* at note 2, p. 3-4. The Complainant included a copy of an *Energy Assistance Eligibility Notice* issued by the Missouri Department of Social Services detailing the Complainant's potential “benefit amount.” The Complainant has since supplemented the record through the Office of Public Counsel's *Motion for Summary Determination and Attachments* that show a payment made from the Missouri Low Income Home Energy Assistance Program on December 29, 2014. EC-0216-0001, EFIS No. 19, Attachment C (Sep. 14 2015). This is the document referenced in *Staff's Report and Recommendation*, page 3 ¶ 7; however due to a filing error, was not included in Staff's filing.

¹⁶ ER-2014-0358, EFIS No. 23, *Direct Testimony of William R. Davis*, p. 20.

of notice are moot as they do not pertain to the facts of this case. “Latent ambiguity” does not apply to statutory interpretation and Ameren Missouri fails to identify relevant facts that would substantiate latent ambiguity; thusly its application of extrinsic evidence should be excluded from this proceeding.

16. Courts apply an additional standard to determine whether ambiguity exists if the plain language of a statute leads to an absurd or illogical result.¹⁷ The legal standard requires a showing of “complete contradiction in the language.”¹⁸ Ameren Missouri argues that an absurd result exists because the tariff contains no provisions regarding a customer procedure to provide documentation.¹⁹ As evidenced in Ameren Missouri’s *Answer*, it claims that the Complainant was denied in-part for failure to provide evidence of “assistance received,” since the letter included in the *Complaint* only proves the Complainant’s *eligibility* to receive assistance.²⁰ Clearly, Ameren Missouri has the means to discern legitimate and illegitimate claims, as they have argued those points in this case.²¹ However, now that the Complainant has supplemented the record with evidence proving disbursement, appended hereto as Attachment A, it is absurd that Ameren Missouri claims the existence of a ambiguity as to receiving notice or verifying consumer information when it had no difficulty denying the initial claim. Furthermore, Commission Rule 4 CSR 240-13.025 details the procedure for billing adjustments; therefore there is no need for an independent

¹⁷ *City of Univ. City v. AT & T Wireless Services*, 371 S.W.3d 14, 20 (Mo.App. E.D. 2012) See, e.g., *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.*, 248 S.W.3d 101, 107 (Mo.App. W.D.2008).

¹⁸ *Id.*

¹⁹ *Supra* at note 5, p. 7-9.

²⁰ *Supra* at note 2, p. 3-4.

²¹ *Id.*

procedure to be identified in the tariff. An individual may disclose their receipt of aid; there are no confidentiality concerns where an individual waives confidentially by disclosing their account information. Ameren Missouri argues that they are uncertain as to what may constitute evidence to substantiate that an individual has received assistance paid to another utility. This argument requires the Commission to find that a State-generated receipt may not be sufficient evidence to prove whether or not a residential customer received program assistance within the past twelve months. Upon review of Attachment A, the customer's name and service address are identified, as well as the date of disbursement and designated assistance program. As this document identifies all determinative standards to qualify for the low-income exemption and is issued by the Missouri Department of Social Services, Staff believes this document is sufficient to substantiate qualification. As Ameren Missouri has failed to identify a “complete contradiction” in the language of the tariff, it fails to establish ambiguity.

17. Ameren Missouri has failed to identify ambiguity within the terms of the tariff, and instead seeks to *create* ambiguity through extrinsic evidence. The extrinsic evidence is not persuasive as to the existence of parties' intent, as a presumption exists that the intent of the parties is clear made clear in the tariff.²² Without the existence of any ambiguity, extrinsic evidence of a party's intent beyond the plain language of the tariff is irrelevant in the application of the law.²³

²² **Wheeler v. Board of Police Com'rs of Kansas City**, 918 S.W.2d 800, 803 (Mo.App. W.D. 1996) (In interpreting a tariff, the purpose is to “ascertain the intent of the parties *from the language used[.]*”) (Emphasis added).

²³ See **City of Univ. City v. AT & T Wireless Services**, 371 S.W.3d 14, 19 (Mo.App. E.D. 2012), *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010).

18. Courts have overturned the Commission's attempt to interpret unambiguous tariff terms in the past. In ***Laclede Gas Company v. Public Service Commission***, the Commission issued an Order stating that Laclede's tariff language was unambiguous, but concluded a different result must have been intended as the plain language produced an "illogical" result.²⁴ The Court found that the Commission's premise for interpreting against the plain language of the tariff was based on hypothetical calculations. The Court found that Laclede's tariff "is clear and unambiguous and cannot be given another meaning by the Commission's hypothetical envisioning of an "illogical result."²⁵ Likewise, Ameren Missouri argues the burdens of compliance, which are hypothetical. This case presents the Commission similar facts to ***Laclede***, wherein the Respondent asks the Commission to abandon the plain language of a tariff for its subjective intent. As Ameren Missouri has failed to show ambiguity within the tariff language, any interpretation of an unambiguous tariff or Stipulation and Agreement made by the Commission may be doomed to *Laclede's* fate.

19. Staff requests that the Commission apply the appropriate statutory interpretation standards in this case, because once a tariff is approved by the Commission, it becomes Missouri law, and it is interpreted in the same manner as a statute.²⁶ By permitting Ameren Missouri to unilaterally determine the intent of the Commission in its interpretation of this phrase, what would prevent it from doing the same to the thousands of sentences within its 300 plus page tariff? Ameren Missouri

²⁴ ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n.***, 156 S.W.3d 513, 521 (Mo.App. W.D. 2005).

²⁵ *Id.* at 522.

²⁶ *Id.* at 521.

laments “that a reader must look to at least four different sources...to even determine who qualifies as a “low-income” customer entitled to the exemption[.]”²⁷ Its solution, however, is to apply unpublished qualifications without review or consent from the Commission at will. Not only will Ameren Missouri require its customers to be expert researchers, now its customers are expected to be mind-readers.

20. It should not be the policy of the Commission to dismiss the tenets of statutory interpretation for the sake of expediency. Ameren Missouri has other means of recourse to address this issue; unilateral interpretation is not one of them. While the result of this case may seem “illogical” to Ameren Missouri, upon review of the plain language of the tariff, as well as Attachment A, it is clear that the Complainant meets the standards of a low-income customer identified in the Stipulation and Agreement, and incorporated by reference in the tariff.

WHEREFORE, Staff renews its recommendation that the Commission find that the Complainants qualify as “low-income customers” for purposes of exemption from Ameren Missouri’s MEEIA charges.

Respectfully submitted,

/s/ Hampton Williams

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²⁷ *Supra* at note 5, p. 6.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of October, 2015.

/s/ Hampton Williams