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

MISSOURI INDUSTRIAL ENERGY CONSUMERS' MEMORANDUM IN OPPOSITION TO AMEREN MISSOURI'S APPLICATION FOR REHEARING

The Missouri Industrial Energy Consumers ("MIEC"), respectfully opposes Union Electric Company d/b/a Ameren Missouri's (the "Company") Application for Rehearing in the above titled case. After hearing an exhaustive presentation of the relevant facts and reviewing a substantial amount of legal analysis provided by the parties in their post-hearing briefs, the Commission rightly found that the Company imprudently excluded two off system power supply contracts with Wabash Valley Power Association ("Wabash") and American Electric Power Operating Companies ("AEP") from the fuel adjustment clause ("FAC") approved by the Commission in Case No. ER-2008-0318.

The Company's Application for Rehearing is comprised mainly of conclusory statements, misrepresentations of the Commission's reasoning, and a re-hashing of the factual and legal arguments previously made in the Company's post-hearing briefs. MIEC will spare the Commission the chore of trudging back through the multiple issues that were thoroughly analyzed and decided in this case. Rather, MIEC will briefly address only the following three issues: 1) the Company's actions were imprudent and ratepayers were harmed by the Company's imprudent actions in violating the FAC Tariff; 2) the Commission interpreted the tariff in a manner that was consistent with the statute

the tariff was intended to implement; and 3) refunds to customers ordered in this case are not confiscatory.

1) The Company's actions were imprudent and Missouri ratepayers were harmed by Company's imprudence, because they were deprived of more than 17 million dollars to which they were entitled under the tariff and would have received but for the Company's violation.

As an initial matter, the Company argues that it's act of excluding the AEP and Wabash revenues from the FAC was not imprudent because it is "what a reasonable person would have done given the circumstances facing the Company." Application for Rehearing, at ¶ 7. The Company's logic is flawed and appears to be based on the dubious notion that the ends (balancing the Company's portfolio) justifies the means (violating the terms of the tariff to the detriment of Missouri ratepayers). Such logic is not persuasive. As was demonstrated during the hearing, Commission Rules provide ample legal mechanisms that the Company could have employed to ameliorate the impact of the storm on its bottom line. The Company could have sought an accounting authority order, filed a new rate case, and/or sought to withdraw or cancel the FAC. A reasonable party would have accessed one of these legal mechanisms available to it rather than violate the tariff under which it was legally obligated to Missouri ratepayers. The Company's decision to forego all of these legal mechanisms and to employ the illegal measure of violating the FAC was neither reasonable nor prudent. As such, the Commission rightly found that the Company's act of violating the tariff was imprudent.

The Company further argues that its actions were not imprudent because they "left customers in the same position as they would have been had the ice storm not occurred." This argument is a red herring. As an initial matter, the fact of the ice storm is completely irrelevant with respect to how the Commission should interpret the tariff at

issue. Indeed, the Company's own witness, Ms. Barnes, admitted under cross-examination that "[T]he fact of the storm [is not] germane [or] relevant in any way to how this Commission interprets the clause that is at issue in the tariff[.]"[1] While the Company's counsel gave a loquacious plea in it's opening statement for the Commission to take into account the ice storm when rendering its decision [indeed a valiant effort was made to give a pictorial presentation of the damage caused by the storm], the ice storm is not relevant to the Commission's analysis of whether the Company violated the tariff.

Second, the Company has no basis to opine on what position customers were in after the storm occurred. Indeed, Company Witness Lynn Barnes was asked whether it was fair for the Company to make assumptions about the financial impact the storm may have had on its customers. Her cavalier response was, "I can't solve world hunger here."[2]

The issue is simple. The tariff, which the Company drafted, required non-excluded off-system sales revenue to flow through the FAC. The AEP and Wabash Contracts were non-excluded off-system sales contracts (as was thoroughly demonstrated in the Commission's Report and Order). Thus, the Company was required to flow the revenues from the AEP and Wabash contracts through the FAC. The Company's failure to flow the AEP and Wabash revenues through the FAC resulted in ratepayers losing in excess of $17 million dollars to which they were entitled under the terms of the tariff. A $17 million dollar loss to ratepayers constitutes harm by any standard. Thus, Ameren Missouri's violation of the tariff caused harm to ratepayers, and the Commission rightly ordered the Company to refund to ratepayers the amount they were harmed.

[1] Transcript, Page 240, Lines 8-12.
[2] Transcript, Page 241, Lines 7-8.

2) The Commission interpreted the tariff in a manner that was consistent with the statute the tariff was intended to implement.

The Company argues that the Commission failed to interpret the tariff in a manner that is consistent with the statute the tariff was intended to implement. Specifically, the Company alleges that the Commission failed to interpret the tariff in a way that would afford the company "a sufficient opportunity to earn a fair return on equity" as required by RSMo. 386.266. The Company's argument fails, because implicit in the Company's argument is the notion that the Commission should interpret the tariff in such a way that the Company is guaranteed a return on equity that is satisfactory to the Company despite the Company's own missteps. Such an interpretation simply fails to comport with the clear language of the statute. The statute requires the Commission to interpret the tariff so as to afford the Company "*a sufficient opportunity* of a fair return on equity" not a guarantee of a return on equity that is satisfactory to the Company at all times under all circumstances. Nothing in Missouri law requires the Commission to completely immunize the Company from the business risks it undertakes, including the risk it undertook in seeking the FAC, and the risk it undertook in failing to employ the legal mechanisms at its disposal after incurring losses due to the storm.

Moreover, the fact that the Company applied for a rehearing shortly after the storm demonstrates that at the time of the application the Company understood the terms of the tariff in the same way as the Commission has interpreted the tariff in this case. Specifically, the Company was aware at the time the tariff was adopted that the tariff prohibited the Company from excluding revenues from off-system sales contracts (other than the existing municipal contracts) from the FAC. If the Company truly believed at the time of the tariff's adoption that it was free to exclude ordinary year-long power sale

contracts from the FAC, it would not have felt compelled to file for a rehearing. It would have simply entered into such contracts and balanced its portfolio. It's early Application for Rehearing belies its later self-serving interpretation of the tariff and its feigned surprise at the fact that all of the other parties in this case interpret the tariff in the same way as the Commission.

3) The refunds to customers ordered in this case are not confiscatory under Missouri law because they merely represent a return to Missouri ratepayers what was always rightfully theirs.

In the last paragraph of the Company's Application for Rehearing, it offers the conclusory and wholly unsupported statement that "the refunds to customers ordered in this case are confiscatory and thereby violate the Company's right to due process of law as guaranteed by both the United States and Missouri Constitutions." It is impossible to know upon what grounds the Company presents this novel argument for which there is no evidence in the record. However, a brief review of Missouri law demonstrates that the Company has failed to offer a colorable argument that the refunds in this case are confiscatory. Precedent was set early and firmly in Missouri with respect to what does and does not constitute a confiscatory action by the Commission, and that precedent has not changed:

> The fact that a utility may reach financial success only in time or not at all . . . does not make past losses an element to be considered in deciding . . . whether the rate is confiscatory. A company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of errors in management, or of omission to exact proper prices for its output, cannot erect out of past deficits a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory.

State ex rel. Capital City Water Co. v. Public Service Com., 298 Mo. 524, 539-540 (Mo. 1923).

In this case, the Commission's Order that the Company refund illegally gotten revenues from its ratepayers is far from confiscatory. On the contrary, the Company's act of keeping the illegally gotten revenues was a confiscatory act on the part of the Company to the detriment of the ratepayers. Additionally, it was entirely improper for the Company to seek recovery for the loss of Noranda's fixed costs through the FAC mechanism. Furthermore, as was discussed earlier, the Company had perfectly legal mechanisms at its disposal that could have defrayed the losses it incurred. The fault for failing to employ these legal mechanisms rests squarely on the Company. So the refunds in this case do not constitute unjust confiscation, but rather just restitution to Missouri ratepayers for the losses they incurred as a result of the Company's illegal and improper actions. As such, the Company's confiscatory argument fails, because it is not confiscatory for the Commission to return to Missouri ratepayers what was always rightfully theirs.

Conclusion

Based on the foregoing, MIEC respectfully requests that the Commission deny the Company's Application for rehearing. The Commission's findings of fact and law are well-supported in the record, and the Company has failed to support any of the conclusory allegations in its Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was filed with the Commission's electronic filing system this 16th day of May, 2011.

/s/ Brent Roam