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' POST-HEARING BRIEF

The Missouri Industrial Energy Consumers ("MIEC") respectfully submits its Post-Hearing Brief in accordance with the Commission's Order Setting Procedural Schedule in this case.

INTRODUCTION

> "*'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean.'*"
>
> Through the Looking Glass by Lewis Carroll

The evidence in this case shows that Ameren Missouri ("the Company") imprudently, improperly and unlawfully excluded the revenues it collected under two off-system power sale agreements[1] from its calculation of the Fuel and Purchased Power Adjustment Clause ("FAC") for the time period of March 1, 2009 through September 30, 2009, by attempting to make the words of Tariff Sheet 98.3 mean what the Company chose them to mean, rather than what they actually mean in the regulatory context. This Commission should find that the subject contracts are not "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, and thus not excluded from the FAC for the following reasons:

[1] The Company entered into off-system power sales agreements with American Electric Power Service Corporation ("AEP") on 2/27/09 and Wabash Valley Power Association ("Wabash") on 4/28/09.

1. The phrase "requirements sales," which has a particular meaning in the regulatory context as defined by multiple sources, does not contemplate the types of agreements the Company entered into with counter-parties AEP and Wabash. Additionally, a regulatory definition should be used to interpret the subject phrase rather than a "market" definition because the phrase was drafted and adopted in the regulatory context of a rate case, not in the context of the marketplace;
2. The parties to Tariff Sheet 98.3 did not *intend* at the time of the drafting that it would include the types of agreements the Company entered into with AEP and Wabash; and
3. The phrase "requirements sales" is ambiguous because it has two meanings—one meaning in the regulatory context and another meaning in the market—and therefore must be construed against the drafter (the Company) as a matter of law.

Consequently, this Commission should order the revenues and associated fuel expense generated by the AEP and Wabash agreements to be included in the calculation of the FAC such that that the margins from these sales will be used to reduce the fuel cost of the Company's rate payers as was contemplated by the FAC Tariff.

HISTORY

A brief history of the facts that led to this action may prove instructive. The Company first sought an FAC in 2007, but its request was denied. In 2008 it again approached the Commission with an FAC request. At that time, the interested parties entered into a stipulation and agreement as to all FAC tariff rate design issues—no party

objected to it—and this Commission approved it on January 8, 2009. The relevant language of the tariff to which the parties agreed states:

Tariff Sheet 98.3

> **Off-System Sales shall include all sales transactions . . . excluding Missouri retail sales and long-term full and partial requirements sales . . . .**[2]

Less than a month after drafting and adopting the above language, the Company came back before this Commission asking the Commission "to revise the approved fuel adjustment clause to allow the Company to retain a portion of its off-system sales revenue that would otherwise be passed through the fuel adjustment clause."[3] The proposed revisions to the FAC "would allow Ameren UE to recoup the revenue it expect[ed] to lose because of decreased sales of electricity to Noranda's aluminum smelting plant due to damage to the plant resulting from the recent severe ice storm."[4]

On February 19, 2009, this Commission denied the Company's application for rehearing, finding that "'in its judgment' . . . Ameren UE has not shown sufficient reason to rehear the Report and Order."[5] Within six weeks of the Commission's denial of the Company's application for rehearing, the Company entered into an off-system power sale agreement with AEP, and two months after that, it entered into a similar agreement with Wabash. In a not-so-subtle attempt to thwart the Commission's Order denying the Company's application for rehearing, the Company simply mischaracterized these two

[2] Tariff Sheet 98.03.
[3] Order Denying Ameren's Application for Rehearing, Case No. ER-2008-0318.
[4] *Id.*
[5] *Id.*

contracts as "long term partial requirements sales" and maintained that these contracts somehow fit within the exclusionary language of Tariff Sheet 98.3.

1. The Wabash and AEP contracts are <u>not</u> "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because that phrase—which has a particular meaning in the regulatory context as defined by multiple sources—does not contemplate the types of agreements the Company entered into with AEP and Wabash.

At least three official regulatory sources—the FERC Form 1, the Edison Electric Institute ("EEI") Glossary and the Rural Utilities Service ("RUS") Glossary—provide a unanimous definition of "requirements service" that does not contemplate the types of contracts the Company entered into with AEP and Wabash.[6] All three of these regulatory sources define "requirements service" as follows:

> **<u>Requirements Service:</u> Service that the supplier plans to provide on an ongoing basis (i.e., the supplier includes projected load for this service in its system resource planning).**[7]

The Company attempts to characterize the Wabash and AEP contracts as "partial requirements sales," using two alternative theories: 1) the Wabash and AEP contracts actually fit within the regulatory definition above; and, alternatively 2) the above regulatory definition should be disregarded as antiquated and irrelevant, and a "market" definition of requirements sales should instead be used to interpret Tariff Sheet 98.3. Both of these theories fail because the contracts do not qualify as requirements service under the "regulatory" definition above, and a "market" definition of that phrase is inapplicable to the interpretation of the Tariff.

[6] Haro Surrebuttal, Ex. 2, JH-S5, p. 134 of the EEI Glossary and JH-S3; Transcript, Page 263, Lines 2-25.
[7] *Id.*

Company Theory # 1:

The Company's attempt to characterize the AEP and Wabash contracts as "requirements sales" as that phrase is understood in the regulatory context quickly unravels into linguistic absurdity. Company witness Jaime Haro testified that he "agree[d] with the EEI glossary definition of requirements service[8]," which requires suppliers to plan to provide service to the buyer on "an ongoing basis."[9] However, to maintain that the AEP and Wabash contracts fit within the regulatory definition, Mr. Haro was forced to define the phrase "ongoing basis" in such a way as to render it completely meaningless. According to Mr. Haro, "ongoing basis" could simply mean "the term of the contract."[10] Indeed, when pressed, Mr. Haro conceded that under his definition, "ongoing basis", could mean as little as a month or even a day.

> Q. And when you were asked to define "ongoing basis," you said that to you, that term could mean just for the extent or length or the duration of the contract; isn't that right?
>
> A. Yeah, that's right.
>
> . . .
>
> Q. Okay. If the contract is 30 days, would you still apply that definition "ongoing basis" to 30 days?
>
> A. Yeah. . . .
>
> . . .
>
> Q. So a day-long contract constitutes or could be construed as service on an ongoing basis . . . ?

[8] The definitions of "requirements service" found in FERC Form 1, the EEI glossary and RUS are indistinguishable.
[9] Transcript, Page 93, Line 21 through Page 94, Line 21.
[10] Transcript, Page 68, Lines 1-11.

. . .

A. Well, you – the way I understood is you're asking the word "ongoing," what does it mean. . . .

Q. And I'm saying so if you have a one-day contract, ongoing basis under your understanding would mean for the duration of that day?

A. Yeah.[11]

Only after Mr. Haro was confronted with the logical conclusion that his definition of "ongoing basis" could mean "one hour," that he acquiesced, stating, "that may be a stretch."[12]

It is frankly inconceivable that the term "ongoing basis" means nothing more than "the term of the contract" because such a definition would include *every* contract for any duration between every supplier and every buyer. Presumably every supplier plans to provide service to its buyers for the life of the contracts (even stop-gap temporary contracts) into which they enter with their buyers. Failure to do so would constitute breach and possibly fraud. So, it simply makes no sense to interpret the phrase "ongoing basis" as meaning "for the term of the contract" as Mr. Haro does.

It is clear from the Company's testimony and the facts surrounding the AEP and Wabash contracts that the Company never intended to supply service to these counter-parties on an ongoing basis. Rather, the Company entered into the AEP and Wabash contracts as merely a stop-gap solution to the anticipated loss of the Noranda load and did not renew these contracts after Noranda was back at full operation.[13] As such, the AEP and Wabash contracts simply do not fit within the regulatory definition of

[11] Transcript, Page 86, Line 15 through Page 89, Line 10.
[12] Transcript, Page 88, Lines 1-4.
[13] Transcript, Page 67, Lines 11-25; *see also* Transcript, Page 119, Line 16 through Page 120, Line 1.

"requirements service" because the evidence demonstrates that the Company did not plan to provide service to AEP and Wabash on an ongoing basis.

Company Theory # 2:

The Company's second theory appears to be that this Commission should ignore the regulatory definition of "requirements service" provided in the FERC Form 1, the EEI Glossary and the RUS Glossary as antiquated and irrelevant,[14] and adopt the amorphous and self-serving "market" definition of "requirements service" for which there is no authority. This theory fails because the so-called "market" definition lacks any authority or tangible source, and the document to be interpreted is expressly a regulatory document, drafted and adopted within the regulatory context of a rate case.

Company Witness Mr. Haro was unable to point to any authority for his "market" definition of requirements service, except the EEI glossary, which clearly contradicts the Company's position as demonstrated above.[15] And Company Witness Ms. Barnes simply relies on Mr. Haro's definition of requirements service to inform her view and admits that the meaning of the term "partial requirements sales" is "outside [her] area of expertise."[16] As such, the Company failed to provide a single source or authority other than Mr. Haro's own testimony as to the "market" definition of partial requirements sales. On the other hand, MIEC Witnesses pointed to long-established regulatory documents (namely FERC Form 1, the EEI Glossary and the RUS Glossary) to support the regulatory definition of the phrase as it is used in Tariff Sheet 98.3.

[14] Haro Surrebuttal, Ex. 2, Page 5, Line 14 through Page 8, Line 25.
[15] Transcript, Page 50, Lines 7-22.
[16] Transcript, Page 175, Lines 3-13; Transcript, Page 195, Lines 22-25.

Furthermore, the regulatory definition rather than a "market" definition should govern the interpretation of Tariff Sheet 98.3, because the tariff was adopted within the *regulatory* context of a rate case between regulatory participants, not by traders in the marketplace.[17] The Company failed to provide any rationale to explain why their "market" definition should govern a phrase that was drafted and adopted in the regulatory context. In contrast, MIEC Witnesses offered compelling testimony to support the common-sense position that a *regulatory* definition should be used to interpret a phrase that was drafted and adopted in the regulatory context. For example, Mr. Brubaker testified as follows:

> A. [W]hat we're doing here, what the Commission does, is to regulate Ameren Missouri, and in so doing, it has to understand what the context is and what requirements contracts . . . have traditionally been and how they have been treated in jurisdictional allocations in rate cases. And that's a whole different matter than what may be taking place among power traders in the wholesale market. There's certain allocation paradigms that are followed and certain conventions and treatments of contracts and undertakings of obligations that affect retail rates. And because we have both base rates and fuel adjustment clauses adjusting what customers pay, it's important to . . . keep a clean distinction and to understand the implications of the contracting process. . . . I think what's more relevant is how [the AEP and Wabash contracts] are traditionally treated in retail rate cases because that's what we're doing here is setting retail rates. And the definition of "requirements contracts" that contemplates including [them] in the resource plan and planning to provide service on an ongoing basis . . . is the more compelling argument and reason for deciding how to treat them.[18]

Similarly, Mr. Fayne testified:

> A. [There is] a requirements transaction in the context of the fuel clause and . . . a requirements contract . . . in the context of the marketplace . . . [T]here's a very significant distinction between those two . . . . [A] requirements contract in the context of a marketplace has a general definition of meeting the buyer's load requirements. . . . A

[17] Transcript, Page 355, Lines 13-19.
[18] Transcript, Page 510, Line 13 through Page 511, Line 14.

> requirements contract in the context of a fuel clause is a very different matter and I think . . . really needs to be defined in the full context of the regulatory rate-making treatment of the utility. . . . My belief is the only [relevant definition in this case] is how it's treated in the regulatory context.

In sum, the phrase "requirements sales" in Tariff sheet 98.3 holds a particular meaning (as defined by FERC Form 1, the EEI Glossary and the RUS Glossary) in the regulatory context that is unique from its meaning in the marketplace. The evidence demonstrates that while the AEP and Wabash contracts may qualify as requirements sales as that phrase is loosely used in the marketplace, they do not qualify as requirements sales as that phrase is understood in the regulatory context. Further, the evidence supports the position that this Commission should apply a "regulatory" rather than a "market" definition to that phrase in the tariff, because the phrase was drafted and adopted within the regulatory context of a rate case, not as between energy traders in the marketplace.

2. The Wabash and AEP contracts are not long-term "partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because the parties did not intend at the time of the drafting that it would include the types of agreements the Company entered into with AEP and Wabash.

The only testimony related to the parties' intent as to the meaning of requirements sales in Tariff Sheet 98.3 at the time of the stipulation and agreement was provided by Staff Witness Lena Mantle. Ms. Mantle testified under oath as follows:

> Q. Can you tell this Commission how you interpreted the phrase long-term partial requirement service found in tariff sheet 98.3 at the time the parties entered into the FAC agreement?
>
> A. When I first read Marty lines' (sic) testimony and looked at the exemplar tariff . . . that definition was one that I was concerned about because I wasn't for sure what it meant. And for that reason, I had asked

> AmerenUE during the settlement technical conference exactly what that meant. At that time that I was given the answer, well, that's our wholesale municipal customers. No one else in the room seemed to disagree with them. It seemed like everybody else thought it was obvious, so that is the definition that I gave to OSSR when the stip and agreement was entered into.[19]

Not only is Ms. Mantle's testimony clear and unequivocal on this point, but also the Company failed to produce a shred of evidence to rebut it. While Mr. Weiss denies recalling the above exchange, his testimony provides no evidence of any alternative meaning the Company may have had in mind when it drafted that phrase. Mr. Weiss testifies that he was "in attendance at the majority of the meetings between Ameren Missouri and Staff concerning the FAC tariff"[20] and yet remains conspicuously silent on the issue of what the Company meant by the phrase "partial requirements sales" at the time it drafted the phrase. Mr. Weiss' silence on the issue, and the Company's failure to produce any other witnesses that were present at the stipulation meetings (Marty Lyons, for example) to testify as to what the Company meant when it drafted the phrase at issue leaves this Commission with little choice but to accept Ms. Mantle's testimony that the Company's stated intention with respect to the subject phrase referred to its wholesale municipal customers.

Interestingly, the Company's two principal witnesses on the issue of the meaning of the phrase, Mr. Haro and Ms. Barnes, were not present during the meetings at issue, and as such can offer no evidence as to what the Company meant by the term "partial requirements sales" in the Tariff. Indeed, unless Ms. Mantle's above account is deemed completely fictitious by this Commission, it provides the sole evidence as to the parties'

[19] Transcript, Page 352, Lines 9-24.
[20] Weiss Direct, Ex. 5, Page 6, Lines 6-19.

understanding of the meaning of "long-term partial requirements sales" at the time of the stipulation and agreement.

The 2010 revision of the tariff language further supports Ms. Mantle's testimony that the phrase was intended to mean only the Company's municipal customers. When the Tariff was revised in the 2010 rate case, the phrase "to Municipal customers" was merely inserted after the phrase "long-term full and partial requirements sales," so that the entire passage reads "Off-system sales shall include all sales transactions . . . excluding Missouri retail sales and long-term full and partial requirements sales *to Missouri municipalities*."[21] During cross-examination, Mr. Haro was afforded the opportunity to explain the revision to the tariff. His response (before a break was taken) wholly supports Ms. Mantle's position that the 2010 revision to the tariff was merely a "clarification" of the meaning of the prior tariff. His testimony is notable for the stark difference between his admission before the break and the opposite position he took after a break afforded him the opportunity to confer with Company counsel. His testimony *before* the break:

> A. We changed [the clause] in the next rate case.
>
> Q. And what word did you add. . . ?
>
> A. "Municipalities." <u>We clarified it because if that was the intention, then it was very simple to just limit it to municipalities</u>. . . .[22]

Moments later, after, the break, Company counsel led Mr. Haro's testimony to the exact opposite position than the one he had taken before the break, namely that the change was *not* a clarification of the drafter's intent:

[21] Transcript, Page 357, Lines 1-16 (emphasis added).
[22] Transcript, Page 63, Lines 4-9.

Q. Can you tell me, when we added the word "municipal"? Can you tell me what happened?

A. Yeah, I think when we added the word, it was a change to the tariff, it was a change that came with other changes in the – in the tariff itself.

Q. So it was not a clarification?

A. It was not a clarification. It was a change.[23]

In light of the surrounding circumstances, Mr. Haro's subsequent attempt to characterize the 2010 revision as a substantive "change" to the Tariff rather than a mere "clarification" (per Ms. Mantle's testimony and Mr. Haro's prior testimony)[24] seems simply incredible.

Therefore, this Commission should adopt Ms. Mantle's testimony as to the intention of the drafters with respect to the phrase "partial requirements sales" because the Company has failed to offer any alternative explanation of its intention at the time it drafted the phrase, and subsequent revisions to the tariff support Ms. Mantle's recollection of the Company's intent at the time the tariff was adopted.

3. The Wabash and AEP contracts are not "long-term partial requirements sales" as that phrase is used in Tariff Sheet 98.3, because the phrase is ambiguous in that it has two meanings—one meaning in the regulatory context and another meaning in the market—and thus, must be construed against the drafter (the Company) as a matter of law.

It is undisputed that the Company drafted the tariff that is the subject of this proceeding. Both company witnesses affirmed unequivocally that the Company was responsible for drafting the tariff's phrase "long term full and partial requirements sales."

[23] Transcript, Page 142, Lines 8-14.
[24] Transcript, Page 357, Line 12 through Page 358, Line 5; *see also Id.*

Company witness Ms. Barnes, for example admitted, "we wrote the tariff."[25] Mr. Haro similarly admitted that the Company was responsible for drafting the tariff.[26]

It is also undisputed that the phrase is ambiguous in that it has at least two meanings—one meaning in the regulatory context and another in the marketplace. MIEC witnesses Mr. Brubaker and Mr. Fayne testified extensively regarding the two definitions ("regulatory" and "market") of the phrase, advocating the adoption of the regulatory definition. The FERC Form 1, the EEI Glossary and the RUS Glossary provide the regulatory definition, while Mr. Haro's surrebuttal testimony appears to represent the "market" definition that is advocated by the Company.[27] That the phrase at issue has at least two seemingly reasonable definitions renders it inherently ambiguous. Further, both staff witnesses Lena Mantle and Dana Eaves testified that the term was ambiguous or unclear to them.[28] And while Mr. Haro testified that the phrase was "not ambiguous" he based his position on the fact that he and the AEP/Wabash counter-parties (all energy traders) understood the meaning of the phrase as it is used in the marketplace.[29] Mr. Haro's testimony merely supports the fact that while traders in the marketplace may share a definition of the phrase at issue, it is not a definition shared in the regulatory context. Thus, it is indisputable that the phrase at issue has two distinct definitions, and as such, is ambiguous.

Under Missouri law, it has long been held that any ambiguity in the language of a tariff is to be strictly construed against the drafter. See, for example, *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. Minn. 1971) ("[T]he tariff should be

[25] Transcript, Page 188, Line 17.
[26] Transcript, Page 62, Line 15 through Page 63, Line 3.
[27] Haro Surrebuttal, Ex. 2, Page 13, Lines 11-13.
[28] Transcript, Page 326, Lines 1-8; Transcript, Page 414, Lines 5-14.
[29] Transcript, Page 83, Lines 10-22.

strictly construed against the carrier since the carrier drafted the tariff; and consequently, any ambiguity or doubt should be decided in favor of the shipper."); *Union Wire Rope Corp. v. Atchison, T. & S. F. R. Co.*, 66 F.2d 965, 967 (8th Cir. Mo. 1933) ("Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier. . . .[T]his [is] an application of the general rule as to construction of written contracts and instruments. . . ."). *Kansas City S. R. Co. v. Kansas City Power & Light Co.*, 430 F. Supp. 722 (W.D. Mo. 1976) ("Where an ambiguous tariff is drafted by the carrier, and construction of the tariff is in doubt, such construction must be in favor of the shipper and against the carrier.").

It is clear from the testimony in this case that reasonably intelligent people can reasonably disagree about the meaning of the phrase "partial requirements sales" as that phrase is used in Tariff Sheet 98.3. It is also clear from the testimony that the Company drafted the ambiguous language of Tariff Sheet 98.3. Therefore, this Commission should apply the long-standing rule of Missouri law that requires any ambiguity or doubt in a tariff to be construed against the drafter, and should adopt the regulatory definition of the phrase "partial requirements sales" that is advocated by Staff and MIEC.

Conclusion

The words of Tariff Sheet 98.3 have a particular meaning in the regulatory context, and cannot mean something different just because the Company chooses them to mean something else. The MIEC is asking this Commission to interpret the language of Tariff Sheet 98.3 according to its regulatory meaning, according to the meaning that was intended at its adoption, and according the meaning that is required by Missouri law. This Commission should find that the AEP and Wabash contracts at issue were not "long

term partial requirements sales" as that phrase is used in Tariff Sheet 98.3. This Commission should further find that the Company acted imprudently, improperly and unlawfully by excluding the revenues it collected under two off-system power sale agreements from its calculation of the Fuel and Purchased Power Adjustment Clause ("FAC") for the time period of March 1, 2009 through September 30, 2009, because it did so in contravention of the terms of the governing FAC. The phrase "requirements service," which has a particular meaning in the regulatory context as defined by multiple sources, does not contemplate the types of agreements the Company entered into with AEP and Wabash. Further a regulatory definition of the subject phrase should be used to interpret the phrase rather than a "market" definition because the phrase was drafted and adopted in a regulatory context during a rate case, not in a market context among energy traders. Additionally, the parties to Tariff Sheet 98.3 did not intend at the time of the drafting that it would include the types of agreements the Company entered into with AEP and Wabash. Rather, the intended meaning of the subject phrase at the time of its adoptions contemplated only the Company's wholesale municipal customers. Finally, because the phrase "partial requirements sales" has two meanings—one meaning in the regulatory context and another meaning in the market—it is ambiguous, and must be interpreted as against the drafter (the Company) as a matter of Missouri law.

Consequently, this Commission should order the revenues and associated fuel expense generated by the AEP and Wabash agreements to be included in the calculation of the FAC such that that the margins from these sales will be used to reduce the fuel cost of the Company's rate payers as was contemplated by the FAC Tariff.

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 sent by electronic mail this 10th day of February, 2011, to the parties on the Commission's service list in this case.

/s/ Diana Vuylsteke