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.	))))	File No. EO-2010-0255

POST-HEARING BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

PURSUANT TO COMMISSION ORDER

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STAFF'S POST-HEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (Staff) by and through counsel, and respectfully provides the following to the Missouri Public Service Commission (Commission) as its *Post-Hearing Brief*.

This case turns on the meaning of the following language from the fuel adjustment clause tariff sheets of Union Electric Company d/b/a Ameren Missouri (Ameren):

> Off-System Sales shall include all sales transaction (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.[1]

Ameren entered into a bilateral contract on February 27, 2009, with American Electric Power Service Corporation as agent for the AEP Operating Companies (AEP)[2] and another bilateral contract on April 28, 2009, with Wabash Valley Power Association, Inc.[3], that it did not treat as being off-system sales for purposes of its fuel adjustment clause. For the reasons stated in Staff's *Prudence Report and Recommendation*[4] in this case, which is supported by the evidence, the Commission should find these two bilateral contracts were off-systems sales for

[1] Exhibit 11, *Eaves* Direct/Rebuttal, p. 3, lines 15-24.
[2] Exhibit 2, *Haro* Surrebuttal, Schedule JH-S1.
[3] Exhibit 2, *Haro* Surrebuttal, Schedule JH-S2
[4] Exhibit 8, *Staff's Prudence Report and Recommendation.*

purposes of Ameren's Fuel Adjustment Clause. Once making those findings the Commission should order Ameren to credit its customers through its fuel adjustment clause the aggregate sum of $17,169,838, with interest, with interest continuing to accrue thereon at the rate of Ameren's short-term borrowing rate.[5]

FACTS

The Commission authorized Ameren to implement a Fuel Adjustment Clause (FAC) in its general rate case, Case No. ER-2008-0318. In its Report and Order issued January 27, 2009, the Commission approved FAC implementing the tariff sheet that took effect March 1, 2009.[6] In that case, parties entered into a nonunanimous stipulation and agreement that set out proposed FAC tariff language, which the Commission approved.[7] At the time when Ameren and other parties were negotiating the terms of that stipulation and agreement, Ameren provided requirements sales to several municipalities.[8] Ameren had long-standing wholesale purchased power agreements with the following municipalities: City of Kahoka, City of Kirkwood, City of Marceline and the City of Perry (collectively referred to as "the Municipals").[9]

On January 28, 2009, an ice storm caused damage to Ameren's transmission and distribution systems; particularly in the southeast portion of the state.[10] As a result of the ice storm, Noranda Aluminum, Ameren's largest customer, went off line.[11] Because of its loss of the Noranda load, on February 5, 2009, in Case No. ER-2008-0318, Ameren filed its *Application for Rehearing*, seeking expedited treatment to modify its just authorized FAC, which flowed

[5] *See* Section 386.266(4), RSMo, (Supp. 2009).
[6] Exhibit 11, *Eaves* Direct/Rebuttal, p. 2, lines 16-17.
[7] Exhibit 3, *Barnes* Direct, p. 3, line 23 – p. 4, line 2.
[8] Exhibit 3, *Barnes* Direct, p. 5, lines 6-8.
[9] Exhibit 17, *Municipal Contracts;* Tr. Vol. 2, p. 59, line 1 – p. 60, line 1
[10] Exhibit 11, *Eaves* Direct/Rebuttal, p. 4. lines 11-14.
[11] Exhibit 11, *Eaves* Direct/Rebuttal, p. 4, lines 19-27; p. 6, FN 2.

95% of Ameren's revenues from off-system sales to Ameren's customers.[12] In this *Application for Rehearing,* Ameren asked the Commission to alter the terms of its FAC to exclude all incremental off-systems sales that resulted from the excess capacity and energy available due to its loss of the Noranda load.[13] Ameren wanted to "cover the long-term duration of the excess sales" or, more importantly, the duration of the Noranda outage.[14] On February 19, 2009, the Commission denied Ameren's *Application for Rehearing*.[15]

Subsequently, Ameren entered into two bilateral contracts. On February 27, 2009, Ameren and Ameren Electric Power Association, Inc. (AEP) executed a Physical Capacity and associated Energy (Partial Requirements – baseload) agreement for 100 megawatts of capacity.[16] On April 28, 2009 Ameren and Wabash Valley Power Association (Wabash) entered into an Electric Service Agreement for 150 megawatts of Capacity.[17] Neither the AEP contract nor the Wabash contract provided any system planning.[18]

The purpose of Commission Rule 4 CSR 240-20.090 as stated in the Missouri Code of State Regulations is "The rule sets forth the definitions, structure, operation, and procedures relevant to the filing and processing of applications to reflect **prudently incurred fuel and purchased power costs** through an interim energy charge or a fuel adjustment clause which allows periodic rate adjustments outside general rate proceedings."[19] A FAC allows a utility to adjust its rates charged based on its prudently incurred costs (over or under the base fuel rate) outside of a general rate case.[20]

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[12] Exhibit 11, *Eaves* Direct/Rebuttal, p. 4, line 19 – p. 5, line 4.
[13] *Motion for Rehearing and Motion for Expedited Treatment*, Case No. ER-2008-0318.
[14] Tr. Vol. 2, p. 74, lines 9-10.
[15] Exhibit 11, *Eaves* Direct/Rebuttal, p. 5, lines 18-25.
[16] Exhibit 11, *Eaves* Direct/Rebuttal, p. 5. Lines 27-30; Exhibit 2, *Haro* Surrebuttal, Schedule JH-S1.
[17] Exhibit 11, *Eaves* Direct/Rebuttal, p. 5 line 30 – p. 6, line 2; Exhibit 2, *Haro* Surrebuttal, Schedule JH-S2.
[18] Tr. Vol. 2, p. 65, lines 6-8; Tr. Vol. 2. p. 65, lines 21-23.
[19] 4 CSR 240-20.090 (emphasis added); Tr. Vol. 2, p. 48, lines 2-7.
[20] Exhibit 11, *Eaves* Direct/Rebuttal, p. 2, lines 17-19.

Section 386.244.4(4), RSMo (Supp. 2009)[21] and Commission Rule 4 CSR 240-20.090(7) require prudence reviews of the costs subject to an electric utility's FAC at least every 18-months. Staff commenced its prudence review of the costs subject to Ameren's FAC on March 11, 2010. In its prudence review, Staff evaluated and analyzed Ameren's fuel and purchased power costs for the period March 1 through September 30, 2009 – the first two accumulation periods of Ameren's FAC.[22] The first, shortened, accumulation period is March 1, 2009 through May 31, 2009, and the second accumulation period is June 1, 2009 through September 30, 2009.[23]

PROCEDURAL HISTORY

On March 11, 2010, Staff filed its *Notice of Start of Prudence Audit* for Ameren's Fuel Adjustment Clause pursuant to Section 386.266.4 and Commission Rule 4 CSR 240-20-090(7).

On August 31, 2010, Staff filed its *Prudence Report and Recommendation* recommending an amount to be included as customer refund adjustment associated with Off-System Sales revenues related to the AEP and Wabash contracts.[24] On October 12, 2010, Staff filed a *Correction to Staff's Prudence Report and Recommendation* to revise the amount.[25]

On September 9, 2010, Ameren requested a hearing regarding *Staff's Prudence Report and Recommendation*.

On January 10 and 11, 2011, the Commission held an evidentiary hearing in this matter. The following parties participated in the evidentiary hearing: Ameren, Staff, the Office of the

[21] All statutory references are to the Revised Statutes of Missouri 2000, as currently supplemented, unless otherwise noted.
[22] Exhibit 8, *Staff Prudence Report and Recommendation*, p. 1.
[23] Exhibit 8, *Staff Prudence Report and Recommendation*, p. 1.
[24] Exhibit 8, *Staff's Prudence Report and Recommendation*, p. 18; Exhibit 11, *Eaves* Direct/Rebuttal, p. 3, lines 4-5.
[25] This correction modified the amount of Staff's proposed refund in Off-System Sales Revenues to Ameren ratepayers.

Public Counsel (Public Counsel), Missouri Industrial Energy Consumers (MIEC), and the Missouri Energy Group.

BURDEN OF PROOF

The burden of proof the Commission employs regarding prudence has been well summarized by the Western District Court of Appeals in *State ex re. Associated Natural Gas Co, v. Public Service Com'n of State of Mo.,* 945 S.W.2d 520, 528-29 (Mo. App. W.D., 1997) as follows:

> The PSC has defined its prudence standard as follows:
>
> > [A] utility's costs are presumed to be prudently incurred . . . However, the presumption does not survive "a showing of inefficiency or improvidence."
> >
> > . . . [W]here some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent. (Citations omitted).
>
> *Union Electric*, 27 Mo. PSC (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, Etc., v. Fe. Energy Reg. Com'n*, 669 F.2d 799, 809 (D.C. Cir. 1981)). In the same case, the PSC noted that this test of prudence should not be based upon hindsight, but upon a reasonableness standard:
>
> > [T]he company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problems prospectively rather than reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that conformed the company.
>
> *Union Electric*, 27 Mo. P.S.C. at 194 (quoting *Consolidated Edison Company of New York, Inc* 45 P.U.R. 4th 331 (1982)).

In reversing the Commission in *Associated Natural Gas,* the Court did not criticize the Commission's definition of prudence, but held, in part, that to disallow a utility's recovery of costs from its ratepayers based on imprudence the Commission must determine the detrimental

impact of that imprudence on the utility's ratepayers.[26] The Commission should continue to employ this burden of proof standard.

OFF-SYSTEM SALES REVENUES, TARIFF SHEET 98.3,

It is Staff's position that the net revenues Ameren derived from the purchased power sales agreements between Ameren and counter-parties Wabash Valley Power Association, Inc. and American Electric Power Service Corporation as Agent for the AEP Operating Companies were imprudently excluded from the definition of off-system sales revenue (OSSR) found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri's Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009. The OSSR is a component of the following formula in Ameren's FAC which is used to determine changes to the FAC charges that appear on Ameren customer bills: [27]

$$FPA_{(RP)} = [(CF+CPP-OSSR-TS-S) – (NBFC \times S_{AP})] \times 95\% + (I+R)/S_{RP}$$ [28]

OSSR is defined on FAC Tariff Sheet No. 98.3 as:

> OSSR = Revenue from Off-System Sales allocated to Missouri electric operations. Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.[29]

The overriding issue in this matter, is whether or not the AEP and Wabash contracts are long-term partial requirements sales "that are associated with (1) AmerenUE Missouri jurisdiction generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission." It is undisputed that the AEP and Wabash contracts are not long-term full

[26] *Id.* at 529-30.
[27] Exhibit 11, *Eaves* Direct/Rebuttal, p. 3, line 5.
[28] Exhibit 11, *Eaves* Direct/Rebuttal, p. 2, line 21.
[29] Exhibit 11, *Eaves* Direct/Rebuttal, p. 3, lines 15-24.

requirements sales. However, the parties dispute whether the AEP and Wabash contracts are both long-term and partial requirements sales and whether the tariff requires that they must also be "associated with (1) AmerenUE Missouri jurisdiction generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission." It is Staff's position that the exclusion contained in the definition of OSSR is modified by the clauses that follow it, so that it reads "excluding Missouri retail sales and long-term full and partial requirements sales, that are association with (1) AmerenUE Missouri jurisdiction generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission."

The terms of "long-term full requirements sales" and "long-term partial requirements sales" are not defined in Ameren's tariff sheets. Each party to this case is proposing a different definition to certain words in each term and, therefore, what each term means. Ultimately, the issue is what did the Commission understand the OSSR definition to be when it approved the FAC tariff sheets in question.

PAROL EVIDENCE RULE

Ameren's tariff sheets do not define "long-term", "full requirements sales", or "partial requirements sales." Since the Tariff Sheet No. 98.3 was presented to the Commission as part of the stipulation and agreement regarding the Fuel Adjustment Clause in Case No. ER-2008-0318, the Commission could look to the Stipulation and Agreement for clarification of the meaning of the OSSR component. Stipulation and Agreements are contracts.[30] When interpreting a

[30] *State of Missouri ex rel. Riverside Pipeline Co., L.P., v. Public Service Com'n,* 215 S.W.3d 76 (Mo. En Banc, 2007) (A stipulation, like any other settlement agreement, but be construed using ordinary rules of contract construction. A contract must be construed as a whole so as to not render any terms meaningless, and with a construction that gives reasonable meaning to each phrase and clause and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense.) *Id.* at 84. (internal citation omitted); *Fiegener v. Freeman-Oak Hill Health System,* 996 S.W.2d 767 (Mo. App. W.D. 1999) ("Since settlement is a species of contract it is governed by contract law. Consequently, a settlement must possess all the essential elements of a contract to be legally valid and enforceable.). *Id.* at 771 (internal citations omitted); *Andes v. Albano,* 853 S.W.2d 936 (En Banc, 1993) ("Interpretation of a release or settlement agreement is governed by the same

contract, Courts look at what is contained within the four corners of the contract. However, if there is ambiguity, the parol evidence rule allows the use of extrinsic evidence for guidance. Since there is a clear disagreement among the parties as to the meaning of the OSSR terms and that disagreement is not contrived, the Commission's extrinsic evidence may be used to determine the meaning of any ambiguous words.

The parol evidence rule is a principle that preserves the integrity of written documents or agreements by prohibiting the parties from attempting to alter the meaning of the written document through the use of prior and contemporaneous oral or written declarations that are not referenced in the document.[31] Parol evidence is evidence given orally.[32] Ambiguities arise when something is susceptible to two or more different meanings or calls for inconsistent or different performances by the same party.[33] Ambiguities are to be resolved within the four corners of the written contract, utilizing standard rules of construction, if possible. If the ambiguity cannot be resolved by construction, parol evidence is admissible to establish the true intent of the parties.[34]

There are two types of ambiguities that arise in a contract. Patent ambiguities are those that appear on the face of the writing, i.e. one that appears exclusively within the contract itself.[35] Latent ambiguities are those that arise from collateral matters that make a facially clear

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principles applicable to any other contractual agreement, and the primary rule of construction is that the intention of the parties shall govern.). *Id.* at 941.

[31] *West's Encyclopedia of American Law.*

[32] Black's Law Dictionary, 7th Edition.

[33] *Daniels Exp. and Transfer Co. v. GMI Corp*., 897 S.W.2d 90 (Mo. Ct. App. E.D. 1995).

[34] *See Young Dental Mfg. Co. v. Engineered Products, Inc*., 838 S.W.2d 154 (Mo. Ct. App. E.D. 1992) (Parties had a contract where Young Dental provided molds to Engineered Products. The contract provided that Engineered Products could "scrap" molds that were over three years old. Young Dental contends that they were supposed to be returned, Engineered Products contends they were to be discarded. The court ruled that because "scrap" has a widely accepted meaning (dispose, discard, etc.) that outside evidence to the contrary cannot be used. Parol evidence can only be used to find the meaning of something that is clearly ambiguous or uncertain.).

[35] *Finova Capital Corp. v. Ream*, 230 S.W.3d 35 (Mo. Ct. App. S.D. 2007) (i.e., one that is created by a term or clause in the contract that is susceptible to two different meanings, or a contract that calls for two different types of performances by one party.).

or unambiguous writing unclear or ambiguous.[36] Normally, parol evidence cannot be used to create an ambiguity; however, it may be used if offered to demonstrate the existence of collateral matters that create a latent ambiguity, as where it is shown that a fact referenced in the written contract did not actually exist.[37]

Ambiguity is not created simply because the two parties disagree over the meaning of the contract.[38] Whether or not a contract is ambiguous is a question of law to be decided by the court.[39] If a contract is ambiguous, and the ambiguity cannot be resolved by construing the document, extrinsic evidence concerning the true intent of the parties is admissible. The issue of the parties' true intent is to be submitted to the trier of facts.[40]

As a matter of law, the Commission must determine that there is an ambiguity in the agreement, before parol evidence may be used. Before the Commission decides to look to the stipulation and agreement for guidance, it must first determine that there is an ambiguity in the agreement about the definitions of OSSR.

In order for there to be an ambiguity, the court must determine that something in the contract is susceptible to two or more different meanings, or calls for inconsistent or different performances by the same party.[41] Additionally, ambiguity can also arise when there is duplicity, indistinctness, or uncertainty in the meaning in the words used in the contract.[42] In this situation, the court (or Commission) will do all it can to interpret meaning of the terms

[36] *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330 (Mo. 1996). (a gym, in its contract, asserted that it was immune to any and all claims against it. Facially, this contract is unambiguous. However, because this is impossible, the contract is impossible. "A contract that purports to relieve a party from any and all claims but does not actually do so duplicitous, indistinct and uncertain.").
[37] Royal Banks of Missouri v. Fridkin, 819 S.W.2d 359 (Mo. 1991).
[38] *Atlas Reserve Temporaries, Inc. v. Vanliner Ins. Co.*, 51 S.W.3d 83 (Mo. Ct. App. W.D. 2001).
[39] *Kells v. Missouri Mountain Properties, Inc.*, 247 S.W.3d 79 (Mo. Ct. App. S.D. 2008).
[40] *Graham v. Goodman*, 850 S.W.2d 351 (Mo. 1993).
[41] *Daniels Exp. and Transfer Co. v. GMI Corp*., 897 S.W.2d 90 (Mo. Ct. App. E.D. 1995).
[42] *Anderson v. Curators of University of Missouri,* 103 S.W.3d 394, (Mo. Ct. App. W.D. 2003).

within the four corners of the document. If this proves futile, the court (or Commission) can look to outside evidence to help interpret the terms of the contract.[43]

Therefore, if the Commission determines that there is an ambiguity in the definition of OSSR, and it cannot determine the parties' intent within the four corners of the contract, parol evidence may be used to determine the parties' true intent. In that situation, the testimony of Staff expert, Lena Mantle should be considered. Though each party had the opportunity to present evidence on this matter, she is the only one who testified under oath that the intent of the subject language was to refer to municipal wholesale power contracts.[44]

Staff expert, Lena Mantle was involved in the development of Ameren's initial FAC tariff.[45] Ms. Mantle was present for the majority of the discussions related to the FAC during general rate Case No. ER-2008-0318.[46] Ms. Mantle's understands the OSSR definition to be a description of wholesale municipal contracts between Ameren and the Municipalities.[47] The contracts Ms. Mantle understood to be a part of OSSR were contracts included in Ameren's integrated resource plan and included in Ameren's net system input.[48] Also, Ameren's witness Mr. Haro testified that the OSSR exclusion was meant to encompass the Municipal contracts.[49]

This understanding is further supported by actions in the general rate case, Case No. ER-2010-0036, where the word "municipalities" was added to the definition of OSSR.[50] The replacement language in the tariff now reads: "excluding Missouri retail sales and long-term full and partial requirements sales to **Missouri municipalities**, that are associated with (1)

[43] *Young Dental Mfg. Co. v. Engineered Products, Inc.*, 838 S.W.2d 154 (Mo. Ct. App. E.D. 1992).
[44] Tr. Vol. 4, p. 351, lines 21-24; Tr. Vol. 4, p. 352, lines 1- 24; Tr. Vol. 4, p. 353, lines 15-19; Tr. Vol. 4, p. 354, lines 1-6.
[45] Exhibit 12, *Mantle* Direct/Rebuttal, p. 3, line 19.
[46] Exhibit 12, *Mantle* Direct/Rebuttal, p. 3, line 23 – p. 4, line 2.
[47] Exhibit 12, *Mantle* Direct/Rebuttal, p. 4, lines 3-25.
[48] Exhibit 12, *Mantle* Direct/Rebuttal, p. 5, lines 1-4.
[49] Exhibit 2, *Haro* Surrebuttal, p. 10, lies 9-11.
[50] Tr. Vol. 2, p. 63, lines 7-9; Tr. Vol. 4, p. 301, lines 6-7; Tr. Vol. 4, p. 356, lines 6-7.

AmerenUE Missouri jurisdiction generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission."[51]

Ms. Mantle testified to Staff's confusion regarding the AEP and Wabash contracts in Case No. ER-2010-0036, which is where Staff "discovered" the existence of the AEP and Wabash contracts.[52] Ameren's witness, Steven Wills responded to Ms. Mantle's statements regarding confusion behind the treatment of the AEP and Wabash contracts in Ameren Case No. ER-2010-0036, by stating his "testimony and workpapers were not ambiguous on the topic. Ameren Missouri was clear, forthright and complete in the information it presented regarding AEP and Wabash in that case [ER-2008-0318] and any suggestion to the contrary is not correct."[53] As to the content of his "clear" testimony in Case No. ER-2008-0318, Mr. Wills provided the following quote from his direct testimony in Case No. ER-2008-0318:

> Second, I used the adjusted sales in the development of normalized net systems output that I provided to the Company witness Timothy D. Finnell for production cost modeling.[54]

Mr. Wills is clearly wrong about the clarity of his direct testimony. There was confusion and ambiguity in Ameren's treatment of the AEP and Wabash contracts in Case No. ER-2010-0036 and in the relationship of those contracts to OSSR, otherwise we would not be here today.

Therefore, should the Commission find there is an ambiguity that cannot be clarified within the four corners of the contract, the Commission may consider witness's testimony in an effort to resolve the ambiguity and should consider Ms. Mantles testimony regarding the intent of the OSSR language.

[51] Tr. Vol. 4, p. 357, lines 1-11. (emphasis added).
[52] Exhibit 12, *Mantle* Direct/Rebuttal, p. 8, lines 5-7.
[53] Exhibit 6, *Wills* Surrebuttal, p. 11, lines 9-11.
[54] Exhibit 6, *Wills* Surrebuttal, p. 11, lines 9-15.

PARTIAL REQUIRMENT SALES

One of the terms in Tariff Sheet No. 98.3 is "partial requirements sales." Staff urges the Commission to use the definition contained within FERC Form 1 and the Edison Electric Institute's definition of "requirements sales." On page 310, the FERC Form 1 defines "requirement service" as "RQ – for requirement service. Requirement service is service which the supplier plans to provide on an ongoing basis (i.e., the supplier includes projected load for this service in its system resource planning). In addition, the reliability of requirements service must be the same as, or second only to, the supplier's service to its own ultimate consumers."[55] The EEI defines "requirement service" as "service that the supplier plans to provide on an ongoing basis (i.e., the suppler includes projected load for this service in its system resource planning.) In addition, the reliability of requirements service must be the same as, or second only to, the supplier's service to its own ultimate customers."[56]

Further Mr. Eaves provided a definition from the United States Energy Information Administration Independent Statistics and Analysis (EIA) that defines "partial requirements consumer" as "a wholesale consumer with generating resources insufficient to carry all its load and whose energy seller is a long-term firm power source supplemental to the consumer's own generation or energy received from others. These terms and conditions of the sale are similar to those for a full requirements consumer."[57]

The contracts between Ameren and AEP and Ameren and Wabash are not partial requirements contracts. Unlike AEP and Wabash, Ameren has had long-standing requirements

[55] Tr. Vol. 4, p. 326, lines 9-15; Exhibit 11, *Eaves* Direct/Rebuttal, p. 10, lines 20-25; Exhibit 14, *Brubaker* Direct, Schedule MEB-2, p. 3.
[56] Exhibit 14, *Brubaker* Direct, p. 4, lines 7-11.
[57] Tr. Vol. 4, p. 344, line 20 – p. 345, line 3. The EIA defines a "full requirements consumers" as "a wholesale consumer without other generating resources whose electric energy seller is a sole source of long-term firm power for the consumer's service area. The terms and conditions of sale are equivalent to the seller's obligation to its own retail service, if any." Tr. Vol. 4, p. 344, lines 11-18.

contracts with the municipalities of Kirkwood, Kahoka, Marceline, and Perry; relationships that have lasted more than five years.[58] Ameren had no intention of renewing its contracts with AEP and Wabash.[59] Those relationships between Ameren and AEP and Ameren and Wabash were not "on-going." Ameren only sought to provide service for brief periods of time.[60] But for the January 2009 ice storm, Ameren would not have entered into the contracts with AEP and Wabash.[61]

Another key distinction between the Municipals, AEP and Wabash, is that the Municipals do not own their own generation, or their generation is not economic, but rather they rely on Ameren to supply their energy needs.[62] AEP has its own generation and does not rely upon Ameren to meets its load requirements on an ongoing basis.[63] Under the EIA definition of "partial requirements consumer" the utility seeking power does not have enough of its own generation to supply its customers with energy.[64] Ameren does not provide AEP or Wabash with any planning services.[65] Also, Ameren did not include AEP or Wabash in its system resource planning, which is a requirement under the FERC Form 1 and EEI's definition of "requirements service."[66]

In Case No. ER-2008-0318, the costs allocated to the Municipal contracts were allocated through the energy and demand allocators.[67] These contracts revenues were appropriately

[58] Tr. Vol. 2, p. 59, line 1 – p. 60, line 1.
[59] Tr. Vol. 2, p. 67, lines 22-25.
[60] Tr. Vol. 2, p. 74, lines 9-10.
[61] Tr. Vol. 2, p. 119, lines 20-25.
[62] Tr. Vol. 2. p. 60 line 2 – p. 61, line 14.
[63] Tr. Vol. 2, p. 66, lines 19-25.
[64] Tr. Vol. 4, p. 344, line 20 – p. 345, line 3.
[65] Tr. Vol. 2, p. 65, lines 6-23.
[66] Tr. Vol. 2, p. 66, lines 12-18.
[67] Exhibit 12, *Mantle* Direct/Rebuttal, p. 5, lines 5-7.

excluded from the OSSR because the costs associated with serving those Municipalities were not included in retail costs through the use of jurisdictional allocators.[68]

MIEC's expert, Maurice Brubaker testified that the AEP and Wabash contracts are not requirements contracts.[69] Mr. Brubaker asserts that "requirements service" is "the provision of power to municipal customers, and sometimes rural electric cooperatives, on a basis whereby the selling utility incorporates the requirements of these customers (who typically have little or no generation of their own) into its resource planning."[70] Mr. Brubaker's definition is corroborated by the definition of "requirement service" in the FERC Form 1,[71] and further corroborated by the EEI definition of "requirement service."[72]

Mr. Brubaker's testimony addresses the fact that Ameren is not providing AEP and Wabash with any of the Regional Transmission Organization (RTO) or Open Access Transmission Tariff (OATT) services.[73] The contracts between Ameren and AEP and Ameren and Wabash only provide for energy and capacity.[74] The contracts provided to the Municipals provide for energy, capacity and the RTO and OATT services.[75]

MIEC's expert witness, Henry Fayne, states that the contracts between AEP and Wabash equate to "opportunity sales."[76] Mr. Fayne's testified that since Ameren received excess power due to the loss of Noranda's load, its ability to replace the Noranda load created an opportunity for Ameren to enter into additional off-system sales.[77]

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[68] Exhibit 11, *Eaves* Direct/Rebuttal, p. 4, lines 8-10; Exhibit 12, *Mantle* Direct/Rebuttal, p. 5, lines 7-12.
[69] Exhibit 14, *Brubaker* Direct, p. 3, line 3.
[70] Exhibit 14, *Brubaker* Direct, p. 3, lines 3-7.
[71] Exhibit 14, *Brubaker* Direct, p. 3, lines 15-20.
[72] Exhibit 14, *Brubaker* Direct, p. 4, line 3; Schedule MEB-3.
[73] Exhibit 14, *Brubaker* Direct, p. 4, lines 18-20; *see* Schedule MEB-4.
[74] Exhibit 14, *Brubaker* Direct, p. 4, lines 11-12.
[75] Exhibit 14, *Brubaker* Direct, p. 5, lines 5-6; *see* Schedule MEB-5.
[76] Exhibit 13, *Fayne* Direct, p. 3, line 20.
[77] Exhibit 13, *Fayne* Direct, p. 4, lines 9-13.

Clearly, the AEP and Wabash contracts do not meet the definition of "partial requirements" contained within the OSSR exclusionary language. The Commission should order Ameren to include the revenues associated with the AEP and Wabash contract in its FAC as a part of the OSSR component.

LONG-TERM

The other term at issue in Tariff Sheet No. 98.3 is "long-term." Staff urges the Commission to use the definition contained within FERC Form 1. FERC Form 1 defines long-term as "LF – for long-term service. 'Long-term' means five years or longer and 'firm' means that service cannot be interrupted for economic reasons and is intended to remain reliable even under adverse conditions (e.g., the supplier must attempt to buy emergency energy from third parties to maintain deliveries of LF service)."[78]

Since long-term is not defined in Ameren's tariff or in the nonunamimous stipulation and agreement regarding Ameren's FAC the Commission approved in Case No. ER-2008-0318, Staff and the Commission, must look to other sources for guidance. Staff expert, Dana Eaves, turned to Ameren's 2009 Annual Report filed with the Commission.[79] That Annual Report filed with the Commission is the same as the FERC Form 1 Report filed with the Federal Energy Regulatory Commission. The FERC Form 1 defines long-term as "five years or longer and 'firm' means that service can not be interrupted for economic reasons and is intended to remain reliable even under adverse condition (e.g., the supplier must attempt to buy emergency energy from third parties to maintain deliveries of LF service). This category should not be used for long-term firm service which meets the definition of RQ service. For all transactions identified

[78] Exhibit 14, *Brubaker* Direct, Schedule MEB-2, p. 3.
[79] Exhibit 11, *Eaves* Direct/Rebuttal, p. 10, lines 17-18.

as LF, provide in a footnote the termination date of the contract defined as the earliest date that either the buyer or settler can unilaterally get out of the contract."[80]

Ameren's contract with AEP was for fifteen months,[81] and its contract with Wabash was for eighteen months.[82] Clearly neither of the contracts are for a period greater than five years. Further, Ameren classified both the AEP and Wabash contracts as intermediate-term service in its 2009 FERC Form 1.[83] FERC Form 1 defines intermediate-term service as "the same as LF service except that 'intermediate-term' means longer than one year but less than five years."[84] In Ameren's 2009 Annual Report, it listed the Cities of Centralia, Hannibal, Kahoka, Kirkwood, Marceline, and Perry as requirements services.[85] Further, Ameren's witness, Mr. Haro believes the FERC Form 1 definitions are valid but not for transacting in the market.[86] Here, parties are not transacting in the market, parties are in a regulatory forum. Thus, under Mr. Haro's belief of the use of FERC Form 1 definition "they [the definitions] can still be used."[87]

The AEP and Wabash contracts do not meet the definition of "long-term" contained within the OSSR exclusionary language. The Commission should order Ameren to include the revenues associated with the AEP and Wabash contract in its FAC as a part of the OSSR component.

PRUDENCE

It was imprudent, improper and unlawful for Ameren Missouri to exclude the revenues derived from the power sales agreements with AEP and Wabash in the OSSR component of the

[80] Exhibit 11, *Eaves* Direct/Rebuttal, p. 11, lines 1-10.
[81] Exhibit 2, *Haro* Surrebuttal, Schedule JH-S1.
[82] Exhibit 2, *Haro* Surrebuttal, Schedule JH-S2.
[83] Exhibit 11, *Eaves* Direct/Rebuttal, p. 11, lines 26-27.
[84] Exhibit 11, *Eaves* Direct/Rebuttal, p. 11, lines 11-13.
[85] Exhibit 11, *Eaves* Direct/Rebuttal, p. 12, lines 3-5; p. 13, lines 3-10.
[86] Tr. Vol. 2, p. 57, lines 16-19.
[87] Tr. Vol. 2, p. 57, lines 17-18.

Ameren Missouri's Fuel and Purchases Power Adjustment mechanism. This imprudence resulted in harm to ratepayers.

The result of the Noranda reduction in load is that Ameren would recover less revenue through permanent rates.[88] Ameren was not losing fuel costs, it was losing fixed costs.[89] Ameren's revenue requirement in Case No. ER-2008-0318 was set based on the notion that it would recover approximately $139 million in costs from Noranda.[90] Unfortunately, the ice-storm caused Noranda to lose power.[91] Ameren estimated that it would lose approximately $90 million annual as a result of the impact of the ice storm.[92]

Since Ameren was denied its request to remove the OSSR component from its FAC, it sought to remedy its loss of the Noranda load. Ameren's short-term option was to sell the power as an off-system sale.[93] However, Ameren did not want to sell the power as off-system sales because 95% of the sales revenues would flow back to Ameren's customers through the FAC.[94] Instead Ameren, sought to circumvent the FAC OSSR component by entering into what it deemed to be long-term partial requirement sales.[95] While it was imprudent for Ameren to enter into the AEP and Wabash contracts, how Ameren treated the costs and revenues associated with those contracts was imprudent.[96]

Staff's proposed prudency disallowance is $17,169,838, collectively for accumulation periods 1 and 2.[97] By not flowing the revenues associated with the AEP and Wabash contracts through Ameren's FAC, Missouri ratepayers are harmed because Ameren has denied Missouri

[88] Exhibit 11, *Eaves* Direct/Rebuttal, p. 7, line 3-4.
[89] Exhibit 11, *Eaves* Direct/Rebuttal, p. 7, lines 8-11.
[90] Exhibit 3, *Barnes* Direct, p. 5, lines 12-16.
[91] Exhibit 3. *Barnes* Direct, p. 6, line 6.
[92] Exhibit 3, *Barnes* Direct, p. 6, lines 12-15.
[93] Exhibit 3, *Barnes* Direct, p. 7, lines 15-18.
[94] Exhibit 16, *Ameren's 2008 Annual Report*, p. 69.
[95] *See* Exhibit 3, *Barnes* Direct, p. 8, lines 5-16.
[96] Exhibit 12, *Mantle* Direct/Rebuttal, p. 8, lines 13-20; Exhibit 11, *Eaves* Direct/Rebuttal, p. 14, lines 6-11.
[97] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 5-7.

customers the right of having the AEP and Wabash contracts credited to their rates, while they are taking on the risk of increased fuel and purchased power costs.[98] When the Commission approved Ameren's FAC, the risk of fluctuations in fuel costs shifted from Ameren to its customers.[99] The customers now bear the risk of changes in fuel costs outside of a general rate proceeding.[100]

Ameren cannot have it both ways. Ameren's witness, Ms. Barnes stated "the fuel adjustment clause is only designed to allow recovery of fuel and purchased power costs and has nothing to do with the Company's ability to recover costs relating to storm restoration."[101] However, Ameren is seeking to recover its fixed costs associated with Noranda through its off-system sales. Ameren cannot circumvent Commission regulation when it does not like the outcome it may incur. Ameren is seeking to retain $17 million in fuel costs, when it lost the recovery of fixed costs, not fuel costs, when it lost the Noranda load. While the statute does indicate that the FAC must be "reasonably designed to provide a utility with a sufficient opportunity to earn a fair return on equity" Ameren has never challenged the design of its FAC the Commission approved in Case No. ER-2008-0318.[102]

In a rate case, the Commission authorizes a rate for return on equity. This authorized rate is an opportunity to earn a return, not a guaranteed of a return.[103] Ameren's witness, Ms. Barnes, attempts to distract the Commission by emphasizing that Ameren did not earn its' authorized rate

[98] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 10-18.
[99] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 10-18.
[100] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 10-18; Tr. Vol 3. p. 398, lines 20-21.
[101] Exhibit 4, *Barnes* Surrebuttal, p. 4, lines 8-10.
[102] Section 386.070.
[103] Exhibit 11, *Eaves* Direct/Rebuttal, p. 8, line 4-7.

of return.[104] Ms. Barnes does not believe that the Commission considered the loss of the customer Noranda, when determining Ameren's rate of return in Case No. ER-2008-0318.[105]

The Commission should find that Ameren was imprudent for not flowing $17,169,838, of revenue associated with the AEP and Wabash contracts to its customers through its FAC.[106] By not flowing the revenues associated with the AEP and Wabash contracts through its FAC, it harms Missouri ratepayers, because Ameren has denied them the right of having the AEP and Wabash revenues credited to their rates while the customers bear the risk of increased fuel and purchased power costs.[107]

CONCLUSION

Ameren seeks to hide behind the ice storm that caused Noranda to temporarily reduce its load in January 2009, seeking sympathy for an unfortunate event to benefit the shareholders. Ameren was imprudent for not including certain revenues associated with off-system sales into its Fuel Adjustment Clause. This imprudence harmed ratepayers because they did not receive the revenues associated with certain off-system sales that should have been flown through the Fuel Adjustment Clause, but instead were inappropriately excluded. Ameren has interpreted the tariff language in an unreasonable fashion to get the relief that benefits the shareholders at the detriment of ratepayers. Staff requests that the Commission find that Ameren imprudently misinterpreted the language in Tariff No. 98.3 and this imprudence caused harm to the ratepayers and order Ameren to pass the revenues associated with the AEP and Wabash contracts through the OSSR component with interest.

WHEREFORE, the Staff submits the foregoing as its Post-Hearing Brief in this matter.

[104] *See* Exhibit 4, *Barnes* Surrebuttal, p. 2.
[105] Exhibit 4, *Barnes* Surrebuttal, p. 2, lines 17-22.
[106] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 5-7.
[107] Exhibit 11, *Eaves* Direct/Rebuttal, p. 9, lines 10-18.

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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 10th day of February, 2011

/s/ Jaime N. Ott