BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a AmerenUE's Purchased Gas Adjustment Factors to be Audited in its 2006-2007 Actual Cost Adjustment	)))	**File No. GR-2008-0107**
In the Matter of Union Electric Company, d/b/a AmerenUE's Purchased Gas Adjustment Factors to be audited in its 2008-2009 Actual Cost Adjustment	)))	**File No. GR-2008-0366**
In the Matter of Union Electric Company d/b/a Ameren Missouri's Purchased Gas Adjustment Factors to be Audited in its 2008-2009 Actual Cost Adjustment	))))	**File No. GR-2009-0337**
In the Matter of Union Electric Company d/b/a Ameren Missouri's Purchased Gas Adjustment Factors to be Audited in its 2009-2010 Actual Cost Adjustment	))))	**File No. GR-2010-0180**
In The Matter Of Union Electric Company, d/b/a Ameren Missouri's 2010-2011 ACA Audit	))	**File No. GR-2012-0077**

STAFF RESPONSE TO ORDER DIRECTING RESPONSE

COMES NOW the Staff ("Staff") of the Missouri Public Service Commission ("Commission"), through the undersigned counsel, and for its Staff Response to Order Directing Response, states as follows:

1. On March 13, 2013, the Commission issued an Order Directing Response ("Order") in which it directed Staff and Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") to respond to the four questions raised in the body of the Order no later than April 15, 2013. Those questions and Staff's responses thereto, are set forth below.

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(1) Why is it still necessary for Staff to "monitor" Ameren Missouri's efforts to recover overcharges from MoGas?

As discussed under number 3 below, once the ACA account balances are finalized and the cases are closed, an argument could be made that the actions of Ameren Missouri related to the payment of the invoiced amounts incurred and paid during the historical ACA periods / cases could not be questioned. This would include Ameren Missouri's efforts to recover from MoGas any overcharges previously paid by Ameren Missouri. Since the actions of Ameren Missouri – including actions to recover any overcharges paid – are a significant factor in the need for and timing and amount of any eventual refunds, such actions should be subject to review. If the historical ACA cases are closed, it is questionable how Ameren Missouri could be held accountable for taking no action (such as no further action to recover the overcharges). The Order states that "[t]he Commission is aware that Ameren Missouri has engaged in extensive litigation with MoGas and has been awarded a multi-million dollar judgment by the Circuit Court. However . . . it is not clear how much Ameren Missouri may ultimately collect from MoGas." Staff is aware that Ameren Missouri ** [redacted] **. The historical ACA cases need to remain open so as to give Ameren Missouri ** [redacted] ** because, as stated above, if those ACA cases are closed it is

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questionable how Ameren Missouri could be held accountable for its actions or inactions related to its efforts to recover overcharges from MoGas.

(2) If Ameren Missouri ultimately recovers some amount of overcharges from MoGas, would it be appropriate to reflect those recovered amounts in the ACA periods in which those amounts are recovered rather than in the ACA periods in which the overcharges were incurred?

Yes. Staff's position is that all refunds of overcharges received should be flowed-through in the period of receipt; however, that does not mean that the ACA periods / cases should be closed before those refunds are received, as discussed under number 3 below.

Paragraph 5 of Sheet 28 of Ameren's PGA tariffs provides:

> 5. Any refunds which the Company receives in connection with natural gas services purchased, together with any interest included in such refunds, will be refunded to the Company's applicable customers unless otherwise ordered by the Commission. **Such refunds shall be credited to the ACA account in the month received** and shall be a part of the overall ACA interest calculation.
>
> The refund amount will be allocated to each firm sales, interruptible sales and transportation rate classification based upon the same allocation of such costs as calculated during the base period in Section II. herein. (Emphasis added)

(3) If the recovered overcharges can be reflected in future ACA periods, would it now be appropriate to establish the final ACA balances for each of the ACA years back to 2006?

No. As stated in the Staff Reply to Ameren Response filed in Case No. GR-2012-0077 on March 11, 2013, an argument could be made that finalizing the ACA balances could raise issues regarding retroactive ratemaking and/or the filed rate doctrine, thereby precluding the Commission from ordering any adjustments related to those ACA periods and removing Ameren Missouri's incentive to recover overcharges.

To further elucidate this argument concerning the filed rate doctrine and retroactive ratemaking, the Missouri Court of Appeals has stated that:

> The filed rate doctrine also precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency. *Nantahala*, 476 U.S. at 963, 106 S.Ct. at 2355; *Arkansas*, 453 U.S. at 577, 101 S.Ct. at 2930. This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration. *Columbia Gas Transmission Corp. v. F.E.R.C.*, 831 F.2d 1135, 1140 (D.C. Cir. 1987). In its discussion of the doctrine, the *Arkansas* court explains that it explicitly prohibits an entity from "imposing a rate increase for gas already sold," 453 U.S. at 578, 101 S.Ct. at 2931, and states, in a footnote, that an entity "may not impose a retroactive rate alteration and, in particular, may not order reparations." *Id.* at n. 8.

State ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri, 954 S.W.2d 520, 531 (Mo. App. 1997); *see also, State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App. 2010). The *Associated* opinion even quoted, with apparent approval, a statement of the Commission from its Report and Order in Case No. GR-93-140 that "The amount of the proposed adjustment must be based on excessive expenditures incurred during the particular ACA period involved." *State ex rel. Associated Natural Gas Company v.*

Public Service Commission of the State of Missouri, 954 S.W.2d 520, 529 (Mo. App. 1997).

In *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951), the Supreme Court of Missouri held that

> money which was collected by municipally owned gas utility [and prior investor owned gas utility] from customers in accordance with rate schedules fixed by municipal regulatory body [and, in the case of the prior investor owned utility, by the Missouri Public Service Commission] and which was impounded in federal court to await decision on review of Federal Power Commission's order reducing rate charged utility by interstate wholesaler of natural gas came into utility's hands unconditionally and was property of utility and no part of money would be allotted to customers.

Id. In other words, even though the pipeline's rates to the LDC went down, and the difference between the old pipeline rates and new pipeline rates were impounded in federal court pending review of the order of the FPC reducing the pipeline's rates, since the LDC's rates charged to its customers were not reduced or impounded at the local level the LDC was entitled to the entirety of the impounded funds. The court opined that money "**unconditionally** paid as prescribed by the lawfully promulgated and effective rates became and was the property of the distributors [*i.e.*, the local gas distribution company/utility]. . . .when the **established** rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal constitutions." 361 Mo. at 671, 236 S.W.2d at 354. (Emphasis added). In the ACA cases currently at issue, all money which has been paid has been paid conditionally, or subject to refund; however, if the Commission were to establish

the final ACA balances, the "condition" will have been removed and the LDC (Ameren Missouri) cannot be deprived of the money received.

Similar to the *Lightfoot* case is the case of *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666 (1950), which was another Missouri Supreme Court case. In *Straube*, the customers of a local gas distribution company sought to compel the LDC to pay them their interest in two funds under a theory of unjust enrichment; one fund being the amount received by the LDC from the federal appeals court upon affirmance of a pipeline rate reduction order of the Federal Power Commission (funds which had been impounded by the court pending appeal), and the other fund being the alleged excess amount collected by the LDC from its customers after the rate reduction order was in effect as to the LDC's purchases of gas and before a new rate had been established for the LDC's service to its customers. The court held that the customers had not stated a claim upon which relief could be granted, and stated that

> The facts alleged by appellants [the customers] in the petition before us show that respondent [the utility company] lawfully came into possession, custody and control of both funds without any encroachment upon the rights of the appellants. Respondent never collected and appellants never paid more than the legally established rate for gas furnished by respondent and appellants' rights were never invaded. The money legally and properly collected from appellants under the established rate schedules became and was the property of respondent. **When the established rate of a utility has been followed**, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions. (Emphasis added)

Straube v. Bowling Green Gas Co., 360 Mo. at 142, 227 S.W.2d at 671 (1950).

Perhaps one of the most well-known Missouri cases addressing the issue of retroactive ratemaking is the case of *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. en banc 1979) in which the

Missouri Supreme Court struck down the old electric fuel adjustment clause (FAC) for residential and small commercial customers as being beyond the statutory authority of the Commission. Even though it struck down the FAC it did not order refunds of amounts collected by the utilities under the FAC, stating that:

> to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery [citation omitted**]. It may not, however, redetermine rates already established and paid** without depriving the utility (or the consumer if the rates were originally too low) of his [*sic*] property without due process. [citations omitted] (Emphasis added)

State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d at 58. To similar effect is the case of *State ex rel. Barvick v. Public Service Commission*, 606 S.W.2d 474 (Mo. App. 1980).

Related to the foregoing discussion of retroactive ratemaking is the issue of "superseded" tariffs. In *State ex rel. Public Counsel v. Public Service Commission of the State of Missouri*, 328 S.W.3d 347 (Mo. App. 2010) the Court of Appeals stated

> As related to this case, "[w]hen tariffs are superseded by subsequent tariffs that are filed and approved, the 'superseded tariffs are generally considered moot and therefore not subject to consideration.'" *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290, 295 (Mo. App. 2005) (quoting *State ex rel. Mo. Pub. Serv. Comm'n [sic] v. Fraas*, 627 S.W.2d 882, 885(Mo. App. 1981)). "Underlying the application of the doctrine of mootness in ratemaking orders is the prohibition of retroactive ratemaking which renders the court without the ability to afford relief in regard to a superseded order." *Intercon Gas, Inc.,* 848 S.W.2d at 596. We cannot provide relief in the case of superseded rates because amounts collected under **established** rates "become [ ] the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal

> constitutions." (Emphasis added) *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 354 (1951).

State ex rel. Public Counsel v. Public Service Commission of the State of Missouri, 328 S.W.3d at 352 (Mo. App. 2010). The *Joplin* case referenced in the prior quotation, *State ex rel. City of Joplin v. Public Service Commission of the State of Missouri*, 186 S.W.3d 290, 295 (Mo. App. 2005), stated that:

> When tariffs are superseded by subsequent tariffs that are filed and approved, the "superseded tariffs are generally considered moot and therefore not subject to consideration." *State ex rel. Mo. Pub. Serv. Comm'n [sic] v. Fraas*, 627 S.W.2d 882, 885 (Mo. App. W.D. 1981). This is so because superseded tariffs cannot be corrected retroactively, *id.*, and if funds paid under those Commission-approved tariffs are not segregated in a court registry pending the final outcome, there is no monetary relief that can be given to the party challenging the rates. *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353-54 (1951).

In the ACA cases currently at issue, all money which has been paid has been paid conditionally, or subject to refund, and accounted for, which serves the same purpose as paying the money into a segregated fund pending the outcome of the ACA cases; however, if the Commission were to establish the final ACA balances, there would arguably be no relief that could be given.

Finally, in the *Fraas* case cited in both the *Public Counsel* and *Joplin* opinions, subsequent to the Commission's July 1979 order which was in question, the company filed new tariffs in October 1979 and part of the increases requested there were allowed under Commission order of August 1980; the company filed for yet another increase in September 1980, which was permitted in part pursuant to a stipulation approved in May 1981. Regarding the challenge to the 1979 order, the court stated

> The Commission's argument correctly states the general rule. Any error which may have been made against the Company by reason of the order

> dated July 19, 1979, cannot now be corrected retroactively to give relief for the period of time that the old tariffs here questioned were in effect. [citation omitted] Nor can those old tariffs now be amended prospectively, because the 1979 tariffs have been superseded by subsequent tariffs filed and approved. It is because of this inability by the reviewing court to give any relief, that issues under old, superseded tariffs are generally considered moot and therefore not subject to consideration. [citations omitted]

State ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882 at 885 (Mo. App. 1981).

Based on the above cases, it should be clear that if final ACA balances are established for the ACA years back to 2006 (*i.e.*, the ACA balances are finalized) and the cases are closed, an argument could be made that the actions of Ameren Missouri related to the payment of the invoiced amounts incurred and paid during the historical ACA periods/cases could not be questioned. This would include Ameren Missouri's efforts to recover from MoGas any overcharges previously paid by Ameren Missouri. One might even argue that when/if Ameren Missouri finally collects any money on its judgment against MoGas, Ameren Missouri could keep the entire amount received for itself, without making any refunds to its ratepayers (although this argument would appear to conflict with the provision of Ameren Missouri's tariff set forth under number 2 above). Whether the courts would ultimately agree with either of these arguments cannot be known for certain. However, the risk is too great if the Commission establishes the final ACA balances for each (or any) of the ACA years back to 2006.

(4) Are either Ameren Missouri or its customers being harmed by the delay in finalizing the ACA balances for the years back to 2006?

No, the delay in finalizing the ACA balances, *i.e.,* keeping the ACA cases open, by itself does not harm either Ameren Missouri or its customers. If Ameren Missouri claims to be concerned about uncertainty or legal expenses being incurred, those issues would remain whether the cases are left open or are closed, so long as Ameren Missouri continues its efforts to recover overcharges from MoGas and any refunds-related issues remain unresolved. Although it might be argued that customers are being harmed by the delay in receiving refunds, finalizing the ACA balances without corresponding refunds would do nothing to address that situation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 15th day of April 2013.

/s/ Jeffrey A. Keevil