BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri.	))))	Case No. EO-2012-0074

AMEREN MISSOURI'S APPLICATION FOR REHEARING

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and pursuant to Section 386.510, RSMo. (Cum. Supp. 2011) and 4 CSR 240-2.160(1) hereby files it Application for Rehearing respecting the Commission's July 31, 2013 Report and Order issued in this case. In support of its Application, the Company states as follows:

1. The Commission erred in ordering the Company to refund $26,342,791 plus interest instead of $23,042,791 plus interest because (a) the Commission incorrectly assumed that the Missouri Court of Appeals May 14, 2013 opinion in Case No. WD75403, *State ex rel. Union Elect. Co. v. Pub. Serv. Comm'n et al.*, 399 S.W.3d 467 (Mo. App. W.D. 2013) (the "Opinion") required a refund in the ordered amount, and (b) requiring a refund in the ordered amount was unreasonable because it was contrary to the overwhelming weight of the evidence, was arbitrary and capricious and constituted an abuse of discretion.

2. The holding of the Opinion is that the Commission's interpretation of the exclusion from the fuel adjustment clause ("FAC") of "long-term full and partial requirements sales" was reasonable because the Commission interpreted the FAC in such a way that it was limited to the four municipal contracts to which costs had been allocated as part of the rate case when the FAC at issue was approved. *Id.* at 488-89. The Court rejected Ameren Missouri's

interpretation of the exclusion because, concluded the court, it would allow a FAC to be used to recover lost retail revenues, a use that the Court indicated would be unlawful under the FAC statute, Section 386.266.1, RSMo. (Cum. Supp. 2011). *Id.* at 484.

3. Not one word in the Opinion, or its holding, addresses or impacts in any way the factual determination this Commission had to make respecting the proper dollar amount to refund once it was determined that the AEP and Wabash contract margins had to be included in the FAC.

4. When issuance of the Report and Order was discussed at Agenda, it was apparent that all three Commissioners in the majority believed they were compelled by the Opinion to require a refund of AEP and Wabash margins. The Company does not dispute that *a* refund was required of any margins that had not already been refunded. But the Commission was not required to require a refund of *margins that had already been refunded*, as here. To the extent a majority of the Commission ordered the approximately $26.3 million refund instead of approximately $23 million based upon such a belief, the majority was mistaken. Consequently, we request that the Commission grant rehearing to consider anew the appropriate amount of the refund.

5. In addition to the fact that the Opinion did not require an approximately $26.3 million refund, such a requirement is not supported by the weight of the competent and substantial evidence of record, is arbitrary and capricious and constitutes an abuse of discretion, and for those reasons the Commission's decision on the amount of the refund is unreasonable. *See, e.g., State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n.*, 103 S.W.3d 753, 759 (Mo. banc 2003) (Commission decisions must both be lawful *and reasonable*). Perhaps the

unreasonableness of the Commission's decision simply arose from overlooking the fact that Opinion did not compel such a result, or from overlooking the issue of the proper amount of the refund entirely.

6. Regardless of the reason for the Commission's decision on the amount of the refund, the decision is unreasonable because no fair reading of the record in this case could lead one to the conclusion that the "W" factor in the *Second Nonunanimous Stipulation and Agreement* in Case No. ER-2010-0036 (the "Stipulation") required refunds for anything other than AEP and Wabash margins. This is true for at least two reasons. First, the Stipulation contained two discrete sections, one of which had nothing to do with this issue. The one that did was unambiguously labeled "**AEP AND WABASH CONTRACTS**". Second, no reasonable tribunal could conclude that the "W" factor did not reflect the requirement that $3.3 million ($300,000 for 11 months[1]) of AEP and Wabash margins be refunded through the FAC despite Staff witness Lena Mantle's flip-flop on this subject only *after* this issue arose, as expressly provided for in the AEP AND WABASH CONTRACTS section of the Stipulation, as follows:

> The fuel adjustment clause tariff sheets shall also be revised to include an additional reduction in the numerator of the FPA factor in the amount of $300,000 per month during a twelve-month period commencing with the first full month for which new rates from this case are effective, which shall be accomplished in accordance with the following two highlighted changes to AmerenUE's fuel adjustment clause, which are in addition to changes agreed to in the First Nonunanimous Stipulation and Agreement:
>
> $FPA_{(RP)} = [[(CF+CPP-OSSR-TS-S-W) – (NBFC \times S_{AP})] \times \_\_\% + I + R - N]/S_{RP}$
>
> W = $300,000 per month for the months, _____, 2010 through, _____, 2011. This factor "W" expires on _____, 2011.

[1] The period ended up being 11 months because of the timing of the next rate case and the re-basing of net fuel costs that occurred in that rate case.

7. In this regard the Commission, without any explanation, states it found Ms. Mantle more credible than Company witness Gary Weiss on the issue of whether the stand-alone provision creating the "W" factor covered AEP and Wabash margins. That statement is completely at odds with the record. *Before* the issue of the $3.3 million of AEP and Wabash margins was ever raised, Ms. Mantle answered a data request (Exhibit 17 in the record in this case) as follows:

> Please list, by document (paper or electronic) type, date, and author/recipient (if shown by the document) all documents reviewed (whether relied upon by Ms. Mantle or not) by Ms. Mantle in arriving at the opinions expressed in Ms. Mantle's testimony in this docket.
>
> - Proposed tariff sheets filed in direct by AmerenUE witness Marty Lyons in ER-2008-0318 on April 4, 2008
>
> - Order Denying AmerenUE's Application for Rehearing issued on February 19, 2009
>
> - *AmerenUE ER-2010-0036 settlement document [the Stipulation] showing Noranda load loss* ***and AEP and Wabash offset*** . . . (emphasis added).[2]

8. That Ms. Mantle later, in trying to deny the Company credit for a refund it had already paid, tried to claim that the stipulation did not require refunds of margins from the AEP and Wabash contracts strains credulity beyond any reasonable breaking point. Consequently, the Commission's conclusion that she was "more credible" is unreasonable and arbitrary and capricious and, additionally, reflects an abuse of discretion because on this record it is clearly against the logic of the surrounding circumstances *See, e.g., State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n.*, 186 S.W.3d 376, 382 (Mo. App. 2005) (a decision is arbitrary and unreasonable when it shocks [the] court's sense of justice and is clearly against the logic of the

[2] Page 4 of Ex. 17.

surrounding circumstances); *See also Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 276 (Mo. App. W.D. 1995) (overruled on other grounds), *citing Egelhoff v. Holt*, 875 S.W.2d 543, 549-50 (Mo. banc 1994) .Nor does the fact that the Stipulation contains language to the effect that the Stipulation preserves all parties' ability to take whatever position they want to take in a future case regarding how the margins under these contracts should be treated for ratemaking purposes have anything to do with the proper calculation of what amount of margins have to be refunded in this case, because they were not previously refunded. The specific language of that provision simply preserves the parties' ability to take any position they wish regarding how these contracts should be treated, "including the position that these AEP and Wabash contracts . . . should be treated as off-system sales . . ." during the period when the prior FAC tariff was in effect. The parties *did* take those positions and Staff and MIEC prevailed. But the Stipulation does not contemplate that the Company should have to pay duplicate refunds if the contract margins are ultimately treated as off-system sales and included in the FAC.

9. The Company accepts the Commission's decision to order a refund of the AEP and Wabash margins that it has not already refunded. But to require another refund to customers of $3.3 million (plus interest) of refunds the Company has already refunded means that customers are not only benefitting from the an Act of God (the unprecedented ice storm that knocked out the power lines of a *different company* causing Noranda's smelter to lose power) by receiving tens of millions of dollars of off-system sales margins they would never have received if the ice storm had not occurred, but they will indeed receive an amount that is *greater* than the margins the Company realized from the AEP and Wabash contracts. In sum, by ordering approximately $26.3 million in refunds instead of approximately $23 million, the Company will

have to (a) bear the huge losses in base rate revenues caused by the ice storm because the Company will not be able to keep the AEP and Wabash contract margins, and (b) will have to kick in an additional $3.3 million of its shareholders' money to pay a duplicate amount that has already been credited to customers. It is error for the Commission to order such a result.

WHEREFORE, the Company seeks rehearing on the issue of the proper amount of the refund, and requests that the Commission revise its Report and Order to require only a refund of the approximately $23 million of AEP and Wabash margins that it has not yet refunded to customers through the FAC, plus interest.

Respectfully submitted,

SMITH LEWIS, LLP

/s/James B. Lowery
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

Thomas M. Byrne, #33340
Director and Asst. General Counsel
1901 Chouteau Avenue
P.O. Box 66149, MC-1310
St. Louis, MO 63101-6149
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
tbyrne@ameren.com

Attorneys for Union Electric Company d/b/a Ameren Missouri

Dated: August 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was served via e-mail on all counsel of record this 22nd day of August, 2013.

/s/ James B. Lowery