BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the First True-Up Filing Under the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri	)))	File No. ER-2010-0274

STAFF'S BRIEF IN RESPONSE TO INITIAL BRIEF OF AMEREN MISSOURI

Respectfully submitted,

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April 21, 2011

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COMES NOW the Staff of the Public Service Commission of the State of Missouri ("Staff"), by and through counsel, and for its Brief in Response to the Initial Brief of Union Electric Company d/b/a Ameren Missouri states:

Introduction

The issue is this case is the finality of the Commission's approval of NBFC rates of 1.001 ¢/kWh for the months of June through September and 0.690 ¢/kWh for the months of October through May that are in Ameren Missouri's Original Tariff Sheet No. 98.5[1] and First Revised Tariff Sheet No. 98.5 ("original NBFC rates").[2] The issue is not, as Ameren Missouri describes it, the rates applied to customer usage to determine the fuel adjustment charges appearing on their bills—the FPA_c (Cumulative Fuel and Purchased Power Adjustment).[3] These original NBFC rates apply for service in the months from March 1, 2009[4] to June 20, 2010.[5] Staff believes they are as final as the 95%/5% sharing mechanism and other parameters of

[1] *Stipulation of Facts*, Ex. C.

[2] Ameren Missouri's currently effective tariff sheet no. 98.5 which the Commission approved with its *Order Approving Compliance Tariff Sheets and Depreciation Rates* issued June 16, 2010 in File No. ER-2010-0036, and of which the Commission is requested to take official notice pursuant to § 536.070(6), RSMo. 2000. *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 256, 265-66 (Mo. App. 2007).

[3] *Stipulation of Facts*, Ex. C.

[4] The date when Original Tariff Sheet No. 98.5 took effect. See *Stipulation of Facts*, para. 6 and Ex. C.

[5] The last service date to which First Revised Tariff Sheet No. 98.5, which took effect June 21, 2010, applies. See *Stipulation of Facts*, para. 6 and Ex. C.

Ameren Missouri's fuel adjustment clause formula found on Original Tariff Sheet Nos. 98.1 to 98.4.[6]

Staff argues finality primarily based on section 386.550, RSMo. 2000, which provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." However, Staff is not abandoning its filed rate doctrine and prohibition against retroactive ratemaking arguments, also based on finality of Commission orders and decisions, it made in its recommendation filed in this case on December 30, 2010.

Ameren Missouri characterizes the issue in this case to be correcting FPA_c by correcting an erroneous input to the calculation of FPA_c.[7] The input it asserts is erroneous is the original NBFC rates.[8] Ameren Missouri argues NBFC rates must be calculated based on kWh sales at the generation level; it did not calculate the original NBFC rates at the generation level and consequently, it under billed its retail customers by $579,709 for the first accumulation period of March 1 to May 30, 2009; and the Commission can, and should, allow Ameren Missouri to bill the $579,709 through a future FPA_c.[9]

Stated another way, Ameren Missouri's argument is that the following tariff provision

> NBFC=Net Base Fuel Costs are the net costs determined by the Commission's order as the normalized test year value (and reflecting an adjustment for Taum Sauk, consistent with the term TS) for the sum of allowable fuel costs (consistent with the term CF), plus cost of purchased power (consistent with the term CPP), less revenues from off-system sales (consistent with the term OSSR), less an adjustment consistent with the term "S," expressed in cents per kWh, at the generation level, as included in the Company's retail rates.[10]

[6] *Stipulation of Facts*, Ex. C.
[7] See *Initial Brief of Ameren Missouri*, particularly, pp. 4 and 10.
[8] *Initial Brief of Ameren Missouri*, most explicitly on p. 14.
[9] *Initial Brief of Ameren Missouri*, particularly, pp. 3, 12-15.
[10] *Stipulation of Facts*, Ex. C.

required Ameren Missouri to use kWh sales at the generation level for calculating NBFC rates; it did not so when it calculated the original NBFC rates;[11] the Commission can now ignore the original NBFC rates and, instead, use lower NBFC rates based on kWh sales at the generation level to find Ameren Missouri under billed its retail customers by $579,709 for the first accumulation period of March 1 to May 30, 2009; and then the Commission can, and should, allow Ameren Missouri to bill the $579,709 through a future FPA_c. Staff believes the Commission can no more do so than it can change the sharing mechanism on Original Tariff Sheet Nos. 98.1 and 98.2.[12]

Because, with its *Order Approving Compliance Tariff Sheets* issued on February 19, 2009, in Case No. ER-2008-0318 the Commission finally approved the original NBFC rates of 1.001 ¢/kWh for the months of June through September and 0.690 ¢/kWh for the months of October through May for what ended up being the period March 1, 2009 to June 20, 2010 , and because they were and are published in Ameren Missouri's tariff, Staff disagrees. It is Staff's view that when the Commission approved the original NBFC rates and they took effect, they became "at the generation level" for purposes of Ameren Missouri's fuel adjustment clause. Unlike the distance between two cities, NBFC rates are not something of which the Commission can take official notice.

As explained below, in collateral proceedings such as this one, section 386.550, RSMo. 2000, requires that the original NBFC rates the Commission first approved in Case No. ER-2008-0318, and again approved in File No. ER-2010-0036 to be used for the period March 1, 2009 to June 20, 2010,[13] are conclusive; "In all collateral actions or proceedings the orders and

[11] *Stipulation of Facts*, paras. 5, 28 and 29.
[12] *Stipulation of Facts*, Ex. C.
[13] By referencing the First Revised Tariff Sheet No. 98.5, Staff is not suggesting that the original NBFC rates for periods prior to June 20, 2010, could or should have been changed in that tariff sheet; Staff is

decisions of the commission which have become final shall be conclusive." Further, it is the fuel adjustment clause tariff provisions which control; and they are as binding on the Commission as they are on the utility and the public, although the Commission may order them changed prospectively. *State ex rel. St. Louis Gas Co. v. Public Service Commission*, 315 Mo. 312, 286 S.W. 84 (1926); *State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App. 2010) and *State ex rel. AG Processing, Inc. v. Public Service Commission*, ___ S.W.3d ___, 2011 WL 690570 (Mo. App. W.D.), Util. L. Rep. P 27,133. In the latter *State ex rel. AG Processing, Inc.* case the court stated at 2011 WL 690570, pp. 3-4:

> Thus, under *UCCM*, a utility is limited to recovery of costs which were recoverable under "the rate" in effect at the time the costs were incurred. We believe "the rate" in effect at a particular time, as that term is used in *UCCM's* description of the retroactive ratemaking doctrine, includes any fuel adjustment clause then in effect.

This true-up is for the period March 1 to May 30, 2009. Ameren Missouri's fuel adjustment clause tariff sheets in effect for that period—both Original and First Revised Tariff Sheet No. 98.5—include the original NBFC rate of 0.690 ¢/kWh for the months of October through May. In Ameren Missouri's next following general rate increase case, File No. ER-2010-0036, the Commission, prospectively for periods after June 20, 2010, based on new evidence, approved different NBFC rates. Those NBFC rates appear in Original Tariff Sheet No. 98.12.[14]

Alternatively, if the Commission views it may revisit in this case the original NBFC rates it first approved in Case No. ER-2008-0318, Staff urges it not do so because the enabling statute, implementing rules and tariff provisions are designed for the true-up to be limited to ascertaining

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only pointing out they were not, which relates to this NBFC rates issue existing for later accumulation periods.

[14] The Commission is requested to take official notice of Original Tariff Sheet No. 98.12 pursuant to § 536.070(6), RSMo. 2000. *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 256, 265-66 (Mo. App. 2007).

the difference between what was billed and collected, and finality of all issues after the prudence review. The March 1 to May 30, 2009, period of this true-up is included in the prudence review docketed as File No. EO-2010-0255, which is now fully submitted to the Commission for decision after an evidentiary hearing.

Collateral Attack

Section 386.550, RSMo. 2000, provides: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." In this case Ameren Missouri is collaterally attacking the Commission's approval of Ameren Missouri's Original Tariff Sheet No. 98.5 in Case No. ER-2008-0318 and its approval of First Revised Tariff Sheet No. 98.5 in File No. ER-2010-0036. Those are the tariff sheets where the NBFC rates are 1.001 ¢/kWh for the months of June through September and 0.690 ¢/kWh for the months of October through May for accumulation periods from March 1, 2009, to June 20, 2010. Ameren Missouri has stipulated the Commission approved Original Tariff Sheet No. 98.5 as part of the tariff sheets is approved on February 19, 2009, to become effective on March 1, 2009.[15] As permitted by section 536.070(6), RSMo. 2000, Staff requests the Commission to take official notice of Ameren Missouri's currently effective First Revised Tariff Sheet No. 98.5, its *Order Approving Compliance Tariff Sheets* issued February 29, 2009, in Case No. ER-2008-0318 and its *Order Approving Compliance Tariff Sheets and Depreciation Rates* issued June 16, 2010 in File No. ER-2010-0036; presently these are the tariff sheets and Commission orders approving tariff sheets pertinent to the issue in this case.[16]

[15] *Stipulation of Facts*, para. 5.

[16] *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W.3d 256, 265-66 (Mo. App. 2007). Staff notes that section 536.070(6), RSMo. 2000, contemplates agencies taking official notice *sua sponte*, in part, shown by the requirement notice be given to the parties if the agency takes official notice of "technical or scientific facts, not judicially cognizable, within their competence, . . . and give the parties

With its application in this case, filed twenty months after the original NBFC rates first took effect, Ameren Missouri asserts that during the first recovery period of its fuel adjustment clause it under billed its retail customers by $579,709 because the original NBFC rates were too high, in particular the 0.690 ¢/kWh rate for the months of October through May. Ameren Missouri's sole avenue for challenging the NBFC rates in Original Tariff Sheet No. 98.5 as being too high was to comply with the review process set out in sections 386.500 and 386.510, RSMo. 2000, *i.e*., timely raise the issue before the Commission in a request for rehearing, and, if denied, timely file a petition for a writ of review in an appropriate circuit court. Had it done so, Ameren Missouri could have sought a court order staying or suspending the NBFC rates it now asserts the Commission may ignore. Section 386.520, RSMo. 2000. Likewise, it could have done the same regarding First Revised Tariff Sheet No. 98.5.

The Commission is bound by the provisions of Ameren Missouri's tariff in effect, including the NBFC rates. *State ex rel. St. Louis Gas Co. v. Public Service Commission*, 315 Mo. 312, 286 S.W. 84 (1926); *State ex rel. AG Processing, Inc. v. Public Service Commission*, 311 S.W.3d 361 (Mo. App. 2010) and *State ex rel. AG Processing, Inc. v. Public Service Commission*, ___ S.W.3d ___, 2011 WL 690570 (Mo. App. W.D.), Util. L. Rep. P 27,133.

This case is similar to the situation reported in *State ex rel. Licata, Inc. v. The Public Service Commission of Missouri*, 829 S.W.2d 515 (Mo. App. 1992), a case Ameren Missouri cites in its initial brief. In *Licata* a mobile home owner and operator challenged in 1988 the constitutionality of a particular tariff provision the Commission had approved in 1985, and argued it was only challenging the tariff provision, not the Commission's order approving it. The court made short shrift of that argument stating:

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reasonable opportunity to contest such facts or othwerwise show that it would not be proper for the agency to take such notice of them."

> However, Licata fails to note that the only purpose of the order of the Commission in 1985 was the approval of Article 10. Thus, it is impossible to separate Article 10 from the order of the Commission. When Licata attacks Article 10, it must necessarily attack the order which enabled KPL to adopt and enforce Article 10. By § 386.550, Licata cannot collaterally attack the order of the Commission by which Article 10 was adopted. For that reason Licata may not in this proceeding attack Article 10 but is bound by the requirements of Article 10.[17]

It is also similar to the situation the Commission recently addressed with its *Order Regarding Motions to Dismiss* issued January 26, 2011, in *In the Matter of MoGas Pipeline, LLC's Application and Complaint*, File No. GC-2011-0138. The Commission dismissed the application and complaint, in part, because it was a collateral attack on a prior Commission order. Based on Ameren Missouri's December 1, 2010, motion to dismiss filed against MoGas Pipeline, LLC's *Application and Complaint*, it appears to Staff Ameren Missouri may argue in this case that because the Commission's *Report and Order* in Case No. ER-2008-0318 is the subject of a pending appeal in the Southern District, No. SD30865, the Commission's approval of Original Tariff Sheet No. 98.5 is not "final." It is.

As the following paragraphs demonstrate, for purposes of the Public Service Commission Act, as modified, if the process for judicial review of a Commission order or decision set out in sections 386.510 and 540, RSMo. 2000, is available, the order or decision is final. This is because finality of the order or decision is a prerequisite to judicial review.

In *Summers v. Public Service Commission*, 366 S.W.2d 738 (Mo. App. 1963), the Commission held a joint hearing on the separate requests of two telephone companies for certificates of convenience and necessity to serve the same area after which a group of residents filed a petition seeking for Southwestern Bell Telephone Company to serve them. The Commission issued a report and order authorizing one of the two telephone companies to serve

[17] *Licata* at 518.

the disputed area, but did not act on the residents' petition. On these facts the court held no review of the residents' petition was available because there was no final order or decision, but that, as to the requests of the two telephone companies, the Commission had issued final orders permitting judicial review. Since what is now section 386.510, RSMo. 2000, was enacted before what is now section 18, of article V of the Missouri Constitution first became part of the Missouri State Constitution, the court's discussion of section 386.510 being the implementation of the constitutional provision is in error; however, the requirement of finality of an agency order before judicial review comports with the statutory scheme of which section 386.510 is a part.

This requirement of finality of a Commission order or decision for judicial review has been recognized in numerous appellate opinions: *State ex rel. AG Processing, Inc. v. Public Service Commission,* 276 S.W.3d 303 (Mo. App. 2008) (Order going into effect before applications for rehearing are decided does not make the order final.); *City of Park Hills v. Public Service Commission,* 26 S.W.3d 401, 404 (Mo. App. 2000) (Commission order denying motion to dismiss is not a final order—an order is not final "while it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by the issuing agency," *citing Dore & Assoc. Contracting, Inc. v. Missouri Dept. of Labor and Indus. Relations Commission,* 810 S.W.2d 74, 75 (Mo. App. 1990)); *State ex rel. Riverside Pipeline Company, L.P. v. Public Service Commission,* 26 S.W.3d 396 (Mo. App. 2000) (Denials of motions to dismiss are interlocutory, not final.); *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission,* 924 S.W.2d 597, 601 (Mo. App. 1996) (Complaint to challenge commission-approved territorial agreement is an improper collateral attack on a final order and "[section 386.550, RSMo. 2000,] is indicative of the law's desire that judgments be final."); and

State ex rel. State Highway Commission of Missouri v. Conrad, 310 S.W.2d 871, 876 (Mo. 1958).

Although it does not so directly and pointedly admit it is doing so, in this case Ameren Missouri is asserting the original NBFC rates are wrong and, therefore, the Commission may ignore them. This is an impermissible collateral attack on the Commission's decision approving the tariff sheets where the original NBFC rates appear (Original Tariff Sheet No. 98.5, superseded by First Revised Tariff Sheet No. 98.5), and the Commission cannot ignore the provisions of Ameren Missouri's tariff, including the provision that sets the NBFC rates to be 1.001 ¢/kWh for the months of June through September and 0.690 ¢/kWh for the months of October through May for the period starting March 1, 2009 and ending June 20, 2010.

Fairness

In its initial brief, on page ten, Ameren Missouri argues it is "simply proposing to correct an incorrect input in a prospective FPA_c rate adjustment" to allow it to collect an additional $579,709. Not so. As addressed above, Ameren Missouri is seeking to lower the original NBFC rates of 1.001 ¢/kWh for the months of June through September and 0.690 ¢/kWh for the months of October which apply during the period March 1, 2009 to June 20, 2010. Those original NBFC rates are an input into the determination of the FPA_c rate. Further, if the Commission does have the authority to now ignore the original NBFC rates and, instead, use lower NBFC rates that would allow Ameren Missouri to collect an additional $579,709 for the period of March 1 to May 30, 2009, the Commission should not do so any more than it should change the sharing mechanism from 95%/5% to some other sharing percentages.

The purpose of the Public Service Commission Act is primarily to protect the public from utilities. *State ex inf. Barker v. Kansas City Gas Company*, 254 Mo. 515, S163 S.W. 854, 857-58

(1914). Ameren Missouri's retail customers have every right to expect and rely on the fuel clause charges that appear on their bills being based on the provisions of the fuel adjustment clause tariff sheets that are in effect, including the NBFC rates. It would be unfair to retail customers to effectively change the applicable NBFC rates found in Ameren Missouri's tariff *after* they were already billed fuel adjustment charges based on those NBFC rates because Ameren Missouri, through no fault of the retail customers, failed to take into account its losses between generation and transmission when it developed those NBFC rates in its tariff. Ameren Missouri had its opportunity to correct the error in the NBFC rates before the Commission's February 19, 2009, *Order Approving Compliance Tariff Sheets* took effect on March 1, 2009.

While Staff now agrees Ameren Missouri did not calculate the NBFC rates of 1.001 ¢/kWh and 0.690 ¢/kWh at the generation level, Staff did not know Ameren Missouri had not calculated them at the generation level when Ameren Missouri filed Original Tariff Sheet No. 98.5 in February of 2009.[18] In fact, Ameren Missouri itself did not realize until November of 2009 that it had not calculated the NBFC rates on Original Tariff Sheet No. 98.5 at the generation level,[19] and it was not until early this year, after multiple meetings and discussion, that Staff finally understood Ameren Missouri's position and agreed Ameren Missouri had not calculated the original NBFC rates at the generation level.[20] Staff believes that since Ameren Missouri stopped including transmission losses in its average system loss factors when the Midwest Independent Transmission System Operator commenced Day Two markets in 2005,[21] Ameren Missouri should have known Staff's simulation model runs attached as Appendix A to the *Stipulation and Agreement as to Off-System Sales Related Issues* in Case No. ER-2008-0318

[18] *Stipulation of Facts*, paras. 5 and 20.
[19] *Id*. at para. 29.
[20] See *Id*., including paras. 29 and 30.
[21] *Stipulation of Facts*, paras. 21-24.

that Ameren Missouri used for determining the winter NBFC rate and summer NBFC rate in Original Tariff Sheet No. 98.5 did not include transmission losses well before it agreed to and relied upon them for determining the NBFC rates in Original Tariff Sheet No. 98.5.[22]

Regardless, necessarily, when the Commission approved Original Tariff Sheet No. 98.5, because Original Tariff Sheet No. 98.5 says they are "at the generation level," the NBFC rates on that tariff sheet—the original NBFC rates—were "at the generation level." If Ameren Missouri were invoking equity for relief—it is not since the Commission has no equity powers— since the failure to include transmission losses originated with Ameren Missouri, Ameren Missouri would not be entitled to equitable relief.

Ameren Missouri's Authority

Ameren Missouri cites a number of cases on pages seven through eleven of its initial brief for the proposition the Commission has authority to change Ameren Missouri's fuel adjustment clause FPA_c rate, and that, generally, doing so does not violate the filed rate doctrine or the prohibition against retroactive ratemaking. Staff agrees with these general propositions. Staff also agrees with Ameren Missouri's cite on page eight of its initial brief that relief for misapplication of a tariff is not barred by the filed-rate doctrine.

However, Staff vehemently disagrees with these statements appearing at the end of the first full paragraph on page ten of Ameren Missouri's initial brief: "Similarly the Company is not proposing any change to the formula producing the rate charged (or credited) to customers—the FPA_c rate. Rather the Company is simply proposing to correct an incorrect input in a prospective FPA_c rate adjustment." Ameren Missouri is proposing to change the FPA_c formula by changing a factor the Commission first fixed when it approved Original Tariff Sheet 98.5—

[22] See *Stipulation of Facts*, para. 15.

the NBFC rates. The NBFC rates are a factor in the FPAc, just like the 95%/5% sharing mechanism. None of the cases cited by Ameren Missouri involve changing the formula approved by the regulator. All involve either allegations of failure to comply with the adjustment clause or of manipulating costs or revenues flowed through it.

Ameren Missouri itself, in language it quotes from *Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy*, 801 N.E.2d 220 (Mass. 2004) on page 9 of its initial brief, provides support for Staff's position. That support appears in the following quote:

> Unlike the base rate, which is a calculation of rates going forward based on historical data, the CGAC [(cost of gas adjustment clause)] adjusts semi-annually for utility costs as they actually have been incurred, ***according to a mechanically applied technical formula.*** See *Consumers Org. for Fair Energy Equality, Inc. v. Department of Pub. Utils., supra* at 606, 335 N.E.2d 341. ***The formula itself is a fixed "rate" that cannot be changed outside the hearing procedure mandated by G.L. c. 164, § 94.*** (Emphasis added.) See *id.* at 604, 335 N.E.2d 341. But the "dollars and cents" amount inserted into the flow-through formula is presumptively not fixed. *Id.* They represent costs over which utilities often have little bargaining power or control, and it would defeat the very purpose of a CGAC to require these costs to be frozen until the expensive and cumbersome process of a rate change hearing is completed. See *id.* at 606-607, 335 N.E.2d 341 (it would be "incongruous" to require a § 94 rate proceeding before passing cost fluctuations onto ratepayers, because "the clauses were designed precisely to avoid those proceedings except where changes were being proposed in the clauses themselves").[FN14] See also *Newton v. Department of Pub. Utils.*, 367 Mass. 667, 678, 328 N.E.2d 885 (1975) (distinguishing power to order rate rebate for inadequate telephone service under G.L. c. 159, with its "specific sections relating to the regulation of rates and service," from the general ratemaking powers of G.L. c. 164, § 76C, and regulations issued thereunder).

Id. at 231. Similarly, parts of the fuel rate adjustment clause involved in *Public Service Commission v. Delmarva Power & Light Co. of Maryland*, 42 Md. App. 492, 400 A.2d 1147 (1979), cited by Ameren Missouri are stated in the court's opinion. One of them is the following fixed parameter analogous to the NBFC rates here: "The price per kWh of electricity sold will be adjusted each month to reflect changes in the cost of fuel above or below the ***base cost of 3.52***

mills (sic) ***per kWh***." *Id*. at 495 (400 A.2d at 1149) (Emphasis added). That parameter was not at issue in that case.

Ameren Missouri also relies on *State ex rel. North Carolina Utilities Commission v. Norfolk Southern Railway Company*, 106 S.E.2d 681 (N.C. 1959), for the proposition a mistake in a tariff may later be corrected. As Ameren Missouri states, that case turned on a tariff schedule erroneously showing the distance from Lane to Greensboro was 101 miles when it was actually 100 miles. The difference is significant because the commission specifically had approved rates of $1.30 per ton for distances of 80 to 100 miles, and $1.40 per ton for distances of 100 to 125 miles. The appellate court found the commission rather than the circuit court had jurisdiction in the first instance to correct the error on the ground the published tariff on file showed a rate of $1.40 per ton applicable to shipments between Lane and Greensboro, but then held that the charges made at the $1.40 per ton rate were not made in accordance with the published tariff and a mistake in mileage cannot be used to increase a rate. The distance error in the tariff was corrected prospectively and that commission had statutory authority to make retroactive orders, at least at that time and in the circumstance presented. The facts are readily distinguishable from those here. Courts may take judicial notice of the distance between cities. See *e.g. Maxwell v. City of Hayti*, 985 S.W.2d 920, 922 (Mo App. 1999). Unlike a distance between two cities, the NBFC rates are the result of numerous inputs each of which reasonable people may differ. See the definition of NBFC found in the *Stipulation of Facts*, Ex. C, Original Tariff Sheet No. 98.5.

Staff provided to Ameren Missouri's counsel a Westlaw search for opinions it conducted. A copy of the research results Staff obtained are appended to this brief. Included in those results is citation to a 2002 Alaska supreme court case Staff finds significant, in part because, like

Ameren Missouri's issue with developing NBFC rates at the transmission level rather than the generation level, it deals with losses. That case is *Matanuska Electric Association, Inc. v. Chugach Electric Association, Inc.*, 53 P.3d 578 (Alaska 2002), also appended. There, in dispute was whether, due to incorrect line loss factors, the fuel surcharges had been too high and could be corrected retroactively. Unlike this situation of retrospective costs, the fuel surcharge in the *Matanuska* was prospectively based on estimates. However, the opportunity for review of fuel surcharge filings the court relied on for holding the fuel surcharges were rates that could not be challenged because of the rule against retroactive ratemaking is very similar to that available under this Commission's rules during the initial FPA filings, true-up and prudence review.

It appears to Staff that under section 386.266, RSMo. Supp. 2010, 4 CSR 240-3.161, 4 CSR 240-20.090, the fuel adjustment clause tariff sheets of Ameren Missouri, The Empire District Electric Company and KCP&L Greater Missouri Operations Company, Commission practice, and section 386.550 RSMo. 2000, Commission review of costs that flow through a fuel adjustment clause in Missouri ends with the prudence review.

Unlike the Wyoming commission, this Commission does not have a statute available to it similar to the following statute quoted in the *MGTC, Inc. v. Public Service Commission of Wyoming*, 735 P.2d 103, 107 (Wyo. 1987), opinion cited by Ameren Missouri:

> "If upon hearing and investigation, any rate shall be found by the commission to be inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential or otherwise in any respect in violation of any provision of this act, the commission may fix and order substituted therefor such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act. Such rate so ascertained, determined and fixed by the commission shall be *charged, enforced, collected and observed by the public utility for the period of time fixed by the commission.*" (Emphasis added.) Section 37-2-121, W.S.1977.

The court in *MGTC* relied on that statute in holding the commission was authorized to order refunds of overcharges made with its surcharge adjustment which operates like a purchased gas adjustment for a local gas distribution company in Missouri.

Conclusion

For all the reasons stated and considerations raised above—finality, fairness to retail customers, filed rate doctrine and prohibition against retroactive ratemaking, the Commission should reject Ameren Missouri's attempt to change the NBFC rates that appeared in Original Tariff Sheet No. 98.5 and appear in currently effective First Revised Tariff Sheet No. 98.5 and, therefore, reject Ameren Missouri's request to bill its retail customers an additional $579,709 for the first accumulation period of its fuel adjustment clause—March 1 to May 30, 2009.

Further, because Ameren Missouri has stipulated in paragraph 37 of the Stipulation of Facts the Commission's resolution of this issue should apply to this case and Ameren Missouri's next four true-up filings, subject to existing rights under section 386.500 et seq. RSMo., Staff requests the Commission to indicate whether it intends its resolution of this issue in this case to be indicative of how it will resolve the same issue for the second accumulation period in the pending case, *In the Matter of the Second True-up Filing Under the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri,* File No. ER-2011-0321.

Respectfully submitted,

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/s/ Nathan Williams

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1. State ex rel. AG Processing, Inc. v. Public Service Com'n ex rel. State, 311 S.W.3d 361, 2010 WL 1027491, , Mo.App. W.D., March 23, 2010(No. WD 70799.)

   ...remedy any over- or under-collections, including interest at the utility's short term borrowing rate, through subsequent rate adjustments or **refunds**; (3) In the case of an adjustment mechanism submitted under subsections 1 and 2 of this section, includes provisions requiring ...

   ...rate case or compliant proceeding. (Emphasis added.) Thus, under the plain language of this statute, the Commission may approve a **fuel adjustment clause** by adopting specific rate schedules (tariffs) incorporating such an adjustment. Only costs incurred after the effective date of an appropriate tariff may be recovered under a **fuel adjustment clause**. See State ex rel. Associated Natural Gas Co., 954 S.W.2d at 531 [10] [11] In the case at bar...

2. Gordon v. Council of City of New Orleans, 9 So.3d 63, 2009 WL 885961, Util. L. Rep. P 27,047, 2008-0929 (La. 4/3/09), , La., April 03, 2009(Nos. 2008-C-0929, 2008-C-0932, 2008-OC-1226, 2008-OC-1240.)

   ...Denied May 29, 2009. Background: Customers of electric utility company filed complaint with city council requesting that council review utility's **fuel adjustment clauses** (FAC) filings and costs passed through to utility's ratepayers. Council issued resolution and order requiring utility to **refund** to ratepayers certain costs that council found had been improperly flowed through utility's FACs. Customers appealed. The Civil District Court ...

   ...Appeal, 977 So.2d 212, affirmed as amended, and, thereafter, on grant of customers' petition for rehearing, directed utility to **refund** $34,300,000 to its ratepayers for charges related to non-fuel administrative costs incurred by utility's corporate affiliate to provide fuel ...

   ...consolidation and grant of writ applications, the Supreme Court, Victory , J., held that council's decision not to require utility to **refund** non-fuel administrative costs incurred by utility's corporate affiliate to provide fuel procurement and fuel storage services to utility's owner...

3. Gordon v. Council of City of New Orleans, 977 So.2d 212, 2008 WL 586207, 2005-1381 (La.App. 4 Cir. 2/25/08), , La.App. 4 Cir., February 25, 2008(No. 2005-CA-1381.)

   ...2) k. Actions by Consumers. City council did not abuse its role as an administrative adjudicator in refusing to order **refunds** to ratepayers for alleged overcharges billed by electric company through fuel adjustment charges; although prospective realignment of costs had been ...

   ...had been improperly recovered through fuel adjustment charge in prior periods or that any costs component was improperly included in **fuel adjustment clause** filings prior to revenue-neutral realignment, any inaction with respect to the city council in auditing fuel adjustment charge was ...

...Commission's original jurisdiction in hearing the type of claims set forth in the Delaney plaintiffs' petition, provides: 1. “Entergy shall **refund** to its then current LPSC-jurisdictional ratepayers the sum of $72 million dollars (the “Settlement Amount”) via a credit to the **fuel adjustment clause**.” The **refund** was applicable to then current customers who were subject to the fuel adjustment charges at the time of the **refund**, on a kWh allocation basis. Additionally, the credit would be spread over the months of July, August, and September 2001...

4. C Office of Consumer Counsel v. Department of Public Utility Control, 279 Conn. 584, 905 A.2d 1, 2006 WL 2346316, , Conn., August 22, 2006(No. 17465.)

...Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 56 (Mo.1979) (permitting utility to use **fuel adjustment clause** impermissibly permits one factor to be considered to exclusion of all others in determining whether rate should be increased); Philadelphia ...

...of an isolated item of revenue or expense may not be, without more, the subject of the [c]ommission's order of **refund** or recovery, respectively, on the occasion of the utility's subsequent rate increase requests” The court found that, in the case...

5. H CenterPoint Energy Entex v. Railroad Com'n of Texas, 208 S.W.3d 608, 2006 WL 1865439, Util. L. Rep. P 26,956, , Tex.App.-Austin, July 07, 2006(No. 03-04-00731-CV.)

...to review until after they occurred. In dicta, the Matanuska court relied on Wisconsin Power & Light, a case that considered **fuel adjustment clauses** contained in wholesale electricity rates. Id. at 586 reviewing Wisconsin Power & Light, 511 N.W.2d at 295-97). The Wisconsin Supreme Court held that ordering a **refund** for imprudent fuel purchases violated the rule against retroactive ratemaking. Wisconsin Power & Light, 511 N.W.2d at 297. In part ...

...The agency had, in fact, often approved rates on interim bases so that it could review fuel costs and order **refunds** after that review. Id. As a result, the court held that, having “approved [the utility's] rates, including the utility's expected ...

...30] To the extent that Wisconsin Power & Light could be interpreted broadly as prohibiting as retroactive ratemaking in Wisconsin any **refund** based on a review of fuel purchase costs passed through to customers through **fuel adjustment clauses**, we decline to adopt that reasoning here. Instead, we find persuasive the dissenting opinion to that case, arguing that, because “rates calculated under the **fuel adjustment clause** go into effect without advance approval by the [regulatory agency], the utility cannot validly expect that charges thus collected are...

6. H Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Co., 804 N.E.2d 289, 2004 WL 422598, Util. L. Rep. P 26,882, , Ind.App., March 09, 2004(No. 93A02-0212-EX-1062.)

...provision, Vajda answered no and explained: [By] adding the earnings to the authorized net operating income for purposes of the **fuel adjustment clause**, you're in effect excluding the effect of those incremental earnings. So I think we're saying the same thing. I think ...

...the utility to make the expenditures, be allowed the additional return, and then through the return mechanism, have to immediately **refund** those incremental revenues that the statute granted for those [CCT] investments. In essence, it would be granting the recovery and...

7. H Fitchburg Gas and Elec. Light Co. v. Department of Telecommunications and Energy, 440 Mass. 625, 801 N.E.2d 220, 2004 WL 33070, , Mass., January 08, 2004

...companies do vary, it is instructive to note that other States that have examined this issue have also concluded that **fuel adjustment clauses** are not retroactive ratemaking. See, e.g., Daily Advertiser v.

Trans-La, 612 So.2d 7, 23 (La.1993) (noting “in ...

...for escalating fuel costs also compels retrospective reconciliation to exclude charges identifiably resulting from unreasonable computations or inclusions” and affirming **refund** order where “appellant's fuel adjustment charges to its customers included fuel costs which had already been fully recovered” MGTC, Inc ...

...adjustment] reconciliation proceedings do not violate the retroactivity rule because the utility commissions have not approved the amounts collected under [**fuel adjustment clauses**] in ‘general’ rate making proceedings” Similarly, other jurisdictions have determined that, pursuant to its general supervisory authority, a regulatory body overseeing a utility company may order a **refund** through a **fuel adjustment clause**. See, e.g., Daily Advertiser v. Trans-La, supra at 25 “By implication, the commission's ongoing authority to investigate fuel cost adjustments passed on through such clauses includes the power, when necessary, to take corrective measures and to order **refunds** for charges not prudently incurred” Matter of Niagara Mohawk Power Corp. 69 N.Y.2d 365, 372-373, 514 N.Y.S.2d 694, 507 N.E.2d 287 (1987) “[T]he power to order **refunds** must be implied, for there is little purpose in reviewing fuel adjustment charges, and the consumer's interests are ignored, if corrective action is not authorized for imprudent expenditures automatically passed through to the ratepayers. Manifestly, a **refund** is justified when the charges passed through to ratepayers result not from marketplace conditions, which the adjustment allowances are intended...

8. New York State Elec. & Gas Corp. v. Public Service Com'n of State of New York, 194 Misc.2d 467, 753 N.Y.S.2d 332, 2002 WL 31817891, Util. L. Rep. P 26,844, 2002 N.Y. Slip Op. 22742, , N.Y.Sup., December 09, 2002

...Corp. v. Public Service Commission of the State of New York, supra, the Court held that “[t]he power to order **refunds** of imprudent charges collected under **fuel adjustment clauses** may be implied from the Commission's general rate-making powers and from its authority over fuel adjustment allowances under former...

9. Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc., 53 P.3d 578, 2002 WL 1943494, Util. L. Rep. P 26,826, , Alaska, August 23, 2002(No. S-9839.)

...its fuel surcharges for 1995 using the actual line loss factor for that year. The commission also ordered Chugach to **refund** an amount based on the difference between the original line loss factor and the revision to its wholesale customers. In making its decision, the commission noted that “the principles relevant to retroactive ratemaking are not applicable to **fuel adjustment clauses**.” Both Chugach and MEA sought reconsideration of the commission's order. Chugach argued the commission overlooked the prohibition against retroactive ratemaking...

10. Consolidated Edison Co. of New York, Inc. v. Pataki, 292 F.3d 338, 2002 WL 1207514, Util. L. Rep. P 14,403, , C.A.2 (N.Y.), June 05, 2002(Docket Nos. 00-9358(L), 00-9426(CON) and 00-9442(CON).)

...in the form of a rate order by consent. Of relevance to this appeal, the agreement includes a so-called “**fuel adjustment clause**” (“FAC”), which allows Con Ed to pass certain costs along to its ratepayers in the form of temporary rate increases ...

...is empowered to bar Con Ed from passing imprudently incurred costs along to ratepayers and to force the utility to **refund** imprudently incurred costs already recouped. N.Y. Pub. Serv. Law § 66 (12)(k) (2001). Pursuant to the FAC, Con Ed...

11. Lowenburg v. Entergy New Orleans, Inc., 763 So.2d 751, 2000 WL 722201, 1999-1270 (La.App. 4 Cir. 5/17/00), , La.App. 4 Cir., May 17, 2000(No. 99-C-1270.)

...Service Commission. In Daily Advertiser, residential and commercial natural gas customers sued several pipeline companies alleging the defendants had manipulated **fuel adjustment clauses** and thereby overcharged customers. Besides seeking a **refund** of the alleged overcharges, plaintiffs asserted state law antitrust violations and sought damages for those and other state law claims...

12. Entergy Gulf States, Inc. v. Louisiana Public Service Com'n, 726 So.2d 870, 1999 WL 21237, Util. L. Rep. P 26,708, 1998-0881 (La. 1/20/99), , La., January 20, 1999(No. 98-CA-0881.)

...SERVICE COMMISSION, et al. No. 98-CA-0881. Jan. 20, 1999. Electric utility appealed Public Service Commission (PSC) order disallowing **fuel adjustment clause** filings. The District Court, East Baton Rouge Parish Robert D. Downing , J., required utility to **refund** ratepayers for portion of fuel adjustment charges and determined that portion of disallowances were not reasonable. Both Public Service Commission ...

...Supreme Court, Kimball , J., held that: (1) Commission applied proper prudence review standards in scrutinizing utility's decisionmaking; (2) disallowance of **fuel adjustment clause** recovery for outages and refueling outage extensions was not arbitrary nor capricious; (3) utility failed to demonstrate that it acted ...

...Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. If utility fails to carry its burden on **fuel adjustment clause** review and does not demonstrate that it acted prudently in incurring replacement power costs with regard to outage related replacement power costs, utility is saddled with replacement power costs and must **refund** any such costs previously billed to customers through fuel adjustment charge. [8] 317A Public Utilities 317AIII Public Service Commissions or...

13. Koch Gateway Pipeline Co. v. F.E.R.C., 136 F.3d 810, 1998 WL 80174, 329 U.S.App.D.C. 70, Util. L. Rep. P 14,192, , C.A.D.C., February 27, 1998(No. 97-1024.)

...another case declaring that although buyout costs could not automatically be passed on to customers under the applicable regulations (the "**fuel adjustment clause**" regulations), it would grant a waiver from the regulations if the utility could show that the buyout provided "ongoing benefits ...

...one. Although FERC eventually granted Gulf's waiver request, it declined to grant the waiver retroactively. It thus ordered Gulf to **refund**, with interest, the buyout costs it had previously charged its customers, a total of $2.7 million. Although we agreed ...

...on July 2, 1996. Moreover, although the Commission acted consistent with its decision in Williams Natural Gas in ordering a **refund**, it failed to distinguish these cases from the Gulf Power -type cases, in which FERC, on remand, waived strict compliance...

14. Michael v. City of Minden, 704 So.2d 409, 1997 WL 772064, 30,058 (La.App. 2 Cir. 12/10/97), , La.App. 2 Cir., December 10, 1997(No. 30058-CA.)

...Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. City's use of proceeds from wholesale electricity overcharge **refund** settlement to upgrade city's electric distribution system, rather refunding of proceeds to ratepayers as overcharge under **fuel adjustment clause**, was within city's unregulated legislative authority to establish electricity rates and earn profit and, thus, city's decision would not be ...

...of error lacks merit. Authority of Municipal Utility The plaintiffs contend that the City was not entitled to allocate the **refund** proceeds toward improving the electric utility system. They argue that the **fuel adjustment clauses** are not designed to provide the utility with a profit and so any **refund**

derived from adjustment overcharges must be returned to the customers. Any municipality or parish may construct, acquire, extend or improve ...

...fuel costs. Daily Advertiser, supra. [6] Plaintiffs seek to extend this limitation to the present situation by arguing that because **fuel adjustment clauses** are not designed to allow the utility to earn a profit, a **refund** from overcharges of these adjustments must be returned to the customer. Although this result may be required in the regulatory...

15. Gulf States Utilities Co. v. Louisiana Public Service Com'n, 689 So.2d 1337, 1997 WL 76815, Util. L. Rep. P 26,628, 96-2046 (La. 2/25/97), , La., February 25, 1997(No. 96-2046.)

...35 million annual payment representing gain received by utility on sale of generating units to joint venture be eliminated from **fuel adjustment clause** and rates charged to ratepayers. Utility appealed. The Nineteenth Judicial District Court, Parish of East Baton Rouge William H. Brown ...

...The Supreme Court, Lemmon , J., 633 So.2d 1258, reversed and remanded. On remand, Commission issued order requiring utility to **refund** to customers certain amounts for fuel adjustment overcharges, imprudence disallowances, and interest on past **refund**. On review, the Nineteenth Judicial District Court affirmed. On direct appeal, the Supreme Court, Calogero , C.J., held that: (1) Commission's calculation of utility **fuel adjustment clause** overcharge **refund** to ratepayers of portion of annual payment representing gain received by utility on sale of generating units to joint venture ...

...in allowing utility's shareholders recovery of, but not return on, expenses incurred in transaction with joint venture, in calculating utility **fuel adjustment clause** overcharge **refund**; (3) Commission did not violate rule against retroactive rate making when it retroactively disallowed utility's **fuel adjustment clause** charges for prior period, requiring overcharge **refund** to ratepayers; (4) for purposes of utility **fuel adjustment clause** recovery, Commission did not act arbitrarily and capriciously in disallowing as imprudent purchased-power costs stemming from power outages beyond scheduled refueling outages at utility's nuclear power plant; (5) Commission properly calculated **refund** for imprudent purchased-power costs stemming from nuclear plant outages by separately determining amount purchased-power costs for replacement power...

16. Beatty v. Metropolitan St. Louis Sewer District, Not Reported in S.W.2d, 1995 WL 128401, , Mo.App. E.D., March 28, 1995(No. 65824.)

...judgment regarding the ordinance meaningless. MSD suggests Utility Consumers Council supports its argument because the court did not order a **refund** for the monies collected under the **fuel adjustment clause** and roll-in. Id. at 58. However, the court recognized the utilities were entitled to file with the Public Service ...

...collected by the utilities pursuant to commission approval might not have exactly matched those amounts actually collected, to order a **refund** would “clearly be confiscatory.” Id. The court refused to order an offset of a **refund** because this would constitute impermissible, retroactive rate making. Id. In the present case, MSD was not entitled to the increased...

17. United Cities Gas Co. v. Illinois Commerce Com'n, 163 Ill.2d 1, 643 N.E.2d 719, 205 Ill.Dec. 428, 1994 WL 523775, Util. L. Rep. P 26,431, , Ill., September 22, 1994

...power plant in determining whether fuel purchases were prudently made. The court affirmed the Commission's order of a $70 million **refund** of charges collected under the uniform **fuel adjustment clause** (UFAC), which is the equivalent of the PGA in the electricity industry, on the ground that the plant operated at...

18. Wisconsin Power and Light Co. v. Public Service Com'n, 181 Wis.2d 385, 149 P.U.R.4th 351, 511 N.W.2d 291, 1994 WL 39455, Util. L. Rep. P 26,387, , Wis., February 08, 1994(No. 91-1096.)

...145 11 5(1) k. In general. Electric utility did not violate filed rate doctrine, so as to justify order to **refund** excess revenue, by charging rate determined pursuant to Public Service Commission (PSC)-approved **fuel adjustment clause** (FAC) based on unreasonably high fuel costs allegedly resulting from utility's imprudent management; PSC had statutory authority to oversee utility's ...

...798, 800 (Fla.App.1979) Second, the majority's very reliance on the PSC's power to oversee the fuel contract during the **fuel adjustment clause** period, and to audit the fuel costs, implies that the PSC could have assessed some penalty or **refund** against WP & L after the PSC discovered WP & L's improper administration of the fuel contract. The PSC would have learned ...

...after they occurred. Thus the majority seems to concede either that the PSC could have imposed a retroactive penalty or **refund** on account of improper administration of the **fuel adjustment clause** (and thus the opinion is internally inconsistent) or that the PSC was powerless to remedy problems identified through audits of fuel costs (in which case audits are worthless for purposes of ensuring a utility's compliance with the **fuel adjustment clause**). See, e.g., Daily Advertiser v. Trans LA, 612 So.2d 7, 25 (La.1993) 4 FN4. This reasoning is similar...

19. Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp., 140 P.U.R.4th 528, 612 So.2d 7, 1993 WL 9658, Util. L. Rep. P 26,288, , La., January 19, 1993(Nos. 92-C-0988, 92-C-1001.)

...general. (Formerly 317Ak145 By implication, Louisiana Public Service Commission's ongoing authority to investigate fuel cost adjustments passed on through automatic **fuel adjustment clauses** includes power, when necessary, to take corrective measures and to order **refunds** for charges not prudently incurred. LSA-Const. Art. 4, § 21(B) LSA-R.S. 45:302 45:303 45:1163 ...

...Conditions precedent. (Formerly 265k28(1.5) Requiring natural gas customers alleging, inter alia, antitrust violations in connection with alleged manipulation of automatic **fuel adjustment clauses** by intrastate pipeline and local distribution company to exhaust administrative remedies before Louisiana Public Service Commission would not be futile; Commission had power to review filing to determine whether overcharges were made and, if appropriate, to order **refunds** or fashion other appropriate remedies. [29] 29T Antitrust and Trade Regulation 29TXVII Antitrust Actions, Proceedings, and Enforcement 29TXVII(B) Actions ...

...illegal scheme through which Florida Power artificially inflated its fuel costs and passed such increases onto its customers through its **fuel adjustment clause**. Dismissing the action, the Florida appellate court held that this was a rate matter within the exclusive jurisdiction of the...

20. Wisconsin Power and Light Co. v. Public Service Com'n of Wisconsin, 171 Wis.2d 553, 492 N.W.2d 159, 1992 WL 357536, Util. L. Rep. P 26,269, , Wis.App., October 01, 1992(No. 91-1096.)

...of rates paid under prior orders; and that we see that as retroactive rate making. Finally, the commission points to **fuel adjustment clauses** as an example of allowable “retroactive rate making” in that they permit recovery of past increases in fuel costs from current rates. It is true, of course, that state law now prohibits electric utilities from employing **fuel adjustment clauses**. Even so, as in the Wisconsin Public Service case just discussed, **fuel adjustment clauses** simply permitted the utility to recover prior fuel cost increases in future rates. Their implementation did not, as does the penalty in this case, result in **refunds** of rates collected under prior commission orders. We are satisfied that all of the “analogies” offered by the commission in...

21. People of Cook County ex rel. O'Malley v. Illinois Commerce Com'n, 237 Ill.App.3d 1022, 606 N.E.2d 79, 179 Ill.Dec. 247, 1992 WL 356849, , Ill.App. 1 Dist., September 25, 1992(Nos. 1-91-

0046, 1-91-0172 and 1-91-0501.)

...with the ICC monthly calculations of FAC charges and submit to annual audits of FAC charges and costs. Re Uniform **Fuel Adjustment Clauses**, 45 PUR 4th at 18 Additionally, section 9-220 provides that the ICC conduct annual public hearings to determine the ...

...to consumers and to reconcile the costs collected under the FAC with the actual costs incurred. The ICC will order **refunds** if it determines that the charges passed on through the FAC do not represent actual costs of prudently purchased fuel...

22. H Towns of Concord, Norwood, and Wellesley, Mass. v. F.E.R.C., 955 F.2d 67, 1992 WL 20383, 293 U.S.App.D.C. 374, 60 USLW 2539, , C.A.D.C., February 11, 1992(No. 90-1619.)

...In General. Under filed rate doctrine as applied through Federal Power Act, Federal Energy Regulatory Commission has discretion to withhold **refunds** to consumers when it discovers that utility has passed on to customers, through **fuel adjustment clause**, costs incurred but not considered by Commission to be properly included under clause. Federal Power Act, §§ 205(c), 206 ...

...originating in utility-owned companies like the Yankees. The Chief Accountant of the Commission, apparently ignoring the fact that the **fuel adjustment clause** regulations define purchased economic power as " all charges incurred in buying economic power" (18 C.F.R. § 35.14(a)(11 ...

...¶ 61,055, at 61,157 (1987). Accordingly, in Iowa-Illinois, the Commission urged utilities that had improperly collected SNFDC through their **fuel adjustment clauses** to come forward within 60 days. It promised that any utility doing so would not be "required to make **refunds** of the improperly collected amounts" if it could satisfy "a four-part test designed to ensure that the company is...

23. C Henry v. Corporation Com'n of State of Okl., 825 P.2d 1262, 1990 WL 142044, 1990 OK 103, 1990 OK 104, , Okla., October 02, 1990(Nos. 68776, 68793 and 68795.)

...No. 158, the Commission staff alleged that in the course of monitoring AOG's compliance with Commission Rules and Regulations governing **fuel adjustment clauses** 1 it had discovered that AOG was recovering line loss 2 through the purchased gas adjustment clause. 3 The application ...

...adjustment clause had resulted in an overrecovery of fuel costs. The application sought an order from the Commission directing a **refund** to AOG's customers. Additionally, the application requested that AOG's gas costs be rebased. No mention was made that an increase...

24. Ohio Power Co. v. F.E.R.C., 105 P.U.R.4th 530, 880 F.2d 1400, 1989 WL 83251, 279 U.S.App.D.C. 327, Fed. Sec. L. Rep. P 94,528, , C.A.D.C., July 28, 1989(No. 88-1293.)

...of such fuel may be included. Amounts collected from customers in excess of such reasonable cost shall be subject to **refund**. 38 Fed.Reg. 17,253 (1973) (emphasis added). Only the unitalicized sentence has been retained in the current regulation. After public comment ...

...in the adjustment clause. * * * Fuel charges which do not appear to be reasonable may result in the suspension of the **fuel adjustment clause** or cause an investigation thereof to be made by the Commission on its own motion under section 206 of the ...

...price is subject to the jurisdiction of a regulatory body, the cost of the fuel may be included in the **fuel adjustment clause**." 39 Fed.Reg. 40,58 3 (1974) (emphasis added). The addition of the "deemed" language suggests, albeit weakly, that the prior version...

25. Boston Edison Co. v. F.E.R.C., 856 F.2d 361, 1988 WL 91013, , C.A.1, September 06, 1988(No. 87-1935.)

...100 L.Ed. 388 (1956) There are cases, to be sure, where the Commission's remedial power has been exercised to ensure **refunds** which were retroactive in nature. See, e.g., Southern California Edison Co. v. FERC, 805 F.2d 1068, 1070-72 (D.C.Cir.1986) (amounts charged through **fuel adjustment clause** in excess of the actual price of fuel ordered refunded); Consolidated Gas Transmission Corp., 771 F.2d at 1550-51 (affirming **refund** order where utility, contrary to Commission regulations, failed to pass through adjustment credits); East Tennessee Natural Gas Co. v. FERC, 631 F.2d 794, 798-800 (D.C.Cir.1980) (**refund** appropriate to correct failure to pass along supplier credits as required under adjustment clause on file); Delmarva Power & Light Co., 24 F.E.R.C. ¶ 61,199 at 61,461 (Aug. 1, 1983) (amounts improperly collected through **fuel adjustment clause** ordered refunded). Leaving aside that virtually all of these cases concerned fuel cost adjustments, 9 it is clear that none ...

...or limitations on, customers' assertions of claims. The effect of such a concatenation of circumstances upon the availability of remedial **refunds** remains, insofar as we can tell, an open question. To answer this question, we believe it helpful to consider a...

26. Minnesota Power & Light Co. v. F.E.R.C., 852 F.2d 1070, 1988 WL 78601, , C.A.8, August 01, 1988(No. 87-2230.)

...Board Statement No. 4, ¶ 147. In recent years, when a utility included certain fuel-related costs in its wholesale **fuel adjustment clause** without express approval, the Commission granted a waiver or recognized that it would be inappropriate to require **refunds** where the costs were legitimate costs which a utility was otherwise entitled to recover through its wholesale rates. 8 FN8...

27. Business and Professional People for Public Interest v. Illinois Commerce Com'n, 171 Ill.App.3d 948, 525 N.E.2d 1053, 121 Ill.Dec. 746, 1988 WL 59137, , Ill.App. 1 Dist., June 10, 1988(Nos. 87-3356, 87-3373, 87-3408 and 87-3846.)

...and 87-3846. June 10, 1988. Rehearing Denied July 14, 1988. Utility sought review of order of Commerce Commission requiring **refund** to customers of portion of uniform **fuel adjustment clause**. The Appellate Court, Murray, J., held that: (1) Commission had authority to order **refund** based on utility's imprudent projection as to when nuclear power plant would be substantially on line; (2) Commission finding that ...

...was imprudent was supported by substantial evidence; (3) Commission had no authority to impose either pre- or postorder interest on **refund**; and (4) Commission was entitled to seek mandatory injunction for enforcement of its order. Affirmed in part and reversed in ...

...21 k. Verdicts, Findings, and Awards. Commerce Commission had no statutory authority to impose either pre or postorder interest on **refund** order against utility for adjustment of uniform **fuel adjustment clause**. Ill.Rev.Stat.1979, ch. 111 2/3 , ¶ 36 [7] 219 Interest 219I Rights and Liabilities in General 219 21 k. Verdicts, Findings, and Awards. **Refund** order against utility to reduce uniform **fuel adjustment clause** could not be deemed a damages award subject to postjudgment interest pursuant to statute. Ill.Rev.Stat.1979, ch. 111 2/3...

28. Abrams v. Public Service Com'n of State of N.Y., 136 A.D.2d 187, 526 N.Y.S.2d 261, 1988 WL 23974, , N.Y.A.D. 3 Dept., March 24, 1988

...Rochester Gas & Elec. Corp. v. Public Serv. Commn. of State of N.Y. supra The PSC, however, declined to order a **refund** of RG & E's increase in rates for its expense of purchasing alternative power during the shutdown, which rate increase RG & E put into effect through the automatic **fuel**

adjustment clause in its tariff (see, Public Service Law § 66[12] Petitioner brought this CPLR article 78 proceeding to challenge the...

29. Kessel v. Public Service Com'n of State of N.Y., 136 A.D.2d 86, 525 N.Y.S.2d 717, 1988 WL 17251, , N.Y.A.D. 3 Dept., March 03, 1988

...Corp. v. Public Serv. Commn. of State of N.Y. (supra the Court of Appeals held that the authority to order **refunds** of imprudent charges collected under **fuel adjustment clauses** may be implied from the PSC's general rate-making powers and from its authority over fuel adjustment allowances under the...

30. Niagara Mohawk Power Corp. v. Public Service Com'n of State of N.Y., 69 N.Y.2d 365, 507 N.E.2d 287, 514 N.Y.S.2d 694, 1987 WL 1364479, , N.Y., April 02, 1987

...in certain past decisions and practices and whether costs of improvements were passed on to consumers through rate adjustments under **fuel adjustment clauses**. The Commission found that power company had acted imprudently in certain circumstances and ordered it to **refund** excessive fuel adjustment charges. Power company petitioned for review. The Supreme Court, Albany County, transferred case. The Supreme Court, Appellate Division, 118 A.D.2d 908, 499 N.Y.S.2d 477, annulled Commission's order for **refund** and remitted matter. Permission to appeal was granted. The Court of Appeals, Simons, J., held that: (1) Commission had implied power to order **refund** of rates that were incurred pursuant to **fuel adjustment clause** and that were imprudently incurred; (2) statutes authorizing Commission to order **refund** of money incurred in various situations did not prohibit Commission from ordering **refund** of automatically recovered fuel expenses that were not subjected to Commission review for reasonableness in regular rate proceeding; and (3) Commission was not required to invoke temporary rate procedure in order to order **refund** of excessive fuel expenses. Reversed. West Headnotes [1] 317A Public Utilities 317AIII Public Service Commissions or Boards 317AIII(A) In ...

...Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. Public Service Commission had implied power to order **refund** of power company's rates that were incurred pursuant to **fuel adjustment clause** and that were imprudently incurred before Commission was given express power to order **refunds**, in that Commission had power to approve **fuel adjustment clauses**, to review charges imposed pursuant to them, and to establish just and reasonable rates. McKinney's Public Service Law §§ 4 ...

...and Extent in General. Charges incurred as a result of utility's own inefficiency and mismanagement and passed to ratepayers under **fuel adjustment clause** are subject to **refund**. McKinney's Public Service Law §§ 66 , subds. 12, 12-a 72-a [9] 145 Electricity 145 11 5 Discrimination and Overcharge...

31. Southern California Edison Co. v. F.E.R.C., 805 F.2d 1068, 256 U.S.App.D.C. 364, 55 USLW 2308, , C.A.D.C., November 25, 1986(No. 85-1718.)

...Decided Nov. 25, 1986. Wholesale customers of electric utility petitioned Federal Energy Regulatory Commission to require utility to pass along **refunds** received by utility from fuel suppliers. The Commission held for customers, and utility petitioned for review. The Court of Appeals, Starr, Circuit Judge, held that Federal Energy Regulatory Commission correctly interpreted fixed-rate **fuel adjustment clause** in electric utility contracts to require utility to remit to its wholesale customers **refunds** received by utility from its fuel suppliers because reopening proxy period to permit flow through of fuel supplier **refunds** was no different than reopening proxy period to correct utility's own billing mistakes. Petition denied. West Headnotes [1] 145 Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. Federal Energy Regulatory Commission correctly interpreted fixed-rate **fuel adjustment clause** in electric utility contracts to require

regulated utility to remit to its wholesale customers **refunds** received by utility from its fuel suppliers because reopening proxy period to permit flow through of fuel supplier **refunds** was no different than reopening proxy period to correct utility's own billing mistakes. [2] 145 Electricity 145 11 5 Discrimination and ...

...General. Federal Energy Regulatory Commission did not abuse its discretion in failing to permit electric utility to retain fuel supplier **refunds** as partial compensation for utility's prior underrecovery of fuel costs, because underrecovery was consequence of utility's own decision to switch from fixed-rate to cost-of-service **fuel adjustment clause**. Petition for Review of an Order of the Federal Energy Regulatory commission. Brian J. McManus, Washington, D.C., with whom Richard ...

...provision commonly found in electric utility contracts. Specifically, the issue is whether the Federal Energy Regulatory Commission correctly interpreted a **fuel adjustment clause** to require a regulated utility to remit to its wholesale customers **refunds** received by the utility from its fuel suppliers. For the reasons that follow, we conclude that the Commission's decision was...

32.  Niagara Mohawk Power Corp. v. Public Service Com'n, 118 A.D.2d 908, 499 N.Y.S.2d 477, 1986 WL 1167031, , N.Y.A.D. 3 Dept., March 06, 1986

...past decisions and practices and whether cost of improvements had been passed on to its customers through rate adjustments under **fuel adjustment clauses**. The Commission found that power company had acted imprudently in certain circumstances and ordered it to **refund** excessive fuel adjustment charges. After power company's petition for review was transferred by order of Supreme Court, Albany County, the Supreme Court, Appellate Division, Mikoll, J., held that: (1) Commission had no power to **refund** excessive fuel charges before effective date of amendment so empowering it; (2) Commission's determination was supported by substantial evidence; and...

33.  Block Island Power Co. v. Public Utilities Com'n, 505 A.2d 652, 1986 WL 1167032, , R.I., March 04, 1986(Nos. 84-181-M.P., 84-356-M.P. and 84-360-M.P.)

...1984 order. On June 1, 1984, the commission issued a compliance order that approved of the new rates and the **fuel-adjustment clause**. Following further proceedings, the commission issued its Second Compliance Report and Order on July 9, 1984, which disallowed a portion ...

...the company to its affiliate supplier, Island Services, Inc. (Island Services). In conjunction with this disallowance, the commission ordered a **refund** of fuel charges to the company's customers. The company filed its petition for a review of this second order with...

34.  Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, , C.A.5 (Miss.), May 17, 1985(No. 84-4220.)

...Public Service Commission that all gas, whether it be an overage or an underage, will be flowed through in a **fuel adjustment clause** to its rate payer." However, no such statute (nor any court decision or attorney general's opinion or similar authority) has ...

...obliged to pass them through while they are disputed. I also observe that the Mississippi statute specifically provides for the **refund** of excessive charges, with interest, by credit on the utility bill if the overcharged party is then a customer of...

35.  Rochester Gas and Elec. Corp. v. Public Service Com'n of State of N.Y., 754 F.2d 99, , C.A.2 (N.Y.), January 29, 1985(No. 309, Docket 84-7562.)

...requires us to hold that the imputation policy places an unreasonable burden on interstate commerce. FN8. The use of the **fuel adjustment clause**, deferred accounting, or periodic **refunds** are the alternative methods suggested by RG & E. Br. of RG & E at 6-7. It focused, however, on the

fuel adjustment clause. Br. of RG & E at 27. In sum, although PSC's imputation policy may create some incentive to make incidental sales...

36. New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 39 Fed.R.Serv.2d 1, , C.A.5 (La.), May 21, 1984(No. 82-3194.)

...The City and the Commission, during their respective periods of regulating NOPSI's rates, approved its electricity rate schedules containing a "**fuel adjustment clause**" by which NOPSI has been generally authorized to increase its electric charges every month to the extent of (but without ...

...1983) Plainly, under Louisiana law neither the City nor the Commission is required to authorize use or continued use of "**fuel adjustment**" **clauses** in filed rate schedules, such clauses being simply a procedural device employed by the regulatory authority in carrying out its ...

...utility may effectuate an increased rate before its approval by the Commission, but if the rate is not ultimately approved **refund** must be made, as it must also if a Commission-approved rate is implemented and later overturned on court appeal...

37. Nantahala Power and Light Co. v. F.E.R.C., 727 F.2d 1342, 1984 WL 914408, , C.A.4, February 24, 1984(Nos. 82-1872(L), 82-1896, 82-2032, 82-2131, 82-1904 and 82-1948.)

...Nantahala to keep as much of the monies as it would have been entitled to if Nantahala had submitted a **fuel adjustment clause** 4 instead. A **fuel adjustment clause** is part of the tariffs of most utilities subject to Commission jurisdiction; a utility is entitled to use the clause ...

...conformance with the Commission's rules. Although Nantahala had not made such a filing, the Commission permitted it to calculate its **refunds** as if it had. FN4. A fuel adjustment clause is designed to automatically pass on to consumers costs associated with ...

...in cost of power it purchased from TVA. Both Nantahala and the Customers object to the Commission's treatment of the **refunds**. The Customers object to the Commission's decision to allow recovery under the substitute formula. They argue that the Commission should have required Nantahala to **refund** the full amount it improperly collected under the PPAC. We disagree. **Fuel adjustment clauses** are allowed as a matter of course to utilities, if requested. Thus, the Commission was not allowing Nantahala to keep...

38. Carolina Power & Light Co. v. F.E.R.C., 716 F.2d 52, 230 U.S.App.D.C. 248, , C.A.D.C., August 26, 1983(Nos. 82-1442, 82-1567.)

...and Cities of Bennettsville and Camden, South Carolina (Intervenors) filed a Complaint, Petition for Declaratory Order, and for Order Directing **Refund** of Illegal Overcharges Under **Fuel Adjustment Clause** in Docket No. E-9606, wherein the Intervenors raised a procedural issue concerning the Company's recovery of spent nuclear fuel ...

...from May, 1977 until December 29, 1977, when the rates filed in Docket No. ER77-485 became effective subject to **refund**. The Intervenors requested, inter alia, that the Company be required to **refund**, with interest, all amounts collected under the **fuel adjustment clause** for spent nuclear fuel storage and disposal during that time period. The city of Fayetteville, North Carolina was allowed to...

39. National Fuel Gas Distribution Corp. v. Pennsylvania Public Utility Com'n, 76 Pa.Cmwlth. 102, 464 A.2d 546, 1983 WL 821976, , Pa.Cmwlth., August 04, 1983

...Superior Ct. 438, 102 A.2d 229 (1954) where it was held that the utility had been properly ordered to **refund** monies collected pursuant to its **fuel adjustment clause** because the clause had been

unlawfully employed to augment base rates, that is, to reap a profit. No such artifice has here been alleged and the situation presented in Magee is now the express subject of **refund** authorization pursuant to Code Section 1307(e) Finally, we note that Section 2102 of the Code, 66 Pa.C.S. § 2102...

40. C.C. Spike Copley Garage, Inc. v. Public Service Com'n of W. Va., 171 W.Va. 489, 300 S.E.2d 485, , W.Va., February 15, 1983(No. 15731.)

...providing a new procedure for public utilities to change rates including elimination of rates being put into effect subject to **refund** except in limited, specific situations; providing a procedure of receivership for utilities and the appointment of a receiver; providing for ...

...necessity within a certain time period; providing for the enforcement of certain federal acts; prohibiting rate increases based on automatic **fuel adjustment clause**; allowing the governor to designate the public service commission as the responsible or enforcing agency in this state for the...

41. Detroit Edison Co. v. Michigan Public Service Com'n, 416 Mich. 510, 331 N.W.2d 159, , Mich., December 23, 1982(Docket Nos. 61295, 61294, June Term, 1979.Calendar No. 4.)

...and on reconsideration leave to appeal was granted. 403 Mich. 853 (1978) On October 27, 1978, this Court stayed the **refund** of the money collected. After the cause was argued, we remanded on February 1, 1980, to the commission to take ...

...Edison in determining billings for the months of February, March, April, and May of 1975, and particularly as to which **fuel adjustment clause** was used during those months. The findings after remand were filed by the commission on July 30, 1982. II The...

42. Consumer Protection Bd. of State of N.Y. v. Public Service Commission of State of N.Y., 85 A.D.2d 321, 449 N.Y.S.2d 65, , N.Y.A.D. 3 Dept., March 18, 1982

...this proceeding seeking to annul the commission's determination as illegal and unconstitutional, to halt collection of all charges under the **fuel adjustment clause**, and to **refund** all amounts collected subsequent to the issuance of the determination here under review. [1] Although Special Term transferred the instant...

43. Abrams v. Consolidated Edison Co. of New York, Inc., 87 A.D.2d 708, 449 N.Y.S.2d 323, , N.Y.A.D. 3 Dept., March 18, 1982

...separate proceeding. FN* In fact, the PSC has just recently concluded that Con. Ed. incurred $33.7 million of excessive **fuel adjustment clause** charges between October 17, 1980 and December 14, 1980 due to lack of reasonable care in its management and operation of the Indian Point II nuclear facility and has directed Con. Ed. to **refund** this amount, with interest, to its rate payers (Case 27869-CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Opinion No. 82...

44. Cities of Batavia, Naperville, Rock Falls, Winnetka, Geneva, Rochelle and St. Charles, Ill. v. Federal Energy Regulatory Commission, 672 F.2d 64, 1982 WL 914269, 217 U.S.App.D.C. 211, , C.A.D.C., February 09, 1982(Nos. 80-1072, 81-1270.)

...be effected. [5] 145 Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. Although a previously approved **fuel adjustment clause** was included within a revised schedule, the Federal Energy Regulatory Commission was not precluded from proceeding under Section 205 of ...

...Act, which gives the Commission the discretion to suspend new schedules for a period and to require the utility to **refund** any portion of the increased rate not found justified. Federal Power Act, § 205, 16 U.S.C.A. § 824d [6] 145 ...

...commissions. Shortly thereafter, Com Ed submitted a revised Rate 78, which went into effect on October 31, 1974 subject to **refund**. Cities intervened, Record (R.) 3795, challenging the revised rate as discriminatory and alleging defects in rate design, cost of service...

45. Southwestern Public Service Co. v. State, 637 P.2d 92, 1981 WL 610455, 1981 OK 136, , Okla., November 10, 1981(No. 54667.)

...in the amount of $1,357,409, but granted a general rate increase in the amount of $379,838; and Required Southwestern to **refund** to its Oklahoma customers the sum of $64,030 purportedly resulting from an excess return from Tuco, Inc. which was then a wholly owned subsidiary of Southwestern, which **refund** was to be affected through Southwestern's **fuel adjustment clause**. Southwestern alleges that the order of the Commission violates its rights under the United States Constitution, Amendments V and XIV ...

...of return of 8.73%. The Commission granted Tuco the same rate of return as Southwestern (14%), and ordered a **refund** of the amount exceeding 14% ($64,030) to be rebated by adjustment in Southwestern's **fuel adjustment clause**. Southwestern alleges the Commission's order is arbitrary and contrary to the law and the evidence. It further contends that the Commission had no power to order a **refund** because this amounts to a retroactive setting of the rates of Southwestern. Both the power and duty of the Commission...

46. Orr Felt Co. v. City of Piqua, Not Reported in N.E.2d, 1981 WL 2565, , Ohio App. 2 Dist., October 08, 1981(CASE NO. 80 CA 63.)

...Ohio Power Company for charges previously passed by Columbus & Southern in the amount of $125,000 to its customers through its **fuel adjustment clause**. No adjustment was made by the audit as to this **refund** because the auditors discovered that Columbus & Southern had excluded $119,000 in net energy charges which could have been billed as a result of the purchase. The Supreme Court found that the Public Utility Commission's “refusal to **refund** the demand costs is a valid exercise of its broad authority to promulgate rules designed to foster utility fuel procurement ...

...for the consumer and the utility is both reasonable and lawful.” As to the commission's determination not to order a **refund** of $125,000 in fuel costs passed through the fuel cost adjustment clause, which resulted in a $6,000 difference, the Supreme...

47. First Hartford Corp. v. Central Maine Power Co., 425 A.2d 174, , Me., January 29, 1981

...so where Commission was correct in concluding it could give no prospective relief and did not have authority to order **refunds** for amounts charged under former **fuel adjustment clauses**, Court had no jurisdiction to review order. 35 M.R.S.A. § 305 Jensen, Baird, Gardner & Henry, George F. Burns (orally), Portland ...

...granted and that the Commission lacked subject-matter jurisdiction. CMP asserted (1) that the proceeding had become moot because the **fuel adjustment clauses** complained of were no longer in effect, paragraphs 18.8 and 18.9 having been superseded by new provisions of ...

...and (4) that the Commission had no authority to stay CMP from collecting amounts due or to order CMP to **refund** any amounts collected pursuant to such rates. FN3. CMP's motion before the Commission for judgment on the pleadings pursuant to...

48. State ex rel. Barvick v. Public Service Commission, 606 S.W.2d 474, , Mo.App. W.D., October 01, 1980(No. WD 31072.)

...Commission to pass through to its retail electric customers additional costs which were arrived at

by use of an existing **fuel adjustment clause**. Public counsel for the State of Missouri filed an application for rehearing, alleging that the Public Service Commission's order authorizing ...

...Cole County, James T. Riley, J., in favor of the Commission. The Court of Appeals, Pritchard, J., held that: (1) **refund** to electric customers of the charged and collected "net under accrued" charge collected pursuant to Public Service Commission's order authorizing the pass through additional charges to utility's electric customers could not be ordered, nor could a **refund** to customers be ordered of certain gas **refunds** withheld by utility company, if either were collected under existing **fuel adjustment clause**, and (2) whether surcharges were included in the application and whether the accounting and computation were accurate were matters to ...

...in part with directions. West Headnotes [1] 145 Electricity 145 11 5 Discrimination and Overcharge 145 11 5(1) k. In General. **Refund** to electric customers of charged and collected "net under accrued" charge, which was collected pursuant to Public Service Commission's order authorizing pass through additional charges to the utility's electric customers, could not be ordered, nor could **refund** to customers be ordered of certain gas **refunds** withheld by utility company, if either were collected under existing **fuel adjustment clause**. [2] 145 Electricity 145 11 3 Regulation of Charges 145 11 3(7) k. Judicial Review and Enforcement. Issue of whether surcharges...

49. State v. Union Gas Systems, Inc., 609 P.2d 1287, 1980 OK 55, , Okla., April 08, 1980(No. 53237.)

...of rule 3." (Emphasis supplied). In October of 1977, the Commission issued order No. 135207 wherein it adopted an automatic **fuel adjustment clause** applicable to gas companies. Section 8 of this order provided: "any credits, **refunds** or allowances on previously purchased gas, received by the utility from any supplier shall be deducted from the cost of ...

...of 1977, Union Gas System, Inc. (Union), appellee herein, filed an application with the Commission seeking approval of a suitable **fuel adjustment clause**. The referee's report found Union would suffer financial hardship without the use of its recommended **fuel adjustment clause**. The Attorney General intervened and filed exceptions to the recommended clause because it did not adopt the standard clause set ...

...No. 148460 herein appealed. This order contained a different method for crediting any adjustment. It stated in part: "Any credits, **refunds** or allowances, on previously purchased gas for resale received by the utility during the year from any source shall be...

50. Virginia Elec. & Power Co. v. International Broth. of Boilermakers, Not Reported in F.Supp., 1980 WL 2062, 103 L.R.R.M. (BNA) 3144, 88 Lab.Cas. P 11,919, , N.D.W.Va., March 03, 1980(No. 75-212-E)

...oil in the generating process. And at Page 34 and 35: The following guidelines for the design and application of **fuel adjustment clauses** will be promulgated for adoption by the respondents: Rule No. 6 - All **refunds** of fuel costs, resulting from overcharges, late charges, or any other reasons, and all recoveries and adjustments of whatever nature...

51. State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 33 P.U.R.4th 273, 585 S.W.2d 41, 1979 WL 396330, , Mo., June 29, 1979(No. 60848.)

...for writ of review was filed in regard to Public Service Commission's report and order which authorized use of automatic **fuel adjustment clause** for recovery of fuel costs by electric utilities, which authorize roll-in to basic rates of amounts collected under prior **fuel adjustment clause** and which authorized use of surcharge for fuel costs incurred by utilities during period covered by prior **fuel adjustment clause** but not collectable under terms of such clause before it was superseded by another clause. The Circuit Court, Cole County ...

...the Supreme Court, Seiler, J., held that: (1) statutory provisions did not give Commission power to authorize use of automatic **fuel adjustment clause** for recovery of utilities' fuel cost as part of residential rate structure; (2) directing Commission to determine what a reasonable rate would have been and to require a credit or **refund** of any amount collected in excess of such amount would be improper, in that it would involve retroactive rate-making, and (3) even if a **fuel adjustment clause** were permissible, Commission's authorization of use of a surcharge would have been improper, in that it would have constituted retroactive ...

...1951) This does not mean that the utilities have received a windfall profit of the amounts illegally collected. If no **fuel adjustment clause** or roll-in had been in effect, the utilities would have had a right to file for an increased rate...

52. Public Service Commission v. Delmarva Power & Light Co. of Maryland, 42 Md.App. 492, 400 A.2d 1147, , Md.App., May 11, 1979(No. 1077.)

...been included in calculating the total, and accordingly resulted in a higher fuel cost for purposes of application of the **fuel adjustment clause**. Haskins & Sells pointed out in in its report that Delmarva's exclusion of nuclear test generation resulted in the collection of ...

...the customers through lower rates before Delmarva's next rate proceeding was concluded, so that Order No. 62552 directed Delmarva to **refund** only the remaining difference of $125,000. The hearing examiner of the Commission after extensive hearings filed a proposed order which...

53. Public Service Co. of New Hampshire v. Federal Energy Regulatory Commission, 600 F.2d 944, 1979 WL 396286, 195 U.S.App.D.C. 130, , C.A.D.C., May 03, 1979(Nos. 77-1592, 77-2004, 77-2005, 78-1329 and 78-1330.)

...conformance with their wording and they were obviously drafted in a very careful manner. [FN34] Petitioners have generously offered to **refund** the extra money billed during the first months the superseded clauses were effective in exchange for the much greater amounts ...

...accepted. We are not persuaded. One's thinking need not be very “refined” to understand that if the purpose of a **fuel adjustment clause** is to defer billing, then billing must be deferred. [FN35] Petitioners' decision to bill during the first months the superseded ...

...First Circuit offered four reasons for its conclusion that the rule against retroactive ratemaking was not controlling in cases involving **fuel adjustment clauses**. First, “fuel cost adjustment clauses are . . . unique animals” [FN55] designed “ ‘to make utilities whole,’ and the surcharge can now be defended as simply implementing the same policy.” [FN56] Second, a Commission regulation permits “deviation from the prescribed operation of **fuel adjustment clauses** . . . for good cause shown . . . .” [FN57] Third, “the Commission does allow in other circumstances for ‘after the fact matching of actual costs and revenues,’ [FN58] Finally, “the Commission . . . has permitted a type of **refund** outside of the ordinary rate-suspension context.” [FN59] We are not persuaded by any of these arguments. FN55. 579 F...

54. Office of Consumers' Counsel v. Public Utilities Commission, 57 Ohio St.2d 78, 386 N.E.2d 1343, 1979 WL 396356, 11 O.O.3d 245, , Ohio, March 21, 1979(No. 78-415.)

...k. Payment and Collection of Charges. Finding and order of State Utilities Commission that utility would not be ordered to **refund** $125,000 in fuel cost passed through fuel cost adjustment clause which was subsequently refunded to utility was neither unreasonable nor ...

...in light of findings that utility neglected to charge $119,000 for net energy costs which it could

have passed through **fuel adjustment clause** and that resulting difference of $6,000 was so minimal that cost of administering adjustment would exceed the **refund**. R.C. § 4905.66(F) This appeal arises from an opinion and order of the Public Utilities Commission of Ohio...

55. H Public Service Commission of Maryland v. Baltimore Gas and Elec. Co., 40 Md.App. 490, 393 A.2d 193, , Md.App., November 02, 1978(No. 1254.)

...follows: "In reviewing the total picture of Company past earnings, the extent of the savings to customers under the present **fuel adjustment clause** and having in mind the basic purpose of regulation to achieve just and fair results, the Examiner believes that any **refund** would be shortsighted and impair to some degree, for the long-haul, the financial ability of the Company. The Examiner also believes that it would not be in the ultimate public interest to order **refunds** and that the very high investment in plant to provide the lower cost operation should be given simultaneous recognition. Finally ...

...The Examiner finds that under Section 70 of the Public Service Commission Law and effective orders of the Commission that **refunds** could be required as a matter of law, but that the factual circumstances present in this proceeding do not require...

56. C Ohio Power Co. v. Public Utilities Commission, 54 Ohio St.2d 342, 25 P.U.R.4th 544, 376 N.E.2d 1337, 8 O.O.3d 353, , Ohio, June 14, 1978(No. 77-862.)

...Electric utility appealed as of matter of right from order of Public Utilities Commission directing a reconciliation adjustment or a **refund** in connection with fuel adjustment charges. The Supreme Court, Paul W. Brown, J., held that: (1) order was not void ...

...to comply with statutory requirement that within 30 days after conclusion of hearing the Commission issue an appropriate order; (2) **fuel adjustment clauses** may not be used as a carte blanche authorization to pass through to tariff customers expenses other than fuel costs ...

...fairly attributable to the production of the service to those customers, and (3) it was not unreasonable to order a **refund** on finding that fuel adjustment charges to tariff customers included fuel costs incurred to produce power sold to other utilities...

57. H Southern Cal. Edison Co. v. Public Utilities Com., 20 Cal.3d 813, 24 P.U.R.4th 588, 576 P.2d 945, 144 Cal.Rptr. 905, , Cal., March 23, 1978(S.F. 23500.)

...concerning the neutral effects of fuel clauses." (Id. at p. 7.) For these and other reasons the subcommittee found that "**fuel adjustment clauses**, in any form, are unwise, unnecessary, unworkable, and unfair" (id. at p. 1), and concluded that such clauses "should be abolished except during limited emergency periods. Even in such situations, all **fuel adjustment clause** charges should be subject to a prompt commission audit and **refund** with interest." (Id. at p. 3.) FN14. The investigation inquired into the fuel cost collection practices of Pacific Gas and...

58. State ex rel. Utilities Commission v. Edmisten, 291 N.C. 451, 232 S.E.2d 184, , N.C., January 31, 1977(No. 145.)

...by G.S. 62-140 Thus, even if, as of 30 November 1973, when it applied for permission to use a **fuel adjustment clause**, Duke could have shown that in November 1973 its rates were not sufficient to recover the full cost of coal ...

...been relieved from some anticipated expense, such as taxes, its November 1973 customers would not have been entitled to a **refund** and its December 1973 customers would not have been entitled to have their rates reduced below the amount necessary to...

59. Bradley v. Milliken, 426 F.Supp. 929, , E.D.Mich., January 21, 1977(Civ. No. 35257.)

...Co. (VEPCO), 539 F.2d 357 (4th Cir. 1976) The trial judge was a customer of plaintiff VEPCO. Under a **fuel adjustment clause** VEPCO's customers were directly surcharged an amount which VEPCO claimed as damages. If VEPCO was successful in the action, it might have been required to **refund** to its customers that part of the damages recovered which represented the surcharge. The trial judge considered defendant's motion to...

60. State ex rel. Utilities Commission v. Edmisten, 291 N.C. 327, 230 S.E.2d 651, 1976 WL 357283, 83 A.L.R.3d 903, , N.C., December 21, 1976(No. 39.)

...and Public Utilities 92 4371 k. Gas and Electricity. (Formerly 92k298(7) Utilities Commission's interim ex parte order which authorized fossil **fuel adjustment clause** to be placed in effect by electric utility on an interim basis pending further hearing and final determination did not ...

...process requirements of notice and an opportunity to be heard, since sufficient protection was afforded by subsequent hearings and utility's **refund** undertaking. Const.1970, art. 1, § 19 U.S.C.A.Const. Amend. 14 G.S. § 62-132 Appeal by the Attorney General, Intervenor ...

...same day upon which the Commission entered its order permitting the interim increase, the utility applied for approval of the **fuel adjustment clause** as above described to be effective on bills rendered on and after March 1, 1974. Attached to this application was the utility's undertaking for **refund** with interest of all amounts collected under the fuel clause which may later be found to exceed rates finally determined...

61. In re Virginia Elec. & Power Co., 539 F.2d 357, , C.A.4 (Va.), May 24, 1976(Nos. 76-1070, 76-1168.)

...the judge has in the subject matter is the remote contingent possibility that he may in futuro share in any **refund** that might be ordered for all VEPCO customers. Such a contingent interest does not presently exist and will not be ...

...may be entered in this litigation. Neither Judge Warriner nor any other customer of VEPCO will have a claim for **refund** until, if ever, there occurs an intervening and independent decision of a state agency, the Virginia State Corporation Commission, which ...

...damages that are predicated upon fuel charges which VEPCO was allowed to collect from its customers under the Corporation approved **fuel adjustment clause**. Even then, whether to order a **refund**, in what amount, and over what period of time, will depend entirely upon the exercise of regulatory authority of the...

62. State ex rel. Utilities Commission v. Edmisten, 29 N.C.App. 258, 224 S.E.2d 219, , N.C.App., May 05, 1976(No. 7510UC374.)

...as established in the fossil fuel clause. Based upon its findings of fact and conclusions, the Commission approved the fossil **fuel adjustment clause** set forth in CP&L's application filed 25 January 1974, approved all revenues collected thereunder from bills rendered through 30 September 1974, and discharged and cancelled CP&L's undertaking for **refund** with respect to all such revenues on bills rendered through 30 September 1974. The Commission's order further directed that it...

63. Morgan v. Virginia Elec. & Power Co., 22 N.C.App. 300, 206 S.E.2d 338, , N.C.App., July 03, 1974(No. 7410UC509.)

...No. 7410UC509. July 3, 1974. Orders of the Utilities Commission granted permission to a public utility to implement a fossil **fuel adjustment clause** on an interim basis, and the Commission denied

a motion to postpone the effective date of the order, but granted a motion to provide for **refund** in event that the clause was found on final hearing to be unjustified. The Attorney General appealed. The Court of ...

...Baley, J., held that the order denying the motion to postpone effective date but granting the motion to provide for **refund** was interim in nature, and not appealable. Appeal dismissed. West Headnotes 145 Electricity 145 11 3 Regulation of Charges 145 11 3 ...

...Enforcement. (Formerly 145k1.3(7) Order of Utilities Commission denying motion to postpone effective date of order allowing utility to put fossil **fuel adjustment clause** into effect but granting motion to provide for **refund** in event clause was found to be unjustified on final disposition was interim in nature, and not appealable. G.S. §§...

64. Petition of Allied Power & Light Co., 132 Vt. 354, 321 A.2d 7, , Vt., March 29, 1974(No. 137-73.)

...utility was free to elect to use the clause, but precluded from using any other form of purchase power or **fuel adjustment clause**. Prior to putting the clause into effect, each utility is required to file with the Board tariff revisions incorporating the ...

...and non-power cost items, or refrain from increasing its earnings distribution, either as dividends of investor-owned utilities, patronage **refunds** of cooperative utilities, or payments to a municipality in excess of the level of property taxes properly assessed in the...

65. Tampa Elec. Co. v. Nashville Coal Co., 214 F.Supp. 647, , M.D.Tenn., February 26, 1963(Civ. A. No. 2418.)

...parties. Defendants' contention is without merit and plaintiff is entitled to recover $204,871.07 as unpaid rent. Because of the **fuel adjustment clause** contained in the plaintiff's rate schedule, a major portion of the increase in fuel expense cause by the defendants' breach ...

...plaintiff's customers as the result of increases in rates. As the record shows, however, the plaintiff will be obligated to **refund** to its customers any amounts recovered as damages in this proceeding which represent increased fuel expense ‘passed on’ to such...

66. Magee Carpet Co. v. Pennsylvania Public Utility Commission, 174 Pa.Super. 438, 102 A.2d 229, , Pa.Super., January 19, 1954

...98, October Term, 1953, and at No. 2, March Term, 1954, held that where Public Utility Commission properly found that **fuel adjustment clause** of tariff supplement of Electric Power Company providing for adjustment of charges to consumers to reflect changing cost of fuel ...

...consumers more than actual increase in fuel costs, Commission was authorized to make the excess charges by company subject of **refunds** to consumers. Order affirmed. West Headnotes [1] 145 Electricity 145 11 3 Regulation of Charges 145 11 3(7) k. Judicial Review ...

...Electricity 145 11 3 Regulation of Charges 145 11 3(6) k. Proceedings Before Commissions. Where Public Utility Commission properly found that **fuel adjustment clause** of tariff supplement of electric power company providing for adjustment of charges to consumers to reflect changing cost of fuel...

53 P.3d 578, Util. L. Rep. P 26,826
(Cite as: 53 P.3d 578)

Supreme Court of Alaska.
MATANUSKA ELECTRIC ASSOCIATION, INC., a non-profit electric membership cooperative,
Appellant,
v.
CHUGACH ELECTRIC ASSOCIATION, INC., a non-profit electric membership cooperative,
Appellee.
No. S-9839.

Aug. 23, 2002.

Electric cooperative appealed decision of the Regulatory Commission compelled it to refund payments collected as a result of a miscalculation in the cost of generation and transmission line loss. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., reversed Commission's decision, finding it to be retroactive ratemaking. Cooperative customer appealed. The Supreme Court, Carpeneti, J., held that: (1) fuel surcharge for the generation and transmission line loss factor was a Commission-made rate, and (2) Commission's powers did not include the power to bypass the rule against retroactive ratemaking.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases
In an administrative appeal where the superior court acts as an intermediate appellate court, the Supreme Court directly reviews the agency action in question.

[2] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases
As the Supreme Court substitutes its judgment for that of an administrative agency, it is the Court's duty to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.

[3] Electricity 145 11.5(2)

145 Electricity
145k11.5 Discrimination and Overcharge
145k11.5(2) k. Actions by Consumers. Most Cited Cases
Whether the Regulatory Commission's decision ordering electric cooperative to refund customer payments collected from fuel surcharges constituted unlawful ratemaking was a question of law.

[4] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases

Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases
Because assessing the scope of an administrative agency's authority involves statutory interpretation, or analysis of legal relationships, about which courts have specialized knowledge and expertise, the Supreme Court's independent judgment is used.

[5] Public Utilities 317A 194

317A Public Utilities
317AIII Public Service Commissions or Boards
317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission
317Ak194 k. Review and Determination in General. Most Cited Cases
The Regulatory Commission's findings of fact are reviewed for clear error and are only reversed if there is not substantial evidence to support them.

[6] Public Utilities 317A 119.1

317A Public Utilities
317AII Regulation
317Ak119 Regulation of Charges
317Ak119.1 k. In General. Most Cited Cases
Retroactive ratemaking is impermissible under Alaska state law.

[7] Electricity 145 11.3(4)

145 Electricity
145k11.3 Regulation of Charges
145k11.3(4) k. Operating Expenses. Most Cited Cases
Fuel surcharge for the generation and transmission line loss factor was a Regulatory Commission-made rate, that was subject to prohibition against retroactive ratemaking; electric cooperative requested approval of its surcharges before passing them through to its customers, and although Commission had full power to review additional data concerning cooperative's line losses and to reexamine its own determination that line loss factor used in calculating surcharge was appropriate, neither Commission nor customer questioned cooperative's continued reliance on approved line loss factor for ten-year period.

[8] Public Utilities 317A 119.1

317A Public Utilities
317AII Regulation
317Ak119 Regulation of Charges
317Ak119.1 k. In General. Most Cited Cases
The essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the Regulatory Commission can take is to prospectively revise rates in an effort to set more appropriate ones.

[9] Electricity 145 11.5(2)

145 Electricity
145k11.5 Discrimination and Overcharge
145k11.5(2) k. Actions by Consumers. Most Cited Cases
Whether or not true-ups should have been limited to one quarter was not an issue raised in the points of appeal, was not seriously briefed by any party, and, thus, would be deemed waived on appeal; question was best considered by the Regulatory Commission and was not critical to finding that compelling electric cooperative to refund payments collected as a result of a miscalculation in the cost of generation and transmission line loss was retroactive ratemaking.

[10] Appeal and Error 30 1079

30 Appeal and Error
30XVI Review
30XVI(K) Error Waived in Appellate Court
30k1079 k. Insufficient Discussion of Objections. Most Cited Cases
The Supreme Court deems issues addressed only cursorily in briefs waived by the party.

[11] Appeal and Error 30 766

30 Appeal and Error
30XII Briefs
30k766 k. Defects, Objections, and Amendments. Most Cited Cases
Where an issue addressed only cursorily in briefs involves a question of law that is critical to a proper decision, it may be considered on appeal.

[12] Electricity 145 11.3(1)

145 Electricity
145k11.3 Regulation of Charges
145k11.3(1) k. In General. Most Cited Cases
Regulatory Commission's powers did not include the power to bypass the rule against retroactive ratemaking.

[13] Electricity 145 11.5(2)

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145 Electricity
145k11.5 Discrimination and Overcharge
145k11.5(2) k. Actions by Consumers. Most Cited Cases
Evidence did not support the conclusion that electric cooperative knew that its actual line loss factor was below that used for years to calculate fuel surcharge; it was not clear when documents offered by customer were generated, and witness testified cooperative assumed the rate used instead of calculating the actual value.
***580** Stephen M. Ellis and Jeffrey P. Stark, Delaney, Wiles, Hayes, Gerety, Ellis & Young, Inc., Anchorage, for Appellant.

Donald W. Edwards, Chugach Electric Association, Anchorage, and Andrew F. Behrend, Heller Ehrman White & McAuliffe LLP, Anchorage, for Appellee.

Virginia A. Rusch, Assistant Attorney General, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Amicus Curiae Regulatory Commission of Alaska.

Before: FABE, Chief Justice, MATTHEWS, BRYNER, and CARPENETI, Justices.

OPINION

CARPENETI, Justice.

I. INTRODUCTION

Retroactive ratemaking by a utility is prohibited in Alaska, as it is in the majority of jurisdictions in the United States. The Regulatory Commission of Alaska compelled Chugach Electric Association to refund payments collected as a result of a miscalculation in the cost of generation and transmission line loss. The superior court, concluding that the commission's ruling constituted retroactive ratemaking, reversed the commission's order. We agree, and therefore affirm the decision of the superior court.

II. FACTS AND PROCEEDINGS

"To comprehend the rule against retroactive ratemaking [as well as the facts involved in a retroactive ratemaking case], it is necessary first to understand the process for the setting of public utility rates." [FN1]

FN1. Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U. ILL. L.REV.. 983, 993.

A. Background

The provision of electric service by Chugach Electric Association, Inc. (Chugach) and Matanuska Electric Association, Inc. (MEA) is governed by AS 42.05. Because Chugach and MEA are electrical cooperatives organized under AS 10.25, they come under the provisions of AS 42.05.

Chugach generates electricity and sells it wholesale to MEA. Chugach's rates have two components: a base rate and an adjustment to that rate known as a fuel surcharge. The base rate reflects the fixed costs of providing electric service, as well as other costs that tend to remain stable. The fuel surcharge is a fluctuating charge that operates to protect Chugach against those costs associated with purchasing and generating power that are not as stable.

A utility's rates and business practices are governed by the tariffs it has in effect with the Regulatory Commission of Alaska [FN2] (commission). [FN3] The filing or revision of a tariff is a complicated and lengthy process.[FN4] As a means of expediting the procedure, Alaska state law allows utilities to utilize a simplified rate filing process.[FN5] The simplified rate filing process allows utilities to modify their base rates through quarterly or semi-annual rate filings.[FN6] Through this process, utilities are allowed to adjust their base rates, subject to certain limitations,[FN7] without filing and litigating full rate cases.

FN2. In 1999, the name "Regulatory Commission of Alaska" was substituted for "Alaska Public Utilities Commission" in accordance with ch. 25, § 30(a), SLA 1999.

FN3. AS 42.05.371.

FN4. As MEA notes,

under 3 AAC 48.220, an original and 10 copies of each utility tariff filing must be provided to the

Commission at least 45 days prior to the proposed effective date. Moreover, 3 AAC 48.275 sets forth a voluminous list of supporting materials that must accompany a permanent or interim tariff revision. The Commission examines the information provided in the course of its investigation, which can take several months to complete.

FN5. AS 42.05.381(e).

FN6. 3 Alaska Administrative Code 48.710(b) (2000).

FN7. 3 AAC 48.770.

***581** While the simplified rate filing is a means for a utility to have an expedited procedure to establish its base rate, a Cost of Power Adjustment Filing allows the same expedited process for surcharges. The Fuel and Purchased Power Cost Adjustment Factors (fuel surcharge filing) is an adjustment Chugach filed with the commission to its base rate and is the focus of the present dispute. This surcharge is calculated through a procedure established in a tariff similar to the simplified rate filing process. Through this mechanism, the commission permits utilities such as Chugach to collect a surcharge designed to recover fluctuations in fuel costs relative to costs in the base rate.[FN8] Fuel surcharge filings are not subject to the same review as the base rate, although there are some similarities between the fuel surcharge filing procedure and simplified rate filing procedure.

FN8. These surcharges can also be referred to as fuel cost adjustment clauses. "[T]he purpose of such a clause is to permit prompt rate adjustment to offset unusual changes in fuel costs...." *Southern California Edison Co. v. Pub. Utils. Comm'n*, 20 Cal.3d 813, 144 Cal.Rptr. 905, 576 P.2d 945, 947 (1978).

This appeal involves the use of an estimated generation and transmission system energy loss in Chugach's fuel surcharge filings. A generation and transmission line loss factor is an adjustment to the base rate to reflect the amount of electric energy that is lost through its generation and transmission. This amount varies and cannot always be accurately predicted. Because of the fluctuations, it is part of the fuel surcharge and is adjusted on a periodic basis. Additionally, because the fuel surcharge is an estimate, the amount collected might fall short or exceed the actual cost of a utility's fuel and purchased power. After a given period, the commission reconciles fuel cost recoveries collected through a fuel surcharge. Such recoveries are collected in a balancing account and only balance "over-or undercollections occurring in the immediately preceding quarter through adjustments for the following quarter." "The purpose of these 'true-up' proceedings is to determine whether the amounts passed through to customers were in accordance with the [actual surcharge]." [FN9] Thus, whatever variances occur are taken into account when calculating the next quarterly fuel surcharge filing.

FN9. Krieger, *supra* note 1, at 1017.

B. Facts

Chugach's fuel surcharge was approved in 1987 and governed Chugach's collection of fuel surcharges. Approval authorized Chugach to collect fuel surcharges as an adjustment to base rates if certain requirements were met. Approval of the surcharge permitted adjustments to the rate on a quarterly basis. The amount of the permissible adjustment was the difference between the estimated fuel and purchase power costs for the upcoming quarter and the base amount established in the tariff. To support these estimates, Chugach was required to file a tariff advice letter with the commission, no later than forty-five days after the beginning of each quarter, along with tariff sheets showing the fuel surcharges, studies of its fuel and purchased power costs, documentation of those costs, as well as other supporting documentation.

The Fuel and Purchased Power Cost Adjustment Factors established a balancing account to reconcile the fuel surcharge with actual fuel costs. Through separate accounts for wholesale and retail customers, Chugach debited the actual monthly fuel and purchased power costs and credited the total of the base rate plus the fuel surcharge in effect for that month multiplied by the number of kilowatt hours sold. The commission was permitted to adjust Chugach's fuel surcharge rates individually and in its simplified rate filing each quarter, but only under limited circumstances. The procedures established by the Fuel and Purchased Power Cost Adjustment

Factors provided that all fuel surcharge rates are subject to review and adjustment after being implemented unless "sooner authorized" by the commission.

Chugach sought and gained the approval of the commission before each surcharge was implemented. At the time the commission's approval is sought, the same information is submitted to Chugach's customers. Thus, MEA received a copy of Chugach's fuel surcharge***582** documentation each time it was submitted to the commission. A fuel surcharge filing can total well over 100 pages.

Upon submitting its fuel surcharge filing to the commission, Chugach's documents are reviewed and a tariff action memorandum is prepared by a utility tariff analyst. All of the tariff action memoranda in this case reflect that the documents were in fact received, reviewed, and that the calculations contained in them were correct. In each tariff action memorandum, the utility tariff analyst recommended the commission approve Chugach's tariff advice letter submitting that quarter's fuel surcharge. Each tariff advice letter submitted for the 1995-1997 period received commission approval before it became effective. Each contained that quarter's fuel surcharge rate.

Since the mid-1980s, Chugach has used a line loss factor of 5.219% in its rate filings for wholesale customers. In a general rate case in 1987, the commission issued an order formally approving this factor as an appropriate reflection of Chugach's transmission line losses. This line loss factor was identified in all of Chugach's simplified rate filings and each of the quarterly fuel surcharge filings that the commission later approved.

In November 1997 Chugach and MEA discovered a discrepancy in the line loss factor Chugach used in its projected fuel surcharges. Chugach's own documents showed the actual line loss experienced by Chugach in 1995, 1996, and 1997 was substantially lower than the 5.219% Chugach had claimed in its simplified rate filings and fuel surcharge filings. On June 25, 1999 a utility tariff analyst recommended suspension of the surcharge.

When confronted with the discrepancy between its actual line losses and what it had charged for line losses, Chugach acknowledged and rectified the error. Chugach then submitted revised tariffs to the commission that more accurately reflected the line loss factor in future rates. Chugach, however, refused to refund the overcharged tariffs, invoking the doctrine prohibiting retroactive ratemaking.

C. Proceedings

This appeal arises from commission docket number U-96-37. Until December 1997 the issues in that docket were limited to Chugach's base rates established through the simplified rate filing process. On December 19, 1997 MEA raised the issue of the incorrect generation and transmission line loss factor. MEA asked the commission to correct Chugach's line loss factor and demanded a refund based on the difference between the incorrect line loss factor and the corrected one.

In Order U-96-37(13) issued on July 1, 1998, the commission ordered Chugach to recalculate its fuel surcharges for 1995 using the actual line loss factor for that year. The commission also ordered Chugach to **refund** an amount based on the difference between the original line loss factor and the revision to its wholesale customers. In making its decision, the commission noted that "the principles relevant to retroactive ratemaking are not applicable to **fuel adjustment clauses**."

Both Chugach and MEA sought reconsideration of the commission's order. Chugach argued the commission overlooked the prohibition against retroactive ratemaking, creating "confiscatory rates which result in taking Chugach property without due process of law." The commission denied Chugach's request for reconsideration. MEA's petition for reconsideration asserted that the commission's previous order was internally inconsistent. MEA noted the order only addressed the use of the newly calculated generation and transmission line loss factor for 1995, failing to require a new line loss factor be utilized for the 1996 and 1997 portions of the refund. The commission granted MEA's request and ordered refunds for the additional years using the actual line loss factor from those particular years.

Chugach appealed the commission's decisions in U-96-37(13) and U-96-37(18) [FN10] to ***583** the superior court. Both MEA and the commission filed briefs in

response. On July 27, 2000 the superior court reversed the commission's decision. In his decision, Superior Court Judge Peter A. Michalski held that the commission clearly erred "in its determination that Chugach's use of the tariff mandated line loss factor was 'incorrect';" Judge Michalski also held "that going back more than one quarter in the correction of a Cost of Power Adjustment constitutes retroactive rate making."

FN10. This was the order granting MEA's petition for reconsideration and denying Chugach's motion for reconsideration.

MEA now appeals. The commission declined to pursue an appeal and is no longer a party to this action. It has, however, filed an *amicus curiae* brief outlining its position.

III. STANDARD OF REVIEW

[1][2] In an administrative appeal where the superior court acts as an intermediate appellate court, we directly review the agency action in question. [FN11] "As we substitute our judgment, it is our duty 'to adopt the rule of law that is most persuasive in light of precedent, reason, and policy.' " [FN12]

FN11. *See Northern Alaska Envtl. Ctr. v. State, Dep't of Natural Res.*, 2 P.3d 629, 633 (Alaska 2000).

FN12. *Cook Inlet Pipe Line Co. v. Alaska Pub. Utils. Comm'n*, 836 P.2d 343, 348 (Alaska 1992) (citing *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979)).

[3][4] Whether the commission's decision ordering Chugach to refund MEA payments collected from fuel surcharges constitutes unlawful ratemaking is a question of law. Because assessing the scope of an agency's authority "involves statutory interpretation, or analysis of legal relationships, about which courts have specialized knowledge and expertise," our independent judgment is used.[FN13] "However, even under the independent judgment standard [we have] noted that the court should give weight to what the agency has done, especially where the agency interpretation is longstanding." [FN14]

FN13. *Far N. Sanitation, Inc. v. Alaska Pub. Utils. Comm'n*, 825 P.2d 867, 871 n. 6 (Alaska 1992).

FN14. *Nat'l Bank of Alaska v. State, Dep't of Revenue*, 642 P.2d 811, 815 (Alaska 1982).

[5] The commission's findings of fact are reviewed for clear error and are only reversed if there is not substantial evidence to support them.[FN15]

FN15. *Tlingit-Haida Reg'l Elec. Auth. v. State*, 15 P.3d 754, 761 (Alaska 2001).

IV. DISCUSSION

A. The Rule Against Retroactive Ratemaking

[6] Both MEA and Chugach agree that retroactive ratemaking is impermissible under Alaska state law. We concur.

" 'A fundamental rule of ratemaking is that rates are exclusively prospective in nature.' " [FN16] One purpose of having such a rule is a consumer's right to rely on rates set by the commission. "Some reliability, of course, is essential to the public utility regulatory system. If commissions could retroactively change rates willy-nilly,[FN17] and ratepayers' bills and utility revenues were continually subject to large fluctuations, serious questions would arise concerning the legitimacy of the ratemaking process." [FN18] Thus, the rule is critical for a utility to plan its finances. [FN19] Other purposes for prohibiting retroactive rates include "investor confidence, utility credit rating, and the integrity of service." [FN20] And "[r]etroactivity, even where permissible, is not favored, except upon the clearest mandate." [FN21]

FN16. *Far N. Sanitation*, 825 P.2d at 872 (quoting *New England Tel. & Tel. Co. v. Pub. Util. Comm'n*, 116 R.I. 356, 358 A.2d 1, 20 (1976)).

FN17. "Whether desired or not.... Being or occurring whether desired or not." An alteration of "*will ye, nill ye,* be you willing, be you unwilling." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1320 (1988).

FN18. Krieger, *supra* note 1, at 1040.

FN19. *Far N. Sanitation*, 825 P.2d at 872.

FN20. *Alaska Pub. Utils. Comm'n v. Municipality of Anchorage*, 902 P.2d 783, 788 (Alaska 1995).

FN21. *In re Cen. Vermont Pub. Serv. Corp.*, 144 Vt. 46, 473 A.2d 1155, 1161 (1984).

***584** The question before us is whether requiring Chugach to refund amounts collected in excess of the generation and transmission line loss factor constitutes impermissible retroactive ratemaking.

B. The Rule Against Retroactive Ratemaking Applies to the Fuel Surcharge at Issue.

Chugach contends that the rule against retroactive ratemaking applies to the fuel surcharge here. MEA, as well as the commission, distinguish the fuel surcharges from regular commission-made rates, both arguing that, because of this distinction, fuel surcharges are not susceptible to the prohibition.

1. The fuel surcharge constitutes a commission-made rate.

[7] While Chugach maintains that the fuel surcharge for the generation and transmission line loss factor is a rate, MEA claims the surcharge is distinguishable from a rate. The commission concurs with MEA, arguing that fuel surcharges are distinct from actual rates because "unlike traditional rates which are estimates derived from historical costs and consumption adjusted to predict future costs and consumption, surcharges in Alaska are designed and administered to cover actual costs exactly."

"The difficulty in classification [for fuel surcharges] stems not only from the inflationary rise in fuel costs that triggered the problem, but from the fact that fuel cost adjustment clauses are themselves unique animals that are not easily assimilated to classical rate-making principles." FN22

FN22. *Maine Pub. Serv. Co. v. Fed. Power Comm'n*, 579 F.2d 659, 668 (1st Cir.1978).

Chugach draws a distinction in the case law regarding fuel surcharges that have been pre-approved by the relevant state's utilities commission from those where the fuel surcharge did not receive such review. In distinguishing between the two, Chugach notes that where the fuel surcharge received approval by the necessary authority before enactment, the court did not permit a retroactive refund of any excess rates, finding it constituted retroactive ratemaking. However, where the utility's surcharge did not receive review, the court was more likely to find the rule against retroactive ratemaking did not apply, as the commission retained jurisdiction over the matter. MEA, however, argues that it is not whether the rates were reviewed that matters, but rather how much review they received. The question, therefore, is what type of review does the commission provide for fuel surcharge filings in Alaska and whether such review is adequate to consider a fuel surcharge a rate, applicable to the prohibition against retroactive ratemaking.

a. Fuel surcharges in Alaska receive a documentary review.

Chugach argues that the distinction between the instant case and those cases supporting the proposition that fuel surcharges are in a different category than rates is that the charges in this case were approved by the commission. MEA and the commission argue that the fuel surcharge filings utilized by Chugach only received ministerial review. Chugach's position is the more persuasive.

In their dissent from the commission's order denying reconsideration, Commissioners Alyce A. Hanley and James M. Posey wrote "[t]he argument that [Chugach's fuel surcharge] filings were only subject to a superficial review is disingenuous." The dissenters note that the filings received "extensive review." However, utility tariff analyst Dawn Bishop Kleweno affied that "[u]nder the present system, it is simply impossible to thoroughly investigate fuel surcharges like rates in a rate case."

Chugach used the simplified rate filing process to establish its base rates and argues that if the same review is given to fuel surcharge filings as to simplified rate filings, one cannot constitute a rate if the other does not. The processes are indeed similar. Chugach submitted the same amount of documentation for both its simplified rate filings as well as its fuel surcharge filings. Much of the same information is included in both processes. Both filings are made at least forty-five days before the

rate takes effect and are subject ***585** to investigation and possible suspension if the commission feels they need additional time for review.[FN23] Simplified rate filing rates are deemed final once they are approved.[FN24]

FN23. AS 42.05.411(a); AS 42.05.421.

FN24. 3 AAC 48.730(a) provides, in part: "A cooperative's rate adjustment filing under 3 AAC 48.700-3 AAC 48.790 is governed by 3 AAC 48.280 and will become permanent at the end of the notice period described in AS 42.05.411 unless the commission suspends the filing in accordance with AS 42.05.421."

b. The commission's review of Chugach's fuel surcharge is substantial enough to constitute a rate.

Despite the similarities between the simplified rate filing and fuel surcharge filing review processes, MEA and the commission claim their differences outweigh the similarities because the commission's review of the latter is purely ministerial. We disagree.

It is true that the fuel surcharge filing procedure is not the same as the simplified rate filing process in all respects. While the simplified rate filing applies to base rates, the fuel surcharge filing is for estimated costs such as line loss factors. Generally, there is no public notice regarding fuel surcharge filings. The commission also notes that generally there is also no hearing. Under AS 42.05.421, however, the commission does have the power to conduct a hearing upon its own motion "to determine the reasonableness and propriety of the filing."

The commission further argues that the analyst's duties, in reviewing a fuel surcharge filing, do not include investigating the underlying accuracy of information such as the line loss factor or meter read data, claiming the fuel surcharge filing is primarily reviewed "to verify the prior quarter's fuel costs ... unless something unusual stands out," and that, "[t]here simply is not enough time to investigate a utility's estimates for fuel costs and [kilowatt hour] sales prior to the next quarterly filing." While this may generally be true, in the present case MEA acknowledges that in 1987 the commission issued an order in a contested general rate proceeding in which MEA itself was an intervenor, expressly finding it appropriate for Chugach to use a 5.219% line loss factor for its transmission losses. Thereafter, Chugach relied on this order, and the commission repeatedly approved the same figure for Chugach's line loss factor for a period of years without inquiring into why there was no fluctuation, something that could be considered "surprisingly unusual." And, although the balancing account rectifies other changes in price, the account cannot rectify the constant use of the wrong figure when it is not due to any actual costs, but instead human error.

[8] The law supports this approach. "[T]he essential principle of the rule against retroactive ratemaking is that when the estimates prove inaccurate and costs are higher or lower than predicted, the previously set rates cannot be changed to correct for the error; the only step that the [commission] can take is to prospectively revise rates in an effort to set more appropriate ones." [FN25] As one court stated, "[t]ariffs are encompassed within the prohibition against retroactive ratemaking, particularly when, as in the present case, they share similarities with rate schedules." [FN26] Here, the similarities vastly outweigh any differences between the two. And, as the court stated in *First Hartford Corp. v. Central Maine Power Co.*,[FN27] "[w]hether or not the clauses were 'just, reasonable and otherwise lawful', as the Commission's orders recited, they functioned as rates, filed and approved in advance of their inclusion in customers' charges." [FN28] Thus, "[t]he time for challenging a fuel adjustment ***586** rate is before the rate is approved by the Commission." [FN29]

FN25. *Detroit Edison Co. v. Michigan Pub. Serv. Comm'n*, 416 Mich. 510, 331 N.W.2d 159, 164 (1982).

FN26. *Kansas Gas & Elec. Co. v. State Corp. Comm'n of the State of Kansas*, 14 Kan.App.2d 527, 794 P.2d 1165, 1171 (1990) (holding the state's commission and the utility bound by the original tariff until changed by further order of that commission).

FN27. 425 A.2d 174 (Me.1981).

FN28. *Id.* at 177.

FN29. *Id.* at 181.

Even if we were to agree with MEA and the commission and find that the amount of review the commission gave to the fuel surcharge filings was inadequate, we agree with the Wisconsin Supreme Court's reasoning in *Wisconsin Power & Light Co. v. Public Service Commission of Wisconsin,* [FN30] making the argument irrelevant.

FN30. 181 Wis.2d 385, 511 N.W.2d 291 (1994).

In *Wisconsin Power & Light,* the public service commission for the state of Wisconsin determined that Wisconsin Power & Light imprudently administered a contract for coal causing the company to overcharge customers for electricity. Wisconsin Power & Light was therefore ordered to pay nine million dollars in penalties, an amount derived from the actual "overcharges." The case is similar to the instant case as one party there contended that the penalties were valid, because Wisconsin Power & Light "use[d] unreasonably high fuel costs" when calculating its rates.[FN31] It was thus argued that the commission was only responsible for reviewing the formula, not the numbers plugged into it.[FN32] Similarly here, the commission claims analysts are not responsible for investigating the numbers. The Wisconsin court rejected this argument, as do we. The commission had the power to review Chugach's filings each time they were submitted. The record shows that the amount of review given fuel surcharge filings is in dispute. As in *Wisconsin Power & Light,* however, the dispute is irrelevant. What is relevant is that the commission had full power to review additional data concerning Chugach's line losses and to reexamine its own determination that a 5.219% line loss factor was appropriate; yet neither the commission nor MEA questioned Chugach's continuing reliance on the approved line loss factor until 1997.

FN31. *Id.* at 295.

FN32. *Id.*

The commission, which purportedly reviewed the filings, cannot now argue that proper review did not take place. Chugach requested approval of its surcharges before passing them through to its customers. The commission's duty to check submitted filings for accuracy is not excused; it has specific statutory authority to investigate and even suspend a utility's proposed filing prior to implementation.

2. Is the one-quarter limitation for true-ups prohibited by the rule against retroactive ratemaking?

[9] In his order, Judge Michalski holds that "going back more than one quarter in the correction of a Cost of Power Adjustment constitutes retroactive rate making."

[10][11] Whether or not true-ups should be limited to one quarter is not an issue raised in the points of appeal and is not seriously briefed by any party. We deem issues addressed only cursorily in briefs waived by the party. [FN33] Where an issue involves a question of law that is critical to a proper decision, it may be considered.[FN34] However, in the instant case, this question is best considered by the commission [FN35] and is not critical to our finding that any refund would be retroactive ratemaking. Accordingly, we decline to consider the allowable duration of the true-up period.

FN33. *Elsberry v. Elsberry,* 967 P.2d 1004, 1006 & n. 3 (Alaska 1998).

FN34. *Vest v. First Nat'l Bank of Fairbanks,* 659 P.2d 1233, 1234 n. 2 (Alaska 1983).

FN35. *Cole v. Ketchikan Pulp Co.,* 850 P.2d 642, 647 (Alaska 1993) (remanding issue to Workers' Compensation Board because board had not previously considered it and because parties had not briefed or argued issue on appeal).

3. The commission's powers do not include the power to bypass the rule against retroactive ratemaking.

[12] In this case, the commission approved each tariff establishing the quarterly fuel surcharge rate before that rate took effect. Chugach argues that, even if the commission had the general authority to change a commission-approved fuel surcharge***587** rate, it could not do so in the instant case as the procedure for revising the quarterly fuel surcharge rate is in the tariff itself.[FN36] MEA responds that the commission's actions here were valid under our previous case law,

which stated that it has "whatever powers are expressly granted to it by the legislature or conferred upon it by implication as necessarily incident to the exercise of powers expressly granted." [FN37] We need not consider whether or not the commission's order violates the procedures established in the tariff, as we have already found any refund here would constitute retroactive ratemaking.

FN36. Chugach thus argues that the commission's order violates four statutes in the utility code: AS 42.05.371, AS 42.05.411, AS 42.05.421, and AS 42.05.431.

FN37. *Glacier State Tel. Co. v. Alaska Pub. Utils. Comm'n*, 724 P.2d 1187, 1190 (Alaska 1986).

4. The evidence does not support the conclusion that Chugach knew that the actual line loss factor was below 5.219%.

[13] In its brief, MEA contends that a decision in Chugach's favor would allow Chugach to retain the benefit of an incorrect line loss factor and that Chugach knew the line loss factor was incorrect for several years and did not use this knowledge to correct the factor. MEA claims that when Myles C. Yerkes, a representative of the Alaska Electric Generation & Transmission Cooperative, met with Chugach he was provided line loss data for the 1995-1997 period. MEA then argues that "expressly set out in those documents, the actual ... line loss for those years was not 5.219%, but rather 3.64%, 2.61%, and 2.79%."

Chugach denies there is any evidence that it knew that the line loss factor it was using was incorrect. Although the documents MEA cites do set out line loss factors below 5.219%, it is not clear when these documents were generated. Also, Yerkes states in his affidavit that Chugach assumed the 5.219% rate "instead of calculating the actual value."

The assertion that Chugach had prior knowledge of the overstated line loss is not supported by the evidence.

V. CONCLUSION

The prohibition against retroactive ratemaking applies to the generation and transmission line loss factor included in Chugach's fuel surcharge filing. We therefore AFFIRM the decision of the superior court that reversed the commission's order requiring Chugach to refund its wholesale customers amounts collected in excess of the actual line loss factor.

EASTAUGH, Justice, not participating.
Alaska,2002.
Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.
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(Cite as: 53 P.3d 578)