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

INITIAL BRIEF OF AMEREN MISSOURI

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Company" or "Ameren Missouri"), by and through counsel, and for its Initial Brief, states as follows:

BACKGROUND/INTRODUCTION

This is a simple case. Its facts, while technical in nature, are undisputed.[1] The fuel adjustment clause ("FAC") rate charged to customers and in effect during the first recovery period under the Company's FAC reflected a rate that was based upon a comparison of (a) actual net fuel costs incurred in the first accumulation period at the generation level, to (b) net base fuel costs ("NBFC") calculated using kilowatt-hour ("kWh") sales that indisputably were *not* at the generation level.[2] Why does this matter? Because the FAC tariff ("Rider FAC") *required* the calculation of the kWh sales at the generation level, as provided for in the tariff itself:

> NBFC = Net base fuel costs are the net costs determined by the Commission's order as the normalized test year value . . . expressed in cents per kWh, *at the generation level*, ... (emphasis added).
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> Fact Stipulation, Exh. C, Sheet 98.5

Kilowatt hour sales "at the generation level" means that the sales include both distribution and transmission losses. The kWh sales used to calculate the Company's NBFC did not include

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[1] *See* ¶¶ 16, 28 of the Stipulation of Facts, filed jointly by the Staff and the Company, on March 3, 2011, which is hereinafter referred to as the "Fact Stipulation."
[2] There are two NBFC values, one for summer and one for winter.

transmission losses, and thus were not expressed in cents per kWh at the generation level. ***Id.***, ¶¶ 15-16, 28. Consequently, the NBFC listed in Rider FAC (*see* Fact Stipulation, Exh. C, sheet 98.5) were not calculated in the manner required by Rider FAC.

The failure to properly calculate the NBFC was unintended. Neither the Company nor the Staff recognized this failure when Rider FAC was presented to the Commission for approval in January 2009. ***Id.***, ¶ 20. The Company first recognized the failure in November 2009 and contacted the Staff about the problem shortly thereafter. ***Id.***, ¶ 29. Discussions with the Staff about the issue continued over approximately the next year. ***Id.***, ¶¶ 29-30. The first recovery period ("RP 1") ended on September 30, 2010, and the first true-up under Rider FAC, which pertains to RP 1, was due and was filed on December 1, 2010. ***Id.,.*** ¶¶ 31-32 The Staff formally indicated its opposition to correcting this mistake when it filed its Recommendation in this case on December 30, 2010.

The FPA_C rate reflects the change in net fuel costs occurring during an accumulation period. The change in net fuel costs is a dollar figure that is ultimately converted to a rate (i.e., the FPA_C rate). Part of calculating that dollar figure involves multiplying the NBFC by the kWh sales from the accumulation period (i.e., by "S_{AP}"). The product of that calculation is compared to the actual net fuel costs and 95% of that difference becomes the amount that the FPA_C rate charged to customers is designed to collect. *See generally* Fact Stipulation, ¶¶10-11, 25-26. Rider FAC requires that S_{AP} be determined "at the generation level," just like the NBFC. (*See* Fact Stipulation, Exh. C, sheet 98.4). S_{AP} *was* determined at the generation level, as required by Rider FAC.[3]

Not calculating the kWh sales used to determine the NBFC value at the generation level, while *calculating* S_{AP} using kWh sales at the generation level, created an unintended mismatch. Fact Stipulation, ¶ 28. This mismatch caused an understatement of the difference between actual net fuel

[3] This means that the kWh sales reflected in S_{AP} did include transmission losses.

costs incurred by the Company to serve its load and make off-system sales passed through to customers in the FAC (on a cents per kWh basis) and the NBFC (also on a cents per kWh basis) that would have been calculated had the kWh sales on both sides of the equation been determined at the generation level, as expressly required by Rider FAC. For the recovery period being trued-up in this case (RP 1), the mismatch and the resulting understatement of net fuel costs totaled $579,709. That is, had NBFC been calculated as the tariff required using kWh sales at the generation level, customers would have been billed an additional $579,709 during RP 1.[4]

Rider FAC authorizes the Company to add a separate line item reflecting either a surcharge or a credit on customer bills to "reflect differences between actual fuel and purchase power costs, including transportation, net of Off-System Sales Revenues (OSSR) (i.e., Actual Net Fuel Costs) and Net Base Fuel Costs (factor NBFC, as defined below), calculated and recovered as provided for herein." Fact Stipulation, Exh. C, Sheet 98.1. That surcharge or credit is the product of the rate the customers are charged – the FPA_C rate. ***Id.***, Sheet 98.2; Sheet 98.7. In the case of base rates, a customer would be charged $x cents per kWh multiplied by the customer's usage. Under the FAC, customers are also charged (or credited) by $x cents per kWh, but instead of "x" being a fixed sum stated in a base rate tariff, "x" under the FAC is a cents per kWh figure produced by completion of the FPA_C calculation. There are three FPA_C rates in effect at all times, one for each of the three voltage levels at which customers take service. ***Id.***, Sheet 98.7, lines 14.1 through 14.3. As noted, it is the FPA_C rate that is

[4] The $579,709 figure is confirmed by the Staff's Memorandum (Appendix A) to the Staff Recommendation in this case – see Page 2 of 4). The effect of this unintended mismatch also impacts recovery periods two through five. Correction of the mismatch across those four additional recovery periods means customers should be billed an additional $4,653,056, for a total of $5,232,765 (plus interest) across all five affected recovery periods. There is no mismatch in recovery periods six and beyond, because the NBFC applied to recovery periods six and beyond were calculated using kWh sales at the generation level.

charged to (or credited to) customers. ***Id.*** The FPA_C rate is the result of a calculation that uses several inputs, including NBFC and S_{AP} . ***Id.***

The Staff, incorrectly as we will demonstrate herein, takes the position that the filed rate doctrine and the corollary general rule against retroactive ratemaking disables the Commission as a matter of law from correcting what was obviously a mistake that was made in calculating one of the inputs used to calculate the rate customers are charged (or credited) each time a FAC rate adjustment occurs. Staff Recommendation, ¶¶ 11 to 13. Staff also takes the position that the Commission should decline to allow this mistake to be corrected even if the Staff's argument that the Commission is disabled from doing so is rejected.

Not only may the Commission allow this mistake to be corrected as a matter of law, it should, and indeed must, do so; otherwise, the actual difference in net fuel costs versus NBFC as it was required to be calculated by the FAC tariff will simply not be reflected through the FAC, as the FAC contemplates and requires.

As outlined below, the Staff is wrong as a matter of law when it argues that the filed rate doctrine/general rule against retroactive ratemaking applies to FAC adjustments. Moreover, the Staff is also simply wrong as a matter of law when it argues that an incorrect input in the formula that determines a rate customers pay cannot be corrected. To the extent the Staff would argue that as a matter of some kind of "policy" a mistake like this *should* not be corrected, even if it can be, the Staff's policy argument is similarly flawed.

The FAC credit or surcharge – the sum credited or charged via a separate line item on customers' bills – is the product of a complex and technical formula, which depends on a number of inputs and which when applied produces a rate – the FPA_C rate – that is applied to usage. The goal of that rate (a goal which the law does not impede) is to make sure that customers are charged (or credited), once true-ups and prudence reviews are completed – the right sum for fuel and purchased power, net of off-system sales (subject only to the sharing provisions of the FAC tariff). The "right sum" is the actual difference between the base (properly determined in accordance with the FAC tariff) and the actual net fuel costs.

Mistakes sometimes occur; given the fallibility of human beings, they will certainly occur again. And mistakes can cut both ways – they can result in inaccurate debits or credits to customers' bills. This mistake happened to result in under-charges; the next one may go the other way. This true-up is a ready-made, fair, symmetrical and common sense mechanism to get it right, precisely in the manner contemplated by the FAC tariff. Future true-ups will provide the same mechanism to get it right if another mistake that goes the other way occurs in the future. If the Staff's view of the law (and policy) is adopted, that fair, common sense mechanism would apparently be unavailable to the Commission. We think such a result would misstate the law, and would reflect poor policy.

ARGUMENT

A. The Staff is misapplying the filed rate doctrine and its corollary general prohibition against retroactive ratemaking.

The Staff's contention that the filed-rate doctrine (which, as used by the Staff, is synonymous with the general prohibition on retroactive ratemaking[5]) confuses the Commission's inability to *retroactively* change a *base rate* charged to customers with the Commission's well-accepted ability to make *prospective* adjustments to the *interim rate* charged to customers under an FAC.

[5] There are two basic legal principles encompassed within what has been termed the "filed rate doctrine." First, the doctrine holds that a state regulatory commission must give effect to a rate set by the federal government, based upon supremacy clause principles. ***State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n***, 954 S.W.2d 520, 530-31 (*citing* ***Nantahala Power and Light Co. v. Thornburg***, 476 U.S. 953, 963, 106 S.Ct. 2349, 2355, 90 L.Ed.2d 943 (1986)). Second, the doctrine means a regulated utility must collect the rates, and only the rates, properly filed with and approved by the regulatory commission. "This [second] aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking. . . ." ***Id.*** (*citing* ***Columbia Gas Transmission Corp. v. F.E.R.C.***, 831 F.2d 1135, 1140 (D.C. Cir. 1987)). It is this second aspect that Staff argues bars the relief sought by the Company in this docket.

Consider the following simplified example. Assume a utility with one rate class and no FAC concludes a rate case and as a result of that rate case the Commission sets its base rate at 5 cents per kWh. Assume that it does so based upon a test year revenue requirement that included $1 million of coal costs. Further, assume that as it turns out, coal costs end up being $2 million per year. Can the Commission retroactively raise the base rate? In other words, can it go back and charge a base rate of 5.5 cents per kWh to reflect the extra $1 million of coal costs? Under an elementary application of the general prohibition against retroactive ratemaking, the answer is "no." This is because the base rate stated in the tariff was 5 cents per kWh. Under the filed rate doctrine, the utility must charge that rate – no more and no less – for every kWh it sold while the rate was in effect; it matters not what its actual costs and revenues turned out to be. The converse would also be true. Neither the Staff nor an intervenor could later come back and claim that coal costs were actually $500,000, and require a retroactive reduction of the base rate.

Contrast the foregoing example with a rate charged to customers under an FAC – i.e., the FPA_C rate at issue here. The FPA_C rate is the product of a formula contained in Rider FAC. The FPA_C rate is calculated after the fact based upon a retrospective examination of the net fuel costs actually incurred in an accumulation period versus an assumed base. The FPAc rate, at the moment it is charged, is *not* expected to be final. It is, by definition, an interim rate. *See* 4 CSR 240-20.090(4). In fact, unless the estimated sales used (S_{RP}) to apply the FPA_C rate in a given recovery period is or was spot-on correct (and all would agree that such an event is highly improbable), we know with virtual certainty that the FPA_C rate charged during the RP will be wrong, and that it will not be final. We also know with certainty that an adjustment based upon what *actually happened in the past* will have to be made when the true-up is completed. The same thing would occur if, pursuant to the after-the-fact prudence review, the Commission determined that a portion of the costs already passed through to customers pursuant to the FPA_C rate was imprudently incurred. In that case, the FPA_C rate will have to be changed prospectively to account for the disallowance of costs that were imprudently incurred in the past. Consequently, if the FPA_C rate is, for example, determined to be \$0.01 for a recovery period and if that 1 cent is charged to customers, the later adjustments may (and in fact, will) result in a different FPA_C rate, applied prospectively – e.g., \$0.02 cents. The rate applied prospectively is undeniably different because of a retrospective look at what happened – sales were different than assumed, costs were imprudently occurred or, here, a mistake was made – but no one claims that this prospective adjustment is "retroactive ratemaking." There is no logical basis to allow for a prospective correction of the charge based on the retrospective costs incurred but not allow for a prospective correction for a retrospective error.

B. Courts that have examined the issue consistently hold that the general prohibition against retroactive ratemaking does not apply to automatic adjustment clauses.

While the precise mistake at issue here – failing to include transmission losses in the sales used to calculate an electric utility's base fuel costs – has not been dealt with by another public utility commission or a court, *prospective adjustments to FAC rates* based upon past charges under an FAC which were later determined to have been improper (based upon a retrospective look at what actually happened) have universally been found proper. Why have the courts universally found it proper to make prospective adjustments to FAC rates to correct inputs that were in error in the past? Because FACs (or other automatic adjustment clauses, like PGAs) are "'unique animals,' falling outside the parameters of the rule against retroactive ratemaking." ***Daily Advertiser v. Trans-La (A division of Atmos Energy Corp.)***, 612 So.2d 7, 24 (La. 1993). Put another way, the courts have recognized that a rate charged under an FAC that is prospectively changed based upon retrospective events does not violate the filed rate doctrine or its corollary general rule against retroactive ratemaking.

Daily Advertiser involved a damage action by customers arising from charges they paid under rate adjustments made under the gas utility's PGA clause. The plaintiffs claimed the utility (and its affiliated seller of gas) manipulated the cost of gas that was charged to the utility and then passed on to customers through PGA adjustments, resulting in overcharges to customers. There was no question that the utility had paid for the gas, and those costs were passed on to customers through its PGA. In its defense, the utility claimed that the filed rate and retroactive ratemaking doctrines would preclude the Louisiana Commission from granting the relief the customers requested. Like FAC charges in Missouri, the utility calculated the rate (based upon the gas costs) and made a filing that adjusted the rate periodically. Like FAC charges in Missouri, rate adjustments took place without a full-blown rate case and were largely ministerial in nature.[6]

The Louisiana Supreme Court rejected the utility's argument that the filed rate and retroactive ratemaking doctrines precluded prospective changes in PGA rates to account for these past events. The court stated that the "filed-rate doctrine does not preclude a party from challenging a utility's misapplication of its tariff." 612 So.2d at 21. The court also held that "monthly cost adjustments pursuant to such clauses [PGA, FAC] does not constitute ratemaking in the traditional sense because such adjustments go into effect without an antecedent reasonableness review and thus are not "commission-made" rates. It follows then that the commission is not precluded by the rule against retroactive rate making from subsequently examining and modifying such adjustments." ***Id.*** at 23. FAC adjustments in Missouri also take effect without an antecedent reasonableness review. Indeed, those reviews take place later – in prudence reviews and true-up proceedings.

[6] *Cf.* 4 CSR 240-20.090(4), which requires that FAC rate adjustments take effect so long as they are in accordance with the utility's FAC tariff and the Commission's FAC rules. As noted earlier, true-up and prudence review proceedings then later retrospectively look at what actually happened, and may result in prospective adjustments to account for those past events.

Other courts agree. In ***MGTC v. Pub. Serv. Comm'n of Wyoming***, 735 P.2d 103, 107 (Wy. 1987), the Wyoming Supreme Court applied the same rule, stating as follows:

> The rule [against retroactive ratemaking] is limited to *general* ratemaking proceedings, however, and should not be invoked to prevent adjustments in rates pursuant to automatic adjustment mechanisms such as a gas balancing account. *Southern California Edison Co v. Public Utilities Comm'n*, 20 Cal.3d 813, 144 Cal. Rptr 905, 576 P.2d 945 (1978). The balancing account system, by its very nature, requires a retrospective analysis to identify past over- and underrecoveries. We hold that the rule against retrospective ratemaking does not prohibit the refunds ordered by the Commission. (emphasis in original).

In ***MGTC***, the utility had made two adjustments under its "gas balancing account" (i.e., its PGA), but in connection with the third adjustment, the commission's staff became aware that the prior adjustments had been calculated incorrectly (resulting in an overcharge). The commission conducted a review and ordered refunds. The utility argued on review in the courts that the refunds constituted retroactive ratemaking. As the quote above indicates, the Wyoming Supreme Court disagreed on the basis that gas balancing account [PGA] adjustments are not ratemaking for purposes of the rule.

Fitchburg Gas and Elec. Light Co. v. Dept. of Telecommunications and Energy, 801 N.E.2d 220 (Mass. 2004) is similar. In ***Fitchburg***, the utility included certain "inventory financing charges" in both its base rates and in its PGA (called a "gas adjustment clause" in Massachusetts). This was discovered by the Department and after investigation, the utility was ordered to refund the doubly-collected sums with interest over a period similar to that over which they were collected. The utility appealed, arguing that the refund order constituted retroactive ratemaking. The Massachusetts Supreme Court rejected the utility's argument, stating as follows:

> [W]e have no difficulty in concluding that an order retroactively adjusting a CGAC is well within the department's general supervisory authority over utility costs. * * * Unlike the base rate, which is a calculation of rates going forward based on historical data, the CGAC adjusts semi-annually for utility costs as they actually have been incurred, according to a mathematically technical formula. * * * The formula itself is a fixed "rate" that cannot be changed outside the hearing procedure . . . . But the "dollars

and cents" amount inserted into the flow-through formula is presumptively not fixed. ***Id.*** at 637-38.

The Court went on to observe that "a regulatory body correcting a 'mistake in the expense allowance resulting from the improper use of data' does not engage in a ''second look' that violate[s] the prohibition on retroactivity." ***Id.*** at 639; s*ee also* ***Gulf States Utilities Co. v. Louisiana Public Serv. Comm'n***, 689 So.2d 1337 (La. 1997) (A "retroactive disallowance" of costs that were passed through an FAC but which had been double-counted was appropriate and was not "retroactive ratemaking."). 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.

Another case that demonstrates that it is not retroactive ratemaking to correct a mistake (intentional or not) in the calculation of an FAC rate that has already been charged is ***Public Serv. Comm'n of Md. v. Delmarva Power & Light Co.***, 400 A.2d 1147 (Md. Ct. App. 1979). In that case, the Maryland Commission ordered Delmarva to refund an alleged overcharge under its FAC which occurred when Delmarva excluded kWhs associated with test generation at a new nuclear plant from the calculation of its FAC rates. Delmarva's omission made the denominator in the FAC formula smaller, and, thus, the rate was higher than it should have been. (In the case before the Commission, it's just the opposite – the denominator is larger and thus the FPA_C rate was lower than it should have been). Delmarva appealed the commission's decision, and the circuit court reversed, finding in favor of Delmarva. The commission appealed to the Maryland Court of Appeals, which affirmed the commission's decision.

Before the Court of Appeals, Delmarva argued that requiring it to recalculate the FAC charges by changing the denominator to include the test generation kWhs constituted impermissible retroactive ratemaking. The Court of Appeals rejected Delmarva's argument, stating as follows:

> As these [FAC] clauses contemplate complex formulas which must be tested against mathematical calculations from designated figures each month, we conclude that, implicitly, the Commission must retain jurisdiction over such charges in order to assure that the charges made are fair and reasonable to the customer as well as the company. Where, as in this case, the Commission determines that an overrecovery has been made by the company, the Commission under the broad power [citing statutes] may in its discretion order a refund.
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> ****
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> *We do not mean by this conclusion to suggest even remotely that the Commission is empowered to engage in retroactive ratemaking, but we distinguish between the ordinary rate making process and the necessarily ongoing process of verifying and adjusting fuel adjustment clauses so that they accurately reflect the increased and decreased costs (we hope) of the fuel necessary to operate a utility plant.* (emphasis added).

Id. at 1153.

C. Mistakes in an input necessary to determine the applicable rate to be charged to customers, even when the incorrect input itself is listed in the tariff, may be corrected.

Even where an automatic adjustment clause was not at issue, courts have recognized that pure mistakes in an input used in a tariff to determine the rate that customers pay may and should be corrected, even if the correction is after-the-fact and even where the input is listed in the tariff itself. In ***State ex rel. North Carolina Utilities Comm'n v. Norfolk Southern Ry. Co***., 106 S.W.2d 681 (N.C. 1959), the carrier concluded a rate case and then filed tariffs that fixed certain rates for shipments covering a distance of up to 100 miles, and a different rate for shipments covering a distance of more than 100 miles. The tariff contained a table listing the mileage between various points. The table in the published tariff listed the mileage between Lane, North Carolina and Greensboro, North Carolina as 101 miles. The rate listed in the published tariff for a shipment covering 101 miles was $1.40 per ton. The rate listed in the published tariff for a shipment covering 100 miles or less was $1.30 per ton. The carrier transported freight for a shipper from Lane to Greensboro and applied the $1.40 charge (based upon the tariff which said it was 101 miles from Lane to Greensboro). It was later discovered, however, that the table in the tariff was wrong. The distance between Lane and Greensboro was, in fact, just 100 miles. The shipper brought an action to recover the difference in the applicable charge.

The North Carolina Public Utilities Commission ruled for the shipper, and the carrier appealed to the North Carolina Supreme Court, arguing that a retroactive adjustment could not be made. The Supreme Court affirmed the Utilities Commission. In doing so, the Supreme Court observed that the "plaintiff [shipper] paid 10 cents per ton in excess of what the Utilities Commission had fixed as a just and reasonable rate for the short line distance of 100 miles." ***Id.*** at 478. The carrier "urgently contend[ed] the Commission is without power to enter a retroactive order awarding reparations for charges which were made in accordance with approved tariff schedules." ***Id.*** at 481. The Supreme Court rejected this argument, noting that the argument assumed that "the charges were made in accordance with the published tariffs." ***Id.*** The Supreme Court held that the charges were not made in accordance with the tariffs because the tariffs "authorize $1.30 per ton for mileage units 80-100 miles, and a *mistake in mileage cannot be used to increase the rate*. A rate of $1.40 for 100 miles is simply not within the authorized tariffs." ***Id.*** The Court also stated that "[w]e think the fixing of the rate of $1.30 per ton for distances 80-100 miles was the controlling factor and did not authorize the collection of a higher rate for any shipment within that distance bracket. The defendants *should not be permitted to change the rate by the act of* ***making a mistake*** in the distance reported in their tariff schedule." ***Id*****.** at 481.

Similarly, the Company's FAC tariff contains a true mistake analogous to the incorrect distance listed in the Delmarva tariff – it contains NBFC values that were not calculated in the manner required by the FAC tariff because the NBFC values were not determined at the generation level; i.e., transmission losses were mistakenly omitted from the kWhs used in the calculation. When those mistaken NBFC values are then plugged-into the FPA_C rate formula (just as when the inaccurate 101 mile figure was used to trigger the rate to apply in ***Norfolk Southern***), the wrong rate is then charged to customers – in this case, a rate that was too low; in ***Norfolk Southern***, a rate that was too high. Had the mistake not occurred here (or in ***Norfolk Southern***), the rate produced by the FPA_C calculation would have been right; i.e., higher. Like the carrier in ***Norfolk Southern,*** the Staff should "not be permitted to change rate [the result of the FPA_C rate formula] by the act of making a mistake in the . . . [NBFC calculation]." It is important to note that had the mistake caused the FPA_C rate to be *overstated*, the Company should not be allowed to collect a rate that is too high as the result of a mistake. The Commission should (and can) correct errors like this, whether they result in rates that are too high or too low.

D. The application of a new FPA_C rate in the future that corrects the impact of the mistake made in the past is not retroactive ratemaking.

Lastly, we would point to the very recent decision of the Missouri Court of Appeals for the Western District in ***State ex rel. AG Processing, et al. v. Pub. Serv. Comm'n***, Case No. WD 71986 (Slip. Op. March 1, 2011). In that case, the Court of Appeals affirmed the Commission's approval of Aquila's fuel adjustment clause, which had been challenged by AG Processing and Public Counsel as violative of the general rule against retroactive ratemaking. In doing so, the Court of Appeals made clear that a rate adjustment that applies *prospectively* to service provided to customers *after* the rate adjustment takes effect does not "modify or recalculate the rate to be charged for electricity provided to customers *before* the rate adjustment was approved." ***AG Processing***, *supra* (Slip Op., at 10) (emphasis in original). Consequently, a prospective rate adjustment is not retroactive ratemaking even if it recoups previously incurred costs. ***Id.*** "In prior cases, this Court has rejected claims that measures to recoup previously incurred costs constitute retroactive ratemaking, when the recoupment measures operation prospectively, and do not alter the cost of utility service previously provided to customers." (*Citing* ***State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n***, 210 S.W.3d 330 (Mo. App. W.D. 2006) and ***State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n***, 976 S.W.2d 470 (Mo. App. W.D. 1998)).

During RP 1, customers were charged an FPA_C rate for the electric service they received during RP 1 (between October 1, 2009 and September 30, 2010). Correction of the mistake discussed above in this case, via an adjustment to the FPA_C rate that will apply *prospectively* to electric service customers will receive later, will not "modify or recalculate the [FPA_C rate] . . . charged for electricity provided to customers before the [new FPA_C rate] . . ." will be approved. ***Id.*** Stated another way, allowing the additional charges that, but for the mistake, would have been included in the prior FPA_C rate to be recovered through a future FPA_C rate will allow a mistake that was made in the past to be corrected, but it will not "alter the cost of the utility service previously provided to customers." ***Id.*** Consequently, the relief requested by the Company in this docket is not retroactive ratemaking.

CONCLUSION

A mistake was made through no party's fault. As a result, the NBFC values listed in the FAC tariff were not determined as the FAC tariff required. Interim FPA_C rates were calculated and charged based upon the mistaken input – the mistaken NBFC input. The filed rate doctrine and its corollary, the general prohibition against retroactive ratemaking, do not preclude the correction of the mistake via the application of an FPA_C rate in the future that corrects the under-charges which have occurred solely because of the mistake.

Moreover, not correcting the mistake would result in a failure to follow the FAC tariff because the FPA_C rates charged in RP 1 and ultimately applied after a new FPAc rate is implemented after the true-up will have failed to reflect actual changes in net fuel costs as required by the FAC tariff. Not only would this be a failure to follow the tariff, but it would also reflect poor policy. The next mistake may result in an over-charge to customers. Adoption of the Staff's position would preclude correction of that mistake, as surely as the Staff argues a correction should not be made here. There is simply no cogent justification for declining to correct a known mistake made in an interim FPA_C rate that was applied erroneously in the past.

Dated: March 22, 2011.

Respectfully submitted,

SMITH LEWIS, LLP

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

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

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

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Initial Brief was served via e-mail on the counsel of record for the following parties, on this 22nd day of March, 2011.

Nathan Williams
Staff of the Commission
P.O. Box 360
Jefferson City, MO 65102
nathan.williams@psc.mo.gov

Lewis R. Mills, Jr.
Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
lewis.mills@ded.mo.gov

/s/James B. Lowery