**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of the First Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri | ) ) ) ) | Case No. EO-2010-0255 |

## APPLICATION FOR REHEARING

Union Electric Company d/b/a Ameren Missouri (hereinafter "Ameren Missouri" or the "Company"), pursuant to §386.500.1, RSMo., and 4 CSR 240-2.160, hereby applies for rehearing of the *Report & Order* issued by the Commission in the above-captioned case on April 27, 2011. In support of its application, Ameren Missouri states as follows:

1. All orders and decisions of the Commission must be lawful and reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n.*, 103 S.W.3d 753, 759 (Mo. banc 2003). To be considered lawful, the Commission must act within its statutory authority and must correctly interpret and apply applicable law. *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n.*, 293 S.W.3d 63, 71 (Mo. App. S.D. 2009). To be considered reasonable, all decisions of the Commission must be based on competent and substantial evidence on the whole record and must not be against the weight of the evidence. *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n.*, 224 S.W. 3d 20, 24 (Mo. App. W.D. 2007).

2. All Commission decisions also must contain sufficient findings of fact and conclusions of law. *Friendship Village v. Pub. Serv. Comm'n.*, 907 S.W.2d 339, 344 (Mo. App. 1995). Findings of fact must articulate the basic facts from which the Commission reached its ultimate conclusions, must be sufficient to show how controlling issues were decided, and cannot be completely conclusory. *State ex rel. Coffman v. Pub. Serv. Comm'n.*, 121 S.W.3d 534, 542 (Mo. App. 2003).

3. As a creature of statute, the Commission can exercise only those powers expressly conferred on it by statute and such other, implicit powers as are necessary to enable it to carry out powers specifically granted. *State ex rel. Kansas City Transit v. Pub. Serv. Comm'n.*, 406 S.W.2d 5, 8 (Mo. banc

1966). To be lawful, the Commission's decisions and actions must be wholly within the sphere of the authority described in the preceding sentence.

4. In addition, the Commission cannot act in a manner that is arbitrary and capricious or otherwise constitutes an abuse of discretion. *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n.*, 186 S.W.3d 376, 382 (Mo. App. W.D. 2005).

5. With respect to each and all of the findings of fact hereinafter discussed in this Application for Rehearing, the Commission's *Report & Order* is based on inadequate findings of fact in that the findings do not sufficiently articulate the basic facts that support the findings. With respect to each and all of the conclusions of law hereinafter discussed in this Application for Rehearing, the Commission's *Report & Order* does not sufficiently show how controlling issues were decided. With respect to all of the findings and conclusions hereinafter discussed such findings and conclusions are contrary to, or is not supported by, competent and substantial evidence on the whole record; are against the weight of the evidence; are arbitrary, capricious, and an abuse of discretion; and/or are unlawful or unjust and unreasonable.

6. The Commission erred when it found and concluded that the two power supply contracts that are at the heart of this case – one involving Wabash Valley Power Association ("Wabash") and the other involving American Electric Power Service Corporation on behalf of the AEP Operating Companies ("AEP") – are not "long-term full or partial requirements sales," as that phrase was used in the fuel adjustment clause ("FAC") tariff approved by the Commission in Case No. ER-2008-0318.

7. The Commission erred in ordering a refund to customers on the basis of the Staff's allegation that the Company acted imprudently in not including the revenues from the sales under the AEP and Wabash contracts in the FAC. The Company's actions with regard to the AEP and Wabash contracts are consistent with what a reasonable person would have done given the circumstances facing the Company and, thus, the Company acted prudently. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n,* 954 S.W.2d 520, 529 (Mo. App. W.D. 1997). Moreover, ordering the Company to make

refunds based upon a finding of imprudence is prohibited as a matter of law unless the imprudence caused harm to customers. *Id.* The Company's actions did not cause any harm to customers because the exclusion of the revenues from the Wabash and AEP contracts from the FAC calculations left customers in the same position as they would have been had the ice storm not occurred. Consequently, the Commission's decision is contrary to the terms and conditions of the FAC tariff, which only allows it to order refunds if the Company acted imprudently and is therefore unlawful. Moreover, the Commission's decision is contrary to its own regulations, specifically, 4 CSR 240-20.090, which only authorizes the Commission to order refunds as a result of a prudence review if the utility acted imprudently and if harm resulted, and for this additional reason is also unlawful.

8. The Commission erred in ordering a refund to customers on the basis that the Company's actions were improper because the AEP and Wabash contracts fall within the exclusion for long-term full or partial requirements contracts contained in the FAC tariff and therefore the tariff required that the sales under those contracts be excluded from the FAC calculations as a matter of law. Consequently, the Commission's decision is unlawful.

9. The Commission erred when it found that "[t]he only testimony about the intent of the parties when they agreed upon the definition of off-system sales was offered by Lena Mantle on behalf of the Staff." The exclusion at issue was contained in the initial tariff filed at the initiation of Case No. ER-2008-0318 and was drafted by the Company. No party to Case No. ER-2008-0318 suggested that the language in question be changed. The language in question, as drafted by the Company, was thus included in the compliance tariff filed near the conclusion of Case No. ER-2008-0318. The intent of the other parties to Case No. ER-2008-0318 is irrelevant as a matter of law. Moreover, the finding in question ignores, and is contrary to, the weight of competent and substantial evidence on the record in this case that establishes that: (i) Ms. Mantle's testimony regarding the substance of her conversation with certain Company personnel, which occurred more than two years ago, was unreliable because her recollections about that conversation were, at best, vague; (ii) there is no documentation corroborating her

recollections; and (iii) the Ameren Missouri personnel who supposedly were present during the conversation affirmatively denied making the statements Ms. Mantle attributed to them.

10. The Commission erred in finding that changes to the language of the FAC tariff that Ameren Missouri agreed to in Case No. ER-2010-0036 provide "background" that can, or should, be used to resolve the tariff interpretation questions at issue in this case. The terms of the Stipulation and Agreement pursuant to which Ameren Missouri agreed to the changes expressly provide as follows:

> This Stipulation and Agreement is being entered into solely for the purpose of disposing of the issues that are specifically addressed in this Stipulation and Agreement. In presenting this Stipulation and Agreement, none of the Parties to this Stipulation and Agreement shall be deemed to have approved, accepted, agreed, consented or acquiesced to any ratemaking principle, procedural principle, or principle or rule of law, including, without limitation, any method of cost or revenue determination or cost allocation or revenue related methodology, or any legal principle or rule of law relating to whether or not the Commission can or cannot modify or discontinue an FAC for the Company (if an FAC is permitted in this case) in a subsequent rate case. Moreover, none of the Parties shall be prejudiced or bound in any manner by the terms of this Stipulation and Agreement (whether this Stipulation and Agreement is approved or not) in this or any other proceeding, other than a proceeding limited to enforce the terms of this Stipulation and Agreement, except as otherwise expressly specified herein.

Moreover, the terms of that Stipulation and Agreement provide that:

> If the Commission does not unconditionally approve this Stipulation and Agreement without modification, and notwithstanding its provision that it shall become void.

The Commission unconditionally approved the Stipulation and Agreement, and thus the changes agreed-upon by the Company cannot be used as a basis for the Commission's decision in this case. Moreover, the agreed-upon changes are of no probative value whatsoever to any of the issues in this case because they were agreed to in a subsequent rate case and were made as part of a settlement agreement involving multiple issues, the consideration for which is not recited in the Stipulation and Agreement, and is not a part of the record in this case. There is also no competent and substantial evidence on the record in this case that any party to Case No. ER-2010-0036 intended any of the language changes agreed to in that case would clarify or further define terms or phrases used in the FAC approved in Case No. ER-2008-0318.

11. The Commission erred in finding that Ameren Missouri's definition of the phrase "long-term full or partial requirements sales," as used in the FAC tariff approved by the Commission in Case No. ER-2008-0318, was based solely on the way in which power supply contracts are treated in the wholesale electric market at the relevant time; that is, when it was drafted, filed, and approved. Certainly the way such contracts are viewed in the electricity markets operating at the time the subject phrase was drafted by Ameren Missouri was a part of the Company's definition, but it was not the sole basis for its definition. The evidence and arguments presented in this case clearly establish that Ameren Missouri's definition also is fully consistent with Federal Energy Regulatory Commission's ("FERC") long-standing policy as to how long-term requirements contracts are viewed in a regulatory context and is also consistent with the Commission's prior construction of the phrase "long-term." *See, e.g., In re: Aquila, Inc.*, 257 P.U.R.4th 424 (Mo. P.S.C. 2007); *In re: Southwestern Bell*, 218 P.U.R.4th 429 (Mo. P.S.C. 2002). Because the FERC, and not the Commission, has primary jurisdiction over the power supply contracts that are at issue in this case, the FERC's long-standing policy regarding what constitutes a long-term requirements contract should control.

12. The Commission erred when it found that the definition of "long-term requirements sales" offered by the non-Ameren Missouri parties to this case reflects the regulatory definition of the key terms used in that phrase at the relevant time; that is, when it was drafted, filed, and approved. The competent and substantial record evidence in this case shows that those parties relied on obscure instructions to the FERC Form 1 Report that: (i) were adopted more than twenty years ago; and (ii) were adopted for the sole purpose of prescribing a uniform method for reporting annual financial and operating data contained in that report. As such the FERC Form 1 instructions neither relate to nor reflect the definitions of either "long-term" or "partial requirements sales" at the FERC or in the electric power markets at the relevant time.

13. The Commission erred when it found that the regulatory definition of the phrase "long-term" was not one year or longer but was, instead, five years or longer based on the instructions to the

FERC Form 1 Report. The weight of competent and substantial evidence on the record in this case establishes that the FERC's long-standing policy to categorize all power supply agreements of one year or longer as "long-term" constitutes the regulatory definition of that term. The Commission's own decisions reflect the same definition. *See In re: Aquila* and *In re: Southwestern Bell, supra.*

14. The Commission erred when it found that the regulatory definition of a requirements contract or sale is more restrictive than the definition used in the electric power markets at the relevant time. The critical elements of both the regulatory and market definitions of requirements service is that the seller is obligated to provide both the capacity and the energy necessary to fulfill all or a portion of the buyer's requirements to provide electricity to end users. Moreover, the Commission ignored relevant portions of definitions promulgated by the Edison Electric Institute and focused, instead, on a definition from the instructions for the FERC Form 1 Report that indicates that to qualify as requirements service the seller's power supply obligation must be "ongoing." The Commission then compounded its error by failing to specify how long a service obligation must be in order to qualify as "ongoing." The Commission also erred in concluding that the contracts were not part of the Company's "system planning" and thus were not "ongoing" because they were not included in a Company integrated resource plan filing. It was impossible to include them in an integrated resource plan filing because such filings occur every three years, with the 2008 filing concluding prior to the existence of the subject contracts, and the 2011 filing not having been made when the contracts expired.

15. The Commission erred in concluding that neither the Wabash nor the AEP agreements was a requirements sale because the capacity necessary to provide service under those contracts was not included in Ameren Missouri's system resource planning. Uncontroverted evidence on the record in this case establishes that the *capacity* from the Company's generating units that was used to supply power under the Wabash and AEP agreements was included in the Company's 2008 integrated resource plan ("IRP"), which the Commission approved in Case No. EO-2007-0409. The record further establishes that even the non-Ameren Missouri parties conceded that whether a particular contract or the load associated

with a particular customer is included in an IRP "is not necessarily determinative of whether [a particular power supply agreement] is a requirements contract."

16. The Commission erred when it found that the Wabash and AEP contracts are not requirements contracts simply because the terms of those contracts differ from the terms included in certain power supply agreements between Ameren Missouri and various municipal utilities – e.g. the *amount* of capacity provided under those agreements. There is no competent and substantial evidence on the record in this case that establishes that the terms of those municipal contracts define or constitute minimum standards that must be met in order for a power supply agreement to qualify as a requirements sale. Moreover, there is nothing in the Commission's *Report & Order* that explains how those municipal contracts can be considered "ongoing" since testimony by Ameren Missouri's witnesses made clear that all but one the municipal contracts at issue had terms of less than five years, and further, given that it was the Company's intention to terminate the existing municipal contracts when they expire. The municipal contracts were also no more "ongoing" than, for example, the Wabash contract which related to serving the load of Citizens Electric, with whom the Company has had an ongoing relationship for decades. Finally, the Commission's finding blurs, or even erases, the distinction between full and partial requirements contracts and full or partial requirements sales.

17. The Commission erred in finding that because Ameren Missouri did not list either the Wabash or AEP contract as a long-term requirements contract in the Company's 2009 FERC Form 1 Report those contracts do not qualify as "long-term full or partial requirements sales," as that phrase is used in the Company's FAC. Uncontroverted record evidence in this case establishes that: (i) Ameren Missouri filed its Form 1 Report according to the reporting instructions prescribed for that report; (ii) those instructions were developed for financial reporting purposes and do not reflect the relevant market or regulatory definitions for long-term requirements sales and were not relied upon by Ameren Missouri when it drafted the language at issue; and (iii) the Company never intended, or even considered, that the

instructions to the FERC Form 1 Report would control the meaning of any term used in the FAC tariff at issue in this case.

18. The Commission erred when it concluded that although applicable law requires that FAC tariffs be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity," the law does not also require the Commission to interpret those tariffs in any particular manner. Missouri law governing tariff interpretation is clear: tariffs are to be interpreted in a manner that is consistent with the statute the tariff was intended to implement. *See Foremost-McKesson, Inc. v. Davis*, 488 S.W.2d 193, 201 (Mo. banc 1972). Because §386.266, RSMo., mandates that Ameren Missouri's FAC be designed to afford the Company "a sufficient opportunity to earn a fair return on equity," the Commission is obligated to interpret that tariff in a manner that is consistent with that statutory objective.

19. The Commission erred in interpreting the language of Ameren Missouri's FAC tariff in a manner that is: (i) inconsistent with the plain meaning of the words used in that tariff, and (ii) contrary to the Company's intent when it proposed the tariff language that ultimately was adopted by the Commission in Case No. ER-2008-0318. The weight of the competent and substantial evidence on the record in this case clearly establishes that when it proposed the tariff definition of "OSSR" Ameren Missouri intended that all key terms used in that definition – including "long-term" and "partial requirements sales" – would be interpreted consistent with the way those terms were then used and understood both by regulators and parties involved in the electric power markets. There is no evidence that the Company intended, and there was no evidence before the Commission that would have allowed the Commission to intend, or even contemplate at the time the Commission approved Ameren Missouri's FAC, that the instructions to the FERC Form 1 Report would control the meaning of any term or phrase used in the tariff. Indeed, the evidence in this case clearly establishes that Staff did not come up with the idea of applying the FERC Form 1 definitions until sometime after August 31, 2010, the date on which it filed its "Prudence Review of Costs Related to the Fuel Adjustment Clause for the Electric Operations of

Union Electric Company, d/b/a AmerenUE," which accused the Company of acting imprudently with respect to the manner in which it interpreted its FAC tariff.

20. The Commission erred by interpreting the FAC tariff in a manner that ignores the specific language of the tariff, which simply requires that exempt "requirements sales" be "long-term," and, instead, adopts a new requirement that requirements sales be "ongoing." A tariff, like a statute, must be interpreted according to the words actually used in the tariff, and it is both unlawful and unfair to interpret Ameren Missouri's FAC tariff in a manner that ignores the actual tariff language in favor of alternate language, which appears nowhere in the tariff, that allows the Commission to achieve and/or justify a particular result.

21. The Commission erred in concluding that the Wabash and AEP contracts do not constitute long-term partial requirements sales under the language of Ameren Missouri's FAC tariff. The weight of competent and substantial evidence in this case establishes that both contracts satisfy the relevant market and regulatory definitions of "long-term" and "requirements" sales, which were the definitions intended by the Company when the tariff language was proposed and approved.

22. The Commission erred when it concluded that adopting the Company's proposed definitions of key terms in its FAC "would render the tariff's definition of off-system sales nearly meaningless." There is no competent and substantial evidence on the record in this case that supports that conclusion. Moreover, the patent falsity of this conclusion can easily be demonstrated by reference to the terms of Ameren Missouri's FAC tariff itself. For example, because the tariff exemption for certain off-system sales is limited to "long-term" sales, all sales or energy and capacity that are less than one year in duration do not qualify for the exemption.

23. The Commission erred when it found that when the Noranda load was lost the megawatt hours would only be available to sell on the off-system market. The competent and substantial evidence of record indicates that the megawatt hours would also be available to rebalance the Company's generation portfolio by making long-term full or partial requirements sales.

24. The Commission erred when it concluded that the Company's interpretation of its FAC would "deprive its ratepayers of the benefit of the bargain implicit in the Commission's approval of the fuel adjustment tariff language." Section 386.266.1, RSMo., makes clear that the purpose of any FAC authorized by the Commission is to provide "an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in [a utility's] prudently incurred fuel and purchased-power costs, including transportation." The interpretation of the FAC tariff proposed by Ameren Missouri in this case accomplishes this objective. In contrast, the interpretation of the FAC tariff proposed by the non-Ameren Missouri parties, and adopted by the Commission, will force the Company to return to customers, and thereby deny recovery, of more than $17 million in prudently incurred fuel and power costs for the seven month period March 1, 2009, to September 30, 2009. Thus, it is the Commission's interpretation of the FAC tariff, not the interpretation proposed by Ameren Missouri, that both ignores the purpose of §386.266, RSMo., and deprives the Company of the benefits that the FAC was intended to deliver.

25. The Commission erred in requiring Ameren Missouri to offset increases in prudently incurred fuel and purchased power costs with corresponding increases in off-system sales that the Company realized after the date of the Commission's *Report & Order* in Case No. ER-2008-0318. Although §386.266, RSMo., authorizes the Commission to approve rate schedules authorizing periodic adjustments in rates outside general rate proceedings to reflect increases and decreases in the utility's prudently incurred fuel and purchased power costs, that statute does not authorize the Commission to adjust, or otherwise address, changes in the amounts of off-system sales revenues a utility receives between general rate cases. As the Missouri Supreme Court stated in *State ex rel. Util. Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n.*, 585 S.W.2d 41, 56 (Mo. banc 1979), the Commission's regulatory powers are limited to "the circumference of powers conferred on it by the legislature" and the Commission has no authority "to change the ratemaking scheme set up by the legislature." Because the Commission has no specific statutory authority to adjust rates between rate cases based on changes in off-

system sales revenues, the refunds mandated by the Commission in its *Report & Order* in this case are unlawful.

26. The Commission erred in concluding that Ameren Missouri acted imprudently or in a manner that was otherwise contrary to law or the requirements of its FAC tariff when the Company did not use revenues from the Wabash and AEP contracts to offset increases in prudently incurred fuel and purchased power costs for the period March 1, 2009, through September 30, 2001, and thereafter.

27. The Commission erred because the refunds to customers ordered in this case are confiscatory and thereby violate the Company's right to due process of law as guaranteed by both the United States and Missouri Constitutions.

WHEREFORE, for any or all of the reasons stated herein, Ameren Missouri respectfully requests the Commission grant rehearing of its April 27, 2011, *Report & Order* in this case.

Respectfully submitted,

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**ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI**

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on May 6, 2011, to all parties of record.

/s/ L. Russell Mitten
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