BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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**

REPORT AND ORDER

Issue Date: April 27, 2011

Effective Date: May 7, 2011

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APPEARANCES

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CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

REPORT AND ORDER

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The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This order determines that Union Electric Company d/b/a Ameren Missouri acted imprudently, improperly and unlawfully when it excluded revenues derived from power sales agreements with AEP and Wabash from off-system sales revenue when calculating the rates charged under its fuel adjustment clause.

Procedural History

On August 31, 2010, the Commission's Staff filed a Prudence Report and Recommendation regarding its first prudence review of Ameren Missouri's costs related to

its fuel adjustment clause (FAC). In its Report, Staff concluded that Ameren Missouri acted imprudently in not including certain costs and revenues in calculating the FAC rate it billed to its customers. The costs and revenues Staff contends were improperly excluded from the fuel adjustment clause are associated with Ameren Missouri's sales of energy to American Electric Power Operating Companies (AEP) and to Wabash Valley Power Association, Inc. (Wabash). Staff advised the Commission to order Ameren Missouri to refund approximately $24.1 million plus interest to its customers by an adjustment to its FAC charge. Subsequently, on October 12, 2010, Staff corrected its prudence report and recommendation to reflect revised calculations that indicate Ameren Missouri over-collected $17,169,838 during the recovery periods in question, rather than the $24,073,236 over-collection Staff had shown in its initial prudence report.

Ameren Missouri disputed Staff's claim of imprudence and on September 9, 2010, requested a hearing regarding Staff's recommendation.[1] Commission Rule 4 CSR 240-3.161(10) provides that parties to the rate case in which the Commission established Ameren Missouri's fuel adjustment clause are automatically parties to this prudence audit case, without the necessity of having to apply for intervention. By that rule, the Commission recognized the following entities as parties to this case:

AARP;
Consumers Council of Missouri;
IBEW Local Union 1455, 1439, 2, 309, 649, and 702;
International Union of Operating Engineers – Local No. 148;
Laclede Gas Company;
Missouri Coalition for the Environment;
Missouri Department of Natural Resources;
Missouri Energy Group;

[1] The Office of the Public Counsel, the Missouri Retailers Association, and the Missouri Industrial Energy Consumers support Staff's proposed adjustment, but also requested a hearing in pleadings filed on September 10, 2010.

Missouri Industrial Energy Consumers;
Missourians for Safe Energy;
Noranda Aluminum;
State of Missouri; and
The Commercial Group.

In addition, the Commission allowed the Missouri Retailers Association, which was not an automatic party, to intervene.

On September 29, 2010, following a prehearing conference, the Commission established a procedural schedule leading to an evidentiary hearing regarding Staff's recommended adjustment to Ameren Missouri's FAC charge. In compliance with the established procedural schedule, the interested parties prefiled direct, rebuttal, and surrebuttal testimony. The evidentiary hearing was held on January 10 and 11, 2011. The parties filed post-hearing briefs on February 10, 2011, with reply briefs following on February 24.

Findings of Fact

1. On January 27, 2009, the Commission issued a Report and Order[2] in Commission File Number ER-2008-0318 concerning Ameren Missouri's request for a general rate increase. As part of that Report and Order, the Commission approved for the first time Ameren Missouri's request to implement a fuel adjustment clause.

2. The next day, January 28, 2009, Southeastern Missouri was struck by a terrible ice storm.[3] The ice storm knocked down the power lines that serve the aluminum smelter operated by Noranda Aluminum, Inc. As a result, the smelter lost electric power in mid-cycle, causing the molten aluminum to solidify in the smelting equipment. Noranda

[2] *In the Matter of Union Electric Company, d/b/a AmerenUE's Tariffs to Increase Its Annual Revenues for Electric Service*, Report and Order, File No. ER-2008-0318 (January 27, 2009).

[3] Barnes Direct, Ex. 3, Page 5, Lines 19-24.

quickly restored one of the three production lines, but could not immediately put the second and third lines back into production. Two-thirds of Noranda's production capacity was lost while the solidified aluminum was jackhammered out of the equipment.[4]

3. When Noranda lost production capacity, it reduced the amount of electricity it purchased from Ameren Missouri. The loss of sales to Noranda was a serious problem for Ameren Missouri because Noranda normally buys a lot of electricity. Before the damage resulting from the ice storm, Noranda hourly consumed more than 460 megawatts of electricity at a very high load factor, meaning it used nearly the same amount of electric power every hour of every day throughout the year.[5]

4. Because of the damage to Noranda's production capacity, Ameren Missouri stood to lose approximately $90 million per year of its normal electric sales to Noranda.[6] That amounts to approximately four percent of Ameren Missouri's base-rate revenue requirement from which the company's rates were developed.[7]

5. Since Ameren Missouri would not be selling as much electric power to Noranda, it would have more electric power available to sell on the off-system market. Such off-system sales could partially offset the revenue lost on sales of power to Noranda. However, there was a problem with off-system sales.

6. Under the fuel adjustment clause that the Commission approved the day before the ice storm, revenue from off-system sales is used to offset Ameren Missouri's fuel

[4] Barnes Direct, Ex. 3, Page 6, Lines 4-10.

[5] Haro Direct, Ex. 1, Page 6.

[6] Barnes Direct, Ex. 3, Page 6, Lines 12-15.

[7] Barnes Surrebuttal, Ex. 4, Page 2, Lines 19-20.

purchase costs, subject to a 95/5 sharing mechanism.[8] That means Ameren Missouri is allowed to pass 95 percent of any net changes in fuel/purchased power costs through to its customers outside of a general rate case. The other 5 percent must be absorbed by the company's shareholders.

7. Normally, the fuel adjustment clause would benefit Ameren Missouri because the company would be allowed to pass through to customers 95 percent of what were anticipated to be rising fuel costs without having to experience the delay that would result if the company had to file a new rate case to recover those increased fuel costs. However, that 95/5 sharing mechanism also applied to off-system sales. That means 95 percent of any increase in off-system sales would benefit ratepayers rather than the company by offsetting rising fuel costs under the fuel adjustment clause's formula.

8. Thus, if Ameren Missouri simply replaced the revenue it could no longer earn by selling power to Noranda - revenue that is not subject to sharing mechanism of the fuel adjustment clause - by selling more power off-system, it would be unable to retain 95 percent of that replacement revenue. That would result in a revenue shortfall for Ameren Missouri's shareholders.

9. Ameren Missouri first attempted to avoid that revenue shortfall by asking the Commission to rehear its Report and Order and modify the approved fuel adjustment clause to exclude revenue from those off-system sales used to offset the lost sales to Noranda.[9] The Commission denied Ameren Missouri's application for rehearing in an order issued on February 19, 2009.[10]

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[8] Eaves Direct/Rebuttal, Ex.11, Page 3, Lines 4-9.

[9] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs To Increase its Annual Revenues for Electric Service,* File No. ER-2008-0318, Application for Rehearing and Motion for Expedited Treatment

10. In its February 19 order denying Ameren Missouri's application for rehearing, the Commission found that it could not modify the fuel adjustment clause tariff in the manner Ameren Missouri requested without setting aside the approved stipulation and agreement regarding the fuel adjustment clause, reopening the record to take evidence on the appropriateness of the proposed change, and making a decision before the March 1, 2009 operation of law date. The Commission concluded that such action was "obviously impossible" and on that basis denied Ameren Missouri's application for rehearing. The Commission's order did not make any decision or ruling on the merits of Ameren Missouri's proposal, nor did the Commission take any evidence on the merits of that proposal.

11. After the Commission denied Ameren Missouri's application for rehearing, the company's revised tariff, now including the fuel adjustment clause, went into effect on March 1, 2009.

12. With the fuel adjustment clause now in effect, Ameren Missouri began looking for a means to sell power to replace the lost Noranda load. In replacing that load, Ameren Missouri sought to enter into sales contracts that would most closely resemble the service to Noranda by rebalancing the load with regard to the type of customer served and credit exposure faced by Ameren Missouri.[11] Ameren Missouri also acknowledged that it was seeking to enter into a contract that would be excluded from operation of the fuel adjustment clause.[12]

(February 5, 2009).

[10] *In the Matter of Union Electric Company d/b/a AmerenUE's Tariffs To Increase its Annual Revenues for Electric Service,* File No. ER-2008-0318, Order Denying AmerenUE's Application for Rehearing (February 19, 2009).

[11] Haro Direct, Ex. 1, Pages 4-5, Lines 8-22, 1-17.

[12] Transcript, Page 118, Lines 7-11.

13. Ameren Missouri subsequently entered into two contracts that it describes as long-term partial requirements contracts. The first contract was with American Electric Power Service Corporation (AEP) for 100 megawatts for a duration of 15 months. The second contract was with Wabash Valley Power Association, Inc., to serve Citizen Electric load in Missouri. That contract was for 150 megawatts for a duration of 18 months.[13]

14. Ameren Missouri's description of these contracts as long-term partial requirements contracts is important because of the controlling terms found in the fuel adjustment clause tariff. That tariff provides:

> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.[14] (emphasis added).

Ameren Missouri contends these contracts fall within the tariff's exclusion for long-term full and partial requirements sales, the other parties contend they do not. The question then becomes: what are the appropriate definitions of "long term" and "full and partial requirements" sales?

15. Before examining those definitions in more detail, it is important to understand the genesis of Ameren Missouri's fuel adjustment clause tariff. The definition of off-system sales that is at issue in this case was initially proposed through the testimony of Ameren Missouri's witness, Marty Lyons, as part of Ameren Missouri's request for a fuel adjustment clause in Ameren Missouri's rate case, ER-2008-0318.[15]

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[13] Haro Direct, Ex. 1, Page 7, Lines 1-10.

[14] Eaves Direct/Rebuttal, Ex. 11, Schedule DEE-5-3.

[15] Transcript, Page 350, Lines 5-17.

16. The parties in ER-2008-0318 did not agree that Ameren Missouri should be allowed to implement a fuel adjustment clause and the Commission resolved that overall issue in its report and order. However, the parties were able to agree upon the details of the language that would be included in the fuel adjustment clause tariff if the Commission decided to allow Ameren Missouri to implement a fuel adjustment clause. The exact language of the tariff, including the definition of off-system sales, was agreed to in a stipulation and agreement that the Commission approved as part of the resolution of ER-2008-0318.[16]

17. The 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 Staff.[17] As case coordinator and expert witness for Staff, Mantle was involved in negotiations surrounding the development of Ameren Missouri's fuel adjustment tariff. She testified that, based on conversations with Ameren Missouri's representatives, she understood that the tariff definition was designed to exclude from operation of the fuel adjustment clause the wholesale electric supply contracts that Ameren Missouri had entered into with various municipal utilities.[18]

18. The exclusion of those municipal contracts from the operation of the fuel adjustment clause makes sense, because in the pending rate case, ER-2008-0318, Ameren Missouri's costs were allocated to municipal utilities through energy and demand allocators. In other words, Ameren Missouri's costs to provide wholesale service to the

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[16] Barnes Direct, Ex. 3, Pages 3-4, Lines 23-24, 1-5.

[17] Mantle is the Manager of the Energy Department, Utility Operations Division of the Missouri Public Service Commission.

[18] Mantle Direct/Rebuttal, Ex. 12, Page 4, Lines 3-25.

municipalities were not being flowed through the Fuel Adjustment Clause, so it would have been inappropriate to flow the revenues received from the municipalities through the Fuel Adjustment Clause. Including those revenues within the fuel adjustment clause would have required Ameren Missouri to pay all the costs of those contracts while receiving credit for only five percent of the revenues generated through those contracts.[19]

19. When Ameren Missouri's fuel adjustment tariff was once again before the Commission in Ameren Missouri's next rate case, ER-2010-0036, the parties, including Ameren Missouri, stipulated that the tariff's definition of off-system sales would be changed to specifically exclude long-term full and partial requirements sales to Missouri municipalities.[20] As a result, under the revised tariff, revenue from both the Wabash and the AEP contracts would be treated as off-system sales and would be flowed through the fuel adjustment clause.

20. With that background, we can now return to a discussion of the definitions of "long-term" and "full and partial requirements" sales. Ameren Missouri's fuel adjustment clause tariff does not define either term, so the parties proposed their own definitions. Ameren Missouri would base its definitions on the way in which such contracts are currently treated in the wholesale electric marketplace. The other parties would define those terms in what they describe as a more traditional regulatory context.

21. In the context of today's marketplace for wholesale electric power, a long-term power supply contract is one that covers a period of one year or more. That was amply demonstrated through the testimony of Jaime Haro, Director, Asset Management and

[19] Mantle Direct/Rebuttal, Ex. 12, Page 5, Lines 1-16.

[20] Transcript, Page 357, Lines 1-11, and Page 82, Lines 7-22.

Trading for Ameren Missouri,[21] and Duane Highley, Director of Power Production for Associated Electric Cooperative, Inc.[22] Both men have marketed and traded power for several years and concur that in the context of that marketplace, "a 'long-term' power supply agreement would be one which covers a period of one year or more. A short-term agreement is commonly understood to be one with a term of less than one year."[23]

22. While a contract with a duration of one year or more is treated as a long-term contract within the context of the wholesale electric market, this Commission is not seeking to define the term in that context. Rather, the Commission must define long-term within a regulatory context. In that context, Staff's witness points to a definition of long-term found in the FERC Form 1 used by Ameren Missouri in filing annual reports with FERC and this Commission. By that definition, a long-term contract is one that lasts five years or longer, an intermediate term contract is longer than one year, but less than five years, and a short-term contract is one year or less.[24] For purposes of its annual reports, Ameren Missouri does not classify either the Wabash or the AEP contracts as long-term requirements contracts.[25]

23. A similar disagreement exists between the parties regarding the appropriate definition of a requirements contract. Again, Jaime Haro and Duane Highley explain that within the context of the marketplace, "a long-term partial requirements sale is an agreement where the seller provides resources sufficient to meet part of the purchasing

[21] Haro Direct, Ex. 1, Page 1, Lines 4-6.

[22] Highley Surrebuttal, Ex. 7, Page 1, Lines 10-13.

[23] Highley Surrebuttal, Ex. 7, Page 6, Lines 7-9.

[24] Eaves Direct/Rebuttal, Ex. 11, Pages 10-11, Lines 24-26, 1-18.

[25] Eaves Direct/Rebuttal, Ex. 11, Page 11, Lines 29-31.

entity's load obligation during the term of the agreement."[26] The other parties counter that in a regulatory context, the definition of a requirements contract is more restrictive.

24. Jaime Haro testified that his definition of a partial requirements contract is based on his "understanding of the market" and the only regulatory authority he cited to support his definition was the definition offered by the Edison Electric Institute (EEI).[27]

25. Ameren Missouri refers to the definition of "Partial Requirements" offered by the Edison Electric Institute as support for its definition of a partial requirements contract. That definition is a follows:

> A wholesale customer who purchases, or is committed to purchase, only a portion of its electric power generation need from a particular entity. There is often a specified contractual ceiling on the amount of power that a partial requirements customer can take from the entity. In contrast, a "requirements" or "full requirements" customer is committed to purchase all of its needs from a single entity and generally would not have a ceiling on the amount of power it can take.[28]

26. Edison Electric Institute also offers a definition of "Full Requirements" as follows:

> A wholesale customer (utility) that is committed to purchase all of its electric power generation from a single generator and generally there is not a ceiling on the amount of power purchased.[29]

27. Neither the definition of "Partial Requirements," nor the definition of "Full Requirements," actually defines "Requirements." Instead, they simply define the difference between partial and full requirements. If the meaning of "Requirements" is to be

[26] Haro Surrebuttal, Ex. 2, Page 2, Lines 1-3.

[27] Transcript, Page 50, Lines 7-24.

[28] Haro Surrebuttal, Ex. 2, Schedule JH-S5.

[29] Haro Surrebuttal, Ex. 2, Schedule JH-S5.

understood in either definition, reference must be made back to the definition offered for Requirements Service.

28. The Edison Electric Institute defines "Requirement Service" as:

> Service that the supplier plans to provide on an ongoing basis (i.e. the supplier includes projected load for this service in its system planning). In addition, the reliability of requirements service must be the same as, or second only to, the supplier's service to its own ultimate customers."[30]

The same definition of requirement service is found in the instructions for completion of the FERC Form 1.[31]

29. Consistent with those definitions, the commonly understood concept of requirements service is the provision of power to municipal customers or rural electric cooperatives on a basis whereby the selling utility incorporates the requirements of these customers into its resource planning.[32]

30. The key phrase in the definition of requirements service is that it is service the supplier plans to provide on an ongoing basis. The Wabash and AEP contracts are for terms of only 18 and 15 months and Ameren Missouri acknowledged that it entered into those contracts to replace the Noranda load lost due to the ice storm.[33] Those contracts expired on May 31, 2010, and October 31, 2010, and were not renewed.[34] In short, it is clear that Ameren Missouri did not intend to provide these services to Wabash and AEP on an ongoing basis.

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[30] Brubaker Direct, Ex. 14, Schedule MEB-3.

[31] Haro Surrebuttal, Ex. 2, Schedule JH-S3.

[32] Brubaker Direct, Ex. 14, Page 3, Lines 3-7.

[33] Haro Direct, Ex. 1, Page 7, Lines 1-10.

[34] Transcript, Page 49, Lines 10-12.

31. In an effort to fit the Wabash and AEP contracts into the EEI and FERC definitions of requirement service, Ameren Missouri's witness, Jaime Haro, suggested that the definitions' statement that requirement services are to be provided on an ongoing basis could simply mean that they are to be provided for the term of the contract.[35] When pressed on cross-examination, Haro conceded that his definition of ongoing basis as meaning the term of the contract could apply to contracts with a term of a single day.[36]

32. All parties agree that Ameren Missouri's existing electric sales contracts with various municipalities are requirements sales that are properly excluded from the tariff's definition of off-system sales. The Wabash and AEP contracts differ substantially from Ameren Missouri's contracts with the municipalities in that Ameren Missouri provides substantially more capacity and energy services to the municipalities than it did to Wabash and AEP under their contracts. The contracts with AEP and Wabash strictly provide capacity and energy, leaving the buyer to arrange the transmission, pay for transmission and for all other services required to accept the power from the seller. In addition, the municipal contracts were longer in length than the AEP and Wabash contracts.[37]

33. In short, the contracts with the municipalities are for requirements service and Ameren Missouri designated them as such in its 2009 FERC Form 1 filing. In contrast,

[35] Transcript, Page 68, Lines 7-13.

[36] Transcript, Page 87, Lines 19-25.

[37] Brubaker Direct, Ex. 14, Page 5, Lines 3-19. Brubaker designated this testimony describing the terms of the contracts as highly confidential because Ameren Missouri had designated the contracts as highly confidential at the time. At the hearing, Ameren Missouri agreed that the contracts could be treated as public information and the Commission so designated them. See. Transcript, Page 519. Therefore, the witness' description of the terms of the contract is also treated as public information.

Ameren Missouri categorized the Wabash and AEP as Intermediate Firm Service, and not as Requirements Service in that same 2009 FERC Form 1 filing.[38]

34. Ameren Missouri testified that in view of the new, more competitive wholesale energy market, it would not be offering requirements service to the municipalities in the coming years after those existing contracts terminate according to their terms.[39]

35. If the revenues Ameren Missouri received from the Wabash and AEP contracts during the recovery periods at issue in this case are flowed through the Fuel Adjustment Clause, Ameren Missouri must refund its customers $17,169,838 as calculated in the Correction to Staff's Prudence Report and Recommendation filed on October 12, 2010.

Conclusions of Law

1. Ameren Missouri is a public utility, and an electrical corporation as those terms are defined in Section 386.020(43) and (15), RSMo Supp. 2010. As such, Ameren Missouri is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo.

2. Section 386.266.4(4), RSMo Supp. 2010, gives the Commission authority to approve an electrical corporation's fuel adjustment tariff if it finds that the tariff includes "provisions for prudence reviews of the costs subject to the adjustment mechanism no less frequently than at eighteen-month intervals, and shall require refund of any imprudently incurred costs plus interest at the utility's short-term borrowing rates." The fuel adjustment tariff that the Commission approved for Ameren Missouri contains such provisions.

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[38] Brubaker Direct, Ex. 14, Page 3, Lines 1-24.

[39] Wills Surrebuttal, Ex. 6, Page 6, Lines 23-26.

3. Commission Rule 4 CSR 240-20.090(7) establishes procedures for the conduct of prudence reviews respecting fuel adjustment tariffs.

4. In order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that the utility acted imprudently and that such imprudence resulted in harm to the utility's ratepayers.[40]

5. The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision. In that decision, the Commission held that a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[41]

6. Section 386.266.4(1), RSMo Supp. 2010, gives the Commission authority to approve an electrical corporation's fuel adjustment tariff if it finds that the tariff is "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The Commission has approved such a tariff for Ameren Missouri and no one challenges that tariff in this case. Ameren Missouri argues that this provision also requires the Commission to interpret the language of the previously approved tariff in a manner that protects the utility's ability to earn a fair return on equity. There is no such requirement in the plain language of the statute and the Commission will interpret this tariff in the same manner it would interpret any other tariff.

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[40] *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n, 954 S.W.2d 520 (Mo. App. W.D. 1997).*

[41] *In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues. And In the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.* 27 Mo. P.S.C. (N.S.) 183 (1985).

7. Under Missouri law, once the Commission approved the fuel adjustment tariff, that tariff acquired "the same force and effect as a statute directly prescribed from the legislature."[42] Therefore, a reviewing court is to interpret a tariff in the same manner it interprets a statute.[43]

8. In interpreting Ameren Missouri's fuel adjustment tariff, the Commission must "ascertain the intent of [Ameren Missouri and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning."[44] The Commission may look beyond the plain and ordinary language of Ameren Missouri's tariff "'only when the meaning is ambiguous or [acceptance of the plain and ordinary language] would lead to an illogical result defeating the purpose of the [tariff].'"[45]

Decision

The language from Ameren Missouri's tariff that is in question is as follows:

> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and long-term full and partial requirements sales, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission.

As explained more fully in the findings of facts section of this report and order, that definition of off-system sales determines what revenue is to be run through the fuel

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[42] *State ex rel. Laclede Gas Company v. Pub. Serv. Comm'n, 156* S.W.3d 513, 521 (Mo App. W.D. 2005), quoting *All-States Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W. 2d 314, 317 (Mo. App. E.D. 1996).

[43] *Id*.

[44] *Id.*, quoting *Wolff Shoe Co. v. Dir. Of Revenue*, 762 S.W. 2d 29, 31 (Mo. banc 1988).

[45] *Id.*, quoting *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W. 2d 383,387 (Mo. banc 1987).

adjustment clause subject to a 95/5 sharing mechanism. Ameren Missouri is able to keep 100 percent of revenue that the definition excludes from off-system sales, which explains the company's desire to exclude revenue derived from the Wabash and AEP sales from off-system sales.

Some confusion was injected into the hearing by Staff's misreading of part of the tariff language. That misreading derives from a confusingly placed comma in the definition. Staff would read the second part of the definition as if there were no comma between "sales" and "that". Thus, the definition would state "excluding Missouri retail sales and long-term full and partial requirements sales that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission." In other words, the numbered provisions at the end of the sentence would modify "long-term full and partial requirement sales". However, there is a comma before "excluding" and after "sales", and that creates a parenthetical expression that modifies "all sales transactions" at the start of the sentence.

The intended meaning of the definition would be clearer if it were rearranged as follows:

> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447) that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission, excluding Missouri retail sales and long-term full and partial requirements sales.

Aside from grammatical construction, the correctness of that meaning of the definition is clear because if the numbered provisions at the end of the sentence are taken to be limitations on the exclusion rather than the inclusion, then all sales transactions would be

unlimited and off-system sales would be defined as including transactions that are associated with non-Missouri jurisdictional generating units. That would not be a reasonable interpretation of the definition.

No one questions the exclusion of Missouri retail sales from the definition of off-system sales, but the intended meaning of the exclusion of "long-term full and partial requirements sales" is much less clear. In interpreting the meaning of the phrase "long-term full and partial requirements sales", the Commission must look first to the plain and ordinary meaning of those words and may look beyond those words only if their meaning is ambiguous. In the context of Ameren Missouri's sales of electric power to Wabash and AEP, those words are ambiguous. They are not defined anywhere in the tariff and they do not have a plain and ordinary meaning outside the tariff. Therefore, the Commission will attempt to ascertain the intent of Staff, Ameren Missouri, and the other parties when they agreed to this tariff language through their stipulation and agreement.

The parties presented arguments about the tariff language as if there were two provisions to be interpreted, "long-term" and "full and partial requirement sales". However, the tariff language can best be understood as a single provision, a description of a type of sale that is to be excluded from the definition of off-system sales.

The type of sale to be excluded is described in the Edison Electric Institute and FERC Form 1 definitions as "requirements service". That is the type of sales contract that Ameren Missouri had entered into with municipal utilities, cooperatives, and other investor owned utilities over the years. It is also a type of sales contract that has become much less common in recent years, as the wholesale electric market has become less regulated.

The key phrase in the definition of "requirements service" is the requirement that the supplier plans to provide such service "on an ongoing basis (i.e. the supplier included projected load for this service in its system planning)." As the wholesale electric market has changed in recent years, Ameren Missouri has moved away from requirements service contracts, leaving only the remnant municipal requirements contracts, which Ameren Missouri intends to not renew when their terms expire.

The tariff's definition of long-term full and partial requirements sales was not limited to municipal customers, but by the time the parties were negotiating the language of the tariff, those were the only such existing customer contracts that would fall within the definition. That also explains the statement that Lena Mantle testified she heard from a representative of Ameren Missouri during those negotiations. Since the municipal contracts were the only ones in existence at that time that would fall within the definition, it is reasonable to conclude that Ameren Missouri's employees would name those contracts when asked about the definition of long-term full and partial requirements sales.

Thus, the tariff's definition of off-system sales was intended to exclude requirements sales of the type exemplified by the existing requirements sales to the municipalities. The question then becomes, are the Wabash and AEP contracts the sort of requirements sales that fall within the intent of the tariff?

The Commission concludes that the Wabash and AEP contracts are not long-term full or partial requirements contracts as defined by Ameren Missouri's tariff. They simply do not have the characteristics to qualify as such contracts. Ameren Missouri calls them such, but it must stretch the definition beyond the breaking point to do so.

If Ameren Missouri's definition were accepted, nearly any sales contract of over one-year duration would qualify as a long-term full or partial requirements contract that could be excluded from the fuel adjustment clause. Ameren Missouri would be able to choose unilaterally to define an off-system sale out of the fuel adjustment clause and thereby increase its profits at the expense of its ratepayers. Such a broad definition would render the tariff's definition of off-system sales nearly meaningless and would make the fuel adjustment clause extremely one-sided in a way that was not intended by the Commission or by the parties to the stipulation and agreement that presented that tariff language to the Commission for approval. Ameren Missouri describes its contracts with Wabash and AEP as long-term full or partial requirements contracts, but, to paraphrase MIEC's witness, Maurice Brubaker, calling a dog a duck does not make it quack, and calling Ameren Missouri's contracts with Wabash and AEP long-term full or partial requirements contracts does not make them so.

Ameren Missouri also argues that it did not act imprudently in entering into the Wabash and AEP contracts and that nothing it did has harmed ratepayers. On that basis, it argues that the Commission has no basis to find the imprudence necessary to require it to refund money to its ratepayers.

Ameren Missouri bases that argument on the fact that had there been no ice storm and Noranda had not been forced to curtail its production and resulting purchases of electricity, the money Noranda paid to Ameren Missouri would not have been flowed through the fuel adjustment clause and the company would not have had to share 95 percent of that revenue with its ratepayers. Ameren Missouri contends that the revenue it received from the Wabash and AEP contracts merely replaced the revenue it lost from

Noranda and therefore, its ratepayers are no worse off than they would have been had there been no ice storm.

Ameren Missouri's argument would however deprive its ratepayers of the benefit of the bargain implicit in the Commission's approval of the fuel adjustment tariff language proposed in the stipulation and agreement among the parties to the rate case, ER-2008-0318. The bargain implicit in the approved fuel adjustment clause is that ratepayers will pay more to help the company when the utility's fuel costs rise or offsetting revenue from off-system sales drop. On the other hand, ratepayers will benefit from decreased rates if fuel costs drop or offsetting revenue from off-system sales increase. Here offsetting revenue from off-system sales, as those revenues were defined in the tariff, increased and ratepayers should have benefited in the amount of $17,169,838. However, Ameren Missouri sought to deprive ratepayers of that benefit by branding the Wabash and AEP contracts as long-term full or partial requirements contracts when they do not qualify as such under the terms of the company's tariff. In doing so, Ameren Missouri acted contrary to the requirements of its tariff and therefore acted inappropriately.

THE COMMISSION ORDERS THAT:

1. Union Electric Company, d/b/a Ameren Missouri shall refund $17,169,838 to its ratepayers by an adjustment to its FAC charge to correct an over collection of revenues for the period of March 1, 2009, to September 30, 2009.

2. This report and order shall become effective on May 7, 2011.

BY THE COMMISSION

(S E A L)

Steven C. Reed
Secretary

Gunn, Chm., Clayton, and Kenney, CC., concur;
Davis, C., dissents, with dissenting opinion to follow;
Jarrett, C., dissents.
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 27th day of April, 2011.