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

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

## REPORT AND ORDER

**Issue Date:** July 31, 2013

**Effective Date:** August 30, 2013

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

## APPEARANCES

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**James B. Lowery,** Attorney at Law, Smith Lewis, LLP, 111 South Ninth Street, Suite 200, Columbia, Missouri 65201

For Union Electric Company, d/b/a Ameren Missouri.

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For the Office of the Public Counsel and the Public.

**Kevin A. Thompson and Amy Moore**, Chief Staff Counsel and Legal Counsel, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102

For the Staff of the Missouri Public Service Commission.

**SENIOR REGULATORY LAW JUDGE: Ronald D. Pridgin**

# 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 ("OSSR") when calculating the rates charged under its fuel adjustment clause.

## Procedural History

On October 28, 2011, the Commission's Staff filed a Prudence Report and Recommendation regarding its second 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 $26.3 million plus interest to its customers by an adjustment to its FAC charge.

Ameren Missouri disputed Staff's claim of imprudence and on November 7, 2011, and again on March 7, 2012, requested a hearing regarding Staff's recommendation. 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 following entities are 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;
Missouri Industrial Energy Consumers;
Missourians for Safe Energy;

Noranda Aluminum;
State of Missouri; and
The Commercial Group.

On March 30, 2012, 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 June 21, 2012. The parties filed post-hearing briefs on July 20, 2012, with reply briefs following on August 24, 2012. Because a pending case at The Missouri Court of Appeals, which will be discussed later, would dictate how the Commission should proceed, the Commission awaited the court's opinion before proceeding further.

## List of Issues

On June 12, 2012, the parties submitted a Joint List of Issues. The issues are as follows:

1. Are the revenues derived from the power sales agreements between Ameren Missouri and counter-parties Wabash Valley Power Association, Inc. ("Wabash") and American Electric Power Service Corporation as agent for the AEP Operating Companies ("AEP") excluded from the definition of "OSSR" found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri's Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009?

2. Was it imprudent, improper and/or unlawful for Ameren Missouri to exclude the Company's power sale agreements with AEP and Wabash from off-system sales and

not include the revenues collected under the Company's power sale agreements with AEP and Wabash in OSSR and, therefore, not include those revenues in its calculation of the Fuel and Purchased Power Adjustment rates for the time period of October 1, 2009, to June 20, 2010?

3. Did Ameren Missouri's conduct described in Paragraph 2, above, result in harm to its ratepayers?

4. Should Ameren Missouri refund to its ratepayers through its FAC the amount improperly collected from them by virtue of the conduct described in Paragraph 2, above?

5. What is the amount that should be refunded, if any?

## Findings of Fact

1. On January 27, 2009, the Commission issued a Report and Order[1] 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.[2] 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 quickly restored one of the three production lines, but could not immediately put the second

[1] *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).
[2] Barnes Direct, Ex. 1, Page 8, Lines 8-15.

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.[3]

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.[4]

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.[5]

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.[6]

6. 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. 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 purchase costs, subject to a 95/5 sharing mechanism.[7] 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.[8]

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[3] *Id*., lines 18-22.
[4] Haro Direct, Ex. 3, Page 6, Line 10 through Page 7, Line 2.
[5] Barnes Direct, Ex. 1, Page 9, Lines 1-4.
[6] *Supra* at fn. 4, Page 7, Line 4 through Page 8, Line 5.
[7] Eaves Direct/Rebuttal, Ex. 8, Page 8, Lines 1-16.
[8] *Id.*

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.[9]

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.[10]

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.[11] The Commission denied Ameren Missouri's application for rehearing in an order issued on February 19, 2009.[12]

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

[9] *Id.* at Page 12, Lines 16-24.
[10] Barnes Direct, Ex. 1, Page 10, Lines 12-17.
[11] *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 (February 5, 2009).
[12] *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).

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.[13]

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.[14]

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.[15]

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.[16]

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[13] *Id.*
[14] *Supra* at fn. 10.
[15] Haro Direct, Ex. 3, Page 4, Line 1 through Page 8.
[16] *Id.* at page 7, lines 6-12.

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.[17] (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.[18]

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

[17] Eaves Direct/Rebuttal, Ex. 8, Schedule DEE-5-3.
[18] Transcript, Pages 11-12.

stipulation and agreement that the Commission approved as part of the resolution of ER-2008-0318.[19]

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.[20] As case coordinator and expert witness for Staff, Mantle was involved in negotiations surrounding the development of Ameren Missouri's fuel adjustment tariff.[21] 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.[22]

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 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.[23]

[19] Barnes Direct, Ex. 1, Page 5, Line 13 through Page 6, Line 1.
[20] At all pertinent times, Mantle was the Manager of the Energy Department, Utility Operations Division of the Missouri Public Service Commission.
[21] Mantle Direct/ Rebuttal, Ex. 9, Page 5, Lines 14-21.
[22] *Id.* at page 6, lines 1-26.
[23] *Id.* at page 7, lines 4-14.

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.[24] 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.[25] The other parties would define those terms in what they describe as a more traditional regulatory context.[26]

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.[27]

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, a long-term contract is one that lasts five years or

[24] Barnes Direct, Ex. 1, Page 12, Lines 7-10.
[25] Haro Surrebuttal, Ex. 4, Page 1, Line 17 through Page 4, Line 23.
[26] Mantle Direct/Rebuttal, Ex. 9, Page 6, Line 1 through Page 10, Line 6. Brubaker Rebuttal, Ex. 10, Page 5, Lines 1 through Page 6, Line 23.
[27] *Supra* at fn. 25.

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.[28]

23. In its 2009 annual report, Ameren Missouri does not classify either the Wabash or the AEP contracts as long-term requirements contracts.[29]

24. Ameren Missouri filed its 2009 annual report before the Commission's decision in Ameren Missouri's first prudence review case of its fuel adjustment clause.[30]

25. Ameren Missouri filed a 2010 annual report in which it referred to the AEP contract at issue as Requirements Service and Short-Term Firm Service, and in which it referred to the Wabash contract at issue as Short-Term Firm Service.[31]

26. 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.[32]

27. 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.[33]

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[28] Eaves Direct/Rebuttal, Ex. 8, Page 15, Line 8 through Page 16, Line 24.
[29] *Id.* at page 16, lines 31-34.
[30] *Id.* at page 17, lines 3-12.
[31] *Id.* at page 16, lines 25-28.
[32] Haro Surrebuttal, Ex. 4, Schedule JH-S5.
[33] *Id.*

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

29. 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."[34]

The same definition of requirement service is found in the instructions for completion of the FERC Form 1.[35]

30. 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.[36]

31. 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.[37] Those contracts expired on May 31, 2010, and October 31, 2010, and were not renewed.[38] In short, it is

[34] Brubaker Rebuttal, Ex. 10, Schedule MEB-3.
[35] *Supra* at fn. 34, Schedule JH-S3.
[36] *Supra* at fn. 36, page 5, lines 1-8.
[37] Haro Direct, Ex. 3, Page 7, Lines 4 through Page 8, Line 3.
[38] Transcript, Page 101, Lines 20-25.

clear that Ameren Missouri did not intend to provide these services to Wabash and AEP on an ongoing basis.

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.[39]

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, Ameren Missouri categorized the Wabash and AEP as Intermediate Firm Service, and not as Requirements Service in that same 2009 FERC Form 1 filing.[40]

34. In Ameren Missouri's subsequent rate case, File No. ER-2010-0036, the parties signed a *Second Nonunanimous Stipulation and Agreement*. The agreement had the specific limited purpose of resolving the treatment of the AEP and Wabash contracts only for that case.[41]

35. That stipulation contains a mathematical formula which uses a "W-Factor". That "W-Factor" was simply a part of the settlement of how the AEP and Wabash contract

[39] Brubaker Rebuttal, Ex. 10, Page 7, Line 4 through Page 8, Line 10.
[40] *Id.* at Page 5, Lines 1-24.
[41] Mantle Direct/Rebuttal, Ex. 9, Page 9, Line 21 through Page 10, Line 6.

revenues should be treated in File No. ER-2010-0036.[42] Ameren Missouri offered evidence that some $3.3 million of margins arising from the AEP and Wabash contracts have already been flowed back to customers because the language of the *Second Nonunanimous Stipulation and Agreement* contained a stand-alone provision called "AEP and Wabash Contracts" that credited customers for 12 months after the new rates set in that rate case took effect.[43] The Commission found Ms. Mantle more credible than Mr. Weiss on this issue.

36. If the parties to the stipulation meant for the "W-Factor" to offset the AEP and Wabash margins that had not flowed through the fuel adjustment clause, then the parties could have, and likely would have, stated so in the stipulation. Instead, the stipulation included language that specifically allowed the parties to take any position in a subsequent case regarding the AEP and Wabash contracts.[44]

37. 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 $26,342,791, plus interest accrued at Ameren Missouri's short-term borrowing rate from May 31, 2011 until the amount is refunded.[45]

## 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

[42] *Id.* at Page 10, Lines 8-16.
[43] Weiss Direct, Ex. 5, Page 3, Line 20 through Page 4, Line 20; Weiss Surrebuttal, Ex. 6, Page 7, Line 13 through Page 8, Line 13.
[44] *Supra* at fn. 46, Page 12, Lines 6-10.
[45] Eaves Direct/Rebuttal, Ex. 8, Page 1, Line 25 through Page 2, Line 3.

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.

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.[46]

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.[47]

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

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

[47] *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).

"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.

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."[48] Therefore, a reviewing court is to interpret a tariff in the same manner it interprets a statute.[49]

8. For an earlier accumulation period, the Missouri Court of Appeals held that Ameren Missouri imprudently, improperly and unlawfully excluded revenues derived from the AEP Operation Companies, Inc., and Wabash Valley Power Association contracts at issue in this case from off-system sales revenue when calculating the rates charged under its fuel adjustment clause.[50]

9. A fuel adjustment clause allows a utility, outside of a general rate case, to change the charge for power per kilowatt-hour by the amount of an increase or decrease in the utility's fuel costs. The Commission has no power to allow a fuel adjustment clause for the purpose Ameren Missouri is seeking, which is to recover lost retail revenue to cover

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[48] *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).

[49] *Id*.

[50] *See State ex. rel. Union Electric Company d/b/a Ameren Missouri v. Public Service Commission of the State of Missouri*, Case No. WD 75403 (Opinion issued May 14, 2003; mandate issued June 5, 2013).

fixed costs, even in response to a calamitous loss of such revenue.[51] The interpretation Ameren Missouri urges would permit the fuel adjustment clause to be used for an unlawful purpose, which would be to recover lost retail revenues that have no relationship to the variable cost of fuel or purchased power.[52]

10. The phrase "long-term full and partial requirements sales" in Ameren Missouri's fuel adjustment clause referred to the four existing municipal contracts in existence when the 2008 general rate case was opened. Such a meaning is consistent with the limited statutorily authorized purpose for fuel adjustment clauses. That meaning also will not render the clause unenforceable due to exceeding the Commission's statutory authority.[53]

## Decision

1. Are the revenues derived from the power sales agreements between Ameren Missouri and counter-parties Wabash Valley Power Association, Inc. ("Wabash") and American Electric Power Service Corporation as agent for the AEP Operating Companies ("AEP") excluded from the definition of "OSSR" found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri's Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009?

**No.**

2. Was it imprudent, improper and/or unlawful for Ameren Missouri to exclude the Company's power sale agreements with AEP and Wabash from off-system sales and not include the revenues collected under the Company's power sale agreements with AEP

[51] *See id*., slip op. at 26, 38.
[52] *See id.,* slip op. at 27.
[53] *See id.* slip op. at 36.

and Wabash in OSSR and, therefore, not include those revenues in its calculation of the Fuel and Purchased Power Adjustment rates for the time period of October 1, 2009, to June 20, 2010?

**Yes.**

3. Did Ameren Missouri's conduct described in Paragraph 2, above (Decision Section), result in harm to its ratepayers?

**Yes.**

4. Should Ameren Missouri refund to its ratepayers through its FAC the amount improperly collected from them by virtue of the conduct described in Paragraph 2, above?

**Yes.**

5. What is the amount that should be refunded, if any?

**Ameren Missouri must refund its customers $26,342,791, plus interest accrued at Ameren Missouri's short-term borrowing rate from May 31, 2011 until the amount is refunded.**

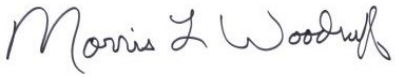
**THE COMMISSION ORDERS THAT:**

1. Union Electric Company, d/b/a Ameren Missouri shall refund $26,342,791 plus interest accrued at Ameren Missouri's short-term borrowing rate from May 31, 2011 until the amount is refunded to its ratepayers by an adjustment to its FAC charge to correct an over collection of revenues for the period of October 1, 2009, to June 20, 2010.

2. All other requests for relief are denied.

3. This report and order shall become effective on August 30, 2013.

**BY THE COMMISSION**



Morris L. Woodruff
Secretary

R. Kenney, Chm., concurs, with
separate concurring opinion to follow;
Stoll and W. Kenney, CC., concur;
Jarrett, C., dissents, with separate
dissenting opinion to follow;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 31st day of July, 2013.