BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Authority to Sell and Repurchase Coal and Lease Property	)))	**Case No. EO-2012-0146**

STAFF BRIEF

Respectfully submitted,

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December 6, 2011

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In the Matter of the Application of Union Electric Company d/b/a Ameren Missouri for Authority to Sell and Repurchase Coal and Lease Property	)))	**File No. EO-2012-0146**

STAFF BRIEF IN RESPONSE TO ORDER DIRECTING FILING

The Commission's November 28, 2011 *Order Directing Filing* directs the Staff of the Missouri Public Service Commission (Staff) to file no later than December 5, 2011 a legal analysis to clarify issues involving the Option Agreement For Purchase Of Membership Interest (Option Agreement). On December 5, 2011, the Staff filed a Motion For Extension Of Time to December 6, 2011 to file Staff Brief in response to Order Directing Filing. The Staff addresses below the Option Agreement and issues regarding which the Commission identified it wanted clarification from the Staff and Ameren Missouri.

I. **Option Agreement**

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II. **Issue 1**: Is Ameren Missouri required to obtain Commission approval prior to exercising the Option Agreement for Purchase of Membership Interest By and Between Buffington Holdings (B), L.L.C. and Union Electric Company d/b/a Ameren Missouri Relating to Buffington Partner, L.L.C. ("Option Agreement")?

Upon further reflection, the Staff believes that a better statement of Issue 1 can be fashioned. Although Issue I, stated as is, can be answered, a better statement of Issue 1 is:

> Can the Commission condition its approval of Ameren Missouri's Application for authority to sell and repurchase coal and lease property on requiring Ameren Missouri to obtain Commission approval prior to exercising the Option Agreement for Purchase of Membership Interest By and Between Buffington Holdings (B), L.L.C. and Union Electric Company d/b/a Ameren Missouri Relating to Buffington Partner, L.L.C. ("Option Agreement")?

The answer to this question is "yes." The Option Agreement has been executed by Ameren Missouri and BH subject to Ameren Missouri receiving Commission authority to proceed with the refined coal project. The Commission can condition its approval of

Ameren Missouri's Application. There is a legal standard required to be met for the Commission to exercise its authority; the transaction/project, pursuant to Section 393.190.1 RSMo. 2000, must not be detrimental to the public. The Option Agreement is part of the transaction/project. The Option Agreement is not an agreement in a vacuum as is Issue 1 drafted on November 28, 2011.

Whether Ameren Missouri is required to obtain Commission approval prior to exercising the Option Agreement for Purchase of Membership Interest By and Between Buffington Holdings (B), L.L.C. and Union Electric Company d/b/a Ameren Missouri Relating to Buffington Partner, L.L.C. ("Option Agreement") if the Option Agreement were a completely stand alone agreement would seem to produce a different answer. But that is not the actual fact situation.

The statutory section that empowers the Commission to grant certificates of convenience and necessity (CCN) expressly authorizes the Commission to impose conditions:

> Section 393.170.3: The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. ***The commission may by its order impose such condition or conditions as it may deem reasonable and necessary***. . . . [Emphasis supplied].

There is no express empowerment to the Commission in Section 393.190.1 RSMo. 2000 to impose conditions in authorizing the sale, assignment, lease, transfer, transfer, mortgage, or the other disposition or encumbrance of the whole or part of the franchise, works, or system necessary or useful in the performance of the electrical corporation's duties to the public. Nonetheless, the Commission has been granted implied powers by the Legislature. Section 386.040 provides the Commission "all powers necessary or proper to enable it to carry

out fully and effectually all the purposes of this chapter." Section 386.250.7 provides the Commission jurisdiction, supervision, powers and duties "[t]o such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly."[1]

Turning to Commission history, one of the more pronounced imposition of conditions by the Commission occurred respecting St. Joseph Light & Power Company (SJLP) regarding its involvement in the ownership of the Iatan 1 generating unit in the earlier stages of that project. On November 16, 1976, SJLP filed with the Commission an application for emergency/interim rate relief with revised tariff sheets designed to increase annual revenues by approximately $2.5 million on an annual basis.[2] SJLP contended that without emergency/interim rate relief, it would default on the Iatan project because no other alternatives for meeting its construction commitments were available. SJLP further contended that default on Iatan would jeopardize its ability to provide adequate service, which would compromise SJLP's status as an independent electric utility and possibly require SJLP to merge with a larger electric utility. The Commission stated that "the pivotal issue in this case is Company's need for the additional generating

[1] *See also State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561, 567, 567 n.1 (Mo.App. K.C.D. 1976) (Commission has power to grant interim test or experimental rates "as a matter of necessary implication from practical necessity," and power to grant interim rate increases "within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.")

[2] Subsequently on December 20, 1976, as a result of the enactment of Section 393.135 (Proposition No. 1) by voters on November 2, 1976, SJLP filed revised tariff sheets effective as of February 1, 1977 reducing rates by $1.4 million by removing construction work in progress from rate base. As a consequence, SJLP's requested emergency electric rate increase was for $3.9 million over the rates on file and in effect as of February 1, 1977. Section 393.136, also Proposition 1, was also adopted by popular vote on November 2, 1976. (Section 393.136 provides that any charge by an electrical corporation for service based on the costs of construction in progress or on property before it is fully operational and used for service being made on November 2, 1976 shall not be deemed unjust or unreasonable by reason of Section 393.135, and shall not be prohibited thereby, for a period of 90 days after the effective date of the law.)

capacity which Iatan will provide and the secondary issue is how will Company finance its participation in Iatan with or without the emergency rate relief requested in this case."[3]

The Commission found that (1) appropriate cost/benefit economic analysis indicated that SJLP should postpone completion of Iatan 1 for at least one year from its planned in service date of 1980, but (2) SJLP was the junior partner of KCPL, no great savings would result to KCPL from bringing Iatan 1 on line in 1981 over 1980, and (3) SJLP had no authority to postpone Iatan 1 one or more years. On March 4, 1977 in *Re St. Joseph Light & Power Co.*, Case No. ER-77-93, Report And Order, 21 Mo.P.S.C.(N.S.) 357, 368, 373 (1977), the Commission approved emergency/interim rate relief for SJLP contingent upon, among other things, SJLP entering into a binding agreement disposing of 57 to 67 megawatts (MWs) of its 157 MW entitlement to Iatan 1 capacity by the effective date of the final Report And Order issued in connection with SJLP's permanent rate case, *Re St. Joseph Light & Power Co.*, Case No. ER-77-107, Report And Order, 21 Mo.P.S.C.(N.S.) 466 (1977).[4] The Commission authorized emergency/interim rate relief in the amount of an increase of annual gross electric revenues of $1.3 million, exclusive of gross receipts and franchise taxes, pending resolution of SJLP's pending permanent rate increase case on the basis that the "Company's financial integrity and credit worthiness will be impaired to the extent that the capital necessary for the provision of safe and adequate service cannot be raised." 21 Mo.P.S.C.(N.S) at 372, 373. The Commission went on to state that it could not ignore the extreme financial burden which full participation in the Iatan project placed on SJLP and its customers. Therefore, the Commission conditioned its

[3] 21 Mo.P.S.C.(N.S) at 358.

[4] The Case No. ER-77-93 Report And Order reported at 21 Mo.P.S.C.(N.S.) 356 does not reflect the correction made to the date by which the Commission directed SJLP to dispose of 57 to 67 megawatts of Iatan 1 capacity. The correction is reflected in an unreported Correction Order issued by the Commission on April 26, 1977 in Case No. ER-77-93.

authorization of emergency/interim rate relief on SJLP being required to refund the emergency/interim rate relief to its customers if: (1) its return on common equity exceeded 13.5% during the period that the emergency/interim rates were in effect; (2) it did not submit to the Commission documentary evidence that it had entered into a binding agreement disposing of 57 to 67 MWs of its Iatan 1 entitlement by the effective date of the final Report And Order issued in connection with SJLP's permanent rate case, Case No. ER-77-107; and (3) the Commission found in the permanent rate case that the interim rates it had previously authorized in Case No. ER-77-93 were unreasonable. *Id.*

On June 3, 1977 KCPL and SJLP executed an amending supplement to their Iatan Memorandum Of Understanding, which adjusted their ownership interests in Iatan upon authorization by the Commission. By a joint application filed July 26, 1977 in Case No. EO-78-12, KCPL and SJLP sought Commission approval of the proposed adjustments to their ownership interests in Iatan as to the site, common facilities and Iatan 1 generating unit. On August 22, 1977 in Case No. EO-78-12, the Commission issued an Order Granting Application To Adjust Ownership Interests (unreported decision) authorizing KCPL and SJLP to adjust their ownership interests in Iatan as requested and as reflected in the First Supplement to their Iatan Memorandum Of Understanding. The Commission concluded that "the authority sought is in the public interest in that it permits SJLP, within the time dictated, to divest itself of a portion of its entitlement at Iatan in compliance with the Commission's order in Case No. ER-77-93."

The Staff would also note that in *Re Union Electric Co.*, Case No. EM-96-149, Report And Order, 6 Mo.P.S.C.3d 28 (February 21, 1997) the Commission conditioned its approval of the Stipulation And Agreement, which purported to settle all issues raised by the

parties, regarding the proposed merger between Union Electric Company (UE) and CIPSCO Inc. resulting in Ameren Corp. as a federally regulated utility holding company and UE as a Missouri subsidiary operating company, among the establishment of various other entities. The Commission conditioned its approval on UE filing a pleading within ten (10) days consenting to the following conditions:

> (a) No later than December 31, 1997, Union Electric Company shall file or join in the filing of a regional ISO proposal at the Federal Energy Regulatory Commission that eliminates pancaked transmission rates, that is consistent with the ISO guidelines set out in FERC Order 888, and that meets the following requirements:
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> > (1) If the ISO proposal filed at FERC is the result of the current efforts by UE and other utilities to establish a Midwest ISO, UE shall simultaneously file at this Commission a request for approval of its participation in the proposed ISO;
> >
> > (2) If the Midwest ISO proposal is filed at FERC and UE has chosen not to participate, then UE shall advise this Commission within thirty (30) days of the FERC filing why it is not participating in the Midwest ISO;
> >
> > (3) If the Midwest ISO proposal is not filed before the FERC by December 31, 1997, then by March 31, 1998 UE shall file with this Commission a plan for establishing an independent entity charged with the operation, pricing and planning of its transmission system. This plan shall be developed in cooperation with Staff and the Office of the Public Counsel, shall provide for the formation and expansion of this independent entity to include other utilities, and shall be filed with the FERC; and
>
> (b) By January 1, 1998 and with the participation of Staff and the Office of Public Counsel, Union Electric Company shall file with this Commission a report that assesses the potential ability of the merged companies to exercise vertical and especially horizontal market power in price deregulated retail generation.[5]

On February 25, 1997, UE filed with the Commission a Notice Of Acceptance Of Conditions.

[5] 6 Mo.P.S.C.3d at 40-41.

If the Commission does not have the power to condition its grant of authority, it can just disapprove the transaction as being detrimental to the public. *Environmental Utilities, LLC. v. Public Serv. Comm'n*, 219 S.W.3d 256 (Mo.App. W.D. 2007) concerned a joint application for Missouri American Water Company to buy the assets of Osage Water Company, which the Commission had previously determined to be a distressed utility.[6] The proposed sale excluded the Osage Water Company assets serving Cedar Glen Condominiums.[7] As a result, the proposed sale would have left Cedar Glen Condominiums customers with substandard service from Osage Water Company, while the customers absorbed by Missouri American Water Company would have seen the cost of their sewer service double.[8]

The Commission concluded that the proposed sale would be detrimental to the public interest, so it offered Missouri American Water Company the option of amending its Application to purchase the Cedar Glen Condominiums related assets in the transaction. When Missouri American Water Company refused, the Commission rejected the application, which the court upheld as lawful and reasonable.[9] In that case, the Commission essentially conditioned its approval on Missouri American Water Company's purchase of all of Osage Water Company's assets.

III. **Issue 2**: Are tax credits, that could flow to Ameren Missouri as a result of exercising the Option Agreement, assets subject to the Commission's regulatory authority, and does any transfer of these asserts require Commission approval?

[6] *Id.* at 261.

[7] *Id.*

[8] *Id.* at 266.

[9] *Id.*

The answers are "yes" and "yes." Furthermore, because Ameren Missouri might encounter a situation where Ameren Missouri itself might not be able to make full use of the tax credits, the Staff recommends to the Commission that Ameren Missouri should retain its rights, subject to Commission approval, to encumber, sell, transfer, or assign for value any tax credits it may receive as a result of exercising the option under the Option Agreement. Otherwise, there may be detriment to the public.

Section 393.190.1 RSMo. 2000 provides regarding an electrical corporation's "works or system, necessary or useful in the performance of its duties to the public":

> 393.190. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, ***works or system, necessary or useful in the performance of its duties to the public***, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. . . . Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value. [Emphasis added].

The language "necessary or useful in the performance of its duties to the public" in Section 393.190.1 and the language "necessary or convenient for the public service" in Section 393.170.3 RSMo. 2000 for certificates of convenience and necessity were part of the Public Service Commission Act as it was originally enacted in 1913, and both have remained essentially unchanged since then – the Legislature added tax impact disclosure requirements to

Section 393.190.1 in 1984. They should be viewed together within the scope and purposes of the entire Public Service Commission Act.

For purposes of a certificate of convenience and necessity, "[t]he term "necessity" does not mean "essential" or "absolutely indispensable," but that an additional service would be an improvement justifying its cost."[10] While the Commission does not have jurisdiction to manage the day-to-day activities of the utilities it regulates, the Commission does have oversight authority to assure that service is safe and adequate, and rates are just and reasonable, in the service of the public.[11]

The Staff notes that the term "electric plant" defined in Section 386.020(14) does not include either the term "system" or the term "works." The term "system of accounts" appears in Section 393.140(4):

> Section 393.140(4) Have power, in its discretion, to prescribe uniform methods of keeping accounts, records and books, to be observed by gas corporations, electrical corporations, water corporations and sewer corporations engaged in the manufacture, sale or distribution of gas and electricity for light, heat or power, or in the distribution and sale of water for any purpose whatsoever, or in the collection, carriage, treatment and disposal of sewage for municipal, domestic or other necessary beneficial purpose. It may also, in its discretion, prescribe, by order, forms of accounts, records and memoranda to be kept by such persons and corporations. Notice of alterations by the commission in the required method or form of keeping a ***system of accounts*** shall be given to such persons or corporations by the commission at least six months before the same shall take effect. Any other and additional forms of accounts, records and memoranda kept by such corporation shall be subject to examination by the commission. [Emphasis added].

See also 4 CSR 240-20.030 Uniform System Of Accounts – Electrical Corporations.

[10] *State ex rel. Intercon Gas, Inc. v. Public Serv. Comm'n,* 848 S.W.2d 593, 597-98 (Mo.App. W.D. 1993) quoting *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo.App. K.C.D. 1973).

[11] *Public Service Comm'n v. Kansas City Power & Light Co.*, 325 Mo. 1217, 31 S.W.2d 67 (banc 1930); 219 S.W.3d 256; Sections 393.130 and 393.150 RSMo. 2000.

Besides physical property, there is recognition in the law of the existence of "intellectual property." *Black's Law Dictionary*, 9th ed. 2009, defines "intellectual property" as follows:

> **intellectual property.** (1808) **1.** A category of intangible rights protecting commercially valuable products of the human intellect. • The category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition. [Cases: Copyrights and Intellectual Property 1.] **2.** A commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret. — Abbr. IP.

The Commission has taken an expansive view of the word "system: as used in the cited statute. In *Re Kansas City Power & Light Co.*, Case No. EO-92-250, *Order Establishing Jurisdiction And Clean Air Act Workshops*, 1 Mo.P.S.C.3d 359 (1992), KCPL requested a determination from the Commission that a sale or other disposition to a third party of sulfur dioxide (SO_2) emission allowances created by the Clean Air Act Amendments of 1990 (CAAA) did not require Commission approval under Section 393.190. The Commission held it had jurisdiction and stated, in part, as follows:

> The term "works" as supported by KCPL and the other utilities could be limited to a literal meaning of things physical in nature, part of the tangible property used to generate electricity. The same limitation could be placed on the term "system", thus indicating that "system" is almost a redundancy of "works". The Commission does not believe the term "system" is intended to be so literally construed. It is, of course, true that court cases and Commission decisions interpreting Section 393.190 have dealt with tangible property such as generating plants, transmission lines and substations. Those are the issues that have been before the courts and the Commission and concerning which decisions were made. The Commission, though, believes that a utility's system is greater than the physical parts which would be its "works". A utility's system is the whole of its operations which are used to meet its obligation to provide service to its customers. *City of St. Louis* [*v. Public Serv. Comm'n*, 73 S.W.2d] at 400 [(Mo. banc 1934)]. The U.S. Congress has mandated that KCPL meet emission standards. Those standards are based upon KCPL's steam-electric generating units. To enable KCPL to meet the emission limits, Congress created emission allowances which attach to each generating unit. These emission allowances have been made an integral part of KCPL's generating facilities and, thus, an integral part of its generating system. KCPL must utilize these allowances in meeting its

> obligations to its Missouri ratepayers. The Commission finds that emission allowances are necessary and useful in the performance of KCPL's duties to the public and are part of KCPL's "system", and any sale or transfer of these allowances is void without prior Commission approval.[12]

The Staff has consistently taken the position that the utility had to obtain Commission authorization to sell or transfer the property/asset/interest in question – Case No. GO-2003-0354 (sale of office equipment in Texas and transfer of gas supply workforce),[13] Case No. EO-2005-0156 (Aquila combustion turbines), Case No. EO-2010-0211 (former Aquila service center), Case No. HO-2007-0419 (Trigen long-term coal contract) – and only in Case No. HO-2007-0419 did the Staff, after the utility represented it would not seek recovery of the contract investment through customer rates, change its position and recommend the Commission disclaim jurisdiction. In Case No. EO-2009-0148 (former Aquila service center), the Staff asserted KCP&L Greater Missouri Operations Company (GMO) required Commission authorization before it sold its Platte City service center and the Commission determined GMO required Commission authorization for the sale and authorized GMO to consummate the pending sale. In Case Nos. EO-2010-0211 and EO-2010-0060 (former Aquila service center), GMO did not challenge that it required Commission authorization to consummate the sale and requested that authorization, which the Commission gave in Case No. EO-2010-0211. In Case No. EO-2010-0060, GMO sought Commission authority to sell a service center; GMO dismissed that case before Staff filed its recommendation.

[12] *Id*. at 362.

[13] *Re Transfer of Assets, including Much of Southern Union's Gas Supply Department, to EnergyWorx, a Wholly Owned Subsidiary, Order Closing Case*, 12 Mo.P.S.C.3d 488 (August 5, 2004) (*See also* Concurring and Dissenting Opinions).

The Commission recently in File Nos. ER-2010-0355 and ER-2010-0356 treated Section 48A tax credits as property necessary or useful in the performance of Kansas City Power & Light Company's (KCPL) and KCP&L Greater Missouri Operations Company's (GMO) duties to the public. *Report And Order Directing KCPL And GMO To Apply To The IRS To Revise The Memorandum Of Understanding Regarding The Advanced Coal Tax Credits For Iatan* (March 16, 2011); *Order Granting Clarification Of Report And Order Directing KCPL And GMO To Apply To The IRS To Revise The Memorandum Of Understanding Regarding The Advanced Coal Tax Credits For Iatan* (March 30, 2011).

At the on-the-record proceeding on November 28, 2011, counsel for the Staff cited *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75-77 (Mo.banc 1982) (*State Tax Comm'n*) and *State ex rel. AG Processing v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo.banc 2003) (*AG Processing*) in regards to Issue 2 as raised by Commissioner Robert Kenney. Arguably, there is the question of whether Issue 2 is calling for a determination in the nature of a "declaratory judgment" or an "advisory opinion." Is the issue "justiciable" or "ripe" for determination at this stage? In *State Tax Comm'n*, the Missouri Supreme Court held that the Legislature could not turn an administrative agency into a court by granting it power that has been reserved by the Missouri Constitution to the judiciary, specifically the power to render declaratory judgments.

Black's Law Dictionary (6th ed. 1990) defines the term "declaratory judgment" and "justiciable controversy" as follows:

> **Declaratory judgment.** Statutory (see Declaratory Judgment Act) remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the rights and status of litigants even though no consequential relief is awarded. . . .

> **Justiciable controversy.** A controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it; rights must be declared upon existing state of facts and not upon state of facts that may or may not arise in future. A question as may properly come before a tribunal for decision. . . . Courts will only consider a "justiciable" controversy, as distinguished from a hypothetical difference or dispute or one that is academic or moot. . . .

The Commission itself recently cited the *State Tax Comm'n* case in *In the Matter of MoGas Pipeline, LLC's Application and Complaint*, File No. GC-2011-0138, p. 8, *Order Regarding Motions To Dismiss,* January 26, 2011, an application and complaint case of MoGas Pipeline, LLC, which the Commission dismissed. Quoting from *State Tax Comm'n*, the Commission stated in part at page 8 of its *Order Regarding Motions To Dismiss*:

> Missouri law is clear; the power to issue a declaratory judgment is a judicial remedy that is not available to administrative agencies.[11] . . . "[a]gency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." [footnote omitted].
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> [11] *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69 (Mo.banc 1982).

Furthermore respecting Commission decisions, it is well-established that there is no *stare decisis* respecting Commission determinations. *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo.App. W.D. 1992); *State ex rel. General Tel. Co. v. Public Serv. Comm'n*, 537 S.W.2d 655, 661-62 (Mo.App. W.D. 1976)[14] (*General Telephone*);

[14] In *General Telephone*, the Court of Appeals held that the Commission's decision in a prior General Telephone Company case had no binding effect in a subsequent General Telephone Company case:

> Insofar as the conclusion in the 1962 case is concerned, it has no binding effect in a future rate case. A concise statement of the applicable rule is found in 2 Davis, Administrative Treatise Section 18.09, 605, 610, (1958), as follows:
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> > "* * * For an equity court to hold a case so as to take such further action as evolving facts may require is familiar judicial practice, and administrative agencies necessarily are empowered to do likewise. When the purpose is one of regulatory action, as distinguished from merely applying law or applying law or policy to past facts, an agency must at all times be free to take such steps as may be proper in the circumstances, irrespective of its past decisions. * * * Even when conditions remain the same, the administrative

State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Public Serv. Comm'n, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. Jackson County v. Public Serv. Comm'n*, 532 S.W.2d 20 (Mo. banc 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976); *State ex rel. Arkansas Power & Light Co. v. Public Serv. Comm'n*, 736 S.W.2d 457, 462 (Mo.App. 1987); *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 706 S.W.2d 870, 880 (Mo.App. 1985); *State ex rel. St. Louis v. Public Serv. Comm'n*, 47 S.W.2d 102, 105 (Mo.banc 1931); *Marty v. Kansas City Light & Power Co.*, 259 S.W. 793, 796 (Mo. 1923).

AG Processing itself is clear that this long-standing rule regarding *stare decisis* has not changed:

> . . . In support of its claim that the Applicants were required to submit a market power study, AGP cites several prior PSC decisions in which the PSC required merger applicants to file market power studies. However, an administrative agency is not bound by *stare decisis*, nor are PSC decisions binding precedent on this Court.[18] . . .
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> [18] *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo.App.1992); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994).

Nonetheless, *AG Processing* also stands for the holding that the Commission should have made a decision respecting the reasonableness of the acquisition premium paid by a Commission regulated utility in an acquisition and merger at the Commission for approval when the Commission performed its cost analysis and evaluating whether the proposed acquisition and merger would meet the standard of not detrimental to the public. The Missouri Supreme Court found the issue of the reasonableness of the acquisition premium to be a necessary and essential

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> understanding of those conditions may change, and the agency must be free to act * * *." (Footnotes omitted.)
>
> Clearly the commission in this case was not bound by the action in the 1962 case.

537 S.W.2d at 661-62.

issue (also relevant and critical) for the Commission to consider and decide when determining whether to approve the acquisition and merger, regardless of the fact that the acquisition premium recoupment issue would be addressed in a subsequent ratemaking case. 120 S.W.3d at 736.

The issues relating to the Option Agreement For Purchase Of Membership Interest can be analogized to the acquisition premium issue in *AG Processing*. These issues are necessary and essential (also relevant and critical) for the Commission to consider and decide when determining whether to approve Ameren Missouri's Application in File No. EO-2012-0146. As a consequence, the *State Tax Comm'n* case does not apply to the issues relating to the Option Agreement For Purchase Of Membership Interest.

The Staff further directs the Commission's attention to *AG Processing* and a somewhat recent major decision of the Commission under Section 393.190.1, *Re Union Electric Co., d/b/a AmerenUE*, Case No. EO-2004-0108, *Report And Order On Rehearing*, 13 Mo.P.S.C.3d 266 (2005) (*Union Electric)*. In *Union Electric*, the Commission understood *AG Processing* to require it to evaluate both the present and future impacts of a transfer at the time it makes its decision whether to allow the transfer sought pursuant to Section 393.190.1.

In *Union Electric*, the Commission explained that the Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing "not detrimental to the public standard" and clarified the analytical use of the standard. The Commission concluded that what was required was a cost-benefit analysis in which all of the benefits and detriments in evidence were considered. The Commission related that *AG Processing* required the Commission to consider all possible benefits and detriments and determine whether the proposed transaction was likely to be a net benefit or a net detriment to the public. The Commission stated

that "[a]pproval should be based upon a finding of no net detriment."[15] In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission noted in *Union Electric* that its duty is to ensure that the utility provides safe and adequate service to its customers at just and reasonable rates. The Commission concluded:

> . . . .A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.[16]

It should be noted that the Missouri Supreme Court in *AG Processing* indicated that the cost of all factors to be considered are not necessarily mathematically calculable with precision, but the factors are still to be considered and evaluated:

> . . . No evidence was presented that would quantify how the cost of debt attributable to SJLP would increase, and even if it is assumed that the merger will increase the cost of debt for SJLP's ratepayers, that fact alone does not require the Commission to reject the merger. The risk of an increased cost of debt is just one factor for the Commission to weigh when deciding whether or not to approve the merger, and based on the evidence in the record, the PSC's findings and conclusions were not unreasonable concerning this issue.[17]

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.

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[15] 13 Mo.P.S.C.3d at 293.

[16] *Id*.; *See Love 1979 Partners v. Public Serv. Comm'n*, 715 S.W.2d 482, 490 (Mo.banc 1986).

[17] 120 S.W.3d at 737.

Finally, the "Purpose" clause of 4 CSR 240-20.015 Affiliate Transactions states: "This rule is intended to prevent regulated utilities from subsidizing their nonregulated operations. . . . The rule and its effective enforcement will provide the public the assurance that their rates are not adversely impacted by the utilities' nonregulated activities." The definitions for "affiliated entity, "affiliate transaction," and other terms are not limited to regulated utilities. The January 3, 2000 *Missouri Register* published Order Of Rulemaking[18] relates, in part, as follows:

> COMMENT: A purpose of the rule is to prevent regulated utilities from subsidizing their unregulated operations. This would occur where costs of unregulated operations are shifted to ratepayers for regulated operations or where subsidies are provided to unregulated operations through preferential service or treatment, including pricing. All commenters in support of the rule agreed with the Commission's intended purpose. . . .
>
> RESPONSE: . . . The rulemaking record supports full effective limitations on cost shifting. . . .

In the Matter of 4 CSR 240-20.015 Proposed Rule – Electric Utilities Affiliate Transactions, Case No. EX-99-442, Order Of Rulemaking 25 Mo.Reg. 1, 55 (2000).

WHEREFORE, Staff counsel submit the instant Staff Brief in response to the Commission's November 28, 2011 Order Directing Filing.

Respectfully submitted,

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[18] The rulemaking for 4 CSR 240-20.015 was docketed as Case No. EX-99-442 and the Order of Rulemaking appears at 25 Mo.Reg. 1, 55-59 (January 3, 2000).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing filing of *Staff Brief In Response To Order Directing Filing* was served via e-mail on counsel for all parties of record on this 6th day of December, 2011.

/s/ Steven Dottheim