BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the First True-Up Filing Under the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri.	))))	File No. ER-2010-0274

REPLY BRIEF OF AMEREN MISSOURI

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

INTRODUCTION

The Staff's position in this case continues to evolve, so much so that the Staff's Brief reflects an attempt to change facts to which the Staff has already stipulated. Staff now claims that it is the "Staff's view" that the erroneously calculated NBFC values, which were indisputably *not* determined at the generation level as *required* by the express terms of the FAC tariff, magically "became 'at the generation level'"[1] simply because they were miscalculated and simply because they ended up in a tariff sheet that the Commission approved. Staff's "view" cannot, however, change the facts. The phrase "at the generation level" means that the sales used to determine the NBFC rates had to include all line losses – both distribution and transmission losses – and it is undisputed that those sales did not include transmission losses and thus were not at the generation level.[2] Staff's contention is like claiming that a cubic zirconia in an engagement ring "became" a "diamond" simply because the man who proposed to his prospective bride and the prospective bride herself, both mistakenly *thought* it was a diamond, only to learn later that they were both wrong. Believing a cubic zirconia is a diamond doesn't

[1] Staff's Brief, p. 3.
[2] ¶¶ 14, 16 of the Stipulation of Facts.

make it so when in fact it is not a diamond, nor does believing at the time of the calculation that the sales used were at the generation level, when in fact they were not, cause them to "become" at the generation level.

Why does the Staff now argue that the NBFC values have magically "become" at the generation level? Because the Staff needs to manufacture this fiction to sustain the other most noteworthy part of the evolution of the Staff's position – that section 386.550, RSMo. prevents the relief sought by the Company. This is because the Staff undoubtedly realizes the inconsistency of its position, that is, its argument that two admittedly erroneous numbers in the FAC tariff must be treated as though they are sacrosanct, simply because they are typed on the page, while arguing that the mandate in the tariff that the NBFC rates be "determined at the generation level" can be ignored. The Staff apparently realizes that this position smacks of the Staff wanting to have it both ways (because the Staff is arguing that the Commission should give effect to those parts of the FAC tariff that support the Staff's theory, but should ignore those parts that do not) so the Staff is desperately trying to eliminate the inconsistency by its fictional transformation of sales that were not at the generation level into sales that it now claims were at the generation level.

In this Reply Brief, we will demonstrate that section 386.550, RSMo. does not prevent the Commission from ensuring that the rates charged to customers under the FAC reflect the rates that the FAC tariff requires the Company to charge. Moreover, we will demonstrate why the Staff's attempt to avoid the overwhelming authority that supports the relief sought by the Company, and the Staff's tepid adherence –though they say they don't abandon, they abandon– to its argument that retroactive ratemaking principles preclude the relief sought in this docket, fail.

The bottom line is that when mistakes like this occur that result in under-charges or over-charges in the FAC, the Commission can and should correct them to ensure that the FAC operates as intended; that is, to ensure that customers pay the actual difference (or 95% of it) between the net fuel costs incurred and the net base fuel costs calculated as the FAC tariff required – no more, and no less.

ARGUMENT

A. Section 386.550, RSMo. does not bar the relief sought in this case.

The Staff claims that asking the Commission to utilize NBFC values calculated *in the manner required by the FAC tariff* is an impermissible collateral attack on the FAC tariff and the order approving it. Not only is the Staff's argument inconsistent in asking the Commission to give effect to some tariff provisions, but not others, but it also reflects an improper application of Section 386.550.

Section 386.550 can only apply if the validity of the Commission's order approving the FAC tariff (or the validity of the FAC tariff itself) is being questioned; merely asking the Commission to properly interpret and apply the tariff is not a collateral attack. *See, e.g.*, ***State ex rel. Pub. Water Supply Distr. No. 2 v. Burton***, 379 S.W.2d 593, 600 (Mo. 1964) (a collateral attack only occurs if the validity of the original order is questioned; interpretation of an order [or a tariff] "necessarily acknowledges its validity and does not constitute a collateral attack."). The Staff's extended discussion of the *Licata* case and of principles relating to finality at pages 6-7 of its Brief is inapposite. *Licata* simply stands for the proposition that one cannot avoid Section 385.550, when it in fact applies, by claiming that the attack relates to a tariff where the tariff has been approved by an order; i.e., the order and the tariff go together for purposes of the statute. The Company makes no such claim; Section 386.550 simply does not apply. Nor has the

Company claimed that the order approving the FAC tariff is not final. The FPA_C *rates* charged pursuant to the FAC tariff are not final, but rather are interim rates, subject to revision, as is requested in this case.

No one questions either the validity of the FAC tariff or the Commission's order approving it. This may explain why the Staff has only belatedly raised this collateral attack argument, having made no mention of it when it made its initial filing opposing the relief sought by the Company in this case. To the contrary, the Staff's position, for which the Staff has provided virtually no support, was that the filed rate doctrine/general prohibition against retroactive ratemaking precluded the relief sought in this case. In our initial brief, and herein, we demonstrate why the Staff's argument in this regard fails.

In any event, the Company and the Staff agree that the FAC tariff and the order approving it are valid. No one claims they are unlawful, and no one claims that they are unreasonable. Absent such a claim, the validity of the tariff is not at issue and there is no collateral attack. ***See, e.g., State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n***, 328 S.W.3d 329, 333 (Mo. App. W.D. 2010) ("Our review of commission decisions is limited to determining whether or not the commission exceeded its constitutional and statutory authority or otherwise acted unlawfully; whether or not competent and substantial evidence on the whole record supported its decision; whether or not its decision was based on lawful procedure or a fair trial; and whether or not the commission acted arbitrarily, capriciously, unreasonably, or abused its discretion."). There is no claim that the Commission's order or the FAC tariff is somehow flawed or invalid under any of those standards.

The issue in this case is: was the actual difference in the net fuel costs actually incurred by the Company as compared to NBFC values *calculated as they were required to be calculated* *by the terms of the FAC tariff* reflected through charges or credits passed through to customers under the FAC during recovery period one? Because it is undisputed that the NBFC values were not determined as the FAC tariff required, the answer to that question is unequivocally "no." Applying the tariff as required does not collaterally attack its validity; rather, it ensures that the tariff, which has the force and effect of law, is properly applied.

On the facts at issue here, properly applying the tariff requires the Commission to construe it because of the mistake that was made in calculating the NBFC rates. A tariff has the force and effect of law in the same manner as a statute adopted by the General Assembly. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n****.,* 156 S.W.3d 513, 521 (Mo. App. 2005). Consequently, principles of statutory construction govern application of a tariff provision. In its *Report and Order* issued in Case No. GA-2007-0289, ***In re Application of Missouri Gas Energy****,* (February 24, 2008), the Commission summarized the tariff construction process as follows:

> A tariff is a document which lists a public utility [sic] services and the rates for those services." [citing *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W. 2d 569, 575 (Mo. App. 1997)] There can be no dispute that the Commission has the power to approve [utility] tariffs, and once the Commission approves a tariff, it becomes Missouri law. ***Thus, . . . tariffs have "the same force and effect as a statute directly prescribed by the legislature.****"* [citing *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n.,* 156 S.W.3d 513, 521 (Mo. App. 2005)]. ***Tariffs are interpreted in the same manner as state statutes. Consequently, Missouri courts would interpret Commission approved tariffs by trying to "ascertain the intent of [the company 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.***

2008 WL 506279 (emphasis added).

There is absolutely no question that the intention of the Company and the Commission was that the kilowatt-hour sales used to determine the NBFC rates, as well as the units used to calculate the FPA_C rate charged to customers (in Factor S_{ap}), were to be determined at the generation level so that there would *not* be a mismatch that would lead to the under-recovery (or if the facts were reversed, an over-recovery[3]) that occurred here. The FAC tariff as a whole is expressly designed to "pass . . . through ... [the] differences between actual fuel and purchased power costs, including transportation, net of Off-System Sales Revenues (OSSR) (i.e., Actual Net Fuel Costs) and Net Base Fuel Costs (factor NBFC, *as defined below*), calculated and recovered as provided for herein" (emphasis added).[4] The Actual Net Fuel Costs that were used in the FPA_C calculations that resulted in a rate being applied to customer bills included the fuel and purchased power costs necessary to generate the kilowatt-hours to serve customers, including *all* line losses, transmission and distribution line losses, meaning they were determined at the generation level. The NBFC values were *not* "calculated . . . as provided for herein" because they were not calculated using all line losses; i.e., factor NBFC was not determined "as defined below" because the definition required that the sales used to calculate the factor be at the generation level, and they were not. Consequently, construing the FAC tariff as the Staff now advocates (i.e., calling a cubic zirconia a diamond when it is undisputed that it is not) fails to accomplish what the FAC tariff by its very terms is designed to accomplish. That construction cannot therefore comport with the intention of the Company and the Commission, and thus violates the most fundamental of all rules governing tariff construction; that is, to give effect to

[3] Had that mismatch occurred in the opposite manner (use of kilowatt-hour sales at the generation level to determine NBFC with use of kilowatt-hour sales *not* at the generation level to determine Sap) an over-recovery would have occurred.

[4] Rider FAC, Sheet 98.1, attached to the Stipulation and Agreement as Appendix A.

that intent. *See, e.g.,* ***Gott v. Dir. of Revenue***, 5 S.W.3d 155, 158 (Mo. *banc* 1999) (The principal rule of statutory construction is to ascertain the intent of the legislature.).[5]

Consequently, proper application of the FAC tariff requires that the Commission grant the relief sought by the Company in this docket.

B. Staff's declaration that it would be "unfair" for customers to pay what the FAC tariff intended for them to pay, that is, the actual difference between the Company's net fuel costs and net base fuel costs determined as the FAC tariff required, reflects a misapplication of the Commission's role in public utility regulation.

Incredibly, the Staff claims it would be "unfair" for customers to pay what they should have paid in the first place simply because they were already billed for what we now know reflected an under-charge for the net fuel costs the Company actually incurred to produce the electricity that those customers actually consumed. Prospectively making a future FPA_C rate higher to correct this under-charge, even though the former FPAc rate that was too low has already been billed, is not only fair, but it is precisely the kind of prospective adjustment to the FPA_C rate contemplated by the FAC tariff itself. For example, whenever the forecasted kilowatt hour sales used to determine the FPA_C rate for a particular recovery period turn out to be higher than the actual kilowatt hour sales experienced during that recovery period, customers are also later charged a higher FPA_C rate because in that circumstance the already-

[5] There is a second reason Section 386.550 does not apply. When the tariff was approved, the circumstances were that everyone assumed that the kilowatt-hour sales derived from the Staff's model (which the parties had agreed would be used) were determined at the generation level. Today, the circumstances are that everyone now understands that those kilowatt-hour sales were not at the generation level and that everyone now understands that there is a mismatch between the sales used to calculate the NBFC values and the sales used to calculate the adjustments passed on to customers. The parties have stipulated to these facts, and have stipulated that those facts were unknown to them at the time the tariff was approved. As the Commission has recognized, what otherwise might be a collateral attack on a Commission order is not a collateral attack where there has been a change in circumstances that justifies reexamination of the relevant issue. *See, e.g.* ***In re: KCP&L***, Case No. ER-2007-0291, 2008 WL 2444662 (Mo. P.S.C.) (May 29, 2008) ("The courts have recognized an exception to the prohibition on collateral attacks on Commission decisions where a party can establish a change of circumstances that would justify a reexamination of the relevant issue."), *citing* ***State ex rel. Ozark Border Elec. Coop v. Pub. Serv. Comm'n***, 924 S.W.2d 597 (Mo. App. W.D. 1996). We repeat: the relevant issue is was the difference between actual net fuel costs and what were truly the NBFC *determined as required by the tariff* passed through the FAC, and the answer is an unequivocal "no."

billed former FPA_C rate was too low to fully collect the actual net fuel costs that they should have paid for by customers.

Moreover, by the Staff's logic, had the mistake at issue in this docket gone the other way (e.g., had the kilowatt hour sales used to calculate the NBFC values been too high, not too low) it would be "unfair" for customers to later receive credit via a lower FPA_C rate in the future for the resulting *over-charge* that would have occurred simply because of a mistaken calculation. Staff's sense of "fairness" simply makes no sense, and it is terrible policy because it elevates what all agree is an interim FPA_C rate that was not subject to an exhaustive review when first implemented, and that is not final until the true-up and prudence review process is completed, to a status of permanency that nearly all cases who have examined a similar issue agree is a status that should only be afforded base rates.

In support of tortured view of what it claims to be "fair," the Staff cites ***State ex inf. Barker v. Kansas City Gas Co.***, 163 S.W. 854, 857-58 (Mo. 1913), for the proposition that it is the Commission's primary duty to "protect" the public from utilities. ***Barker*** is inapposite. ***Barker*** was an action for a writ of mandamus to compel a gas utility to provide gas service at a higher pressure during the summer months. The case was decided just months after the Public Service Commission Law was enacted. A customer had sought a writ of mandamus and a preliminary writ had been issued, but the Commission moved to quash the preliminary writ arguing that the customer's relief was, in the first instance, at the Commission. The Supreme Court agreed and quashed its preliminary writ. In doing so, the Supreme Court discussed the then brand new Commission and the law that created it. As part of that discussion the Supreme Court properly noted that under the Public Service Commission Law, whereby utilities are given monopoly service territories, the Commission's oversight and regulation "takes the place of and stands for competition," which prior to enactment of the law had itself been inadequate to "protect" the public. *Barker,* however, provides no authority for the notion that customers should not pay their share (95%) of the actual net fuel costs incurred to serve them under an FAC approved by the Commission as part of the overall just and reasonable rates the Commission itself established. Indeed, "fairness" in the context of public utility regulation means doing that which is fair to both the utility and the customers. *See* ***State ex rel. Washington Univ. v. Public Serv. Comm'n***, 272 S.W. 971, 973 (Mo. *banc* 1925) ("When we say 'fair', we mean fair to the public, and fair to the investors."). Denying the Company recovery of the 95% of the actual net fuel costs incurred to serve customers would be entirely unfair to the Company, and contrary to the Supreme Court's declaration of what fairness means in the context of public service commission regulation.

The other angle taken by the Staff in insisting that customers pay the actual fuel costs incurred to serve them is "unfair" is to imply that somehow the Company doesn't have clean hands and thus should bear the consequences of the mistake that was made. This is a continuation of the finger-pointing that was first observed in surrebuttal testimony filed by the Staff in the Company's pending rate case, where it was essentially claimed that it was the Company's alleged unilateral failure to supply the right data (4 CSR 240- 3.190 load data that was claimed to not be at the generation level) and that it was the Company's unilateral calculation error which led to the mistake at issue here. The Staff is effectively continuing that claim in its brief in this case, alleging that the "Staff believes" certain things and also alleging that the Company "should have known" what was in the Staff's mind.[6]

[6] Staff Brief, p. 10.

As the record in Case No. ER-2011-0028 shows,[7] however, the Staff had it wrong in several important respects. The record in that case shows first, that the Staff was wrong to claim that the 3.190 load data provided by the Company was not at the generation level (it was);[8] second, that the Staff was wrong to claim that the 3.190 load data lead to the mistake at issue here (it didn't, because the Staff in fact used other load data that the Company had expressly told the Staff was not at the generation level[9]); and third, that the Staff was wrong to claim that the 3.190 load data had been changed at the time of the case where the FAC tariff at issue here was adopted so that it was no longer reported at the generation level (in fact, changes were not made until approximately one year *after* the FAC was implemented).[10] The record also reflects an admission that the Staff made a mistake when it used the data that it had been told was not at the generation level as the Staff's net system input.[11] And while the Company agrees that it was deeply involved in the calculation of the NBFC values that are now known to be wrong – indeed the Company freely admits that it used the sales from the Staff's model, which did not include transmission losses – the record in that case also reflects that the Company was not alone in making an error in calculation because the Staff too was involved in those calculations.[12] And as noted, the loads (kilowatt hour sales) that were not at the generation level that were used to calculate those NBFC values were taken from the Staff's model. Indeed, both the Company, when it filed the FAC tariff, and the Staff, when it recommended it be approved, told the

[7] The Company requests that the Commission take administrative notice of the portions of the record in Case No. ER-2011-0028 cited in footnotes 7 through 11 and 13 and 14 below, a case in which the Staff itself placed at issue the circumstances that have led to the contest in this docket, circumstances the Staff continues to put at issue in this case given its claim that the Company "should have known" what the Staff knew or understand, and what the Staff was doing with that information.
[8] Case No. ER-2011-0028, Tr. p. 1641, lines 15-25; p. 1642, lines 4-10; p. 1664, lines 13-17; Exh. 170.
[9] Case No. ER-2011-0028, Exhs. 167, 168.
[10]Case No. ER-2011-0028, Tr. p. 1641, lines 3-10; p. 1664, lines 13-17; Exh. 168.
[11] Case No. ER-2011-0028, Tr. p. 1653, lines 4-17
[12] Case No. ER-2011-0028, Exh. 171, p. 2; Exh. 172; Tr. p. 2168, lines 7-21.

Commission that to the best of their knowledge the NBFC values were determined in accordance with the FAC tariff when in fact, both sides now know, they were not.

The point of the foregoing discussion is not that the Company, with hindsight, perhaps could not have caught the *mutual mistake* made by both it and the Staff; perhaps it literally could have had it been able to piece together what data the Staff was and was not using in its modeling – the Company has never claimed otherwise.[13] The real point is that the Staff, too, possessed the information it needed to avoid the mistake, but for reasons that are unimportant to what should be done in this docket, the Staff didn't avoid the mistake. And as the Staff also conceded, there may have been communication issues between the Staff and the Company, fair enough – but some of the communication issues that led to the mistake at issue here lay with the Staff as well.[14] This finger-pointing is a distraction to the real issue: implementation of the FAC tariff as intended.

Regardless, what is important is that we get it right now in a manner that is fair – fair to customers and fair to the Company. ***State ex rel. Washington Univ.***, *supra.* That fair result is to correct the mistake. In this case correcting the mistake will correct an under-charge to the financial benefit of the Company. In the next case, correction of a mistake may be to correct an over-charge to the financial benefit of customers.[15]

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[13] It is odd indeed that the Staff expected the Company to understand what the Staff was and was not doing, what data the Staff was and was not using and how, when Ms. Mantle, who was in charge of the department that was responsible for the fuel modeling, herself thought that the 3.190 load data was used when in fact it was not. If the Manager of the Energy Department doesn't know what data was used and how, it's not clear how the Company was supposed to know.

[14] Case No. ER-2011-0028, Tr. p. 1669, lines 14-18.

[15] It is noteworthy that the Staff also agrees that mistakes will likely occur in the future. Exh. 201 (Staff's Cost of Service Report), p. 114, lines 5-7.

C. The Staff's attempt to distinguish some of the authorities cited by the Company in its initial brief fails.

The Staff goes to great lengths to distinguish the line of authority discussed by the Company in its initial brief that demonstrates that prospectively accounting for the under-charge caused by the mistake at issue here in a prospective adjustment to the FPA_C rate violates no legal principle. As outlined below, Staff's attempt to distinguish these cases fails.

The Staff first claims that ***Fitchburg Gas and Elec. Light Co. v. Dept. of Telecom. and Energy***, 801 N.E.2d 220 (Mass. 2004), which the Company cited in its initial brief, supports the Staff's position; that is, supports the Staff's tepid argument that the general prohibition against retroactive ratemaking applies to the FAC adjustment at issue here. But the Staff misapplies that case, just as it misapplies ***Public Serv. Comm'n v. Delmarva Power & Light Co. of Maryland***, 400 A.2d 1147 (Md. App. 1979), also cited by the Company in its initial brief. The linchpin of the Staff's attempt to turn cases such as these on their heads is Staff's effort to elevate an obviously incorrect input in the FPA_C rate formula – the erroneous NBFC values – to the status of a base rate applied to customers' bills in the Company's base rate tariffs. The Company agrees: to cite one example, the 8.63 cents per kilowatt hour that is applied to residential customers' bills in the summer under the base rate tariff approved in Case No. ER-2008-0318 could not be changed unless and until a new, superseding tariff took effect after another general rate case filing.[16] And the Company agrees that the FPA_C rate *formula* at the top of Sheet 98.2 of the FAC tariff also cannot be changed unless a new FAC tariff is approved because that formula produces the charge that appears on customers' bills; i.e., customers are charged the FPA_C rate. In this case, the Company is not asking the Commission to change a base rate for any of its six

[16] The Company requests the Commission take administrative notice of tariff sheet no. 28, approved (now superseded) in Case No. ER-2008-0318.

rate classes, nor is the Company asking the Commission to change the FPA_C rate formula. Rather, the Company is asking the Commission to recognize a mistake in an *input* into that formula.

Like the formula in ***Fitchburg Gas***, the FPA_C rate formula is applied mechanically – values (dollars and cents) are plugged in, a computation is done, and a rate that is charged to customers is produced. It is true that one of the inputs in that formula is listed in the FAC tariff, just as it is true that the mandate that this input was to be determined at the generation level is provided for in the FAC tariff. The FAC tariff, like all tariffs, must be interpreted according to its intent, and its intent is expressly stated – NBFC values "determined at the generation level" must be used. For the Staff to prevail, it must ignore this intent, and it must ignore the "determined at the generation level" requirement in the FAC tariff. In ***Fitchburg Gas***, one of the dollar figures used in what was the equivalent of the FPA_C rate formula in that case included dollars that should not have been included. The utility claimed, however, that because those dollars had been used in the formula – the formula that produced the rate charged to customers, it would be retroactive ratemaking to use a different value. Recognizing that it is the formula that is fixed – not the "dollars and cents" inserted into it, the court rejected the utility's claim. In doing so the court recognized that it was "taking corrective action in response to an error" and that doing so was "well within its authority . . .." ***Fitchburg Gas***, 801 N.E.2d at 231.

That the Staff is misapplying ***Fitchburg Gas*** was recently confirmed by the court that issued the opinion in that case. In ***Southern Union Co. v. Dept. of Pub. Util.***, 941 N.E.2d 633, 642 (Mass. 2011), the Massachusetts Supreme Court cited ***Fitchburg Gas*** for the proposition that "[t]he rule [against retroactive ratemaking] prohibits a retroactive change to a 'base rate' * * * [but] this court has determined that a retroactive adjustment to a cost of gas adjustment clause .

. . does not violate the rule against retroactive ratemaking because, among other things, it is not an adjustment to the base rate . . . …" Thus, Massachusetts, like nearly every other jurisdiction that has looked at the question, recognizes that the general prohibition against retroactive ratemaking only applies to a change in the *base rates* that are charged to customers. The Company is asking that the FPA_C rate resulting from this docket – the rate charged under a rate adjustment mechanism, its FAC, and not a base rate – reflect the under-charge that has occurred. ***Fitchburg Gas*** does not support the Staff's position, which is that the prohibition against retroactive ratemaking bars the relief sought herein;[17] to the contrary, it supports the Company's position, as we argued in our initial brief, and as confirmed by ***Southern Union.***

The Staff also misapplies ***Delmarva.*** The Staff is correct that the base against which fuel adjustments were measured was not at issue in that case, but rather, it was other dollars used in the equivalent of the FPA_C rate formula in that case that were at issue. But nothing in the ***Delmarva*** opinion remotely suggests that the Maryland court would have had any problem whatsoever correcting an FAC charge that had been levied because of an incorrectly calculated base (had one existed). To the contrary, the court fully recognized that there is an important distinction between "the ordinary rate making process [where base rates are set] and the necessarily ongoing process of verifying and adjusting fuel rate adjustment clauses so that they *accurately reflect the increased and decreased cost (we hope) of the fuel necessary to operate a utility plant*" (emphasis added). ***Delmarva***, 400 A.2d at 1153. In the case before this Commission, it is undisputed that if the consequences of this mistake are not corrected as the Company requests in this docket, the FPA_C rates charged to customers will not accurately reflect

[17] Staffs Brief, p. 2 ("Staff is not abandoning its filed rate doctrine and prohibition against retroactive ratemaking arguments . . ..").

the costs of the fuel and purchased power net of off-system sales used to produce the electricity that customers also, without dispute, consumed.

The Staff next attacks the Company's citation of ***State ex rel. North Carolina Util. Comm'n v. Norfolk Southern Ry. Co.***, 106 S.E.2d 681 (N.C. 1959), arguing that the fact that it could be shown by judicial notice that the input listed in the tariff at issue in that case was incorrect is somehow different than showing via stipulated facts that there is an incorrect input in the case at bar. Judicial notice is nothing more than an evidentiary doctrine that obviates the need for producing a document or a witness to establish a fact. In the case at bar, the Stipulation of Facts provides the evidence, but the fact that the *manner* of providing the evidence in this case is different than the manner employed in ***Norfolk Southern*** is of no consequence. The point is that the evidence demonstrates that an input was wrong. Moreover, the incorrect input is used in what by the express terms of the Commission's FAC rules is an *interim* (i.e., not final) rate – the FPA_C rate.

Moreover, the Staff mischaracterizes the importance of ***Norfolk Southern*** and wrongly claims that it is "readily distinguishable."[18] The holding of the case is that even though 101 miles was *listed in the tariff (in a base rate tariff nonetheless)* because the 101 miles constituted an incorrect input used in a formula (the rate table in the tariff in that case) from which the rate applied to bills came, the railroad was simply not authorized to charge the $1.40 rate. ***Norfolk Southern***, 106 S.E.2d 684. That is very closely analogous to the situation here. A key input, the NBFC values, are also listed in the FAC tariff, but like the distance in ***Norfolk Southern,*** the values are wrong and when they are used in the FPA_C formula they produce the wrong rate. Applying ***Norfolk Southern*** to the present case would indicate that the Company is simply not

[18] Staff's Brief, p. 13.

authorized to charge that wrong rate and that the Commission *must* correct the impact of the mistake so that the correct rate is charged. Finally, it makes no difference whatsoever that in North Carolina, at least at the time, it was the commission that gave monetary relief in overcharge cases rather than the courts, as would occur in Missouri. If it is alleged that the wrong rate has been charged in Missouri, whether an over-charge or an under-charge, the Commission determines in the first instance what the correct rate is and then the customer or the utility must go to circuit court to recover the over- or under-charged sums. In North Carolina, at least at the time, the monetary relief was available at the commission. That difference doesn't diminish the principle established in the case and the analogy it provides here.

The Staff's next attempt to avoid the overwhelming authority that establishes that this Commission can and should correct the consequences of the mistake is to cite to just one of the dozens of cases the Staff itself found when it searched Westlaw for " 'fuel adjustment clause' w/p refund." Of the 66 cases the Staff's search produced, Staff cites one -- ***Matanuska Elec. Assoc., Inc. v. Chugach Elec. Assoc., Inc***., 53 P.2d 578 (Ak. 2002). The Staff cites the case and attaches it to its brief apparently because the Staff believes it supports the Staff's retroactive ratemaking argument. The problem is that a careful reading of the case demonstrates that given the base rate and adjustment clause ratemaking practices in Alaska, had the Alaska court decided the charges under the fuel surcharge at issue in that case could be corrected after-the-fact then the Alaska court would have in effect been deciding that there simply was no retroactive ratemaking bar in Alaska at all, even with regard to base rate tariffs. Consequently, ***Matanuska*** is inapposite, as the facts of the case demonstrate.

In ***Matanuska***, a utility had miscalculated its fuel surcharge and over-charged a customer. The customer obtained an order from the commission requiring a refund, and the utility appealed, arguing that a refund would constitute retroactive ratemaking and in particular, arguing that this was so because in Alaska fuel surcharge filings were essentially the same as base rate filings, to which the retroactive ratemaking prohibition had long been applied. In reaching the conclusion, on the facts before the court, that it would be retroactive ratemaking in Alaska to order a refund, the Alaska Supreme Court went through a rather exhaustive description of the substantial similarity between what it referred to as the "simplified rate filing process," which was how base rates were set in Alaska, and the process of making fuel surcharge filings. The argument in the case boiled down to the following: was the level of review and scrutiny given base rate filings versus fuel surcharge filings materially the same? If it was, the retroactive ratemaking bar, which had apparently always been applied to base rate filings, would necessarily apply to fuel surcharge filings. The court concluded the level of review and scrutiny was essentially the same. The key to the court's decision is reflected in the following passage from the opinion:

> Chugach [the utility] used the simplified rate filing process to establish its base rates and argues that if the same review is given to fuel surcharge filings as to simplified rate filings, one cannot constitute a rate if the other does not. The processes are indeed similar. Chugach submitted the same amount of documentation for both its simplified rate filings as well as its fuel surcharge filings. Much of the same information is included in both processes. Both filings are made at least forty-five days before the rate takes effect and are subject to investigation and possible suspension if the commission feels they need additional time for review.

Id. at 584-85**.**

The rather unique facts and processes in Alaska which led the court to agree with the utility's argument that if a base rate can't be changed retroactively due to a mistake, neither can a fuel surcharge that was calculated incorrectly, are not present here. A fuel adjustment clause filing bears no resemblance to the hundreds if not thousands of pages of information filed in a rate case, nor to the exhaustive review (including the typical approximately five month long audit by the Staff and others) conducted by the Commission through the course of an 11-month rate case process. The Commission's FAC rules mandate that unless the adjustment filing is not in accordance with the tariff, the rules and Section 386.266, it shall take effect on an interim basis automatically and without the need for Commission action in just 60 days. 4 CSR 240-20.090(4).[19] There is also another factual distinction between the ***Matanuska*** case and the facts at issue here. In ***Matanuska***, the line loss factor that had been used in the fuel surcharge filings at issue had been established as part of a base rate proceeding in 1987, and it had been used for at least a decade in *both* base rate and fuel surcharge filings. After at least a decade, the utility discovered that its actual line losses were lower, and prospectively started using the lower figure when it made its filings. There was no allegation that the line loss factor approved in the 1987 base rate case was erroneous, or in any way was not calculated as it should have been. Those facts are not present here. Here, there is evidence that the NBFC values were never right.

Staff's final attempt to distinguish the authorities cited by the Company is to point to a statute the Staff incorrectly claims was relied upon by the Wyoming Supreme Court when it reached its decision in ***MGTC, Inc. v. Pub. Serv. Comm'n of Wyoming***, 735 P.2d 103 (Wy. 1987). As explained in the Company's initial brief, ***MGTC*** involved a commission order requiring the utility to refund overcharges that occurred under its PGA due to an erroneous calculation when the PGA rate was first applied. It is true that the Wyoming Supreme Court *mentioned* section 37-2-121, and that the court noted that *if* "read literally" the statute might

[19] While a regulatory law judge typically issues a delegation order approving the FAC adjustments, such an order is not required ("the commission shall either issue an interim rate adjustment order approving the tariff schedules and the FAC rate adjustment within sixty (60) days of the electric utility's filing or, if not such order is issue, the tariff schedules and the FAC rate adjustments shall take effect sixty (60) days after the tariff schedules were filed.").

provide authority for the refunds. However, it is not true that the court "relied on that statute"[20] when it upheld the refund or that the court relied on the statute in any way. To the contrary, after noting that the statute "might" grant refund authority, the court went on to ignore the statute and addressed the question of whether the general prohibition against retroactive ratemaking would bar the refund. Had the court relied on the statute at issue and found that it did allow refunds, the entire retroactive ratemaking discussion would have been unnecessary. In answering the question in the negative, the court stated that the rule against retroactive ratemaking is "limited to *general* ratemaking proceedings . . .." ***MGTC***, 735 P.2d at 107. Indeed, the *holding* of the case has nothing to do with the statute: "We hold that the rule against retroactive ratemaking does not prohibit the refunds ordered by the Commission." ***Id.***

D. The overwhelming weight of authority establishes that the Commission can and should correct the consequences of the mistake at issue in this case.

We have demonstrated above that none of the Staff's arguments or attempts to distinguish some of the authorities cited by the Company in its initial brief withstand scrutiny. We would note that the Staff made no attempt to rebut the exhaustive discussion in ***Daily Advertiser v. Trans-La (A division of Atmos Energy Corp.***) of why the rule against retroactive ratemaking does not apply to an FAC adjustment contained in the opinion. 612 So.2d 7, 24 (La. 1993) (Rate adjustment mechanisms are "'unique animals,' falling outside the parameters of the rule against retroactive ratemaking."). Nor did the Staff take issue with the Company's citation to ***Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n***, 689 So.2d 1337 (La. 1997), nor with the Company's discussion of ***State ex rel. AG Processing, et al. v. Pub. Serv. Comm'n***, Case No. WD71986 (Slip. Op. March 1, 2011). As noted earlier, the Staff did attach a list of

[20] Staff's Brief, p. 15.

some 66 cases that at least potentially might speak to these issues, but they only cited one of them.

The cases cited in the Company's initial brief demonstrate that interim rates initially charged under an automatic adjustment mechanism like the Company's FAC are, unlike base rates, not subject to the general prohibition against retroactive ratemaking. This is principally because they have not, until the true-up and prudence reviews are over, been subjected to a full Commission determination of their reasonableness. They are instead "unique animals," as earlier noted. ***Daily Advertiser***, 612 So.2d 7, 24.[21] They do "not constitute rate making in the traditional sense of that term because such adjustments go into effect without an antecedent reasonableness review and thus are not 'commission-made' rates." ***Id.*** at 23. Consequently, it follows that "the commission is not precluded by the rule against retroactive rate making from subsequently examining and modifying such adjustments." ***Id.***

CONCLUSION

As we indicated in our initial brief, a mistake was made through no party's fault. As a result, the NBFC values listed in the FAC tariff were not determined as the FAC tariff required. Interim FPA_C rates were calculated and charged based upon the mistaken input – the mistaken NBFC input. The filed rate doctrine and its corollary, the general prohibition against retroactive ratemaking, do not preclude the correction of the mistake via the application of an FPA_C rate in the future that corrects the under-charges which have occurred solely because of the mistake. Neither is the requested relief in this case a collateral attack on the Commission's order that

[21] While there is no case that addresses precisely the facts at issue here, the general conclusion that charges under automatic adjustment clauses are different than base rates and not subject to the rule against retroactive ratemaking has been reached by many courts, including those already cited by the Company and others. *See, e.g.,* ***Equitable Gas Co. v. Penn. Pub. Util. Comm'n***, 526 A.2d 823-830-31 (Pa. 1987); ***Southern California Edison Co. v. Public Util. Comm'n***, 576 P.2d 945, 954-55 (Cal. 1978); ***Ohio Power Co. v. Public Util. Comm'n***, 376 N.E.2d 1337, 1338 (Oh. 1978).

approved the FAC tariff. The FAC tariff and the order approving it are valid, but an input in the tariff is the result of a mistaken calculation, and indeed a calculation that violates the terms of the tariff itself and that must be corrected if the intention of the tariff is to be respected.

Not only does the law support and arguably demand correction of this mistake, failure to correct it would reflect poor policy. The next mistake may result in an over-charge to customers. Adoption of the Staff's position would preclude correction of that mistake, as surely as the Staff argues a correction should not be made here. There is simply no cogent justification for declining to correct a known mistake made in an interim FPA_C rate that was applied erroneously in the past.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Reply Brief was served via e-mail on the counsel of record for the following parties, on this 3rd day of June, 2011.

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