BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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	))))	**Case No. EO-2012-0074**

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT

I dissent.

My concern is that the majority may have misunderstood the appellate opinion involving the first prudence review of costs subject to Ameren's Fuel Adjustment Clause involving a previous accumulation period.[1] The Court of Appeals affirmed the Commission's decision in that prior case.[2] During discussions at the July 31, 2013, agenda meeting before voting on the Report and Order in this case, it was apparent to me that the main driver in the decision was that the majority felt bound to reach the same decision because of the Court of Appeals opinion relating to the prior case.[3] The majority misconstrues both the standard of review that the court applied and the court's actual holding and, to the extent the majority felt bound to vote for the Report and Order because of the appellate opinion, it erred in deciding this case.

In reviewing the Commission's Report and Order in Case No. EO-2010-0255, the Court of Appeals correctly set out the differing standards of review when a tariff is unambiguous as well as when it is ambiguous:

[1] Case No. EO-2010-0255 (also referred to herein as "the prior case").

[2] *See State ex rel. Union Electric Company d/b/a Ameren Missouri v. Public Service Commission of the State of Missouri*, 399 S.W.3d 467 (Mo. App. W.D. 2013).

[3] I dissented in the prior case. A copy of my dissent in EO-2010-0255 is attached and incorporated herein by reference.

> We review the PSC's interpretation of an **unambiguous** tariff *de novo* in the same manner that we would review a trial court's interpretation of a statute. *De novo* review similarly applies to review the PSC's determination of whether a tariff applies to a given set of facts. **If a tariff is ambiguous, however, such that the intended meaning cannot be definitively resolved by the language of the tariff itself, we will apply traditional rules of "statutory" construction, and review the PSC's resort to evidence of the tariff's intended meaning as a factual determination entitled to deference.** 399 S.W.3d 467, 477-78 (citations omitted) (emphasis added).

The court further stated:

> **If Ameren's tariff is ambiguous, however, we review the PSC's resolution of the ambiguity under the reasonableness prong to determine whether the finding is supported by substantial and competent evidence on the whole record.**
>
> **With this standard of review in mind**, we consider competing interpretations of the phrase "long-term full and partial requirements sales" offered by the parties, **and we review the PSC's conclusion** that the phrase does not include the AEP and Wabash contracts within its scope. *Id.* at 478 (emphasis added).

The court then found that the tariff at issue was ambiguous:

> In this case, however, we agree with the parties and the PSC. **The phrase "long-term full and partial requirements sales" is ambiguous.** The phrase "long-term full and partial requirements sales" does not possess a meaning that is "plain and clear to a person of ordinary intelligence." *Id.* at 480 (citation omitted) (emphasis added).

The court then reviewed the facts relied on as set out in the Commission's Report and Order, gave them deference, and held that:

> The PSC did not err in concluding that Ameren acted imprudently in excluding the revenues from the AEP and Wabash contracts from the fuel adjustment calculation or in ordering Ameren to refund its ratepayers $17,169,838. *Id.* at 492.

Where the majority goes wrong, I believe, is that it treats the court's holding as a matter of **law** when actually it is a matter of **fact**. I concede that based on the findings of fact in the prior case, the court made the correct decision to affirm. But the court's holding that the PSC did not err in determining that the AEP and Wabash contracts were not "long-term full and partial requirements sales" does not mean that such contracts must be so in perpetuity as a matter of law under all facts and circumstances. The court deferred to the Commission's factual determination.[4]

The court's holding in no way binds the Commission, either as to **law** or **fact**, in this case, or any future case. Simply because two different cases before the Commission share factual similarities does not make the findings of fact and conclusions of law of one case binding on another. It is a well-established principle that this Commission's cases do not serve as precedent, and are not binding on future Commissions. That principle also holds true in applying the appellate court's holding in the prior case to this case. The court's holding in the prior case was decided as a matter of **fact** having no precedential value or treatment on any later Commission case where different, although similar, facts exist.

This case is not a clone of the prior case. There was a hearing, as well as the admission of testimony, exhibits and other evidence, all distinguishable from the prior case. The Commission is not a roving tribunal—rather, it is limited to the facts before it. The Commission must consider only the facts in this case, and not be tempted to consider facts which were not in evidence in reaching its conclusion (including facts from the prior case). Here, the Commission is faced with a case, separate and distinct from the prior case, and could ultimately have found different facts in this case then those it found in the prior case. Should this case reach the Court

[4] *Id*. at 477-78.

of Appeals, the facts of the prior case are beyond the record for the court's review. The record the court would have before it would be limited to the facts of *this case*.

This case is distinct and separate from the one previously reviewed by the Court of Appeals. The record in this case is not identical to the prior case. Even a Commission made up of the same, identical commissioners, could – based upon the record in this case have decided the credibility of witnesses and the relevance of certain evidence differently than in the prior case, even though the prior case and this case share similarities. Simply put, ***the record here could have led to different findings of fact and conclusions then the prior case***. The outcome of this case was not preordained by the Commission's prior case or the holding of the Court of Appeals in the prior case.

Furthermore, even assuming for purposes of argument only that the Commission must follow the court's opinion and find that Ameren acted imprudently, that does not mean a refund to ratepayers is required. Our decisions must take into account both prongs of the prudence test as well as the public interest, not just the interest of the parties to a case. In its Report and Order in this case, the majority did not address the second prong of the prudence test and did not consider the public interest. This is where I part company with the majority in this decision.

Even if Ameren was "imprudent," a utility must not suffer the consequences of its imprudence unless it causes ratepayers harm. As the majority states in paragraph 4, page 16 of the Conclusions of Law section in the Report and Order: "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.**" (*citing State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n,* 954 S.W.2d 520 (Mo. App. W.D. 1997) (emphasis added).

In paragraph 3 of the Decision section on page 19 of the Report and Order, the majority answers the question "Did Ameren Missouri's conduct described in Paragraph 2, above (Decision Section) result in harm to its ratepayers?" with a one-word answer: "Yes." No analysis, no explanation, no reasoning is set forth by the majority—just a conclusory "yes". In the thirty-seven paragraphs in the Findings of Fact section in the Report and Order, there is no finding that the ratepayers were harmed in any way by Ameren's actions. Paragraph 37 in the Findings of Fact section on page 15 of the Report and Order indicates the amount of the revenues if the revenues at issue were flowed through the Fuel Adjustment Clause, but does not indicate how ratepayers were harmed by Ameren's actions. Moreover, in paragraph 8 of the Findings of Fact on page 7 of the Report and Order, the majority finds that if Ameren would sell the power it was no longer able to supply to Noranda as off-system sales, it "would result in a revenue shortfall for Ameren Missouri's shareholders." One person's shortfall is another person's windfall. The majority actually finds that Ameren was harmed, not the ratepayers.

In paragraphs 12 and 13 of the Findings of Fact section on page 8 of the Report and Order, the majority finds that Ameren entered into two contracts to sell power to replace the Noranda load.[5] Even if Ameren's actions were imprudent, it did not cause harm to ratepayers in that but for the ice storm the dollars collected by Ameren under the two contracts would have been paid for by Noranda, for the very same power, and the charges under the Fuel Adjustment Clause to the ratepayers would have been exactly the same as those charges before the majority ordered the refunds. Ameren's actions in this case, even if imprudent, caused no harm to ratepayers. Giving an undeserved windfall to the ratepayers and allowing an undeserved

[5] The majority does not make a specific finding in this case that Ameren did not flow the fuel costs for the two contracts through the Fuel Adjustment Clause. Since that is not disputed, I take it as fact for the purpose of this dissent.

shortfall to the utility is not in the public interest, because it denies the utility the resources it needs to provide safe and adequate service. The Supreme Court of Missouri has affirmed this essential legal principle:

> The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. **We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested.**
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> * * *
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> These instrumentalities are a part of the very life blood of the state, its people, and a fair administration of the act is mandatory. **When we say "fair," we mean fair to the public, and fair to the investors.**

State ex rel. Washington University et al. v. Public Service Commission, 308 Mo. 328, 344 – 45, 272 S.W. 971, 973 (Mo. banc 1925) (emphasis added).

The public interest was not served by the majority's decision in this case. For the foregoing reasons, I dissent.

Respectfully Submitted,

Terry M. Jarrett
Commissioner

Submitted this 13th day of August, 2013.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT
IN THE REPORT AND ORDER

I dissent from the Commission's Report and Order ("Order") because I believe that it reaches the wrong conclusion, is not based upon the law, and is fundamentally flawed in its legal analysis and evidentiary basis for reaching its conclusion.

Findings of Fact

The findings of fact adopted by the majority are inadequate. Many of them are not findings of fact at all. Rather, they are a mixture of regurgitation of allegations and statements of conclusions of law. Following are the facts that I find dispositive of this case:

1. On January 28, 2009, Southeastern Missouri was struck by a terrible ice storm. (Barnes Direct, Exhibit 3, p. 5, lns. 19-24).

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 and third lines back into production. Two-thirds of Noranda's production capacity was lost while the solidified aluminum was jack hammered out of the equipment. (Barnes Direct, Exhibit 3, p. 6, lns. 4-10).

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. (*See Report and Order*, Finding of Fact No. 3, *see also*, Haro Direct, Exhibit 1, pgs. 5-6.)

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. (Barnes Direct, Exhibit 3, p. 6, lns. 12-15). That amounts to approximately four percent of Ameren Missouri's base-rate revenue requirement from which the company's rates were developed. (Barnes Surrebuttal, Exhibit 4, p. 2, lns. 19-20).

5. 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. (Haro Direct, Exhibit 1, pgs. 4-5, lns. 8-22, 1-17).

6. Ameren Missouri subsequently entered into two contracts that the contracts themselves described as 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. ("Wabash"), to serve Citizen Electric load in Missouri. That contract was for 150 megawatts for a duration of 18 months. (Haro Direct, Exhibit 1, p. 7, lns. 1-10).

7. At all relevant times during this case, Ameren Missouri was subject to a fuel adjustment clause (FAC). Off-Systems Sales were subject to the FAC, with some exclusions, including long-term full and partial requirements sales. The fuel adjustment clause 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.

(Eaves Direct/Rebuttal, Exhibit 11, pg. 4, lns. 8-12, Sched. DEE-5).

8. 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. (Haro Direct Exhibit 1, p. 1, lns. 4-6; Highley Surrebuttal, Exhibit 7, p. 5, lns. 10-13).

9. Ameren Missouri entered into the Wabash and AEP contracts to replace the Noranda load lost due to the ice storm. (Haro Direct, Exhibit 1, p. 7, lns. 12-13).

10. Ameren Missouri, Wabash, and AEP intended that the contracts were long-term partial requirements contracts. (Tr. p. 52, lns. 7-11; Haro Direct, Exhibit 1, p. 3, ln. 19; Barnes Direct, Exhibit 3, p. 3, lns. 5-6, p. 8, lns. 5-20).

11. By structuring the AEP and Wabash contracts as long-term partial requirements contracts, Ameren Missouri ratepayers received no detrimental impact. They received the same treatment as if the Noranda load had never been curtailed. If the contracts had not been structured that way, ratepayers would have received a windfall from the ice storm. (Barnes Direct, Exhibit 3, p. 8, lns. 11-16).

12. Ameren Missouri's fuel and purchase power expenses were prudent. (Staff's Prudence Report, Exhibit 8, pp. 7, 10-12, 14, 16).

13. Ameren Missouri's entering into the Wabash and AEP contracts to replace the Noranda load lost due to the ice storm was prudent. (Staff's Prudence Report, Exhibit 8, p. 18; Tr. p. 500, lns. 9-19).

Analysis

This case was a prudence review of costs subject to the Commission-approved fuel adjustment clause of Ameren Missouri. The only question before the Commission was whether Ameren's fuel and purchase power expenses run through the fuel adjustment clause were prudent. It is undisputed that Ameren Missouri's fuel and purchase power expenses were prudent. As such, no disallowances were appropriate and the analysis should have ended there.

Instead, the majority went further, and focused upon the interpretation of a Commission approved tariff as it applied to the terms of contracts between Ameren Missouri and AEP and Ameren Missouri and Wabash. This was beyond the scope of review. The question of the application of the contracts to the FAC is a matter of applying the law (the tariff) to the facts (the contract). This application is not one of prudence, it is instead rooted in the regulatory function of ratemaking and specifically – rate treatment for the costs associated with the contracts (either included or excluded from the FAC). Staff's characterization of this analysis as prudence is a misapplication of the principles of prudence. The allocation of the contracts as off system sales by Ameren is a question of law. There is no dispute that the contracts themselves were prudently entered into.

To find prudence under the majority's chosen context would require that Ameren know in advance the answer to the question of law regarding the contract's application to the

terms of the FAC by this Commission. This prudence review was not the proper vehicle to challenge the contracts' application to the FAC.

That said, for purposes of argument only, if one assumes that this was the appropriate case for challenging the classification of the contracts, then Ameren Missouri still prevails based upon the competent and substantial evidence in the record. The evidence in this case demonstrates that in determining whether the contracts at issue fall within or outside of the FAC exception for off-system sales, that the circumstances at the time of the decision to enter into the contracts is controlling as to the prudence of the contracts themselves. Ameren Missouri made its best efforts to place itself in a position that was as close to its position that had existed prior to the massive ice storm and the loss of its single largest power customer.[1] Ameren Missouri's action in securing contracts with AEP and Wabash maintained the status quo regulatory context which was envisioned when the FAC was ordered by this Commission. Ameren Missouri's action was the type of sound business judgment decision a utility should make under circumstances such as those presented. No evidence, *none*, shows that the contracts with AEP or Wabash were imprudent. For a utility to lose a 500MW customer unexpectedly overnight, for reasons known only to Mother Nature, calls for prompt and decisive action; action that protects not only ratepayers, but also shareholders.

That is exactly what Ameren Missouri did by securing contracts with AEP and Wabash. Any suggestion that Ameren Missouri's contracts, as drafted, were intended to achieve a result which was not harmonious with its position in relation to its shareholders and ratepayers before the ice storm is not supported by any evidence in this case. No questions

[1] *Report and Order*, ER-2011-0028, pg. 8, pg. 12 "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 serviced and credit exposure by Ameren Missouri." *See also,* Haro Direct, Ex. 1, Pages 4-5, Lines 8-22, 1-17.

were raised in this case that the resulting Order in Case No. ER-2010-0036 fails to meet the legislatures mandate in Section 386.266.4(1) RSMo Cum. Supp. (2009) with regard to the operation of a FAC. As such, the FAC tariff must be in harmony with the law. The majority cannot retroactively create conflict between these two provisions of law.

Just as duly promulgated rules of the Commission have the force and effect of law, so do Orders of the Commission. It is also well established that "[A] tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature." *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). This concept also comports with *Foremost-McKesson, Inc., v. Davis*, 488 S.W.2d 193, 201 (Mo. Banc 1972) where the Court stated that "[I]t is a well-established principle that administrative rules, which were promulgated to implement the act, *must be read in conjunction and harmony therewith and, so read, the rules do not eliminate any statutory requisite of intent or effect*." (Emphasis added).

To suggest that a contract entered into by Ameren Missouri could have as its result, the creation of an unlawful construct between the FAC tariff and Section 386.266.4(1) would require a finding that Ameren Missouri acted against its own interests, an allegation that was not proven by any evidence presented. What the majority does here is conclude that Ameren Missouri's contracts with AEP and Wabash, when tested against the FAC tariff, left Ameren Missouri in a different position after the ice storm than before the ice storm, which is not what was intended by Ameren Missouri when it entered into the contracts with AEP and Wabash. The evidence in the case supports Ameren Missouri on this point.

Because a utility has a duty to serve, it cannot merely engage in a transaction which would sell the power formerly used by its largest customer to anyone else, the agreement to

sell had to be one that offered Ameren Missouri the flexibility to resume service to Noranda at a time of Noranda's choosing and that also fit within the resource plans of the utility. This is the statutory confine of service, within which Ameren was legally required to operate. Ameren Missouri, faced with an unprecedented situation, entered into contracts with AEP and Wabash to sell power that would have otherwise been delivered to Noranda. The contracts were intended to place Ameren Missouri in the same, or as similar a situation as possible, as to that which existed prior to the ice storm, and in fact did just that. The Commission's focus should have been on those two contracts and their prudence, and ended at that point, in favor of Ameren Missouri. The simple reason is that a prudence review does not rely upon hindsight to reach its determination; rather, the review places itself into the shoes of the person making the decision at the time and asks whether a reasonable person, knowing all of the facts and circumstances known at that time, would make the same decision today.

The majority instead works its way through a tortured analysis involving statutory construction, while grafting onto the analysis aspects of contract interpretation as well. Ameren Missouri's definition of long term partial requirements sales is dispositive. There was no evidence presented that at the time the two contracts were entered into that anything other than Ameren Missouri's definition was intended by the parties to the contract. The opponents to Ameren Missouri in this matter, and the majority of the Commission, ultimately are saying that no matter what terms, words, or phrases were selected by Ameren Missouri in the contracts with AEP and Wabash, that because Ameren Missouri's words would have been self serving, they are therefore irrelevant. They are not. To the contrary, Ameren Missouri had every incentive to choose words that would ensure its contractual bargain was

met, that the contracts when applied to the FAC achieved the result it desired (keeping it in a position as close to that which existed before the ice storms), and that the contracts' application to the FAC tariff and the terms of the Order in ER-2010-0036 conformed to the law.

The majority makes much ado about ambiguity. What type of contracts existed between Ameren Missouri, AEP and Wabash were between those parties. Any ambiguities' as to those contracts are to be construed under *contract construction standards*. Ameren's representations as to these contracts are undisputed facts because no other party to those contracts presented any evidence or testimony to the contrary; specifically, AEP or Wabash. Mr. Haro testified for Ameren Missouri:

> Well, at the time when I entered a contract, I did not look for particular definitions. *What I did was I contacted counterparties and said I need to enter into a long-term partial requirement deal and that's the kind of the section I entered into*. (Tr. p. 52, lns. 7-11) (Emphasis added).

Mr. Haro testified that he told AEP and Wabash that they were entering into long-term partial requirements contracts, and there is no evidence in the record to the contrary. Any other parties' thoughts, beliefs or interpretations are completely and wholly irrelevant. As such, the AEP and Wabash contracts are long-term partial requirements contracts, as those terms are known by the wholesale electricity marketplace.[2] Ameren Missouri also understood that

[2] Many definitions were offered by the parties in this case for "requirements sales." Missouri law offers a definition for requirements sales under the Uniform Commercial Code. While the UCC is dispositive as to "goods," and therefore not applicable as law to electricity, it is most certainly persuasive authority in this case. Furthermore, the UCC's applicability to gas sales is instructive since many terms and definitions used in the gas business are used with regard to electricity. Also, the UCC's definition of requirement sales appears to be the primordial basis for other definitions in other contexts; a comparison not drawn by any party to this case.

the FAC tariff was constructed within the wholesale electricity marketplace, the same as the two contracts. These are the facts that were known to Ameren Missouri at the time the contracts were entered into, and no hindsight considerations (or definitions) can change these facts.

The Commission's Staff in interpreting the application of the contracts to the FAC tariff arrived at a definition for long term partial requirements contracts *after* the contracts were executed. Any evidence in the record suggesting otherwise is unpersuasive, contradictory and unreliable. Because of the timing in which Staff's definition arose, it is implausible that such a definition was even plausible *at the time* (without hindsight) the AEP and Wabash contracts were executed. This same absurdity as to timing of the definition is again repeated in Staff's definitional recommendation with regard to the FAC, again a definition applied in hindsight.

Further, Staff's proposed definition ignores the regulatory compact that has existed in Missouri since this Commission was created. This Commission was created to serve the public interest. That is, since regulated utilities are monopolies, this Commission acts as a

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Missouri Revised Statutes Section 400.2-306 (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded. (2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

Other references within the UCC for definitional purposes in this case are also persuasive as well, including the UCC treatment of trade usage. Therefore, to dismiss the UCC out of hand in favor of options proposed in this case would be to overlook well established law, which has a long and thorough history in Missouri.

substitute for the marketplace.[3] It follows that if the marketplace provides a solution, then a regulatory solution is not necessary. Thus, the fact that the marketplace defined long-term as one year or more is dispositive. That Staff would look somewhere else other than the marketplace for a definition of long-term is contrary to the regulatory compact.

Conclusion

What the majority has done here is to punish Ameren Missouri for a sound business judgment and to give the ratepayers a windfall that they did not deserve. This does not balance the interests of the shareholders with the interests of the ratepayers as the law requires this Commission to do. While this may fit the majority's idea of redistributive social policy, it ignores the facts and violates the law. For that reason, and the other reasons discussed above, I strongly dissent.

Respectfully submitted,

Terry M. Jarrett, Commissioner

Issued this 24th day of May, 2011.

[3] Charles F. Phillips, Jr., *The Regulation of Public Utilities*, 3rd ed., p. 182 (1993).