Exhibit No.:
Issue(s): Fuel Adjustment Clause - General
Witness: Lynn M. Barnes
Sponsoring Party: Union Electric Company
Type of Exhibit: Surrebuttal Testimony
Case No.: EO-2012-0074
Date Testimony Prepared: June 8, 2012

MISSOURI PUBLIC SERVICE COMMISSION

CASE NO. EO-2012-0074

SURREBUTTAL TESTIMONY

OF

LYNN M. BARNES

ON

BEHALF OF

UNION ELECTRIC COMPANY
d/b/a Ameren Missouri

St. Louis, Missouri
June, 2012

SURREBUTTAL TESTIMONY
OF
LYNN M. BARNES

CASE NO. EO-2012-0074

Q. Please state your name and business address.

A. My name is Lynn M. Barnes. My business address is One Ameren Plaza, 1901 Chouteau Avenue, St. Louis, Missouri 63103.

Q. Are you the same Lynn M. Barnes who filed direct testimony in this case?

A. Yes, I am.

Q. What is the purpose of your surrebuttal testimony in this proceeding?

A. The purpose of my surrebuttal testimony is to address the impact on this case of a circuit court order reversing the Commission's decision in the first prudence review relating to Ameren Missouri's fuel adjustment clause ("FAC"); to provide clarification regarding the magnitude of dollars relating to the disputed contracts at issue in this case; and to respond to certain points in the direct/rebuttal testimony of Missouri Public Service Commission Staff ("Staff") witnesses Dana A. Eaves and Lena Mantle, and Missouri Industrial Energy Consumers ("MIEC") witness Maurice Brubaker.

A. *The Circuit Court Order*

Q. You mentioned the impact of a circuit court order on this case. To what are you referring?

A. As I indicated in my direct testimony, the Commission's April 27, 2011 Report and Order in the first prudence review case involving the Company's FAC (Case

No. EO-2010-0255) is on appeal in the Circuit Court of Cole County, Missouri. Since I filed my direct testimony, the Court has rendered a judgment in the appeal that reverses the Commission's decision in the first prudence review (a copy of the Judgment is attached as Schedule LMB-S1). In fact, the Court's Judgment indicates that the Staff's theory in both that case and this case (that is, that the Company was "imprudent" for how it "classified" the sales under the two contracts at issue in this case), and several of the Commission's conclusions in the prior prudence review case which were based on the Staff's theory, are incorrect. The Court's Judgment reinforces what I said in my direct testimony in this case; that is, we are asking the Commission not to make the same mistake (that the Court has now confirmed it made in Case No. EO-2010-0255) twice.

Q. How does the Judgment impact this case?

A. The Judgment means that the Commission has no basis in this case to agree with the Staff's proposed "prudence" disallowance in this case. To do so would require the Commission to reach conclusions here that the Judgment holds are incorrect.

B. *Mr. Eaves' Testimony*

Q. On page 8 of Mr. Eaves' direct/rebuttal testimony, he states that loss of customer load is part of the risk included in shareholders' return on equity ("ROE"). What does ROE have to do with this case?

A. In my direct testimony I stated that revenues associated with the megawatt-hours that Noranda did not take that were sold to AEP and Wabash did not allow the Company to earn in excess of its authorized ROE during the entire time that Noranda's load was reduced. In fact, Ameren Missouri earned nowhere near its authorized return on equity during that period. I provided that information not because it

can (or should) change the terms of the Company's FAC tariff, but rather, to provide the Commission with the context surrounding the aftermath of the January 2009 ice storm and the Company's admittedly prudent decision to enter into the two contracts. In my opinion, that context is particularly relevant in light of statements in the Commission's Report and Order in Case No. EO-2010-0255 to the effect that the Company had acted "improperly." It was also appropriate given the Staff's unusual theory that the Company was prudent for entering into the contracts that produced the sales at issue, but was "imprudent" for how it classified those sales, which as I read it suggests that the Staff is claiming some kind of impropriety on the Company's part. I would agree that the level of the Company's earnings during the relevant time period cannot impact the terms of the FAC tariff. By the same token, Staff's view that the risk of the 2009 ice storm should have been "compensated" by Ameren Missouri's allowed ROE also cannot support including the AEP and Wabash revenues in the FAC if in fact (as the Circuit Court has found) those revenues are *excluded* from the FAC by the terms of the Company's tariff.

Q. But what about Mr. Eaves' substantive point; that is, that loss of the Noranda load was a risk that was "compensated" by the authorized ROE?

A. I completely disagree. When rates are set based upon a revenue requirement determined using a particular ROE the assumption is that the ROE will compensate the utility for ordinary risks, such as the normal fluctuations in customer load between rate cases and fluctuations in the business cycle. However, the ROE used to develop the revenue requirement in a rate case does not compensate a utility for extraordinary risks such as the unusual and significant impact of the 2009 ice storm.

Q. On page 20 of his direct/rebuttal testimony, Mr. Eaves indicates that the Staff's proposed adjustment has nothing to do with picking winners or losers or creating windfalls. Do you agree with his statement?

A. No, I do not. While the Staff may not intend for its actions to create winners and losers, nonetheless that in fact is what will happen if the Staff's position prevails. If the sales under these contracts are included as off-system sales, Ameren Missouri will lose the approximately $42 million of margins (which would have paid for fixed costs that the sales of those megawatt-hours were expected to cover), and customers will reap a $42 million windfall. Noranda alone will "win" approximately $4 million of this total, for a period when it was only taking limited service from Ameren Missouri.

Q. Relating to the windfall you contend customers would receive, on page 20 of his direct/rebuttal testimony Mr. Eaves disagrees with the assertion in your direct testimony that the result of Ameren Missouri's actions was that customers were in the same position as if the ice storm hadn't occurred, since customers must pay for the storm restoration costs. Please comment on Mr. Eaves' assertion.

A. Certainly. It is true that prudently incurred restoration costs from the 2009 ice storm (almost all of which were capital investments in new poles and conductors that were destroyed by the storm) were used to set the revenue requirement in Case No. ER-2010-0036, in accordance with the standard treatment for storm restoration costs. However, reflecting storm restoration costs in customer rates is a completely separate issue and is not relevant to the dispute in this prudence review. The FAC is only designed to allow recovery of fuel and purchased power costs and has nothing to do with

the impact of storm restoration on the development of the Company's revenue requirement in a rate case.

What I meant by the statement Mr. Eaves cites from my direct testimony is that Ameren Missouri's actions entering into the contracts with AEP and Wabash kept the Company and its customers whole from the standpoint of the *net fuel costs tracked in the FAC*. It is those costs and those costs alone that are at issue in *this* case. On the other hand, Staff's position, if accepted, would result in the Company's inability to recover approximately $42 million prudently incurred higher net fuel costs during the accumulation periods affected by the sales made under the contracts, while resulting in customers paying FAC rates that are lower by that same $42 million, solely as a consequence of the ice storm and Noranda's loss of load. That is a windfall; but for the ice storm FAC rates would have without question been higher by $42 million. Because of the ice storm their FAC rates would be lower by $42 million if the Staff's position is accepted.

Q. Mr. Eaves also claims that customers will somehow be "harmed" by the sales reflected in the two contracts unless the Staff's position is accepted. Do you agree?

A. No, I do not. Customers are not harmed by paying what the Company's tariffs provide they must pay for the electric service they receive. The issue in this case is what the FAC tariff required in terms of the treatment of the sales at issue. If as we contend (and as the Court decided) the sales at issue are outside the operation of the FAC, customers will pay exactly what the tariff provided for – no more and no less. This isn't harm by any definition.

Q. As support for some of the contentions made by Mr. Eaves that you rebut above, Mr. Eaves cites to the Commission's Report and Order in Case No. EO-2010-0255 (generally at pages 9 through 11 of his testimony). Don't those citations support Mr. Eaves' points?

A. I think that the Staff's theories in that case (and this one), which I agree the Commission accepted when it issued its Report and Order, are simply flawed, as the Court found. The sales at issue either do or do not fall within the definition in the FAC. This question has nothing to do with any "bargain" made when the terms of the FAC were agreed upon in Case No. ER-2008-0318. In fact, the language at issue was proposed by the Company at the inception of that case and not one word of it changed as a result of negotiations in the case.

Q. At pages 15 to 17 of his direct/rebuttal testimony Mr. Eaves discusses Ameren Missouri's FERC Form 1 reporting regarding the AEP and Wabash contracts, contending that the Company reporting these contracts correctly in its 2009 FERC Form 1 but did not do so in its 2010 FERC Form 1. Do you agree?

A. No, I do not. As Ameren Missouri's Controller, I review the FERC Form 1 and sign it before it is submitted. Up until 2010, the Company's accounting staff employed a simple litmus test when deciding whether a contract was to be designated as "RQ" per the FERC Form 1 instructions. That litmus test was whether the contract was listed in the IRP prepared prior to the form's completion. However, as Mr. Haro discusses in his surrebuttal testimony (and as he also discussed in his surrebuttal testimony in Case No. EO-2010-0255), system resource planning is an ongoing process whereas an IRP filing only reflects a snapshot of the Company's plan at a given point in

time – when the IRP is prepared. Consequently, in 2010 the decision was made that contracts that were part of the ongoing system planning process should be designated as RQ on FERC Form 1 reports, because the FERC Form 1 instructions define RQ by reference to system resource planning not simply by reference to an IRP prepared at a give point in time.

Q. So does this mean that the FERC Form 1 was incorrect in 2009?

A. Not necessarily, but in the 2009 report we assumed that a contract had to be listed in the IRP to be included in system resource planning. The accountants – myself included – were unaware that system resource planning was broader than that. Once we realized this, we reported the contracts consistent with that understanding starting with the 2010 report.

C. Ms. Mantle's Testimony

Q. Ms. Mantle includes an entire section in her testimony entitled "Staff's Discovery of AEP and Wabash Contracts." Is her recitation of the information the Company provided a fair one?

A. No, it is not. Ms. Mantle claims the Staff didn't become aware of the sales until October 2009. However, on June 1, 2009, the Company timely submitted to the Staff (and served copies of the submittal on all parties to Case No. ER-2008-0318) its first FAC report (for March 2009), as required by the Commission's FAC rules. One of the requirements of those rules is that the report list significant factors that impact the level of net fuel costs for the month being reported. In the significant factor portion of the report the Company stated as follows: "New wholesale customer – AEP." The AEP contract was reflected in that report because it began in March 2009. Approximately two

months later, on July 30, 2009, the Company submitted to the Staff its FAC report for May 2009 (and served copies on the parties), and it reported the second of the two contracts at issue, stating in the significant factors section as follows: "New wholesale customer – Wabash Valley Power Association" (the Wabash contract started in May).

In addition, as Ameren Missouri witness Stephen Wills indicates in his surrebuttal testimony, his direct testimony (filed July 24, 2009) in Case No. ER-2010-0036 specifically mentioned that we had new wholesale contracts, and his workpapers (submitted to the Staff within a few days after July 24, 2009) specifically identified the AEP and Wabash contracts by name. Ms. Mantle was (and is) in charge of the Commission's Energy Department, which is the Department with responsibility for monitoring the FAC reports and also handles the net system input and weather normalization, which was covered by Mr. Wills' rate case testimony and workpapers.

Q. In your opinion, why is it important for the Commission to have an accurate understanding of what information the Company provided to the Staff?

A. Ms. Mantle's testimony implies that the Company was seeking to conceal the existence of these contracts from the Staff. Nothing could be further from the truth, as the facts demonstrate. The Company reported what it was supposed to report, when it was supposed to report it, and provided the information in the rate case it filed in July 2009 when it was supposed to provide it.

Q. At pages 12 to 15 of her testimony, Ms. Mantle spends quite a bit of time discussing Case No. EA-2005-0180, which is the case that resulted in Ameren Missouri's service to Noranda. She seems to be making a point similar to the one you addressed about Mr. Eaves' testimony relating to whether the Company's

authorized ROE "compensated" it for certain risks. Do you care to respond to Ms. Mantle?

A. Yes. Like Mr. Eaves, Ms. Mantle either confuses or perhaps seeks to divert attention from the issue in this case. To repeat: the issue is whether or not the AEP and Wabash contracts reflect long-term partial requirements sales under the FAC tariff. If they do, then the Staff's proposed "prudence" adjustment must be rejected. Staff's opinion about what risks they believe should be compensated by the ROE is really irrelevant to that issue.

D. Mr. Brubaker's Testimony

Q. On page 10 of Mr. Brubaker's direct testimony, he suggests that the amount in dispute in this proceeding and the refund previously ordered are not significant. Do you agree with Mr. Brubaker's conclusion?

A. No. As a preliminary matter, the issue isn't how "significant" the sums at issue are. To state it again: the issue in this case is simply whether or not the sales fall within, or without, the FAC. But regardless, the sums at issue are in fact significant. Over the past three years Ameren Missouri's average after-tax net income was approximately $310 million. The approximately $26 million (about $17 million after-tax) at issue in this case is about 5% of that amount. Moreover, while Mr. Brubaker argues here that the loss of "less than 70 basis points return on equity (.70%)" is insignificant, I've observed in several of the Company's recent rate cases the exact opposite argument when the parties are arguing over many, many issues that would have a much smaller impact, or over larger issues, like the appropriate allowed return on equity. For example, it's doubtful that Mr. Brubaker would consider the difference

between a 10 percent return on equity and a 10.7 percent return on equity to be insignificant—his clients certainly have argued the opposite via testimony from Mr. Gorman of Mr. Brubaker's firm—but that, too, represents a difference of 70 basis points.

Q. Mr. Brubaker (page 9, l. 14-21) takes issue with the Company's contention that the Staff's proposed disallowance isn't really a prudence disallowance at all, claiming that it is "imprudent to violate the law." Do you agree?

A. I would agree with the general observation that it is imprudent to violate the law, but Mr. Brubaker's assertion simply begs the question: what is "the law" in this instance? I agree that the "law" is reflected in the tariff. We neither intend to violate the tariff nor do we believe we have done so. The Cole County Circuit Court agrees with us. So even assuming Mr. Brubaker is correct that it is "imprudent to violate the law" we haven't acted imprudently.

Q. Mr. Brubaker also focuses on what he calls the "regulatory context." For example, he says it is "clearly more relevant," apparently because he realizes that in the power sales industry these contracts unquestionably reflect long-term partial requirements sales, as Ameren Missouri witness Jaime Haro testifies. What does the "regulatory context" tell us about the language at issue in this case?

A. It tells us that these contracts do reflect long-term partial requirements sales.

Q. Why?

A. Mr. Brubaker says that the Commission "sets rates in the regulated retail context," and that is true. Brubaker direct, p. 9, l. 8-9. The Commission also approves

FAC tariffs in that context. As Mr. Haro discussed in his testimony, for the contracts at issue to reflect long-term partial requirements sales they must be long-term (one year or more), and they must reflect requirements sales (a sale of firm energy and capacity to an entity with a load-serving obligation). As best as I can tell from the testimony in this case and from the evidence from Case No. EO-2010-0255, there are no Commission decisions (i.e., no "regulated retail context") that shed any light on the "requirements sales" aspect of the issue. However, that is not true regarding what "long-term" means.

Q. Please explain.

A. When the first FAC was approved in Missouri (post the enactment of Section 386.266 RSMo.) for what was then Aquila, Inc., there was a dispute between the Aquila and the Staff regarding whether costs for capacity purchased by the utility should be within, or outside of, the FAC. The Commission determined that if the capacity purchase was one year or less the capacity purchase costs should be *within* the FAC, but if the capacity purchase was for more than one year, it should be *outside* the FAC. In reaching that conclusion, the Commission set the demarcation line between short- and long-term at *one year*, concluding that a capacity purchase of one year or less is short-term. Case No. ER-2007-0004, Report and Order (issued May 17, 2007) pp. 43-44. So we know in a decision issued less than a year before the Commission approved the FAC tariff at issue here, the Commission -- in the "regulated retail context" -- decided that "long-term" meant "more than one year."

Q. Is there additional information that informs this so-called "regulatory context" into which Mr. Brubaker puts so much stock?

A. Yes, and it involves the FAC tariff at issue in *this* case. Under that tariff, if Ameren Missouri purchases capacity and if that capacity purchase is for a term of *more than one year* the capacity purchase costs are *outside* the operation of the FAC. So in the very rate case that led to the FAC tariff at issue here, the Commission again considered long-term to be more than one year. This treatment logically supports excluding long-term (greater than one year) requirements *sales* (where capacity *and* energy are sold) from the FAC under the exclusion at issue in this case. I would submit that it makes no sense for capacity purchases by Ameren Missouri of greater than a year to be *outside* the FAC, while capacity sales (as part of the sale of capacity and energy under a contract reflecting a requirements sale) of more than one year would be *inside* the FAC.

Q. Are there other examples of what the Commission has considered to be "long- and short-term" in the rate case setting?

A. Yes. The Commission consistently treats utility debt with a maturity of one year or more to be "long-term" debt. And counsel advises me that in the past when the Commission had to decide whether a contract was long- or short-term it decided that a contract for more than one year was "long-term". ***In re: Southwestern Bell Tel. Co.***, 218 P.U.R.4th 429, 430 (Mo. P.S.C. 2002)

Q. So how does the Commission's consistent demarcation between long-term and short-term at one year tie into the determination in this case regarding whether the AEP and Wabash contracts reflect long-term requirements sales?

A. As Mr. Haro explains in his surrebuttal testimony, at the time the FAC tariff was approved there were four long-term full requirements sales with municipalities in Missouri. The Staff claims that in order to be "long-term" the term of the contract

must be five years or more (citing the page 310 of the instructions to FERC Form 1). Those instructions also define "requirements service," which Mr. Brubaker claims controls here.[1] But as Mr. Haro also explains, if the Staff was right then three of those four contracts with the municipalities would also fall within the FAC, just as the Staff contends is the case with the AEP and Wabash contracts. I would submit that Staff (and Mr. Brubaker) can't have it both ways. If the "regulatory context" controls – even if that context could be found in FERC Form 1 instructions – then why wouldn't those municipal contracts also fail to qualify as long-term requirements sales? The answer: they of course would fail to qualify, yet all agree they do qualify. And as I stated earlier, it is not appropriate to resort to obscure and dated FERC reporting instructions to find a "regulatory context" when this Commission has recently defined "long-term" as one year or more in the context of approving FAC tariffs.

Q. Does this conclude your surrebuttal testimony?

A. Yes, it does.

[1] Mr. Brubaker doesn't point to the FERC Form 1 instructions for his definition of "requirements service," but instead points to the Edison Electric Institute's ("EEI") glossary. As Mr. Haro discusses, EEI's definition is grounded in the FERC Form 1 instructions, and is in fact identical.

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

AFFIDAVIT OF LYNN M. BARNES

STATE OF MISSOURI)
) **ss**
CITY OF ST. LOUIS)

Lynn M. Barnes, being first duly sworn on her oath, states:

1. My name is Lynn M. Barnes. I am employed by Union Electric Company d/b/a Ameren Missouri as Vice President Business Planning and Controller.

2. Attached hereto and made a part hereof for all purposes is my Surrebuttal Testimony on behalf of Union Electric Company, d/b/a AmerenUE, consisting of 13 pages (and Schedules LMB through S1), which have been prepared in written form for introduction into evidence in the above-referenced docket.

3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct.

Lynn M Barnes
Lynn M. Barnes

Subscribed and sworn to before me this 8th day of June, 2012.

Julie Donohue
Notary Public

My commission expires: 2/17/2013

Julie Donohue - Notary Public
Notary Seal, State of
Missouri - St. Louis City
Commission #09753418
My Commission Expires 2/17/2013

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STATE *ex rel.* UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
Relator,	)	
vs.	)	**Case No. 11AC-CC00336**
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,	)	
Respondent.	)	

JUDGMENT

This case is before the Court on Relator **Union Electric** Company d/b/a Ameren Missouri's ("Ameren") Petition for Writ of Review filed May 26, 2011, which sought review, under §386.510, RSMo.,[1] of the Public Service Commission's ("PSC") April 27, 2011 Report and Order (the "Order") in PSC Case No. EO-2010-0255, which was styled *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.* After consideration of the briefs filed by Relator, Respondent PSC, and Intervenor Missouri Industrial Energy Consumers ("MIEC"), and after hearing argument thereon from all of the parties on December 2, 2011, this Court rules that the decision of the PSC is reversed for the reasons stated below.

Standard of Review

The standard of review applicable to this Court's review of the PSC Order is whether the Order is "lawful" and "reasonable." ***State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n,*** 40 S.W.3d. 381, 387-88 (Mo. App. W.D. 2001); §386.510, RSMo. If this Court determines that the PSC's Order is unlawful or unreasonable, it is authorized to reverse it or set it aside. ***State ex rel.***

[1] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

Associated Natural Gas Co. v. Pub. Serv. Comm'n, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997); ***State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n,*** 921 S.W.2d 5, 9 (Mo. App. W.D. 1996).

While Relator Ameren has the burden of demonstrating that the Order should be set aside, this Court is not required to give the PSC any deference on questions of law. In determining whether the Order is lawful, this Court must "exercise unrestricted, independent judgment and correct erroneous interpretations of the law." ***Alma Tel. Co.***, 40 S.W.3d at 388; *see also* ***Associated Natural Gas***, 954 S.W.2d at 528; ***Mobile Home Estates***, 921 S.W.2d at 9.

In deciding whether the PSC's Order is "reasonable," this Court must "determine . . . whether the [PSC's] decision was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious or unreasonable, or whether the [PSC] abused its discretion." ***Associated Natural Gas, 954 S.W.2d at 528; Mobile Home Estates,*** 921 S.W.2d at 9.

Findings of Fact

1. On April 4, 2008, Ameren filed tariff sheets and supporting testimony with the PSC that initiated a general rate increase case (Case No. ER-2008-0318). One of Ameren's requests in that rate case was that the PSC approve a fuel adjustment clause ("FAC"). Ameren's proposed fuel adjustment clause would allow rates to change between rate cases based upon increases or decreases in "net fuel costs" as compared to a base level of net fuel costs that would be used to set rates in the rate case. "Net fuel costs" in Ameren's proposed FAC were the sum of fuel costs and purchased power costs less off-system sales.

2. On January 27, 2009, the PSC issued its Report and Order in the rate case which approved an FAC for Ameren. The rate case Report and Order also approved base rates for

Ameren (which do not change between rate cases). The FAC and the new base rates were to take effect on March 1, 2009.

3. On January 28-29, 2009, a devastating ice storm struck Southeast Missouri. Ameren lost service to 95% of its customers in a six-county area, including to Ameren's largest single customer, Noranda Aluminum, Inc. ("Noranda"), which owns and operates a large aluminum smelting facility near New Madrid, Missouri. Ameren's loss of service to Noranda was not due to damage to any Ameren facilities in the area, but rather was due to damage to electric transmission facilities owned by Associated Electric Cooperative, Inc., on whom Noranda relies for delivery of the power it buys from Ameren. The PSC's record contains no evidence that Associated was at fault for the damage to its lines (which was caused by the ice storm) and there is also no evidence nor any allegation that Ameren was at fault.

4. When base rates were approved the previous day by the rate case Report and Order, it was assumed that Noranda's electric load during the time when those rates would be in effect would be approximately 460 megawatts – approximately 9 to 10 percent of Ameren's total load.

5. As a result of the ice storm, Noranda's electric load dropped by approximately two-thirds. This is because loss of electricity for an aluminum smelter causes severe damage to the equipment in the smelter because the molten aluminum in the "pots" used to manufacture aluminum literally "freezes" in those pots. The only way to restore them is to jack-hammer the hardened aluminum out of the pots one-by-one. Because of this, it was uncertain when or if Noranda's operations would return to normal production, but at a minimum it was clear that it would be many months (estimated at the time to be at least one year) before Noranda could conceivably fully restore production.

6. Ameren incurs substantial fixed costs to provide electric service to its customers. Those fixed costs do not vary if electric loads go up or go down. A portion of the rates approved by the PSC are designed to cover those fixed costs, while another portion of the rates are designed to cover Ameren's variable costs, most notably fuel. Ameren's fixed costs were not reduced when it experienced the extremely large reduction in electric load due to the damage to Noranda's facility. However, Ameren's retail revenues from Noranda, which the ratemaking process had designed to cover the fixed costs relating to the power that Noranda was expected to take, were significantly reduced.

7. Faced with a large potentially long-term reduction in its retail revenues without a concomitant reduction in its fixed costs, Ameren took two steps. Ameren first requested that the PSC modify its FAC so that revenues from the megawatt-hours that the ratemaking process had assumed would be sold to Noranda would be retained by Ameren in an amount equal to the revenues that would have been received from Noranda, but for the ice storm. Absent a modification to the FAC, 95% of those revenues might otherwise flow to customers through adjustments in the FAC rates because those megawatt-hours might be sold as off-system sales, which as noted earlier are an offset to fuel and purchased power costs in the FAC. If that occurred, the electric bills of all of Ameren's customers, including Noranda, would be lower than they would have been had the ice storm not occurred, and this would solely be a result of the ice storm. The revenues that made those lower electric bills possible would dollar-for-dollar reduce Ameren's revenues and have a dollar-for-dollar impact on Ameren's bottom line. Ameren's proposed modification of the FAC would have exactly mimicked what customers' bills would have been had the ice storm not occurred. The PSC declined to modify the FAC concluding that to do so would require it to reopen the record and hold a hearing and that given that the tariffs were to take effect in a short time that it was "obviously impossible" to do so

8. Because the PSC declined to modify the FAC, Ameren still faced the problem the ice storm had created: a large, potentially long-term reduction in its retail revenues without a reduction in the fixed costs those revenues were designed to pay. Consequently, Ameren entered into two contracts which it believed reflected long-term partial requirements sales. The contracts were with Wabash Valley Power Association ("WVPA") and American Electric Power Operating Companies, Inc. ("AEP"). Revenues under contracts reflecting long-term partial requirements sales do not flow to customers under the FAC tariff because such sales are specifically excluded from the definition of off-system sales in the FAC tariff under the following tariff provision:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> 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 (emphasis added).

9. The megawatt-hours sold under the WVPA and AEP contracts were the same megawatt-hours that the ratemaking process had assumed would be sold to Noranda.

10. Because of the ice storm, a situation arose which the PSC itself found was "inappropriate": Ameren bore all of the fixed costs that had been allocated to the customer class that serves Noranda (Noranda is the only customer in that class) but was no longer receiving substantial revenues from Noranda that were designed to cover those fixed costs.

11. Section 386.266, RSMo. (Cum. Supp. 2011), under which FACs are authorized, requires periodic prudence reviews of the operation of an electric utility's FAC. On August 31, 2010, the PSC's Staff filed a *Prudence Report and Recommendation* in the first such review of Ameren's FAC. The Staff's *Prudence Report* specifically stated that Ameren's decision to enter

into the WVPA and AEP contracts was prudent, but the Staff also alleged that Ameren was imprudent for how it classified those contracts. The Staff's claim was that the contracts did not reflect long-term partial requirements sales and that therefore the revenues from them must be flowed through to customers via the FAC. The Commission ultimately agreed with the Staff when it issued the Order on review here.

12. The relevant language of the FAC tariff as approved by the PSC in the rate case Report and Order is identical to the language of the FAC tariff as proposed by Ameren at the inception of the rate case.

13. In the power industry a contract is "long-term" if it has a term of one year or more.

14. In the power industry, a contract reflects a "requirements sale" if the power is needed to meet the purchaser's load serving obligations. If the power is needed to meet all of a purchaser's load serving obligation, the sale is a "full" requirements sale; if needed to meet just a part of the obligation, the sale is a "partial" requirements sale.

15. The WVPA and AEP contracts had terms of one year and fifteen months, respectively.

16. The power sold under the contracts was sold to meet a part of the purchasers' load serving obligations.

17. Not all power is sold to meet a purchaser's load serving obligations, because some power purchasers have no obligation to serve load.

18. In entering into the WVPA and AEP contracts, Ameren sought only to sell the megawatt-hours that Noranda could not take due to the ice storm for approximately the period of time Noranda's electric load was expected to be reduced.

19. The price under the subject contracts was quite close to the rate Noranda would have been charged for that same power under Ameren's rates applicable to Noranda.

20. Ameren did not seek to take advantage of the harm caused to Noranda's smelter by selling power other than the power Noranda could not take due to the ice storm.

21. The PSC defined "requirements service" in what it referred to as the "regulatory context," which it found in instructions issued by the Federal Energy Regulatory Commission ("FERC") on page 310 of the FERC's "Form 1," which was issued by the FERC at least 20 years ago. In the context of the FERC Form 1 instructions, "long-term" was defined as five years or more.

22. No witness testified that a "requirements sale" as that phrase is used in the power sales business is found in the definition of "requirements service" in the FERC Form 1 instructions.

23. In its more recent regulation of contracts like the WVPA and AEP contracts, including since the late 1990s/early 2000s after the power markets underwent significant changes, the FERC itself routinely considers contracts with a term of one year or more to be long-term. The PSC itself, in the rate case where the FAC was approved, used one year as the demarcation line between when utility debt was considered to be short- and long-term.

24. The PSC itself, in the first case where the PSC approved a FAC for a utility in Missouri post-the enactment of Section 386.266, also concluded that one year was the demarcation line between short- and long-term capacity purchase contracts as that term is used in a FAC tariff.

25. The FERC Form 1 instructions were not part of the record in the rate case when the FAC tariff was approved, and were not a basis for the Staff's recommendation in the *Staff*

Report. The definitions relied upon by some of the non-Ameren parties (from the Edison Electric Institute and the Rural Utilities Service) were based upon the FERC Form 1 instructions.

26. There were three other contracts with municipal entities that all agree reflected long-term requirements sales with terms of less than five years. The revenues from all of those contracts were excluded from operation of the FAC in the same manner that Ameren contends the revenues from the WVPA and AEP contracts should be excluded. If the definition of "long-term" in the FERC Form 1 instructions controlled, revenues under these contracts would also have to be excluded from the FAC.

27. The "regulatory context" relied upon by the Commission for its conclusion that the WVPA and AEP contracts did not reflect "requirements service" is also based on the FERC Form 1 instructions.

28. The FAC tariff does not refer to "requirements service." Instead, it refers to a requirements sale.

29. The FAC tariff was changed subsequent to the Company entering into the WVPA and AEP contracts as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> 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 to Missouri municipalities***, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission (emphasis added – new language underlined).

30. Ameren's earnings during the entire period the WVPA and AEP contracts were in effect and when retail revenues from Noranda were reduced due to the impact of the ice storm were well below the level authorized by the PSC in the rate case where the FAC tariff was approved.

Conclusions of Law

1. A utility tariff has the force and effect of law, and is consequently binding on the utility, the PSC, and the utility's customers. ***State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n***, 156 S.W.3d 513, 521 (Mo. App. W.D. 2005), *quoting* ***All-States Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.***, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996). Utility tariffs cannot be changed retroactively. *See* ***State ex rel. Utility Consumers' Council of Missouri v. Pub. Serv. Comm'n***, 585 S.W.2d 41, 58 (Mo. *banc* 1978) (an FAC tariff cannot be modified retroactively even if surcharges under it would not have been charged had the lawfulness of those charges been determined before the tariff took effect); ***Arkansas Louisiana Gas Co. v. Hall***, 452 U.S. 571, 577-78 (1981). Utility tariffs are to be interpreted in the same manner as statutes are interpreted. ***Laclede***, 156 S.W.3d at 521. The Court would note that MIEC's contention that contract construction principles govern interpretation of a utility tariff in Missouri (as may be the case for tariffs filed under federal statutes) is directly contradicted by the Supreme Court's decision in ***Laclede.*** Construction of a statute (and a utility tariff) is a question of law. *See, e.g.,* ***Delta Airlines v. Dir. of Revenue***, 908 S.W.2d 353, 355 (Mo. *banc* 1995). Consequently, this Court reviews the PSC's construction of the tariff *de novo*, with no deference given to the PSC with respect to that determination.

2. When interpreting a utility tariff, this Court must determine the intent of the PSC and the utility that filed the tariff at the time of its filing and approval. Therefore, the intention of other parties is irrelevant. If tariff language is unambiguous, it is to be given its plain and ordinary meaning, which is usually found in the dictionary. *See* ***Collins v. Dep't. of Soc. Servs.***, 141 S.W.3d 501, 505 (Mo. App. S.D. 2004). It is for the Court to determine if the tariff is ambiguous, and if a technical term in a tariff is ambiguous, it must be construed according to its technical meaning, with its technical meaning (when a business is involved) being found by

reference to how the term is used in that business. ***City of St. Louis v. Triangle Fuel Co.***, 193 S.W.2d 914, 915 (Mo. App. St. L. 1946). The phrase "long-term" and "requirements sales" are technical terms because they pertain to business. ***Bell v. Poplar Bluff Physicians Group***, 879 S.W.2d 618, 621 (Mo. App. S.D. 1994) (technical terms are those that pertain to arts, science, business, profession, sports or the like).

3. The meaning of "long-term" is ambiguous because it has no plain and ordinary meaning. A "long-term" sale under the FAC tariff is a sale of one year or more. This is because the evidence of record before the PSC was that in the power sales industry one year is the demarcation between long- and short-term contracts. This is also because the meaning of long-term could not have been based on the "regulatory context" relied upon by the Commission and its Staff because if it were there would have been three other contracts that all agreed reflected long-term requirements sales that would not have been excluded from operation of the FAC. Moreover, one year is the demarcation between short- and long-term the Commission used in the ratemaking process as it pertains to utility debt in the rate case where Ameren's FAC tariff was approved, and is also the demarcation the Commission used regarding capacity purchase contracts in approving a FAC for another utility. The foregoing conclusively demonstrates that the FERC Form 1 instructions and the "regulatory context" they provide did not underlie Ameren's or the Commission's intent when the FAC tariff was approved.

4. The phrase "requirements sale" is unambiguous because both terms within that phrase do have a plain and ordinary meaning. A "requirement" is "something required" or "something essential to the existence or occurrence of something else." *Webster's Collegiate Dictionary*. A purchaser with electric load to serve must have (needs) power. Having power is essential to the occurrence of something else – serving customers (load). The plain and ordinary meaning of the term "sale" is "the transfer of ownership of and title to property from one person

to another for a price." *Webster's Collegiate Dictionary.* A sale of power occurred between Ameren and WVPA and AEP.

5. Even if the terms "requirements" and "sale" or the phrase "requirements sale" were ambiguous, one must look to the meaning of those terms or that phrase as used in the power sales business. While the Commission concluded that in the "regulatory context" it relied upon in the Order "requirements service" had the meaning from the FERC Form 1 instructions (and apparently assumed that "requirements service" and "requirements sale" were synonymous), the FERC Form 1 could not have supported the meaning of the terms at issue. This is because as noted the FERC Form 1 instructions were not before the Commission in the rate case when the FAC tariff was approved and, even more telling, the FERC Form 1 instructions cannot be relied upon to determine what the subject contracts meant because the definition of "long-term" in those instructions was conclusively shown to be inapplicable. There is no basis on the record before the PSC to conclude that parts of the FERC Form 1 instructions did underlie their intent while parts did not. The FERC Form 1 instructions must apply *in toto* or not at all. Moreover, even if a "regulatory context" were relevant the PSC's own demarcation between short- and long-term – one year – is a more appropriate "regulatory context" than 20-year-old instructions in the FERC Form 1 that it is demonstrated were not before the PSC in the rate case where Ameren's FAC tariff was approved and which could not apply in any event given that the other three contracts would also have to be included in the FAC.

6. The PSC also erred in concluding that excluding the revenues from the WVPA and AEP contracts would "deprive [Ameren's] ratepayers of the benefit of the bargain implicit in the Commission's approval of the fuel adjustment clause . . .." *Order*, p. 22. The "benefit" the PSC referred to was the lower rates that resulted from flowing the revenues from the WVPA and AEP contracts through to customers via the FAC. Implicit in attempting to hold Ameren to this

"bargain" is the erroneous conclusion, discussed earlier, that these contracts did not reflect long-term partial requirements sales. Because these contracts did reflect such sales, the "bargain" reflected in the FAC tariff was that the revenues would not be covered by the FAC and would belong to Ameren.

7. The foregoing demonstrates that the PSC erred as a matter of law when it construed the FAC tariff in a manner such that the WVPA and AEP contracts did not qualify as contracts that reflected long-term partial requirements sales. This is because, under the FAC tariff as properly construed as a matter of law, both contracts do reflect long-term requirements sales.

8. The foregoing also demonstrates that the PSC was unreasonable in how it construed the FAC tariff. Substantial and competent evidence on the whole record does not support the conclusion that the FERC Form 1 instructions and their definitions of "long-term" or "requirements service" were intended to apply to Ameren's FAC tariff. To the contrary, substantial and competent evidence on the whole record supports only that the contracts did reflect long-term partial requirements sales. The PSC also abused its discretion by ordering the very result that it had concluded was inappropriate: requiring Ameren to bear the fixed costs Noranda's retail revenues no longer covered because of the ice storm while giving the benefits of the revenues from the megawatt-hours Noranda could not take to customers, thereby lowering customer bills with dollars that but for the ice storm customers would never have received. This shocks this Court's sense of justice and consequently constitutes an abuse of discretion. ***See Bowman v. McDonald's Corp.***, 916 S.W.2d 270, 276 (Mo. App. W.D. 1995) (an abuse of discretion has occurred if the action of the lower tribunal shocks the reviewing court's sense of justice).

9. The Order is also unlawful because it effectively rewrites the FAC tariff as follows:

> OSSR = Revenues from Off-System Sales allocated to Missouri electric operations.
>
> Off-System Sales shall include all sales transactions (including MISO revenues in FERC Account Number 447), excluding Missouri retail sales and *sales under* long-term *contracts to* provide full and partial requirements *service* ~~sales~~ *to Missouri municipalities and rural electric cooperatives*, that are associated with (1) AmerenUE Missouri jurisdictional generating units, (2) power purchases made to serve Missouri retail load, and (3) any related transmission (italicized words added).

That the FAC tariff was not so limited is borne out by the fact that the FAC tariff was later changed (to limit it to long-term requirements sales to Missouri municipalities). The tariff amendment was a change because when a statute (or a tariff here) is changed "such change is deemed to have an intended effect, and the legislature [the PSC and the Company here] will not be charged with having done a meaningless act." *See, e.g.,* ***Lombardo v. Lombardo***, 35 S.W.3d 386, 390 (Mo. App. W.D. 2000) (holding that when a child support statute was amended to add the words "and complete" to the requirement that a child enroll in 12 hours of classes the additional words had to be given effect – the same is true here; otherwise, adding the language "to Missouri municipalities" to the FAC tariff would have been a "meaningless act".).

10. The Order is also unlawful because it fails to apply the FAC tariff in a manner that is consistent with the statute it was designed to implement. This is because §386.266 requires that a FAC be "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." Given the magnitude of the revenues lost when the ice storm damaged Noranda's facility and the fact that it is undisputed that during the entire relevant period Ameren's earnings were well below the level authorized in the rate case where the FAC tariff was approved, dictating that the revenues from the WVPA and AEP contracts flow to

customers through the FAC results in Ameren's actual, earned return being anything but the fair return on equity required by the statute.

11. The Order is also unlawful because the PSC lacked authority to order refunds in this case absent a legitimate finding of imprudence and a legitimate finding that any imprudence actually harmed customers. A utility acts "prudently" if its conduct was "reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight." ***Assoc. Natural Gas***, 954 S.W.2d at 528-29. The PSC's task in determining whether the utility was imprudent is to "determine how reasonable people would have performed the tasks that confronted the company." ***Id.*** Put another way: "The Commission will assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" ***In the Matter of Union Electric Co.,*** 27 Mo.P.S.C. (N.S.) 183, 193 (1985), *quoting* ***Anaheim, Riverside, etc. v. Federal Energy Regulatory Comm'n***, 669 F.2d 779 (D.C. Cir. 1981) (citations omitted).

It is undisputed that Ameren was prudent when it entered into the subject contracts. The Court would note that the Staff's allegation in the *Staff Report* to the effect that Ameren was imprudent in how it "classified" the contracts is not an allegation of imprudence. The contracts either do or do not reflect long-term requirements sales. The manner in which Ameren or the Commission "classified" them cannot change what they actually are, and has nothing to do with imprudence.

Even if Ameren were somehow "imprudent," a utility is not to suffer consequences from an imprudent act unless it causes ratepayers harm. The PSC recognized this principle at page 16, ¶ 4 of the Order, where it cites ***Associated Natural Gas*** for that proposition. As noted earlier,

there was no harm to ratepayers because but for the ice storm, the dollars collected by Ameren under the requirements sales to AEP and WVPA would have been paid by Noranda for the very same power that AEP and WVPA took, and the charges under the FAC would have been exactly what those charges were before the PSC ordered refunds under the Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Order be and the same hereby is reversed on the grounds that the Order is unlawful and unreasonable as follows:

1. Because the PSC erred as a matter of law in concluding that the WVPA and AEP contracts did not reflect long-term partial requirements sales, which means that the PSC unlawfully failed to apply the FAC tariff as written;
2. Because in addition to being unlawful, the PSC's construction of the FAC tariff was also unreasonable because substantial and competent evidence of record did not support the conclusion that the FERC Form 1 instructions and their definitions of "long-term" or "requirements service" were intended to apply to Ameren's FAC tariff;
3. Because the PSC abused its discretion by ordering an inappropriate result; that is, that Ameren bear the fixed costs associated with supplying the megawatt-hours Noranda could not take and that were sold to WVPA and AEP while customers retained the revenues associated with those same megawatt-hours only because of the occurrence of the ice storm;
4. Because the PSC unlawfully rewrote the FAC tariff by effectively limiting it to long-term full or partial requirements sales to Missouri municipalities or rural electric cooperatives, although the FAC tariff at the relevant time contained no such limitation;

5. Because the PSC unlawfully failed to apply the FAC tariff in a manner consistent with the requirement of §386.266 that all FAC tariffs be reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity;
6. Because the PSC unlawfully ordered refunds to customers based upon allegations of imprudence where the record supports only the conclusion that Ameren acted prudently in entering into the WVPA and AEP contracts; and
7. Because the PSC acted unlawfully (even had imprudence been established) and because imprudence did not cause harm to ratepayers in that but for the ice storm the dollars collected by Ameren under the WVPA and AEP contracts would have been paid by Noranda for the very same power WVPA and AEP took, and the charges under the FAC to ratepayers would have been exactly the same as those charges were before the PSC ordered refunds.

This cause is HEREBY REMANDED to the Commission for further action.

Jon E. Beetem
Circuit Judge, Div. One
Dated: 5/21/12