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.	))))	File No. EO-2012-0074

STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through counsel, and for its *Initial Brief*, states as follows:

Executive Summary

The case presents the issue of Ameren Missouri's willful attempt to evade the plain language of its Fuel Adjustment Clause ("FAC") tariff and deprive its ratepayers of the benefit of revenues realized from certain off-system sales. Following an ice storm in 2009 that disrupted the operations of Noranda Aluminum, Ameren Missouri's largest single customer, Ameren Missouri faced the loss of some $90 million in retail sales on an annual basis. Ameren Missouri then entered into off-system sales agreements with American Electric Power ("AEP") and Wabash Valley Power Association ("Wabash"). Ameren Missouri's FAC tariff, which Ameren Missouri designed and this Commission approved at Ameren's request, provides that revenues from Missouri retail sales and long-term requirements sales do not flow through the FAC, while revenues from off-system sales do flow through the FAC and offset the fuel and purchased power costs otherwise charged to the ratepayers. For this reason, Ameren Missouri attempted to characterize the AEP and Wabash contracts as long-term requirements sales. This Commission has already once rejected Ameren Missouri's attempt to evade the language of its FAC tariff

(Case EO-2010-0255) and Staff now urges the Commission to do so again and to order Ameren Missouri to refund to the ratepayers the more than $26 million improperly diverted from them.

Introduction

This case is the second prudence review of the Fuel Adjustment Clause ("FAC") of Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"). Prudence reviews, at an interval no greater than eighteen months, are required by Ameren Missouri's Fuel Adjustment Clause (FAC) tariff,[1] by Rule 4 CSR 240-20.090(7), and by Section 386.266.4(4), RSMo.[2] The Missouri Public Service Commission ("Commission") first authorized a FAC for Ameren Missouri in Case No. ER-2008-0318. It became effective on March 1, 2009.[3]

Procedural History:

Staff filed its *Notice of Start of Prudence Audit* on September 8, 2011, advising the Commission, Ameren Missouri, and all interested parties that it intended to conduct a prudence review of the costs and revenues associated with Ameren Missouri's FAC for the period October 1, 2009, through May 31, 2011, and that it intended to make two filings reporting on its review.[4] The review period encompassed the third through seventh accumulation periods since Ameren Missouri's FAC first became effective.[5] On October 28, 2011, Staff filed its *Prudence Report and Recommendation Regarding Wabash and AEP Contracts* concluding that "Ameren Missouri was imprudent for not including all costs and revenues associated with certain sales of energy" to Wabash Valley Power Association ("Wabash") and to American Electric Power Operating

[1] Union Electric Company Tariff P.S.C. MO. No. 1, 1st revised Sheet No. 98.6.

[2] All references to the Revised Statutes of Missouri ("RSMo."), unless otherwise specified, are to the revision of 200 as currently updated, amended and supplemented.

[3] *In the Matter of Union Electric Company d/b/a AmerenUE for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Company's Missouri Service Area*, Case No. ER-2008-0318, Order Approving Compliance Tariff Sheets, issued February 19, 2009, effective March 1, 2009.

[4] *Staff's Notice of Start of Prudence Audit*, filed September 8, 2011, EO-2012-0074.

[5] *Id*.

Companies ("AEP") in its calculation of FAC charges.[6] On February 29, 2012, Staff filed *Staff's Second Prudence Report*, which reported the completed Staff's prudence review and that it found no additional imprudence in connection with Ameren Missouri's FAC.[7]

Ameren Missouri submitted a request for a hearing on March 7, 2012.[8] On March 30, 2012, the Commission established a procedural schedule that set an evidentiary hearing for June 14-15, 2012, and directed several other filings, including a list of issues.[9] At Staff's request, the Commission modified the procedural schedule, setting the hearing for June 21-22, 2012.[10]

Issues:

Pursuant to the procedural schedule the Commission ordered, the parties filed a joint pleading on June 12, 2012,[11] stating the five issues to be determined by the Commission. They are:

> 1. Are the revenues derived from the power sales agreements between Ameren Missouri and counter-parties Wabash Valley Power Association, Inc. ("Wabash") and American Electric Power Service Corporation as agent for the AEP Operating Companies ("AEP") excluded from the definition of "OSSR" found in the Original Tariff Sheets Nos. 98.2 and 98.3 of Ameren Missouri's Fuel and Purchase Power Adjustment Clause, which took effect March 1, 2009?
>
> 2. Was it imprudent, improper and/or unlawful for Ameren Missouri to exclude the Company's power sale agreements with AEP and Wabash from off-system sales and not include the revenues collected under the Company's power sale agreements with AEP and Wabash in OSSR and therefore, not include those revenues in its calculation of the Fuel and Purchased Power Adjustment rates for the time period of October 1, 2009, to June 20, 2010?

[6] Staff's Prudence Report and Recommendation Regarding Wabash and AEP Contracts, filed September 12, 2011, EO-2012-0074.

[7] *Staff's Second Prudence Report (NP and HC)*, filed February 29, 2012, EO-2012-0074.

[8] Ameren Missouri's Second Request for Hearing, filed March 7, 2012, EO-2012-0074.

[9] *Order Setting Procedural Schedule*, filed March 30, 2012, EO-2012-0074.

[10] Order Granting Motion to Modify Procedural Schedule, filed April 13, 2012, EO-2012-0074.

[11] Joint List of Issues, List and Order of Witnesses, Order of Opening Statements, and Order of Cross-Examination, filed June 12, 2012, EO-2012-0074.

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

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

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

Prudence Review Standard:

The standard for prudence reviews is well-established and was summarized by the Western District Court of Appeals in *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of State of Mo.*,[12] when it said, "A utility's costs are presumed to be prudently incurred . . . However, the presumption does not survive 'a showing of inefficiency or improvidence.'"[13] Prudence cases are difficult from Staff's point of view because Staff bears the burden of making an initial showing of imprudence:

> [W]here some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.[14]

Thus, it is the parties challenging the decisions and expenditures of a utility that have the initial burden to defeat the presumption of prudence accorded the utility.[15] Once this burden is met, however, it is the Company's responsibility to show that its conduct was reasonable at the time, under all of the circumstances.[16]

In short, for the purpose of evaluating the prudence of a utility's conduct, the

[12] 954 S.W.2d 520, 528-29 (Mo.App. W.D., 1997).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*; *see also State ex rel. GS Technologies Operating Company, Inc. v. Public Service Commission*, 116 S.W.3d 680 (Mo. App., W.D. 2003).

Commission has adopted a standard of reasonable care requiring due diligence.[17] In other words, "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?"[18]

Argument

Staff recommends the Commission find, as it has already done for a prior audit period, that Ameren Missouri "acted imprudently, improperly and unlawfully" when it did not include in its FAC all costs and revenues associated with the sales of energy to Wabash and AEP and, therefore, that Ameren Missouri should refund to its customers over $ 26 million, plus interest, for the audit period of October 1, 2009, through May 31, 2011[19]

Fuel Adjustment Clause

A FAC is a device for reducing regulatory lag. Regulatory lag is the period of time that elapses between the occurrence of some change in operating conditions that would entitle the utility to collect more, or less, money from its retail customers and the effective date of the new tariffs that allow it to actually collect that extra, or less, money. In Missouri, a general rate case takes eleven months from start to finish, so regulatory lag is at least that long. To address volatility in the significant fuel and purchased power costs beyond Ameren Missouri's control, the Commission approved a FAC for Ameren Missouri in Case No. ER-2008-0318. Ameren Missouri's FAC allows it to pass changes in fuel and purchased power costs on to customers in rates without first having to undergo the eleven months of the general rate case process.

[17] *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 194 (1985).

[18] *Id*.

[19] Staff's Prudence Report and Recommendation Regarding Wabash and AEP Contracts, filed October 8, 2011, EO-2012-0074.

For the points at issue in this case, it is important to understand the mechanics of Ameren Missouri's FAC. First, a certain base amount of fuel costs net of off-system sales ("OSS") margins are built into the general rates that result from Ameren Missouri's general rate cases. It is 95% of the difference between this base amount and the amount Ameren Missouri actually pays for fuel and purchased power net of OSS margins during every four-month long accumulation period that is passed on to customers through its FAC. The other five percent is the responsibility of (or benefit to) Ameren Missouri's shareholders. This sharing is intended to incent Ameren Missouri's executives to manage fuel and purchased power costs efficiently and to maximize OSS. If there is an under-recovery during an accumulation period—that is, if Ameren Missouri spends more for fuel and purchased power or the OSS margin is less than the base amount—95% of the difference is then recovered from its customers over the following twelve months. So, by way of example, if Ameren spends $10 million more on fuel and purchased power net of OSS margins during an accumulation period than the base amount, $9.5 million will be collected from ratepayers through its FAC over the following twelve months.

The reverse is also true. If Ameren Missouri spends less on fuel and purchased power and generates more OSS margin than the base amount during an accumulation period, 95% of the difference is returned to its retail customers over the following twelve months, and Ameren Missouri's shareholders keep the other five percent. Ameren Missouri's FAC is therefore fair to both Ameren Missouri and to its customers. Ameren Missouri is assured of relatively quickly recovering almost all of its fuel and purchased power costs without the delay and expense of a major rate case. Equally, Ameren Missouri's retail customers are assured of quickly getting the benefit of lower-than-expected fuel and purchased power costs.

Off-System Sales

Just as Ameren Missouri's customers are responsible for the cost of power that Ameren Missouri prudently purchases to serve them, in addition to the fuel Ameren Missouri purchases and burns to drive its generators, they are also entitled to receive the benefit of money that Ameren Missouri makes selling power at wholesale. These sales are called "off-system sales." Per the FAC's design, Ameren Missouri's customers receive the benefit of 95% of any off-system sales, and Ameren Missouri's shareholders receive the remaining 5%. In other words, the amount of any under-recovery of fuel and purchased power costs during an accumulation period, for which customers are responsible, is calculated by subtracting 95% of any revenue from off-system sales; and the amount of any over-recovery of fuel and purchased power costs during an accumulation period, which Ameren Missouri must refund to its customers, is increased by adding 95% of any revenue from off-system sales.

When Ameren Missouri's FAC was designed, certain wholesale revenues were carefully excluded from off-system sales. Ameren Missouri's customers received no benefit from these sales and the costs to serve these wholesale customers where not paid by Ameren Missouri's customers. The contracts underlying these wholesale revenues are entered into as part of a long-term relationship where the buyer resells the power to end-users. The contracts are with municipal utilities where the city buys power wholesale for the purpose of reselling that power to its citizens. These cities do not have their own generation and must buy power, year in and year out, to meet the requirements of their customers. These sales reflect long-standing relationships between Ameren Missouri and the cities, relationships so long-standing that Ameren Missouri actually plans for these sales in its integrated resource planning. Ameren Missouri ensures that it

has the capacity to meet the requirements of these cities. The actual language of Ameren Missouri's tariff regarding off-system sales that controls for this audit period follows:[20]

> 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.

Per the tariff, retail sales and long-term requirements sales are not considered off-system sales and are not part of the FAC calculations. Thus, Ameren Missouri's retail customers receive 95% of the benefit of any off-system sales, but no benefit at all from long-term full and partial requirements sales for which the Ameren Missouri customers were not paying the cost to serve. On the other hand, Ameren Missouri receives 100% of the benefit from long-term full and partial requirements sales, but only 5% of the benefit from off-system sales.

The AEP and Wabash Contracts

On January 28, 2009, an ice storm struck southeastern Missouri. The ice storm damaged transmission lines serving the aluminum smelter operated by Noranda Aluminum ("Noranda") in New Madrid, Missouri. At that time, as now, Noranda was Ameren Missouri's single largest customer. Noranda lost two-thirds of its smelting capacity because of the storm and, as a result, only required one-third of the electricity that Ameren Missouri planned to sell to the plant. On an annual basis, Ameren Missouri lost sales worth approximately $90 million per year. The Noranda sales were Missouri retail sales and thus were not part of the FAC calculations. Ameren Missouri retained all the revenues received from selling power to Noranda.

The ice storm occurred the day after this Commission issued its Report and Order in Case No. ER-2008-0318, the general rate case where it first approved Ameren Missouri's FAC. The

[20] Exhibit 8 HC, Direct/Rebuttal Testimony of Dana E. Eaves, Sch. DEE-1 (Staff's Prudence Report and Recommendation Regarding Wabash and AEP Contracts, filed October 8, 2011, EO-2012-0074), p. 2.

ice storm resulted in Ameren Missouri having a large amount of extra power to sell—the power that it had planned to sell to Noranda. However, its newly-created FAC meant that Ameren Missouri would only retain 5% of any revenues from selling that power off-system, that is, to anyone other than its Missouri retail customers. This is the central issue of this case.

Ameren Missouri found itself in a difficult situation following the ice storm. First, Ameren Missouri requested the Commission modify its FAC so that Ameren Missouri would retain a portion of its off-system sales revenues that would otherwise be passed through the FAC.[21] The Commission denied Ameren Missouri's request due to lack of time to reopen the record and render a new decision before the operation of law date.[22] Ameren Missouri's next attempt to mitigate the decrease in expected revenues was to enter into two new power sales contracts, one with AEP and the other with Wabash. Ameren Missouri intentionally did its best to make these two new contracts look like long-term full or partial requirements sales because, under its new FAC, that was the only way for it to retain the earnings from sale of the power that had been ear-marked to Noranda. The AEP contract was for 100 MW over 15 months; the Wabash contract was for 150 MW over 18 months. This is approximately the length of time that Ameren Missouri expected Noranda to take to return to full operation after the ice storm.

The crux of this case is that Ameren Missouri insists that the power sales to AEP and Wabash were "long-term full or partial requirements sales" under its FAC, and that it should be allowed to retain 100% of the revenues associated with those contracts. Staff, as well as the Office of the Public Counsel, Missouri Industrial Energy Consumers, and Barnes Jewish Hospital, insist that the power sales to AEP and Wabash were off-system sales and that, per its

[21] Order Denying AmerenUE's Application for Rehearing, filed February 19, 2009, ER-2008-0318

[22] *Id.*

FAC, Ameren Missouri may only retain 5% of the revenues from those sales. Ameren Missouri's customers are due the remaining 95% of the revenues from those sales.

Issue 1: Were the AEP and Wabash Contracts Off-System Sales?

This Commission has already decided this question in a prior case. In its Report and Order in EO-2010-0255, the Commission rejected Ameren Missouri's argument that the AEP and Wabash contracts were requirements sales rather than off-system sales.[23] The revenues derived from the power sales agreements between Ameren Missouri and Wabash, and Ameren Missouri and AEP are not excluded from the definition of off-system sales found in Original Tariffs Sheets Nos. 98.2 and 98.3 of Ameren Missouri's FAC. According to Staff witnesses Lena Mantle[24] and Dana Eaves,[25] and Missouri Industrial Energy Consumers witness Maurice Brubaker,[26] these contracts are indisputably off-system sales because they are not sold to Ameren Missouri's Missouri retail customers. The only party that argues the contracts should be interpreted as long-term requirements sales is Ameren Missouri.

The Commission concluded in the previous case on this issue that:

> [T]he Wabash and AEP contracts are not long-term full or partial requirements contracts as defined by Ameren Missouri's tariff. They simply do not have the characteristics to qualify as such contracts. Ameren Missouri calls them such, but it must stretch the definition beyond the breaking point to do so.[27]

The Commission also reasoned that, if it accepted Ameren Missouri's argument, the FAC tariff's definition of off-system sales would be nearly meaningless.[28] Under Ameren Missouri's

[23] 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, Report and Order, issued April 27, 2011, EO-2010-0255, pg 20-21.

[24] Exhibit 9, Mantle Direct/Rebuttal Testimony, pg. 5-8.

[25] Exhibit No. 8, Eaves Direct/Rebuttal Testimony, pg. 15-19.

[26] Exhibit No. 10, Brubaker Direct Testimony, pg. 4-9.

[27] *Id.*

[28] *Id.*

interpretation, "nearly any sales contract of over one-year duration would qualify as a long-term full or partial requirements contract that could be excluded from the fuel adjustment clause."[29] Clearly, it could not have been the intent of the Commission or the parties involved in establishing the FAC that Ameren Missouri would be able to "choose unilaterally to define an off-system sale out of the fuel adjustment clause and thereby increase its profits at the expense of its ratepayers."[30] In short, as the Commission has concluded, "[C]alling a dog a duck does not make it quack, and calling Ameren Missouri's contracts with Wabash and AEP long-term full or partial requirements contracts does not make them so."[31]

Issue 2: Was Ameren Missouri's Conduct Imprudent?

It was imprudent for Ameren Missouri to exclude the revenues derived from the power sales agreements with AEP and Wabash from the off-system sales component of Ameren Missouri's FAC calculations for the time period of October 1, 2009, to June 20, 2010.[32] The Commission agreed in its EO-2010-0255 Report and Order that, in deciding to exclude the AEP and Wabash contracts from the FAC calculation by redefining these off-system sales as requirements contracts, Ameren Missouri acted "imprudently, improperly, and unlawfully."[33]

Issue 3: Did Ameren Missouri's Conduct Harm Ratepayers?

Ameren Missouri's conduct resulted in harm to its ratepayers because they paid over $26 million more for service than they would have paid had Ameren Missouri calculated its FPA

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Exhibit No. 8, Eaves Direct/Rebuttal Testimony, Schedule DEE – 3-9, Prudence Review of Costs and Revenues in the Fuel Adjustment Clause of Union Electric Company, d/b/a Ameren Missouri, Related to Ameren Missouri's Contracts with Wabash Valley Power Association and American Electric Power Operating Companies, pg. 7.

[33] *Id.* at pg. 2.

rates for the time period of October 1, 2009, to June 20, 2010, lawfully.[34]

When Ameren Missouri took on Noranda as a customer, it accepted the risk that accompanied taking on a single customer that used so much electricity and provided such a large amount of revenue. When Ameren Missouri requested a FAC that included revenues from contract sales in it, Ameren Missouri was accepting the risk that Noranda might suddenly stop using a large amount of electricity.[35] When the Commission approved the FAC that Ameren Missouri requested, the risk of changes in fuel costs was shifted from Ameren Missouri to its customers[36] and that the revenues from selling that electricity to others instead of Noranda would flow through the FAC.[37] If Ameren Missouri's customers bear the burden of increases in fuel costs, they should benefit when Ameren Missouri's fuel and purchased power costs decrease.[38] The FAC would be oddly inequitable if Ameren Missouri's customers bear the risk of increases in fuel costs less off-system sales revenue but do not receive the benefits of decreasing fuel costs less off-system sales revenue.[39] Furthermore, this Commission has already said as much.[40] In its Report and Order in Case No. EO-2010-0255, the Commission considered Ameren Missouri's argument that the ratepayers were not harmed by the treatment of the AEP and Wabash contracts.[41] The Commission determined Ameren Missouri's argument was contrary to the spirit of the FAC, explaining:

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[34] Exhibit No. 8, Eaves Direct/Rebuttal Testimony, pg. 13, lines 18-23.

[35] Exhibit No. 9, Mantle Direct/Rebuttal Testimony pg. 14, lines 18–20.

[36] Exhibit No. 8, Eaves Direct/Rebuttal Testimony at pg. 14, lines 3-5.

[37] Exhibit No. 9, Mantle Direct/Rebuttal Testimony pg. 14, line 20–pg. 15, line 2.

[38] Exhibit No. 8, Eaves Direct/Rebuttal Testimony at pg. 14, lines 5-6.

[39] *Id*. at lines 9-12.

[40] First Prudence Review of Costs, pg 22.

[41] 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, Report and Order, issued April 27, 2011, EO-2010-0255.

> Ameren Missouri's argument would however deprive its ratepayers of the benefit of the bargain implicit in the Commission's approval of the fuel adjustment tariff language . . . . The bargain implicit in the approved fuel adjustment clause is that ratepayers will pay more to help the company when the utility's fuel costs rise or offsetting revenue from off-system sales drop. On the other hand, ratepayers will benefit from decreased rates if fuel costs drop or offsetting revenue from off-system sales increase. Here offsetting revenue from off-system sales, as those revenues were defined in the tariff, increased and ratepayers should have benefited . . . ."[42]

Ameren Missouri's understanding of its FAC would assign all of the risk of loss to its retail customers and all of the chance of gain to itself. That is not what this Commission intended when it approved Ameren Missouri's FAC, and it is not what the parties who agreed to the language of Ameren Missouri's FAC intended.

Issue 4: Should Ratepayers Receive a Refund?

Ameren Missouri should refund to its ratepayers through its FAC what was collected from them by the imprudent, improper, and unlawful conduct described above.[43] In Case No. EO-2012-0255, the Commission agreed with this conclusion and ordered that Ameren Missouri refund to its customers by flowing through its FAC the revenues it collected through the AEP and Wabash contracts.[44]

Issue 5: What Amount Should Ameren Missouri Refund?

Ameren Missouri should refund over $26 million, plus interest from May 31, 2011, until refunded, at Ameren Missouri's short-term borrowing rate. This amount represents the costs and

[42] *Id*. at 22.

[43] Exhibit No. 8, Eaves Direct/Rebuttal, pg. 12, lines 18-26; Exhibit No. 8, Eaves Direct/Rebuttal Testimony, Schedule DEE – 3-9, *Prudence Review of Costs and Revenues in the Fuel Adjustment Clause of Union Electric Company, d/b/a Ameren Missouri, Related to Ameren Missouri's Contracts with Wabash Valley Power Association and American Electric Power Operating Companies*, pg. 7; Exhibit No. 9, Mantle Direct/Rebuttal Testimony, pg. 15, lines 4-7.

[44] First Prudence Review of Costs, pg 22.

revenues associated with AEP and Wabash capacity and energy sales that should have flowed through the FAC calculation for the periods under review.[45]

In Case No. EO-2010-0255, the Commission ordered Ameren Missouri to refund to its retail customers these same costs and revenues for a different time period.[46] There is no dispute among the parties as to the calculation of this refund, except for Ameren Missouri, who argues that a black box settlement amount in Case No. ER-2010-0036 should reduce the amount it owes to its retail customers in this case.[47] In Case No. ER-2012-0036, the parties signed a *Second Nonunanimous Stipulation and Agreement* (Stipulation) to settle the issue of how the AEP and Wabash contracts would be treated in that general rate increase case, but not future cases.[48] The Stipulation did not resolve the issue of how to address the AEP and Wabash contracts in Ameren Missouri's FAC.[49] In fact, the language of the Stipulation specifically left the parties free to take any position on the AEP and Wabash sales in later cases.[50] The Stipulation states:

> The signatories expressly agree this Stipulation does not, and is not intended to, preclude any party from taking any position in this or in any subsequent Commission case including the position that these AEP and Wabash contracts, for periods prior to the effective date of new rates from this case, should be treated as off-system sales for purposes of AmerenUE's current fuel adjustment clause.[51]

Therefore, the Commission should determine the amount to refund to Ameren Missouri's customers independently from the terms of the Stipulation; the Stipulation is not relevant to these proceedings.[52]

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[45] Exhibit No. 8, Eaves Direct/Rebuttal Testimony, pg. 13, lines 15-26.

[46] First Prudence Review of Costs, pg 22.

[47] Exhibit No. 5, Weiss Direct Testimony, pg. 4, lines 4-6.

[48] Exhibit No. 9, Mantle Direct/Rebuttal Testimony, pg. 9-10.

[49] *Id*. at pg. 10, lines 1-6.

[50] *Id*. at pg. 11, lines 1-35.

[51] *Id*. at pg. 11, lines 18-23.

[52] Exhibit No. 3, Meyer Direct Testimony, pg. 3, lines 14-16.

Circuit Court Decision

On May 21, 2012, Judge John Beetem of the Circuit Court of Cole County issued a judgment on Ameren Missouri's appeal of this Commission's Report and Order in the First Prudence Review discussed above, Case No. EO-2012-0255.[53] Judge Beetem disagreed with the Commission's Report and Order and remanded the case to the Commission for further review.[54] On June 26, 2012, this Commission appealed that judgment to the Western District Court of Appeals. Pursuant to Section 536.140 RSMo, the appellate court will review the Commission's decision, not the Circuit Court's judgment.[55] Therefore, the Commission need not defer to the Circuit Court's reasoning or to Ameren Missouri's presentation of that decision as persuasive.

Conclusion

Ameren Missouri's Fuel Adjustment Clause has worked exactly as it was designed to work. No one expected the 2009 ice storm, but an event such as that one was one of the risks that Ameren Missouri accepted when it asked for authority for a FAC. Contrary to Ameren Missouri's assertion, there is no windfall for its retail customers. In fact, Ameren Missouri's customers have shouldered the burden of the storm restoration costs. Staff urges the Commission to again apply Ameren Missouri's FAC according to its language, as the parties that agreed to it intended. Staff urges the Commission to once again conclude that Ameren Missouri acted "imprudently, improperly and unlawfully" and order Ameren to refund $26 million, plus

[53] State ex rel. Union Electric Company d/b/a Ameren Missouri v. Public Service Commission of the State of Missouri, Case No. 11AC-CC00336, filed May 21, 2012.

[54] *Id*. at pg. 16.

[55] Section 526.140 RSMo (2000). *See also*, *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 152 (Mo. 2003). "On appeal, this Court reviews the AHC's decision, rather than that of the trial court, to determine whether the agency action: (1) Is in violation of constitutional provisions; (2) Is in excess of the statutory authority or jurisdiction of the agency; (3) Is unsupported by competent and substantial evidence upon the whole record; (4) Is, for any other reason, unauthorized by law; (5) Is made upon unlawful procedure or without a fair trial; (6) Is arbitrary, capricious or unreasonable; (7) Involves an abuse of discretion."

interest from May 31, 2011, until refunded, at Ameren Missouri's short-term borrowing rate, to its customers through its Fuel Adjustment Clause.

WHEREFORE, because of the foregoing, Staff prays the Commission to (1) find Ameren Missouri acted imprudently in excluding from its FAC calculations the costs and revenues associated with sales of energy to AEP and Wabash during the period from October 1, 2009, to June 20, 2010, (2) order Ameren Missouri to refund to its customers over $26 million, plus interest from May 31, 2011, until refunded, at Ameren Missouri's short-term borrowing rate, and (3) grant such other and further relief as is just in the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed with first-class postage, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 20th day of July, 2012.

/s/ Amy E. Moore