REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF

THE STATE OF MISSOURI

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Volume 21 MPSC 3d

August 10, 2011 – December 31, 2011

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Morris Woodruff

Reporter of Opinions

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JEFFERSON CITY, MISSOURI

(2017)

PREFACE

This volume of the *Reports of the Public Service Commission of the State of Missouri* contains selected Reports and Orders issued by this Commission during the period beginning August 1, 2011 through December 31, 2011. It is published pursuant to the provisions of Section 386.170, et seq., Revised Statutes of Missouri, 2016.

The syllabi or headnotes appended to the Reports and Orders are not a part of the findings and conclusions of the Commission, but are prepared for the purpose of facilitating reference to the opinions. In preparing the various syllabi for a particular case an effort has been made to include therein every point taken by the Commission essential to the decision.

The *Digest of Reports* found at the end of this volume has been prepared to assist in the finding of cases. Each of the syllabi found at the beginning of the cases has been catalogued under specific topics which in turn have been classified under more general topics. Case citations, including page numbers, follow each syllabi contained in the Digest.

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KEVIN D. GUNN	TERRY M. JARRETT
ROBERT S. KENNEY	

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REPORTS OF
THE PUBLIC SERVICE COMMISSION
OF THE
STATE OF MISSOURI

In the Matter of the Joint Application of Taney County Utilities Corporation and Taney County Water, LLC for authority of Taney County Utilities Corporation to sell certain assets to Taney County Water, LLC

File No. WM-2011-0143

Water §4 Transfer, lease and sale. The Commission has no statutory authority to approve a sale of utility property retroactively. Such sale was approved effective with the Commission's order.

ORDER APPROVING APPLICATION

Issue Date: August 10, 2011 Effective Date: August 20, 2011

The Missouri Public Service Commission is approving the application for sale of a water system ("application") as of the effective date of this order.

A. Procedure

On November 18, 2010, Taney County Utilities Corporation ("Utilities Corporation") and Taney County Water, LLC, ("Water LLC"), (together, "applicants") filed the application. By order dated November 22, 2011, the Commission gave notice of the application. On July 18, Water LLC filed a certificate showing service of tax revenue impact information.[1]

On March 4, 2011, Staff filed its recommendation in favor of granting the application with certain conditions. On March 14, 2011, the Office of the Public Counsel ("OPC") filed a response to the recommendation. On June 16, 2011, Staff filed its *Supplemental Recommendation*, suggesting additional conditions.

On June 29, 2011, the Office of the Public Counsel ("OPC") filed a response stating that OPC has no opposition to Staff's *Supplemental Recommendation*. Applicants filed no response to Staff's *Supplemental Recommendation* within the time provided.[2] The Commission received no application for intervention within the time provided.[3] No law requires a hearing to approve the unopposed application. Therefore, the Commission will determine all

[1] Section 393.190.1. All sections are in RSMo 2000.
[2] June 30, 2011, by order dated June 20, 2011.
[3] August 2, 2011, by the order dated July 7, 2011.

issues based on the verified pleadings,[4] and without separately stating its findings of fact.

B. Discussion

The application seeks the Commission's authorization to sell Utilities Corporation's water system to Water LLC ("the sale"), which the Commission will only deny if approval would be detrimental to the public interest.[5]

i. Conditions

Staff and the applicants agree that the public interest favors the sale. Staff recommends that the Commission approve the sale subject to certain unopposed conditions. All such conditions appear in the ordered paragraphs below, except the effective date of the authorization, as to which the facts and law are as follows.

ii. Effective Date

On January 13, 2010, applicants signed their sale agreement. In the sale agreement, the applicants chose an effective date for the sale of August 18, 2010. But applicants were unaware of Section 393.190.1, which subjects every such sale to prior authorization.

Section 393.190.1 provides:

> No . . . water corporation . . . shall hereafter sell . . . its . . . system . . . without having first secured from the commission an order authorizing it so to do.

And it voids every unauthorized sale:

> Every such sale . . . other than in accordance with the order of the commission authorizing same shall be void.

Under that statute, as a matter of law, no sale occurs until the Commission authorizes it.[6]

Staff and applicants ask the Commission to cure the applicants' error and authorize the sale as of August 18, 2010. But the statute contains no provision for retrospective approval. Retrospective approval was the subject of the recent Missouri Court of Appeals opinion in *State ex rel. Cass County v. Public Serv. Comm'n.*[7]

In that case, the court gave a strict reading to the prior approval requirement in Section 393.170.1, which applies to construction:

> No [public utility] shall begin construction of a [system] without first having obtained the permission and approval of the commission.

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[4] Section 393.190.3; *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n,* 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). All sections are in RSMo 2000.

[5] *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo.1934).

[6] That statute is set forth at length in Appendix 2.

[7] 259 S.W.3d 544, 547 (Mo. App., W.D. 2008).

Retroactive authorization is absent from the statutes:

> [The statute] does not address the circumstances created by [a utility]'s chosen course of action, and authority to grant *post hoc* approval . . . cannot be found therein. [8]

The operative language of the Section 393.170 and 393.190 is the same,[9] so the same result must follow.

The General Assembly's policy, according to the Court of Appeals, is plain: before-the-fact information is simply better than after-the-fact information. The Commission's authority to disallow expenditures after the event does not sufficiently protect the public:

> *[P]ost hoc* authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors. [10]

By contrast, prior authorization:

> . . . allows for consideration of all the relevant constituencies and interests "without muddying the waters of a future rate case"[. 11]

The same policy is manifest in the Section 393.190.1's requirement of notice to local government of revenue impact.[12]

iii. Ruling

No party cites any law against, or alleges any prejudice from, an authorization that is prospective only. Therefore, the Commission will not approve the application retrospectively. The Commission will approve the sale as of this order's effective date.

C. Conclusion

The Commission independently finds and concludes that the sale is not detrimental to the public interest, so the Commission will approve the sale effective with this order's effective date.

THE COMMISSION ORDERS THAT:

1. The application of Taney County Utility Corporation ("Utility Corporation") and Taney County Water, LLC ("Water LLC") is approved.

2. The approval set forth in paragraph 1 is conditioned as follows.

   a. No later than five days after the effective date of this order, by use of documents substantially as shown in Attachment B of the

[8] 259 S.W.3d at 550.
[9] A side-by-side comparison is attached to this order as Appendix 1.
[10] 259 S.W.3d at 549 -550.
[11] *Id*.
[12] Section 393.190.1.

Supplemental Recommendation, Water LLC shall adopt Utility Corporation's:

i. Schedule of rates, rules and regulations, currently on file and approved, by filing an adoption notice and a revised index page with a 30-day effective date; and
ii. Currently approved water utility plant depreciation schedule.

b. On the effective date of the adoption notice:
   i. Utility Corporation's certificate for the provision of water service shall be canceled; and a
   ii. A certificate shall issue to Water LLC for the provision of water service in the Venice on the Lake and Lakeway Subdivision service areas.
c. Water LLC shall not assert the purchase price of $304,500.00 as its rate base when filing its next rate case with the Commission.
d. Nothing in this order precludes the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of Water LLC's certificate, including future expenditures by Water LLC, in any later proceeding.
e. Water LLC shall manage the existing deposits of customers and, as Water LLC refunds deposits, Water LLC will deduct those amounts from the sewer payment amounts sent monthly to Utilities Corporation.
f. Water LLC shall assume full responsibility for payment of the Commission assessment and filing the annual report with the Commission.
g. Water LLC shall:
   i. Maintain utility plant records and all customer account records as acquired from Utility Corporation, and
   ii. Keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in the *Supplemental Recommendation*.

3. This order shall become effective August 20, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

Appendix 1

Section 393.170, RSMo 2000:
1. No [public utility] shall begin construction of a [system] without first having obtained the permission and approval of the commission.

Section 393.190, RSMo 2000:
1. No [public utility] shall hereafter sell [its system] without having first secured. from the commission an order authorizing it so to do.
Every such [transaction] made other than in accordance with the order of the commission authorizing same shall be void.

Appendix 2

393.170. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission [.]
393.190. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

* * *

Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located.

In the Matter of the Joint Application of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water for Authority for Liberty Water to Acquire Certain Assets of Noel Water Co., Inc. and, in Connection Therewith, Certain Other Related Transactions

File No. WO-2011-0328

Water §4 Transfer, lease and sale. The Commission approved the proposed transfer of the water company's assets as being not detrimental to the public interest.

ORDER APPROVING JOINT APPLICATION

Issue Date: August 10, 2011 Effective Date: August 20, 2011

Syllabus: This order approves the application of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water ("Liberty Water") and Noel Water Co. Inc. ("Noel Water") for Liberty Water to purchase substantially all of Noel's assets.

Procedural History

On April 6, 2011,[1] Liberty Water and Noel Water filed a joint application. That application requests, among other things, authority from the Commission for Noel Water to sell its water system and its certificate of convenience and necessity to Liberty Water. Liberty Water and Noel Water entered into an agreement on March 4, 2011, in which Liberty Water agreed to purchase Noel Water's water system.

The Commission issued notice of this application on April 13. In that notice, the Commission allowed anyone who wished to intervene until May 3 to request intervention. The Commission received no intervention requests.

Staff requested a local public hearing on May 27. The Commission convened a local public hearing on June 28. No witnesses testified.

Staff filed its Recommendation on July 25, and filed its Amended Recommendation on August 3. Staff recommends that the Commission approve the transaction, with certain conditions. The Office of the Public Counsel, Liberty Water, and Noel Water responded on August 4, stating that they had no objection to Staff's Amended Recommendation.

Discussion

The application is within the Commission's jurisdiction to decide.[2] Because no party objects to the application, no evidentiary hearing is required.[3] Thus, the Commission deems the hearing waived,[4] and bases its findings on the verified filings, and makes its conclusions as follows.

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[1] All calendar references are to 2010 unless otherwise noted.
[2] Section 393.190 RSMo 2000.
[3] *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n*, 776 S.W.2d 494 (Mo. App. 1989).
[4] Section 536.060, RSMo 2000.

Noel Water is a water corporation and public utility. It holds a certificate of convenience and necessity to provide water service. Noel currently provides water service to 658 residential customers in McDonald County, Missouri.

Liberty Water is a water corporation, a sewer corporation, and a public utility. Liberty Water provides water service to approximately 917 customers, and sewer service to approximately 385 customers, in Missouri.

The Commission may approve a sale of a water company if that sale is not detrimental to the public interest.[5] Based on the verified pleadings, the Commission finds that granting the application for the sale of the water company would not be detrimental to the public interest. The application will be granted.

The Commission further finds that good cause exists for Noel Water and Liberty Water to be excused from the Commission Rule 4 CSR 240-4.020 requirement of filing a 60-day notice prior to filing its application. To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical."[6] Liberty Water and Noel Water state, and the Commission finds, that this case was not likely to be a contested case.

THE COMMISSION ORDERS THAT:

1. The Joint Application is granted.

2. Commission Rule 4 CSR 240-4.020 is waived.

3. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall notify the Commission within five (5) business days after the assets have been transferred.

4. Upon receipt of the notice listed in ordered paragraph three, the Commission shall cancel the certificate of convenience and necessity held by Noel Water Co., Inc., and shall grant Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water a certificate of convenience and necessity to provide water service in the service territory currently held by Noel Water Co., Inc.

5. Noel Water Co., Inc., and Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall, if closing on the assets has not occurred within thirty days after the effective date of an Order from the Commission approving this transfer of assets, file a status report with the Commission thirty days after the effective date of the Order, and at the end of each subsequent thirty (30) day period until closing and the transfer of assets is complete; and, alternatively, if the transfer is not expected to be completed, Noel Water Co., Inc., and Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall file a pleading with the Commission stating such.

6. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall, within five (5) business days after closing, file tariff adoption notice sheets, adopting the water tariff currently in effect for Noel Water, with thirty day notice, authorizing Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water to use the rates and

[5] See Commission Rule 4 CSR 240-3.605(1)(D).

[6] *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

rules of Noel Water's tariff on an interim basis until the effective date of such tariff adoption notice.

7. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall, any time before five days after closing, file tariff adoption notice sheets, with thirty day notice, for its existing water tariff and sewer tariff to update its operating name, and limiting the applicability of those tariffs to the Timber Creek, Holiday Hills, and Ozark Mountain service areas.

8. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall use its company name of Algonquin Water Resources of Missouri, LLC, or file appropriate documentation with the Commission which would allow it to use its chosen fictitious name of Liberty Water, and to take all steps necessary to ensure that the name is consistently used in all communications with its Missouri customers, including billing and filings with the Missouri Public Service Commission, including certificates, tariffs and annual reports.[7]

9. The Commission orders no recovery of acquisition adjustment or acquisition premium in this case, or any future rate cases.

10. The Commission makes no finding that would preclude the Commission from making any determination on any matter in any future rate proceeding, unless otherwise specified in the order.

11. Noel Water Co., Inc., shall transfer all plant records, operations records, and expense records to Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water., Inc. upon closing of the assets, and Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall adopt the individual plant in service, depreciation reserve and contribution in aid of construction (CIAC) balances utilized by the Audit Staff, valued at May 31, 2011, for purposes of determining the appropriate rate base in this proceeding as a starting point for plant in service, depreciation reserve and contributions in aid of construction (CIAC) for the water system of Noel Water Co., Inc. recorded in the books and records of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water, and Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall be required to maintain and retain proper plant in service, depreciation reserve and contribution in aid of construction (CIAC) records on a going forward basis, with the Staff of the Commission meeting with Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water to explain in detail how to maintain these types of records, if necessary.

12. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall maintain its books and records in Missouri or, in absence of such records being maintained in Missouri, shall provide access to its books and records in Missouri. In accordance with the Commission rules, Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water understands that if its books and records, including the newly acquired system of Noel Water Co., Inc. are not provided for review in Missouri, then Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall be responsible for any and all travel costs to review said records. Algonquin Water Resources of

[7] Per Commission File No. WN-2012-0025 and File No. SN-2012-0026, the Commission has granted permission for Algonquin Water Resources of Missouri, LLC to use the fictitious name of Liberty Water as of August 24, 2011.

Missouri, LLC, d/b/a Liberty Water shall comply with all current and future Commission rules and procedures, including use of the appropriate USOA Chart of Accounts, timeliness of Annual Reports to the Commission, and payment and timeliness of annual Public Service Commission Assessments.

13. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall use the schedule of depreciation rates set out in Attachment 1 to the Staff's Amended Recommendation that were prescribed by the Commission and used by Noel Water Co., Inc., from the date of the transfer forward, until changed by any future order of the Commission.

14. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall, in any future rate increase request, file concurrently for all its Missouri regulated water and sewer service areas.

15. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall begin reporting call center information to the Manager of the Engineering and Management Services Department, as described in the Amended Memorandum attached to Staff's Amended Recommendation.

16. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall notify the Manager of the Engineering and Management Service Department and the Office of the Public Counsel at least forty-five days prior to the anticipated closure of the local office and provide both agencies a copy of the anticipated customer notification.

17. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall notify the Manager of the Engineering and Management Service Department and the Office of the Public Counsel of the transfer, elimination or separation of any employees that are located in Missouri concerning the Noel Water Co., Inc. system, if such action occurs within twelve months of the notice of closing of utility assets as required in ordered paragraph 3.

18. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water shall maintain an Emergency Plan, similar to that described in Attachment 2 of Staff's Amended Recommendation, which includes notification to the fire departments, local media, Staff of the Water and Sewer Department, and the Office of the Public Counsel when any such emergency occurs.

19. This order shall become effective on August 20, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.
Pridgin, Senior Regulatory Law Judge

NOTE: A Notice of Correction has been filed and is available in the official case files of the Public Service Commission.

In the Matter of the Joint Application of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water and KMB Utility Corporation for Authority for Liberty Water to Acquire Certain Assets of KMB Utility Corporation and, in Connection Therewith, Certain Other Related Transactions.

File No. WO-2011-0350

Water §4 Transfer, lease and sale. The Commission approved the proposed transfer of water and sewer system as being not detrimental to the public interest.

ORDER APPROVING APPLICATION

Issue Date: August 10, 2011 Effective Date: August 20, 2011

The Missouri Public Service Commission is approving the applications subject to certain conditions.

A. Procedure

Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water ("Liberty") and KMB Utility Corporation ("KMB") filed applications to transfer water system and a sewer system. On April 22, 2011, the Commission ordered notice as required by statute.[1] On May 17, 2011, the Commission consolidated the applications under this file number.

On July 19, 2011, Staff filed its recommendation in favor of granting the applications with certain conditions. On July 28, 2011, Liberty filed a response stating that KMB and Liberty (together, "applicants") have no objection to the recommendation, and offering clarifications to the recommendation's factual report. Also on July 28, 2011, the Office of the Public Counsel ("OPC") filed a response to the recommendation stating that OPC has no objection to the recommendation and the clarifications. On August 5, 2011, Staff filed a reply stating that it adopts the clarifications. The Commission received no motion for intervention.

No law requires a hearing to approve the unopposed applications, so the Commission will determine all issues based on the verified pleadings,[2] and without separately stating its findings of fact.

B. Discussion

The application seeks the Commission's authorization to transfer a water system and a sewer system ("the sale") from KMB to Liberty. The sale is subject to Section 393.190.1, which provides:

> No . . . water corporation . . . shall hereafter [transfer] its . . . system . . . without having first secured from the commission an order authorizing it so to do.

[1] Section 393.190.1. All sections are in RSMo 2000.
[2] Section 393.190.3; *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n,* 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).

The Commission will only deny the applications if approval would be detrimental to the public interest. [3] Staff and the applicants agree that the public interest favors the transfer. Staff recommends that the Commission approve the sale subject to certain unopposed conditions. All such conditions appear in the ordered paragraphs below.

C. Ruling

The Commission independently finds and concludes that the sale is not detrimental to the public interest, so the Commission will approve the application.

THE COMMISSION ORDERS THAT:

1. The applications are approved.

2. KMB Utility Corporation ("KMB") may transfer the assets of KMB to Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water ("Liberty") subject to the following conditions.

   a. Upon closing of the assets, KMB shall turn over all plant records operations records, and expense records to Liberty.
   b. Liberty shall adopt the individual plant in service, depreciation reserve and contributions in aid of construction (CIAC) balances utilized by the Audit Staff for purposes of determining the appropriate rate base in this proceeding as a starting point for plant in service, depreciation reserve and CIAC for the KMB water and sewer systems recorded in the books and records of Liberty. Liberty shall record those values as the amounts of plant, depreciation reserve and contributions in aid of construction, as of May 31, 2011.
   c. Liberty shall maintain and retain proper plant in service, depreciation reserve and CIAC records on a going forward basis. The Audit Staff shall meet with Liberty to explain in detail how to maintain these types of records, if necessary.
   d. Liberty shall report call center information to the Commission's Engineering and Management Services Department staff.
   e. No later than five business days after the closing, Liberty shall file adoption notice tariff sheets. Such tariffs shall adopt the two water tariffs and one sewer tariff currently in effect for KMB, with 30-day notice, and shall authorize Liberty to use the rates and rules of KMB's tariff on an interim basis until the effective date of such tariff adoption notices.
   f. No later than five days after the closing, Liberty shall file adoption notice tariff sheets, with 30-day notice, for its existing water tariff and sewer tariff to update its operating name, and limiting the applicability of those tariffs to the Timber Creek, Holiday Hills, and Ozark Mountain service areas. Such tariffs shall also require Liberty to use its company name, or file appropriate documentation with the Commission which would

[3] *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n, 120 S.W.3d 732, 735 (Mo. banc 2003).*

allow it to use its chosen fictitious name, and to take all steps necessary to ensure that the name is consistently used in all communications with its Missouri customers including billing, and filings with the Commission, including certificates, tariffs and annual reports.

g. From the date of the transfer forward, until changed by further order of the Commission, Liberty shall use the schedule of depreciation rates that the Commission prescribed for KMB, as set out in Attachments 1 and 2 to the *Memorandum* that accompanies *Staff's Recommendation*.
h. Not later than five (5) business days after the assets have been transferred, Liberty shall file notice of the transfer with the Commission. After receipt of that notice, the Commission will cancel the certificates of convenience and necessity for KMB, and grant certificates of convenience and necessity to Liberty for water service and sewer service, as appropriate, in the current KMB service areas.
i. No later than 30 days after the effective date of this order, if closing on the assets has not occurred, KMB and Liberty ("applicants") shall file a status report with the Commission. If the transfer is not expected to be completed, applicants shall file a pleading with the Commission so stating. Applicants shall file the report or pleading not later than 30 days after the effective date of this order and at the end of each subsequent 30-day period until closing and the transfer of assets is complete.
j. Liberty shall file any future rate increase request concurrently for all its Missouri regulated water and sewer systems, as discussed above.
k. Nothing in this order shall preclude the Commission from making any determination on any matter in any future rate proceeding.

3. This order shall become effective August 20, 2011.
4. This file shall close on August 21, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.
Jordan, Senior Regulatory Law Judge

In the Matter of KCP&L Greater Missouri Operations Company for Authority to Implement Rate Adjustments Required by 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism.

File No. EO-2008-0216

Electric. §20 Rates. At any time, the rate a utility recovers must match the tariff in effect.
Electric. §20 Rates. No tariff can authorize recovery of any amount for any period that is before that tariff's effective date.
Electric. §20.1 Fuel Adjustment Clause. Fuel Adjustment Clause amounts are always conditional and subject to adjustment.
Electric. §43 Accounting Authority orders. An adverse ruling is not an unusual, infrequent, abnormal, or extraordinary event sufficient to justify issuance of an accounting authority order.

REPORT AND ORDER ON REMAND

Issued: August 30, 2011 Effective: September 9, 2011

The Missouri Public Service Commission determines the following as to KCP&L Greater Missouri Operations Company's ("GMO") fuel adjustment clause ("FAC").

A. The Commission has authority to order a refund or adjustment.
B. The initial accumulation period begins on July 5, 2007.[1]
C. The amounts over-recovered were $1,975,363 from GMO's MPS district and $484,626 from GMO's L&P district.
D. The adjustment mechanism shall be an adjustment to the FAC by tariff.
E. No accounting authority order shall issue for such adjustment.

The Commission makes those rulings in compliance with the mandate of the Missouri Court of Appeals, Western District ("Court of Appeals"), in *State ex rel. AG Processing, Inc. v. Public Service Comm'n for the State of Missouri*[2] ("the Opinion").

The Opinion found that, to base a rate on cost data, a tariff describing that data must be in effect before the cost is incurred. That holding and its consequences are the subject of this *Report and Order*.

Background

The Opinion ruled on an FAC so the Commission begins by discussing the FAC in terms further explained under the Findings of Fact and Conclusions of Law.

The Commission prescribes a public utility's ("utility") services and rates for all customers in an action commonly called a "general rate case." In a general rate case, the Commission determines rates based, in part, on what it costs a utility to provide its service. Those costs include fuel, purchased power, and associated costs ("fuel") to generate electricity, so the Commission includes an amount for fuel costs ("base cost") as a component of the rate.

[1] All dates are in 2007 unless otherwise noted.
[2] 311 S.W.3d 361, 367 (Mo. App., W.D. 2010) ("the Opinion").

But fuel costs fluctuate frequently and fuel is available only in a limited market. Therefore, the utility has little control over what it pays for fuel. As fuel costs fluctuate and the rate remains unchanged, a windfall may occur for customers when fuel costs rise, or for the utility when fuel costs fall.

To moderate such windfalls, Section 386.266[3] ("the FAC statute") provides that a utility's rate may include devices like an FAC. An FAC passes fuel cost fluctuations—up or down—more directly to customers than the lengthy general rate case process as the courts explain:

> [The FAC statute] explicitly authorizes "periodic rate adjustments *outside of general rate proceedings* to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any federal, state, or local environmental law, regulation, or rule." (Emphasis added.) [The FAC statute] is consistent with the Supreme Court's directive that "[i]f the legislature wishes to approve automatic adjustment clauses, it can of course do so by amendment of the statutes." Stated another way, [the FAC statute] permissibly authorizes a *single issue* ratemaking mechanism that allows periodic (automatic) adjustments outside a general rate case where other costs and revenues are *not* considered. In enacting [the FAC statute], the General Assembly understood the different roles between *single issue* ratemaking mechanisms and *full rate case* proceedings. The General Assembly understood that the role of full rate case proceedings is to set base rates upon a consideration of all relevant factors. The General Assembly understood that by enacting [The FAC statute], an [FAC] could only first be established in a full rate case proceeding, at which time base rates would be established upon a thorough review and consideration of "all relevant factors." The legislature "is presumed to know the state of the law and to pass only those statutes which have some effect or purpose," and the legislature is presumed to have intended a change in existing law by enacting new statutes. Succinctly stated, [the FAC statute] authorizes a change in the law—that periodic *single issue* ratemaking mechanisms are authorized after first being established in a *full rate case* proceeding.[4]

The FAC starts with the base cost and measures fuel cost fluctuations during a period ("accumulation period"). It puts the increase or decrease on customer bills during a later period ("recovery period"). Periods of accumulation and recovery continue through the years in recurring and overlapping cycles.

The Opinion held that, to count any such fluctuations in the FAC, a rate schedule ("tariff") describing those fluctuations must be in effect before those fluctuations occur. A tariff is a multi-page document controlling all rates for any utility. The utility must file its tariff with the Commission and a filed tariff becomes effective unless the Commission rejects it.

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[3] RSMo Supp., 2010.

[4] *State ex rel. Office of Public Counsel and Missouri Indus. Energy Consumers v. Missouri Public Service Comm'n*, 331 S.W.3d 677, 690 (Mo. App., W.D. 2011).

Procedure and Appearances

This action is before the Commission on remand under the Opinion.[5] What further proceedings are consistent with the Opinion was the subject of written and oral argument. The Commission convened limited hearings[6] and set forth a list of issues.[7] The parties filed direct testimony,[8] rebuttal testimony,[9] and a list of issues.[10] The Commission heard oral argument.[11] The parties appeared through counsel as follows:

For GMO:

Karl Zobrist
SNR Denton US LLP
4520 Main Street, No. 1100, Kansas City, Missouri 64111,

and

James M. Fischer
Fischer & Dority, P.C.
101 Madison Street, Suite 400, Jefferson City, Missouri 65101.

For the Commission's staff ("Staff"):

Nathan Williams, Deputy Counsel
Office of the Staff Counsel
Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102.

For Ag Processing, Inc., a Cooperative, and the Sedalia Industrial Energy Users Association (SIEUA), (together, "Industrial Intervenors"):

David Woodsmall
Finnegan, Conrad & Peterson, LC
428 East Capitol Avenue, Suite 300, Jefferson City, Missouri 65101.

For the Office of the Public Counsel ("OPC") and the public:

Lewis R. Mills, Jr., Public Counsel
Office of the Public Counsel
Post Office Box 2330, Jefferson City, Missouri 65102,

[5] Issued July 2, 2010.
[6] August 10, 2010; September 20, 2010; and May 17, 2011.
[7] By order issued on December 22, 2010.
[8] On April 1, 2011.
[9] On April 22, 2011.
[10] On May 6, 2011.
[11] On May 17, 2011.

The Commission makes each ruling on consideration of all allegations and arguments of each party, and the substantial and competent evidence upon the record made in File No. ER-2006-0044[12] ("general rate case"), and in this action, but does not specifically address matters that are not dispositive. The Commission's findings reflect its determinations of credibility. On those grounds, the Commission makes the following findings of fact.

Findings of Fact

1. GMO originally sought an FAC in the general rate case.

I. General Rate Order

2. On July 3, 2006, GMO (then known as Aquila, Inc.) filed a tariff proposing new rates and terms for its electrical service, initiating the general rate case.

3. On May 17, the Commission issued its report and order ("the general rate order"), which:

a. included a base cost in GMO's rate,
b. authorized the use of an FAC,
c. rejected the tariff,
d. required GMO to file a new tariff in compliance with the general rate order's provisions ("compliance tariff"), and
e. included, in that requirement, pages (" tariff sheets") to define the workings of the FAC ("FAC compliance tariff sheets").

4. GMO filed the compliance tariff, including a first attempt at FAC compliance tariff sheets. The Commission approved the compliance tariff, except the FAC compliance tariff sheets, which the Commission rejected.[13]

5. On May 27, the general rate order became effective.

6. GMO filed a second attempt at FAC compliance tariff sheets and the Commission rejected those tariff sheets. [14]

II. The FAC Compliance Tariff Sheets

7. On June 18, GMO filed FAC compliance tariff sheets. Those tariff sheets bore a proposed effective date of July 18, but GMO asked for expedited treatment approving the FAC compliance tariff sheets to be effective on July 1.

8. The FAC compliance tariff sheets proposed that GMO's FAC include the following steps:

a. GMO accumulates data on fuel costs ("accumulation period").
b. GMO files tariff sheets reflecting how fuel costs fluctuated in the accumulation period, and the Commission determines the FAC amount.
c. GMO adjusts bills for fluctuations so that GMO, or the customers, recover the fluctuations during a later period ("recovery period").

9. The FAC compliance tariff sheets proposed that GMO's accumulation period 1 runs from June 1, through November 30.

10. On June 29, the Commission approved the FAC compliance tariff sheets to be effective on July 5.

[12] Section 536.070(6).
[13] On May 25.
[14] On June 14, 2010.

11. On July 10, the Commission denied motions for rehearing, concluding the general rate case.

III. The Cycle 1 Order and the Opinion

12. On December 28, GMO filed tariff sheets describing the cycle 1 ("the cycle 1 tariff sheets"). The cycle 1 tariff sheets sought to use fuel cost fluctuations occurring from June 1 through November 30 ("accumulation period 1") to calculate a recovery period starting on March 1, 2008 and ending on February 28, 2009 ("recovery period 1"). The Commission approved the cycle 1 tariff sheets ("cycle 1 order").[15]

13. Pursuant to the cycle 1 order, GMO used fuel cost data from the entire accumulation period 1 to calculate and bill the FAC .

14. Eliminating cost data for the following portions of accumulation period 1 reduces the FAC recovered from customers as follows.

Dates	MPS district	L&P district
June 1 through July 4	$1,975,363	$484,626
June 1 through July 31	$7,084,354	$1,710,484

15. Pursuant to petitions for writs of review,[16] the Circuit Court of Cole County affirmed the cycle 1 order.

16. Pursuant to notices of appeal,[17] the Court of Appeals reversed the Circuit Court and the Commission in the Opinion.[18] In connection with the Opinion, the Court of Appeals issued its mandate to the Circuit Court of Cole County.[19] The Circuit Court of Cole County remanded the case to the Commission.[20]

17. GMO's recovery period 9 begins on March 1, 2012.

Conclusions of Law

The Commission has jurisdiction to decide this matter under the mandate in the Opinion. The mandate constitutes the court's instructions to the Commission.[21] The Commission's further proceedings are circumscribed in the mandate.[22]

I. The Mandate

A mandate that remands an action is one of two kinds. A mandate may be general, which does not provide specific direction and leaves all issues open to consideration in a new hearing.[23] A mandate may be with directions, which requires the Commission to enter a report and order in conformity with the mandate.[24] The latter describes the mandate because the mandate provides:

> Now on this day, the judgment is reversed, and the cause is remanded to the Circuit Court of Cole County for further proceedings in conformity with the opinion of this court.

[15] Issued on February 14, 2008, effective on March 1, 2008.
[16] Filed on March 16 and April 11, 2008.
[17] On March 16, 2009.
[18] Issued on March 23, 2010.
[19] Issued on July 2, 2011.
[20] Judgment entered on July 19, 2010.
[21] *Bird v. Missouri Bd. For Architects, Prof'l Engineers, Prof'l Land Surveyors and Landscape Architects*, 309 S.W.3d 855, 859 - 860 (Mo. App., W.D. 2010).
[22] *Guidry v. Charter Communications, Inc.*, 308 S.W.3d 765, 768 (Mo. App., E.D. 2010).
[23] 308 S.W.3d at 768.
[24] *Id*.

The opinion states that the remand is:

> . . . with directions to remand to the Commission for further proceedings consistent with this opinion.

The Circuit Court of Cole County, on remand, issued this judgment:

> The Court of Appeals, mandate dated 7-2-10, having found the Commission disregarded the applicable statutory language and the prohibition on retroactive rate making without any statutory or other authority to do so, this Court . . . remands for future proceedings consistent with the Court of Appeals opinion. [25]

To understand what further proceedings are consistent with the Opinion's instructions requires an examination of the Opinion.[26]

II. The Opinion

The Opinion held that a tariff effective on July 5 cannot start accumulation period 1 on June 1 for a later recovery period.

A. Retroactive Rate-Making

The Opinion's premise is that, at any time, the rate recovered must match the tariff in effect. That premise stands on Missouri statutes cited in the Opinion:

> Section 393.140(11)[27] provides that "[n]o corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services ***as specified in its [tariff]s filed and in effect at the time***." [28]

Corollaries of that statute include:

- No utility can recover any amount before the effective date of a tariff authorizing recovery of that amount, and
- No tariff can authorize recovery of any amount for any period that is before that tariff's effective date.

The premise and corollaries articulated above are commonly called the "filed rate doctrine" and go by that name in the Opinion. As to the latter corollary, a transgression is commonly called "retroactive ratemaking." [29]

Retroactive ratemaking applies to an FAC because the statutes apply tariff procedure to an FAC:

> 1. Subject to the requirements of this section, any electrical corporation may make an application to the commission to approve [tariff]s authorizing an interim energy charge, or periodic rate adjustments outside of general rate proceedings to reflect increases and decreases

[25] The omitted language reads "vacates the PSC's Order and[.]" OPC argues that the cycle 1 order is vacated but the Court of Appeals neither vacated, nor authorized the circuit court to vacate, the Cycle 1 order. The Commission is within the supervisory authority of the Court of Appeals, Western District. Mo. Const. Art. V, Section 1, clause 2. Proceedings outside the mandate's directions are void. 308 S.W.3d 765 at 769.

[26] *Frost v. Liberty Mut. Ins. Co.,* 813 S.W.2d 302, 304–05 (Mo. banc 1991).

[27] RSMo 2000.

[28] Opinion, 311 S.W.3d at 365.

[29] *Id*.

> in its prudently incurred fuel and purchased-power costs, including transportation The commission may, in accordance with existing law, include in [FAC tariff]s features designed to provide the electrical corporation with incentives to improve the efficiency and cost-effectiveness of its fuel and purchased-power procurement activities.
>
> * * *
>
> 4. The commission shall have the power to approve, modify, or reject adjustment mechanisms submitted under subsections 1 to 3 of this section [.[30]]

Therefore, an FAC is subject to the ban on retroactive ratemaking.

Retroactive ratemaking is not an issue in the cycle 1 order as to the recovery of GMO's FAC. The effective date of the cycle 1 tariff sheets preceded any recovery. Those facts, under any reading, do not constitute retroactive ratemaking.

B. Invalid Accumulation Period Start Date

Nevertheless, retroactive ratemaking was the basis for reversing the cycle 1 order.

In the cycle 1 order, the Commission concluded that the FAC was authorized as of the general rate order's effective date. The next month's first day, according to the cycle 1 order, started accumulation period 1 because the Commission's regulations so provide:[31]

> The Commission interprets its regulation as establishing a recovery period beginning on the first day of the first month following the Report and Order, and not following the approval of the implementing tariff.[32]

Because the general rate order was effective on May 27, June 1 started the accumulation period, according to the cycle 1 order.

That ruling constituted retroactive ratemaking, according to the Opinion, because:

> Only <u>costs incurred</u> after the effective date of an appropriate tariff may be recovered under [an FAC.[33]]

Under that language, no tariff shall use cost data from any time to calculate an FAC, unless a tariff describing that time is in effect before that time. Thus, the Court of Appeals found retroactive ratemaking, not in the FAC's recovery, but in the FAC's calculation.

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[30] The FAC statute.
[31] 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I).
[32] Cycle 1 order at page 4.
[33] Opinion, 311 S.W.3d 361, 367 (Mo. App. 2010), citing <u>*State ex rel. Associated Natural Gas Co. v. Public Service Comm'n of the State of Mo.*</u>, 954 S.W.2d 520 (Mo. App., W.D. 1997). The emphasis is the Commission's.

C. Other Arguments

GMO offers arguments to show that starting accumulation period 1 on June 1 did not constitute retroactive rate-making. GMO's arguments include the following. The general rate order authorized GMO's FAC as of May 27. The cycle 1 order used historical costs to set the FAC for succeeding periods. Cost data is not recovery. No rate changed on June 1. No rate was based on any service already consumed. Tariff sheets showing customer's FAC took effect before GMO recovered the FAC. No FAC amount appeared on customer bills until after the cycle 1 order.

Also, the same court that issued the Opinion has re-examined the "filed rate doctrine" in the context of an FAC. *State ex rel. AG Processing v. Public Service Comm'n*.[34] In that opinion, the court stated:

> We conclude that forward-looking rate adjustments approved by the PSC pursuant to a previously-adopted [FAC] do not constitute unlawful ratemaking, and accordingly affirm.

Id., slip op. at 1. The order affirmed the Commission's approval of certain tariff sheets. Those tariff sheets reflected cost data from an accumulation period from June 1, 2008 through November 30, 2008. GMO filed those tariff sheets on December 30, 2008.

Nevertheless, the law of the case doctrine bars re-litigation of issues decided on appeal,[35] so the Commission must address the accumulation period's start date.

III. Further Proceedings Consistent

June 1 is not accumulation period 1's valid start date. A valid start date is in dispute. So are the consequences of having used June 1 cost data in recovery period 1, including the existence of an over-recovery, and remedies for over-recovery.

A. Authority

If no remedy is possible, the remaining issues are moot, so the threshold issue is the Commission's authority to order a remedy. That authority must appear in the mandate and opinion. GMO argues that the Opinion does not set forth a remedy. But the Opinion does direct further proceedings. That directive requires the Commission to address the consequences of the invalid start date.

GMO and the Staff argue that the Commission cannot return money recovered under approved tariffs to customers. GMO argues that ordering a refund or adjustment is confiscatory and violates its due process rights. GMO cites case law providing that:

> Due process prevents any court or legislative body from taking money from a utility collected from ratepayers pursuant to lawful rates[.[36]]

That argument is a further corollary of the "filed rate doctrine." But that citation, like other authorities cited in support, does not address the FAC statute.

[34] Case No. WD71987 (Mo. App., W.D. Mar. 1, 2001), Ahuja, J. Mandate issued July 1, 2011.
[35] *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 61 (Mo. banc 1999).
[36] *Lightfoot v. Springfield*, 361 Mo. 659, 236 S.W.2d 348, (Mo. 1951).

Under the FAC statute, FAC amounts are always conditional and subject to adjustment on a continuous cycle. Also, the FAC statute provides that no FAC tariff is lawful unless it includes a device to remedy "any" inaccurate recovery:

> . . . The commission may approve [an FAC tariff if] it finds that the adjustment mechanism set forth in the schedules:
>
> * * *
>
> (2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds [.[37]]

No party cites evidence or authority to define a "true-up" but the context suggests that it signifies a review for events that affect an account after the usual audit period. An annual true-up means that the FAC is unlike a base cost or other conventional rate-making devices. Under those devices an amount is vested when the tariff is effective. But an FAC is continuously contingent and subject to adjustment as the statute provides.

GMO and Staff also argue that the time for a remedy has passed because the true-up period and prudence review associated with recovery period 1 are passed. But the FAC statute provides no such limitation. It provides that the FAC's:

> . . . annual true-up . . . shall accurately and appropriately remedy any over- or under- collections [.[38]]

Shall means must in the present tense.[39] Any means every.[40] Those words require the FAC to include yearly review for adjustments—favoring either the customer or the utility—and include no time limitation.

In other words, GMO and Staff assume that the true-up and prudence review associated with cycle 1 are the only opportunities to adjust the FAC. But, as the history of this case proves, utility litigation takes years to finalize, and the Commission presumes the General Assembly to know that. The statute's plain language preserves remedies and refutes GMO's assumption that mere delay negates the FAC's benefits.

No party cites any authority under which the Commission can declare the FAC statute unconstitutional, or restrict the FAC statute's operation by approving a tariff:

> The Public Service Commission is a **creature** of statute and can function only in accordance with the statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed. [[41]]

Therefore, the Commission will order a remedy for any over-collection that occurred under the cycle 1 order.

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[37] Section 386.266.4.
[38] Emphasis added.
[39] *State ex rel. Scott v. Kirkpatrick*, 484 S.W.2d 161, 164 (Mo. banc 1972).
[40] *State v. Williams*, 24 S.W.3d 101, 115 (Mo. App., W.D. 2000).
[41] *State ex rel. Monsanto v. Public Service Comm'n*, 716 S.W.2d 791, 796 (Mo. 1986).

B. Valid Start Date

Whether an over- or under- recovery occurs in any cycle depends on events in the related accumulation period. The accumulation period exists to measure the fluctuation of fuel costs daily. Daily fluctuation means that every day counted changes whether, and how much, under- or over- recovery exists. An over- recovery exists because the cycle 1 order started accumulation period 1 on June 1. July 5, according to the Opinion, is accumulation period 1's earliest possible start date. November 30 remains the end date. The parties dispute when the start date shall be and, thus, how much information will go into accumulation period 1.

i. August 1

August 1 must be the start date, according to OPC and the Industrial Intervenors, citing the FAC statute and regulations as follows. The FAC statute provides that no FAC tariff is lawful unless it includes a true-up to remedy "any" over-recovery accurately and appropriately:

> . . . The commission may approve [an FAC tariff if] it finds that the adjustment mechanism set forth in the schedules:
>
> * * *
>
> (2) Includes provisions for an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest at the utility's short-term borrowing rate, through subsequent rate adjustments or refunds [.]

That statute also requires the Commission to have implementing regulations.[42]

Those regulations define the true-up year to start on the first day of a calendar month:

> True-up year means the twelve (12)-month period beginning on the first day of the first calendar month following the effective date of the commission order approving [an FAC] unless the effective date is on the first day of the calendar month. If the effective date of the commission order approving a rate mechanism is on the first day of a calendar month, then the true-up year begins on the effective date of the commission order. [[43]]

Under that regulation, the true-up year's start date is the first day of the month.

On those grounds, OPC and the Industrial Intervenors argue as follows. The general rate order was effective on May 27 and ordered accumulation period 1 to start on June 1. The June 1 date is invalid under the Opinion because the cycle 1 tariff sheets were effective on July 5. The FAC statute and implementing regulation require the true-up year to start on the first of the month, and an accumulation period starting any other day will be inaccurate because all utilities keep records only on a monthly basis.

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[42] The FAC statute, subsections 9 and 12.

[43] 4 CSR 240-3.161(1)(G) and 4 CSR 240-20.090(1)(I) ("calendar regulations").

ii. July 5

But that assertion, which is the only assertion relating to accuracy in support of August 1, is unsupported by any citation to evidence. As for authority, the calendar regulations and the FAC statute say nothing about an accumulation period. Specifically, neither provision provides that an accumulation period starts on the first of the month.[44]

Thus, as GMO and Staff note, August 1 lacks support in both law and fact. Conversely, GMO and Staff cite the tariff's effective date to start the accumulation period. Also, GMO and Staff cite persuasive evidence that an annual true-up can accurately and appropriately remedy any over- or under- collection, even if it less than perfectly in synch with a calendar month. It requires normalizing and eliminating a mere four days (July 1-4) from consideration. Eliminating the entire month from consideration is the alternative.

The standard is accuracy and the accuracy of any conclusion increases with information relevant to that conclusion. The conclusion as to cost fluctuations over a six month period was best made by examining all six months. But that pool of information is reduced under the Opinion. The Opinion leaves just under five months for the Commission to examine. OPC and the Industrial Intervenors ask the Commission to use even less. The evidence weighs in favor of July 5 as producing the more accurate remedy for over-recovery.

iii. Ruling

The Commission will order that accumulation period 1 starts on July 5.

C. Amount

The findings of fact show that the amount at issue is GMO's over-recovery from June 1 through July 4 is $1,975,363 from GMO's MPS district and $484,626 from GMO's L&P district. OPC protests that the amount is but an estimate and, therefore, not accurate. But financial accuracy generally connotes something less than an absolute truth,[45] and the FAC statute specifically tolerates approximation, as the annual true-up provision shows. OPC and the Industrial Intervenors offer no authority barring the Commission from using as close an approximation as the Commission can make.[46] Moreover, the Commission determines its findings of fact by a preponderance of the evidence.[47] That standard asks only whether a proposition is more likely true than not true.[48] On that issue the Commission's findings of fact reflect its determinations.

D. Mechanism

OPC and the Industrial Intervenors argue for a cash refund of over-recovered amounts, but the FAC mechanism is already in place,[49] and will not require a whole new set of tariff sheets. Therefore, the Commission will order an adjustment to the FAC to credit the over-recovery. The FAC statute also requires the remedy to include interest at

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[44] The Commission is aware of its conflicting readings of the calendar regulations, but neither reading binds the Commission in this order. *State ex rel GTE North v. Missouri Public Service Comm'n*, 835 S.W.2d 356, 371 (Mo. App., W.D. 1992).
[45] *St. Joe Minerals Corp. v. State Tax Comm'n*, 854 S.W.2d 526, 529 (Mo. App., E.D. 1993).
[46] *Dick Proctor Imports, Inc. v. Director of Revenue*, 746 S.W.2d 571, 575 (Mo. banc 1988).
[47] *State ex rel. Dail v. Public Service Comm'n*, 203 S.W.2d 491, 499-500 (K.C. Ct. App. 1947).
[48] *Southards v. Director of Revenue*, 321 S.W.3d 458, 461 (Mo. App., S.D. 2010).
[49] Starting at P.S.C. MO. No. 1 Sheet No. 124.

GMO's short-term borrowing rate, so the Commission will order such interest on all amounts until credited.

The record shows that GMO's recovery period 9 begins in March 2012, which allows time to calculate the adjustments and interest, so the Commission will order the adjustment made during recovery period 9.

GMO argues that a stay order and suspending bond are necessary under Section 386.520,[50] but Section 386.520 applies only to actions on appeal, not to the self-correction mechanisms required under the FAC tariff.

E. Accounting Authority Order

GMO asks the Commission to issue an accounting authority order (AAO) to record the adjustment that the Commission is ordering, so that GMO can eventually recover those amounts again, presumably after further appeal.

In support, GMO alleges that the over-collected amount constitutes an extraordinary item that justifies a departure from the Commission's standards for utility accounting:

> [E]very electrical corporation subject to the commission's jurisdiction shall keep all accounts in conformity with the Uniform System of Accounts Prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act, as prescribed by the Federal Energy Regulatory Commission (FERC) and published at 18 CFR Part 101 (1992) and 1 FERC Stat. & Regs. paragraph 15,001 and following (1992) [.[51]]

Specifically, GMO cites the following regulation to support a break-out of the credit:

> . . . Those items related to the effects of events and transactions which have occurred during the current period and which are of unusual nature and infrequent occurrence shall be considered extraordinary items. Accordingly, they will be events and transactions of significant effect which are abnormal and significantly different from the ordinary and typical activities of the company, and which would not reasonably be expected to recur in the foreseeable future. (In determining significance, items should be considered individually and not in the aggregate. However, the effects of a series of related transactions arising from a single specific and identifiable event or plan of action should be considered in the aggregate.) [.[52]]

But the event giving rise to the adjustment is the Opinion's reversal of accumulation period 1's start date. An adverse ruling is not an unusual, infrequent, abnormal, or extraordinary event.

[50] RSMo 2000.
[51] 4 MO ADC 240-20.030(1).
[52] 18 CFR 101 General Instruction 7 (emphasis added).

Also, nothing prevents GMO from monitoring the amounts at issue through the FAC process, as the FAC statute and GMO's tariff provide, so the Commission will deny the request for an AAO.

Decision

The Commission makes the following rulings.

THE COMMISSION ORDERS THAT:

1. In its next fuel adjustment clause tariff filing, KCP&L Greater Missouri Operations Company shall provide an adjustment in recovery period 9 crediting its customers in the amount of:
    a. $1,975,363 for GMO's MPS district; and
    b. $484,626 for GMO's L&P district.
2. That adjustment shall include interest under Section 386.266, RSMo Supp. 2010.
3. The request for an accounting authority order is denied.
4. This *Report and Order* shall become effective on September 9, 2011.
5. This file shall close on September 10, 2011.

Gunn, Chm., Davis, and Jarrett, CC, concur;
Kenney, C., dissents;
and certify compliance with the provisions of
Section 536.080, RSMo.

Jordan, Senior Regulatory Law Judge

NOTE: This decision was in response to a remand from the Court of Appeals in *State ex. rel., AG Processing v. Pub. Serv. Comm*., 311 S.W. 3d 361 (Mo. App. W.D. 2010).

In the Matter of the Adjustment of Union Electric Company d/b/a Ameren Missouri's Fuel Adjustment Clause for the 7th Accumulation Period

File No. ER-2012-0028
Tariff No. YE-2012-0065

Electric. §20. Rates. The Commission approved Ameren Missouri's tariff to implement a Fuel Adjustment Clause (FAC) rate adjustment and denied Missouri Industrial Energy Consumers' (MIEC) motion for FAC credits from off-system sales margins.

Rates. §101. Fuel Clauses. The Commission approved Ameren Missouri's tariff to implement a Fuel Adjustment Clause (FAC) rate adjustment and denied Missouri Industrial Energy Consumers' (MIEC) motion for FAC credits from off-system sales margins.

Rates. §101. Fuel Clauses. There is no need to attempt to expedite recovery of alleged imprudently incurred over-collections when Staff's prudence review for the accumulation periods in question will begin in the current month. The Commission's rules and the statutory scheme embodied in Section 386.266, RSMo Supp. 2010, allow not only for the refund of any imprudently incurred cost, but also interest on those cost, the ratepayers will always be made whole through the established FAC mechanism.

ORDER REGARDING FUEL ADJUSTMENT CLAUSE TARIFF

Issue Date: September 7, 2011 Effective Date: September 23, 2011

Syllabus

This order approves Ameren Missouri's tariff to implement a FAC rate adjustment and denies MIEC's motion for FAC credits from off-system sales margins.

Background

On July 25, 2011, Union Electric Company, d/b/a Ameren Missouri ("Ameren Missouri"), submitted an application and tariff designed to implement an adjustment to its current Fuel and Purchased Power Adjustment rates (FPAc) of its Fuel Adjustment Clause (FAC).[1] The tariff bears an effective date of September 23, 2011.

Along with its tariff filing, Ameren Missouri filed the testimony of Jeff L. Dodd, Ameren Missouri's Manager of Wholesale Power and Fuel Accounting. Mr. Dodd testified that the purpose of the tariff is "to adjust customer rates for changes in Ameren Missouri's fuel and purchased power costs net of off-system sales revenues (i.e., net fuel costs), which were experienced during the four-month period February 2011 through May 2011."[2] Mr. Dodd further explained:

> Ameren Missouri's net fuel costs during the February 1, 2011 to May 31, 2011, Accumulation Period have increased as compared to the net base fuel costs ("NBFC") applicable to that period. The factor driving this cost increase was lower off-system sales margins caused by lower

[1] On August 18, 2011, Ameren Missouri revised its tariff sheet to correct the sheet number.

[2] This four-month period is the third Accumulation Period occurring under Ameren Missouri's current Rider FAC, which was approved by the Commission in Case No. ER-2010-0036. It is the seventh overall Accumulation Period if one accounts for the full and partial Accumulation Periods that occurred under Ameren Missouri's initial Rider FAC, approved by the Commission in Case No. ER-2008-0318, and accounts for prior Accumulation Periods under the current Rider FAC.

> power prices. Specifically, for the subject Accumulation Period Ameren Missouri's net fuel costs are more than the NBFC for that period by approximately $5,866,077. In accordance with the Commission's rule and Ameren Missouri's approved Rider FAC, Ameren Missouri is making this filing to set its FPAc rate so that customers will pay 95% of this cost increase. Also included in this FPAc rate are amounts resulting from orders received in Case No. EO-2010-0255 (The Company's first prudence review docket; this reduces net fuel costs by $17,169,838),[3] and Case Nos.ER-2010-0274 and ER-2011-0321 (the Company's first and second true-up dockets, which increases net fuel costs by a total of $2,199,132). The Commission's FAC rules require these Commission-ordered sums to be included in the new FPAc rate. The new FPAc rate will appear as a separate line item on the customers' bills starting with the October, 2011 billing month, when the Recovery Period applicable to the subject Accumulation Period begins.

Ameren Missouri's proposed tariff changes the current FPAc per kWh rate (without voltage level adjustment) to $0.00174 per kWh which is the cumulative sum of: 1) the FPA_5 of $0.00154 per kWh, 2) the FPA_6 of $0.00058 per kWh, and 3) FPA_7 of $(0.00038) per kWh. Because of a difference in line losses, there are different current FPAc per kWh rates for service taken at Secondary, Primary, and Large Transmission voltage levels. Listed below are the proposed FPAc per kWh rates, the current FPAc per kWh rates and the difference between them for Secondary, Primary, and Large Transmission service.

Service	Proposed FPAc	Current FPAc	Difference
Secondary	$0.00188/kWh	$0.00419/kWh	$(0.00231)/kWh
Primary	$0.00182/kWh	$0.00406/kWh	$(0.00224)/kWh
Large Transmission	$0.00176/kWh	$0.00393/kWh	$(0.00217)/kWh

By these proposed changes in the FPAc, Ameren Missouri requests a decrease in the revenues it bills through its Fuel Adjustment Charge on customers' bills of $9,733,915 during Recovery Period 7—October 2011 to May 2012. Based on a monthly usage of 1,100 kWh, the proposed change to the applicable FPAc will decrease the Fuel Adjustment Charge of an Ameren Missouri residential customer's bill from $4.61 to $2.07, a decrease of $2.54 per month.

MIEC's Motion

On August 16, 2011, the Missouri Industrial Energy Consumers ("MIEC") filed a "Motion for FAC Credits from Off-System Sales Margins." MIEC asserts:

> As a result of the Company's failure to flow the revenues from the contracts into which it entered with Wabash Valley Power Association ("Wabash") and American Electric Power Operating Companies ("AEP") through the FAC, the Company over-collected not only $17,169,838 for

[3] This filing also included $735,477 in interest on the $17,169,838, making the total refund $17,905,314. See Staff's Recommendation filed on August 24, 2011, Memorandum page 4.

> accumulation periods one and two, but also over-collected an additional $24,866,885 for accumulation periods three through five (October, 2009 through September 2010). This amount (a total of **$42,036,723**) is uncontested, as it was admitted by the Company in the Surrebuttal Testimony of Ameren Missouri's Controller, Ms. Lynn Barnes in Case No. EO-2010-0255. (Emphasis added by MIEC)

MIEC believes that Ameren Missouri's alleged over-collection of the additional $24,866,885, not included in the requested adjustment, has already been fully litigated in File Number EO-2010-0255, that collateral estoppel should apply to that determination, and that Ameren Missouri's new FAC rates should be reduced to reflect the total amount of revenues that were over-collected as a result of the contracts with AEP and Washbash for accumulation periods one through five.

Ameren Missouri's Reply

On August 26, 2011, Ameren Missouri filed a response to MIEC's motion.[4] Ameren Missouri contends that under the Commission's rules and its FAC tariff, any adjustments to previously charged rates under the FAC that arise from a prudence review respecting a particular period are to be included in the first adjustment filing occurring after the prudence review order is issued, and in this instance no prudence review has yet occurred on Ameren Missouri's alleged over-collection of the additional $24,866,885. Ameren Missouri maintains that:

> . . . the FAC tariff, which, again, has the force and effect of law, also requires that a sum be included in the "R" factor if there are prudence review-related adjustments that were "ordered [past tense] by the Commission." The "R" factor is part of the formula used to calculate the FAC adjustment. When the formula was applied to the accumulation period at issue, there had been no prudence review-related adjustment "ordered by the Commission" *other than* the $17,169,838. The existence of *that* order necessarily dictated that the *ordered* prudence review adjustment value in the "R" factor in the formula was to be $17,169,838. There is no choice in the matter; the only prudence related adjustments that can and must be included in the R factor are those that have been ordered by the Commission—nothing more or less. It is undisputed that the "R" factor in the formula used to calculate the rate filed with the adjustment indeed is $17,169,838.

Ameren Missouri also asserts that MIEC has mistakenly made two presumptions:

> First, MIEC presumes that the result of a subsequent prudence review on these issues will be the same as the result in Case No. EO-2010-0255. That case is on review before the Circuit Court of Cole County (Case No. 11AC-CC00336). The Court could reverse the Commission's decision

[4] On August 31, 2011, MIEC filed a reply to Ameren Missouri's response, and on September 1, 2011, MIEC revised its reply. Ameren Missouri, in turn, responded to MIEC. These filings did not raise any additional issues or alter the ultimate analysis and decision.

> in Case No. EO-2010-0255, which may lead the Commission to reach a different result in a subsequent prudence review. There may be additional facts adduced during the Staff's audit, or additional evidence presented by a party to the subsequent prudence proceeding that also could lead to a different result. For those or other reasons, the Commission may or may not enter a similar order after a future prudence review. Moreover, while MIEC will be free to *argue* in a future prudence review proceeding that the Commission *should* apply principles of collateral estoppel, it is not true (as MIEC suggests) that the Commission *must* do so because the Commission is not bound by the doctrine of collateral estoppel. *See, e.g., In Re: The matter of Southwestern Bell Telephone Co.'s Proposed Radio Common Carrier Tariff***,** 1990 Mo. PSC LEXIS 52 **(**"The Commission is not strictly bound by the principles of stare decisis, res judicata or collateral estoppel.").

Finally, Ameren Missouri claims that: (1) it has followed all requirements of the FAC statute, the FAC rules, and the FAC tariff; (2) MIEC has not alleged any noncompliance with the applicable law; and, (3) the FAC statute and rules mandate that the FAC adjustment become effective after 60 days if it is in accordance with the FAC tariff and the FAC rules.

Staff's Recommendation

On August 24, 2011, the Commission's Staff filed its recommendation regarding Ameren Missouri's FAC tariff. Staff reviewed Ameren Missouri proposed tariff sheet, the direct testimony of Ameren Missouri witness Jeff L. Dodd and associated Ameren Missouri work papers, as well as, Ameren Missouri's monthly information submitted in compliance with 4 CSR 240-3.161(5) and verified that the actual fuel and purchased power costs match the fuel and purchased power costs in Ameren Missouri's proposed tariff. Staff reviewed Ameren Missouri's monthly reports and verified that the kWh billed shown on the monthly reports match the accumulation period sales used to calculate the FPA rates.

Staff also reviewed Ameren Missouri's monthly interest rates that are applied to 95% of the over/under Base Energy Cost amount and verified that the interest rates and calculations of interest amounts are correct for FPA7. Staff also reviewed and verified the correctness of the following Commission ordered adjustments in this filing: true-up for Recovery Periods 1 and 2 with interest, and refund for Accumulation Periods 1 and 2 Consequently, Staff recommends the Commission issue an order approving Ameren Missouri's proposed tariff sheet, "as filed on August 18, 2011[sic],"[5] to become effective on September 23, 2011, as requested by Ameren Missouri.

On August 29, 2011, Staff filed its response to MIEC's "Motion for FAC Credits from Off-System Sales Margins." Staff states that it supports making adjustments to FACs at the earlier opportunity to minimize regulatory lag. However, Staff further observes:

[5] Ameren Missouri's tariff revision was filed on August 16, 2011.

> File No. EO-2010-0255, upon which MIEC rely, is currently undergoing review in a case Ameren Missouri brought before the Circuit Court of Cole County, Missouri, Case No. 11AC-CC00336, and could be reversed. And, despite MIEC"s argument to the contrary, the Commission could reach a different result on the issue of whether the Wabash and AEP contracts are long-term full or partial requirements contracts for purposes of its fuel adjustment clause for the period October 1, 2009, through June 20, 2010,[6] than it did for the period March 1, 2009, to September 30, 2009. The Commission has not yet taken evidence on that issue for any or all of that time period.

Staff states that it would support MIEC"s request if evidence on the issue of whether the Wabash and AEP contracts are long-term full or partial requirements contracts for purposes of its fuel adjustment clause for the period October 1, 2009, through June 20, 2010 could be taken expeditiously. If not, then Staff believes the issue should be left to be addressed in Staff"s second prudence review—for the period October 1, 2009, through May 31, 2011, which Staff will begin in early September 2011.

Analysis and Decision

The Commission's rule regarding FACs requires the Commission to issue an order approving or rejecting the company's tariff within 60 days of its filing.[7] And, if the FAC rate adjustment complies with the Commission's rule, Section 386.266, RSMo Supp. 2010, and the FAC mechanism established in the most recent general rate proceeding, the Commission is required to approve the rate adjustment or allow the proposed tariff implementing the adjustment go into effect by operation of law.[8]

The Commission has reviewed Ameren Missouri's tariff filings, and Staff's verified recommendation and memorandum, and finds that the tariff sheet implementing the FAC rate adjustment is in compliance with the Commission's order establishing the FAC and with all applicable statutes and regulations. Ameren Missouri has complied with the Commission's Reports and Orders in File Numbers ER-2011-0028, ER-2010-0274, ER-2011-0321 and EO-2010-0255 regarding its FAC, true-ups of RP1 and RP2, and the customer refund for RP1 and RP2. Consequently, 4 CSR 240-20.090(4) requires the Commission to approve Ameren Missouri's tariff or allow it to go into effect by operation of law.

Because the Commission's rules and the statutory scheme embodied in Section 386.266, RSMo Supp. 2010, allow not only for the refund of any imprudently incurred cost, but also interest on those cost, the ratepayers will always be made whole through the established FAC mechanism. And, there is no need to attempt to expedite recovery of alleged imprudently incurred over-collections when Staff has indicated that its prudence review for the accumulation periods in question in MIEC's motion will begin this month.

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[6] Staff notes that Effective June 1, 2010, Ameren Missouri's tariff was revised to limit the exception for long-term full or partial requirements contracts for purposes of its FAC to municipal contracts.

[7] Commission Rule CSR 240-20.090(4).

[8] *Id*.

The Commission has previously rejected MIEC's attempt to inappropriately expedite recovery of over-collections made by Ameren Missouri that were not yet ordered by the Commission in File Number ER-2011-0317, and the Commission must not violate its rules mandating approval of a proposed FAC rate adjustment when it is in compliance with the FAC statute and Commission rules.

THE COMMISSION ORDERS THAT:

1. The Missouri Industrial Energy Consumer's "Motion for FAC Credits from Off-System Sales Margins" is denied.
2. Union Electric Company, d/b/a Ameren Missouri' revised tariff filing, assigned Tariff No. YE-2012-0065 is approved to be effective September 23, 2011, as an interim rate adjustment, subject to true-up and prudence reviews. The tariff approved is:

   MO. P.S.C. No. 5, Section 4

   5th Revised Sheet No. 98.14, Canceling 4th Revised Sheet No. 98.14
3. This order shall become effective on September 23, 2011.
4. This file shall be closed on September 24, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

In the Matter of the Third True-Up Filing Under the Commission-Approved Fuel Adjustment Clause of Union Electric Company d/b/a Ameren Missouri

File No. ER-2012-0029

Electric. §20 Rates. The Commission approved the true-up amount recommended by Staff regarding Ameren Missouri's Fuel Adjustment Clause.

ORDER RESOLVING THIRD TRUE-UP FILING

Issue Date: September 7, 2011 Effective Date: September 17, 2011

On July 25, 2011, Union Electric Company d/b/a Ameren Missouri submitted an application to the Commission containing its third fuel adjustment clause true-up filing, as it is required to do by Commission Rules 4 CSR 240-3.161 and 240-20.090. Commission Rule 4 CSR 240-20.090(5)(D) requires the Commission's Staff to examine and analyze the information Ameren Missouri has submitted and to submit a recommendation to the Commission not later than 30 days after Ameren Missouri made its filing. Under that rule, the Commission must then act to approve, reject, or suspend Ameren Missouri's true-up filing within 60 days unless that timeline is suspended by the Commission.

Staff's recommendation, filed on August 24, indicated its agreement that the true-up amount for Recovery Period 3 (billing months June 2010 through May 2011) is an under-collection by Ameren Missouri of $1,018,872. Staff further recommends that the Commission order Ameren Missouri to include the contemporaneously filed true-up amount into its contemporaneously filed FPA rates adjustment for future filings. Ameren Missouri accepted Staff's recommendation in a filing made on September 1.

By the terms of the Commission's regulation, all parties to Ameren Missouri's rate case, ER-2010-0036, are automatically parties to this case.[1] In an order issued on July 26, the Commission notified those parties of Ameren Missouri's filing and invited any other interested parties to apply to intervene by August 15. No additional party asked to intervene and no party, other than Ameren Missouri, responded to Staff's recommendation.

Based on the verified recommendation of its Staff, the Commission will approve Ameren Missouri's Application.

[1]Commission Rule 4 CSR 20-20.090(5)(D).

THE COMMISSION ORDERS THAT:

1. The true-up amount for Recovery Period 3 is established as an under collection by Ameren Missouri of $1,018,872, to be included in its next FPA rate adjustment filing.

2. Ameren Missouri shall include contemporaneously filed true-up amounts into its contemporaneously filed FPA rate adjustments. Specifically, Ameren Missouri shall include the true-up amount for its the Recovery Period 4 (billing months of October 2010 through September 2011 in its FPA rate adjustment filing for the Recovery Period covering billing months February 2012 through September 2012.

3. This order shall become effective on September 17, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

Barry Road Associates, Inc., d/b/a/ Minsky's Pizza, and The Main Street Associates, Inc., d/b/a Minsky's Pizza, and Harry Mark Wooldridge, Complainants, v. Southwestern Bell Telephone Company, d/b/a AT&T Missouri, Respondent.

File No. TC-2011-0396

Evidence, Practice and Procedure §24 Procedure, evidence and proof. The movant has the burden to prove that summary determination is proper. When the movant introduces facts showing a right to judgment as a matter of law, the burden then shifts to the non-movant, who must respond with countervailing evidence showing that there is a genuine dispute as to one or more of the movant's material facts

REPORT AND ORDER GRANTING MOTION FOR SUMMARY DETERMINATION

Issue Date: September 13, 2011 Effective Date: September 23, 2011

Syllabus: This order grants summary determination in favor of Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri").

Background and Procedural History

On June 20, 2011[1], Complainants filed a Complaint with the Commission, pursuant to an April 4 order of the Honorable Anne Mesle, Judge of the Circuit Court of Jackson County, Missouri ("the Order"). Specifically, the Order stayed an underlying class action proceeding between Complainants and AT&T Missouri (hereafter "class action") to allow the Complainants to seek a ruling from the Commission to determine whether the "settlement payments made by AT&T Missouri are to be passed through to AT&T Missouri customers pursuant to 17.11 General Exchange Tariff 35 or similar and related tariffs."

On July 27, Southwestern Bell Telephone Company, d/b/a AT&T Missouri, filed an Answer, Affirmative Defenses, a Motion for Summary Disposition, and a Memorandum of Law in Support of its Motion for Summary Disposition. The Staff of the Commission supported AT&T's motion, and Complainants opposed it, both filings being on August 26.

FINDINGS OF FACT

Based upon undisputed facts, the Commission makes these Findings of Fact.

1. On March 11, 2010, Complainants filed a first amended putative class action petition against AT&T Missouri, et. al, for violation of the Missouri Merchandising Practices Act, unjust enrichment, money had and received, breach of the implied covenant of good faith and fair dealing, and statutory damages.[2]

[1] Calendar references are to 2011 unless otherwise indicated.
[2] *Complaint*, Ex. A, p. 3.

2. The pass-through of back taxes upon which Complainants' underlying claims rest is rooted in three prior lawsuits filed against AT&T Missouri and related entities.[3]

3. Each of the lawsuits was settled, and the settlement terms required that AT&T Missouri make back tax payments to eligible taxing entities.[4]

4. AT&T Missouri began to pass through the back tax payments to its customers via a monthly surcharge.[5]

5. A "back tax payment" is an amount calculated by a formula given to each class member that has timely and validly submitted a claim form.[6]

6. A "total back tax payment" means $65 million, inclusive of attorneys' fees, to be divided amount class members, St. Louis County, and class counsel.[7]

7. The claim form requires a class member to provide a certified copy of an ordinance enacted by the class member accepting the settlement with AT&T Missouri.[8]

8. The fees class counsel were entitled to receive was $16.25 million of the $65 million total back tax payment.[9]

9. AT&T Missouri is not surcharging its retail customers any amounts paid as attorneys' fees in connection with the settlement.[10]

10. $48.75 million was set aside for payment of back taxes, with $16.25 being left for attorney's fees.[11]

11. The *Wellston* court ordered AT&T Missouri to make back tax payments.[12]

12. The *St. Louis County* settlement provided for AT&T Missouri to make back tax payments.[13]

13. Each party in *St. Louis County* was to pay its own attorneys' fees.[14]

14. The *Springfield* settlement specified the amount of money AT&T Missouri was to pay as back tax payment, and what amount AT&T Missouri was to pay as attorneys' fees.[15]

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission has authority over AT&T Missouri's telephone service rates, and AT&T Missouri must include them in a filed tariff subject to the jurisdiction of the

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[3] *Id.* (the underlying tax lawsuits will be referred to as the *Wellston, St. Louis County,* and *Springfield* cases).
[4] *Id.* at pp. 1, 2, 5.
[5] *Complaint*, Ex. B, p. 2.
[6] *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 10 (or "the *Wellston* settlement"), p. 12
[7] *Id.*
[8] *Id.* at 32.
[9] *Id.* at 36.
[10] *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 11 (or "Order Approving Settlement"), p. 3.
[11] *Id.* at 8, 13-17.
[12] *Id.* at 18.
[13] *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition,* Ex. 12A (or "*St. Louis County* Settlement), p. 8.
[14] *Id.* at 20.
[15] *Memorandum of Law in Support of AT&T Missouri's Motion for Summary Disposition*, Ex. 12B (or "*Springfield*" Settlement), p. 2.

Commission.[16] The Commission has authority to hear and decide complaints brought against public utilities operating in Missouri.[17]

AT&T Missouri's current General Exchange Tariff states, in pertinent part,

> There shall be added to the customer's bill or charge, as a part of the rate for service, a surcharge equal to the pro rata share of any franchise, occupation, business, license, excise, privilege or other similar tax, fee or charge (hereafter called "tax") now or hereafter imposed upon the Telephone Company by ay taxing body or authority, whether by statute, ordinance, law, or otherwise and whether presently due or to hereafter become due.[18]

Approved tariffs become law, and have the same force and effect as a statute.[19] The tariff governs the relationship between AT&T Missouri and Complainants.[20]

Standard of Review for Summary Determination

Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of "a contested case by disposition in the nature of summary judgment or judgment on the pleadings."

Commission Rule 4 CSR 240-2.117(1), provides, in relevant part:

> (A) Except in a case seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.
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> * * *
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> (E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

This is not a case seeking a rate increase, or a case subject to an operation of law date. Thus, the motion for summary determination is properly before the Commission.

A defendant establishes a right to summary disposition by (1) offering facts that negate one or more essential elements of the plaintiff's claim, or (2) showing that the plaintiff will be unable to produce sufficient evidence to establish one or more essential elements of the plaintiff's claim.[21]

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[16] Sections 392.220, 392.245 RSMo.
[17] Section 386.390, RSMo 2000.
[18] *AT&T Missouri General Exchange Tariff*, P.S.C. Mo. – No. 35, Section 17.11, Original Sheet No. 26 (issued September 9, 1991, effective October 9, 1991).
[19] *Allstates Transworld Vanlines v. Sw. Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996).
[20] *See Bauer v. Sw. Bell Tel. Co.,* 958 S.W.2d 568, 570 (Mo. App. 1997).
[21] *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993). *See also Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 707 (Mo. banc 2005).

The movant has the burden to prove summary disposition is proper.[22] When the movant introduces facts showing a right to judgment as a matter of law, the burden then shifts to the non-movant, who must respond with countervailing evidence showing that there is a genuine dispute as to one or more of the movant's material facts.[23]

Moreover, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing[24] inasmuch as "[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest."[25]

DECISION

Complainants' theory is based upon the claim that the phrase "back tax payments" in the *Wellston, et. al.* settlements have a meaning specifically defined in those settlements. In other words, the "back tax payments" aren't really that, but something else.

Complainants, however, do not state what that meaning is, and the Commission can discern no other meaning to that phrase. This is especially true in light of the phrase "total back tax payments" including attorneys' fees. The negative implication of those two phrases would appear to be that "back tax payments" do not include attorneys' fees.

Further, class members (which are municipalities) claiming money under the *Wellston* settlements were required to produce copies of ordinances accepting the settlement. Thus, the Commission cannot see any other conclusion but that AT&T Missouri, in paying according to the settlement, did so to pay a "tax . . . imposed by any taxing body or authority . . . by . . . ordinance" as mentioned in AT&T Missouri's tariff.

Further, paying the settlement per a court-approved settlement also is paying a "tax . . . imposed . . . by statute, ordinance, law or otherwise" as listed in AT&T Missouri's tariff. Complainants' mere assertion that "back tax payment" means something else other than its ordinary meaning, without any evidence that the agreement gave it any other meaning, is not a specific fact which shows there is a genuine issue for hearing.[26]

Although not binding upon the Commission, the Commission notes that both the Wellston and the class action courts themselves rejected Complainants' arguments, and found the payments specifically involve taxes.

Complainants' arguments do not present a *genuine* issue of *material* fact.[27] The Commission will grant AT&T Missouri's motion for summary determination.

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[22] *See ITT, id.*, 854 S.W.2d at 378.
[23] *Id.* at 381.
[24] *See, e.g., Determination on the Pleadings, The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004).
[25] *Determination on the Pleadings, In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004). *See also Wood & Hulston Bank v. Mahan*, 815 S.W.2d 454, 457 (Mo. App. 1991).
[26] *See Kinder v. Notorangelo*, 615 S.W. 433, 434 (Mo. App. 1980).
[27] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48;106 S. Ct. 2505, 2510 (1986).

THE COMMISSION ORDERS THAT:

1. The Motion for Summary Determination filed by Southwestern Bell Telephone Company d/b/a AT&T Missouri is granted.

2. Southwestern Bell Telephone Company d/b/a AT&T Missouri may pass through settlement payments, but not any amount paid as attorneys fees, to its customers pursuant to AT&T Missouri General Exchange Tariff, P.S.C. Mo. – No. 35, Section 17.11, Original Sheet No. 26.

3. This order shall become effective on September 23, 2011.

4. This case may be closed on September 24, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

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In the Matter of the Second Prudence Review of Costs Subject to the Commission-Approved Fuel Adjustment Clause of The Empire District Electric Company

Case No. EO-2011-0285

Electric §20.1 Fuel Adjustment Clause. The Commission approved Staff's unopposed prudence review of the company's fuel costs to be recovered through its fuel adjustment clause.

ORDER APPROVING STAFF'S PRUDENCE REVIEW

Issue Date: September 20, 2011 Effective Date: September 30, 2011

The Empire District Electric Company ("Empire") has used a fuel adjustment clause since the Commission approved the use of that clause in the company's general rate case, ER-2008-0093. Section 386.266.4(4) RSMo Supp. 2010, the statute that authorizes an electric utility to use a fuel adjustment clause, requires the Commission to conduct a prudence review of the utility's fuel costs no less frequently than at 18-month intervals. The 18-month prudence review is also required by Commission Rule 4 CSR 240-20.090(7) and by Empire's tariff.

On March 9, 2011, the Commission's Staff filed a notice stating that it started its prudence audit on that date. Commission Rule 4 CSR 240-20.090(7)(B) establishes a timeline that requires Staff to file a recommendation regarding the results of its audit no later than 180 days after it initiates its audit. The timeline then directs the Commission to issue an order regarding Staff's audit no later than 210 days after Staff initiates it audit, unless within 190 days some party to the proceeding requests a hearing.

Staff filed its report and recommendation regarding its prudence audit on August 26, 2011. No party requested a hearing by the 190th day after Staff initiated its audit. Therefore, the Commission may now consider Staff's report and recommendation.

Staff's report and recommendation regarding its prudence review states that Staff has conducted a review of all aspects of Empire's fuel costs as they are passed through to customers under the fuel adjustment clause. Staff does not identify any imprudence by Empire that would result in harm to the utility's ratepayers.

The Commission finds Staff's report and recommendation regarding its prudence review of Empire's fuel costs to be reasonable. No party has requested a hearing, or in any other way opposed or objected to Staff's recommendation. Therefore, the Commission will approve Staff's report.

THE COMMISSION ORDERS THAT:

1. Staff's Report regarding its prudence audit of the costs subject to The Empire District Electric Company's fuel adjustment clause is approved.
2. This order shall become effective on September 30, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

Ag Processing, Inc., a Cooperative, Complainant, v. KCP&L Greater Missouri Operations Company, Respondent.

File No. HC-2010-0235

Steam §42 Planning and management. The purpose of a hedging program is not to make money, nor is it to ensure that customers pay the lowest possible cost. Rather, the purpose of a hedging program it to mitigate the risk of price volatility.
Steam §42 Planning and management. The prudence standard does not require a company to correctly foresee the direction a natural gas market will take.
Evidence, Practice and Procedure. §4 Presumption and burden of proof. Generally in a complaint case, the burden of proof is on complainant as the party asserting the affirmative on the issue of the utility's imprudence.
Evidence, Practice and Procedure. §4 Presumption and burden of proof. Although this case began as a complaint, by the terms of a prior stipulation and agreement, it was in effect a full prudence review of the company's fuel purchasing practices. Therefore the burden of proof shifted to the company when the complainant established a serious doubt as to the prudence of the expenditure.

REPORT AND ORDER

Issue Date: September 28, 2011
Effective Date: October 8, 2011

Appearances

Stuart W. Conrad, Esq., Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 1109 Broadway, Kansas City, Missouri 64111,
and
David L. Woodsmall, Esq., Finnegan, Conrad & Peterson, 428 East Capitol Avenue, Suite 300, Jefferson City, Missouri, 65101, for Complainant, Ag Processing, Inc., a Cooperative.

Karl Zobrist, Esq., and **Lisa A. Gilbreath, Esq.**, SNR Denton US LLP, 4520 Main Street, Suite 1100, Kansas City, Missouri 64111, for Respondent, KCP&L Greater Missouri Operations Company.

Samuel D. Ritchie, Associate Counsel, Missouri Public Service Commission, Post Office Box 360, 200 Madison Street, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Judge: Morris L. Woodruff, Chief Regulatory Law Judge.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

Procedural History

On January 28, 2010, Ag Processing Inc., a Cooperative, (AGP) filed a complaint against Aquila, Inc., d/b/a Aquila Networks – L&P, now known as KCP&L Greater Missouri Operations Company (KCPL-GMO). The complaint is related to Aquila's provision of industrial steam service to AGP's soybean processing plant in St. Joseph, Missouri.

AGP initially filed its complaint in Case Numbers HR-2007-0028 and HR-2007-0399, which are cases in which the Commission is considering possible Quarterly Cost Adjustments under KCPL-GMO's steam tariffs. The Commission separated AGP's complaint from those two cases and assigned it its current case number in an order issued on February 11, 2010.

KCPL-GMO filed a timely answer to AGP's complaint on March 15, 2010. Thereafter, AGP and KCPL-GMO prefiled direct and rebuttal testimony. Although the Commission's Staff and the Office of the Public Counsel are parties to this complaint action, neither presented any evidence and neither took any position regarding AGP's complaint.

The Commission conducted an evidentiary hearing on November 18 and 19, 2010. AGP and KCPL-GMO filed initial briefs on January 11, 2011, followed by reply briefs on February 9, 2011.

The Steam Services Provided by KCPL-GMO

1. KCPL-GMO's predecessor companies began making and supplying industrial steam from the Lake Road Plant in St. Joseph, Missouri in the 1930s, originally serving the animal packing plants located in that area. The Lake Road Plant's boilers are also used to produce steam to drive turbines to generate electricity. KCPL-GMO currently has five customers for the steam it produces. They are AGP; Triumph Foods, LLC; Albaugh Chemical; Nestlé/Purina PetCare; and Land O' Lakes, Omnium Division, a chemical company.[1]

2. AGP is KCPL-GMO's largest steam customer. During 2006 and 2007, the period at issue in this case, AGP took about two-thirds of the industrial steam supplied to the steam customers from the Lake Road Plant.[2]

3. The industrial steam is produced primarily from a coal-fired boiler. But, since the steam load exceeds the capacity of the coal-fired boiler, natural gas is also used as a fuel source. Natural gas costs more than coal, so coal is used as the base-load fuel, while natural gas is used as a swing fuel when extra steam production is needed.[3]

[1] Rush Direct, Ex. 104, Pages 6-7, Lines 18-23, 1-2.
[2] Johnstone Direct, Ex. 1, Page 2, Lines 6-7.
[3] Johnstone Direct, Ex. 1, Page 2, Lines 8-12.

The Hedging Program

4. In February 2006, KCPL-GMO's predecessor, Aquila, instituted a program of financial hedging for its natural gas supply. The company continued to purchase physical natural gas supplies in the same manner, but began buying and selling financial instruments to adjust its effective gas cost.[4] Previously, the company had simply purchased the natural gas it needed at market rates.[5]

5. Aquila decided to make all purchases for its 2006 hedging program on February 16, 2006, believing that it had an opportunity to lock in its natural gas needs for the year at a satisfactory price level.[6] Aquila's average hedge purchase price for all of 2006 for steam customers was $8.15 per MMBtu for future contracts, and an average strike price of $8.71 per MMBtu for call option purchases. The company sold puts at a $6.00 per MMBtu average. Aquila made these purchases anticipating that natural gas prices would rise throughout the balance of the year.[7]

6. However, natural gas prices did not rise throughout the balance of the year, instead dropping to $4.12 per MMBtu in September 2006.[8]

7. Aquila's natural gas hedge program for its steam production was in place once again for 2007. Aquila also purchased the 2007 hedge positions in 2006, but spread those purchases out over 9 months.[9] Again, natural gas market prices trended lower than the hedge positions.[10]

8. At AGP's request, Aquila suspended its natural gas hedging program for its steam production in October 2007.[11]

9. The net cost of Aquila's natural gas hedge program for its steam production was $1,164,960 in 2006 and $2,441,861 in 2007. Under Aquila's Quarterly Cost Adjustment tariff, 80 percent of those costs were collected from Aquila's steam customers. The net hedging program costs Aquila collected from its steam customers amounted to $931,968 for 2006 and $1,953,488 for 2007.[12] Those are the costs that AGP contends should be refunded to Aquila's steam customers.

Should Aquila have Adopted a Hedging Program?

10. The mere fact that Aquila's hedging program's cost exceeded the savings realized from that program does not mean that Aquila was imprudent or that the hedge program's net costs should be refunded to Aquila's steam customers. The purpose of a hedging program is not to make money, nor is it to ensure that customers pay the lowest possible cost. Rather the purpose of a hedging program is to mitigate the risk of price volatility. A properly designed and implemented hedging program will reduce peak prices, but may also may limit participation in a falling market.[13] In other words, in some circumstances customers may pay more for natural gas than they would have if the hedging program was not in place.

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[4] Johnstone Direct, Ex. 1, Page 2, Lines 13-19.
[5] Transcript, Page 190, Lines 6-13.
[6] Gottsch Direct, Ex. 102, Page 14, Lines 13-16.
[7] Gottsch Direct, Ex. 102, Pages 14-15, Lines 23, 1-5.
[8] Blunk Direct, Ex. 105, Page 24, Line 8.
[9] Johnstone Direct, Ex. 1, Page 13, Lines 17-21.
[10] Johnstone Direct, Ex. 1, Page 20, Lines 6-7.
[11] Johnstone Direct, Ex. 1, Page 31, Lines 18-19.
[12] Johnstone Rebuttal, Ex. 2, Page 30, Lines 8-11.
[13] Gottsch Direct, Ex. 102, Page 5, Lines 3-19.

11. Aquila's hedging program was designed to be market neutral, meaning the company was not supposed to attempt to predict whether the price of natural gas would rise or fall, but rather would purchase financial contracts that would result in an average market cost over a period of time in the future.[14]

12. In general, the Commission has encouraged utilities to implement and utilize hedging programs to mitigate price volatility. In fact, the Commission has a rule, 4 CSR 240-40.018, which requires natural gas utilities to engage in hedging activities to mitigate price volatility. That regulation does not apply to Aquila's steam operations, but it does indicate the Commission's support for hedging activities by Missouri's utilities.

13. Aquila's concerns about price volatility in the natural gas marketplace were certainly justified in 2006 and 2007. Since the winter of 2000-2001, the natural gas marketplace had experienced significant price fluctuations. In that winter alone, gas prices ranged from $4.485/MMBtu to $9.978/MMBtu. In December 2004 gas was at $6.83/MMBtu. By December 2005, it peaked at $15.378/MMBtu.[15]

14. Volatility did not end in 2006. By September 2006, prices had dropped to $4.120/MMBtu. Prices climbed back to $13.58/MMBtu in July 2008, but then dropped below $4.00/MMBtu in January 2009.[16]

15. In addition, in the summer of 2005, the natural gas producing regions of the United States Gulf Coast had been struck by two severe hurricanes, Katrina and Rita, causing major disruptions in the nation's supply of natural gas.[17] In early 2006, weather forecasters were again predicting an active hurricane season for 2006[18], with a resulting chance for new natural gas price spikes.

16. Because of the history of price volatility and predictions of future volatility due to concerns about the weather and natural gas supplies, Aquila acted prudently when it considered entering into a natural gas hedging program in February 2006.

17. In February 2006, Aquila entered into a stipulation and agreement to resolve Case No. HR-2005-0450, its pending rate case before the Commission. The implementation of a natural gas price hedging program for Aquila's steam operations had been discussed in the testimony filed in that case, including in the testimony filed on behalf of AGP by Maurice Brubaker.[19]

18. The stipulation and agreement that resolved Case No. HR-2005-0450 contemplated the establishment of a natural gas price hedging program by Aquila for its steam operations. Specifically, Section 8.1 of that stipulation and agreement provided that "[t]he cost of gas in Account 501 will include the cost of physical gas deliveries and financial instruments, when settled, associated with gas deliveries in the quarterly period."[20]

[14] Gottsch Direct, Ex. 102, Page 8, Lines 1-4.
[15] Blunk Direct, Ex. 105, Page 24, Lines 1-12.
[16] Blunk Direct, Ex. 105, Schedule WEB-12.
[17] Blunk Direct, Ex. 105, Page 27, Lines 5-21.
[18] Gottsch Direct, Ex. 102, Schedule GLG-4.
[19] Blunk Direct, Ex. 105, Schedule WEB-6, Pages 6 and 7 of 16.
[20] Clemens Direct, Ex. 101, Schedule GLC-1, Page 5 of 16.

19. The parties to the stipulation and agreement discussed and understood the term "financial instruments" as used in Section 8.1 to mean the futures contracts and option contracts that would be used in Aquila's natural gas hedging program for its steam operations.[21]

20. The stipulation and agreement that resolved Case No. HR-2005-0450 created a Quarterly Cost Adjustment (QCA) mechanism. The QCA required Aquila to file quarterly rate adjustments to reflect 80 percent of changes in actual fuel costs above or below an established base amount. Aquila was not allowed to pass 20 percent of its fuel costs to its customers under the QCA to better align its interests with those of its customers. [22]

21. The QCA also contained a coal performance standard that limited the amount of fuel costs that could be passed through to the steam customers. Aquila primarily produced steam using a coal-fired boiler. It used its natural gas-fired boiler only when demand for steam could not be met using the coal-fired boiler. Since coal was a less expensive fuel than natural gas, the QCA established a minimum standard for coal-fired steam production that protected customers from higher fuel costs if Aquila failed to meet those production standards.[23]

22. Under the QCA, quarterly fuel cost variations are collected from customers over the following twelve-month period. The effect is to protect steam customers from price volatility by increasing retail prices gradually in a period of increasing prices and reducing prices gradually in a period of decreasing prices, thereby averaging the ups and downs as fuel prices move up and down from quarter to quarter.[24]

23. Since the QCA, apart from a separate hedging program, had the effect of reducing fuel cost volatility for customers, AGP contends Aquila was imprudent in not taking that effect of the QCA into account when deciding to implement its natural gas fuel cost hedging program.

24. While the QCA had the effect of reducing fuel cost volatility for Aquila's steam customers, it was not a fuel cost hedging program. The QCA did not affect the effective price that Aquila would have to pay to obtain its natural gas supplies.[25] In other words, the QCA would delay Aquila's ability to pass higher natural gas costs to its customers, but it would only be a delay. Inevitably, those higher costs would be passed to the steam customers. In contrast, a properly functioning hedging program could effectively reduce the costs paid for fuel, to the benefit of both Aquila and its customers.

25. When they created the QCA, the parties to the stipulation and agreement contemplated the creation of a price hedging program as part of the QCA as evidenced by the language in section 8.1 of that stipulation and agreement that allowed the cost of financial instruments to be included as a cost of gas.[26] It is only with the benefit of 20/20 hindsight, knowing that natural gas prices did not rise precipitously during the period in question, that it can be argued that the price protections afforded by the hedging program were not necessary. Therefore, the Commission finds that Aquila was

[21] Clemens Direct, Ex. 101, Page 3, Lines 10-14. See also, Transcript, Page 64, Lines 5-25.
[22] Clemens Direct, Ex. 101, Schedule GLC-1, Section 8, Page 4-16.
[23] Johnstone Direct, Ex. 1, Pages 8-9, Lines 7-24, 1-4.
[24] Johnstone Direct, Ex. 1, Pages 6-7, Lines 3-8, 1-9.
[25] Transcript, Page 176, Lines 7-12.
[26] Clemens Direct, Ex. 101, Schedule GLC-1, Page 5-16.

not imprudent in implementing a natural gas price hedging program of some type. The next question is whether the hedging program it actually adopted was prudently designed.

Was Aquila's Hedging Program Prudently Designed?

26. The hedging program that Aquila implemented for its steam operations was taken directly from the hedging program it had been using for its electric operations.[27]

27. Aquila's natural gas hedging program for steam production was to procure one-third of the monthly forecast quantity of natural gas through fixed price New York Mercantile Exchange (NYMEX) futures contracts, one-third in options contracts, and the remaining one-third at the then prevailing spot market.[28]

28. Aquila's one-third program was designed to dampen both upward and downward swings in the market price of natural gas. When natural gas prices went up Aquila's exposure to the increased costs was limited because one-third of those costs would be fixed by the options contracts, one-third would be capped by the options contracts, and only one-third would be subject to market rates. If market prices dropped, Aquila would not have to exercise the options on one-third of the gas requirements, while another one-third of those gas requirements would be purchased at market rates. Thus, two-thirds of the gas requirement could be purchased at the lower market cost, to the benefit of both Aquila and its steam customers.[29]

29. Aquila's one-third hedging program for steam production was taken directly from its hedging program for electric production. Aquila did not closely evaluate that program to customize it for application to its steam production, but no evidence was presented to establish that the one-third hedging program was imprudently designed or that it would not have produced reasonable results given appropriate inputs.

30. Indeed, Aquila ran a comparison study of what the results would have been if an alternative gas hedging program administered by Kase & Company known as EZ Hedge had been used in 2006 and 2007. Using the same inputs as Aquila's one-third program, EZ Hedge would have lost $1,457,660 for 2006 and $3,686,720 for 2007. Both amounts are significantly higher than the losses that resulted from Aquila's one-third hedging program.[30]

31. The Commission finds that AGP has failed to present sufficient evidence to create a serious doubt about the prudence of the design of Aquila's natural gas hedging program for its steam operations. Rather, the problem with Aquila's hedging program was with its implementation, not its design. The Commission will address that issue in the next section of this report and order.

[27] Transcript, Page 164, Lines 17-24.
[28] Gottsch Direct, Ex. 102, Page 3, Lines 15-22.
[29] Gottsch Direct, Ex. 102, Pages 6-7, Lines 17-23, 1-10.
[30] Gottsch Direct, Ex. 102, Page 17, Lines 9-13.

Was the Hedging Program Prudently Implemented?

32. AGP alleges that Aquila's hedging program was imprudently implemented in two respects. The first involves Aquila's transactions in financial instruments.

33. As part of its hedging program, Aquila purchased financial instruments to balance the cost of purchasing the physical supplies of natural gas it would need to produce steam. As previously indicated, part of Aquila's hedging program was to purchase options to hedge one-third of anticipated volumes.

34. Options come in two flavors. A call option provides the purchaser with the option to purchase gas in a future month at a price referred to as a strike price. A call option helps protect the purchaser against a rising price.[31] The other flavor of option is a put option. A put option provides the purchaser with the option to sell gas in a future month at a set strike price. Such an option would give the holder of the option an opportunity to participate more fully in a falling price market.[32]

35. AGP criticized Aquila as imprudent for selling put options in the apparent belief that market prices would rise, thereby depriving its customers of protection against the falling market that actually developed.[33]

36. Aquila bought and sold both call and put options to hedge its costs through the use of a price collar. That program applies the premium gathered from selling a put to the cost of the premium of the call.[34] Thus, Aquila's decision to sell puts does not by itself indicate that the company acted imprudently. The prudence standard does not require that Aquila correctly foresee the direction the natural gas market will take. The company's sale of put options in a market in which prices fell does not establish that the company acted imprudently.

37. AGP's other accusation of imprudence in the implementation of Aquila's hedging program concerns the volumes of gas that Aquila decided to hedge. The problem is that Aquila chose to purchase financial instruments to hedge much more gas than it actually burned.

38. For the period of April 2006 through December 2007, Aquila purchased hedge positions for approximately 2,000,000 mmBtus of gas for steam production. During the same period the company actually burned only 1,500,000 mmBtus of gas for steam production.[35]

39. Remember, Aquila intended to operate a one-third hedging program. That means that one-third of its natural gas purchases for steam production should have been unhedged, to be purchased at market rates. Since its forecasts of usage were so far off, Aquila in effect bought none of its gas supplies at market rates, rendering its one-third hedging program ineffective from the start.

40. Aquila's hedging of more gas than it actually burned is problematic because that position tends to amplify variations in the natural gas market. If the hedged volume is reasonably close to the physical quantity needed, the net price of the amount of gas hedged can be locked in regardless of market price levels.[36] If Aquila's one-third

[31] Johnstone Direct, Ex. 1, Page 14, Lines 6-12.
[32] Johnstone Direct, Ex. 1, Page 14, Lines 16-22.
[33] Johnstone Direct, Ex. 1, Page 15, Lines 2-17.
[34] Gottsch Direct, Ex. 102, Page 7, Lines 16-19.
[35] Transcript, Pages 88-89, Lines 3-25, 1-11. *See also*, Ex. 109.
[36] Johnstone Direct, Ex. 1, Page 18, Lines 4-6.

hedging program had been based on a better forecast of gas usage, that program could have worked as designed and Aquila's customers would have benefited from reduced volatility.

41. However, when physical volumes of gas are substantially less that the volumes hedged, the hedging program will create a price change opposite in direction to the change in the market. In other words, the net cost of gas under the hedging program will actually go up in a down market and down in an up market. The results will be very volatile and potentially very beneficial or very costly.[37]

42. Since market prices in 2006 and 2007 trended down as compared to the hedge positions, the effect was to substantially increase net gas costs. If costs had gone up instead, windfall benefits would have resulted from substantially decreased net gas costs. But the point of a hedging program is to decrease volatility, not to speculate on windfall profits or losses.[38]

43. The impact of the hedging program on net gas prices in October 2006 provides a good illustration of the problem with the operation of Aquila's hedging program. In that month, the market price of gas had fallen to $4.62. However, under the hedging program, the net cost of gas for that month was $12.76. That extreme price variation occurred because the physical volume of gas purchased was only 25 percent of the design volumes. The first one-third of the hedging program, which was designed to purchase futures contract to protect against rising prices was itself 35 percent larger than the physical volumes used so that losses on that portion of the hedge were amplified. In effect, Aquila had 160,000 mmBtu in costly hedge positions spread over only 58,939 mmBtus physically used to produce steam.[39]

44. Throughout the years in question, Aquila's forecasted/budgeted natural gas usage far exceeded the actual amounts burned for steam production.[40] That variation and its devastating effect on the hedging program is sufficient to demonstrate a serious doubt as to the prudence of Aquila's operation of that hedging program. Thus, the initial presumption of prudence is overcome, and the burden shifts to Aquila to dispel those doubts and prove that the hedging program was operated prudently. Aquila has failed to meet that burden.

45. Aquila explained that its forecast for the volumes of steam it would need to produce, and thus the amount of natural gas it would hedge was based on information submitted by its customers. Aquila had only a handful of large industrial steam customers, so the company simply asked its customers to estimate how much steam they would need in the future. An Aquila employee, Joseph Fangman, periodically spoke with the customers about their anticipated need for steam.[41] Fangman then passed that raw information on to another Aquila employee, Tim Nelson, who did the actual forecasting.[42] The record does not indicate how Tim Nelson prepared his forecasts because he did not testify.

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[37] Johnstone Direct, Ex. 1, Page 18, Lines 15-18.
[38] Johnstone Direct, Ex. 1, Page 20, Lines 6-10.
[39] Johnstone Direct, Ex. 1, Page 21, Lines 1-12.
[40] Johnstone Rebuttal, Ex. 2, Page 22, Chart Reb-2.
[41] Transcript, Page 279, Lines 4-12.
[42] Fangman Direct, Ex. 103, Page 4, Lines 13-20.

46. AGP offered Aquila reasonably accurate estimates of its steam usage, but the estimates Aquila obtained from some of its other steam customers were described by Fangman as "soft" and "fuzzy", less reliable.[43] In fact, those other customers significantly overestimated the amount of steam they would use.[44]

47. Aquila was aware that its customer's estimates of steam usage were unreliable. In his testimony Fangman described one industrial customer that always expected to be ramping up production in the next month, thus requiring more steam, but which never actually increased production as planned.[45]

48. Aquila would place the blame for its inaccurate forecasts squarely on its customers, arguing that as the sole available supplier of steam, it has an obligation to plan to meet all the needs of its customers.[46] While certainly Aquila had an obligation to meet the needs of its customers, it was Aquila's responsibility to determine the reasonableness of its customer's estimates. Aquila knew that those customer estimates were not reliable and had an obligation to structure its hedging program to account for the uncertainty of volumes of gas, yet there is nothing in the record to indicate that it did so. Aquila has not met its burden of proving that it operated its hedging program in a prudent manner.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Burden of Proof

A. In form, this is a complaint brought by AGP against Aquila/KCPL-GMO. Normally in a complaint brought before the Commission, the burden of proof would be on AGP, the complainant, as the party asserting the affirmative on the issue of the utility's imprudence.[47] However, this case is more complicated than a straight-forward complaint.

B. An approved stipulation and agreement that resolved Aquila's 2005 steam rate case (HR-2005-0450) established a Quarterly Cost Adjustment mechanism that allowed Aquila to make quarterly rate adjustments to reflect 80 percent of the change in its actual fuel costs above or below an established base amount.[48]

C. That stipulation and agreement also establishes a method by which the prudence of Aquila's fuel purchase decisions can be reviewed. The Commission's Staff is required to conduct an initial, first-step, prudence review to determine "that no significant level of imprudent costs is apparent." If it determines a further review is necessary, Staff may also proceed, as a second-step, with a full prudence review.[49]

D. However, the stipulation and agreement also allows any Aquila steam customer, including AGP, to file a complaint to initiate the second-step full prudence

[43] Transcript, Page 289, Lines 1-22.
[44] Ex. 9.
[45] Fangman Direct, Ex. 103, Page 10, Lines 11-19.
[46] Transcript, Page 294, Lines 11-16.
[47] *State ex rel. GS Technologies Operating Co. v. Pub. Serv. Comm'n*, 116 S.W.3d 680, 693 (Mo. App. W.D. 2003).
[48] Clemens Direct, Ex. 101, Schedule GLC-1, Page 4 of 16.
[49] Clemens Direct, Ex. 101, Schedule GLC-1, Pages 6-8, of 16.

review, even if Staff chooses not to pursue such a review.[50] It is just such a complaint that AGP has currently brought before the Commission.

E. Because this is actually a full prudence review of Aquila's fuel purchasing decisions rather than an ordinary complaint, AGP is not saddled with the burden of proof throughout the proceeding. Instead, the Commission's modified prudence standard of review is applicable.

F. Under that standard of review, which the Commission established in a 1985 decision, a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[51] The Commission's standard of review regarding prudence decisions has subsequently been accepted by reviewing courts.[52]

G. Based on its findings of fact, the Commission has concluded that AGP has demonstrated serious doubt about the prudence of Aquila's decisions regarding its gas-cost hedging program. Therefore, Aquila/KCPL-GMO must shoulder the burden of proving that those decisions were prudent.

Appropriate Relief

H. The approved stipulation and agreement also affects the degree of relief that is appropriate in this case. In a typical complaint case, the Commission would grant relief only to the party that brought the complaint. Since AGP is the only steam customer that filed a complaint, it would be the only customer that received relief. However, as previously indicated this is not a typical complaint.

I. As the Commission previously concluded in section D of these conclusions of law, the approved stipulation and agreement that resolved Aquila's 2005 steam rate case allowed AGP to initiate a full prudence review of Aquila's fuel purchasing decisions by filing this complaint. Thus, this action took on the character of a prudence review rather than a complaint that would be limited to AGP's specific concerns.

J. Since this action is a full prudence review, it applies to all of Aquila's steam customers. The Commission found that Aquila did not act prudently with regard to all its steam customers, not just with regard to AGP. Therefore, the relief ordered by the Commission should apply to all of Aquila's steam customers.

Decision

The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decision.

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[50] Clemens Direct, Ex. 101, Schedule GLC-1, Page 8 of 16.

[51] *In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues. And in the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company*, 27 Mo. P.S.C. (N.S.) 183 (1985).

[52] *State ex rel. Associated Natural Gas v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528-29 (Mo. App. W.D. 1997).

The evidence showed that Aquila hedged the purchase price of far more natural gas than it actually needed to use to produce steam to serve its customers. By doing so, Aquila operated a hedging program that actually increased rather than reduced price volatility. AGP amply demonstrated serious doubt about the prudence of Aquila's operation of the hedging program. Therefore, Aquila had the burden of proving that it operated the hedging program in a prudent manner. Aquila failed to meet that burden.

Aquila collected net hedging costs from its steam customers amounting to $931,968 for 2006 and $1,953,488 for 2007. The record is not clear about how much net hedging costs Aquila would have incurred if it had properly forecast the amount of natural gas it needed to purchase to supply steam to its customers. Perhaps it would have incurred some costs even if it has been completely accurate in its forecasting. Neither party presented any evidence that would allow the Commission to make that determination.

However, it appears that net hedging costs would have been small if the required amount of natural gas had been accurately forecast. As AGP's witness, Donald Johnstone, explained, small changes in volumes would have only small effects on the hedging program. Because of the previously described amplification effect, large variations in volumes result in very large problems.[53]

In any event, Aquila had the burden of proving that it operated its hedging program in a prudent fashion. It failed to establish that any part of the cost of operating that program was prudently incurred. Therefore, the Commission finds that Aquila's entire net cost of operating its natural gas price hedging program for steam production in 2006 and 2007 was imprudently incurred and must be refunded to its steam customers through operation of the QCA.

THE COMMISSION ORDERS THAT:

a. KCP&L Greater Missouri Operations Company shall refund to its steam customers, through operation of the Quarterly Cost Adjustment, the net cost of operating its natural gas price hedging program for steam production in the amount of $931,968 for 2006 and $1,953,488 for 2007.

b. This order shall become effective on October 8, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur;
and certify compliance with
Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 28th day of September, 2011.

NOTE: The case was appealed to the Missouri Court of Appeals Reversed and remanded by *AG Processing v. KCPL Greater Missouri Operations Co*., 385 S.W.3d 511 (Mo. App W.D. 2012)

[53] Transcript, Page 110, Lines 2-6.

In the Matter of the Joint Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas and Missouri Gas Utility, Inc., for Approval of the Merger of Southern Missouri Natural Gas with Missouri Gas Utility, Inc., and for Certain Related Transactions.

File No. GM-2011-0354

Gas. §6 Transfer, lease and sale. The Commission approved the proposed merger of two natural gas local distribution companies as being not detrimental to the public interest, based on the unanimous stipulation and agreement of the parties.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT

Issue Date: September 28, 2011 Effective Date: October 8, 2011

Syllabus: This order approves the Unanimous Stipulation and Agreement ("Stipulation"), and allows Southern Missouri Natural Gas Company, L.P., d/b/a Southern Missouri Natural Gas ("SMNG") and Missouri Gas Utility, Inc. ("MGU") to merge. MGU will be the surviving entity. The order also grants SMNG and MGU a waiver from the Commission's rule requiring a 60-day notice before filing a contested case.

Procedural History

On April 27, 2011[1], SMNG and MGU filed an application. That application requests, among other things, authority from the Commission for SMNG and MGU to merge, with MGU as the surviving entity. Southern Union Company, d/b/a Missouri Gas Energy, filed an application to intervene on May 18. The Commission granted the application on May 31.

The Joint Applicants

SMNG is a Missouri limited partnership that owns and operates a natural gas transmission and distribution system in south central Missouri. It is a "gas corporation" and a "public utility" subject to the Commission's jurisdiction.

MGU is a wholly owned subsidiary of Summit Utilities, Inc., and is a Colorado Corporation. MGU operates natural gas distribution and transmission systems in northern and central Missouri. It is also a "gas corporation" and a "public utility" subject to the Commission's jurisdiction. The ultimate owners of SMNG and MGU are the same, which is IIF CNG Investment LLC.

The applicants state that the sale would not be detrimental to the public interest because the sale would not result in any reduced level of service or reliability. Further, the sale would not result in any rate changes. Finally, the sale would not impact tax revenues of the Missouri political subdivisions in which any structures, facilities, or equipment of SMNG or MGU is located.

[1] Calendar references are to 2011 unless otherwise noted.

Unanimous Stipulation and Agreement

On September 15, SMNG, MGU, MGE, the Staff of the Commission, and the Office of the Public Counsel submitted a Stipulation. The Stipulation is attached to this order as Exhibit A.

The signatories agreed that the Commission should approve the application subject to certain conditions. Those conditions involve adherence to Missouri rules, affiliate transactions, accounting for plant in service, surveillance, customer service standards, depreciation, tariffs, rate increase requests, waiver of rate reviews, prior orders and agreements, gas safety, no detriment to customers, interaction with adjoining utilities, name change of MGU, and operations.

The Commission can approve of the requested merger upon finding the merger would not be detrimental to the public interest.[2] The Commission has reviewed the pleadings, and the Stipulation, and upon that review, finds that the proposed merger would not be detrimental to the public interest. The Commission finds the Stipulation reasonable, and will approve it. The Commission further finds the relief requested in the application reasonable, and will grant the application.

THE COMMISSION ORDERS THAT:

1. The Unanimous Stipulation and Agreement is approved.
2. Southern Missouri Natural Gas Company, L.P. d/b/a Southern Missouri Natural Gas and Missouri Gas Utility, Inc., are authorized to perform in accordance with the Merger Agreement and all other transaction-related instruments, and to take any and all other actions that may be reasonably necessary and incidental to the performance of the merger.
3. Missouri Gas Utility, Inc., is authorized, via the Merger Agreement, to merge and consolidate Southern Missouri Natural Gas Company, L.P. d/b/a Southern Missouri Natural Gas' public utility operations with Missouri Gas Utility, Inc., as more fully described in the filed documents including the Merger Agreement, Joint Application, and Direct Testimony.
4. The Merger and other relief sought in the Joint Application and the conditions of the Unanimous Stipulation and Agreement are not detrimental to the public interest.
5. The Motion for Waiver of the 60-day notice of filing contained in Commission Rule 4 CSR 240-4.020(2) is granted.
6. The terms of the Unanimous Stipulation are just and reasonable, and the Commission orders that the signatories shall be bound by and comply with the terms of the Unanimous Stipulation and Agreement.
7. The Commission further grants such other relief as may be necessary and appropriate to accomplish the purposes of the Merger and the Joint Application, and to consummate the Merger and related transaction in accordance with the Merger and the Joint Application.

[2] Section 393.190 RSMo (2000), Commission Rule 4 CSR 240-3.215.

8. The Commission grants a waiver of rate reviews as required in File Nos. GA-2009-0264, GA-2009-0422, GA-2010-0189 and GA-2010-0289.
9. This order shall become effective on October 8, 2011.
10. This case shall be closed on October 9, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of Missouri Gas Utility, Inc., for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Transmission Line and Distribution System to Provide Gas Service in Benton County, Missouri as a New Certificated Area

File No. GA-2012-0044

Certificates §21 Grant or refusal of certificate generally. The Commission granted the applicant's unopposed application for a certificate of convenience and necessity to construct and operate natural gas facilities in Benton County, Missouri.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: September 28, 2011 Effective Date: October 8, 2011

The Missouri Public Service Commission is granting the application for permission and approval to construct gas facilities and provide gas service, as described in the title of this action.

Procedure

Missouri Gas Utility, Inc. ("MGU") filed the application on August 9, 2011. On August 10, 2011, the Commission published notice of the application. In the same order, the Commission set a deadline for filing applications to intervene, and the Commission received no application for intervention.

On September 7, 2011, the Commission's staff ("Staff") filed its *Staff Recommendation*. On September 13, 2011, Staff filed its *Amended Staff Recommendation*. On September 16, 2011, MGU filed *MGU Response to Staff Recommendation*.

The statutory provision for a "due hearing"[1] means that the Commission may grant an unopposed application without a hearing.[2] Such is the case here as follows. The *Staff Amended Recommendation* favors the amended application, subject to certain conditions. The *MGU Response to Staff Recommendation* agrees to those conditions. Therefore, no hearing was required and the Commission bases its findings and conclusions on the affidavits filed.

Standard

Gas facility construction[3] and service[4] require the Commission's prior permission and approval. Such permission and approval depend on MGU showing:

> . . . that the granting of the application is required by the public convenience and necessity[;[5]]

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1 Section 393.170.3, RSMo 2000.

2 *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Com'n,* 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). For the same reason, the Commission need not separately state its findings of fact.

3 Section 393.170.1, RSMo 2000.

4 Section 393.170.2, RSMo 2000, first sentence.

5 4 CSR 240-3.205(1)(E).

and the Commission determining:

> . . . that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service[.[6]]

Further, the Commission may condition its approval and permission as follows:

> The commission may by its order impose such condition or conditions as it may deem reasonable and necessary [.[7]]

"Necessary" and "necessity" relate to the regulation of competition, cost justification, and safe and adequate service.[8] On finding convenience and necessity, the Commission embodies its permission and approval in a certificate,[9] which the statutes call a certificate of convenience and necessity.[10]

Findings and Conclusions

The verified filings support the convenience and necessity of MGU's proposed construction and service because such filings show the following.

1. MGU has the operational capability to provide gas service in the area that is the subject of the amended application ("new service area").

2. Gas service for the new service area would not jeopardize natural gas service to the MGU's current existing customers.

3. MGU's provision of gas service in the new service area is in the public interest under the conditions set forth in the ordered paragraphs below.

On those grounds, the Commission independently finds and concludes that MGU's proposed construction and service are necessary and convenient for the public service, subject to reasonable and necessary conditions, as set forth below. Therefore, the Commission will grant the amended application.

THE COMMISSION ORDERS THAT:

1. The application is approved.

2. A certificate of convenience and necessity, reflecting the Missouri Public Service Commission's permission and approval for construction and service shall be issued to Missouri Gas Utility, Inc. ("MGU") in the area described in the application ("new service area").

3. The provisions of paragraphs 1 and 2 are subject to the following conditions.

a. MGU's shareholders shall be fully responsible for the success of this project, with no liability or responsibility put on MGU's existing customers.

b. MGU shall obtain adequate capacity on the pipeline to reliably serve all customers in the new service area, including capacity necessary to serve any future growth.

c. MGU shall maintain the operational capability to provide gas service in the new service area.

[6] Section 393.170.3, RSMo 2000.

[7] *Id.*

[8] *State ex rel. Intercon Gas, Inc. v. Public Serv. Com'n of Mo.*, 848 S.W.2d 593, 597 (Mo. App., W.D. 1993).

[9] Section 393.170.2, RSMo 2000, second sentence.

[10] 4 CSR 240-3.205.

d. The new service area shall not jeopardize natural gas service to MGU's current customers.
e. MGU shall use the depreciation rates currently on file with the Commission.
f. Within 30 days of this order's effective date, MGU shall file revised tariff sheets to include the new service area.

4. This order shall become effective on October 8, 2011.
5. This file shall close on October 9, 2011.

Gunn, Chm., Davis, Jarrett, And Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

The Staff of the Missouri Public Service Commission, Complainant, v. Aspen Woods Apartment Associates, L.L.C., and National Water & Power, Inc. Respondents.

File No. WC-2010-0227

Public Utilities. §7. Jurisdiction and powers of the State Commission. The Commission dismissed the complaint for lack of jurisdiction.

ORDER DISMISSING COMPLAINT

Issue Date: October 5, 2011 Effective Date: October 5, 2011

After reviewing this file the Commission has decided to dismiss Staff's complaint.

THE COMMISSION ORDERS THAT:

1. The Staff of the Missouri Public Service Commission's complaint against Aspen Woods Apartment Associates, L.L.C. and National Water & Power, Inc. is dismissed for lack of jurisdiction.
2. This file shall be closed.
3. This order shall be effective immediately upon issuance.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

In the Matter of a Repository File Concerning Ameren Missouri's Submission of its 2011 RES Compliance Plan

File No. EO-2011-0275

Electric. §42 Planning and Management. Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan.

NOTICE REGARDING AMEREN MISSOURI'S 2011 RES COMPLIANCE PLAN

Issue Date: October 5, 2011

On April 15, 2011, Union Electric Company, d/b/a Ameren Missouri, filed its Renewable Energy Standard Compliance Plan for 2011-2013, as it was required to do by Commission Rule 4 CSR 240-20.100(7). The Commission's rule requires the Staff of the Commission to review the utility's compliance plan and to file a report about its review within 45 days.[1] Staff complied with that requirement by filing a report on May 31, in which it reported that it found no deficiencies in Ameren Missouri's plan.

The Commission's rule also allows Public Counsel and other interested persons or entities to file comments regarding Ameren Missouri's plan.[2] The Missouri Coalition for the Environment, d/b/a Renew Missouri filed such comments on May 31.

Renew Missouri described what it believes to be two deficiencies in Ameren Missouri's compliance plan. First, it contends that Ameren Missouri may not rely on electrical output from its existing Keokuk hydroelectric plant as a renewable resource. Second, it argues that Ameren Missouri may not rely on renewable energy credits (RECs) collected before January 1, 2011, to meet its renewable energy requirements for 2011.

The Commission's regulation does not specify what, if any, action the Commission is to take regarding Ameren Missouri's RES Compliance Plan and any alleged deficiencies in that plan, except to allow the Commission to "establish a procedural schedule if necessary".[3] Staff, Public Counsel, the Missouri Department of Natural Resources, the Missouri Industrial Energy Consumers (MIEC), and Ameren Missouri filed written responses to Renew Missouri's comments and the Commission held a hearing regarding those comments on August 30.

[1] 4 CSR 240-20.100(7)(D).
[2] 4 CSR 240-20.100(7)(E).
[3] 4 CSR 240-20.100(7)(F).

After considering the comments of all the parties, the Commission concludes that no further order from the Commission is appropriate at this time. On April 15, 2012, Ameren Missouri must file its annual RES Compliance Report to explain how it has complied with the renewable energy mandates of the Renewable Energy Standard Law[4] also known as Proposition C. The plan that is currently before the Commission is only Ameren Missouri's suggestion of how it intends to meet those requirements. The Commission's actual determination of whether Ameren Missouri has met the renewable energy mandates will not be made until after the company files its 2012 report.

For that reason, any decision the Commission could make in this case, would have no binding effect on its determination regarding the 2012 report and could only prejudge or confuse the decisions the Commission will need to make next year. Therefore, the Commission will decline to issue any further orders in this case.

Gunn, Chm., Jarrett, and Kenney, CC., concur;
Davis, C., concurs with concurring opinion to follow.

Woodruff, Chief Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Davis has been filed.

[4] Sections 393.1020, et seq., RSMo (Supp. 2010).

In the Matter of a Repository File Concerning The Empire District Electric Company's Submission of its 2011 RES Compliance Plan

File No. EO-2011-0276

Electric. §42 Planning and Management. Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan.

NOTICE REGARDING EMPIRE'S 2011 RES COMPLIANCE PLAN

Issue Date: October 5, 2011

On April 15, 2011, The Empire District Electric Company filed its Renewable Energy Standard Compliance Plan for 2011-2013, as it was required to do by Commission Rule 4 CSR 240-20.100(7). The Commission's rule requires the Staff of the Commission to review the utility's compliance plan and to file a report about its review within 45 days.[1] Staff complied with that requirement by filing a report on May 31, in which it reported that it found no deficiencies in Empire's plan.

The Commission's rule also allows Public Counsel and other interested persons or entities to file comments regarding Empire's plan.[2] The Missouri Coalition for the Environment, d/b/a Renew Missouri filed such comments on May 31.

Renew Missouri described what it believes to be two deficiencies in Empire's compliance plan. First, it contends that Empire may not rely on electrical output from its existing Osage Beach hydroelectric plant as a renewable resource. Second, it argues that the statute under which Empire claims to be exempt from compliance with the solar provisions of the controlling statute has been repealed by implication by the passage of Proposition C.

The Commission's regulation does not specify what, if any, action the Commission is to take regarding Empire's RES Compliance Plan and any alleged deficiencies in that plan, except to allow the Commission to "establish a procedural schedule if necessary".[3] Staff, Public Counsel, the Missouri Department of Natural Resources, the Missouri Industrial Energy Consumers (MIEC), and Empire filed written responses to Renew Missouri's comments and the Commission held a hearing regarding those comments on August 30.

[1] 4 CSR 240-20.100(7)(D).
[2] 4 CSR 240-20.100(7)(E).
[3] 4 CSR 240-20.100(7)(F).

After considering the comments of all the parties, the Commission concludes that no further order from the Commission is appropriate at this time. On April 15, 2012, Empire must file its annual RES Compliance Report to explain how it has complied with the renewable energy mandates of the Renewable Energy Standard Law,[4] also known as Proposition C. The plan that is currently before the Commission is only Empire's suggestion of how it intends to meet those requirements. The Commission's actual determination of whether Empire has met the renewable energy mandates will not be made until after the company files its 2012 report.

For that reason, any decision the Commission could make in this case, would have no binding effect on its determination regarding the 2012 report and could only prejudge or confuse the decisions the Commission will need to make next year. Therefore, the Commission will decline to issue any further orders in this case.

Gunn, Chm., Jarrett, and Kenney, CC., concur;
Davis, C., concurs with concurring opinion to follow.

Woodruff, Chief Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Davis has been filed.

[4] Sections 393.1020, et seq., RSMo (Supp. 2010).

In the Matter of a Repository File Concerning Kansas City Power & Light Company's Submission of its 2011 RES Compliance Plan

File No. EO-2011-0277

Electric. §42 Planning and Management. Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan.

NOTICE REGARDING KCP&L'S 2011 RES COMPLIANCE PLAN

Issue Date: October 5, 2011

On April 15, 2011, Kansas City Power & Light Company filed its Renewable Energy Standard Compliance Plan for 2011-2013, as it was required to do by Commission Rule 4 CSR 240-20.100(7). The Commission's rule requires the Staff of the Commission to review the utility's compliance plan and to file a report about its review within 45 days.[1] Staff complied with that requirement by filing a report on May 31, in which it reported that it found no deficiencies in KCP&L's plan.

The Commission's rule also allows Public Counsel and other interested persons or entities to file comments regarding KCP&L's plan.[2] The Missouri Coalition for the Environment, d/b/a Renew Missouri filed such comments on May 31.

Renew Missouri described what it believes to be a deficiency in KCP&L's compliance plan. It argues that KCP&L may not rely on renewable energy credits (RECs) collected before January 1, 2011, to meet its renewable energy requirements for 2011.

The Commission's regulation does not specify what, if any, action the Commission is to take regarding KCP&L's RES Compliance Plan and any alleged deficiencies in that plan, except to allow the Commission to "establish a procedural schedule if necessary".[3] Staff, Public Counsel, the Missouri Department of Natural Resources, the Missouri Industrial Energy Consumers (MIEC), and KCP&L filed written responses to Renew Missouri's comments and the Commission held a hearing regarding those comments on August 30.

[1] 4 CSR 240-20.100(7)(D).
[2] 4 CSR 240-20.100(7)(E).
[3] 4 CSR 240-20.100(7)(F).

After considering the comments of all the parties, the Commission concludes that no further order from the Commission is appropriate at this time. On April 15, 2012, KCP&L must file its annual RES Compliance Report to explain how it has complied with the renewable energy mandates of the Renewable Energy Standard Law,[4] also known as Proposition C. The plan that is currently before the Commission is only KCP&L's suggestion of how it intends to meet those requirements. The Commission's actual determination of whether KCP&L has met the renewable energy mandates will not be made until after the company files its 2012 report.

For that reason, any decision the Commission could make in this case, would have no binding effect on its determination regarding the 2012 report and could only prejudge or confuse the decisions the Commission will need to make next year. Therefore, the Commission will decline to issue any further orders in this case.

Gunn, Chm., Jarrett, and Kenney, CC., concur;
Davis, C., concurs with concurring opinion to follow.

Woodruff, Chief Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Davis has been filed.

[4] Sections 393.1020, et seq., RSMo (Supp. 2010).

In the Matter of a Repository File Concerning KCP&L-GMO's Submission of Its 2011 RES Compliance Plan

File No. EO-2011-0278

Electric. **§42 Planning and Management**. Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan.

NOTICE REGARDING KCPL-GMO'S 2011 RES COMPLIANCE PLAN

Issue Date: October 5, 2011

On April 15, 2011, KCP&L Greater Missouri Operations Company (KCPL-GMO) filed its Renewable Energy Standard Compliance Plan for 2011-2013, as it was required to do by Commission Rule 4 CSR 240-20.100(7). The Commission's rule requires the Staff of the Commission to review the utility's compliance plan and to file a report about its review within 45 days.[1] Staff complied with that requirement by filing a report on May 31, in which it reported that it found no deficiencies in KCPL-GMO's plan.

The Commission's rule also allows Public Counsel and other interested persons or entities to file comments regarding KCPL-GMO's plan.[2] The Missouri Coalition for the Environment, d/b/a Renew Missouri filed such comments on May 31.

Renew Missouri described what it believes to be a deficiency in KCPL-GMO's compliance plan. It argues that KCPL-GMO may not rely on renewable energy credits (RECs) collected before January 1, 2011, to meet its renewable energy requirements for 2011.

The Commission's regulation does not specify what, if any, action the Commission is to take regarding KCPL-GMO's RES Compliance Plan and any alleged deficiencies in that plan, except to allow the Commission to "establish a procedural schedule if necessary".[3] Staff, Public Counsel, the Missouri Department of Natural Resources, the Missouri Industrial Energy Consumers (MIEC), and KCPL-GMO filed written responses to Renew Missouri's comments and the Commission held a hearing regarding those comments on August 30.

[1] 4 CSR 240-20.100(7)(D).
[2] 4 CSR 240-20.100(7)(E).
[3] 4 CSR 240-20.100(7)(F).

After considering the comments of all the parties, the Commission concludes that no further order from the Commission is appropriate at this time. On April 15, 2012, KCPL-GMO must file its annual RES Compliance Report to explain how it has complied with the renewable energy mandates of the Renewable Energy Standard Law,[4] also known as Proposition C. The plan that is currently before the Commission is only KCPL-GMO's suggestion of how it intends to meet those requirements. The Commission's actual determination of whether KCPL-GMO has met the renewable energy mandates will not be made until after the company files its 2012 report.

For that reason, any decision the Commission could make in this case, would have no binding effect on its determination regarding the 2012 report and could only prejudge or confuse the decisions the Commission will need to make next year. Therefore, the Commission will decline to issue any further orders in this case.

Gunn, Chm., Jarrett, and Kenney, CC., concur;
Davis, C., concurs with concurring opinion to follow.

Woodruff, Chief Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Davis has been filed.

[4] Sections 393.1020, et seq., RSMo (Supp. 2010).

In the Matter of Southern Union Company, d/b/a Missouri Gas Energy's Tariff Proposal to Assess Security Deposit on New Service Applicants that Receive a Credit Score of 724 or Below.

File No. GT-2011-0375
Tariff No. JG-2011-0565

Gas. §33 Billing practices. The Commission approved a stipulation and agreement that allowed a gas utility to assess security deposits against new customer with low credit scores on an experimental basis.

ORDER APPROVING UNANIMOUS STIPULATION AND AGREEMENT AND APPROVING TARIFF

Issue Date: October 5, 2011 Effective Date: October 15, 2011

On May 17, 2011, the Office of the Public Counsel filed a motion asking the Commission to suspend a tariff submitted by Southern Union Company, d/b/a Missouri Gas Energy (MGE). The Commission took no immediate action regarding Public Counsel's motion and Public Counsel, MGE, and the Commission's Staff commenced negotiations about the tariff. During the course of those negotiations, MGE voluntarily extended the effective date of its tariff until August 10. On August 4, MGE, Public Counsel, and Staff filed a unanimous stipulation and agreement that addresses concerns about MGE's tariff. That stipulation and agreement includes a revised tariff that the parties agreed could go into effect on August 10.

The Commission had questions about the unanimous stipulation and agreement and about MGE's tariff. To allow more time to address those questions, the Commission suspended MGE's tariff until August 20, and directed counsel for the parties to appear at the Commission's agenda meeting to answer Commissioner questions. That agenda session did not satisfy all the Commission's concerns, so the Commission further suspended MGE's tariff until November 18. The Commission conducted an on-the-record presentation on September 6, hearing testimony and argument from MGE, Staff, and Public Counsel regarding the stipulation and agreement and the tariff.

MGE's tariff would allow the company to assess security deposits on new customers based on the prospective customer's credit score. That would be inconsistent with the provisions of Commission Rule 4 CSR 240-13.030(1)(C), so the unanimous stipulation and agreement would require the Commission to waive the contrary provisions in the regulation. The parties agree that the credit score provision of the tariff should be treated as experimental and suggest that the tariff provision be reevaluated in MGE's next rate case. The parties further explained that MGE's proposed security deposit provision is similar to a provision in Laclede' Gas Company's tariff that has worked well for that company and its customers over the past several years.

The Commission has the legal authority to accept a stipulation and agreement as offered by the parties pursuant to Section 536.060, RSMo 2000. After reviewing MGE's tariff and the unanimous stipulation and agreement, and having heard the explanations offered by the parties, the Commission independently finds and concludes that MGE's tariff is just and reasonable and should be approved. The Commission further finds and concludes that the unanimous stipulation and agreement submitted by the parties should be approved.

While the Commission will approve the stipulation and agreement and MGE's tariff, it is still concerned about the use of credit scores in the determination of whether to require customer deposits. MGE's tariff indicates that the credit scoring criteria are to be implemented on an experimental basis. The Commission directs its Staff to closely monitor the credit scoring criteria's impact on MGE's customers. The Commission will consider that impact in its ongoing review of the Commission's Chapter 13 rule on customer service and billing practices.

THE COMMISSION ORDERS THAT:

1. The Unanimous Stipulation and Agreement filed on August 4, 2011, concerning Southern Union Company d/b/a Missouri Gas Energy's tariff to assess security deposits based on credit scores is approved.
2. Southern Union Company d/b/a Missouri Gas Energy is granted a waiver from the provisions of Commission Rule 4 CSR 240-13. 030(1)(C) that are inconsistent with the provisions of its tariff.
3. Southern Union Company d/b/a Missouri Gas Energy, the Office of the Public Counsel, and the Commission's Staff shall comply with the terms of the Unanimous Stipulation and Agreement.
4. The following tariff sheet, filed by Southern Union Company d/b/a Missouri Gas Energy on May 11, 2011, and assigned Tariff No. JG-2011-0565, is approved, as amended, for service on and after October 15, 2011:

   P.S.C. MO. No. 1

   First Revised Sheet No. R-12, Canceling Original Sheet No. R-12

5. This order shall become effective on October 15, 2011.
6. This file shall be closed on October 16, 2011.

Gunn, Chm., Davis, and Jarrett, CC., concur;
Kenney, C., dissents with dissenting opinion to follow.

Woodruff, Chief Regulatory Law Judge

NOTE: At the time of publication, no opinion of Commissioner Kenney has been filed
NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of Veolia Energy Kansas City, Inc. for Authority to File Tariffs to Increase Rates

File No. HR-2011-0241
Tracking Nos. YH-2011-0532 and YH-2011-0533

Steam. §20 Rates. The Commission approved a stipulation and agreement to allow the utility to implement a rate increase.

ORDER APPROVING AND INCORPORATING STIPULATION AND AGREEMENT, REJECTING TARIFFS, AND DIRECTING FILING OF NEW TARIFFS

Issue Date: October 12, 2011 Effective Date: October 19, 2011

The Missouri Public Service Commission is rejecting the pending tariff and ordering Veolia Energy Kansas City, Inc. ("Veolia") to file new tariff sheets in compliance with this order. This order sets forth the terms of, and charges for, Veolia's steam service as proposed in the *Stipulation and Agreement* filed on September 29, 2011. The *Stipulation and Agreement*'s terms include a revenue increase of approximately $1,379,210, which accounts for a part of its current revenue deficiency. Veolia's customers include commercial office, government and institutional facilities, hospitality and event venue customers, and owners or managers of multi-unit residential property, but Veolia does not provide steam service directly to any residential customers.

The Commission makes each ruling on consideration of all allegations and arguments of each party. The Commission has considered the substantial and competent evidence upon the whole record but does not specifically address matters that are not dispositive. The Commission's findings reflect its determinations of credibility.

On those grounds, the Commission independently makes the following findings and conclusions.

A. Appearances

For Veolia:

Diana M. Vuylsteke
Bryan Cave, LLP
211 N. Broadway, Suite 3600, St. Louis, Missouri 63102.

For Staff:

Jennifer Hernandez, Associate Staff Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, MO 65102.

For the City of Kansas City, Missouri:

Mark W. Comley
Newman, Comley & Ruth P.C.
601 Monroe Street, Suite 30, P.O. Box 537, Jefferson City, MO 65102

For Kansas City Power & Light Company:

James M. Fischer
Fischer & Dority, P.C.
101 Madison Jefferson City, Missouri 65101

For Southern Union Company d/b/a Missouri Gas Energy:

Dean L. Cooper
Brydon, Swearengen & England, PC,
312 East Capitol, P.O. Box 456, Jefferson City, MO 65102.

Senior Regulatory Law Judge: Daniel Jordan.

B. Procedural Background

On April 22, 2011, Veolia filed schedules setting forth proposed terms of and rates for service ("tariffs"). The tariffs proposed a general rate increase of approximately 19 percent. The tariffs bore an effective date of May 22, 2011. By order dated May 4, 2011, the Commission suspended the tariff until February 16, 2012, the maximum time allowed by statute.[1] The suspension of the tariffs initiated a contested case.[2] A contested case is a formal hearing procedure, but it allows for waiver of procedural formalities[3] and a decision without a hearing,[4] including by stipulation and agreement.[5]

By order dated May 2, 2011, the Commission directed that notice of this action be provided to the public and to certain parties and set a deadline for filing applications to intervene. The Commission granted applications to intervene from:

- The City of Kansas City, Missouri;
- Kansas City Power & Light Company; and
- Southern Union Company d/b/a Missouri Gas Energy.

The Commission established the test year relevant to Veolia's rates by order dated May 19, 2011. As of September 2, 2011, the parties pre-filed all direct and rebuttal testimony, and filed no surrebuttal. The Commission scheduled an evidentiary hearing for October 17-21 and 24-28, 2011.

[1] Section 393.150, RSMo 2000.
[2] Section 393.150.1, RSMo 2000; and Section 536.010(4), RSMo Supp. 2010.
[3] Sections 536.060(3) and 536.063(3), RSMo 2000.
[4] Sections 536.060, RSMo 2000.
[5] *Id*. and 4 CSR 240-2.115.

On September 29, 2011, Veolia, Staff, and the City of Kansas City filed the *Stipulation and Agreement*, signed by all parties except the following non-signatory parties:

- Kansas City Power & Light Company; and
- Southern Union Company d/b/a Missouri Gas Energy.

No party filed any opposition to the *Stipulation and Agreement* by the seven-day deadline that the Commission's regulations set,[6] so the Commission cancelled the evidentiary hearing, and will treat the *Stipulation and Agreement* as unanimous.[7]

C. The *Stipulation and Agreement's* Provisions

The *Stipulation and Agreement* waives procedural requirements that would otherwise be necessary before final decision.[8] The *Stipulation and Agreement* resolves all issues among the signatory parties and seeks an "order approving all of the specific terms and conditions of" the *Stipulation and Agreement*. The specific terms and conditions of the *Stipulation and Agreement* include the following.

As to some matters, the *Stipulation and Agreement* provides that the parties will separately discuss certain matters ("deferred matters"). Deferred matters appear in the *Stipulation and Agreement* as follows.

3(c) Single Metering Point for the City under LCS Tariff.
6. Payroll Distribution.
7. Corporate Cost Study.

This order includes no determination on the deferred matters in those paragraphs. As to the remaining matters, the *Stipulation and Agreement* submits a proposed resolution for the terms of and rates for Veolia's steam service.

In support of the *Stipulation and Agreement*'s provisions, the signatory parties ask to enter all pre-filed testimony into the record, and the Commission will grant that request. The Commission's review of the record shows that substantial and competent evidence weighs in favor of the *Stipulation and Agreement*'s provisions. Therefore, the Commission will incorporate the *Stipulation and Agreement*'s provisions into this order and lift the suspension of the tariffs.

Because the Commission is lifting the suspension, and no party seeks an evidentiary hearing, the Commission need not convene an evidentiary hearing. Because no hearing is required on an undisputed matter,[9] the Commission will decide this action as a non-contested case. Therefore, the Commission need not separately state its findings of fact.[10]

The Commission reports the following conclusions.[11]

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[6] 4 CSR 240-2.115(2)(B).
[7] 4 CSR 240-2.115(2)(C).
[8] Section 536.060, RSMo 2000.
[9] *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm'n,* 776 S.W.2d 494, 496 (Mo. App., W.D. 1989).
[10] Section 536.090, RSMo 2000.
[11] Section 386.420.2, RSMo 2000.

D. Jurisdiction

Because the Commission is a creature of statute, the statutes determine the Commission's jurisdiction.[12] The Commission's jurisdiction generally includes every public utility corporation,[13] which includes heating companies.[14] Heating companies include Veolia because Veolia provides steam heat service to 54 customers.[15] Regulating Veolia's service and rates is specifically within the Commission's jurisdiction by the filing of tariffs.[16] The filing of tariffs began this action.

E. Service

The standard for service is that "service instrumentalities and facilities as shall be safe and adequate [.[17]]" Upon review of the record and the *Stipulation and Agreement*, the Commission independently finds and concludes that the *Stipulation and Agreement*'s proposed terms support safe and adequate service. Without further discussion, the Commission incorporates such provisions, as if fully set forth, into this *Report and Order*.

F. Rates

The standard for rates is "just and reasonable,"[18] a standard founded on constitutional provisions, as the United States Supreme Court has explained.[19]But the Commission must also consider the customers.[20]Further, the balancing of investor and consumer interests is not reducible to a single formula.[21] Moreover, making such pragmatic adjustments is part of the Commission's duty.[22] Thus, the law requires a just and reasonable end, but does not specify a means.[23]

(i) Revenue Adjustment

Determining whether an adjustment is necessary requires comparing Veolia's current net income to Veolia's revenue requirement. Revenue requirement is the amount of money that a utility may collect per year, which depends on the requirements for providing safe and effective service at a profit. Those requirements are tangible and intangible.[24]

The Commission determines the revenue requirement from the conventional analysis of the resources devoted to service. To provide service, a utility devotes resources, which the conventions of accountancy classify as either expense or investment as follows.

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[12] *State ex rel. Monsanto v. Public Service Comm'n,* 716 S.W.2d 791, 796 (Mo. banc 1986).
[13] Section 386.250(5), RSMo 2000.
[14] Section 386.020(43), RSMo Supp. 2010; Sections 393.140(1) and 393.290, RSMo 2000.
[15] Section 386.020(20), RSMo Supp. 2010.
[16] Sections 393.140(11), 393.150, and 393.290, RSMo 2000.
[17] Section 393.130.1, RSMo Supp. 2010 and Section 393.290, RSMo 2000.
[18] *Id*. and Section 393.150.2, RSMo 2000.
[19] *Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n of the State of West Virginia*, 262 U.S. 679, 690 (1923).
[20] *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).
[21] *Id.* at 586 (1942).
[22] *Bluefield*, 262 U.S at 692; *State ex rel. Associated Natural Gas Co. v. Public. Serv. Comm'n*, 706 S.W.2d 870, 873 (Mo. App., W.D. 1985) (citing *Hope Natural Gas Co.*, 320 U.S. at 602-03).
[23] *Id*.
[24] *Hope Natural Gas Co.,* 320 U.S. at 603 (1944).

- Expenses include operation, replacement of capital items as they depreciate ("current depreciation"), and taxes on the return.
- Investment is the capital basis devoted to public utility service ("rate base") on which the utility seeks profit ("return" on investment).
- Return is therefore a percentage ("rate of return") of rate base.
- Rate base includes capital assets ("gross plant"), less historic deterioration of such assets ("accumulated depreciation"), plus other items.
- Those components relate to each other in the following formula:
- Revenue Requirement = Expenses + (Rate Base x Return)
- Expenses = Operating Costs + Current Depreciation + Taxes
- Rate Base = Gross Plant – Accumulated Depreciation + Other Items

The rate of return depends on the cost of each component in the utility's capital structure.

But determining the revenue requirement is not the entire analysis. That is because the utility collects that amount from its customers. Customers are not all the same and need not receive the same treatment.

(ii) Rate Design

Rate design is how a utility distributes its revenue requirement among its various classes of customer. Customers vary as to the costs attributable to their service and their rates should reflect their costs respectively. Just and reasonable rates may account for such differences among customers.

(iii) Rates Proposed in the Settlement

A utility has the burden of proving that increased rates are just and reasonable[25] by a preponderance of the evidence.[26] The Commission has compared the evidence on the whole record with the *Stipulation and Agreement* as to both rate adjustment and rate design. The Commission independently finds and concludes that the rates proposed in the *Stipulation and Agreement* are just and reasonable rates. Therefore, the Commission incorporates those provisions, as if fully set forth, into this order without further discussion.

G. Expedited Filings

For those reasons, the Commission will reject the tariffs and order the filing of new tariff sheets in compliance with this *Report and Order* ("compliance tariffs"). Compliance tariffs constitute Appendix A to the *Stipulation and Agreement* and the parties request approval of such compliance tariffs effective on November 1, 2011. To accommodate that request, the Commission will order an expedited date for this order becoming effective, [27] the filing of compliance tariffs, and the filing of Staff's recommendation on the compliance tariffs.

H. Decision

The Commission makes the following rulings.

[25] Section 393.150.2, RSMo 2000.
[26] *State Board of Nursing v. Berry*, 32 S.W.3d 638, 641 (Mo. App., W.D. 2000).
[27] Section 386.490.3, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. All pre-filed testimony and accompanying exhibits are entered into the record and such documents already on file, in the Commission's electronic filing and information system, shall suffice for that purpose without the filing of hard copy.

2. The provisions of the *Stipulation and Agreement* are approved and incorporated into this order as if fully set forth.

3. The Commission makes no determination as to the deferred matters described in the body of this order.

4. The suspension of the tariffs number YH-2011-0532 and YH-2011-0533 is lifted and tariff numbers YH-2011-0532 and YH-2011-0533 are rejected.

5. No later than October 19, 2011, Veolia shall file a new tariff ("compliance tariff") consistent with the *Stipulation and Agreement*.

6. The filing of the compliance tariff shall initiate a new action that shall receive a new file number.

7. No later than October 26, 2011, the Commission's staff shall file its recommendation on the compliance tariff.

8. This order shall become effective on October 19, 2011.

9. This file shall close on October 20, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the 2009 Resource Plan of KCP&L Greater Missouri Operations Company Pursuant to 4 CSR 240-22

File No. EE-2009-0237

Electric. §42. Planning and management. Missouri Department of Natural Resources (MDNR) and the Office of the Public Counsel failed to meet, by a preponderance of the evidence, their burden of proving that KCP&L Greater Missouri Operations Company (GMO) violated the Commission's Chapter 22 rules, the Non-Unanimous Stipulation and Agreement, or the Stakeholder Process Agreement. The Commission required GMO to address the concerns raised by the stakeholders in this proceeding in its April Integrated Resource Plan (IRP) filing.
Evidence, Practice and Procedure. §26. Burden of proof. Missouri Department of Natural Resources (MDNR) and the Office of the Public Counsel failed to meet, by a preponderance of the evidence, their burden of proving that KCP&L Greater Missouri Operations Company (GMO) violated the Commission's Chapter 22 rules, the Non-Unanimous Stipulation and Agreement, or the Stakeholder Process Agreement.

REPORT AND ORDER

Issue Date: October 19, 2011
Effective Date: October 29, 2011

APPEARANCES

APPEARING FOR KCP&L GREATER MISSOURI OPERATIONS COMPANY:
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and

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APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:
Kevin Thompson, Chief Staff Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Harold Stearley, Deputy Chief Regulatory Law Judge

I. Procedural History

KCP&L Great Missouri Operations Company ("GMO") filed its Integrated Resource Plan ("IRP"), as required by 4 CSR 240 – Chapter 22, on August 5, 2009. The majority of the parties filed a Non-Unanimous Stipulation and Agreement ("Agreement") that included a Stakeholder Process Agreement for resolving several of the parties' concerns and alleged deficiencies with the IRP. The Agreement required stakeholder meetings culminating with the filing of a revised IRP. On June 2, 2010, after conducting an independent review of the IRP and the unopposed Agreement the Commission determined that the IRP was compliant with the Commission's Chapter 22 rules and approved it.

On January 18, 2011, after being granted a one-month extension of time, GMO submitted its revised IRP filing.[1] With that filing, GMO stated:

> As a result of this additional analysis completed per the Stipulation and Agreement in Case No. EE-2009-0237, GMO has determined that the preferred resource plan filed in August, 2009 is no longer appropriate. Significant changes have occurred in projections of both natural gas costs and CO2 emission costs along with recently proposed U.S. Environmental Protection Agency regulations, (Transport Rule) that dictates [sic] the need to fully evaluate additional alternative resource plans prior to determining a revised preferred plan. GMO will be conducting this additional analysis and expects to have results available in the summer of 2011.

On February 8, 2011, the Commission's Staff filed a complaint against GMO opening File No. EC-2011-0250. Staff alleged that because GMO did not file a preferred resource plan with its revised IRP that GMO had violated Commission Rules 4 CSR 240-22.070(10) and (11), 22.080(1)(A)-(D) and (7) and 22.010(2). Staff further alleged that GMO's incomplete filing violated the Agreement and the Commission's order approving it.

On April 27, 2011, the Commission ordered GMO to file its revised preferred resource plan no later than July 1, 2011. The Commission also set a hearing in this matter (not Staff's complaint case) to determine if GMO violated the stipulation and agreement. The evidentiary hearing was held on August 1, 2011.[2]

II. Findings of Fact and Conclusions of Law

A. The Parties

Introduction

Not all of the parties to this case appeared for the evidentiary hearing convened on August 1, 2011. The parties entering appearances are delineated in the findings of fact below.

Findings of Fact

1. KCP&L Greater Missouri Operations Company ("GMO") is a Missouri corporation with its principal office and place of business located at 1201 Walnut Street, Kansas City, Missouri 64106-2124. GMO is primarily engaged in the business of generating, transmitting, distributing, and selling electric energy in portions of northwestern Missouri.[3]

2. Dogwood Energy, L.L.C. ("Dogwood") is a limited liability company organized and existing under the laws of the State of Delaware and authorized to conduct business in the State of Missouri. Dogwood owns the 625 MW combined cycle generating facility located in Pleasant Hill, Missouri, which is within the MPS service territory of GMO.[4]

3. Missouri Joint Municipal Electric Utility Commission ("MJMEUC") is a body corporate and politic of the State of Missouri, organized and existing as a joint municipal utility commission pursuant to Section 393.700, et seq. Fifty-eight Missouri municipalities currently are parties to the joint contract establishing MJMEUC. MJMEUC serves 5 municipalities that currently have wholesale power contracts with GMO and 7 municipalities directly embedded in GMO's transmission system that take transmission service through the Southwest Power Pool.[5] MJMEUC is a wholesale energy and transmission customer of GMO, both directly and on behalf of its contracting municipalities.[6]

4. Missouri Department of Natural Resources (MDNR") is Missouri's general environmental agency charged with administering the programs assigned to the Department relating to environmental control and the conservation and management of natural resources.[7] MDNR, and specifically its Division of Energy, is a state agency vested with the powers and duties set forth in Section 640.150, RSMo 2000, which includes planning for energy resource development; analyzing energy management issues; consulting and cooperating with all state and federal governmental agencies on matters of energy research and development, management, conservation and distribution; assessing the potential impacts on environmental quality; and analyzing the potential for increased use of energy alternatives and making recommendations for the expanded use of such alternate energy sources and technologies.[8]

5. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."[9] Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."[10]

6. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.[11]

Conclusions of Law – Jurisdiction and Burden of Proof

GMO provides electric service to customers throughout the service area certificated to it by the Commission.[12] GMO is an "electrical corporation" and "public utility" as those terms are defined by Section 386.020, RSMo Supp. 2010, and is subject to the Commission's jurisdiction, supervision, control and regulation as provided in Chapters 386 and 393, RSMo.

Because Staff dismissed its complaint against GMO, and because MDNR and Public Counsel are the only remaining parties that are alleging any violations of the Commission's rules, the Agreement and the Stakeholder Process Agreement, MDNR and Public Counsel bear the burden of proof. The burden of proof is the preponderance of the evidence standard.[13] In order to meet this standard, MDNR and Public Counsel must convince the Commission it is "more likely than not" that GMO violated the Commission's rules, or the terms of the Agreement and Stakeholder Process Agreement, and/or the Commission's order approving the Agreement and Stakeholder Process Agreement.[14]

B. Witnesses

Introduction

A total of four witnesses provided testimony at the evidentiary hearing. Those witnesses were: Lena Mantle for Staff, Adam Bickford for MDNR, Kevin Bryant for GMO and James Okenfuss for GMO.

Findings of Fact

7. The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.

8. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

Conclusions of Law – Witness Testimony

Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony.[15] An administrative agency, as fact-finder, also receives deference when choosing between conflicting evidence.[16] In fact, the Commission "may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it."[17]

The Commission receives deference when reaching decisions based on technical and scientific data.[18] And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.[19] Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.[20]

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.[21] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.[22] Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.[23]

C. The 2009 IRP Filing, the Agreement and the Stakeholder Process Agreement Introduction

The procedural posture of this case is unique. The Commission convened an evidentiary hearing in the IRP file as opposed to convening one in Staff's related complaint file, i.e. EC-2010-0250. When MDNR intervened in Staff's complaint, it stated that while it generally agreed with Staff's allegations it would not declare a position at that time. MDNR's position on the issues was unknown to the Commission prior to the evidentiary hearing held in this file, File No. EE-2009-0237. Similarly, Public Counsel declared no position on any issue in either file prior to the hearing, and its position was not clearly defined until it submitted its post-hearing brief.

After the evidentiary hearing, Staff voluntarily dismissed its complaint and neither MDNR nor Public Counsel filed a separate complaint. Nevertheless, issues regarding alleged violations of the Commission's rules and the Agreement and the Stakeholder Process Agreement have been raised at the evidentiary hearing by MDNR and Public Counsel. GMO did not object, but rather defended its positions. Consequently, Section 536.063(3) is applicable because it provides: "Where issues are tried without objection or by consent, such issues shall be deemed to have been properly before the agency." Although no formal complaint was filed with the Commission by MDNR or Public Counsel,[24] a contested case proceeding on their alleged violations was held that ensured all due process requirements.

MDNR alleges that GMO did not comply with three requirements in the Agreement and Stakeholder Process Agreement by: (1) making changes in its Demand-Side Management ("DSM") portfolio; (2) failing to select a preferred resource plan with the revised IRP filing; (3) failing to file an analysis of the retirement of the Sibley 3 coal unit.[25]

MDNR also maintains that GMO failed to vet all plans and programs through the stakeholder process, post execution of the Stakeholder Process Agreement.[26] Implied in these various allegations is the additional allegation that if GMO violated the Agreement or the Stakeholder Process Agreement, then GMO violated the Commission's order approving them.

In addition to alleging this non-compliance, MDNR's witness testified that the alleged breaches of the Agreement and Stakeholder Process Agreement would also be violations of the Commission's IRP rules; specifically 4 CSR 240-22.070(6) (failure to select a preferred resource plan); 4 CSR 240-22.050(7) (failure to test DSM portfolios for cost effectiveness); 4 CSR 240-22.050(6)(C) and 11(G) (adding a new program to the DSM portfolio without a proper description); and 4 CSR 240-22.070 (failure to properly analyze alternative resource plans).[27]

Public Counsel's allegations mirror those of MDNR. However, while MDNR and Public Counsel outline their allegations in general terms, and while MDNR identifies what it believes are specific rule violations, neither identifies specific paragraphs, by number, of the Agreement or the Stakeholder Process Agreement that GMO is alleged to have violated.

In terms of relief, MDNR requests the Commission to order GMO to comply with the Agreement by correcting its alleged deficiencies and filing a revised IRP. Additionally, MDNR and Public Counsel seek Commission findings that GMO violated the terms of the Agreement and Stakeholder Process Agreement. Neither party has sought penalties.

Dogwood takes a more pragmatic view. Dogwood did not file or join any complaint. Dogwood does not seek any findings of violations and observes that GMO is required to make its next IRP filing in April 2012. Dogwood believes that little would be gained from requiring GMO to make further changes to its 2009 IRP or the subsequent supplemental filings. Dogwood believes that efforts should now focus on GMO's next IRP filing and that any remaining concerns should be addressed in that filing. Dogwood has listed its concerns, most of which address purchased power agreements, in its post-hearing brief.

In its post-hearing briefing, Staff reiterates its position that GMO, following the July 1, 2011 supplemental filing, is now in compliance with the Commission's IRP rules. Staff has several concerns with GMO's revised filings and states its desire to have any further efforts to address those concerns by GMO occur with GMO's April 2012 IRP filing.

Findings of Fact – General Provisions of the IRP, the Agreement and the Stakeholder Process Agreement

9. GMO filed its 2009 Integrated Resource Plan ("IRP") on August 5, 2009.[28]

10. The IRP was composed of 8 volumes and various appendices: Volume 1, the Executive Summary of the IRP; Volume 2, the Filing Schedule and Requirements; Volume 3, Load Analysis and Forecasting; Volume 4, Supply-Side Resource Analysis; Volume 5, Demand-Side Resources Analysis; Volume 6, Integrated Resource Analysis; Volume 7, Risk Analysis and Strategic Selection; and Volume 8, Filing Schedule and Requirements.[29]

11. Among other things, the IRP included alternative resource plans, a preferred resource plan, and an analysis of various Demand-Side Management ("DSM") Programs.[30]

12. Cost effectiveness testing was performed on the DSM programs.[31]

13. On April 12, 2010, GMO, Staff, Public Counsel, MDNR and Dogwood filed a Non-Unanimous Stipulation and Agreement ("Agreement") that purported to remedy all alleged deficiencies and concerns in the 2009 IRP filing.[32]

14. The same parties executing the Agreement also executed and filed a "Stakeholder Process Agreement" as an appendix to the Agreement.[33]

15. The remaining parties, the Sedalia Industrial Energy Users' Association ("SIEUA"), the City of Kansas City, Missouri ("KCMO"), and the Missouri Joint Municipal Electric Utility Commission ("MJMEUC"), were not signatories to the Agreement or the Stakeholder Process Agreement, but those parties did not oppose either Agreement.[34]

16. On June 2, 2010, the Commission, after conducting its own independent review, approved the Agreement and found the IRP to be compliant with the Commission's Rules.[35]

17. The Agreement reflects that some concerns were not fully resolved by the Agreement itself, but rather an alternative solution had been agreed upon in the attached Stakeholder Process Agreement.[36]

18. The signatories to the Agreement executed the Stakeholder Process Agreement and agreed that the stakeholder process would serve as the means for planning and implementing remedies for any identified concerns or deficiencies.[37]

19. The Stakeholder Process Agreement expressly states: "The parties agree that one of the objectives of the meetings described and schedule herein is to discuss and attempt to come to terms regarding specific action items and elements to be addressed in the supplements and revised IRP to be filed by GMO."[38]

20. The specific action items in the Stakeholder Process Agreement are delineated in paragraphs 7 through 33.[39]

21. The majority of the action items are couched terms that do not mandate specific filings with the Commission, i.e. agreements: to discuss, to define, to present, to examine, to propose, to work with, to identify, and to evaluate.[40]

22. The signatories to the Agreement and Stakeholder Process Agreement reserved the right to take any disputes concerning implementation or action items related to GMO's IRP, revised IRP or supplemental filings to the Commission for resolution.[41]

23. No language in either the Agreement or Stakeholder Process Agreement provides that stakeholder meetings, held subsequent to the Commission approval of the Agreement and Stakeholder Process Agreement, will create additional terms, conditions or obligations for the parties that would become part of the Commission-approved Agreement or the Stakeholder Process Agreement.[4]

24. No additional agreements, or modifications to the Agreement and Stakeholder Process Agreement, were filed by the signatories with the Commission after April 12, 2010.[43]

25. No additional agreements, or modifications to the Agreement and Stakeholder Process Agreement, were approved by the Commission after the Commission approved the April 12, 2010 Agreement on June 2, 2010.[44]

Findings of Fact – Provisions of the Agreement and Stakeholder Process Agreement Related to the Allegations

26. Paragraph 1 to the Agreement requires GMO to file "a revised IRP filing." It does not require GMO to file a completely new or a "complete" IRP. The terms used indicate that the additional filings will consist of revisions to the IRP already filed.[45]

27. The Agreement does not require that a preferred resource plan be selected through the stakeholder process.[46] Nor does the Agreement require GMO to accept any particular preferred plan.[47]

28. Paragraph 30 to the Stakeholder Process Agreement states, in pertinent part:

> However, GMO and the other Parties agree that at the completion of the revised integration analysis (through MIDAS modeling) GMO will use a spreadsheet analysis approach to quantify the impact on company revenues and earnings resulting from the preferred resource plan selected by GMO in its revised IRP filing, both with and without the non-traditional accounting procedures requested in GMO's 2010 revised IRP filing and any associated ratemaking treatment to be sought by GMO for demand-side resources. GMO's revised filing will include discussion and identification of an alternative resource plan as a contingency option should GMO determine there to be inadequate DSM cost recovery available to it and an alternative resource acquisition strategy is thus preferred. (Emphasis added.)[48]

29. The language in Paragraph 30 to the Stakeholder Process Agreement, while vague, creates an expectation for the *selection* of a preferred resource plan in GMO's revised IRP filing. This language does not require a new selection that is different than the preferred resource plan already selected when the original IRP was filed on August 5, 2009. Nor does this language require that a completely new preferred resource plan be filed.

30. Paragraphs 19-32 of the Agreement direct that various concerns regarding GMO's DSM resources analysis will be addressed by the terms in the Stakeholder Process Agreement.[49]

31. Paragraphs 20 through 25 and Paragraph 30 of the Stakeholder Process Agreement address action items related to GMO's DSM program.[50]

32. Paragraphs 20 and 21 of the Stakeholder Process Agreement specifically address "Alternative Levels of DSM Program Implementation." Paragraph 21 provides, in pertinent part:

> GMO agrees to include one or more portfolios of new DSM programs in addition to the all-DSM portfolio in the revised IRP scheduled to be filed December 17, 2010. At least one of these additional portfolio(s) of DSM programs will incorporate a more aggressive level of DSM implementation than the "all-DSM" portfolio. These additional portfolios will be treated as resources that are available for selection of alternative resource plans that are included in the integrated analysis. Agreement on criteria to be met by the additional, alternative portfolio will be discussed at the April and May 2010 stakeholder meetings and decided prior to the June 2010 stakeholder meeting.

33. The language in Paragraph 21 of the Stakeholder Process Agreement references discussing and deciding upon "criteria" for the additional alternative portfolio.

34. There is no language in the Agreement or the Stakeholder Process Agreement requiring GMO to use specific DSM programs for the portfolios to be included in the revised IRP.

35. There is no language in the Agreement or the Stakeholder Process Agreement requiring stakeholder agreed to demand-side programs to be included in GMO's updated analysis and its preferred plan.[51]

36. There is no language in the Agreement or the Stakeholder Process Agreement requiring a new cost-effectiveness test when GMO made its revised IRP filings, or requiring cost effectiveness testing of any of the DSM programs included in the revised IRP supplemental filings.[52]

37. On-going electronic mail discussions following the approval of the Agreement and Stakeholder Process Agreement between various stakeholders in July and October of 2010 demonstrate an on-going discussion regarding DSM portfolios. This discussion was non-binding and subject to change. Nothing in the electronic mail offered into evidence at the hearing can be construed as a being a formally executed agreement to modify or further qualify the terms of the Agreement and Stakeholder Process Agreement. No finalized agreement from any electronic mail discussion was submitted to the Commission for approval.[53]

38. Paragraph 8 of the Agreement requires the analysis of retiring Sibley 3 to be addressed by the terms in the Stakeholder Process Agreement.[54]

39. Paragraph 11 of the Stakeholder Process Agreement provides, in pertinent part:

> GMO agrees to develop at least one alternative resource plan that includes retirement of Sibley 3 and to include this alternative resource plan in the revised integration analysis for the filing due December 17, 2010.[55]

40. The language of the Stakeholder Process Agreement does not require an alternative resource plan be included that evaluates the retirement of Sibley 3 separately from the retirement of any other plants.

Findings of Fact – The January 18, 2011 IRP Filing

41. GMO filed its Revised Integrated Resource Analysis on January 18, 2011 after being granted a one-month extension of time.[56]

42. The revisions filed on January 18, 2011, supplement the original IRP filing on August 5, 2009.[57]

43. GMO's Revised IRP submission included revisions to: Volume 6, Revised Integrated Analysis, which included Appendix A - Integrated Analysis Report (HC and NP versions); Volume 8, Filing Schedule and Requirements - Nontraditional Accounting; and Exhibit 1, a DSM example (HC and NP versions).[58]

44. GMO included eleven alternative resource plans in the revised analysis, nine of which were devised in the stakeholder process to analyze different levels of supply-side resources that included base load generation and renewable resource inclusion, peak-load generation, and retirement scenarios.[59]

45. GMO included four alternative resource plans in the revised Volume 6 that included the retirement of the entire Sibley Station (i.e. Sibley 1, 2 and 3).[60]

46. MDNR knew that retirement of the Sibley Station included the retirement of Sibley 3.[61]

47. GMO included DSM portfolios and energy programs in the revised analysis.[62]

48. GMO did not, nor was it required to, refresh the cost effectiveness study of the DSM portfolios from its August 5, 2009 filing.[63]

49. GMO's revised analysis did not include a new selection of a preferred resource plan or a completely new preferred resource plan.
50. GMO gave notice that the preferred resource plan selected with the August 5, 2009 IRP filing was no longer appropriate related to changes in projected natural gas costs, CO2 emission costs and new EPA regulation proposals pursuant to Commission Rule 4 CSR 240-20.070(10).[64]
51. The Commission's IRP rules that were in effect at the time of GMO's IRP filing do not require a company to prepare and file a completely new IRP when a company finds it is no longer appropriate to use the preferred plan that was originally selected.[65]

Findings of Fact – The July 1, 2011 IRP Filing
52. GMO submitted its completed analysis for its 2009 IRP, and filed a new preferred resource plan on July 1, 2011.[66]
53. The July 1, 2011 filing was authorized by Commission orders.[67]
54. The revisions filed on July 1, 2011 supplement the original IRP filing on August 5, 2009.[68]
55. This final filing included revisions to: Volume 1, the Executive Summary of the IRP; Volume 6, Integrated Resource Analysis; and Volume 7, Risk Analysis and Strategic Selection.[69]
56. Twelve alternative resource plans were developed for integrated resource analysis, each of which included sufficient renewable resources to meet the Missouri Renewable Energy Standard.[70]
57. A preferred resource plan was selected that replaced the previously selected plan in the August 5, 2009 IRP filing.[71]
58. The revisions addressed the changed circumstances that prompted GMO to select a new preferred resource plan.[72]
59. The selected preferred resource plan includes an enhanced level of proposed DSM programs starting in 2012, subject to receiving acceptable approval under the Missouri Energy Efficiency Investment Act (MEEIA), and renewable resources additions beginning in 2014.[73]
60. The level of DSM investment in the July 1, 2011 preferred plan and supplemental filing is an increase from current levels of DSM investment for GMO.[74]
61. GMO did not, nor was it required to, refresh the cost effectiveness study of the DSM portfolios its August 5, 2009 filing.[75]

Conclusions of Law - The 2009 IRP Filing, the Agreement and the Stakeholder Process Agreement
The substantial and competent evidence in the record as a whole supports the following conclusions of law:
The August 5, 2009 IRP filing was supplemented by the January 18, 2011 and July 1, 2011 filings. It is clear from reviewing the documents and the testimony, that together, these three filings comprise a single IRP. GMO selected a preferred resource plan when it originally filed its IRP. That selection did not change at the time of the supplemental filing on January 18, 2010, nor was GMO required to select a different preferred plan. GMO's IRP was not deficient in terms of selecting a preferred resource plan.

GMO properly gave notice pursuant to the Commission's rules that its preferred plan was no longer appropriate. This notice did not alter the selection of the preferred plan; rather it provided the Commission with the basis for GMO to revise that plan. Contemporaneously with this notice, GMO should have requested an extension of time to revise the preferred plan or select a new preferred plan. While the supplemental filing on July 1, 2011, was late in terms of the deadline established by the Agreement, the late filing was authorized by Commission orders.

Similarly, recognizing the three filings comprise one IRP, there is no language in the Commission's rules, the Agreement or the Stakeholder Process Agreement that supports the alleged violations in relation to GMO's DSM portfolios. The programs were adequately described and cost-effectiveness testing was performed. GMO also included a more aggressive level of DSM investment in the July 1, 2011 preferred plan as required by the Agreement and the Stakeholder Process Agreement. While MDNR complains that the level of DSM energy savings was less than what it believes was agreed to in the July 21, 2010 electronic mail,[76] all that the Agreement and Stakeholder Process Agreement required was a level of DSM savings greater than current levels.[77]

MDNR's contention that e-mails between the parties describing DSM programs became binding agreements in terms of what was required in GMO's DSM portfolios are erroneous. These documents demonstrate nothing more than an on-going discussion between various parties, a discussion which is subject to change. No "agreements" to modify or further qualify the terms of the Agreement and Stakeholder Process Agreement were formalized, executed or submitted to the Commission for approval. No additional agreements were reached pursuant to the terms of the Agreement or the Stakeholder Process Agreement that modified the terms of those Commission-approved documents.

With regard to alternative resource plans including an analysis of the Sibley 3 unit, MDNR and Public Counsel examine GMO's filings separately to allege a violation of the Agreement. As previously noted, the supplemental filings are all part of a singular IRP, and GMO has met the requirement to include alternative resource plans analyzing the retirement of Sibley 3. MDNR's and Public Counsel's argument in this regard are without merit.

In summary: The substantial and competent evidence in the record as a whole supports the conclusion that GMO did not violate any Commission IRP rules when filing its 2009 IRP and the supplements to the IRP. The substantial and competent evidence in the record as a whole supports the conclusion that GMO did not violate the Agreement or the Stakeholder Process Agreement.

III. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts, as it has found them, to the law to reach its conclusions, the Commission has reached the following final decision.

MDNR and Public Counsel have failed to meet, by a preponderance of the evidence, their burden of proving that GMO violated the Commission's Chapter 22 rules, the Agreement or the Stakeholder Process Agreement. This is not to say that the Commission is unsympathetic to concerns raised by the stakeholders during this proceeding. While these concerns are not deficiencies, the Commission expects GMO to address them fully. GMO is required to file its next full triennial IRP under the Commission's recently promulgated changes to the Chapter 22 rules in April 2012.

GMO will be required to address the concerns raised by the stakeholders in this proceeding in April IRP filing.

THE COMMISSION ORDERS THAT:

1. The Missouri Department of Natural Resources KCP&L and the Office of the Public Counsel failed to establish any violations on the part of KCP&L Greater Missouri Operations Company in relation to its 2009 Integrated Resource Plan and supplemental filings.
2. The relief requested by the Missouri Department of Natural Resources is denied.
3. The relief requested by the Office of the Public Counsel is denied.
4. KCP&L Greater Missouri Operations Company shall address all concerns raised by the parties to this action in its April 2012 Integrated Resource Plan filing.
5. This Report and Order shall become effective on October 29, 2011.
6. This file shall be closed on October 30, 2011.

[1] The Commission had granted GMO a one month extension from the original deadline of December 17, 2010. EFIS Docket Entry Number 54, *Order Granting Extension of Time*, issued on December 28, 2010. EFIS is the Commission's Electronic Filing and Information System.

[2] Transcript, Volume 2. In total, the Commission admitted the testimony of 4 witnesses and received 22 exhibits into evidence. Post-hearing briefs were filed on September 8, 2011 and reply briefs were filed on September 22, 2011. The case was deemed submitted for the Commission's decision on September 22, 2011, when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

[3] EFIS Docket Entry No. 1, *Application for Waivers Concerning the 2009 Integrated Resource Plan Submission of KCP&L Greater Missouri Operations Company*, filed on December 4, 2008.

[4] EFIS Docket Entry No. 2, *Application to Intervene*, filed December 10, 2008.

[5] EFIS Docket Entry No. 21, *Application to Intervene*, filed August 26, 2009.

[6] See In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief, *Report and Order*, 266 P.U.R.4th 1, 2008 WL 2648913, 14 (Mo. P.S.C. 2008). While MJMEUC entered an appearance, it did not actively participate in the hearing and did not file a post-hearing brief.

[7] *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 19 (Mo. banc 2003).

[8] EFIS Docket Entry No. 4, *Missouri Department of Natural Resources' Application to Intervene*, filed on December 23, 2008.

[9] Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

[10] Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

[11] Commission Rules 4 CSR 240-2.010(11) and 2.040(1).

[12] See File Numbers EM-2007-0374 and EN-2009-0164.

[13] *Bonney v. Environmental Engineering, Inc*., 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp*., 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas,* 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

[14] *Holt v. Director of Revenue, State of Mo*., 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999*); Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

[15] *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

[16] *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

[17] *Veal v. Leimkuehler* , 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

[18] *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA,* 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus,* 478 F.Supp. 125, 131 (D.C.Cir.1979).

[19] *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness,* 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

[20] Id.

[21] *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 36

[22] Id.

[23] *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

[24] At the beginning of the evidentiary hearing, Public Counsel informed the Regulatory Law Judge that it did not want, at that time, to pursue a complaint based upon the allegations raised by Staff in its complaint action, File No. EC-2011-0250. Transcript, p. 19. However, in its post-hearing brief, Public Counsel does allege violations of the Agreement and Stakeholder Process Agreement and states it believes the evidence supports a Commission finding of the violations. Public Counsel has not sought penalties or any other form of relief.

[25] Transcript, pp. 59-130.

[26] Transcript, pp. 66, 80-81, 84, 96-97, 101, 104-105, 108-109, 124-128. See also Public Counsel's Post- hearing Brief, EFIS Docket Entry No. 103, filed September 8, 2011.

[27] Staff Exh. 1; GMO Exh. 2; Transcript, pp. 85-101. The failure to test allegation was restricted to the January 18, 2011 filing. The added program was called "Residential Lighting and Appliances." Another program was removed from the portfolio, the "Affordable New Homes" program. The addition and subtraction of programs occurred with the July1, 2011 filing. The failure to properly analyze alternative resource plans was restricted to the January 18, 2011 filing.

[28] Transcript, p. 27 (Official Notice). See also EFIS Docket Entries 14-18.

[29] Id.

[30] Id. Transcript, pp. 103, 131-132, 145-146, 148, 151.

[31] Transcript, pp. 120-121, 137-138.

[32] MDNR Exh. 2; Transcript, pp. 112, 118-119.

[33] MDNR Exh. 2; Transcript, pp. 65-66.

[34] MDNR Exh. 2.

[35] Transcript, p. 33; EFIS Docket Entry No. 48, *Order Approving Nonunanimous Stipulation and Agreement and Accepting Integrated Resource Plan*, issued June 2, 2010, effective June 12, 2010.

[36] MDNR Exh. 2; Transcript, pp. 65-66.

[37] MDNR Exh. 2; Transcript, pp. 65-66.

[38] MDNR Exh. 2.

[39] MDNR Exh. 2

[40] MDNR Exh. 2.

[41] MDNR Exh. 2.

[42] MDNR Exh. 2; Transcript, pp. 112-113.

[43] Transcript, pp. 111-113, 118.

[44] *Id.* See also EFIS Docket Entries for File No. EE-2009-0237.

[45] MDNR Exh. 2

[46] MDNR Exh. 2.; Transcript, pp. 58, 128.

[47] MDNR Exh. 2.; Transcript, p. 123.

[48] MDNR Exh. 2.

[49] MDNR Exh. 2

[50] MDNR Exh. 2.

[51] Transcript, p. 58.

[52] MDNR Exh. 2; Transcript, pp. 120-122, 137-138.

[53] MDNR Exhs. 4 and 5; Transcript, pp. 71-74, 111-113.

[54] MDNR Exh. 2.

[55] MDNR Exh. 2.

[56] Transcript, pp. 27 (Official Notice), 74, 77, 125; See EFIS Docket Entry No. 57, *KCP&L Greater Missouri Operations Company's Submission of Its Revised Integrated Resource Analysis* (NP and HC), filed on January 18, 2011.

[57] MDNR Exh. 2; Transcript pp. 130-201.

[58] MDNR Exh. 6.

[59] MDNR Exh. 6.

[60] MDNR Exh. 6, pp. 8-11, Plans 3, 7, 8, and 9.

[61] Transcript, p. 102.

[62] MDNR Exh. 6.

[63] Transcript, p. 154. See finding of Fact Number 36.

[64] Transcript, pp. 25-43 (Judicial Admission), 86-87, 115-116, 131-132, 139, 146, 154, 167, 190-191, 197-198. See also Staff Exh. 1.

[65] Staff Exh. 1; Transcript, pp. 118-121.

[66] Transcript, pp. 27 (Official Notice), 46, 77, 119, 131-133; MDNR Exhs. 9 and 10; EFIS Docket Entry No. 62, *KCP&L Greater Missouri Operations Company's Submission of Its Completed Analysis for Its Integrated Resource Plan and Its Preferred Resource Plan*, filed July 1, 2011.

[67] Transcript, pp. 37 (Judicial Admission), 149; EFIS Docket Entry No. 59, *Order Directing Filing*, issued April 19, 2011; EFIS Docket Entry No. 61, *Order Directing Filing, Providing Notice and Setting Hearing*, issued April 27, 2011.

[68] MDNR Exh. 2; Transcript, pp. 130-201 (See page 132 in particular).

[69] DNR Exh. 9

[70] MDNR Exh. 9; Transcript, p. 133.

[71] Transcript, pp. 46, 131; See also Footnote 66.

[72] See Finding of Fact Number 50 and accompanying footnote.

[73] MDNR Exh. 9. Transcript, pp. 133-139.

[74] Transcript, pp. 138-139.

[75] Transcript, p. 154. See Finding of Fact Number 36.

[76] Transcript, p. 103.

[77] See Findings of Fact Numbers 32, 59,and 60.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur;
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 19th day of October, 2011.

St. Louis Natural Gas Pipeline, L.L.C., Complainant, v. Laclede Gas Company, Respondent.

File No. GC-2011-0294

Evidence, Practice and Procedure §30. Settlement procedures
Commission Rule 4 CSR 240-2.115 provides that if no objection is made to a nonunanimous stipulation and agreement within seven days of its filing, a stipulation and agreement may be treated as unanimous. No party objected within the seven-day deadline, nor were any comments or responses filed by the response deadline. Because no party filed an objection to the agreement, the Commission deemed the agreement was unanimous.
Gas §40. Transportation. Based on the Commission's independent and impartial review of the unopposed agreement and the draft interconnection agreement, the Commission found that the agreement was consistent with the public interest and approved it. The complaint filed by St. Louis Natural Gas Pipeline, L.L.C. on March 22, 2011 was dismissed with prejudice.
Gas §41. Pipelines. Based on the Commission's independent and impartial review of the unopposed agreement and the draft interconnection agreement, the Commission found that the agreement was consistent with the public interest and approved it. The complaint filed by St. Louis Natural Gas Pipeline, L.L.C. on March 22, 2011 was dismissed with prejudice.

ORDER APPROVING AND INCORPORATING NONUNANIMOUS STIPULATION AND AGREEMENT

Issue Date: October 19, 2011 Effective Date: October 29, 2011

Background

On March 22, 2011, St. Louis Natural Gas Pipeline, L.L.C. ("SLNGP"), filed a complaint against Laclede Gas Company ("Laclede"). SLNGP proposes to construct and operate an interstate natural gas pipeline running from Glen Carbon, Illinois to St. Louis, Missouri, and to interconnect its pipeline with local distribution facilities owned and operated by Laclede at Riverview Drive in St. Louis, Missouri. SLNGP alleged that while its proposed construction offers numerous advantages to Laclede and its customers, Laclede refused to enter into an interconnection agreement. SLNGP claims that Laclede's refusal to enter an interconnection agreement violates numerous laws and is contrary to the public interest.

On July 11, 2011, SLNGP and Laclede indicated that they were willing to negotiate to determine if a mutually acceptable interconnection agreement could be reached. These parties proposed a negotiation schedule, and the Commission stayed the complaint and implemented that schedule. On September 30, 2011, SLNGP and Laclede filed a Stipulation and Agreement ("Agreement"). SLNGP and Laclede are the only signatories to the Agreement, but no other party to the complaint filed a response or opposed the Agreement.

The Agreement

The Agreement includes a draft interconnection agreement and multiple provisions describing the requirements for its execution. The major provisions of the Agreement are embodies in the first four numbered paragraphs as follows:

1. Laclede agrees to sign and execute the attached interconnection agreement (Attachment A) with SLNGP at such time, if any, that SLNGP receives all final federal approvals required to construct its proposed interstate pipeline, provided that such final FERC approvals are received within three (3) years of the date of this Stipulation and Agreement and such approvals or implementing tariffs are not inconsistent with the terms of this Settlement Agreement or the attached interconnection agreement. This three (3) year deadline shall not apply if Laclede or any of its affiliates or representatives takes action to oppose SLNGP's FERC application or takes action that delays decision on SLNGP's FERC application, including any appeal of FERC approval of SLNGP's pipeline project by any of the aforementioned.

2. The interconnection agreement set forth in Attachment A is substantially the same interconnection agreement initially submitted to Laclede by SLGNP with modifications designed to ensure that the interconnection agreement is truly risk free to Laclede, consistent with SLNGP's representations in this case. Among others, these modifications include the following:

(a) The attached interconnection agreement seeks to ensure that Laclede and its customers will not be responsible in any future interconnection agreement for the O&M cost associated with maintaining the SLNGP take point unless or until such time as the proposed pipeline is regularly used by Laclede or customers behind Laclede's city gate. It does so primarily by adding provisions to the Agreement specifying that SLNGP would pay such costs until such time as the pipeline consistently achieved an annual average load factor for deliveries on behalf of Laclede equal to at least 20% of its capacity, with a proportional offset for any firm volumes taken by Laclede on its own behalf in the unlikely event Laclede subscribes to firm transportation service on the pipeline.

(b) The interconnect agreement has been modified to ensure that Laclede and its customers would not be responsible for any costs, including any unanticipated cost overruns, incurred in constructing the interconnection facilities. This is primarily accomplished by having the interconnection agreement impose on SLNGP, rather than Laclede, the obligation to pay the contractor who would be installing the facilities, subject to Laclede's specifications, monitoring and approval.

(c) The interconnection agreement has been modified to ensure that Laclede and its customers shall bear no liability or cost exposure of any kind if the pipeline project does not attain sufficient subscriptions to keep it viable. This is primarily accomplished by including provisions in the interconnection agreement which make it clear that Laclede did not believe the project was economic, that SLNGP was knowingly taking on the risk that neither Laclede or other customers would subscribe to transportation service, that Laclede would have sole discretion

> (subject only to prudence reviews by the Missouri PSC) to determine whether it would or would not subscribe to such service in the future, and that SLNGP would release and indemnify Laclede from any and all claims by SLNGP and any of its affiliates and representatives relating to a lack of subscription.
>
> 3. The Parties further agree that this Stipulation and Agreement shall not be represented by SLNGP during the FERC approval process as signaling any interest by Laclede that it will subscribe to SLNGP's proposed FT service. Instead, any representations shall state, consistent with this Stipulation and Agreement, that Laclede's commitment is strictly limited to entering into a risk free interconnection agreement upon receipt of all required regulatory approvals, and should in no way be construed as constituting any form of commitment on the part of Laclede to subscribe to any transportation or other service offered by SLNGP on its pipeline.
>
> 4. In exchange for Laclede's commitments as outlined above, the Parties agree that the Complaint Case shall be dismissed with prejudice, and that SLNGP shall release, and hereby does release, Laclede and all of its affiliates and representatives from any and all related claims that SLNGP has or may have against them. Except as provided in this Stipulation and Agreement, including the attached interconnection agreement, SLNGP's release extends only to facts, circumstances or events occurring prior to the date hereof. Laclede and its affiliates and representatives release any and all claims against SLNGP and its affiliates and representatives to the same extent.

The interconnection agreement is incorporated as Attachment A to the Agreement.

Decision

The complaint is a contested case normally requiring a formal hearing procedure. But procedural formalities may be waived[1] and the case may be decided on the basis of a stipulation and agreement without convening a hearing.[2]

Commission Rule 4 CSR 240-2.115 provides that if no objection is made to a non-unanimous stipulation and agreement within seven days of its filing, the stipulation and agreement may be treated as unanimous. No party objected within the seven day deadline, nor were any comments or responses filed by the response deadline. Because no party has filed a timely objection to the Agreement, the Commission will treat the Agreement as being unanimous.

Based on the Commission's independent and impartial review of the unopposed Agreement and the draft interconnection agreement, the Commission finds that the Agreement is consistent with the public interest and shall approve it. Because the settlement disposes of this action, the Commission need not separately state its findings of fact.[3] Therefore, the Commission incorporates the terms of the Agreement into this order.

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[1] Sections 536.060(3) and 536.063(3), RSMo 2000.
[2] Sections 536.060, RSMo 2000 and 4 CSR 240-2.115.
[3] Section 536.090, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The provisions of the nonunanimous Stipulation and Agreement filed by St. Louis Natural Gas Pipeline, L.L.C. and Laclede Gas Company on September 30, 2011 are approved and incorporated into this order as if fully set forth. The signatories shall comply with the terms of the Stipulation and Agreement. A copy of the Stipulation and Agreement is attached to this order as Appendix A.
2. The complaint filed by St. Louis Natural Gas Pipeline, L.L.C. on March 22, 2011 is dismissed with prejudice.
3. This order shall become effective on October 29, 2011.
4. This file shall be closed on October 30, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In The Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by Ameren Missouri in its Next Triennial Compliance Filing or Next Annual Update Report

File No. EO-2012-0039

Electric. §42 Planning and Management. The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing.

ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES

Issue Date: October 19, 2011 Effective Date: October 29, 2011

A provision in the Commission's revised electric utility resource planning rule, 4 CSR 240-22.080(4), requires Missouri's electric utilities to consider and analyze special contemporary issues in their triennial compliance filings and in their annual update reports. The regulation requires the Commission to issue an order by November 1 of each year specifying the list of special contemporary issues that each electric utility is to address. The regulation also provides that by September 15, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation then allows the utilities and other parties until October 1 to file comments regarding the suggested issues.

Staff, Public Counsel, the Missouri Department of Natural Resources (MDNR), the Missouri Industrial Energy Consumers (MIEC), and a group of environmental organizations led by the Natural Resources Defense Council (NRDC)[1] filed suggested special contemporary issues for Ameren Missouri analysis and response in its next IRP filing. Staff, MDNR, NRDC, and Ameren Missouri filed responses to those suggestions. The Commission must now determine what special contemporary issues Ameren Missouri should address.

This is not a contested case. The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision.[2] The Commission's rule gives the Commission broad discretion in determining what issues a utility should be required to address, indicating:

> [t]he purpose of the contemporary issues lists is to ensure that evolving regulatory, economic, financial, environmental, energy, technical, or customer issues are adequately addressed by each utility in its electric resource planning. Each special contemporary issues list will identify new and evolving issues but may also include other issues such as unresolved deficiencies or concerns from the preceding triennial compliance filing.[3]

[1] The other organizations joining with the NRDC are Sierra Club, Renew Missouri, Mid-Missouri Peaceworks, and Great Rivers Environmental Law Center.

[2] *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, (Mo App. W.D. 2008)

[3] 4 CSR 240-22.080(4).

It is also important to note that the Commission's IRP rules require Ameren Missouri to file a full IRP study once every three years. Ameren Missouri last filed an IRP study in February 2011 and that study is still under consideration by the Commission in Case No. EO-2011-0271, with a hearing scheduled for December 2011. Ameren Missouri does not need to file its next full IRP study until April 1, 2014.[4] That means Ameren Missouri will need to address the special contemporary issues identified in this order in its 2012 annual update report, not in a full IRP study.

That distinction is important because in its annual update report, the electric utility is only expected to address "changing conditions since the last filed triennial compliance filing or annual update filing."[5] For that reason, the requirement to examine special contemporary issues should not be allowed to expand the limited annual update report into something more closely resembling a triennial compliance report.

In preparing a list of special contemporary issues, the Commission is also mindful of the limited amount of time available to Ameren Missouri to address the identified issues. The company must file its annual update report no less than 20 days before its annual update workshop, which must be held on or about April 1 of each year.[6] That means Ameren Missouri will have only a few months in which to prepare and report its analysis of the identified issues. Therefore, the Commission must choose the identified issues wisely to allow Ameren Missouri an opportunity to thoroughly address the chosen issues. Requiring the company to address every issue proposed by the various parties within the available time would only result in a superficial analysis that would be less helpful than a more detailed analysis of appropriately limited issues.

Ameren Missouri's response to the issues suggested by the other parties establishes an appropriate framework for consideration of which proposed special issues Ameren Missouri should be required to address. As Ameren Missouri indicates, there is no reason to require Ameren Missouri to further address issues that have been addressed or that have been identified as alleged deficiencies in the company's 2011 IRP filing. The Commission will address those issues in the ongoing review of the 2011 IRP filing in Case No. EO-2011-0271.

Furthermore, the Commission will not require Ameren Missouri to address in its annual update issues that are not truly urgent. Such issues may be important and may be appropriately addressed in Ameren Missouri's next triennial compliance report, but do not need to be addressed as a special issue in the company's annual update report.

The Commission's rule also allows the Commission to adopt special contemporary issues that have not been proposed by any party.[7] The Commission notes that potential or anticipated changes in state and federal environmental or renewable energy standards could have a substantial impact on Missouri's electric utilities. Therefore, the Commission will direct the utilities to examine the potential or proposed changes in state or federal regulations and explain how the adoption of such changes would affect their compliance plans.

[4] 4 CSR 240-22.080(1)(C).

[5] 4 CSR 240-22.080(3)(B).

[6] 4 CSR 240-22.080(3).

[7] 4 CSR 240-22.080(4)(C).

The Commission is also concerned about the type and amount of any federal or state subsidies the electric utilities expect to receive in conjunction with their proposed resource planning. Therefore, the Commission will direct the utilities to disclose and discuss the amount of any estimated federal or state subsidies either implicit or explicitly part of their proposed resource planning.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

THE COMMISSION ORDERS THAT:

1. Ameren Missouri shall analyze and document the following special contemporary issues in its 2012 annual update report:

a. Evaluate the need and options for mitigation to comply with current and pending EPA rules based on currently available assessments of the rule requirements and costs of mitigation measures including ranges of uncertainty for capital costs for large retrofits;

b. Include evaluation of plans with reduced levels of DSM consistent with Ameren Missouri's updated preferred resource plan;

c. Update forecasts for natural gas prices and include the effects of lower gas prices in scenarios used for risk analysis; and

d. Evaluate coal price uncertainty as an independent uncertain factor to generally reflect uncertainties that could drive the cost of coal to Ameren Missouri.

e. Analyze potential or proposed changes in state or federal environmental or renewable energy standards and report how those changes would affect Ameren Missouri's plans for compliance with those standards.

f. Analyze the levelized cost of energy needed to comply with the current Renewable Energy Standards law compared to the cost of energy resulting from a portfolio comprised solely of existing resources with no additional renewable resources.

g. Disclose and discuss the amount and impact of every state or federal subsidy Ameren Missouri expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.

2. This order shall become effective on October 29, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In The Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by The Empire District Electric Company in its Next Triennial Compliance Filing or Next Annual Update Report

File No. EO-2012-0040

Electric. §42 Planning and Management. The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing.

ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES

Issue Date: October 19, 2011 Effective Date: October 29, 2011

A provision in the Commission's revised electric utility resource planning rule, 4 CSR 240-22.080(4), requires Missouri's electric utilities to consider and analyze special contemporary issues in their triennial compliance filings and in their annual update reports. The regulation requires the Commission to issue an order by November 1 of each year specifying the list of special contemporary issues that each electric utility is to address. The regulation also provides that by September 15, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation then allows the utilities and other parties until October 1 to file comments regarding the suggested issues.

Staff and the Missouri Department of Natural Resources (MDNR) filed suggested special contemporary issues for The Empire District Electric Company's analysis and response in its next IRP filing. MDNR and Empire filed responses to those suggestions. The Commission must now determine what special contemporary issues Empire should address.

This is not a contested case. The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision.[1] The Commission's rule gives the Commission broad discretion in determining what issues a utility should be required to address, indicating:

> [t]he purpose of the contemporary issues lists is to ensure that evolving regulatory, economic, financial, environmental, energy, technical, or customer issues are adequately addressed by each utility in its electric resource planning. Each special contemporary issues list will identify new and evolving issues but may also include other issues such as unresolved deficiencies or concerns from the preceding triennial compliance filing.[2]

It is also important to note that the Commission's IRP rules require Empire to file a full IRP study once every three years. Empire does not need to file its next full IRP study until April 1, 2013.[3] That means Empire would need to address the special contemporary issues identified in this order in its 2012 annual update report, not in a full IRP study.

[1] *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, (Mo App., W.D. 2008)
[2] 4 CSR 240-22.080(4).
[3] 4 CSR 240-22.080(1)(C).

That distinction is important because in its annual update report, the electric utility is only expected to address "changing conditions since the last filed triennial compliance filing or annual update filing."[4] For that reason, the requirement to examine special contemporary issues should not expand the limited annual update report into something more closely resembling a triennial compliance report.

Empire has raised a further complication by filing an application for variance that is pending both in this case and in Case No. EE-2012-0095. That application asks the Commission to grant Empire a variance from several provisions of the IRP regulations in light of the stipulation and agreement that resolved Empire's last IRP case, EO-2011-0066.

Empire contends that the earlier stipulation and agreement requires Empire to update and communicate with various stakeholders in much the same manner as is required by the Commission's recently implemented IRP rules. For that reason, Empire asks the Commission to grant it a waiver of those communications requirements of the IRP rule. One of the rule provisions that Empire asks the Commission to waive is the requirement to file the annual update that would include the special contemporary resource planning issues that are to be identified by this order. Empire proposes to instead incorporate those special planning issues into the stakeholder updates it is required to make under the stipulation and agreement.

The Commission is not yet ready to rule on Empire's application for variance that is pending in Case Number EE-2012-0095 as other potentially interested parties have not yet had an opportunity to respond. However, the Commission does not need to make that ruling before identifying special contemporary resource planning issues in this order. The Commission will identify the issues in this order. In a subsequent order to be issued in EE-2012-0095, the Commission will decide whether those issues must be addressed in Empire's annual update or whether they must be addressed through the stakeholder update process required by the stipulation and agreement.

In preparing a list of special contemporary issues, the Commission is also mindful of the limited amount of time available to Empire to address the identified issues. The rule requires the company to file its annual update report no less than 20 days before its annual update workshop, which must be held on or about April 1 of each year.[5] That means Empire will have only a few months in which to prepare and report its analysis of the identified issues. If the Commission decides that Empire should instead follow the stakeholder update process established by the stipulation and agreement, the updated report would still be due by April 1, 2012. Therefore, the Commission must choose the identified issues wisely to allow Empire an opportunity to thoroughly address the chosen issues. Requiring the company to address every issue proposed by the various parties within the available time would only result in a superficial analysis that would be less helpful than a more detailed analysis of appropriately limited issues.

[4] 4 CSR 240-22.080(3)(B).
[5] 4 CSR 240-22.080(3).

The Commission agrees with Empire that the establishment of special contemporary issues should not be allowed to expand the annual update process into a triennial compliance filing. Many of the special issues identified by Staff and MDNR would be appropriate for Empire's next triennial compliance filing in 2013, but not for an annual update. Furthermore, the Commission will not require Empire to address in its annual update issues that are not truly significant and urgent. Such issues may be important and may be appropriately addressed in Empire's next triennial compliance filing, but do not need to be addressed as a special issue in the company's annual update report.

In addition to the issues it proposed in its own filing, MDNR's response to the other filings asks the Commission to require Empire to address several issues identified by the Natural Resources Defense Council (NRDC) in the parallel proceeding regarding Ameren Missouri, EO-2012-0039. The NRDC did not raise those issues with regard to Empire in this case. On October 12, Empire filed a motion asking the Commission to either strike that portion of MDNR's comments or to refuse to consider the additional issues proposed by MDNR in its response.

The Commission's regulation requires the Commission to quickly determine what, if any additional issues it wants Empire to address in its next annual IRP update filing. That regulation sets a time for interested individuals and entities to offer suggestions and allows time for Empire and others to respond to those suggestions. The regulation does not allow time for further exchanges of suggestions. As a result, Empire and the other commenters have not had an opportunity to respond to the additional issues that MDNR would import into this case.

Ultimately, it is up to the Commission to decide whether Empire should address a particular issue. There is nothing wrong with MDNR bringing additional issues to the Commission's attention, but no one has shown a compelling reason why Empire should be required to address issues that were specifically addressed to Ameren Missouri by a commenter in another matter. Therefore, the Commission will deny Empire's Motion to Strike, but will not include MDNR's additional issues as special contemporary issues for Empire to address in this case.

The Commission's rule also allows the Commission to adopt special contemporary issues that have not been proposed by any party.[6] The Commission notes that potential or anticipated changes in state and federal environmental or renewable energy standards could have a substantial impact on Missouri's electric utilities. Therefore, the Commission will direct the utilities to examine the potential or proposed changes in state or federal regulations and explain how the adoption of such changes would affect their compliance plans.

The Commission is also concerned about the type and amount of any federal or state subsidies the electric utilities expect to receive in conjunction with their proposed resource planning. Therefore, the Commission will direct the utilities to disclose and discuss the amount of any estimated federal or state subsidies either implicit or explicitly part of their proposed resource planning.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

[6] 4 CSR 240-22.080(4)(C).

THE COMMISSION ORDERS THAT:

1. The Empire District Electric Company shall analyze and document the following special contemporary issues either in its 2012 annual update report or through the stakeholder update process established by the Stipulation and Agreement that resolved Case No. EO-2011-0066, depending upon a subsequent order of the Commission to be issued in Case No. EE-2012-0095:

    a. Analyze and document how Empire's load-forecast will account for the impact of tornado damage in its service territory. Analyze and document how on-going recovery efforts impact Empire's capacity balance and participation in DSM programs. Analyze and document how these changes impact the preferred resource plan or contingency plans;

    b. Investigate and document the impacts on Empire's preferred resource plan and contingency plans of a loss of significant load for the short term and potentially for the long term that may be the result of a prolonged double dip recession or a large customer or group of customers no longer taking service from Empire; and

    c. Investigate and document the updated impacts of newly proposed aggressive environmental regulations on Empire's preferred resource plan and contingency plans.

    d. Analyze potential or proposed changes in state or federal environmental or renewable energy standards and report how those changes would affect Empire's plans for compliance with those standards.

    e. Analyze the levelized cost of energy needed to comply with the current Renewable Energy Standards law compared to the cost of energy resulting from a portfolio comprised solely of existing resources with no additional renewable resources.

    f. Disclose and discuss the amount and impact of every state or federal subsidy Empire expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.

2. The Empire District Electric Company's Motion to Strike is denied.
3. This order shall become effective on October 29, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In The Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by Kansas City Power & Light Company in its Next Triennial Compliance Filing or Next Annual Update Report

File No. EO-2012-0041

Electric. §42 Planning and Management. The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing.

ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES

Issue Date: October 19, 2011 Effective Date: October 29, 2011

A provision in the Commission's revised electric utility resource planning rule, 4 CSR 240-22.080(4), requires Missouri's electric utilities to consider and analyze special contemporary issues in their triennial compliance filings and in their annual update reports. The regulation requires the Commission to issue an order by November 1 of each year specifying the list of special contemporary issues that each electric utility is to address. The regulation also provides that by September 15, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation then allows the utilities and other parties until October 1 to file comments regarding the suggested issues.

Staff and the Missouri Department of Natural Resources (MDNR) filed suggested special contemporary issues for Kansas City Power & Light Company's (KCP&L) analysis and response in its next IRP filing. MDNR and KCP&L filed responses to those suggestions. The Commission must now determine what special contemporary issues KCP&L should address.

This is not a contested case. The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision.[1] The Commission's rule gives the Commission broad discretion in determining what issues a utility should be required to address, indicating:

> [t]he purpose of the contemporary issues lists is to ensure that evolving regulatory, economic, financial, environmental, energy, technical, or customer issues are adequately addressed by each utility in its electric resource planning. Each special contemporary issues list will identify new and evolving issues but may also include other issues such as unresolved deficiencies or concerns from the preceding triennial compliance filing.[2]

It is also important to note that KCP&L's next full IRP triennial compliance filing is due on April 1, 2012.[3] That means KCP&L will need to address the special contemporary issues identified in this order in its 2012 full IRP study, not in its annual update report, as is the case for Ameren Missouri and Empire District Electric Company.

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[1] *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, (Mo App. W.D. 2008)
[2] 4 CSR 240-22.080(4).
[3] 4 CSR 240-22.080(1)(C).

That distinction is important because in its annual update report, the electric utility is only expected to address "changing conditions since the last filed triennial compliance filing or annual update filing."[4] The requirements for the full triennial compliance report are much broader and for that reason, it is appropriate to require KCP&L to address a more extensive and detailed set of special contemporary issues.

KCP&L's comments in response to the issues recommended by Staff and MDNR indicate that KCP&L generally accepts the proposed issues and explains how the company intends to address them. The only exception concerns issue number 4 proposed by MDNR. In that proposed issue, MDNR asks KCP&L to analyze and document low probability outcomes with extremely high or low values (such as natural or man-made disasters that would result in energy emergency events including significant loss of load and equipment outages) as a part of risk assessment.

The Commission agrees with KCP&L that this proposed issue is too vague to be acted upon. Furthermore, the current risk analysis criteria established in the Commission's rule should be sufficient to address KCP&L's risk. The Commission will not establish this issue as a special contemporary issue.

In addition to the issues it proposed in its own filing, MDNR's response to the other filings supports and asks the Commission to require KCP&L to address several issues identified by the Natural Resources Defense Council (NRDC) in the parallel proceeding regarding Ameren Missouri, EO-2012-0039. The NRDC did not raise those issues with regard to KCP&L in this case. As a result, KCP&L and the other commenters have not had an opportunity to respond to those proposed issues. In any event, the NRDC issues that MDNR endorses are of a sort that KCP&L must address in its full IRP triennial compliance report even without being designated as a special contemporary issue. Therefore, the Commission will not include those issues as special contemporary issues for this case.

The Commission's rule also allows the Commission to adopt special contemporary issues that have not been proposed by any party.[5] The Commission notes that potential or anticipated changes in state and federal environmental or renewable energy standards could have a substantial impact on Missouri's electric utilities. Therefore, the Commission will direct the utilities to examine the potential or proposed changes in state or federal regulations and explain how the adoption of such changes would affect their compliance plans.

The Commission is also concerned about the type and amount of any federal or state subsidies the electric utilities expect to receive in conjunction with their proposed resource planning. Therefore, the Commission will direct the utilities to disclose and discuss the amount of any estimated federal or state subsidies either implicit or explicitly part of their proposed resource planning.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

[4] 4 CSR 240-22.080(3)(B).
[5] 4 CSR 240-22.080(4)(C).

THE COMMISSION ORDERS THAT:

1. Kansas City Power & Light Company shall analyze and document the following special contemporary issues in its 2012 IRP triennial compliance filing:

a. Investigate and document the impacts on KCP&L's preferred resource plan and contingency plans of aggressive regulations by the FERC, regional transmission organizations (RTOs) or Missouri statutes or regulations to allow aggregators of retail customers (ARCs) to operate and market demand response services in Missouri;

b. Investigate and document the impacts on KCP&L's preferred resource plan and contingency plans of a new much more aggressive renewable energy standard (e.g., at least double the current standard for Missouri) with no rate cap;

c. Investigate and document the impacts on KCP&L's preferred resource plan and contingency plans of a very aggressive energy efficiency resource standard (e.g., annual energy savings of 1.5% each year for 20 years and annual demand savings of 1.0% each year for 20 years from electric utility demand-side programs) with no rate cap in Missouri;

d. Investigate and document the impacts on KCP&L's preferred resource plan and contingency plans of a loss of significant load for the short term and potentially for the long term that may be the result of a prolonged double-dip recession or a large customer or group of customers no longer taking service from KCP&L;

e. Investigate and document the impacts of aggressive environmental regulations on KCP&L's preferred resource plan and contingency plans;

f. Analyze and document relationships between uncertain factors when making a determination of whether uncertain factors are entirely independent or if they should be analyzed with covariant risk analysis;

g. Analyze, rank, and document existing coal plant fleet as retirement candidates;

h. Analyze and document aggressive DSM portfolios without constraints. Include analysis and documentation of demand-side investment mechanisms necessary to implement each DSM portfolio;

i. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs, and combined heat and power projects in collaboration with municipal water treatment plants and other local waste or agricultural/industrial processes with on-site electrical and thermal load requirements, especially in targeted areas where there may be transmission or distribution line constraints;

j. Analyze and document analysis of DSM programs targeted to achieve energy efficiency savings in the agricultural sector;

k. Analyze and document alternative customer information/behavior modification program options to increase customer awareness and encourage more efficient use of energy;

l. Analyze potential or proposed changes in state or federal environmental or renewable energy standards and report how those changes would affect KCP&L's plans for compliance with those standards;

m. Analyze the levelized cost of energy needed to comply with the current Renewable Energy Standards law compared to the cost of energy resulting from a portfolio comprised solely of existing resources with no additional renewable resources;

n. Disclose and discuss the amount and impact of every state or federal subsidy KCP&L expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.

2. This order shall become effective on October 29, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In The Matter of a Determination of Special Contemporary Resource Planning Issues to be Addressed by KCP&L Greater Missouri Operations Company in its Next Triennial Compliance Filing or Next Annual Update Report

File No. EO-2012-0042

Electric. §42 Planning and Management. The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing.

ORDER ESTABLISHING SPECIAL CONTEMPORARY RESOURCE PLANNING ISSUES

Issue Date: October 19, 2011 Effective Date: October 29, 2011

A provision in the Commission's revised electric utility resource planning rule, 4 CSR 240-22.080(4), requires Missouri's electric utilities to consider and analyze special contemporary issues in their triennial compliance filings and in their annual update reports. The regulation requires the Commission to issue an order by November 1 of each year specifying the list of special contemporary issues that each electric utility is to address. The regulation also provides that by September 15, Staff, Public Counsel, and other interested parties may file suggested issues for consideration. The regulation then allows the utilities and other parties until October 1 to file comments regarding the suggested issues.

Staff and the Missouri Department of Natural Resources (MDNR) filed suggested special contemporary issues for KCP&L Greater Missouri Operations Company's (KCPL-GMO) analysis and response in its next IRP filing. MDNR and KCPL-GMO filed responses to those suggestions. The Commission must now determine what special contemporary issues KCPL-GMO should address.

This is not a contested case. The Commission does not need to hear evidence before reaching a decision and does not need to make findings of fact and conclusions of law in announcing that decision.[1] The Commission's rule gives the Commission broad discretion in determining what issues a utility should be required to address, indicating:

> [t]he purpose of the contemporary issues lists is to ensure that evolving regulatory, economic, financial, environmental, energy, technical, or customer issues are adequately addressed by each utility in its electric resource planning. Each special contemporary issues list will identify new and evolving issues but may also include other issues such as unresolved deficiencies or concerns from the preceding triennial compliance filing.[2]

It is also important to note that KCPL-GMO's next full IRP triennial compliance filing is due on April 1, 2012.[3] That means KCPL-GMO will need to address the special contemporary issues identified in this order in its 2012 full IRP study, not in its annual update report, as is the case for Ameren Missouri and Empire District Electric Company.

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[1] *State ex rel. Public Counsel v. Public Service Com'n*, 259 S.W.3d 23, (Mo App. W.D. 2008)
[2] 4 CSR 240-22.080(4).
[3] 4 CSR 240-22.080(1)(C).

That distinction is important because in its annual update report, the electric utility is only expected to address "changing conditions since the last filed triennial compliance filing or annual update filing."[4] The requirements for the full triennial compliance report are much broader and for that reason, it is appropriate to require KCPL-GMO to address a more extensive and detailed set of special contemporary issues.

KCPL-GMO's comments in response to the issues recommended by Staff and MDNR indicate that KCPL-GMO generally accepts the proposed issues and explains how the company intends to address them. The only exception concerns general issue number 4 proposed by MDNR. In that proposed issue, MDNR asks KCPL-GMO to:

> analyze and document low probability outcomes with extremely high or low values (such as natural or man-made disasters that would result in energy emergency events including significant loss of load and equipment outages) as a part of risk assessment.

The Commission agrees with KCPL-GMO that this proposed issue is too vague to be acted upon. Furthermore, the current risk analysis criteria established in the Commission's rule should be sufficient to address KCPL-GMO's risk. The Commission will not establish this issue as a special contemporary issue.

In addition to the issues it proposed in its own filing, MDNR's response to the other filings supports and asks the Commission to require KCPL-GMO to address several issues identified by the Natural Resources Defense Council (NRDC) in the parallel proceeding regarding Ameren Missouri, EO-2012-0039. The NRDC did not raise those issues with regard to KCPL-GMO in this case. As a result, KCPL-GMO and the other commenters have not had an opportunity to respond to those proposed issues. In any event, the NRDC issues that MDNR endorses are of a sort that KCPL-GMO must address in its full IRP triennial compliance report even without being designated as a special contemporary issue. Therefore, the Commission will not include those issues as special contemporary issues for this case.

The Commission's rule also allows the Commission to adopt special contemporary issues that have not been proposed by any party.[5] The Commission notes that potential or anticipated changes in state and federal environmental or renewable energy standards could have a substantial impact on Missouri's electric utilities. Therefore, the Commission will direct the utilities to examine the potential or proposed changes in state or federal regulations and explain how the adoption of such changes would affect their compliance plans.

The Commission is also concerned about the type and amount of any federal or state subsidies the electric utilities expect to receive in conjunction with their proposed resource planning. Therefore, the Commission will direct the utilities to disclose and discuss the amount of any estimated federal or state subsidies either implicit or explicitly part of their proposed resource planning.

After considering these factors, the Commission will adopt the list of special contemporary issues set forth in this order.

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[4] 4 CSR 240-22.080(3)(B).
[5] 4 CSR 240-22.080(4)(C).

THE COMMISSION ORDERS THAT:

1. KCP&L Greater Missouri Operations Company shall analyze and document the following special contemporary issues in its 2012 IRP triennial compliance filing:

a. Investigate and document the impacts on KCPL-GMO's preferred resource plan and contingency plans of aggressive regulations by the FERC, regional transmission organizations (RTOs) or Missouri statutes or regulations to allow aggregators of retail customers (ARCs) to operate and market demand response services in Missouri.;

b. Investigate and document the impacts on KCPL-GMO's preferred resource plan and contingency plans of a new much more aggressive renewable energy standard (e.g., at least double the current standard for Missouri) with no rate cap;

c. Investigate and document the impacts on KCPL-GMO's preferred resource plan and contingency plans of a very aggressive energy efficiency resource standard (e.g., annual energy savings of 1.5% each year for 20 years and annual demand savings of 1.0% each year for 20 years from electric utility demand-side programs) with no rate cap in Missouri;

d. Investigate and document the impacts on KCPL-GMO's preferred resource plan and contingency plans of a loss of significant load for the short term and potentially for the long term that may be the result of a prolonged double-dip recession or a large customer or group of customers no longer taking service from KCPL-GMO.

e. Investigate and document the impacts of aggressive environmental regulations on KCPL-GMO's preferred resource plan and contingency plans.

f. Analyze and document relationships between uncertain factors when making a determination of whether uncertain factors are entirely independent or if they should be analyzed with covariant risk analysis.

g. Analyze, rank, and document existing coal plant fleet as retirement candidates.

h. Analyze and document aggressive DSM portfolios without constraints. Include analysis and documentation of demand-side investment mechanisms necessary to implement each DSM portfolio.

i. Analyze and document the impacts of opportunities to implement distributed generation, DSM programs, and combined heat and power projects in collaboration with municipal water treatment plants and other local waste or agricultural/industrial processes with on-site electrical and thermal load requirements, especially in targeted areas where there may be transmission or distribution line constraints.

j. Analyze and document analysis of DSM programs targeted to achieve energy efficiency savings in the agricultural sector.

k. Analyze and document alternative customer information/behavior modification program options to increase customer awareness and encourage more efficient use of energy.
l. Analyze potential or proposed changes in state or federal environmental or renewable energy standards and report how those changes would affect KCPL-GMO's plans for compliance with those standards.
m. Analyze the levelized cost of energy needed to comply with the current Renewable Energy Standards law compared to the cost of energy resulting from a portfolio comprised solely of existing resources with no additional renewable resources.
n. Disclose and discuss the amount and impact of every state or federal subsidy KCPL-GMO expects to receive with regard to any or all fuel sources it intends to use during the IRP study period.

2. This order shall become effective on October 29, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of the Application of Black River Electric Cooperative and the City of Fredericktown, Missouri for Approval of a Written Territorial Agreement Designating the Boundaries of Each Electric Service Supplier Within a Portion of Madison County, Missouri

File No. EO-2012-0047

Electric. **§6 Territorial agreement**. The Commission approved an uncontested territorial agreement between an electric cooperative and a municipality.

REPORT AND ORDER APPROVING TERRITORIAL AGREEMENT

Issue Date: October 19, 2011 Effective Date: October 29, 2011

This decision approves a Territorial Agreement between Black River Electric Cooperative and the City of Fredericktown, Missouri to establish exclusive service areas for service to new structures by both Black River and Fredericktown.

FINDINGS OF FACT

1. On August 11, 2011, Black River and Fredericktown filed a joint application asking the Commission to approve their written territorial agreement to designate boundaries of exclusive service areas in the City of Fredericktown and in surrounding rural areas of Madison County, Missouri.
2. On August 11, 2011, the Commission provided notice of the filing of the joint application to the County Commission of Madison County, to the members of the General Assembly representing Madison County, and to the public. That notice required applications to intervene to be filed no later than August 25, 2011. No such applications to intervene have been filed.
3. On September 27, 2011, Black River and Fredericktown filed an addendum to their territorial agreement in which they agree that except to the extent permitted by statute, the territorial agreement does not authorize Fredericktown to provide retail electric service outside its corporate boundaries.
4. On October 4, 2011, the Commission's Staff filed a recommendation advising the Commission that the proposed territorial agreement is not detrimental to the public interest and should be approved.
5. Black River is a rural electric cooperative corporation organized and existing under the laws of the State of Missouri.
6. Black River provides electric service to customer in rural areas of Madison County, Missouri.

7. Fredericktown is a fourth class city, organized and existing under the laws of the State of Missouri.

8. Fredericktown owns, operates, and maintains an electric distribution system to serve residents and inhabitants of Fredericktown.

9. Neither Black River nor Fredericktown is subject to regulation by this Commission.

10. The proposed territorial agreement establishes the exclusive service area for new structures for Black River, including areas within the city limits of Fredericktown.

11. The proposed territorial agreement also establishes the exclusive service area for new structures for Fredericktown, including areas outside the city limits of Fredericktown.

12. Since Fredericktown's population is greater than 1,500, Black River could not provide retail electric service to new structures inside Fredericktown absent this agreement.

13. The proposed territorial agreement does not require the transfer of any facilities or customers between Black River and Fredericktown.

14. The proposed territorial agreement is in the public interest because it will eliminate or reduce duplication of facilities, reduce the waste of resources and customer costs, and will allow Fredericktown, Black River, and their customers to know with certainty who will supply electricity to a particular location.

15. Based on the information contained in the joint application and on the recommendation of Staff, the Commission finds that the proposed territorial agreement is not detrimental to the public interest.

CONCLUSIONS OF LAW

A. Section 394.312, RSMo (Supp. 2010), gives the Commission jurisdiction over territorial agreements between rural electric cooperatives and municipal utilities concerning electric service.

B. Under Section 394.312.5, RSMo (Supp. 2010), the Commission may approve such a territorial agreement if the agreement is not detrimental to the public interest.

C. Although Section 394.312.5, RSMo (Supp. 2010), provides that the Commission is to hold an evidentiary hearing to determine whether a territorial agreement is to be approved, no party has requested a hearing. The decision in *State ex rel. Deffenderfer Enterprises, Inc. v. Public Service Comm'n of the State of Missouri*,[1] holds that the requirement for a hearing is met when the opportunity for hearing is provided and no proper party requests the opportunity to present evidence. Therefore, no hearing is necessary.

[1] 776 S.W. 2d 494 (Mo. App. W.D. 1989).

DECISION

Based on its findings of fact and conclusions of law, the Commission determines that the submitted territorial agreement between Black River and Fredericktown is not detrimental to the public interest and shall be approved.

THE COMMISSION ORDERS THAT:

1. The Territorial Agreement between Black River Electric Cooperative and the City of Fredericktown, Missouri is approved.
2. This order shall become effective on October 29, 2011.
3. This case shall be closed on October 30, 2011.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Woodruff, Chief Regulatory Law Judge

In the Matter of Union Electric Company d/b/a Ameren Missouri's Tariff Filing to Implement Changes to the Energy Efficient Natural Gas Equipment and Building Shell Measure Rebate Program

File No. GT-2011-0410
Tariff No. JG-2011-0620

REPORT AND ORDER

RATES. §108. Gas. The Commission rejected Ameren's proposed tariff sheet changing the company's Energy Efficiency Program. The Commission determined the tariff sheet was contrary to a prior Commission-approved Stipulation and Agreement and that the proposed revisions were not in the public interest.
EVIDENCE, PRACTICE AND PROCEDURE. §8. Stipulation. When interpreting an agreement, the Commission considers what the parties were attempting to accomplish. The Commission concluded that the requirement in a Commission-approved agreement for a utility to maintain an Energy Efficiency Program through December 31, 2012, was an attempt by the parties to gather data and evaluate the program. Therefore, a tariff sheet that prematurely cut the program's measures prior to the end of the evaluation period controverted the intent of the parties to the agreement.
EVIDENCE, PRACTICE AND PROCEDURE. §1. Generally. The Commission found that a motion for clarification should be granted.
EVIDENCE, PRACTICE AND PROCEDURE. §6. Weight, effect and sufficiency. When terms of an agreement allowed Ameren to change the company's tariff due to a change in circumstances, facts did not support Ameren's argument that a change of circumstances existed that justified changes to the utility's Energy Efficiency Program. Although Ameren argued that some of the program's measures were not cost effective, the evidence demonstrated that Ameren was aware of this prior to entering into the agreement.

Issue Date: November 2, 2011
Effective Date: November 12, 2011

Appearances

Wendy Tatro for **Union Electric Company d/b/a Ameren Missouri,** 1901 Chouteau Avenue, St. Louis, Missouri 63103

Sarah Mangelsdorf **for the Missouri Department of Natural Resources,** Post Office Box 899, Jefferson City, Missouri 65102

Marc Poston for **the Office of the Public Counsel and the Public,** Post Office Box 2230, Jefferson City, Missouri 65102

Lera Shemwell and Meghan McClowry for **the Staff of the Missouri Public Service Commission,** 200 Madison Street, Post Office Box 309, Jefferson City, Missouri 65102

JUDGE: Kennard Jones, Senior Regulatory Law Judge

Syllabus: In this order, the Commission rejects Ameren Missouri's proposed tariff sheets as being contrary to the Stipulation and Agreement and not in the public interest.

Summary

On January 19, 2011, the Missouri Public Service Commission approved a Stipulation and Agreement entered into between Union Electric Company d/b/a Ameren Missouri, the Staff of the Missouri Public Service Commission, the Office of the Public Counsel and the Missouri Department of Natural Resources.[1] Part of that Agreement requires Ameren to maintain an Energy Efficiency Program.[2] In compliance with the Agreement, Ameren filed tariff sheets on January 21, 2011, which the Commission approved to become effective on February 20, 2011.

On June 8, 2011, Ameren filed tariff sheets with proposed changes to the Energy Efficiency Program. The parties to the Agreement objected to Ameren's proposed changes and moved the Commission to reject the tariff sheets. To consider the arguments, the Commission suspended the tariff until November 5 and held an evidentiary hearing on October 5. The parties submitted post-hearing briefs on October 20 and, to properly consider the case as submitted, the Commission suspended the proposed tariff sheets for an additional 30 days.

Of the number of questions presented by the parties in the List of Issues, the Commission finds that resolution of only two specific questions is necessary to resolve this matter: (1) whether approving Ameren's proposed tariff would be contrary to the Agreement; and (2) whether Ameren's proposed tariff revisions are in the public interest. Through the following Findings and Conclusion, the Commission determines that approving Ameren's proposed tariff would be contrary to the Stipulation and Agreement because the parties have agreed to leave the Agreement in place through December 2012. Further, for a number of reasons set out below, the Commission determines that approval of the proposed tariff sheets would not serve the public interest.

Findings of Fact.

1. Ameren, Staff, OPC and MDNR entered into a Stipulation and Agreement, which the Commission approved on January 19, 2011.[3]
2. As part of the Agreement, Ameren is required to maintain an Energy Efficiency Program.[4]
3. Attached to the Agreement are the tariff sheets the parties intended Ameren to file.[5]
4. In compliance with the Agreement, Ameren filed tariff sheets which the Commission approved to be effective on February 20.[6]
5. On March 10, 18 days after the effective date of the tariff, Ameren notified the parties to the Agreement that it wanted to make changes to its tariff.[7]
6. On June 8, Ameren Missouri filed proposed tariff revisions with the Missouri Public Service Commission.[8]

[1] File No. GR-2010-0363, Order Approving Stipulation and Agreement, issued January 19, 2011.
[2] Staff Exhibit 6, Unanimous Stipulation and Agreement, paragraph 6.
[3] Staff Ex. 15; Order Approving Stipulation and Agreement, Comm. File No. GR-2010-0363 issued January 29, 2011.
[4] Staff Ex 6; Unanimous Stipulation and Agreement, paragraph 6.
[5] Staff Ex. 6, appendix c.
[6] Order Approving Tariff Sheets in Compliance with Commission Order, Comm. File No. GR-2010-0363, item 94.
[7] OPC Ex 1, rebuttal of Ryan Kind, p. 10; and, Staff Ex. 3, proposed sheet no 79.
[8] *See* this docket, Tracking No. JG-2011-0620, revised sheet 79 through revised sheet 85.

7. On June 27, the Staff of the Commission filed a motion requesting that the Commission reject or suspend the tariff.[9]

8. Similar motions were also filed by the Office of the Public Counsel and the Missouri Department of Natural Resources.[10]

9. The tariff sheets set out two programs, residential and general service, each containing a number of "measures" representing items customers intending to reduce energy consumption might purchase. For those items, Ameren offers rebates.[11]

10. The tariff sheets implementing the Energy Efficiency programs provide for uninterrupted availability of the programs and measures programs through December 31, 2012.[12]

11. There is no language in the Agreement suggesting that the term "program" refers to anything less than how those programs appear it the sample tariffs.[13]

12. Through an outside firm, Ameren is required to complete a post-implementation evaluation by December 31, 2012, which shall include usage data for program participants through April 2012.[14]

13. Prematurely cutting measures prior to the end of the evaluation period – April 30, 2012 - will undercut the effort to have the agreed-upon usage data necessary to evaluate the programs.[15]

14. As part of the Stipulation and Agreement, Ameren agreed to a target level of annual funding to be achieved within the next three years ramping up by year three to an amount equal to .5% of gross operating revenues for gas service, including gas cost, or approximately $850,000, for expenditures prudently incurred on cost-effective programs.[16]

15. The parties agreed that Ameren may file proposed revised tariff sheets concerning the Energy Efficiency programs, if Ameren believes circumstances warrant changes.[17]

16. "Programs" are defined as they appear in the tariff sheets attached to the Agreement and filed by Ameren, which includes all of the measures in those programs.[18]

17. Under the Total Resources Cost (TRC) test, a measure in the Energy Efficiency Program with a TRC value greater than 1 is not cost-efficient.[19]

18. Prior to the parties entering into the Unanimous Stipulation and Agreement, there were at least 7 measures with a TRC value of greater than 1.[20]

19. Ameren did not raise any issue regarding cost-effectiveness of the measures prior to implementing the Agreement.[21]

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[9] Staff of the Commission's motion to reject or suspend tariff filed on June 29, 2011, item no. 1 in docket.
[10] The Office of the Public Counsel and Missouri Department of Natural Resources' motions to reject or suspend tariff, filed on June 28 and June 29, item nos. 3 and 4 in docket.
[11] Ameren's currently effective tariff; P.C.S. Mo. No. 2, sheet nos. 80 – 85.
[12] Staff Ex 6; Unanimous Stipulation and Agreement, paragraph 6G.
[13] *Id.*
[14] *Id, paragraph 6C.*
[15] TR. 253-254.
[16] Staff Ex 6, Unanimous Stipulation and Agreement, paragraph 6B.
[17] *Id,* paragraph 6C.
[18] Staff Ex. 6, Unanimous Stipulation and Agreement, page 5, Appendix C.
[19] Ameren Ex. 3, direct testimony of Kyle Shoff, page 2, line 22.
[20] Commission Ex. 1, TRC values of all measures as of June 2010 and June 2011.
[21] Staff Ex. 2, Warren surrebuttal, p. 2, lines 13-22.

20. The Energy Star label is a way for Ameren Missouri customers to see whether a natural gas product is energy efficient.[22]
21. Ameren is an Energy Star partner.[23]
22. Eight of the measures that the company is proposing to eliminate are labeled Energy Star.[24]
23. Approval of Ameren's proposed tariff sheets would eliminate its customers' most requested and most popular rebates.[25]
24. Ameren currently has 19 residential energy efficiency measures and 28 business measures. [26]
25. Approval of Ameren's proposed tariff sheets would eliminate 13, or 68%, of its residential programs and 7, or 25%, of its general service measures.[27]
26. Ameren sent rebates totaling $39,734 to customers who took advantage of measures that the company now seeks to remove.[28]
27. Home energy audits cost from $350 to $600.[29]
28. Those measures Ameren proposes to retain generally require a home energy audit, yet provide minimal rebates to the customers.[30]
29. Customers will not likely take advantage of the remaining measures when comparing the cost of the home energy audit to the amount of the rebate.[31]
30. As of August 2011, there were 486 residential reservations or rebates paid for measures that Ameren proposes to eliminate but no reservations or rebates paid for measures that will remain under Ameren's proposed tariff.[32]

Conclusions of Law

Words should be taken in their ordinary sense in construing contracts, and the parties' mutual intention should be ascertained from the language of the contract and the circumstances surrounding its making.[33] The language in the Agreement states that the tariff shall provide for uninterrupted availability of the energy efficiency programs through December 31, 2012. After which, the cost effectiveness of the programs shall be determined. The Commission has found that prematurely cutting measures prior to the end of the evaluation period will undercut the effort to have the agreed-upon usage data necessary to evaluate the programs. In interpreting the Agreement, the Commission should consider what the parties were attempting to accomplish.[34] Altering those programs prior to the end of the evaluation period would be inconsistent with the parties' intent to gather data and evaluate the programs.

[22] Transcript, page 77.
[23] Transcript, page 78.
[24] Missouri Department of Natural Resources, Ex. 2, list of program measures Ameren proposes to remove.
[25] Staff Ex. 4, Ameren response to data request.
[26] Ameren Ex. 3, direct testimony of Kyle Shoff.
[27] Missouri DNR Ex. 1, rebuttal testimony of Buchanan, p. 17; TR pages 45, 106 and 107-108.
[28] Staff Ex 1, rebuttal testimony of Stahlman, p 15.
[29] Transcript, page 188.
[30] Transcript 229.
[31] Transcript 229.
[32] Staff Exs. 4 and 8; tariff sheet 81.
[33] *Fulkerson v. Great Lakes Pipe Line Co.*, 75 S.W.2d 844 (Mo. 1934).
[34] *Glass v. Mancuso*, 444 S.W.2d 467 (Mo. 1969).

Under the Agreement, Ameren may propose changes to its tariff if the company believes a change in circumstances warrants such. Ameren argues that there has been a change in circumstances and that the company can file a proposed tariff prior to December 31, 2012. This position is not supported by the facts or the law.

The tariff became effective on February 20. Within weeks, Ameren began an attempt to change the tariff. In June it filed proposed changes with the Commission, stating that it analyzed energy efficiency measures and found that some were not cost effective. The evidence shows Ameren was aware that, under its own test, some of the measures were not cost-effective prior to entering into the Agreement. These facts undermine Ameren's position.

Also, specific terms of a contract are given preference over general ones.[35] The language in the Agreement requiring programs to run through December 2012 is specific. However, the Agreement does not state when or under what change of circumstances Ameren can seek to change its tariff. This term is relatively general. The Commission concludes that approving the tariff prior to December 2012 is contrary to the Agreement.

Finally, the Commission must act in the public interest.[36] The Commission has found the following: that many of the measures Ameren proposes to eliminate are labeled Energy Star, which is a way for customers to determine whether a product is energy efficient; Ameren proposes to eliminate 68% of the residential and 25% of the general service measures; Ameren sent rebates totaling $39,734 to customers who took advantage of measures the company now seeks to remove; Ameren proposes to retain measures that require an expensive home energy audit yet provide minimal rebates to the customers; and, most telling is that as of August 2011, there were 486 residential reservation or rebates paid for measures that Ameren proposes to eliminate and no reservations or rebates for measures that will remain under the proposed tariff. In light of all of these factors, the Commission concludes that the proposed tariff would not serve the public interest.

Decision

The Commission will reject the proposed tariff sheets because they are not in the public interest. The Commission also concludes that approval of the proposed tariff sheets would be contrary to the parties' intent when entering into the Stipulation and Agreement.

[35] *Phillips v. Authorized Investors Group*, 625 S.W.2d 917 (Mo. App. 1981).
[36] *Gulf Transport Co. v. Public Service Com'n*, 658 S.W.2d 448, 456 (Mo. App. 1983)

THE COMMISSION ORDERS THAT:

1. The following Tariff Sheets, filed under Tariff File No. JG-2011-0620, are rejected:

P.S.C. Mo. No. 2
8th Revised SHEET No. 79 through 1st Revised SHEET No. 85

2. This order shall become effective on November 12, 2011.
3. This case shall be closed on November 13, 2011.

Gunn, Chm., Davis, Jarrett,
and Kenney, CC., concur, and
certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 2nd day of November, 2011.

In the Matter of the Joint Application of Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water for Authority for Liberty Water to Acquire Certain Assets of Noel Water Co., Inc. and, in Connection Therewith, Certain Other Related Transactions

File No. WO-2011-0328

Water. §4 Transfer, lease and sale. The Commission cancelled the certificate of convenience and necessity of the defunct water company and granted a certificate to the acquiring company.

ORDER CANCELING THE CERTIFICATE OF CONVENIENCE AND NECESSITY OF NOEL WATER CO., INC., AND GRANTING A CERTIFICATE OF CONVENIENCE AND NECESSITY TO ALGONQUIN WATER RESOURCES OF MISSOURI, LLC D/B/A LIBERTY WATER

Issue Date: November 3, 2011 Effective Date: November 3, 2011

On April 6, 2011, Algonquin Water Resources of Missouri, LLC d/b/a Liberty Water ("Liberty Water") and Noel Water Co., Inc. ("Noel Water") submitted an Application to the Commission. Liberty Water wants to purchase substantially all of Noel's assets. The Commission granted the application on August 10, 2011.

In that order, the Commission stated that Liberty Water shall notify the Commission after the assets have been transferred. The order further stated that upon receipt of the notice, the Commission shall cancel the certificate of convenience and necessity held by Noel Water, and shall grant Liberty Water a certificate of convenience and necessity to provide water service in Noel Water's former service territory.

The Commission received the ordered notice from Liberty Water on September 22. Thus, this order cancels Noel Water's certificate, and grants Liberty Water a certificate.

THE COMMISSION ORDERS THAT:

1. The certificate of convenience and necessity granted to Noel Water Co., Inc. is canceled.
2. Algonquin Water Resources of Missouri, LLC, d/b/a Liberty Water is granted a certificate of convenience and necessity to provide water service in the service territory formerly held by Noel Water Co., Inc.
3. This order shall become effective immediately on issuance.

Ronald D. Pridgin, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri, on this 3rd day of November, 2011.

In the Matter of the PGA/ACA Filing of Atmos Energy Corporation for the West Area (Old Butler), West Area (Old Greeley), Southeastern Area (Old SEMO), Southeastern Area (Old Neelyville), Kirksville Area and the Northeastern Area

File No. GR-2008-0364

Gas. §17.1 Purchased Gas Adjustment (PGA). Fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction.

Gas. §17.1 Purchased Gas Adjustment (PGA). Gas. §78 Payments and affiliated interests. Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions.

Gas. §78 Payments and affiliated interests. 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.

Gas. §78 Payments and affiliated interests. The Commission's prudence standard applies when the Commission is evaluating the prudence of an affiliated transaction.

Gas. §78 Payments and affiliated interests. Fair market price is set by the market, not by Staff's review of documents.

REPORT AND ORDER

Issue Date: November 9, 2011
Effective Date: November 19, 2011

Appearances

James M. Fischer and **Larry W. Dority**, Fischer & Dority, P.C. 101 Madison St., Suite 400, Jefferson City, Missouri 65101, for Atmos Energy Corporation.
Robert S. Berlin, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.
Mark D. Poston, Deputy Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102, for The Office of the Public Counsel.

REGULATORY LAW JUDGE: Morris L. Woodruff, Chief Regulatory Law Judge

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

This Report and Order concerns the second phase of the two-phase PGA/ACA process. During the initial Purchased Gas Adjustment (PGA) phase, Atmos Energy Corporation (Atmos) adjusted the rates it charged its customers to allow it to recover its varying costs of acquiring a supply of natural gas to serve those customers. Now, in the Actual Cost Adjustment (ACA) phase of the process, the Commission is examining Atmos' natural gas purchases to determine whether the rate the company charged its customers was correct and whether the decisions the company made regarding its gas purchases were prudent.

For purposes of this case, the Commission's Staff conducted a review of Atmos' billed revenues and its natural gas costs for the period of September 1, 2007, to August 31, 2008. On December 28, 2009, Staff filed its recommendation regarding the actual cost adjustment for Atmos for the specified time period.

Staff initially recommended the Commission disallow $349,015 in gas costs for Atmos' Hannibal service area and $13,964 in gas costs for the Butler service area. The proposed disallowances represent Staff's calculation of the amount of profit earned by Atmos' gas marketing affiliate – Atmos Energy Marketing (AEM) – on sales of gas to Atmos. Staff's underlying concern about AEM's sale of gas to Atmos was its inability to determine whether the gas packages bought by AEM to provide service to Atmos were firm or interruptible packages of gas. Because it could not make that determination from the information supplied by Atmos, Staff proposed to disallow from Atmos' costs all profits AEM earned on the transaction.[1]

Atmos responded to Staff's recommendation on January 28, 2010. Atmos objected to Staff's proposed disallowance of the profits AEM earned on its sales of gas to Atmos. Atmos explained that AEM submitted the lowest and best bids for those transactions in competition with other, unaffiliated gas marketing companies. On that basis, Atmos contends there is no reason for the Commission to disallow the profits AEM earned on the transactions.

Thereafter, the Commission established a procedural schedule whereby Atmos and Staff prefiled direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on March 23 and 24, 2011. Atmos, Staff, and the Office of the Public Counsel filed post-hearing briefs on April 29, 2011, followed by reply briefs on May 20, 2011.

The Disallowances Proposed by Staff

1. Staff proposed two related but independent disallowances of a portion of Atmos' gas costs for the ACA period in question. Initially, in its December 29, 2009 recommendation, Staff asked the Commission to disallow $349,015 in Atmos' gas costs for the Hannibal service area and $13,964 in gas costs for the Butler service area.[2] For both these service areas, Atmos' affiliated gas marketing company, AEM had submitted the lowest and best bid in a competitive bidding process. Staff based its proposed disallowance on its contention that because these were not arms-length transactions, AEM should not be allowed to earn a profit on the transactions. Therefore, Staff

[1] Staff Recommendation Regarding Atmos Energy Corporation's Actual Cost Adjustment, Memorandum, Pages 4 and 5.
[2] Sommerer Direct, Ex. 26, Page 4, Lines 7-9.

proposed to disallow the portion of Atmos' gas costs that would equal its calculation of AEM's gross profits on those transactions.[3]

2. Subsequently, Staff reduced its proposed disallowance of Atmos' gas cost for the Hannibal service area to $308,733.[4] Staff eliminated the proposed adjustment for the Butler service area after it determined that AEM had no gross profits and actually lost money on that transaction.[5]

3. For the first time in its surrebuttal testimony, Staff proposed a new disallowance related to a force majeure event on the Panhandle Eastern Pipeline that supplied gas to the Hannibal and Butler regions. Staff contends that Atmos failed to nominate sufficient gas supplies and failed to ensure that AEM delivered contracted for supplies of gas during that force majeure event. Staff proposed to disallow either $52,572 or $85,775 depending upon alternative scenarios for how much additional gas Atmos had to obtain at a higher cost later in the winter.[6]

Background Facts

4. Atmos Energy Corporation (referred to in this report and order simply as Atmos) operates in Missouri as a regulated natural gas local distribution company, sometime referred to as an LDC. Atmos operates in many states and its Missouri LDC operations are part of its Kentucky/Mid-States division.[7]

5. As an LDC, Atmos obtains supplies of natural gas from natural gas producers and distributes that natural gas to homes and businesses within its service territory. Within Missouri, Atmos provides natural gas service to customers in three geographic areas: Northeastern, Southeastern, and Western. Within each area, Atmos serves customers through one or more operating systems.[8] Staff has proposed disallowances relating to two of those operating systems during the course of this case.

6. The first affected operating system is the Consolidated Hannibal/Canton/Palmyra/Bowling Green operating system within the Northeastern area. That system serves over 14,000 customers, of which approximately 13,000 are residential customers. Natural gas is delivered to this operating system through the Panhandle Eastern Pipeline.[9]

7. The second operating system for which Staff initially proposed a disallowance was the Butler system, within the Western area. It serves approximately 3,700 customers, most of which are residential customers. It is also receives natural gas through the Panhandle Eastern Pipeline.[10]

8. In addition to its regulated operations as an LDC, Atmos also owns Atmos Energy Marketing, LLC. (AEM), a separate, unregulated gas marketing company.[11]

[3] Sommerer Direct, Ex. 26, Page 6, Lines 14-17.
[4] Transcript, Page 640, Lines 4-6.
[5] Transcript, Page 641, Lines 16-19.
[6] Sommerer Surrebuttal, Ex. 28, Pages 19-20, Lines 13-22, 1-3.
[7] Buchanan Direct, Ex. 1, Page 2, Lines 7-13.
[8] Buchanan Direct, Ex. 1, Page 3, Lines 18-20.
[9] Buchanan Direct, Ex. 1, Page 4, Lines 6-10.
[10] Buchanan Direct, Ex. 1, Page 6, Lines 8-11.
[11] Sommerer Direct, Ex. 26, Page 5, Line 4.

9. Atmos holds long-term contracts with various interstate pipelines for natural gas storage and transportation capacity to supply the firm natural gas requirements of its Missouri service areas.[12] Atmos does not produce its own natural gas and does not purchase that gas directly from producers. Instead, Atmos contracts with independent gas marketing companies to purchase the natural gas that is then flowed through the interstate pipeline using Atmos' pipeline capacity.[13]

Atmos' Use of Gas Marketing Companies to Procure its Gas Supply

10. Atmos uses the services of independent gas marketing companies to purchase its natural gas because it does not have the in-house expertise needed to perform the gas marketing services provided by those companies.[14]

11. If it were to undertake its own gas marketing services using its own, in-house employees, Atmos would need to hire or train additional personnel at a substantial cost and develop processes already used by independent gas marketers to secure gas supplies and transport gas through the interstate gas pipeline system.[15]

12. In-house gas marketing employees would still need to negotiate and contract for the purchase and transport of natural gas supplies. The price of gas and the cost to transport that gas would still be determined by market forces, just as those prices are determined by market forces when they are purchased by independent marketing companies.[16]

13. Most importantly, Atmos is a natural gas distribution company. Its core competency is in the distribution of natural gas to its customers. It is able to most efficiently provide service to its customers by focusing on that core competency while leaving gas marketing services to gas marketing companies that specialize in providing that service.[17]

14. On the basis of those facts, Atmos contends that its fully distributed cost of providing gas-marketing services through its own employees would exceed the market price for those gas-marketing services as established by a competitive bidding process among gas marketing companies.[18]

15. Staff does not challenge the specifics of Atmos' decision to purchase its gas supplies through gas marketing companies rather than by using in-house gas marketing experts except to insinuate that it is "most remarkable that the 'largest natural-gas-only distributor in the United States' (per the Company's website) asserts that it does not have the resources to optimize PGA assets."[19]

16. Furthermore, Staff does not seek to disallow Atmos' costs associated with acquiring its gas supply through the services of unaffiliated gas marketing companies. And Staff does not seek to disallow any of Atmos' gas costs based on a fully distributed costs argument.[20] Thus, it is apparent that Staff's concern is only with Atmos' affiliated transactions and not with Atmos' decision to obtain its gas supplies through gas

[12] Buchanan Direct, Ex. 1, Page 6, Lines 16-18.
[13] Buchanan Direct, Ex. 1, Page 6, Lines 18-20.
[14] Buchanan Direct, Ex. 1, Page 20, Lines 20-21.
[15] Buchanan Direct, Ex. 1, Page 21, Lines 5-8.
[16] Buchanan Direct, Ex. 1, Page 21, Lines 13-17.
[17] Buchanan Surrebuttal, Ex. 3, Page 4, Lines 1-15.
[18] Buchanan Direct, Ex. 1, Page 21, Lines 19-22.
[19] Sommerer Rebuttal, Ex. 27, Page 2, Lines 9-11.
[20] Transcript, Page 698, Lines 10-14, See also, Transcript, Pages 197-198, Lines 4-25, 1-8..

marketing companies rather than by purchasing those supplies using in-house gas marketing personnel.

17. The Commission finds that Atmos' fully distributed cost of providing gas-marketing services through its own employees would exceed the market price for those gas-marketing services as established by a competitive bidding process among gas marketing companies.[21]

The Competitive Bidding Process

18. Atmos awards contracts to gas marketing companies using a competitive bid process. Under that process, Atmos issues a request for proposal - an RFP – and interested suppliers submit confidential bids with their proposed pricing for the gas supply services. Atmos evaluates the bids and awards the contract to the company that offers the best bid for reliable supply at the least cost.[22]

19. Atmos used the same RFP process to obtain competitive bids for gas supply service contracts to serve each of its eight operating systems in Missouri. During the 2007-2008 ACA period that is at issue in this case, Atmos awarded two contracts – for the Hannibal/Bowling Green and Butler operating systems – to AEM, its affiliated gas marketing company. The other contracts were awarded to five other, non-affiliated, gas-marketing companies.[23]

20. For the Hannibal/Bowling Green operating system, Atmos sent RFP letters to 56 entities on the bidder list maintained by the company. Atmos sent out 39 RFP letters for the Butler operating system. Several gas-marketing companies submitted conforming bids in response to that RFP. AEM submitted bids for both systems.[24]

21. AEM does not dominate Atmos' bidding process. For the period 2004-2009, Atmos issued 48 RFPs for Missouri gas supply. AEM submitted the successful bid six times. That is consistent with the number of successful bids submitted by other major gas marketers.[25]

22. For this ACA period, there were two overlapping RFP processes.[26] AEM submitted the lowest bid both times. In the first RFP process for the period of April 1, 2007 to March 31, 2008, there were six unaffiliated bidders. AEM submitted the lowest bid at $14,723,472. The lowest bid from an unaffiliated marketer was $14,761,471, but that was a nonconforming bid.[27] The lowest conforming bid from a non-affiliated bidder was for $15,069,726, which is approximately $346,000 higher than the bid submitted by AEM.[28] Staff's witness indicated he did not believe Atmos should have accepted the higher bid over the lower bid from AEM.[29]

23. Interestingly, Atmos paid AEM approximately $13.4 million during the contract period for the amount of gas it actually supplied to the Hannibal district under that contract.[30] Thus, based on actual costs and actual prices, Atmos paid AEM less than it

[21] Buchanan Direct, Ex. 1, Page 21, Lines 19-22.
[22] Buchanan Direct, Ex. 1, Page 6, Lines 20-23.
[23] Buchanan Direct, Ex. 1, Page 11, Lines 10-22.
[24] Buchanan Direct, Ex. 1, Page 10, Lines 3-6. The gas marketers that submitted conforming bids are identified in the testimony but those identities are considered highly confidential and so will not be revealed in this report and order.
[25] Buchanan Direct, Ex. 1, Page 12, Lines 15-20.
[26] Transcript, Page 646, Lines 9-15.
[27] Transcript, Page 647, Lines 2-8. *See also*, Ex. 24HC.
[28] Transcript, Page 651, Lines 4-17.
[29] Transcript, Page 651, Lines 18-21.
[30] Transcript, Page 654, Lines 16-23.

would have paid under the bids submitted by the unaffiliated gas marketing companies.[31]

24. For the second RFP process, covering the period of April 1, 2008 to March 31, 2009, AEM also submitted the lowest bid at $13,947,511. The next lowest bid submitted by a non-affiliated gas marketer was for $14,049,424.[32]

Fair Market Value

25. Much of the testimony and effort put into this case by all parties concerns Staff's attempt to discern what it describes as a fair market value for Atmos' affiliate transactions with AEM. Staff's attempts to establish such a fair market value apart from the results of the bidding process are misguided.

26. All parties accept that fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction.[33]

27. Staff and Public Counsel contend that such a definition of fair market value does not apply to these transactions because, by definition, an affiliate transaction is not arms-length. On that basis, Staff claims the need to audit the books and records of AEM to determine the fair market value of the transaction from AEM's perspective. Since AEM was unable to produce the documents Staff claims it needs to establish that fair market value, Staff asks the Commission to disallow all gross profits that AEM earned on the transaction.

28. Staff and Public Counsel's position ignores the existence of the bidding process in establishing the fair market value for the transaction. If AEM had not submitted a bid, or if it had not submitted the lowest bid, there would be no question that the bidding process established the fair market value of the transaction. Indeed, Staff did not propose any disallowance related to the contracts for Missouri gas supply in which an unaffiliated gas marketing company submitted the lowest and best bid and agreed that the bidding process would establish fair market value for those transactions.[34]

29. Assuming the bidding process was fair and open, and no party has presented evidence to establish a serious doubt about the fairness of the bidding process, that bidding process established the fair market value for the affiliate transactions, just as it did for the transactions with non-affiliated gas marketing companies. Because of the bidding process, Atmos, and ultimately its ratepayers, will pay no more for the services of the affiliated gas marketing company than they would have to obtain the same services from an unaffiliated gas marketing company. In effect, it is the non-affiliated gas marketing companies bidding in the open market that establish the fair market value for the bids won by AEM as much as they do for the bids won by non-affiliated bidders. Absent some showing of insider-dealing to favor an affiliate in the bidding process or some showing of facts that cast doubt on the bidding process itself, there is no need for Staff to search behind the bidding process to try to establish an independent fair market value for the affiliate transactions, if any such determination were possible.

[31] Transcript, Page 709, Lines 14-18.
[32] Transcript, Page 684, Lines 15-20.
[33] Transcript, Page 627, Lines 21-25.
[34] Transcript, Page 667, Lines 7-16.

30. While it does not need to establish a fair market value for the affiliate transactions apart from the value established by the actual fair market, Staff certainly has an obligation to closely examine Atmos' transactions with its affiliate. Indeed, despite a lot of confusing and distracting testimony, it is apparent that Staff's real concern is not with fair market price, AEM's record keeping, or even with the bidding process, rather it is about the actual relationship between Atmos, AEM, and the gas supplied by AEM. In short, Staff is concerned that AEM may have met its obligation to supply gas under its winning bids by providing Atmos with something less than firm gas supplies.[35]

The Provision of Gas Supplies

31. A local distribution company such as Atmos must transport its natural gas supplies from the gas producing areas of the country to its service area through one of several interstate natural gas pipelines. For both the Hannibal/Bowling Green and Butler service areas, Atmos transported its gas through the Panhandle Eastern Pipeline under terms of a long-term firm contract.[36]

32. For the Panhandle Eastern Pipeline the demarcation between the field area, where gas is produced, and the market portion of the pipeline, where commercial deliveries are made, is found at Haven in Kansas.[37] Haven is not however the only receipt point on the Panhandle Eastern Pipeline. There are also secondary receipt points, including one at Louisburg, Kansas, where the Kinder Morgan Pony Express Pipeline connects to the Panhandle Eastern Pipeline.[38]

33. Atmos' request for proposal for natural gas supply, the letter that was sent to all prospective bidders to supply natural gas to meet Atmos' needs, specified that the bidder was to "provide firm and warranted natural gas commodity only requirements for its Missouri service areas." That request for proposal letter further specified, "[a]ll gas supply is to be **firm and warranted** assuring that natural gas supply services will meet all contractual obligations without fail." (emphasis in original)[39]

34. Atmos' request for proposal for natural gas supply allowed all potential bidders to use either the Haven receipt point or a secondary in-path receipt point between Haven and Atmos' service area.[40] As it was allowed to do under the request for proposal, AEM chose to use a secondary in-path receipt point at Louisburg to take gas supplies off the Kinder Morgan Pony Express Pipeline and then transport them along the Panhandle Eastern Pipeline for delivery to Atmos.[41]

35. In the hierarchy established by the Pipeline's tariff, primary firm delivery is the highest priority gas supply. The priority of secondary in-path firm delivery is a notch below primary firm delivery.[42]

36. Although Atmos' request for proposal specifies that the gas supply it seeks to purchase is to be firm, Staff and Public Counsel are concerned that perhaps AEM

[35] Staff's argument is rather confused, but is best set out in Sommerer Surrebuttal, Ex. 28, Page 3.
[36] Buchanan Direct, Ex. 1, Pages 4-6.
[37] Transcript, Page 446, Lines 13-20.
[38] A map showing the primary and secondary delivery points on the Panhandle Eastern Pipeline was included in a PowerPoint presentation made as part of Staff's opening statement. That PowerPoint presentation, including the map, was marked for identification as Ex. 31, but was not admitted into evidence.
[39] Exhibit 8. *See also*, Transcript, Page 355, Lines 9-25.
[40] Transcript, Page 357, Lines 16-23.
[41] Transcript, Page 452, Lines 8-12.
[42] Transcript, Page 383, Lines 1-8.

actually supplied something less than firm gas. As one basis for that concern, Staff points to several transaction confirmation documents for the period in which the statement of service level under the contract was left blank as an implication that AEM was allowed to deliver less than firm gas;[43] an implication that Atmos' witness denied.[44] The priority and firmness of gas supplies becomes important because of events in December 2007.

The Events of December 2007

37. At the end of each month, Atmos nominates the volume of gas that it intends to purchase from its gas marketer in the subsequent month. That volume of gas is known as the company's First of Month (FOM) nomination. The FOM nomination represents a baseload amount of gas that Atmos is committing to buy for each day of the month. If Atmos needs more than the baseload amount of gas for a particular day during the month, it can nominate additional daily gas supplies, or draw more gas from storage. Daily supplies are also known as swing gas or spot gas.[45]

38. When Atmos signs a contract with a gas marketer, a separate index price is set for FOM gas and for daily gas supplies. The price for daily gas supplies may be higher or lower than the FOM prices depending upon the behavior of the gas market.[46]

39. Correctly setting the baseload gas through the FOM nomination is important because nominating too little baseload supply may require the utility to purchase more expensive daily gas supplies. Nominating too much baseload gas may also create problems because the company must take all the baseload gas it has nominated. So, for example, if Atmos were to experience a string of 70 degree days in December it could wind up with gas that it could not use. It might then need to sell that gas back to the supplier at a cost to the company.[47]

40. The usage of natural gas is dependent upon the weather. More gas is used on cold days when customers must use gas to heat their homes and businesses. Thus, gas utilities must consider the weather when deciding how much gas to nominate. Atmos' Gas Supply Plan, which is used for the guidance of the company's gas supply specialists, indicates the company's gas supply plan is based on normal degree-days, a measure of temperature within the company's service area. According to that plan, FOM nominations are typically made to cover gas requirements assuming that monthly heating degree-days will be twenty percent warmer than normal. In that way, the company will have flexibility if warmer weather occurs, or if daily gas prices drop after the FOM nominations are made.[48]

41. For December 2007, the average daily requirement was 3,900 units of gas for the Hannibal/Canton area. Twenty percent warmer than average weather would require 3,100 units for that area.[49] In addition, twenty percent warmer than average weather would require 630 units of gas for the Bowling Green area. The total for the twenty percent warmer than average weather for the two areas is 3,730 units of gas. However,

[43] Transcript, Pages 390-392.
[44] Transcript, Page 392, Lines 18-22.
[45] Transcript, Pages 435-436.
[46] Transcript, Page 437, Lines 5-14.
[47] Transcript, Pages 437-438, Lines 15-25, 1-9.
[48] Buchanan Direct, Ex. 1, Attachment 1. *See also*, Transcript, Pages 543-544, Lines 13-25, 1-12.
[49] Ex. 20. *See also*, Transcript, Page 546, Lines 8-14.

Atmos' actual FOM nomination for Hannibal/Canton/Bowling Green for December 2007 was only 2,800 units of gas,[50] which is a volume roughly 25 percent lower than the average volume for the 20 percent warmer than average weather scenario.[51]

42. While Atmos' Gas Supply Plan indicates Atmos will typically nominate FOM gas sufficient to meet gas requirements for 20 percent warmer than normal weather, that is just a guideline for the company's gas buyers.[52] Atmos' gas buyer is expected to exercise a great deal of independent judgment in determining how much FOM gas to nominate in a particular month.[53]

43. The person at Atmos responsible for the decision to nominate less FOM gas volumes for December 2007 was Mike Walker. Walker testified that in formulating his FOM nomination plan he took into account the amount of gas actually billed during that month in previous years, anticipated weather patterns, and the amount of gas available in storage.[54] Walker explained that he reduced the December 2007 FOM nomination below the 20 percent warmer than average weather scenario because the previous December had been substantially warmer than average and because he believed his November storage gas levels were where they were supposed to be.[55]

44. In fact, November storage levels were five percent lower than Atmos had planned, likely because of a cold snap in late November. But Walker would not have known about his final November storage figures until he received a report from the pipeline in the first week of December.[56]

45. While Staff and Public Counsel criticized Atmos' decision to nominate FOM gas at volumes below the 20 percent warmer than average scenario, the basis for their proposed disallowance is more closely tied to events that occurred after Atmos made its FOM nominations. Normally Walker sent his FOM gas nominations to the various gas marketers that supplied gas to Atmos six business days before the end of the month, which because of the Thanksgiving Holiday, would have fallen on Wednesday, November 21.[57] However, Walker took a vacation day before the holiday, so he made his FOM gas nominations for December 2007 on Tuesday, November 20.[58]

46. On Wednesday, November 21, at about 10:00 p.m., after the close of business, Panhandle Eastern Pipeline sent out a notice to Atmos and other shippers stating that the pipeline would be reducing its mainline capacity because of problems at Haven but that there was no anticipated impact on shippers.[59]

47. By the terms of Atmos' request for proposal letter that formed the basis for its agreement with its gas supplier, it would make its FOM gas nominations within five working days before the beginning of any month.[60] That means its final December FOM nominations were to be sent to the gas supplier no later than 9:00 a.m. on Monday, November 26.[61]

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[50] Ex. 21, *See also*, Transcript, Page 548, Lines 3-9.
[51] Transcript, Page 548, Lines 22-25.
[52] Transcript, Page 577, Lines 9-25.
[53] Transcript, Pages 424-425, Lines 20-25, 1-10.
[54] Transcript, Page 550, Lines 1-4.
[55] Transcript, Page 558, Lines 12-24.
[56] Transcript, Page 426, Lines 3-21.
[57] Transcript, Page 448, Lines 18-20.
[58] Transcript, Page 569, Lines 5-6.
[59] Transcript, Pages 569-570, Lines 16-25, 1-11.
[60] Ex. 22, Section 5.2, *See also*, Transcript, Page 555, Lines 6-14.
[61] Transcript, Pages 556-557, Lines 23-25, 1.

48. In the afternoon of November 26, Panhandle Eastern Pipeline sent out a notice declaring a *force majeure* event due to a partial rupture on the pipeline at Haven.[62] The *force majeure* event meant that the pipeline would likely be cutting gas nominations on the pipeline because of the reduced capacity for transporting gas past the pipeline rupture.

49. Walker agreed that had he known of the *force majeure* event before he made his December FOM nominations, he would have increased his FOM nominations.[63] However, he did not attempt to change his FOM nomination after receiving notice of the *force majeure* declaration because he did not believe the gas suppliers would allow him to change his nomination after it was submitted.[64]

50. Staff and Public Counsel also criticize Atmos' behavior during the course of the *force majeure* event, implying that Atmos sacrificed its own position for the benefit of its affiliated gas marketer, AEM. During the course of the *force majeure* event of December 2007, the pipeline cut Atmos' gas nominations by 31 percent.[65] Furthermore, Atmos' witness agreed that he cooperated with the pipeline and his supplier by not nominating as much daily flowing gas through the pipeline as he could have during the *force majeure* event to avoid additional cuts from the pipeline.[66] Instead, Atmos pulled additional gas out of storage to meet the needs of its customers.[67]

51. Despite the force majeure event, Atmos was able to meet the gas needs of all its customers. No customer suffered a curtailment during that event.[68]

52. Staff agreed that it was reasonable for Atmos to work with the pipeline and its gas supplier during the *force majeure* event to mitigate adverse consequences to the entire pipeline system, to the extent that doing so did not have a negative impact on Atmos.[69] The question is whether Atmos' cooperation had a negative impact on Atmos and its customers.

53. Staff asserts that Atmos' decision to use more storage gas while failing to push its affiliated gas supplier harder for flowing gas supplies during the December *force majeure* event harmed its customers when Atmos had to spend more later in the winter to obtain flowing gas supplies that could have been drawn from storage at a lower cost if storage supplies had not been depleted in December. To compensate Atmos' customers, Staff proposed two alternative disallowances.

54. In its first scenario, Staff proposed to disallow $52,572 in Atmos' gas costs based on Staff's contention that Atmos should have nominated enough FOM gas for December to meet its gas volume requirements for average December weather.[70] Staff also proposed a larger disallowance of $85,775 based on an assumption that Atmos should have increased its December FOM nominations by enough to meet gas volume requirements for average December weather and increase its gas storage volumes by five percent.[71]

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[62] Transcript, Pages 450-451, Lines 25, 1-2.
[63] Transcript, Page 592, Lines 4-6.
[64] Transcript, Pages 582-583, Lines 8-25, 1.
[65] Transcript, Page 373, Lines 2-9.
[66] Transcript, Page 506, Lines 6-17.
[67] Transcript, Page 521, Lines 4-7.
[68] Transcript, Page 450, Lines 2-12.
[69] Transcript, Page 700, Lines 5-19.
[70] Sommerer Surrebuttal, Ex. 28, Page 19, Lines 11-22.
[71] Sommerer Surrebuttal, Ex. 28, Page 20, Lines 1-10.

55. A third scenario was calculated at the hearing that would result in a disallowance of $24,900 if Atmos had increased its December FOM nominations enough to meet the 20 percent warmer than normal December weather volumes assumption.[72]
56. The record does not include a detailed explanation by Staff of how it calculated any of the three disallowance scenarios.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

A. Atmos is a Gas Corporation[73] and a Public Utility[74] as defined by Missouri statute and is therefore subject to the jurisdiction of the Missouri Public Service Commission.[75]

B. 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.[76]

C. The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision. In that decision, the Commission held that a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[77]

D. Contrary to the assertions of Staff and Public Counsel, the Commission's prudence standard applies even when the Commission is evaluating the prudence of an affiliated transaction. In fact, the appellate court decision that explicitly upheld the appropriateness of the Commission's prudence standard concerns the prudence of an affiliate transaction that the Commission was reviewing in an ACA case; exactly the question before the Commission in this case.[78]

E. The Missouri Court of Appeals again explicitly held that the prudence standard applies when the Commission is considering the prudence of an affiliate transaction in its review of the Commission's decision in a Union Electric rate case. In that case, the court rejected an assertion that the Commission's affiliate transaction rule had shifted the burden of proof to the utility to demonstrate the prudence of an affiliate transaction. In the words of the court:

> Their assertion is incorrect. Regulation 240-20.105(6)(c) says, 'this rule does not modify existing legal standards regarding which party has the burden of proof in the commission proceeding.' This means that the regulation does not modify the existing burden of proof. Although UE purchased the CTGs from its affiliates, the commission properly presumed that UE was prudent in its purchase of the CTGs, until the State or Public

[72] Transcript, Page 572, Lines 8-18
[73] Section 386.020(18), RSMo (Supp. 2010).
[74] Section 386.020(43), RSMo (Supp. 2010).
[75] Section 386.250, RSMo 2000.
[76] *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).
[77] *In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues. And In the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.* 27 Mo. P.S.C. (N.S.) 183 (1985).
[78] *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).

> Counsel presented evidence that raised a 'serious doubt' concerning the prudence of its expenditure. (citation to *Associated Natural Gas* omitted).[79]

F. The Commission has a general affiliate transactions rule – 4 CSR 240-40.015 – that establishes regulatory standards surrounding a regulated gas utility's dealings with its affiliated companies. The Commission also has a marketing affiliate transactions rule - 4 CSR 140-40.016 - that specifically regulates transactions between regulated gas corporations and affiliated gas marketing companies. Both rules apply to the transactions between Atmos and its marketing affiliate, AEM.

G. The general affiliate transactions rule provides:

> When a regulated gas corporation purchases information, assets, goods or services from an affiliated entity, the regulated gas corporation shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.[80]

The marketing affiliate transaction rule includes the same language.[81] Atmos complied with these rule requirements when it obtained competitive bids before awarding gas-marketing contracts to AEM.

H. The general affiliate transactions rule further provides:

> A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if –
>
> 1. It compensates an affiliated entity for goods or services above the lesser of –
>
> A. the fair market price; or
>
> B. the fully distributed cost to the regulated gas corporation to provide the goods or series for itself … .[82]

The same language is found in the marketing affiliate transaction rule at 4 CSR 240-40.016(3)(A).

I. Both the general and the specific affiliate transaction rules clearly contemplate that a regulated gas corporation may engage in dealings with an affiliated gas marketing company so long as it complies with the requirements of the regulation.

J. Neither the general nor the specific affiliate transaction regulation includes any language that would preclude an affiliate gas marketing company from earning a profit on its transaction with the regulated gas corporation. Indeed, such a provision would have the practical effect of banning the transactions that are clearly allowed under the rule, as no affiliated company will enter into a transaction in which it is not allowed to earn a profit.

K. Both the general and specific affiliate transaction regulations impose record-keeping requirements on the both the regulated gas company and its affiliates. The relevant portion of the regulations states:

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[79] *State ex rel. Public Counsel v. Pub. Serv. Com'n*, 274 S.W.3d 569, 578 (Mo. App. W.D. 2009). In that case, the court was interpreting the Commission regulation applicable to electric utilities. However, the affiliate transaction regulations applicable to gas utilities - 4 CSR 240-40.015(6)(C) and 4 CSR 240-40.016(7)(C) - contain the same language indicating that the rules do not modify the legal standards regarding which party has the burden of proof in commission proceedings.

[80] 4 CSR 240-40.015(3)(A).

[81] 4 CSR 240-40.016(4)(A).

[82] 4 CSR 240-40.015(2)(A).

> Each regulated gas corporation shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:
>
> 1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the regulated gas corporation;
>
> 2. Documentation of the methods used to allocate and/or share costs between affiliated entities, including other jurisdictions and/or corporate divisions;
>
> 3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions; …[83]

L. Staff and Public Counsel complain that Atmos and its affiliate, AEM, have failed to comply with the record-keeping requirements of the regulations in that AEM failed to provide Staff with records sufficient to allow Staff to determine the fair market value of gas supply costs charged to Atmos.[84]

M. However, the record-keeping requirements cited by Staff and Public Counsel do not require AEM to keep records sufficient to allow Staff to determine the fair market value of gas supplies charged to Atmos, because no such gas supply costs have been charged to Atmos within the meaning of the regulation.

N. The record-keeping requirements cited by Staff and Public Counsel apply to records of affiliated entities concerning the allocation of common costs among the affiliated companies. For example, an affiliate may share an accountant with the regulated utility and some portion of the cost of employing that accountant may be charged to the regulated utility. Those record-keeping requirements do not contemplate a situation where an affiliated company has simply sold a product to the regulated entity at a fair market price determined through an above-board, competitive bidding process.

O. In fact, Staff's witness indicated he was unaware of any provision in the Commission's rules that would require AEM, or any other affiliate, to maintain records sufficient to allow Staff to determine the affiliate's net profits on a transaction by transaction basis.[85]

P. The Commission is required to follow its own rules, because "[r]ules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them." [86] Furthermore, as an administrative agency, the Commission cannot repeal its rules through an adjudicated order. "To repeal a rule, an agency must comply with the notice, publication, and public comment method prescribed in Section 536.021 of Missouri's Administrative Procedures Act."[87]

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[83] 4 CSR 240-40(5)(A). The rule goes on to list further record keeping requirements that are not related to the issues in this case. The same language is found in the Marketing Affiliate Transaction rule at 4 CSR 240-40.016(6)(A).
[84] Transcript, Page 731, Lines 7-17. See also, Staff's Initial Brief, at Page 19.
[85] Transcript, Page 635, Lines 17-21.
[86] *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985).
[87] *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

DECISION

Staff and Public Counsel are appropriately concerned that the Commission closely examine transactions between regulated utilities and their affiliated companies. Certainly such transactions can be used by a utility to improperly pass profits to an unregulated affiliate or transfer costs from an unregulated affiliate to be recovered in rates from captive utility customers. Because of its concerns about such practices, the Commission promulgated rules to govern affiliate transactions in general, and marketing affiliates in particular.

The Commission's rules specifically allow such transactions to occur, but only if the regulated gas corporation does not provide a financial advantage to its affiliate. The rule establishes that a regulated gas corporation provides a financial advantage to its affiliate if it purchases goods or services from its affiliate above the lesser of the fair market price for those goods or services, or the cost the regulated gas corporation would incur to provide the goods or services for itself.[88]

Staff does not present any serious argument to suggest that Atmos could provide gas-marketing services for itself cheaper if it did not use the services of gas marketing companies. Staff's witness threw out some statements suggesting that a big company like Atmos should have the resources to purchase gas for itself, but when pressed, he conceded that Staff was not proposing any adjustment based on the company's fully distributed cost.[89]

Furthermore, Staff did not propose any disallowance relating to the gas supply contracts that Atmos awarded to non-affiliated gas marketing companies after following the same request for proposal process. If it is less expensive for Atmos to purchase gas supplies through non-affiliated gas marketing companies than to maintain its own staff of gas buyers, then there is no basis to believe that it should maintain such a staff of buyers only to avoid awarding a contract to its affiliated marketing company when that company happens to submit a bid lower than the bids submitted by the unaffiliated companies. That leaves the other side of the regulation's limitation that allows Atmos to purchase gas supplies from an affiliated gas marketer only if it does so at or below fair market price.

As simple as it sounds, fair market price is established by the fair market composed of willing buyers and sellers. In this case, that fair market resulted from the request for bids process undertaken by Atmos to determine the least cost bid for gas marketing services in its various service territories. For some of those service territories, but by no means for all, AEM, a gas marketer affiliated with Atmos, submitted the low bid.

For the service territories in which AEM did not submit the low bid, Staff is willing to accept the fair market price as established by the market. However, for those service territories for which AEM did submit the low bid, Staff claims that it must carefully examine AEM's contracts with its suppliers to determine the real fair market price. It argues that if only it had the full cooperation of Atmos and complete access to the records of the unregulated affiliate, including specific transaction records that the unregulated affiliate does not maintain, it could make such a determination. However, Staff's efforts to determine a "real fair market price" are misguided and doomed to

[88] Commission Rule 4 CSR 240-40.015(2)(A).
[89] Transcript, Page 698, Lines 10-14.

failure Fair market price is set by the market, not by Staff's review of documents. Even if Atmos and AEM gave Staff every document they could ever hope to examine they could still never determine a "real fair market price" unless they were able to undertake a full rate case to establish among other things an allowed rate of return for the unregulated gas marketing company; because, as Staff's witness conceded, AEM should be allowed to earn a profit under the proper circumstances.[90]

Public Counsel goes one step beyond Staff and argues that AEM, and indirectly Atmos as its corporate parent, should not be allowed to earn a profit on gas transactions because such profits would be contrary to the regulatory principles surrounding Atmos' use of a PGA/ACA mechanism to recover its gas costs. Public Counsel contends that Atmos is capable of controlling its gas costs through its relationship with its affiliate gas marketing company and therefore its use of the PGA/ACA mechanism would constitute single-issue ratemaking under the test established by the Missouri Court of Appeals in *State ex rel. Midwest Gas Users' Assoc. v. Pub. Serv. Com'n*.[91]

Public Counsel's argument is incorrect because the cost of gas to Atmos is still controlled by the fair market. Atmos can award a gas supply contract to its affiliate only if that affiliate submits the low bid for those services. In fact, since the affiliate, AEM, submitted the low bid on these transactions, ratepayers benefit from the affiliate transaction. If Atmos refused to accept the low bid from its affiliate, its ratepayers would have to pay more for gas to their detriment.

For the foregoing reasons, the Commission will reject Staff's proposed $308,733 disallowance to eliminate AEM's gross profits on its transactions with Atmos.

Staff offered a different basis for its secondary disallowance related to events in December 2007. Staff claims that Atmos acted imprudently when in late November 2007, it failed to nominate enough first of month (FOM) gas supplies for the month of December. On that basis, Staff proposed alternative disallowances that it calculated based on Atmos' deviation from the gas volumes it could be expected to nominate based on normal weather patterns.

Staff also presented a good deal of testimony regarding Atmos' behavior during a *force majeure* event declared by the interstate pipeline that delivered natural gas to the Hannibal/Bowling Green area. That event resulted in decreased flowing gas deliveries and required Atmos to draw more gas from storage than it might have absent the *force majeure* event. It is apparent that Staff was trying to prove that Atmos accepted less than firm gas from AEM and as a result suffered a greater decrease in flowing gas deliveries during the *force majeure* event than it should have if AEM had not attempted to "game" the system.

However, Staff does not attempt to quantify a disallowance based on harm to Atmos' customers resulting from its actions during the *force majeure* event. Instead, Staff attempts to punish Atmos for its questionable decisions in December, but does so by relying on its proposed disallowance based on Atmos' alleged failure to nominate enough FOM gas in November.

The problem with Staffs proposed disallowance is that Atmos' actions during the December *force majeure* event are not related to the prudence of Atmos' decision to nominate less FOM gas in November. Simply put, Staff did not establish that Atmos'

[90] Sommerer Surrebuttal, Ex. 28, Page 3 Liens 7-9. *See also*, Transcript, Page 704, Lines 3-15.
[91] 976 S.W.2d 470 (Mo. App. W.D. 1998). Public Counsel makes this argument in its reply brief.

November decision to nominate less FOM gas for December was imprudent based on what Atmos knew at the time it made the nomination. While Atmos conceded that it would have increased its FOM gas nominations if it had known of the *force majeure* declaration at the time it made its nomination, the pipeline did not declare the *force majeure* event until after Atmos had finalized its nomination. Staff speculated that perhaps Atmos could have changed its FOM nominations after the force majeure was declared, but such speculation is not sufficient to overcome the presumption of prudence afforded to Atmos' decision about how much FOM gas to nominate for December.

Instead of proving that Atmos was imprudent because it nominated too little FOM gas in November, Staff sought to prove that Atmos was imprudent because it did not take a tougher position against AEM in December. But Staff did not quantify a disallowance based on those allegations. In other words, the evidence presented by Staff does not prove whether Atmos nominated less than the proper amount of FOM gas in November. All Staff showed was that Atmos might have suffered a bad result because it did not nominate more FOM gas in November. That 20/20 hindsight is not sufficient to justify a disallowance for imprudence.

In order to justify a disallowance of Atmos' gas costs, the party advocating such a disallowance must show both that the company acted imprudently and that harm resulted to ratepayers. Staff and Public Counsel have not done so and the Commission will reject Staff's secondary proposed disallowances.

On December 28, 2009, Staff recommended various adjustments to Atmos' ACA filing in addition to the affiliate transaction disallowances that the Commission is rejecting in this report and order. Atmos accepted those other adjustments in its response to Staff's recommendation, which it filed on January 28, 2010. The Commission will therefore establish Atmos' ending balances for 2007-2008 in this order based on those agreed upon adjustments.

THE COMMISSION ORDERS THAT:

1. The disallowances proposed by Staff regarding Atmos' transactions with its affiliate are rejected.
2. The ending (over)/under recovery balances for Atmos' 2007-2008 Actual Cost Adjustment are established as provided in the following tables:

Table 1.

Description	Company's ACA Balance	Staff Adjustments	Staff Recommended ACA Balance
Areas B, K, and S			
SEMO District (Area S): Demand ACA	($416,575)	$331 (C)	($416,244)
Commodity ACA	($2,643,834)	($69,893) (A) ($3,580) (B) $2,078 (C) ($16,459) (D)	($2,731,688)
Kirksville District (Area K): Demand ACA	($63,384)	$0	($63,384)
Commodity ACA	($594,196)	($40,657) (A) ($797) (B) ($1,119) (D)	($636,769)
Butler District (Area B): Demand ACA	($38,190)	$0	($38,190)
Commodity ACA	($214,329)	$54,184 (A)	($160.145)

Notes to Staff Adjustments:
(A) ACA beginning balances August 31, 2007, adjusted to prior year ending balances.
(B) Missouri school revenue recovery.
(C) Revenue recovery.
(D) Cash-out.

Table 2.

Description	Company's ACA Balance	Staff Adjustments	Staff Recommended ACA Balance
Consolidated Areas P and U			
Consolidated District: Demand ACA	($413,769)	($163) (D)	($413,932)
Commodity ACA	($744,056)	($102,617) (A) ($2,270) (B) ($26,188 (C) ($3,543) (D)	($908,674)
Neelyville District: Demand ACA	($17,000)	($10) (A)	($17,010)
Commodity ACA	($29,017)	($2,189) (A)	($31,206)

Notes to Staff Adjustments:
(A) ACA beginning balances August 31, 2007, adjusted to prior year ending balances.
(B) Missouri school revenue recovery.
(C) Cash-out.
(D) Revenue recovery.

Table 3.

Description	Company's ACA Balance	Staff Adjustments	Staff Recommended ACA Balance
(Greeley) Area G			
Total ACA Balance	($64,445) (C)	($90,893) (A) $2,734 (B)	($152,604)

Notes to Staff Adjustments:
(A) ACA beginning balances August 31, 2007, adjusted to prior year ending balances.
(B) Revenue adjustment.
(C) Combined demand and commodity ACA balance.

3. This Report and Order shall become effective on November 19, 2011.

Gunn, Chm., Davis, and Jarrett, CC., concur;
Kenney, C., concurs with separate concurring opinion to follow;
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 9th day of November, 2011.

NOTE: At the time of publication, no opinion of Commissioner Kenney has been filed.

NOTE: This case was appealed to the Missouri Court of Appeals and reversed and remanded by office of *Pub. Counsel v. Pub. Serv. Comm*., 409 S.W.3d 371 (Mo. banc. 2013).

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the PGAIACA Filing of Atmos Energy Corporation for the West Area (Old Butler), West Area (Old Greeley), Southeastern Area (Old SEMO), Southeastern Area (Old Neelyville), Kirksville Area and the Northeastern Area	))))))	**File No. GR-2008-0364**

**CONCURRENCE OF COMMISSIONER JEFF DAVIS
TO THE REPORT AND ORDER**

I respectfully concur with my colleagues in the reasoning and decision in the above-referenced case, but wish to add a few additional thoughts.

In almost eight years of being a member of the Missouri Public Service Commission, I have seen more than my fair share of senseless, ridiculous arguments brought here by utilities, consumers and the PSC staff alike. However, the arguments presented by the PSC Staff in this case rise to the level of being the most ridiculous arguments I have seen made here in my eight years at the Commission. Either Atmos Energy is completely innocent or the PSC Staff wholly failed to prove its case.

Like the string of cases involving Missouri Pipeline, Staff will bemoan the fact that if they could have just gotten those gas receipts, they could have proved that Atmos was really doing bad things. Unlike the string of Missouri Pipeline cases, I sincerely doubt the outcome in this case would have been any different because the company's unregulated affiliate was buying different volumes of gas at different times.

It's been said that regulation is a surrogate for competition. Competition must be healthy in Missouri because the largest investor-owned gas distribution company and the second largest investor-owned water company, Aqua America, have both exited Missouri. Here, we have a pretty clear cut case that the PSC Staff abused the regulatory process, rang up tens of thousands, if not more than a hundred thousand dollars in legal bills for the company, and the company is now leaving the state. This case may be one of the most egregious abuses of the

administrative process that I have ever seen.

How much money did Atmos pay out in attorney fees to win this case? We'll never know because the information does not appear to be contained in the record and Atmos, the largest gas distribution company in the United States, has sold its assets to another company and is exiting the state, but it's hard to justify reducing any company's request for attorney fees when they have to journey to the Commission and respond to the PSC Staff's shifting arguments.

In conclusion, the PSC staff responsible for bringing the case against Atmos failed the taxpayers and the ratepayers of this state by wasting everyone's time. The Commission made the right decision, but we should have put an end to this nonsense much earlier in the process thereby saving everyone's time and expense. If the PSC Staff chooses to keep pursuing and handling cases in this manner, the only utilities we're going to have left to regulate will be those that are too big to go anywhere else.

Respectfully submitted,

Jeff Davis, Commissioner

Dated at Jefferson City, Missouri
On this 13th day of January, 2012.

The Staff of the Missouri Public Service Commission, Complainant, vs. Southern Union Company,[1] Respondent.

File No. GC-2011-0100

Gas. §1 Generally. The Commission approved a revised tariff designed to comply with a previous Commission order.

FINAL DECISION AND ORDER TO FILE A NEW TARIFF SHEET

Issue Date: November 9, 2011 Effective Date: November 19, 2011

The Missouri Public Service Commission is denying dismissal and ruling on the complaint's merits as follows.

- Sheet R-34 violates no regulation—promulgated or unpromulgated—and is not unjust or unreasonable under contract law.
- But Sheet R-34 nevertheless contains terms of service that are facially unjust and unreasonable as to Company immunity for negligence related to gas leaks, immunity for any conduct beyond ordinary negligence in general, and customer indemnity.

This order constitutes the Commission's final decision subject to rehearing under Section 386.500, RSMo 2000.[2]

Background

Staff filed the complaint on October 7, 2010, against Southern Union Company ("the Company").[3] The complaint vests the parties with the right to a pre-decision[4] evidentiary[5] hearing. Therefore, this action is a contested case.[6]

The Company filed the motion to dismiss on November 29, 2010, and Staff filed a response on December 1, 2010.

Staff filed its *Motion for Summary Determination* ("Staff's motion") with an affidavit and suggestions on December 12, 2010. On April 11, 2011, the Company filed its response to Staff's motion with an affidavit and memorandum. On May 18, 2011, Staff filed reply suggestions in support of Staff's motion.

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[1] The complaint names respondent as "Missouri Gas Energy, a Division of Southern Union Company," but an unincorporated division of a corporation is not a legal entity, and, therefore, lacks legal capacity to sue or be sued. *ADP Dealer Services Group v. Carroll Motor Co.,* 195 S.W.3d 1, 7 (Mo. App. E.D., 2005). Nevertheless, the Company received notice, made its appearance and filed its answer. Therefore, the Commission corrects the misnomer sua sponte.

[2] 4 CSR 240.2-070(13).

[3] This file was re-assigned to the current regulatory law judge on July 14, 2011.

[4] Section 386.390.5, RSMo 2000.

[5] *Jamison v. Dept. of Soc. Servs*, 218 S. W.3d 399, 408-09 (Mo. banc 2007); *Mathews v. Eldridge,* 424 U.S. 319, 332 (1976).

[6] Section 536.010(4), RSMo Supp. 2010; and Section 536.063(1), RSMo 2000.

The Company filed *Missouri Gas Energy's Motion for Summary Determination* ("utility's motion"), with a memorandum, on April 11, 2011. On May 18, 2011, Staff filed its response to the Company's motion with suggestions. On June 16, the Company filed reply suggestions in support of the Company's motion. The Office of the Public Counsel ("OPC") filed suggestions in support of Staff's motion on June 2, 2011 and the Company filed a response on July 29, 2011. On that date, the motion to dismiss and motions for summary determination were ready for ruling.

The Commission makes each ruling on consideration of all allegations and arguments of each party, and the substantial and competent evidence upon the whole record, but the Commission does not specifically address matters that are not dispositive.

Evidentiary Rulings

Staff and the Company support their respective motions with affidavits as provided by regulation.[7] Also, for additional support, Staff and the Company each ask the Commission to take official notice of the Commission's records.[8] The Commission grants those requests.[9] This order constitutes notice that the Commission takes official notice of scientific and technical facts within the Commission's competence under Section 536.070(6), RSMo 2000.

Charges

In the complaint, Staff alleges that a page ("Sheet R-34") in the Company's tariff sets forth provisions that are contrary to law and public policy. In the motion to dismiss, the Company argues that the complaint is not within the Commission's authority to hear. In the motions for summary determination, each party argues that earlier Commission decisions or regulations support its claim or defense.

Findings of Fact

1. The Company is a Delaware general business corporation in good standing, headquartered at 5444 Westheimer Road, Houston, Texas 77056. The Company is registered as a foreign corporation doing business in Missouri and does business under the registered fictitious name Missouri Gas Energy. The Company's Missouri headquarters is at 3420 Broadway, Kansas City, Missouri 64111.
2. The Company distributes natural gas at retail in Missouri for light, heat and power, using gas plant that it owns or operates, under tariffs approved by the Commission. The Company engages in no other business in Missouri. The Company has approximately 501,000 residential, commercial and industrial customers in 34 Missouri counties.
3. Natural gas is noxious and highly combustible, necessitating high levels of safety precautions in delivery and use. To provide service, some Company property may have to be on customer premises. The Company is seldom on any customer's premises except to turn on service and respond to service calls. The customer's side of the meter is also called the delivery side of the meter.

[7] 4 CSR 240-2.117(1)(C).
[8] Section 536.070(6), RSMo 2000.
[9] Section 536.070(5) and (6), RSMo 2000.

4. On May 1, 2006, the Company filed tariffs[10] that the Commission later rejected.[11] On March 28, 2007, the Company filed new tariff sheets. Those new tariff sheets included The Company's tariff P.S.C. MO. No. 1, Fourth Revised Sheet R-34, ("Sheet R-34"), which the Commission approved by order dated April 3, 2007 ("tariff order").[12] Sheet R-34 limits the Company's liability to the Company's customers, as set forth at length in this order's Appendix. By order dated May 3, 2007, the Commission denied all applications for rehearing.

5. Effective on January 23, 2010, Commission rejected four tariff pages filed by Laclede Gas Company ("Laclede decision").[13] The pages rejected in the Laclede decision included a tariff sheet limiting Laclede's liability to its customers. By order dated July 21, 2010, the Commission denied Laclede's application for rehearing.

Conclusions of Law

The Commission has jurisdiction to hear a complaint against any public utility.[14] A public utility includes a gas corporation,[15] which means an entity operating a gas plant under the Commission's authority.[16] That includes the Company.

The Commission addresses the motion to dismiss and the motions for summary determination ("pending motions") together because the pending motions involve overlapping arguments, authorities, and allegations. The pending motions share the same methods of proof where the motion to dismiss cites matters outside the pleadings. But dismissal and summary determination are not synonymous. Each addresses different issues and has different results.[17]

The motion to dismiss challenges whether the relief sought is within the subject matter jurisdiction[18] of the Commission. The Company, as movant, has the burden of showing that the Commission lacks subject matter jurisdiction to hear the complaint.[19] When an agency lacks jurisdiction, it can only exercise its inherent power to dismiss matters outside its authority.[20]

Summary determination always addresses the merits of a claim or defense.[21] The regulation provides that the Commission may grant either motion for summary determination:

> . . . if the **pleadings, testimony, discovery, affidavits, and memoranda** on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case [.[22]]

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[10] *In the Matter of Missouri Gas Energy's Tariffs Increasing Rates for Gas Service Provided to Customers in the Company's Missouri Service Area*, File No. GR-2006-0422.
[11] *Id.*, *Report and Order*, issued on January 13, 2010.
[12] *Id.*, *Order Regarding Motion for Expedited Consideration and Approval of Tariff Sheets in Compliance with Commission Order*, issued and effective on April 3, 2007.
[13] *In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment*, File No. GT-2009-0056, *Report and Order*, issued on January 13, 2010.
[14] Section 386.390.1, RSMo 2000.
[15] Section 386.020(43), RSMo Supp. 2010.
[16] Section 386.020(18), RSMo Supp. 2010.
[17] *State ex rel. City of Blue Springs, Missouri v. Schieber*, 343 S.W.3d 686, 690 (Mo. App., W.D. 2011).
[18] Missouri recognizes two types of jurisdiction: personal jurisdiction, which is not at issue, and subject matter jurisdiction, which is the authority to order relief. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252-54 (Mo. banc 2009).
[19] *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003) (citations omitted).
[20] *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000) (citations omitted).
[21] *State ex rel. City of Blue Springs, Missouri v. Schieber*, 343 S.W.3d 686, 690 (Mo. App., W.D. 2011).
[22] 4 CSR 240-2.117(1)(E) (emphasis added).

Entitlement to relief as a matter of law depends on the burden of proof and movant's posture as claimant party or defending party.[23]

The Company argues that Sheet R-34 is presumed lawful and reasonable under Section 386.270, RSMo 2000:

Also, Section 386.430 provides:

> In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence [[24]] that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

Those provisions place the burden of proof on Staff, which determines what entitles either party to a favorable decision as follows.

Therefore, on summary determination, the standard for each party is as follows. Staff prevails by establishing, without genuine dispute, the material facts on which Staff would bear the burden of proof at hearing—the elements of Staff's claim. The Company prevails by establishing, without genuine dispute, facts that accomplish any one of three goals. Those goals are: (1) negate any single element of Staff's claim, or (2) show that Staff will be unable to prove any element of Staff's claim even after discovery, or (3) establish the materials facts—the elements—of an affirmative defense.[25] Each party must also show that granting its motion is in the public interest.[26] The public interest includes factors related to "efficient facilities and substantial justice between patrons and public utilities [.[27]]"

Staff and the Company seek summary determination, and OPC supports Staff's motion, so each of those parties has assented to a decision on the merits without a hearing. As Staff puts it, "the Commission may grant summary determination for any party once its authority under the rule [on summary determination] is invoked."[28] Staff is correct and the Commission will enter summary determination for any party as the law and undisputed facts require.

I. Jurisdiction

The Company addresses the threshold issue of whether the Commission can hear the complaint. Because the Commission is a creation of the statutes, the statutes are the source of the Commission's jurisdiction.[29] Therefore, the Commission must find its authority in the words of the statutes.

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[23] *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, which is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

[24] That standard, also found in equity and in contract law, connotes something less than proof beyond reasonable doubt. *McBride v. Mercantile-Commerce Bank & Trust Co.*, 48 S.W.2d 922, 927-28 (Mo. banc 1932).

[25] *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993).

[26] 4 CSR 240-2.117(1)(E).

[27] Section 386.610, RSMo 2000.

[28] *Staff's Suggestions in Opposition to MGE's Motion for Summary Determination and Staff's Reply to MGE's response to Staff's Motion for Summary Determination*, page 2, footnote 2.

[29] *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 331 S.W.3d 677, 682 (Mo. App., W.D. 2011).

The statutes provide that the Commission may order the Company to file tariffs setting forth terms of service:

The commission shall:

* * *

> (11) Have power to require every gas corporation . . . to file with the commission . . . schedules showing . . . all rules and regulations relating to . . . service used or to be used . . . by such gas corporation [.[30]]

Such schedules are changeable under "a new or supplementary schedule, filed voluntarily, or by order of the commission."[31] The Commission may initiate such change because the Commission's "supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest."[32]

The parties dispute how and when such orders and directives may come about.

A. Complaint for Just and Reasonable Terms of Service

In the complaint, Staff cites Section 393.140(5), which expressly allows a complaint relating to an existing tariff, and a Commission decision prescribing just and reasonable terms for the Company's service:

> Whenever **the commission** shall be of the opinion, after a hearing had **upon its own motion or upon complaint**, that the rates or charges or the **acts or regulations** of any such persons or corporations are **unjust, unreasonable**, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall **determine and prescribe** the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and **the just and reasonable acts and regulations to be done and observed** [.[33]]

Under that statute, the Commission may prescribe just and reasonable terms of service when the Commission finds that existing terms of service are unjust and unreasonable, as the complaint charges. Staff is correct that the authority granted in Section 393.140(5) and (11) prevails against each argument of the Company, and require the Commission to deny dismissal, as follows.

B. The Company's Challenges

The Company argues that the Commission cannot hear the complaint on several procedural grounds.

The Company's affirmative defenses include estoppel and, in support of that remedy, cite the *Staff Recommendation* supporting the tariff order.[34] The Company neither specifies the type of estoppel sought, nor pleads facts under which the State is

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[30] Section 393.140, RSMo 2000.
[31] *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n of Missouri*, 315 Mo. 312, 317, 286 S.W. 84, 86 (Mo.1926).
[32] *State ex rel. Chicago, R. I. & P. R. Co. v. Public Serv. Comm'n*, 312 S.W.2d 791, 796 (Mo. banc 1958).
[33] Section 393.140(5), RSMo 2000.
[34] *First Amended Answer by Interlineation*, pages 1-2, paragraph 3.

subject to any species of estoppel,[35] nor offers authority under which the Commission can enforce equitable principles on any facts.[36] The estoppel theory never appears again in the file: neither in the *Motion to Dismiss*, nor the Company's motion for summary determination, nor in any of the Company's filings related to Staff's motion. Therefore, the Commission will grant Staff's motion and deny the Company's motion for summary judgment on that basis.

The remaining grounds are as follows.

(i) Ripeness

The Company argues that the Commission has no authority to decide whether Sheet R-34 is just and reasonable, until the Commission receives an allegation that an event that Sheet R-34 describes has occurred.

> The statutes expressly provide that damages are not an element of this action:
>
> The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.[37]

Nevertheless, the Company cites several authorities in support of its theory.

The Company cites the ripeness doctrine and argues that the complaint alleges no case or controversy. No case or controversy clause exists in the Missouri constitution, and the Company cites no authority applying the ripeness doctrine to any tribunal other than those of the judicial branch. As the Company's authorities show, the ripeness doctrine protects agency decision-making from premature intervention by the judiciary, not the agency itself.[38] The Commission has no authority to determine Section 393.140(5)'s validity under any constitution.

The Company argues that the complaint must allege conduct by the Company. In support, the Company cites Section 386.390.1, RSMo 2000:

> Complaint may be made by the commission of its own motion,. . . in writing, setting forth any act or thing done or omitted to be done by any . . . public utility, . . . claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission [.]

The Company further cites case law holding that the Commission cannot issue an advisory opinion. [39]

But no advisory opinion is at issue. The complaint alleges that the Company is operating under a tariff setting forth unjust and unreasonable terms of service, The complaint seeks a tariff setting forth just and reasonable terms of service. Also, the facts alleged are the text of Sheet R-34. Those allegations are established, in both parties' filings, by evidence consisting of the approved Sheet R-34 on file with the Commission. On such pleading and evidence, an order granting relief does not constitute an advisory opinion. Therefore, the Commission will rule against the Company as to that theory.

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[35] *Prince v. Division of Family Servs.*, 886 S.W.2d 68, 73 (Mo. App., W.D. 1994).
[36] *Lightfoot v. City of Springfield*, 236 S.W.2d 348, 352 (1951).
[37] Section 386.390.3, RSMo 2000.
[38] *Missouri Soybean Assoc. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 26 (Mo. banc 2003).
[39] *State ex rel Kansas City Power & Light Co.*,770 S.W.2d 740, 743 (Mo. App., W. D. 1989).

(ii) Suit and Collateral Action

The Company cites Section 386.270, RSMo 2000, which allows a challenge to the tariff order as follows:

> [A]ll regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable **until found otherwise in a suit** brought for that purpose pursuant to the provisions of this chapter [386, RSMo.]

A suit, as used in Chapter 386, is an action in circuit court. Section 386.600 refers to a "suit to review such order" of the Commission—that is, judicial review. Case law also supports the conclusion that Section 386.270 refers to judicial review.[40] The Company offers no example of an original action in any court to test the Commission's decisions.

The Company also cites Section 386.550, RSMo 2000, which bars a collateral attack on the tariff order as follows:

> In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.

Under that provision, the tariff order is conclusive in any collateral action. A collateral action is an action attempted in lieu of an exclusive remedy.[41] The Company also argues that the complaint constitutes an untimely motion for rehearing of the tariff order.

But contesting the tariff order is not the sole means for determining just and reasonable terms of service under any authority cited. On the contrary, Staff cites the plain language of Section 386.490.2, S.B. 48, 96th Gen. Assem., 1st Reg. Sess.:

> Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or **until changed or abrogated by the commission** [.]

(Emphasis added.) To have the tariff order "changed or abrogated" is the relief sought in the complaint, an original and direct action, under Section 386.140(5).

The Company's arguments render Sections 386.490.2 and 386.140(5) meaningless, and the law presumes against that reading.[42] By contrast, when read in harmony, as Staff suggests, and as befits provisions *in pari materia*,[43] there is no conflict between tariff procedure and complaint procedure. Neither suggests exclusivity, neither demands exhaustion before filing the other,[44] and neither attempts to bypass the Commission.[45] In the absence of any clear requirement to choose between a tariff action and a complaint action, the Commission concludes that those procedures are alternatives.

Therefore, the Commission will rule against the Company as to that theory.

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[40] *State ex rel. GTE North, Inc. v. Missouri Public Service Comm'n*, 835 S.W.2d 356, 367-68 (Mo. App., W.D. 1992).
[41] *State v. Kosovitz,* 342 S.W.2d 828, 830 (Mo.1961).
[42] *Hyde v. City of Columbia*, 637 S.W.2d 251, 262-3 (Mo. App., W.D. 1982).
[43] 835 S.W.2d at 367-68.
[44] *Homestake Lead Co. of Missouri v. Director of Revenue,* 759 S.W.2d 847 (Mo. banc 1988)
[45] *Director of Revenue v. Westinghouse Credit Corp.*, 787 S.W.2d 715, 718 (Mo. banc 1990).

(iii) Standing

The Company argues that Staff has no standing to file the complaint. Commission regulation 1 CSR 240-2.070 provides:

> The commission on its own motion, the **commission staff** through the general counsel, the office of the public counsel, or any person or public utility who feels aggrieved by a violation of any statute, rule, order, or decision within the commission's jurisdiction **may file a complaint**. [[46]]

In that regulation, the Commission delegates[47] its own standing[48] to Staff. Therefore, the Commission will rule against the Company as to that theory.

C. Other Alternative Actions

As Staff notes, even if the Commission could not hear the complaint and even if Staff could not file the complaint, the statutes expressly provide that the Commission can address the subject matter of the complaint. On its own motion the Commission may initiate either a:

- Hearing on whether the Company's terms of service are unjust or unreasonable;[49] or
- Complaint as to the reasonableness of the Company's charges for service,[50] in which all costs of operation are relevant.[51]

Administrative economy favors maintaining Staff's complaint, compared to dismissing the complaint and initiating an identical action on the Commission's motion, so the Commission will deny dismissal on that basis also.

II. Merits

Staff and the Company make the following arguments as to the complaint's merits.

A. Contract

In Staff's motion for summary determination, but not in the complaint, Staff argues that Sheet R-34 Paragraphs 1, 2, 4, and 5, which immunize the Company from ordinary negligence against its customers, are unconscionable under contract law.

Courts refuse to enforce a contract if they find it unconscionable as to procedure and substance.[52] Staff does not cite contract law in the complaint, and concedes that contract law does not apply to a tariff, but Staff nevertheless discusses unconscionability at length. Therefore, the Commission will address that argument.

Procedural unconscionability relates to the formalities of making an agreement like fine print, high pressure sales tactics, and unequal bargaining positions.[53] The General Assembly has determined that customers take no direct part in such formalities in a tariff action; a tariff is enforceable by filing and Commission approval or inaction

[46] 4 CSR 240-2.070(1) (emphasis added).
[47] Under Section 386.240, RSMo 2000.
[48] Under Sections 386.390.1 and 386.140(5).
[49] Section 386.140(5).
[50] Section 393.390.1.
[51] *State ex rel. Office of Public Counsel v. Public Service Comm'n of Missouri*, 858 S.W.2d 806, 812 (Mo. App. W.D. 1993).
[52] *Manfredi v. Blue Cross and Blue Shield of Kansas City*, 340 S.W.3d 126, 132 (Mo. App. W.D. 2011).
[53] *Id.*

alone, [54] and customer participation occurs through the Public Counsel's representation.[55] Therefore, the Commission concludes that Sheet R-34 is not subject to doctrines of contractual procedural unconscionability.

Substantive unconscionability relates to the harshness and unfairness of contract terms. [56] But contractual immunity from ordinary negligence is not necessarily unconscionable. [57] The Commission concludes that Sheet R-34 is not subject to doctrines of contractual substantive unconscionability.

The Commission will deny Staff's motion and grant summary determination for the Company on that theory.

B. Published Regulations

In Complaint Paragraph 10, Staff charges that Sheet R-34, paragraph 3 violates certain provisions of Commission regulations. Commission regulations "prescribe the form of every" tariff under the statutes:

> The Commission shall have power: (11) . . . The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time. [[58]]

Those regulations are at 4 CSR 240-3.260 and Staff cites no such regulation in the complaint. In the complaint, the Commission cites regulation 4 CSR 240-40.030(10)(J) and (12)(S), set out fully in Appendix 2, but those provisions do not say anything about any tariff, so no tariff can violate those provisions.[59]

Regulations 4 CSR 240-40.030(10)(J) and (12)(S) require the Company to visually inspect fuel lines, test fuel lines, comply with local codes, keep records of those activities, cut off unsafe service, and give information to customers. No relief from those duties appears in Sheet R-34 because Sheet R-34 sets forth no waiver of any duty as allowed under 4 CSR 240-40.030(17).

(i) Customer Information and Duty to Warn

In Complaint Paragraph 10(a), Staff cites Company's duty as to customer information and argues that Sheet R-34 relieves the Company of a "duty to warn of potential hazards" under 4 CSR 240-40.030(12)(S). That regulation requires the Company to communicate with the customer as follows.

> 2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

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[54] Section 393.150, RSMo 2000.
[55] Section 386.710.1(2), RSMo 2000.
[56] 340 S.W.3d at 132.
[57] *Frank v. Mathews*, 136 S.W.3d 196, 199-200 (Mo. App., W.D. 2004).
[58] Section 393.140, RSMo 2000.
[59] Even if there were a conflict between the regulation and the tariff, the tariff has the status of a statute, as Staff notes. *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n,* 210 S.W.3d 330, 337 (Mo. App., W.D.2006) (citation omitted). Staff cites no instance in which a regulation controls over a statute. *Fehrman v. Blunt*, 825 S.W.2d 658, 660 (Mo. App., E.D. 1992).

> A. Information on how to contact the operator in the event of an emergency or to report a gas odor;
> B. Information on how and when to contact the operator when excavation work is to be performed; and
> C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection (1)(K). [60]

Subsection (1)(K) requires notice to customers addressing gas pipe maintenance, corrosion, leakage, excavation, inspection, and repair. That duty does not change under Sheet R-34.

Sheet R-34 Paragraph 3 simply imputes knowledge to the customer, that customer equipment may fall out of conformity with safety standards, and makes Company communication irrelevant to that imputation.

> [3] . . . As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware of this fact, and Company shall owe customer no duty to warn of potential hazards that may exist with such facilities on the delivery side of the gas meter, its related appurtenances and piping.

The context of "potential hazards that may exist" is the potential "fail[ure], malfunction, or . . . disrepair" of customer equipment "at any time[,]" of which only the customer has the duty to be aware. By contrast, the Company's duty to give information under 4 CSR 240-40.030(12)(S) arises only at a specified time and only as to specific information.

No general "duty to warn of potential hazards" exists under 4 CSR 240-40.030(12)(S). The regulation and the tariff address different conduct by different persons. The Commission concludes that Sheet R-34 is not inconsistent with 4 CSR 240-40.030(12)(S).

(ii) May or Shall Discontinue Service

In Complaint Paragraph 10(b), Staff cites the Company's duty to discontinue service. Sheet R-34 Paragraph 2 provides:

> [2] Company **may** refuse or **discontinue** service if an inspection or test reveals leakage, escape or loss of gas on customer's premises.

Under the regulation Paragraph (12)(S)3, the Company may also discontinue service:

> The operator shall discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe. The operator, however, **may continue** providing service to the customer if the unsafe conditions are removed or effectively eliminated.

But the regulation also requires discontinuance of service when unsafe, and no waiver of that regulation appears in Sheet R-34, so Sheet R-34 does not alter that requirement. Reading the provisions in harmony, Sheet R-34 merely re-states the regulation's provision that service may continue, and the regulation states when that may happen. Therefore, the Commission concludes that Sheet R-34 is not inconsistent with 4 CSR 240-40.030(12)(S).

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[60] 4 CSR 240-40.030(12)(S)2.

(iii) Summary as to Published Regulations

The Commission will deny Staff's motion, and will grant summary determination for the Company as to Complaint Paragraph 10.

C. Unpublished Regulation

In Complaint Paragraphs 7, 8, and 11, Staff argues that Sheet R-34 violates public policy. In support, Staff cites the Laclede decision. The Laclede decision, Staff argues, constitutes "an authoritative statement of Commission policy."[61]

In other words, Staff alleges that the Commission has made a statement declaring the policy generally applicable to tariff provisions that limit liability. The Company refutes Staff's argument by citing the Laclede decision's language as follows:

> Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so **in this case** because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. **Laclede has produced no convincing evidence** that it would be in the public interest for the Commission **to limit liability in the manner it proposes.** The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs. [[62]]

As the Company notes, the Laclede decision only determined the issues in that action on the record in that action. The Commission determines any contested case, including the propriety of any tariff provision, based on the facts of that case. The tariff order did not declare a policy statement about tariff provisions generally.[63]

The Laclede decision's language negates an element of Staff's claim. That conclusion does not support dismissal but supports a decision on the merits. Therefore, the Commission will deny Staff's motion and grant summary determination for the Company as to Complaint Paragraphs 7, 8 and 11.

D. Facially Unjust and Unreasonable

In Complaint Paragraph 9, Staff argues that Sheet R-34 is unjust and unreasonable on its face as to some of its provisions. As to those provisions, the Company argues that Sheet R-34 does not mean what it says. But a tariff has the same force and effect as a statute so, where needed, the Commission will apply the rules of statutory construction. [64] Of those rules, the first is that the rules do not apply when the provision's intent is clear. [65] If conflict is apparent, the Commission will harmonize

[61] *Complaint*, page 4, paragraph 8.
[62] *Id*., *Report and Order*, January 13, 2010, page 13.
[63] Even if the tariff order contained a statement of general applicability, promulgation must occur before such a statement controls the disposition of a contested case. Sections 536.021 and 536.025, RSMo Supp. 2010.
[64] *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 584 (Mo. App., W.D. 2000).
[65] *Prince v. Division of Family Servs.*, 886 S.W.2d 68, 72 (Mo. banc 1972).

provisions whenever possible.[66] Regulations are subject to the same principles of construction as statutes.[67]

(i) Delivery Side and Customer Side

The Commission must first clarify certain terms in the context of Staff and OPC's arguments. Staff and OPC argue that Sheet R-34 unjustly and unreasonably immunizes the Company from duties as to the Company's property. OPC cites Sheet R-34 Paragraph 2:

> [2] Company will not be liable for any loss, damage or injury whatsoever caused by such leakage, escape or loss of gas from **customer's** service line, yard line, ancillary lines, house piping, appliances or other equipment.

(Emphasis added.) But that liability-limiting language is expressly restricted to leakage from the customer's property. Also, Staff cites Paragraph 5:

> [5] The Company shall not be liable for loss, damage or Injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter [.]

Staff alleges that "the delivery side of the meter" is the Company's side. But the Company shows that the delivery side means the customer side by citation to Sheet R-34 Paragraph 3.

> [3] The Company does not own . . . any piping, vents, or gas utilization equipment on the delivery side of the gas meter [.]

The Company's uncontroverted affidavit[68] confirms that reading. The Commission concludes that the delivery side of the meter is the customer side of the meter.

(ii) General Immunity for Negligence and Less

As to the customer side generally, Sheet R-34 Paragraph 5 immunizes the Company, from events not within the Company's control, and from the Company's negligence.

> [5] The Company shall not be liable for loss, damage or injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter, which shall include . . . any other act or things due to **causes beyond Company's control, or attributable to the negligence of the Company**, its employees, contractors or agents.

(Emphasis added.) The ellipses stand in lieu of a lengthy itemization of circumstances set forth at length in Appendix 1. Those circumstances, OPC argues, purport to nullify circuit court judgments. But the deleted language merely grants immunity for losses due to a court-ordered service stoppage.

In *Warner v. Southwestern Bell Telephone Company*,[69] the Missouri Supreme Court held that a tariff may limit the immunity from ordinary negligence as to failure to correctly edit a telephone book.[70] Under that authority, immunity for negligence is not against public policy for ordinary business activities. Accordingly, immunizing the Company from culpability that is less than ordinary negligence cannot be against public

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[66] *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986).
[67] *State ex rel. Western Outdoor Advertg. Co. v. State Hwy. & Transp. Comm'n of Mo.*, 813 S.W.2d 360, 363 (Mo. App., W.D.1991).
[68] *MGE's Response to Staff's Motion for Summary Determination*, Exhibit 1, page 2, paragraph 9.
[69] *Warner v. Southwestern Bell Telephone Company*, 428 S .W.2d 596 (Mo. Div. 2, 1968).
[70] 428 S .W.2d at 601-04.

policy for ordinary business activities. The Commission concludes that immunity for negligence is not generally contrary to the public interest.

The Commission will deny Staff's motion for summary determination, and grant summary determination for the Company, on that issue.

(iii) Immunity Specifically for Inspection, Leakage, and Repair

But immunity for beyond ordinary negligence, and for matters peculiar to the gas industry, also appears in Sheet R-34. Sheet R-34 Paragraph 3 incorporates equipment standards, including those of the Company.

> [3] All piping, vents or gas utilization equipment furnished by the owner/customer of the premises being served shall be suitable for the purposes hereof and . . . in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company.

Sheet R-34 Paragraph 3 also provides that conformity with those standards is the customer's duty.

> [3] . . . the owner/customer of the premises shall be **responsible for** the **repair** and maintenance of such **at all times** in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company.

(Emphasis added.) Further, customer equipment conformity is never the Company's duty under Sheet R-34 Paragraph 3.

> [3] The Company does not own, **nor** is it **responsible for** the **repair** or maintenance of any piping, vents, or gas utilization equipment on the delivery side of the gas meter, its related appurtenances and piping [.]

(Emphasis added.) Moreover, Sheet R-34 Paragraph 2 releases the Company for all liability based on customer-side leakage.

> [2] Company may refuse or discontinue service if an inspection or test reveals leakage, escape or loss of gas on customer's premises. Company will not be liable for **any** loss, damage or injury **whatsoever** caused by such leakage, escape or loss of gas from customer's service line, yard line, ancillary lines, house piping, appliances or other equipment.

(Emphasis added.) Under those provisions, the Company never has any liability for any inspection, leakage, and repair on the customer side, on any facts, regardless of causation and culpability.

Immunity for conduct more culpable than ordinary negligence is against Missouri's public policy according to the Missouri Supreme Court. *Warner v. Southwestern Bell Telephone Company*.[71] Also, gas leakage is not a risk associated with other businesses. The Commission's voluminous gas safety regulations constitute a policy statement that natural gas is a noxious and combustible substance warranting high safety precautions. Such precautions are only in the customer's control to a limited extent. Liability for negligence encourages the Company to take such safety precautions as are in the Company's control, which promotes the public interest.

Therefore, the Commission will grant Staff's motion, and deny the Company's motion for summary judgment, as to immunity for negligence related to inspection, leakage, and repair on the customer's side of the meter.

[71] 428 S .W.2d at 601-04.

(iv) Customer Liability

Staff argues that Sheet R-32 makes the customer the Company's insurer by imposing duties and liabilities on the customer.

Staff cites Sheet R-34 Paragraph 4, which makes the customer liable for the conduct of third persons.

> [4] The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless[72] and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

(Emphasis added.) That provision limits the customer's liability to damage caused by persons on the premises. While it is true that a trespasser may damage Company property, the customer is better able to prevent that occurrence than the Company. This is especially true as to meters inside houses. Under that reading, the Commission concludes that Sheet R-34 Paragraph 4 is not unjust and unreasonable on its face. The Commission will deny Staff's motion, and grant summary determination for the Company, as to Sheet R-34 Paragraph 4.

Staff also cites Sheet R-34 Paragraph 1, which provides customer indemnity for all Company negligence, without limitation to the customer's claims or Company property.

> [1] Customer shall **save** Company **harmless** from **all claims** for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer **unless** it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by **willful default or gross negligence** on the part of Company or its accredited personnel.

(Emphasis added.) That provision goes beyond Company immunity from customer claims of negligence (Sheet R-34 Paragraph 5) and customer indemnity for persons on the premises (Sheet R-34 Paragraph 4). It makes the customer liable to third persons, like an all-electric neighbor, for the Company's negligence.

That provision is unjust and unreasonable because it makes the customer liable to third persons for the Company's conduct. To indemnify the Company from those losses is the purpose of the commercial liability insurance, which is a cost of doing business. No public policy supports making an insurer out of a customer who is powerless—and is not paid—to control those risks.

Therefore, the Commission concludes that Sheet R-34 Paragraph 1 is unjust and unreasonable. The Commission will grant Staff's motion as to Sheet R-34 Paragraph 1. The Commission will deny summary determination for the Company, as to Sheet R-34 Paragraph 1.

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[72] To hold or save harmless also means to indemnify. *Missouri Pac. R. Co. v. Sonken-Galamba Corp.*, 274 S.W. 930, 932 (K.C. Ct. App., 1925).

(v) Summary as to Facial Unjustness and Unreasonableness

Sheet R-34 is unjust and unreasonable as to Sheet R-34 Paragraphs 2, 3, and 5 insofar as they purport to immunize the Company from liability against:

- any allegation of Company negligence relating to inspection,
- any allegation of Company negligence relating to leakage, and
- any allegation of Company negligence relating to repair.

Sheet R-34 is also unjust and unreasonable as to Sheet R-34 Paragraph 1.

III. Decision

The origin and issues in this action find their genesis in Sheet R-34's drafting, which likely employed the same method as the Commission's statutes—the eclectic method.[73] That method draws on language already used in the industry. But the sources' disparate nature may hinder the creation and comprehension of a coherent whole. Contemporary techniques make clearer drafting possible. Therefore, the Commission will order the filing of a new Sheet R-34 in compliance with this order.

THE COMMISSION ORDERS THAT:

1. Dismissal is denied.
2. Summary determination for Southern Union Company ("the Company") is:
   a. Granted as to the Complaint Paragraphs 7, 8, 10, and 11;
   b. Granted as to Complaint Paragraph 9 as set forth in the body of this order; and
   c. Denied as to the remainder of the complaint.
3. The *Motion for Summary Determination* of the Commission's Staff is:
   a. Granted as to Complaint Paragraph 9, as set forth in the body of this order, and
   b. Denied as to the remainder of the complaint.
4. The provisions of the Company's tariff P.S.C. MO. No. 1 Fourth Revised Sheet R-34 that are unjust and unreasonable, as set forth in the body of this order, are void and unenforceable.
5. No later than December 9, 2011, the Company shall file a P.S.C. MO. No. 1, Fifth Revised Sheet R-34 ("new tariff sheet"). The new tariff sheet shall set forth terms of service that are not unjust and unreasonable as set forth in the body of this order. The Company shall file the new tariff sheet under this file number.
6. This order shall become effective on November 19, 2011.
7. This file shall close on November 20, 2011.

Gunn, Chm., Davis, Jarrett, and Kenney, CC., concur.
Jordan, Senior Regulatory Law Judge

NOTE: This case was appealed to the Missouri Court of Appeals, reversed and remanded by *Pub. Serv. Comm. v. Mo Gas Energy*, 388 S.W.3d 221, (Mo. App. W.D. 2012)

[73] Public Serv. Comm'n v. Union Pac. R. Co., 197 S.W. 39, 40 (Mo. banc 1917).

Appendix 1: Sheet R-34

General Terms and Conditions for Gas Service

3.19 COMPANY LIABILITY:

[1] Customer shall save Company harmless from all claims for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by willful default or gross negligence on the part of Company or its accredited personnel.

[2] Company may refuse or discontinue service if an inspection or test reveals leakage, escape or loss of gas on customer's premises. Company will not be liable for any loss, damage or injury whatsoever caused by such leakage, escape or loss of gas from customer's service line, yard line, ancillary lines, house piping, appliances or other equipment.

[3] The Company does not own, nor is it responsible for the repair or maintenance of any piping, vents, or gas utilization equipment on the delivery side of the gas meter, its related appurtenances and piping. All piping, vents or gas utilization equipment furnished by the owner/customer of the premises being served shall be suitable for the purposes hereof and the owner/customer of the premises shall be responsible for the repair and maintenance of such at all times in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company. As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware of this fact, and Company shall owe customer no duty to warn of potential hazards that may exist with such facilities on the delivery side of the gas meter, its related appurtenances and piping.

[4] The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

[5] The Company shall not be liable for loss, damage or Injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter, which shall include but not be limited to any and all such loss, damage or injury involving piping, vents or gas utilization equipment, whether Inspected or not by the Company, or occasioned by interruption, failure to commence delivery, or failure of service or delay in commencing service due to accident or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bona fide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or, without limitation by the preceding enumeration, any other act or things due to causes beyond Company's control, or attributable to the negligence of the Company, its employees, contractors or agents.

Appendix 2: Regulation 4 CSR 240-40.030

(10) Test Requirements.

(J) Test Requirements for Customer-Owned Fuel Lines.

1. At the initial time an operator physically turns on the flow of gas to new fuel line installations—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure;

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met; and

C. The requirements of any applicable local (city, county, etc.) codes must be met.

2. The temperature of thermoplastic material must not be more than one hundred degrees Fahrenheit (100°F) during the test.

3. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

* * *

(12) Operations.

(S) Providing Service to Customers.

1. At the time an operator physically turns on the flow of gas to a customer (see requirements in subsection (10)(J) for new fuel line installations)—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure; and

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met. This visual inspection need not be met for emergency outages or curtailments. In the event a large commercial or industrial customer denies an operator access to the customer's premises, the operator does not need to comply with the above requirement if the operator obtains a signed statement from the customer stating that the customer will be responsible for inspecting its exposed, accessible gas piping and all connected equipment, to determine that the piping and equipment meets

> any applicable codes, standards, or procedures adopted by the operator to assure safe service. In the event the customer denies an operator access to its premises and refuses to sign a statement as described above, the operator may file with the commission an application for waiver of compliance with this provision.

2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

> A. Information on how to contact the operator in the event of an emergency or to report a gas odor;
>
> B. Information on how and when to contact the operator when excavation work is to be performed; and
>
> C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection (1)(K).[74]

3. The operator shall discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe. The operator, however, may continue providing service to the customer if the unsafe conditions are removed or effectively eliminated.

4. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

[74] 4 CSR 240-40.030(1)(K) requires notice to customers addressing gas pipe maintenance, corrosion, leakage, excavation, inspection, and repair.

In the matter of Union Electric Company's (d/b/a Ameren Missouri) Gas Service Tariffs Removing Certain Provisions for Rebates from Its Missouri Energy Efficient Natural Gas Equipment and Building Shell Measure Rebate Program

File No. GT-2011-0410
Tariff No. JG-2011-0620

RATES. §108. Gas. The Commission rejected Ameren's proposed tariff sheet changing the company's Energy Efficiency Program. The Commission determined the tariff sheet was contrary to a prior Commission-approved Stipulation and Agreement and that the proposed revisions were not in the public interest.
EVIDENCE, PRACTICE AND PROCEDURE. §8. Stipulation. When interpreting an agreement, the Commission considers what the parties were attempting to accomplish. The Commission concluded that the requirement in a Commission-approved agreement for a utility to maintain an Energy Efficiency Program through December 31, 2012, was an attempt by the parties to gather data and evaluate the program. Therefore, a tariff sheet that prematurely cut the program's measures prior to the end of the evaluation period controverted the intent of the parties to the agreement.
EVIDENCE, PRACTICE AND PROCEDURE. §1. Generally. The Commission found that a motion for clarification should be granted.
EVIDENCE, PRACTICE AND PROCEDURE. §6. Weight, effect and sufficiency. When terms of an agreement allowed Ameren to change the company's tariff due to a change in circumstances, facts did not support Ameren's argument that a change of circumstances existed that justified changes to the utility's Energy Efficiency Program. Although Ameren argued that some of the program's measures were not cost effective, the evidence demonstrated that Ameren was aware of this prior to entering into the agreement.

ORDER GRANTING MOTION FOR CLARIFICATION AND CORRECTING REPORT AND ORDER

Issue Date: November 10, 2011 Effective Date: November 10, 2011

On November 2, 2011, the Commission issued its Report and Order. On November 8, the Staff of the Commission filed a Motion for Clarification, informing the Commission of two errors in the Report and Order.

Staff first points to paragraph 17 of the Findings of Fact, which reads:

> Under the Total Resources Cost (TRC) test, a measure in the Energy Efficiency Program with a TRC value greater than 1 is not cost-efficient.

That Finding should read as follows:

> Under the Total Resources Cost (TRC) test, a measure in the Energy Efficient Program with a TRC value greater than 1 is cost-efficient.

Similarly, paragraph 18 reads:

> Prior to the parties entering into the Unanimous Stipulation and Agreement, there were at least 7 measures with a TRC value of greater than 1.

That Finding should read as follows:

> Prior to the parties entering into the Unanimous Stipulation and Agreement, there were at least 7 measures with a TRC value of less than 1.

The Commission will grant Staff's motion and correct the Report and Order as set out above.

THE COMMISSION ORDERS THAT:

1. The Staff of the Commission's Motion for Clarification is granted.
2. The Commission's Report and Order is corrected as set out in the body of this order.
3. This order shall become effective upon issuance.

Kennard L. Jones, Senior Regulatory Law Judge, by delegation of authority pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 10th day of November, 2011.

In the Matter of the Application of The Empire District Electric Company for the Issuance of an Accounting Authority Order Relating to its Electrical Operations and for a Contingent Waiver of the Notice Requirement of 4 CSR 240-4.020(2)

File No. EU-2011-0387

Accounting. §42. Accounting Authority Orders. Based on the Commission's independent and impartial review of the unopposed agreement, the Commission found that the agreement was consistent with the public interest and approved it. The Commission incorporated the terms of the agreement into the order.

ORDER APPROVING AND INCORPORATING UNANIMOUS STIPULATION AND AGREEMENT

Issue Date: November 30, 2011 Effective Date: December 7, 2011

Background

On June 6, 2011, The Empire District Electric Company ("Empire") filed an application for an Accounting Authority Order ("AAO") that would allow Empire to undertake certain accounting procedures in connection with its electrical operations in relation to the damage caused by the May 22, 2011 tornado that struck the City of Joplin, Missouri. The Commission directed notice and established an intervention deadline. Praxair, Inc. and Explorer Pipeline Company intervened. On November 15, 2011, following extensive negotiations, the parties filed a Stipulation and Agreement ("Agreement") purporting to resolve all issues in this matter. All of the parties are signatories to the Agreement and no party has requested a hearing in this matter.

The Agreement

In addition to a contingent waiver of rights in the Agreement, the Signatories request the Commission to enter an order that includes the following:

> a. Authorizes Empire to defer actual incremental Operations & Maintenance expenses associated with repair, restoration, and rebuild activities associated with the May 22, 2011, tornado, and depreciation and carrying charges equal to its ongoing Allowance for Funds Used During Construction rates associated with tornado-related capital expenditures, to Account 182.3, Other Regulatory Assets. This deferral shall not include any difference in charges applicable under Empire's currently effective tariff and any modified tariff that reduces or limits the charges applicable to its customers or developers in connection with restoring or establishing service.
>
> b. Nothing in the Commission's order shall be considered a finding by the Commission of the reasonableness of the costs and/or expenditures deferred, and the Commission reserves the right to consider the ratemaking treatment to be afforded all deferred costs and/or expenditures, including the recovery of carrying costs, if any.

c. Any insurance claim proceeds or government payments or credits applicable to incremental operation and maintenance expense or capital expenditures shall be used to offset the total amount of costs to be deferred.

d. If Empire has not filed an electric general rate case in Missouri by June 1, 2013, then Empire shall write off without rate recovery any deferrals it has already booked.

e. If Empire files an electric general rate case in Missouri by June 1, 2013, then Empire shall ratably amortize to Account 182.3 over a ten-year (120-month) period any deferrals it has already booked, beginning on the earlier of: 1) the effective date of new rates implemented in its next general rate increase case or rate complaint case; or 2) June 1, 2013.

f. Empire shall maintain detailed supporting records, work papers, invoices and other documents to support the amount of costs deferred under this AAO, including any related deferred taxes recorded as a result of the cost deferral. Such records shall include controls in place to ensure all expenditures were reasonable and necessary, detailing food and lodging costs, labor and material costs, procedures and verification for expense versus capitalization determinations, and determination of incremental levels of such costs versus normal ongoing levels of costs. Such records shall be made available for review by Staff, Public Counsel, and other intervenors, pursuant to 4 CSR 240-2.085 and Section 386.480.

Empire also agreed to work with parties as the end of the amortization period approaches to develop a mechanism that ensures Empire does not over or under recover the deferred amounts. And finally, Empire filed a pleading in this docket withdrawing, without prejudice, that portion of its application that seeks authority to defer the lost fixed cost components of Empire's rates.

Analysis and Decision

Missouri courts have recognized the Commission's regulatory authority to grant a form of relief to a utility in the form of an AAO "which allows the utility to defer and capitalize certain expenses until the time it files its next rate case."[1] "The AAO technique protects the utility from earnings shortfalls and softens the blow which results from extraordinary construction programs."[2] "However, AAOs are not a guarantee of an ultimate recovery of a

[1] *State ex rel. Aquila, Inc. v. Public Service Comm'n of State*, 326 S.W.3d 20, 27 (Mo. App. 2010). See also Section 393.140, RSMo 2000. Additionally, Commission Rule 4 CSR 240-20.030(1) requires electric utilities to keep all accounts in conformity with the Uniform System of Accounts prescribed for Public Utilities and Licensees subject to the provisions of the Federal Power Act. However, section (4) of the rule provides that in prescribing this system of accounts the Commission is not committing itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining any other matter.

[2] *Id*.

certain amount by the utility."[3] The AAO "simply allows for certain costs to be separately accounted for *possible* future recovery in a future ratemaking proceeding."[4] "This is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future."[5] Although the courts have recognized the Commission's authority to authorize an AAO in extraordinary and unusual circumstances, there is nothing in the Public Service Commission Law or the Commission's regulations that would limit the grant of an AAO to any particular set of circumstances.[6]

The Commission has discretion in prescribing accounting methods and forms of accounts, records and memorandum kept by an electrical corporation without conducting a hearing.[7] Nevertheless, the Commission issued notice in this matter and allowed interested entities to intervene and request a hearing. No hearing was requested.[8] Instead, the parties filed the unanimous Agreement. The Agreement waives any procedural requirements that would otherwise be necessary before final decision.[9] Also, because the settlement disposes of this action, the Commission need not separately state its findings of fact.[10]

Based on the Commission's independent and impartial review of the unopposed Agreement, the Commission finds that the Agreement is consistent with the public interest and shall approve it. Therefore, the Commission incorporates the terms of the Agreement into this order.

[3] *Id*.

[4] *State ex rel. Office of Public Counsel v. Missouri Public Service Comm'n*, 301 S.W.3d 556, 570 (Mo. App. W.D. 2009).

[5] *Id*.

[6] Section 393.140, RSMo 2000. Extraordinary has been defined as meaning of a nonrecurring nature, and unusual has been defined as meaning a substantial cost. *Missouri Gas Energy v. Public Service Comm'n,* 978 S.W.2d 434, 437 (Mo. App. 1998); *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 858 S.W.2d 806, 811 (Mo. App. 1993).

[7] The courts have not decided the issue of whether Section 393.140(4) (which does not require a hearing) or Section 393.140(8) (which does require a hearing) controls the grant of an AAO. *State ex rel. Public Counsel v. Public Service Commission*, 858 S.W. 2d 806, 809-810 (Mo. App. 1993). The Commission's position is that no hearing is required. *Id*.

[8] The term "hearing" presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties,* the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party;* ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id*.

[9] Section 536.060, RSMo 2000.

[10] Section 536.090, RSMo 2000.

THE COMMISSION ORDERS THAT:

1. The provisions of the Unanimous Stipulation and Agreement filed are approved and incorporated into this order as if fully set forth. The Signatories shall comply with the terms of the Stipulation and Agreement. A copy of the Stipulation and Agreement is attached to this order as Appendix A.
2. This order shall become effective on December 7, 2011.
3. This file shall be closed on December 8, 2011.

Gunn, Chm., Jarrett, and Kenney, CC., concur; Davis, C., absent.

Stearley, Deputy Chief Regulatory Law Judge,

NOTE: The Stipulation and Agreement in this case has not been published. If needed, this document is available in the official case files of the Public Service Commission.

In the Matter of the Application of The Empire District Gas Company, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Nodaway County, Missouri, as an Expansion of its Existing Certified Area

File No. GA-2012-0111

Certificates – §21. Grant or refusal of certificate generally. The Commission determined that provision of natural gas service to the service area described by The Empire District Electric Company (Empire) was in the public interest and the Commission granted a certificate of convenience and necessity. Empire agreed to conditions that the Commission found to be in the public interest, including maintaining separate records for the service area and performing a separate class cost of service and revenue requirement for that service area in the company's next general rate case.
Certificates. §43. Gas. The Commission determined that provision of natural gas service to the service area described by The Empire District Electric Company (Empire) was in the public interest and the Commission granted a certificate of convenience and necessity. Empire agreed to conditions that the Commission found to be in the public interest, including maintaining separate records for the service area and performing a separate class cost of service and revenue requirement for that service area in the company's next general rate case.

ORDER GRANTING CERTIFICATE OF CONVENIENCE AND NECESSITY

Issue Date: December 7, 2011 Effective Date: December 15, 2011

Background

On October 11, 2011, The Empire District Gas Company ("Empire") filed an application requesting that the Commission grant it a Certificate of Convenience and Necessity ("CCN") to expand its service territory into 20 Sections in Township 63 North in Nodaway County, Missouri.[1] Empire asserts that new commercial customers in this area have expressed an interest in converting from their existing fuel sources to natural gas.

The Commission issued notice and set a deadline for intervention requests. No person or entity intervened, and no party requested a hearing.

On November 21, 2011, the Commission's Staff filed its recommendation to grant the CCN subject to certain conditions. No party opposed Staff's recommendation and Empire agreed to the conditions.

[1] Empire filed its application pursuant to Section 393.170, RSMo 2000, and Commission Rules 4 CSR 240-2.060 and 3.205.

Legal Standard to Grant a CCN

"The legislature has seen fit to vest the Public Service Commission with exclusive authority to allocate the territory in which a particular utility may render service, by providing that the Commission shall pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory."[2] The governing statute for the grant of a certificate of convenience and necessity for the allocation of service territory for the provision of natural gas service is Section 393.170, RSMo 2000. Section 393.170 provides:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.
>
> 2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.
>
> 3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

[2] *State ex rel. Doniphan Tel. Co. v. Pub. Serv. Comm'n*, 377 S.W.2d 469, 474 (Mo. App. 1964); *State ex rel. City of Sikeston v. Pub. Serv. Comm'n of Missouri*, 82 S.W.2d 105, 110 (Mo. 1935); *Pub. Serv. Comm'n v. Kansas City Power & Light Co*., 31 S.W.2d 67, 69-70 (Mo. banc 1930); *State ex rel. Harline v. Pub. Serv. Comm'n*, Mo. App., 343 S.W.2d 177, 182 (Mo. App. 1960).

[3] Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Service Commission*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."[3] The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"[4] and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.[5] It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.[6]

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide natural gas service, it offers little statutory guidance as to specific criteria that must be satisfied prior to the grant of such certificates. In fact, pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.

The Commission has articulated the filing requirements for gas utility CCNs in Commission Rule 4 CSR 240-3.205, and the specific criteria to be used when evaluating applications of gas utility CCNs are more clearly set out in the case *In Re Intercon Gas, Inc.,* 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.[7]

Analysis

While Section 393.170 contemplates a Commission decision following "due hearing," the term "hearing" "presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties,* the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... 'Hearing' involves an *opposite party;* ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with 'opportunity to be heard'." [8] The requirement for a hearing was met in this matter when the opportunity for a hearing was provided and no party requested the opportunity to present evidence.[9] Ultimately, Empire's application did not result in a contested case proceeding.

[4] Id.; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

[5] Id. *Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

[6] *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra, quoting St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

[7] Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

[8] *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

[9] *Id*.

The Commission's Staff recommended approval of Empire's application because: (1) no interveners objected; (2) Empire anticipates using customary rights-of-way; (3) no new franchises are necessary; (4) Empire's proposal is economically feasible; and (5) Empire's current contracted capacity is sufficient to serve the additional customers. Additionally, Empire's verified application demonstrates a need for gas service in the service area identified and that there is no other natural gas service available in the described area. The cost of the project will be paid for by Empire or customer-supplied funds pursuant to Empire's extension policy. No external financing for this construction will be necessary. Construction methods will follow Empire's customary standards and the rules of the Commission. Empire's existing rates and regulations for natural gas service contained in its tariff for the Northwest system will apply to service in the proposed area.

Decision

Based on the Commission's independent and impartial review of the verified filings, the Commission determines that Empire has satisfied all necessary criteria for the grant of a CCN. Empire's provision of natural gas service to the service area described is in the public interest and the Commission will grant the request for the certificate. Because Empire has agreed to accept Staff's recommended conditions, and because the Commission finds these conditions to be in the public interest, the Commission will incorporate those conditions into the ordered paragraphs below. Finally, since the application did not result in a contested case, the Commission need not grant Empire a waiver of the 60-day notice of filing requirement in Commission Rule 4 CSR 240-4.020(2), as that rule only applies to cases that are likely to become contested cases.

THE COMMISSION ORDERS THAT:

1. The Empire District Gas Company is granted certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a system for the provision of natural gas service to the public pursuant to its approved rates, rules and regulations in Sections 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26 and 27, Township 63 North, Range 34 West and Sections 7, 8, 17, 18, 19. 20, 29 and 30 Township 63 North, Range 33 West, all in Nodaway County, Missouri.

2. The Empire District Gas Company shall maintain separate records for the new service area described in paragraph 1.

3. The Empire District Gas Company shall perform a separate class cost of service study and revenue requirement for the new service area when it files its next rate case.

4. The Empire District Gas Company shall file revised tariff sheets including the newly certificated service area granted by this order within thirty (30) days of the issue date.

5. This order shall become effective on December 15, 2011.

Gunn, Chm., Davis, Jarrett
and Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission, Complainant, v. Burkhart Mobile Homes, Inc., Respondent.

File No. MC-2011-0319

Manufactured Housing. §19 Penalties. The Commission authorized its general counsel to file an action in circuit court seeking penalties against the respondent for violations of Commission regulations governing the sale of manufactured homes.
Evidence, Practice and Procedure. §24 Procedure, evidence and proof. Summary determination is appropriate where the respondent admits all allegations made in complaint.

ORDER GRANTING SUMMARY DETERMINATION AND AUTHORIZING AN ACTION FOR PENALTIES

Issue Date: December 7, 2011 Effective Date: December 19, 2011

The Missouri Public Service Commission is granting the *Director's Motion for Summary Determination* ("motion"), and authorizing the Commission's General Counsel to seek penalties in circuit court against Burkhart Mobile Homes, Inc., ("Burkhart"). Burkhart made unauthorized sales of mobile homes and sales of unauthorized ("red-tagged") mobile homes. This order constitutes the Commission's final decision subject to rehearing under Section 386.500, RSMo 2000.[1]

Procedure

The Director of Manufactured Housing and Modular Units Program of the Missouri Public Service Commission ("Director") initiated this action by filing a complaint.[2] The Director filed a *First Amended Complaint*.[3] Burkhart filed an answer to the *First Amended Complaint*.[4] The Director filed the motion.[5] Burkhart filed a response.[6]

The Commission may grant a motion for summary determination:

> . . . if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case and the Commission determines that it is in the public interest [.[7]]

1 4 CSR 240.2-070(13).

2 On March 31, 2011.

3 On October 14, 2011, as provided by the order issued on that date.

4 *Respondent's Answer to Director's First Amended Complaint*, filed on October 21, 2011.

5 On November 2, 2011.

6 *Respondent's Response in Opposition to Director's Motion for and Suggestions in Support of His Motion for Summary Determination* filed on December 1, 2011.

7 4 CSR 240-2.117(1)(E) (emphasis added).

The Director prevails by establishing, without genuine dispute, the facts material to the Director's claim.[8] Burkhart's response admits all allegations in the motion, and does not ask for any hearing, so the response waives hearing.[9]

The Director has established, and Burkhart has raised no dispute as to, the following facts.

Findings of Fact

1. Burkhart is a domestic general business corporation administratively dissolved on August 25, 2010, and not since reinstated. Burkhart's principal place of business is at 8700 E. 70 Highway, Kansas City, Jackson County, Missouri.

2. Burkhart is in the business of selling manufactured homes and modular units. Burkhart held a registration as a dealer of manufactured homes and modular units until February 23, 2010. On February 23, 2010, Burkhart's registration expired and the Commission has not since reinstated or renewed Burkhart's registration.

3. At all relevant times, Burkhart knew and understood that it was not authorized to sell manufactured homes while its dealer registration was not in effect. At all relevant times, Burkhart knew and understood that it was prohibited from selling a new manufactured home marked as non-compliant with legal standards ("red-tagged," as further explained below). Each new manufactured home at issue was manufactured after January 1, 1974.

4. On May 20, 2010, the Director red-tagged a new Champion I manufactured home, which Burkhart sold to William and Wanda Smith of Lansing, Kansas on June 14, 2010.

5. Also on May 20, 2010, the Director red-tagged a new Clayton manufactured home, which Burkhart later sold to Milton Kutzil of Excelsior Springs, Missouri, not later than September 10, 2010.

6. In September 2010, Burkhart sold a used manufactured home to Delbert Scott of Overland Park, Kansas.

7. On November 23, 2010, the Director red-tagged a new Champion II manufactured home, which Burkhart later sold to John R. Wilder of Blue Springs, Missouri, not later than December 30, 2010.

8. In January or February 2011, Burkhart sold a manufactured home to Ron and Jacqueline Goddard of Blue Springs, Missouri.

[8] *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380-82 (Mo. banc 1993). That case discusses Missouri Supreme Court Rule 74.04, which is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation. *Johnson v. Mo. Bd. Of Nursing Adm'rs*, 130 S.W.3d 619, 626 (Mo. App., W.D. 2004).

[9] Sections 536.060 and 536.063(3), RSMo 2000.

Conclusions of Law

The Commission has jurisdiction to hear the Director's complaint,[10] because the Commission has jurisdiction to enforce manufactured housing standards,[11] and Burkhart is a manufactured home dealer.[12]

The *First Amended Complaint* sets forth three counts. In Count III, the Director cites Section 700.115.2,[13] which authorizes a penalty up to $1,000 for each violation of chapter 700, RSMo:

> [W]hoever violates any provision of this chapter [700, RSMo] shall be liable to the state of Missouri for a civil penalty in an amount which shall not exceed one thousand dollars for each such violation. If, after a hearing, the commission finds that the person has violated any provision of this chapter [700, RSMo], it may direct its general counsel to enforce the provisions of this section by filing a petition in circuit court for such civil penalties. Each violation of this chapter shall constitute a separate violation with respect to each manufactured home or modular unit or with respect to each failure or refusal to allow or perform an act required by this chapter; except that, the maximum civil penalty may not exceed one million dollars for any related series of violations occurring within one year from the date of the first violation.

The Director charges violations of chapter 700, RSMo, as follows in Counts I and II. In Count I, the Director cites Section 700.045(1): [14]

It shall be a misdemeanor:

> (1) For a . . . dealer to manufacture, rent, lease, sell or offer to sell any manufactured home or modular unit after January 1, 1977, unless there is in effect a registration with the commission [.]

Over the course of about a year Burkhart knowingly sold mobile homes to Smith, Kutzil, Wilder, Goddard, and Scott without a registration in effect. Therefore, the Commission concludes that Burkhart committed five violations of Section 700.045(1) and enters a decision in the Director's favor on Count I.

[10] Section 386.390.1, RSMo 2000; 4 CSR 240-123.090(1); 4 CSR 240-123.020(1); 4 CSR 240-123.090(1); 4 CSR 240-2.070(1).

[11] Section 700.040.1, RSMo Supp. 2010.

[12] Section 700.010(4), RSMo Supp. 2010.

[13] Supp. 2010.

[14] Supp. 2010.

In Count II, the Director cites Section 700.015.1:[15]

> No person shall rent, lease, sell or offer for sale any new manufactured home manufactured after January 1, 1974, unless such manufactured home complies with the code and bears the proper seal.

The "code" includes:

> . . . the standards relating to manufactured homes . . . as adopted by the commission. The commission, in its discretion, may incorporate, in whole or in part, the standards codes promulgated by . . . the United States Department of Housing and Urban Development [("HUD").[16]]

The Commission has incorporated HUD standards.[17] Those standards include 24 CFR § 3282.7(cc), which provides:

> To red tag means to affix a notice to a manufactured home which has been found to contain an imminent safety hazard or a failure to conform with any applicable standard. A red tag is the notice so affixed to the manufactured home.

Burkhart knowingly sold red-tagged mobile homes sold to Smith, Kutzil, and Wilder. Therefore, the Commission concludes that Burkhart committed three violations of Section 700.015.1.

The Director has shown that Burkhart committed eight violations of Sections 700.010 through 700.115 and the Commission concludes that granting the motion is in the public interest. Therefore, the Commission will grant the motion and authorize the Commission's General Counsel to file an action in circuit court seeking penalties under Section 700.115.2. This order addresses all charges in all counts of the *First Amended Complaint*, so the Commission will close this file.

THE COMMISSION ORDERS THAT:

1. The *Director's Motion for Summary Determination* is granted and the Commission's General Counsel is authorized to file an action in circuit court seeking penalties for eight violations of chapter 700, RSMo.
2. This order is effective on December 19, 2011.
3. This file shall close on December 20, 2011.

Gunn, Chm., Davis, Jarrett and
Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

[15] Supp. 2010.

[16] Section 700.010(2), RSMo Supp. 2010.

[17] 4 CSR 240-123.080(1).

In the Matter of Atmos Energy Corporation's 2008-2009 Purchased Gas Adjustment and Actual Cost Adjustment

File No. GR-2009-0417

Gas. §17.1 Purchased Gas Adjustment (PGA). Fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction.
Gas. §17.1 Purchased Gas Adjustment (PGA). Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions.
Gas. §78 Payments and affiliated interests. Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions.
Gas. §78 Payments and affiliated interests. 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.
Gas. §78 Payments and affiliated interests. The Commission's prudence standard applies when the Commission is evaluating the prudence of an affiliated transaction.
Gas. §78 Payments and affiliated interests. Fair market price is set by the market, not by Staff's review of documents.

REPORT AND ORDER

Issue Date: December 21, 2011
Effective Date: January 20, 2012

Appearances

James M. Fischer and **Larry W. Dority**, Fischer & Dority, P.C. 101 Madison St., Suite 400, Jefferson City, Missouri 65101, for Atmos Energy Corporation.
Robert S. Berlin, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Mark D. Poston, Deputy Public Counsel, P.O. Box 2230, Jefferson City, Missouri 65102, for The Office of the Public Counsel.
REGULATORY LAW JUDGE: Morris L. Woodruff, Chief Regulatory Law Judge

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Procedural History

This Report and Order concerns the second phase of the two-phase PGA/ACA process. During the initial Purchased Gas Adjustment (PGA) phase, Atmos Energy Corporation (Atmos) adjusted the rates it charged its customers to allow it to recover its varying costs of acquiring a supply of natural gas to serve those customers. Now, in the Actual Cost Adjustment (ACA) phase of the process, the Commission is examining Atmos'

natural gas purchases to determine whether the rate the company charged its customers was correct and whether the decisions the company made regarding its gas purchases were prudent.

For purposes of this case, the Commission's Staff conducted a review of Atmos' billed revenues and its natural gas costs for the period of September 1, 2008, to August 31, 2009. On December 30, 2010, Staff filed its recommendation regarding the actual cost adjustment for Atmos for the specified period.

Staff initially recommended the Commission disallow $413,165 in gas costs for Atmos' Hannibal service area and $81,852 in gas costs for the Butler service area. The proposed disallowances represent Staff's calculation of the amount of profit earned by Atmos' gas marketing affiliate – Atmos Energy Marketing (AEM) – on sales of gas to Atmos. Staff's underlying concern about AEM's sale of gas to Atmos was its inability to determine whether the gas packages bought by AEM to provide service to Atmos were firm or interruptible packages of gas. Because it could not make that determination from the information supplied by Atmos, Staff proposed to disallow from Atmos' costs all profits AEM earned on the transaction.[1]

Atmos responded to Staff's recommendation on February 2, 2011. Atmos objected to Staff's proposed disallowance of the profits AEM earned on its sales of gas to Atmos. Atmos explained that AEM submitted the lowest and best bids for those transactions in competition with other, unaffiliated gas marketing companies. On that basis, Atmos contends there is no reason for the Commission to disallow the profits AEM earned on the transactions.

Thereafter, the Commission established a procedural schedule whereby Atmos and Staff prefiled direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on September 14, 2011. Atmos, Staff, and the Office of the Public Counsel filed post-hearing briefs on October 28, 2011, followed by reply briefs on November 14, 2011.

The Disallowance Proposed by Staff

1. In its December 30, 2010 recommendation, Staff asked the Commission to disallow $413,165 in Atmos' gas costs for the Hannibal service area and $81,852 in gas costs for the Butler service area, for a total disallowance of $495,017.[2] By the time Staff filed its direct testimony, it had recalculated its proposed disallowance to $401,226.61.[3] Staff further reduced its proposed disallowance in its surrebuttal testimony when it accepted AEM's representation that it had overhead expenses on the questioned transactions of approximately $64,000, not including any profit. On that basis, Staff reduced its proposed disallowance to $337,226.61.[4]

2. The disallowance Staff has proposed in this case is closely related to the disallowances it proposed in File No. GR-2008-0364, Atmos' ACA case for the previous year. By agreement of the parties, the evidentiary record from that earlier case was incorporated into the record for this case.[5]

1 Sommerer Direct, Ex. 16, Schedule 2.

2 Sommerer Direct, Ex. 16, Page 14, Lines 22-23.

3 Sommerer Direct, Ex. 16, Page 15, Lines 18-20.

4 Sommerer Surrebuttal, Ex. 18, Pages 10-11, Lines 19-23, 1-5.

5 Transcript, Pages 237-238, Lines 19-25, 1-11. All footnotes in this order refer to the record in GR- 2009-0417 unless otherwise indicated.

3. On November 9, 2011, after the hearing of this case, the Commission issued a report and order in GR-2008-0364 that rejected the disallowances Staff proposed in that case. The Commission denied Public Counsel's Application for Rehearing regarding that report and order on November 30, 2011.

Background Facts

4. Atmos Energy Corporation (referred to in this report and order simply as Atmos) operates in Missouri as a regulated natural gas local distribution company, sometime referred to as an LDC. Atmos operates in many states and its Missouri LDC operations are part of its Kentucky/Mid-States division.[6]

5. As an LDC, Atmos obtains supplies of natural gas from natural gas producers and distributes that natural gas to homes and businesses within its service territory. Within Missouri, Atmos provides natural gas service to customers in three geographic areas: Northeastern, Southeastern, and Western. Within each area, Atmos serves customers through one or more operating systems.[7] Staff has proposed disallowances relating to two of those operating systems during the course of this case.

6. The first affected operating system is the Consolidated Hannibal-Canton-Palmyra-Bowling Green operating system within the Northeastern area. That system serves over 13,000 customers, of which approximately 11,500 are residential customers. Natural gas is delivered to this operating system through the Panhandle Eastern Pipeline.[8]

7. The second operating system for which Staff proposed a disallowance is the Butler system, within the Western area. It serves approximately 3,500 customers, most of which are residential customers. It is also receives natural gas through the Panhandle Eastern Pipeline.[9]

8. In addition to its regulated operations as an LDC, Atmos also owns Atmos Energy Marketing, LLC (AEM), a separate, unregulated gas-marketing company.[10]

[2] Sommerer Direct, Ex. 16, Page 14, Lines 22-23.

[3] Sommerer Direct, Ex. 16, Page 15, Lines 18-20.

[4] Sommerer Surrebuttal, Ex. 18, Pages 10-11, Lines 19-23, 1-5.

[5] Transcript, Pages 237-238, Lines 19-25, 1-11. All footnotes in this order refer to the record in GR- 2009-0417 unless otherwise indicated.

[6] Buchanan Direct, Ex. 1, Page 1, Lines 7-8.

[7] Buchanan Direct, Ex. 1, Page 4, Lines 1-3.

[8] Buchanan Direct, Ex. 1, Page 4, Lines 11-15.

[9] Buchanan Direct, Ex. 1, Page 6, Lines 1-3.

[10] Sommerer Direct, Ex. 16, Page 5, Lines 1-9.

9. Atmos holds long-term contracts with various interstate pipelines for natural gas storage and transportation capacity to supply the firm natural gas requirements of its Missouri service areas.[11] Atmos does not produce its own natural gas and does not purchase that gas directly from producers. Instead, Atmos contracts with independent gas-marketing companies to purchase the natural gas that is then flowed through the interstate pipeline using Atmos' pipeline capacity. Gas suppliers are selected through a competitive bidding process.[12]

Atmos' Use of Gas Marketing Companies to Procure its Gas Supply

10. Atmos uses the services of independent gas-marketing companies to purchase its natural gas because it does not have the in-house expertise needed to perform the gas marketing services provided by those companies.[13]

11. If it were to undertake its own gas-marketing services using its own, in-house employees, Atmos would need to hire or train additional personnel at a substantial cost and develop processes already used by independent gas marketers to secure gas supplies and transport gas through the interstate gas pipeline system.[14]

12. In-house gas-marketing employees would still need to negotiate and contract for the purchase and transport of natural gas supplies. Market forces would still determine the price of gas and the cost to transport that gas, just as market forces determine those prices when independent marketing companies purchase them. Gas-marketing companies can aggregate all of their customers' gas requirements and therefore purchase larger amounts of gas from suppliers and obtain better gas prices than utilities.[15] For that reason, it is unlikely that large natural gas producers would be willing to sell natural gas directly to Atmos in the small baseload quantities that the company would purchase for its relatively small service areas[16] In fact, if an upstream supplier of natural gas wanted to sell gas directly to Atmos it could submit a bid to do so under Atmos' RFP process.[17]

13. On the basis of those facts, Atmos contends that its fully distributed cost of providing gas-marketing services through its own employees would exceed the market price for those gas-marketing services as established by a competitive bidding process among gas marketing companies.[18]

11 Buchanan Direct, Ex. 1, Page 6, Lines 9-11.

12 Buchanan Direct, Ex. 1, Page 6, Lines 11-14.

13 Buchanan Direct, Ex. 1, Page 22, Lines 6-10.

14 Buchanan Direct, Ex. 1, Page 22, Lines 14-17.

15 Buchanan Surrebuttal, Ex. 3, Pages 4-5, Lines 20-23, 1.

16 Transcript, Page 118, Lines 8-16.

17 Buchanan Surrebuttal, Ex. 3, Page 7, Lines 13-17.

18 Buchanan Direct, Ex. 1, Page 22-23, Lines 22, 1-2.

14. Staff does not challenge Atmos' decision to purchase its gas supplies through gas marketing companies rather than by using in-house gas marketing experts.[19] Staff does not seek to disallow Atmos' costs associated with acquiring its gas supply through the services of unaffiliated gas marketing companies.[20] Thus, it is apparent that Staff's concern is only with Atmos' affiliated transactions and not with Atmos' decision to obtain its gas supplies through gas marketing companies rather than by purchasing those supplies using in-house gas marketing personnel.

15. Based on the foregoing facts, the Commission finds that Atmos' fully distributed cost of providing gas-marketing services through its own employees would exceed the market price for those gas-marketing services as established by a competitive bidding process among gas marketing companies.

The Competitive Bidding Process

16. Atmos awards contracts to gas marketing companies using a competitive bid process. Under that process, Atmos issues a request for proposal - an RFP – and interested suppliers submit confidential bids with their proposed pricing for the gas supply services. Atmos evaluates the bids and awards the contract to the company that offers the best bid for reliable supply at the least cost.[21]

17. Atmos used the same RFP process to obtain competitive bids for gas supply service contracts to serve each of its eight operating systems in Missouri. During the 2008-2009 ACA period (September 1, 2008 – August 31, 2009), Atmos awarded contracts for the Hannibal-Bowling Green and Butler operating systems – the two operating systems that are at issue in this case – to nonaffiliated, gas-marketing companies.[22] However, during the previous ACA period (September 1, 2007 – August 31, 2008) Atmos awarded contracts for those two operating systems to its affiliate, AEM. A portion of those agreements entered into in the previous ACA period carried over into the ACA period at issue. Those portions of those agreements are at issue in this case.[23]

18. For the Hannibal-Bowling Green operating system, the challenged supply-only agreement with AEM was in effect from April 1, 2008, to March 31, 2009. For the Butler operating system, the challenged supply-only agreement with AEM was in effect from November 1, 2007 to October 31, 2008.[24]

19. For the Hannibal-Bowling Green April 2008 gas-supply agreement, Atmos sent an RFP letter to sixty companies. It received bids from four gas-marketing companies. Three of those bids were considered to be conforming.[25] AEM submitted the lowest bid and was awarded the contract.

20. The amount bid by AEM for the Hannibal-Bowling Green gas-supply agreement was approximately $235,000 lower than the bid submitted by the next lowest conforming bidder. That difference amounts to about two percent of the total gas cost under the contract.[26]

[19] Transcript, Page 195, Lines 8-17.

[20] Transcript, Page 222, Lines 20-25.

[21] Buchanan Direct, Ex. 1, Page 6, Lines 14-17.

[22] Buchanan Direct, Ex. 1, Page 12, Lines 1-12.

[23] Sommerer Direct, Ex. 16, Page 13, Lines 13-22.

[24] Sommerer Direct, Ex. 16, Page 13, Lines 14-22.

[25] Transcript, Pages 58-59, Lines 22-25, 1-12. *See also*, Buchanan Direct, Ex. 1, Attachment 2.

[26] Transcript, Pages 59-60, Lines 13-25, 1.

21. For the Butler November 2007 gas-supply agreement, Atmos received bids from six gas-marketing companies. AEM submitted the lowest bid and was awarded the contract.[27]

22. For the Hannibal-Bowling Green April 2009 gas supply agreement, Atmos again sent an RFP letter to approximately 60 gas-marketing companies. It received bids from only two companies and only one of those bids was conforming. AEM did not offer a bid on that agreement. Atmos awarded the contract to the unaffiliated company that submitted the low bid.[28]

23. AEM does not dominate Atmos' bidding process. For the period 2004-2009, Atmos issued 48 RFPs for Missouri gas supply. AEM submitted the successful bid six times. That is consistent with the number of successful bids submitted by other major gas marketers.[29]

Fair Market Value

24. Much of the testimony and effort put into this case by all parties concerns Staff's attempt to discern what it describes as a fair market value for Atmos' affiliate transactions with AEM. Staff's attempts to establish such a fair market value apart from the results of the bidding process are misguided.

25. All parties accept that fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction.[30]

26. Staff and Public Counsel contend that such a definition of fair market value does not apply to these transactions because, by definition, an affiliate transaction is not arms length. On that basis, Staff claims the need to audit the books and records of AEM to determine the fair market value of the transaction from AEM's perspective. Since AEM was unable to produce the documents Staff claims it needs to establish that fair market value, Staff asks the Commission to disallow all gross profits that AEM earned on the transaction.

27. Staff and Public Counsel's position ignores the existence of the bidding process in establishing the fair market value for the transaction. If AEM had not submitted a bid, or if it had not submitted the lowest bid, there would be no question that the bidding process established the fair market value of the transaction. Indeed, Staff did not propose any disallowance related to the contracts for Missouri gas supply in which an unaffiliated gas marketing company submitted the lowest and best bid[31] and agreed that the bidding process would establish fair market value for those transactions.[32]

28. Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions, just as it did for the transactions with non-affiliated gas marketing companies. Because of the bidding process, Atmos, and ultimately its ratepayers, will pay no more for the services of the affiliated gas marketing company than they would have paid to obtain the same services from an unaffiliated gas marketing company. In effect, it is the non-affiliated gas marketing companies bidding in the open market that establish the fair market value for the bids won

[27] Buchanan Direct, Ex. 1, Attachment 2.

[28] Transcript, Page 60, Lines 2-16. *See also*, Buchanan Direct, Ex. 1, Attachment 2.

[29] From GR-2008-0364 - Buchanan Direct, Ex. 1, Page 12, Lines 15-20. The same chart is also found in GR-2009-0417 - Buchanan Direct, Ex. 1, Attachment 2.

[30] From GR-2008-0364 - Transcript, Page 627, Lines 21-25.

[31] Transcript, Page 167, Lines 20-22.

[32] For GR-2008-0364 - Transcript, Page 667, Lines 7-16.

by AEM as much as they do for the bids won by non-affiliated bidders. Absent some showing of insider-dealing to favor an affiliate in the bidding process or some showing of facts that cast doubt on the bidding process itself, there is no need for Staff to search behind the bidding process to try to establish an independent fair market value for the affiliate transactions, if any such determination were possible.

29. In Atmos' previous ACA case, GR-2008-0364, the Commission found that no party "presented evidence to establish a serious doubt about the fairness of the bidding process"[33] In this case, Staff attempts to cast doubt on that bidding process.

30. Staff asserts that the bidding process used by Atmos to award contracts for the Hannibal-Bowling Green and Butler systems was not "robust" because it attracted few bidders.[34] Atmos received three conforming bids for the April 2008 gas-supply contract for the Hannibal-Bowling Green system.[35] For the November 2007 gas-supply contract for the Butler system, Atmos received six bids.[36] Attachment 2 to Rebecca Buchanan's direct testimony is a chart summarizing the bids Atmos received in response to its RFP's for all of its operating systems between April 2004 and November 2009. An examination of that chart reveals that the submission of bids by three or six interested gas-marketing companies is well within an average range for that period.[37] Yet, Staff did not propose a disallowance relating to any of the gas-supply contracts awarded under the same RFP process, except for the contracts for which AEM submitted the winning bid.[38]

31. Furthermore, for the April 2009 gas-supply contract for the Hannibal-Bowling Green system, Atmos' RFP process attracted only two bidders, only one of which was found to be a conforming bid.[39] AEM did not submit a bid for that contract and Staff did not propose a disallowance based on that RFP.[40] Clearly, Staff's concern is with the fact that the contract was awarded to an affiliated gas-marketing company rather than with the number of bidders attracted by the RFP process.

The Provision of Gas Supplies

32. It is apparent that Staff's real concern is not with fair market price, AEM's record keeping, or even with the bidding process, rather it is about the actual relationship between Atmos, AEM, and the gas supplied by AEM. In short, Staff is concerned that AEM may have met its obligation to supply gas under its winning bids by providing Atmos with something less than firm gas supplies.

33 *In the Matter of the PGA/ACA Filing of Atmos Energy Corporation*, File No. GR-2008-0364, Report and Order, Page 11 (November 9, 2011)

34 Sommerer Direct, Ex. 16, Page 19, Lines 4-5.

35 Transcript, Pages 58-59, Lines 22-25, 1-12. *See also*, Buchanan Direct, Ex. 1, Attachment 2.

36 Buchanan Direct, Ex. 1, Attachment 2.

37 Transcript, Page 129, Lines 3-20.

38 Transcript, Page 167, Lines 10-22.

39 Transcript, Page 60, Lines 2-16. *See also* Buchanan Direct, Ex. 1, Attachment 2.

40 Transcript, Page 167, Lines 10-22.

33. A local distribution company such as Atmos must transport its natural gas supplies from the gas producing areas of the country to its service area through one of several interstate natural gas pipelines. For both the Hannibal-Bowling Green and Butler service areas, Atmos transported its gas through the Panhandle Eastern Pipeline under terms of a long-term firm contract.[41]

34. For the Panhandle Eastern Pipeline the demarcation between the field area, where gas is produced, and the market portion of the pipeline, where commercial deliveries are made, is found at Haven in Kansas. Haven is the primary receipt point, but it is not the only receipt point on the Panhandle Eastern Pipeline. There are also secondary receipt points, including one at Louisburg, Kansas, where the Kinder Morgan Pony Express Pipeline connects to the Panhandle Eastern Pipeline.[42]

35. Atmos' request for proposal for natural gas supply, the letter that was sent to all prospective bidders to supply natural gas to meet Atmos' needs, specified that the bidder was to "provide firm and warranted natural gas commodity only requirements for its Missouri service areas." That request for proposal letter further specified, "[a]ll gas supply is to be **firm and warranted** assuring that natural gas supply services will meet all contractual obligations without fail." (Emphasis in original)[43]

36. Atmos' request for proposal for natural gas supply allowed all potential bidders to use either the Haven receipt point or a secondary in-path receipt point between Haven and Atmos' service area.[44] As it was allowed to do under the request for proposal, AEM chose to use a secondary in-path receipt point at Louisburg, Kansas, to take gas supplies off the Kinder Morgan Pony Express Pipeline and then transport them along the Panhandle Eastern Pipeline for delivery to Atmos.[45]

37. In the hierarchy established by the Pipeline's tariff, primary firm delivery is the highest priority gas supply. The priority of secondary in-path firm delivery is a notch below primary firm delivery.[46] However, both primary and secondary firm delivery require the supplier to deliver firm as opposed to interruptible supplies of natural gas.[47]

38. Bids to supply gas at a secondary receipt point frequently have a cost advantage over bids to supply gas at a primary receipt point.[48] However, for the conforming bids submitted under the RFP in question, only AEM's bid was based on receipt at a secondary receipt point.[49]

41 Buchanan Direct, Ex. 1, Pages 4-6.

42 Transcript, Page 104, Lines 13-25.

43 Exhibit 4. *See also*, Transcript, Page 106, Lines 2-24.

44 Transcript, Page 133, Lines 1-10. *See also*, Ex. 4.

45 Transcript, Page 105, Lines 1-13.

46 Transcript, Page 104, Lines 17-20.

47 Transcript, Pages 119-120, Lines 21-25, 1-4.

48 Transcript, Page 107, Lines 2-15.

49 Transcript, Page 105, Lines 5-21.

39. Although Atmos' request for proposal specifies that the gas supply it seeks to purchase is to be firm, Staff and Public Counsel are concerned that perhaps AEM actually supplied something less than firm gas. As one basis for that concern, Staff points to several transaction confirmation documents for the period in which the statement of service level under the contract was left blank as an indication that AEM was allowed to deliver less-than-firm gas.[50]

40. Atmos' witness, Rebecca Buchanan, explained that the service level designations in the transaction confirmation documents were likely left blank through an oversight. However, she was adamant that Atmos fully expected to receive firm gas service under the contract.[51]

41. Staff also suspects that AEM was supplying less-than-firm gas under its contract because its successful April 2008 bid to supply gas to the Hannibal-Bowling Green system was too low in relation to the bids submitted by non-affiliated gas-marketing companies.[52] AEM's successful bid was $235,000 lower than the lowest bid from a non-affiliated gas-marketing company, a difference of about two percent of the roughly $14,000,000 total gas cost under the contract.[53] That modest difference is not enough to raise any red flags about the fairness of the bid.

42. Aside from its concerns about Atmos' failure to fill-in a blank in the contract and the amount of AEM's bid, Staff points to the events of December 2007 as a basis for its contention that AEM may have supplied less than firm gas to Atmos under the contracts.

43. In the afternoon of November 26, 2007, Panhandle Eastern Pipeline sent out a notice declaring a *force majeure* event due to a partial rupture on the pipeline at Haven.[54] The *force majeure* event meant that the pipeline would likely be cutting gas nominations on the pipeline because of the reduced capacity for transporting gas past the pipeline rupture.

44. Staff and Public Counsel criticize Atmos' behavior during the course of the *force majeure* event, implying that Atmos sacrificed its own position for the benefit of its affiliated gas marketer, AEM. During the course of the *force majeure* event of December 2007, the pipeline cut Atmos' gas nominations by 31 percent.[55] Furthermore, Atmos' witness agreed that he cooperated with the pipeline and his supplier by not nominating as much daily flowing gas through the pipeline as he could have during the *force majeure* event to avoid additional cuts from the pipeline.[56] Instead, Atmos pulled additional gas out of storage to meet the needs of its customers.[57]

45. Despite the *force majeure* event, Atmos was able to meet the gas needs of all its customers. No customer suffered a curtailment during that event.[58]

[50] Ex. 7 and Ex. 8.

[51] Transcript, Page 138, Lines 2-24.

[52] Sommerer Rebuttal, Ex. 17, Page 8, Lines 9-11.

[53] Transcript, Pages 59-60, Lines 13-25,1.

[54] From GR-2008-0364 - Transcript, Pages 450-451, Lines 25, 1-2.

[55] From GR-2008-0364 - Transcript, Page 373, Lines 2-9.

[56] From GR-2008-0364 - Transcript, Page 506, Lines 6-17.

[57] From GR-2008-0364 - Transcript, Page 521, Lines 4-7.

[58] From GR-2008-0364 - Transcript, Page 450, Lines 2-12.

46. Staff proposed a disallowance relating to the *force majeure* event in GR-2008-0364 but did not do so in this case as the event occurred in the prior ACA period. However, Staff believes that the cuts to Atmos' flowing gas supplies during the *force majeure* event raise a suspicion that AEM was actually supplying less-than-firm gas under its contract.

47. Although Staff frequently stated throughout the case that there was a risk that AEM was meeting its obligations under the contract with something less-than-firm gas, implying that AEM was using cheaper interruptible supplies that could result in disruptions to customer gas supplies, Dave Sommerer, Staff's witness, actually testified that AEM was meeting its supply obligations with secondary firm delivery taken off the secondary delivery point on the pipeline.[59] The use of secondary firm supply may have resulted in lower priority during the *force majeure* event, but the option to use secondary firm supply through a secondary delivery point was available to all bidders, not just to AEM. Therefore, Atmos and its customers received the service they paid for through the bidding process. There is no credible evidence to show that AEM was using interruptible gas supplies to meet its obligation under the contract.

48. Staff also expresses concern that if Atmos had done a better job of notifying potential bidders of their ability to satisfy the requirements of the contract by using secondary firm supply through a secondary delivery point the resulting bids might have been even lower than the bid submitted by AEM.[60] Thus, Staff criticizes AEM's bid at different times as both too high and too low. However, Atmos' RFP was quite straightforward in informing the potential bidders of the acceptability of a secondary delivery point and there was no credible evidence to establish that any such bidders were confused or misled by the RFP.

49. Staff concedes that it has no evidence of any intentional attempts by Atmos gas supply personnel to increase the profits of AEM and no evidence that Atmos intentionally attempted to increase shareholder profits by accepting the lowest bid from AEM.[61] Furthermore, Staff concedes that the RFP was the same for all bidders and that Atmos evaluated the RFP the same way for all bidders.[62]

50. While most of Staff's case concerns the contracts to supply gas to the Hannibal/Bowling Green district, it also proposes a disallowance for the Butler district. About the disallowance related to the Butler district, Staff's witness said:

> In the Butler area, the RFP provides a better indication of fair market value. However, the Staff still proposes an adjustment to AEM's fair market value because AEM did not provide the cost methodology and allocation records required by the Affiliate Rules.[63]

59 Transcript, Page 217, Lines 15-23. *See also*, Page 223, Lines 14-24.

60 Transcript, Page 232, Lines 14-24.

61 Transcript, Page 170, Lines 5-13.

62 Transcript, Page 170, Lines 19-20.

63 Sommerer Rebuttal, Ex. 17, Page 16, Lines 13-16.

Thus, at least for the Butler district, Staff's proposed disallowance is based primarily on its interpretation of the affiliate transaction rules. The Commission will address the requirements of the affiliate transaction rules in its conclusions of law.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

A. Atmos is a Gas Corporation[64] and a Public Utility[65] as defined by Missouri statute and is therefore subject to the jurisdiction of the Missouri Public Service Commission.[66]

B. 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.[67]

C. The Commission established its standard for determining the prudence of a utility's expenditures in a 1985 decision. In that decision, the Commission held that a utility's expenditures are presumed to be prudently incurred, but, if some other participant in the proceeding creates a serious doubt as to the prudence of the expenditure, then the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent.[68]

D. Contrary to the assertions of Staff and Public Counsel, the Commission's prudence standard applies even when the Commission is evaluating the prudence of an affiliated transaction. In fact, the appellate court decision that explicitly upheld the appropriateness of the Commission's prudence standard concerns the prudence of an affiliate transaction that the Commission was reviewing in an ACA case; exactly the question before the Commission in this case.[69]

E. The Missouri Court of Appeals again explicitly held that the prudence standard applies when the Commission is considering the prudence of an affiliate transaction in its review of the Commission's decision in a Union Electric rate case. In that case, the court rejected an assertion that the Commission's affiliate transaction rule had shifted the burden of proof to the utility to demonstrate the prudence of an affiliate transaction. In the words of the court:

64 Section 386.020(18), RSMo (Supp. 2010).

65 Section 386.020(43), RSMo (Supp. 2010).

66 Section 386.250, RSMo 2000.

67 *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).

68 *In the matter of the determination of in-service criteria for the Union Electric Company's Callaway Nuclear Plant and Callaway rate base and related issues. And In the matter of Union Electric Company of St. Louis, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the company.* 27 Mo. P.S.C. (N.S.) 183 (1985).

69 *State ex rel. Assoc. Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520 (Mo. App. W.D. 1997).

> Their assertion is incorrect. Regulation 240-20.105(6)(c) says, 'this rule does not modify existing legal standards regarding which party has the burden of proof in the commission proceeding.' This means that the regulation does not modify the existing burden of proof. Although UE purchased the CTGs from its affiliates, the commission properly presumed that UE was prudent in its purchase of the CTGs, until the State or Public Counsel presented evidence that raised a 'serious doubt' concerning the prudence of its expenditure. (Citation to *Associated Natural Gas* omitted).[70]

F. The Commission has a general affiliate transactions rule – 4 CSR 240-40.015 that establishes regulatory standards surrounding a regulated gas utility's dealings with its affiliated companies. The Commission also has a marketing affiliate transactions rule – 4 CSR 240-40.016 - that specifically regulates transactions between regulated gas corporations and affiliated gas marketing companies. Both rules apply to the transactions between Atmos and its marketing affiliate, AEM.

G. The general affiliate transactions rule provides:

> When a regulated gas corporation purchases information, assets, goods or services from an affiliated entity, the regulated gas corporation shall either obtain competitive bids for such information, assets, goods or services or demonstrate why competitive bids were neither necessary nor appropriate.[71]

The marketing affiliate transaction rule includes the same language.[72] Atmos complied with these rule requirements when it obtained competitive bids before awarding gas-marketing contracts to AEM.

H. The general affiliate transactions rule further provides:

> A regulated gas corporation shall not provide a financial advantage to an affiliated entity. For the purposes of this rule, a regulated gas corporation shall be deemed to provide a financial advantage to an affiliated entity if –
>
> 1. It compensates an affiliated entity for goods or services above the lesser of –
>
> A. the fair market price; or
>
> B. the fully distributed cost to the regulated gas corporation to provide the goods or series for itself … .[73]

The same language is found in the marketing affiliate transaction rule at 4 CSR 240-40.016(3)(A).

I. Both the general and the specific affiliate transaction rules clearly contemplate that a regulated gas corporation may engage in dealings with an affiliated gas-marketing company so long as it complies with the requirements of the regulation.

[70] *State ex rel. Public Counsel v. Pub. Serv. Com'n*, 274 S.W.3d 569, 578 (Mo. App. W.D. 2009). In that case, the court was interpreting the Commission regulation applicable to electric utilities. However, the affiliate transaction regulations applicable to gas utilities - 4 CSR 240-40.015(6)(C) and 4 CSR 240-40.016(7)(C) - contain the same language indicating that the rules do not modify the legal standards regarding which party has the burden of proof in commission proceedings.

[71] 4 CSR 240-40.015(3)(A).

[72] 4 CSR 240-40.016(4)(A).

[73] 4 CSR 240-40.015(2)(A).

J. Neither the general nor the specific affiliate transaction regulation includes any language that would preclude an affiliated gas-marketing company from earning a profit on its transaction with the regulated gas corporation. Indeed, such a provision would have the practical effect of banning the transactions that are clearly allowed under the rule, as no affiliated company will enter into a transaction in which it is not allowed to earn a profit.

K. The general and specific affiliate transaction regulations impose record-keeping requirements on both the regulated gas company and its affiliates. The relevant portion of the regulations states:

> Each regulated gas corporation shall ensure that its parent and any other affiliated entities maintain books and records that include, at a minimum, the following information regarding affiliate transactions:
>
> 1. Documentation of the costs associated with affiliate transactions that are incurred by the parent or affiliated entity and charged to the regulated gas corporation;
>
> 2. Documentation of the methods used to allocate and/or share costs between affiliated entities, including other jurisdictions and/or corporate divisions;
>
> 3. Description of costs that are not subject to allocation to affiliate transactions and documentation supporting the nonassignment of these costs to affiliate transactions; …[74]

L. Staff and Public Counsel complain that Atmos and its affiliate, AEM, have failed to comply with the record-keeping requirements of the regulations in that AEM failed to provide Staff with records sufficient to allow Staff to determine the fair market value of gas-supply costs charged to Atmos.[75]

M. However, the record-keeping requirements cited by Staff and Public Counsel do not require AEM to keep records sufficient to allow Staff to determine the fair market value of gas supplies charged to Atmos, because no such gas-supply costs have been charged to Atmos within the meaning of the regulation.

N. The record-keeping requirements cited by Staff and Public Counsel apply to records of affiliated entities concerning the allocation of common costs among the affiliated companies. For example, an affiliate may share an accountant with the regulated utility and some portion of the cost of employing that accountant may be charged to the regulated utility. Those record-keeping requirements do not contemplate a situation where an affiliated company has simply sold a product to the regulated entity at a fair market price determined through an above-board, competitive bidding process.

O. In fact, Staff's witness indicated he was unaware of any provision in the Commission's rules that would require AEM, or any other affiliate, to maintain records sufficient to allow Staff to determine the affiliate's net profits on a transaction-by-transaction basis.[76]

[74] 4 CSR 240-40(5)(A). The rule goes on to list further record keeping requirements that are not related to the issues in this case. The same language is found in the Marketing Affiliate Transaction rule at 4 CSR 240-40.016(6)(A).

[75] Transcript, Page 731, Lines 7-17. See also, Staff's Initial Brief, at Page 19.

[76] From GR-2008-0364 - Transcript, Page 635, Lines 17-21.

P. The Commission is required to follow its own rules, because "[r]ules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them."[77] Furthermore, as an administrative agency, the Commission cannot repeal its rules through an adjudicated order. "To repeal a rule, an agency must comply with the notice, publication, and public comment method prescribed in Section 536.021 of Missouri's Administrative Procedures Act."[78]

DECISION

Staff and Public Counsel are appropriately concerned that the Commission closely examine transactions between regulated utilities and their affiliated companies. Certainly, such transactions can be used by a utility to improperly pass profits to an unregulated affiliate or transfer costs from an unregulated affiliate to be recovered in rates from captive utility customers. Because of its concerns about such practices, the Commission promulgated rules to govern affiliate transactions in general, and marketing affiliates in particular.

The Commission's rules specifically allow such transactions to occur, but only if the regulated gas corporation does not provide a financial advantage to its affiliate. The rule establishes that a regulated gas corporation provides a financial advantage to its affiliate if it purchases goods or services from its affiliate above the lesser of the fair market price for those goods or services, or the cost the regulated gas corporation would incur to provide the goods or services for itself.[79]

Staff does not present any serious argument to suggest that Atmos could provide gas-marketing services for itself cheaper if it did not use the services of gas-marketing companies. Staff's witness threw out some statements suggesting that a big company like Atmos should have the resources to purchase gas for itself,[80] but when pressed, he conceded that Staff was not suggesting that Atmos should purchase gas supplies without using the services of a gas-marketing company.[81]

Furthermore, Staff did not propose any disallowance relating to the gas supply contracts that Atmos awarded to non-affiliated gas marketing companies after following the same request for proposal process. If it is less expensive for Atmos to purchase gas supplies through non-affiliated gas-marketing companies than to maintain its own staff of gas buyers, then there is no basis to believe that it should maintain such a staff of buyers only to avoid awarding a contract to its affiliated marketing company when that company happens to submit a bid lower than the bids submitted by the unaffiliated companies. That leaves the other side of the regulation's limitation that allows Atmos to purchase gas supplies from an affiliated gas marketer only if it does so at or below fair market price.

77 *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. Banc 1985).

78 *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 357 (Mo. banc 2001).

79 Commission Rule 4 CSR 240-40.015(2)(A).

80 Sommerer Surrebuttal, Ex. 18, Page 3, Lines 19-2`

81 Transcript, Page 195, Lines 8-17.

As simple as it sounds, fair market price is established by the fair market composed of willing buyers and sellers. In this case, that fair market resulted from the request for bids process undertaken by Atmos to determine the least-cost bid for gas-marketing services in its various service territories. For some of those service territories, but by no means for all, AEM, a gas marketer affiliated with Atmos, submitted the low bid.

For the service territories in which AEM did not submit the low bid, Staff is willing to accept the fair market price as established by the market. However, for those service territories for which AEM did submit the low bid, Staff claims that it must carefully examine AEM's contracts with its suppliers to determine the real fair market price. It argues that if only it had the full cooperation of Atmos and complete access to the records of the unregulated affiliate, including specific transaction records that the unregulated affiliate does not maintain, it could make such a determination. However, Staff's efforts to determine a "real fair market price" are misguided and doomed to failure.

Fair market price is set by the market, not by Staff's review of documents. Even if Atmos and AEM gave Staff every document they could ever hope to examine they could still never determine a "real fair market price" unless they were able to undertake a full rate case to establish among other things an allowed rate of return for the unregulated gas marketing company; because, as Staff's witness conceded in Atmos' last ACA case, AEM should be allowed to earn a profit under the proper circumstances.[82]

For the foregoing reasons, the Commission will reject Staff's proposed $337,226.61 disallowance to eliminate AEM's net profits on its transactions with Atmos.

On December 30, 2010, Staff recommended various adjustments to Atmos' ACA filing in addition to the affiliate transaction disallowances that the Commission is rejecting in this report and order. Atmos accepted most of those other adjustments in its response to Staff's recommendation, which it filed on February 2, 2011. However, Staff's recommended adjustments were filed before the Commission issued its decision in Atmos' prior ACA case, GR-2008-0364. It is not clear to the Commission how the adjustments ordered in GR-2008-0364 are reflected in the adjustments Staff proposed in this case.

Therefore, rather than establish Atmos' ending balances for 2008-2009 in this order, the Commission will direct Staff to file a revised recommendation regarding those balances based on the Commission's decision in this report and order and in GR-2008-0364.

The Commission will make this order effective on January 20, 2012, which is at least fifteen days after Staff will file its adjusted ending balances recommendation pursuant to this order. The Commission will then issue a separate order, effective on the same date as this report and order, to establish those ending balances. That way no one considering a request for rehearing of this report and order will have to request rehearing of an order that does not finally resolve this entire case.

[82] From GR-2008-0364 - Sommerer Surrebuttal, Ex. 28, Page 3 Liens 7-9. *See also*, Transcript, Page 704, Lines 3-15.

THE COMMISSION ORDERS THAT:

1. The disallowances proposed by Staff regarding Atmos' transactions with its affiliate are rejected.

2. No later than January 5, 2012, Staff shall file a revised recommendation regarding Atmos' ending balances for the 2008-2009 ACA period incorporating the adjustments ordered in this Report and Order and in the Report and Order issued in GR-2008-0364. This ordered paragraph shall take effect immediately upon issuance.

3. This Report and Order shall become effective on January 20, 2012.

Gunn, Chm., Davis, and Jarrett, CC., concur;
Kenney, C., concurs, with separate concurring opinion to follow;
Stoll, C., not participating.
and certify compliance with the provisions
of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 21st day of December, 2011.

NOTE: At the time of publication, no opinion of Commissioner Kenney has been filed.
NOTE: The case was appealed to the Missouri Court Of Appeals. Affirmed by *Atmos Energy Corp. v. Office of Pub. Counsel*, 389 S.W.3d 224 (Mo. App. W.D. 2012).

Eric E. Vickers, Complainant v. Union Electric d/b/a Ameren Missouri, Respondent.

File No. EC-2011-0326

Electric. §14. Rules and regulations. The substantial and competent evidence in the record as a whole supported the conclusion that the complainant failed to meet, by a preponderance of the evidence, his burden of proving that more likely than not Ameren Missouri violated any Commission statute, regulation, order, or tariff provision in relation to the application of the Commission's cold weather rule.

REPORT AND ORDER

Issue Date: December 21, 2011

Effective Date: January 20, 2012

APPEARANCES

APPEARING FOR ERIC E. VICKERS:
Eric E. Vickers, 1100 Wyoming, St. Louis, Missouri 63118.

APPEARING FOR UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI:
Sara E. Giboney, Smith Lewis, L.L.P., 111 South Ninth Street, Suite 200, Columbia MO 65205-0918,

And

Wendy K. Tatro, Associate General Counsel, Ameren Services Company, 1901 Chouteau Avenue, St. Louis MO 63166-6149.

APPEARING FOR THE OFFICE OF THE PUBLIC COUNSEL AND THE RATEPAYERS:
Lewis Mills, Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.[1]

APPEARING FOR THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:
Kevin Thompson, Chief Staff Counsel, and **Meghan McClowry**, Legal Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

REGULATORY LAW JUDGE: Harold Stearley, Deputy Chief Regulatory Law Judge

[1] The Office of the Public Counsel entered an appearance at the prehearing conference held on September 20, 2011. Public Counsel made no other appearance in this matter.

I. Procedural History

On April 4, 2011, Eric E. Vickers filed a formal complaint against Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"). Mr. Vickers alleges that Ameren Missouri fails to properly comply with the Commission's regulations with regard to entering into cold weather rule ("CWR") agreements. Specifically, he claims that Ameren Missouri fails to appropriately confirm such agreements in writing.

Mr. Vickers asserts that he was inappropriately required to make a higher payment, an 80% payment on the balance on his account as opposed to a 10% payment, in March 2011 to establish a CWR payment arrangement because Ameren Missouri improperly claimed he had defaulted on a previous CWR agreement. Mr. Vickers contends that since he did not receive written confirmation of a CWR agreement until he made his initial payment in March 2011, there was no earlier CWR agreement that he could have defaulted upon. Because of Ameren Missouri's alleged failure to comply with the law, Mr. Vickers requests that Ameren Missouri be enjoined from enforcing the 80% payment of his outstanding bill that he paid under protest in March to maintain his electric service. He further requests unspecified damages.[2]

Ameren Missouri answered the complaint and sought its dismissal. The Commission's Staff investigated and found no violations of any statute, regulation or Commission-approved tariff. However, because there were material facts in dispute, the Commission held an evidentiary hearing on October 31, 2011 to address Mr. Vickers' allegations.[3]

Although Mr. Vickers raises issues regarding his electric service account with Ameren Missouri and his billing information, which under traditional evidentiary rules waives any privilege of confidentiality for having placed the subject matter of the privileged information in dispute,[4] he asserts that he would like to maintain the confidentiality of his billing records.[5] To be sensitive to Mr. Vickers' request, the Commission will maintain the confidentiality of Mr. Vickers' account number, the electric usage, and the dollar amounts charged and payments on his bills. Exhibits containing that information are currently protected by a highly confidential classification. However, to the extent that relevant conduct and the relevant dates of that conduct relate to Mr. Vickers' complaint (all matters that he placed at issue that are dispositive to his allegations) the Commission will disclose that evidence in the body of this order with appropriate citation to the record.

[2] Mr. Vickers originally brought his complaint on behalf of himself and as though he was representing a class of individuals. He also originally included the Commission as a defendant. On August 10, 2011, the Commission dismissed the class action portion of the complaint and dismissed the Commission as a defendant. EFIS Docket Entry Number 35, *Order Dismissing Complaint In Part and Granting Leave To Amend Complaint*.

[3] Transcript, Volumes 3 and 4. In total, the Commission admitted the testimony of 4 witnesses and received 11 exhibits into evidence. Post-hearing briefs were filed on November 28, 2011and the case was deemed submitted for the Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240- 2.150(1).

[4] *State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 728 -729 (Mo. App. 2011); *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 567 (Mo. banc 2006); *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 533 (Mo. App. 2002); *State ex rel. St. John's Regional Medical Center v. Dally*, 90 S.W.3d 209, 217 (Mo. App. 2002); *Geldback Transport, Inc. v. Delay*, 443 S.W.2d 120, 121 -122 (Mo. 1969).

[5] Transcript pp. 29-30.

II. Findings of Fact and Conclusions of Law

A. The Parties - Findings of Fact

1. Eric E. Vickers ("Complainant") is a residential customer of Ameren Missouri appearing before the Commission on behalf of himself. He resides at 1100 Wyoming Avenue, St. Louis, Missouri 63118. [6]

2. Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") is an integrated electric utility serving approximately 1.2 million retail electric customers in its approximately 24,000 square mile service territory in Missouri. More than 1 million of its customers are residential customers located in 508 communities in 59 of Missouri's counties. In addition to operating and maintaining the approximately 10,500 MW of generating capacity needed to serve its customers, the Company operates and maintains approximately 33,000 miles of distribution lines, approximately 630 distribution substations, and approximately 2,900 miles of transmission lines.[7]

3. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."[8] Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."[9] Although Public Counsel did not file a notice of its intention not to participate in this matter, Public Counsel only appeared at one of the two prehearing conferences and it did not appear for the evidentiary hearing. Nor did Public Counsel file any pleadings in this matter.[10]

4. The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.[11]

Conclusions of Law – Jurisdiction and Burden of Proof

Although Mr. Vickers is not a person or an entity regulated by the Commission, he submitted himself to the Commission's jurisdiction when he filed his complaint pursuant to Section 386.390, RSM0 2000. Ameren Missouri, on the other hand, provides electric service to customers throughout the service area certificated to it by the Commission.[12]

Ameren Missouri is an "electrical corporation" and "public utility" as those terms are defined by Section 386.020, RSMo Supp. 2010, and is subject to the Commission's jurisdiction, supervision, control and regulation as provided in Chapters 386 and 393, RSMo.

[6] Transcript, pp. 27-28, 38-41. See also EFIS Docket Entry No. 25, *Complainant Response to Commission Order*, filed on July 5, 2011.

[7] *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, Report and Order in file No. ER-2011-0028, issued July 13, 2011, effective, July 23, 2011, 2011 WL 2962024, 3 (Mo. P.S.C. 2011). See also Exh. No 100, Direct Testimony of Warner L. Baxter, pp. 4-5, in File Number ER-2011-0028.

[8] Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

[9] Section 386.710(3), RSMo 2000; Commission Rules 4 CSR 240-2.010(10) and (15) and 2.040(2).

[10] Transcript, Volumes 1-4. See also the EFIS docket entries for File Number EC-2011-0326. Public Counsel is subject to dismissal pursuant to Commission Rule 4 CSR 240-2.090 and 2.116.

[11] Commission Rules 4 CSR 240-2.010(10) and (21) and 2.040(1).

[12] See File Numbers EM-2007-0374 and EN-2009-0164

Because Mr. Vickers brought the complaint, he bears the burden of proof. The burden of proof is the preponderance of the evidence standard.[13] In order to meet this standard, Mr. Vickers must convince the Commission it is "more likely than not" that Ameren Missouri violated an applicable statute, a rule, or a provision of a Commission-approved tariff in relation to executing its cold weather rule agreement with him.[14]

B. Witnesses and Witness Credibility

Findings of Fact

5. A total of four witnesses provided testimony at the evidentiary hearing. Those witnesses were: Mr. Vickers, Gay Fred for the Commission's Staff, and Cathy Hart and Michael Horn for Ameren Missouri.

6. The following witnesses are subject matter experts for their individual fields of expertise as identified in their testimony and the exhibits admitted into the record:[15]

> **Gay Carol Fred** is the Commission's Consumer Services Manager. She has held this position for eight years and has been employed by the Commission for twenty-five years. She possesses technical and other specialized knowledge regarding processing consumer complaints, investigations into utility service issues and the applications of the Commission's customer service rules. She has a thorough knowledge of the Commission's customer service rules and has been actively involved with drafting revisions to those rules and continues to evaluate them for further revisions.[16]

[13] *Bonney v. Environmental Engineering, Inc*., 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp*., 936 S.W.2d 104, 110 (Mo. banc 1996).

[14] *Holt v. Director of Revenue, State of Mo*., 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999*); Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

[15] Section 490.065 sets forth the standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003). Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with ***any*** scientific, technical or other specialized knowledge. (Emphasis added). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 2008 WL 2345862, 7 (Mo. App. 2008). The expert is not required to be an expert in all subject matters in order to assist the finder of fact.

[16] Transcript, pp. 49-80.

> **Cathy Hart** has held the position of Ameren Missouri's Customer Services Supervisor for almost ten years. She possesses technical and other specialized knowledge regarding: Ameren Missouri's: (1) methods of conducting business; (2) record keeping; (3) billing practices; (4) customer service protocols; and (5) cold weather rule agreements. Her expertise is outlined in her testimony and it will assist the Commission with understanding the evidence and determining facts in issue in this matter. She is qualified as an expert by the uncontroverted evidence of her knowledge, skill, and experience.[17]
>
> **Michael Horn** has held the position of Ameren Missouri's Credit Collections Supervisor for almost ten years. He possesses technical and other specialized knowledge regarding: (1) bankruptcies; (2) non-service billings; (3) collection agencies; (4) corporate financial analysis; and, (5) Ameren Missouri's Red Flag program. He also possesses technical and other specialized knowledge regarding: Ameren Missouri's: (1) methods of conducting business; (2) record keeping; (3) billing practices; (4) customer service protocols; and (5) cold weather rule agreements. His expertise is outlined in his testimony and it will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.[18]

7. **Eric E. Vickers**, the Complainant, did not provide testimony involving scientific, technical and other specialized knowledge. Nor did he establish any expertise regarding a utility's billing practices, record keeping, customer service protocols, cold weather rule agreements or the Commission's rules. Mr. Vickers provided testimony regarding his personal knowledge on the issues surrounding the payments on his electric bill and events surrounding his cold weather rule agreement with Ameren Missouri. Mr. Vickers is not a subject matter expert.[19]

8. The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.

9. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

[17] Transcript, pp. 80-152.

[18] Transcript, pp. 152-173.

[19] Transcript, pp. 37-48.

Conclusions of Law – Witness Testimony

Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony.[20] An administrative agency, as fact-finder, receives deference when choosing between conflicting evidence.[21] In fact, the Commission "may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it."[22]

The Commission receives deference when reaching decisions based on technical and scientific data.[23] And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.[24] Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.[25]

The Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.[26] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.[27] Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.[28]

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20 *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

21 *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

22 *Veal v. Leimkuehler* , 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

23 *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA,* 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus,* 478 F.Supp.125, 131 (D.C.Cir.1979).

24 *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness,* 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

25 *Id*.

26 *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

27 *Id*.

28 *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

C. Cold Weather Rule Agreements

Findings of Fact - CWR Agreements Generally

10. When Ameren Missouri receives a request for a CWR agreement it: (1) examines the customer's records to see if they have had a CWR payment agreement; (2) if not, it determines the initial payment for a CWR agreement calculating 12 percent of total owed and adding one budget billing amount; (3) splits the remaining amount into 12 monthly payments; (4) explains the terms of the agreement with the customer; (5) asks the customer if they agree to those terms; and (6) makes an agreement with the customer on a date for the initial payment to be made.[29]

11. If a customer is eligible for a CWR payment agreement, Ameren will calculate the minimum amount due for the initial payment, but if the customer declines to enter the agreement, then the entire past balance is due to avoid disconnection.[30]

12. The Commission's CWR dictates the method of calculating initial and reinstatement payments, but the utility and the customer can agree to a different amount.[31]

13. The majority of customers seeking a CWR payment arrangement call Ameren on the date of the scheduled disconnection or a date very close to the date of the scheduled disconnection.[32]

14. If the customer is scheduled for disconnection of service because of a delinquent balance they must make the initial payment the same day they are calling to arrange the CWR payment agreement or no later than the day of the scheduled disconnection.[33]

15. The Commission's CWR requires the initial payment to be made prior to the utility company providing written confirmation of the CWR agreement.[34]

16. Providing written confirmation of a CWR agreement following receipt of the initial payment is the practice of all regulated Missouri utilities covered under the Commission's CWR.[35]

[29] Transcript, p. 82.

[30] Transcript, p. 84-85.

[31] Transcript, pp. 69, 170.

[32] Transcript, p. 83-84.

[33] Transcript, p. 83.

[34] Transcript, pp. 58, 69-70, 76-78.

[35] Transcript, pp. 67-68. As the Commission Staff's states in its investigation report: " . . . it has been Consumer Services Staff experience that all gas and electric Local Distributing Companies (LDCs) have applied the provisions of the CWR payment agreement, payment calculations and initial payments in the same manner and accurately. Had the interpretation of the rules been incorrect or applied incorrectly by any or all (LDCs), the Commission can rest assured that the Commission Staff would have been aware of such violations prior to Mr. Vickers allegations and would have brought such violations before the Commission. Staff Exh. 1.

17. Written confirmation of the CWR agreement provides the customer with on-going protection for the 12-month payment arrangement established for the amount the customer needs to pay on a monthly basis to prevent any threat of service discontinuance.[36]

18. Ameren Missouri routinely confirms CWR agreements in writing with its customers.[37]

19. There is an express exception to the requirement for written confirmation of a CWR agreement that applies when the extension of the due date of the customer's payment to prevent disconnection of service will not exceed two weeks. This exception, among other things, allows a customer to enter a verbal CWR agreement prior to obtaining written confirmation.[38]

20. In most cases the extension of the due date of the customer's payment to prevent disconnection of service does not exceed two weeks from when the oral CWR agreement is made.[39]

21. The ability to enter a CWR agreement verbally, prior to written confirmation, allows for an expedited process to prevent a customer from being disconnected from service pending the time required to memorialize the agreement in writing.[40]

22. It would confuse a customer to receive written confirmation of a CWR agreement if the customer defaults on making the initial payment, because the customer would be getting confirmation of a breached, and thus a non-enforceable, agreement. Failure to make the initial payment results in a new bill being issued, and reinstatement of a CWR agreement after default on the initial payment would require different terms of payment than the defaulted-upon CWR agreement.[41]

23. If a utility company issues written confirmation of a CWR agreement prior to the initial payment actually being paid, the customer would be removed from threat of disconnection. This would disqualify a customer from being eligible to having the initial payment made through the Low Income Home Energy Assistance Program ("LIHEAP").[42]

24. To the knowledge of the Commission's Consumer Services Department, there has been no confusion with regard to interpreting the provisions of the Commission's CWR prior to this complaint.[43]

25. The majority of people who enter into CWR agreements with Ameren Missouri understand the terms of the agreements and the procedure for making the initial payment and receiving subsequent written confirmation of the agreement.[44]

[36] Transcript, p. 61.

[37] Transcript, pp. 59, 86.

[38] Transcript, pp. 45, 70-71, 74-79. "Extension Agreement" is defined in 4 CSR 240-13.015(N) and "means a verbal agreement between the utility and the customer extending payment for fifteen (15) days or less."

[39] Transcript, p. 70.

[40] Transcript, pp. 70-71

[41] Transcript, pp. 80, 86.

[42] Transcript, pp. 69, 103-104.

[43] Transcript, p. 72.

[44] Transcript, pp. 147-150.

26. Ameren Missouri does not receive complaints or inquiries from the majority of people who enter into CWR agreements and most customers comply with the terms of the agreements.[45]

Findings of Fact - Mr. Vickers' CWR Payment Arrangements

27. Ameren Missouri sent Mr. Vickers a disconnection notice on December 14, 2010 because he had a delinquent balance.[46] Mr. Vickers had not made a payment on his November 15, 2010 electric bill.[47]

28. Mr. Vickers was billed for electric service provided for the period between November 15, 2010 and December 14, 2010 on December 15, 2010.[48]

29. On January 3, 2011, Mr. Vickers called Ameren to inquire about entering into a Cold Weather Rule ("CWR") payment arrangement on his account. He was advised of the amount that would be required as a minimum payment that would be due by January 10, 2011 to avoid discontinuance of service.[49] This amount was based upon electric service provided between October 13, 2010 and December 14, 2010 for which no payment had been received, and any other outstanding arrearage (the amount owed on all pre-existing and current bills).[50]

30. Had Ameren Missouri not extended the payment deadline to January 10, 2011 Mr. Vickers' initial payment would have been due on January 3rd, the day his account was set for disconnection.[51] Ameren Missouri's representative knew Mr. Vickers would not be disconnected due to the cold weather so the initial payment deadline was extended until January 10, 2011.[52]

31. The seven-day extension of the due date for payment was less than two weeks, so written confirmation of the verbal CWR agreement was not required.[53]

45 Transcript, p. 151.

46 Transcript, pp. 95-96; Ameren Exhs. 1, 2 and 3. Ameren's Account Activity Statement (Ameren Exh 2) reflects the bill amount one day prior to the billing date reflected in statements mailed to Mr. Vickers (Ameren Exh. 9). Thus, for December, the regular bill transaction is recorded on December 14, 2010, while the billing date on the bill sent to Mr. Vickers is December 15, 2010. Disconnection notices are issued on the same date the transaction is recorded on the Account Activity Statement (Ameren Exh. 3).

47 Ameren Exh. 2. Mr. Vickers had a previous delinquency for having failed to make any payments between May 12, 2010 and September 27, 2010, but he brought his payments up to date between September 28, 2010 and October 13, 2010.

48 Ameren Exh. 1, 2, and 3.

49 Transcript, pp. 43-44, 95-97, 144-146, 156-157. Staff Exh. 1; Ameren Exhs. 4, 5, 6, 8 and 9.

50 Transcript, pp. 82, 156-157; Ameren Exhs. 1, 2, 3, 4, 5, 8 and 9.

51 Ameren Exhs. 3 and 4. A disconnection date is referred to as "Auto Cut Out" on Ameren Missouri's computer screen shots. Ameren Exh. 3. A customer is up for "a cut," or subject to disconnection because of a delinquent balance. Transcript, p. 83.

52 Ameren Exh. 4; Transcript 96-102.

53 See Finding of Fact Number 19 and accompanying footnote.

32. On January 6, 2011, a representative from Ameren Missouri left a notice at Mr. Vickers' home informing him that his service would not be disconnected because of the weather. Having received this notice, Mr. Vickers called Ameren Missouri again. In that January 6, 2011 phone call he admitted he entered into a CWR payment arrangement with Ameren Missouri on January 3, 2011. He also confirmed the dollar amount of the required initial payment and confirms that the initial payment is due by January 10, 2011 to prevent discontinuance of his electric service. Ameren Missouri's representative also informed Mr. Vickers that once the initial payment was made that Mr. Vickers needed to call Ameren back with his receipt number.[54]

33. On January 10, 2011, Mr. Vickers called Ameren Missouri. Mr. Vickers confirmed the terms of the CWR agreement that required his initial payment to be made on that same day, January 10th. He then inquired into the consequences of not paying on January 10th, and Ameren Missouri's representative informed him that he would owe the full balance on his bill. Mr. Vickers also inquired what would happen if he did make the initial payment on January 10th, and Ameren Missouri's representative explained how the monthly payment would be established pursuant to the CWR agreement. Ameren Missouri's representative further explained that Mr. Vickers would be subject to disconnection again on January 14, 2011 and the initial payment deadline was extended until January 14th. Ameren Missouri's representative explained that failure to make the initial payment by the January 14th deadline would constitute a default on the CWR arrangement. Mr. Vickers confirmed that he agreed to the terms of the CWR agreement. Mr. Vickers was again advised that once the initial payment was made that he needed to call Ameren back with his receipt number.[55]

34. The additional 4-day extension of the due date for payment resulted in a total extension that was still less than two weeks, so written confirmation of the verbal CWR agreement was not required.[56]

35. Mr. Vickers did not make the required initial payment for his CWR agreement by the January 14, 2011 deadline and he defaulted on the CWR agreement.[57]

36. As of January 17, 2011, no payment had been received on Mr. Vickers' account.[58] Ameren Missouri issued a new bill requiring payment of the total balance and issued another disconnection notice.[59]

37. Because Mr. Vickers had defaulted on the CWR agreement, no confirmation letter for the agreement was required pursuant to the Commission's CWR.

[54] Transcript, pp. 95-97, 144-146, 156-157. Staff Exh. 1; Ameren Exhs. 4, 5, 6, 8 and 9.

[55] Transcript, pp. 95-97, 144-146, 156-157. Staff Exh. 1; Ameren Exhs. 4, 5, 6, 8 and 9.

[57] Transcript, pp. 43-44, 57-58, 61, 78-79, 95-97, 102, 105-106, 144-146, 156-157. Staff Exh. 1; Ameren Exhs. 1, 2, 3, 4, 5, 6, 8 and 9. Mr. Vickers admits he made a verbal agreement "of sorts" with Ameren Missouri in January 2011, and that he failed to make the initial payment. (Transcript, pp. 43-44). Mr. Vickers admits he defaulted on the verbal agreement in multiple phone recordings. (Ameren Exhs. 4, 5, and 6). Ameren Missouri witness Michael Horn credibly testified that Mr. Vickers admitted that he had entered a CWR agreement in January 2011, and had defaulted on it. (Transcript, p. 157). Mr. Vickers' claims that he had not defaulted on the CWR agreement are not credible.

[58] Transcript, pp. 79, 105-106; Staff Exh. 1; Ameren Missouri Exhs. 1, 2 and 3.

[59] Transcript, pp. 79, 105-106; Ameren Missouri Exhs. 1 and 2. As noted earlier, the billing date is one day later than the transaction appearing in the Account Activity Statement, thus the bill date in January 18, 2011.

38. Despite the fact that Mr. Vickers had defaulted on his CWR agreement, his electric service was not disconnected in January because of the weather.[60]

39. On February 9 and 14, 2011, additional disconnection notices were issued, and on February 15, 2011, Ameren Missouri issued a new bill reflecting that the total balance was due.[61]

40. On February 19, 2011, Mr. Vickers called Ameren Missouri and requested to be put on a CWR payment agreement. Mr. Vickers admitted to having defaulted on his January CWR agreement. Mr. Vickers was given the opportunity to reinstate his CWR agreement with an initial payment deadline of February 24, 2011. Ameren Missouri, exercising its discretion, lowered the amount normally required for reinstatement. Mr. Vickers was advised as to the dollar amount of monthly installment payments to follow. Mr. Vickers agreed to the terms of the reinstatement agreement.[62]

41. The terms of reinstatement agreements require a higher initial payment to catch the customer up on the payments that were missed plus the current bill.[63]

42. The extension of the due date for payment was less than two weeks so written confirmation of the verbal reinstatement agreement was not required.[64]

43. Mr. Vickers failed to make the initial payment and defaulted on the reinstatement agreement.[65]

44. Because Mr. Vickers had defaulted on reinstating the CWR agreement, no confirmation letter of the agreement's reinstatement was required pursuant to the Commission's CWR.

45. Mr. Vickers' electric service was not disconnected in February because of the weather.[66]

46. Mr. Vickers had made no payments on his electric service account during the months of December 2010, and January and February 2011.[67]

47. On March 11, 2011, Ameren Missouri issued another disconnection notice.[68]

48. On March 14, 2011, Mr. Vickers called Ameren Missouri. Mr. Vickers again acknowledged that he had defaulted on the CWR agreement made in January. Mr. Vickers was again offered terms to reinstate the CWR agreement based upon the current amount of the outstanding balance on his account for electric service.[69]

60 Transcript, p. 96. See also Ameren Exhibits 1, 2, and 3 which establish that service was still being provided.

61 Transcript, pp. 106-110; Ameren Missouri Exhs. 1, 2 and 3.

62 Transcript, pp. 106-110; Staff Exh. 1; Ameren Missouri Exh. 6.

63 Transcript, pp. 85-86; 134-135, 139-140,157-159.

64 See Finding of Fact Number 19 and accompanying footnote.

65 Transcript, pp. 106-110; Ameren Missouri Exh. 6.

66 Transcript, pp. 106-110; Ameren Missouri Exhs. 1, 2 and 3.

67 Transcript, p. 110; Ameren Missouri Exhs. 1, 2 and 3.

68 Ameren Missouri Exh. 3.

69 Transcript, pp. 112-116, 157-158, 168, 170-173.

49. The Commission's CWR determines the amount of the payment required to reinstate the defaulted-upon agreement, unless the utility and customer agree to a different amount.[70]

50. Due to an oversight on the part of Ameren Missouri, the amount of the initial payment offered to Mr. Vickers to reinstate the defaulted-upon CWR agreement was lower than what would normally have been offered.[71]

51. Mr. Vickers did not make a payment towards his account until March 15, 2011, and the amount he paid was less than the required amount to reinstate the CWR agreement.[72]

52. On March 16, 2011, Ameren Missouri called Mr. Vickers to inform him that he had not made a sufficient payment to reinstate the defaulted-upon CWR agreement. An additional disconnection notice was issued, and Mr. Vickers was advised that he needed to complete the payment by the end of the day. Mr. Vickers did not make the payment on March 16, 2011, and Ameren Missouri gave him an extension until March 17, 2011 to make the required payment to reinstate the defaulted-upon CWR agreement.[73]

53. Because Mr. Vickers' next billing transaction would have occurred on March 16, 2011, and because he did not complete the initial payment before the end of the day on March 16, 2011, the reinstatement charge for the defaulted-upon CWR agreement would normally have included all the March-related charges and the reinstatement payment should have been much higher since Mr. Vickers failed to meet the March 16, 2011 deadline. Ameren Missouri's willingness to grant the extension until March 17, 2011 reduced the payment required to reinstate the defaulted-upon CWR agreement.[74]

54. Mr. Vickers made an additional payment in an attempt to make the required payment to reinstate his defaulted-upon CWR agreement. He paid slightly less than what was required, but Ameren Missouri accepted his payment and confirmed the arrangement to reinstate his defaulted-upon CWR agreement.[75]

55. On March 24, 2011, Ameren sent to Mr. Vickers, by email and in hard copy, written confirmation of the reinstatement of his defaulted-upon CWR agreement, following receipt of the initial payment as described in Findings of Fact above. The letter stated the terms of his CWR payment agreement at the time of reinstatement.[76]

56. The terms of the reinstated CWR agreement required Mr. Vickers to pay each current month's bill on time and in full, and a monthly installment payment on the remaining charges that were still in arrears.[77]

[70] Transcript, p. 170.

[71] Transcript, pp. 112-113.

[72] Transcript, pp. 157-158.

[73] Transcript, pp. 157-160, Ameren Missouri Exhs. 1, 2, 3, 7 and 9.

[74] Transcript, pp. 113-115; Staff Exh. 1, Appendix A. The total time of the extension granted for Mr. Vickers to make the initial payment was for less than two weeks so confirmation in writing prior to receiving the initial payment was not required. See Finding of Fact Number 19 and accompanying footnote.

[75] *Id.*

[76] Transcript, pp. 112-116; Vickers' Exh. A; Ameren Missouri Exh. 7; Staff Exh. 1.

[77] *Id.* See also Transcript, pp. 157-160.

57. Mr. Vickers was required to make his CWR installment payment and the payment for his March billing period by April 7, 2011.[78]

58. Mr. Vickers filed this complaint on April 4, 2011.[79]

59. Mr. Vickers defaulted on the April 7, 2011 payment and defaulted on the reinstated CWR agreement.[80]

60. Mr. Vickers has paid varying amounts towards his electric bill between June and the date of the evidentiary hearing, none of which were in conformity with the defaulted-upon, reinstated CWR agreement.[81]

61. As of the date of the evidentiary hearing, Mr. Vickers remained in significant arrears on his electric bill.[82]

62. Mr. Vickers does not assert that Ameren Missouri has failed to provide the electric service for which he was billed, or that he did not receive the benefit of the electric service that was provided. [83]

63. Mr. Vickers has no dispute with the amount he was charged by Ameren Missouri on his electric bills for the electric service he received.[84]

64. Mr. Vickers does not assert that the amount charged to reinstate his CWR agreement exceeded the amount he owed Ameren Missouri for electric service, or that it exceeded the amount directed by the Commission's CWR to be charged when a customer defaults on a CWR agreement.

65. Mr. Vickers does not contest his payment history or the amounts he remains in arrears on his electric bill for services he has received from Ameren Missouri.

66. Mr. Vickers does not dispute the amount that he currently owes to Ameren Missouri for electric service he has received.[85]

67. There is no evidence in the record to support a claim that Ameren Missouri fails to provide safe and adequate service.

68. The Commission's Staff investigated Mr. Vickers' complaint and filed a report of its investigation. In that report, Staff recounts its efforts to assist Mr. Vickers resolve his concerns regarding the application of the Commission's CWR prior to the filing of his complaint. Staff included in its report a number of e-mail exchanges between Mr. Vickers and Gay Fred, the Commission's Consumer Services Manager, and Wendy Tatro, Legal Counsel for Ameren Missouri. Staff completed a thorough investigation and acted professionally at all times when corresponding with Mr. Vickers.[86]

78 *Id.*

79 EFIS Docket Entry No. 1, *Formal Complaint Against Ameren Missouri and Missouri Public Service Commission*, filed April 4, 2011.

80 Transcript, p. 116, Ameren Missouri Exhs. 1, 2 and 3.

81 Ameren Missouri Exhs. 1, 2, and 3.

82 Ameren Missouri Exhs. 1, 2 and 3.

83 Transcript, p. 160.

84 *Id.*

85 *Id.*

86 Staff Exh. 1.

Conclusions of Law – Mr. Vickers' CWR Payment Arrangements

The Commission's Cold Weather Rule ("CWR") is codified at 4 CSR 240-13.055. The stated purpose of the rule is:

> This rule protects the health and safety of residential customers receiving heat-related utility service by placing restrictions on discontinuing and refusing to provide heat-related utility service from November 1 through March 31 due to delinquent accounts of those customers.

A portion of the CWR defines the requirements for low-income elderly or disabled customers to register to receive assistance under the Low Income Home Energy Assistance Program ("LIHEAP"). Other portions pertain to how the regulated utility must provide discontinuance notices, when discontinuance is prohibited, how CWR agreements are executed, and how a utility recovers the reasonable operating expenses incurred because of the CWR.

The sections of the CWR pertinent to this complaint are 4 CSR 240-13.055(6) "Discontinuance of Service" and (10) "Payment Agreements." These Sections provide:

> (6) Discontinuance of Service.
> From November 1 through March 31, a utility may not discontinue heat- related residential utility service due to nonpayment of a delinquent bill or account provided—
> (A) The customer contacts the utility and states his/her inability to pay in full;
> (B) The utility receives an initial payment and the customer enters into a payment agreement both of which are in compliance with section (10) of this rule;
> (C) The customer complies with the utility's requests for information regarding the customer's monthly or annual income; and
> (D) There is no other lawful reason for discontinuance of utility service.
>
> (10) Payment Agreements.
> The payment agreement for service under this rule shall comply with the following:
> (A) A pledge of an amount equal to any payment required by this section by the agency which administers LIHEAP shall be deemed to be the payment required. The utility shall confirm in writing the terms of any payment agreement under this rule, unless the extension granted the customer does not exceed two (2) weeks.
> (B) Payment Calculations.
> 1. The utility shall first offer a twelve (12)-month budget plan which is designed to cover the total of all preexisting arrears, current bills and the utility's estimate of the ensuing bills.
> 2. If the customer states an inability to pay the budget plan amount, the utility and the customer may upon mutual agreement enter into a payment agreement which allows payment of preexisting arrears over a reasonable period in excess of twelve (12) months. In determining a reasonable period of time, the utility and the customer shall consider the amount of the arrears, the time over which it developed, the reasons why it developed, the customer's payment history and the customer's ability to pay.

3. A utility shall permit a customer to enter into a payment agreement to cover the current bill plus arrearages in fewer than twelve (12) months if requested by the customer.
4. The utility may revise the required payment in accordance with its budget or levelized payment plan.
5. If a customer defaults on a cold weather rule payment agreement but has not yet had service discontinued by the utility, the utility shall permit such customer to be reinstated on the payment agreement if the customer pays in full the amounts that should have been paid pursuant to the agreement up to the date service is requested, as well as, amounts not included in a payment agreement that have become past due.

(C) Initial Payments.

1. For a customer who has not defaulted on a payment plan under the cold weather rule, the initial payment shall be no more than twelve percent (12%) of the twelve (12)- month budget bill amount calculated in subsection (10)(B) of this rule unless the utility and the customer agree to a different amount.
2. For a customer who has defaulted on a payment plan under the cold weather rule, the initial payment shall be an amount equal to eighty percent (80%) of the customer's balance, unless the utility and customer agree to a different amount.

These sections of the CWR provide a four-step procedure for initiating and executing a CWR agreement:

(1) The customer contacts the utility and states his/her inability to pay in full (Section (6));
(2) the utility **receives** an initial payment (Section (6)) (emphasis added);
(3) the customer enters into a payment agreement; where the initial payment and payment agreement comply with section (10) of the CWR(Section (6) and (10)(B) and (C)); and, after the initial payment is received,
(4) the utility confirms the terms of any payment agreement in writing, unless the extension [of the due date of the customer's payment to prevent disconnection of service] granted the customer does not exceed two (2) weeks (Section (10)(A)).

The rules mandate how the calculation of the initial payment and the subsequent payments are made, unless the utility and the customer agree to a different amount. And, the reasons behind the order of completing these steps were delineated at the evidentiary hearing. Written confirmation follows the receipt of the initial mandated payment for several reasons.

First, allowing a customer to enter into a CWR agreement by phone expedites the arrangements to prevent disconnection. Thus, a customer could be disconnected during the time period it would take to execute a written agreement, and virtually all customers seeking a CWR agreement are calling at a time when they are delinquent on their bill and are rapidly approaching their disconnection date. The majority of defaulting customers call in very close to, or on, their disconnection date. To avoid disconnection at that point in time, the customer must either pay the entire past due balance or a smaller CWR payment.

Second, if a customer fails to make the initial payment and defaults on the CWR agreement and confirmation in writing had previously been provided, that customer would have received written confirmation of a breached, non-enforceable agreement. At the time of the default, the customer would actually be subject to completely different terms of a CWR agreement as required by Section 10(B) and (C) of the rule in order to reinstate the agreement. Those terms would differ substantially from the oral agreement reached between the customer and the utility. Consequently, if the customer had received written confirmation of terms to an agreement that no longer is in effect, this would create confusion for the customer.

Third, Section 10(A) specifically allows for a pledge of a LIHEAP payment to satisfy the initial payment. However, LIHEAP payments are only authorized if the customer's account is delinquent, in collections and faces the threat of disconnection. Issuing the written agreement takes the customer out of collections. So if the customer is taken out of collections prior to the receipt of the LIHEAP payment then that customer is no longer qualified for that payment and it will not be made. In effect, issuing the written agreement too early has the effect of disqualifying the customer from receiving the LIHEAP assistance.

Mr. Vickers did not make his initial payment as required by the Commission's CWR and by his verbal agreement with Ameren Missouri in January. Consequently, he defaulted on his CWR agreement and no written confirmation of the breached agreement was required. Subsequent to his default, Mr. Vickers was given the opportunity to reinstate his CWR agreement, and again he defaulted. Mr. Vickers finally made the initial payment for reinstating his CWR agreement in March 2011, following which Ameren Missouri appropriately provided written confirmation of the reinstatement agreement. After making this one payment, Mr. Vickers promptly defaulted on the next payment required under the reinstatement agreement.

Mr. Vickers' premise that Ameren Missouri failed to confirm his CWR agreement in writing and thus there was no CWR agreement in January is erroneous. Ameren Missouri followed the proper practice and procedure for setting up a CWR payment agreement with Mr. Vickers in compliance with the Commission's rules. Written confirmation of Mr. Vickers' CWR agreement was not required until Ameren Missouri received the initial payment. Because Mr. Vickers' foundational premise is in error, his argument that he was inappropriately charged a higher amount for a CWR payment arrangement is also incorrect. Because Mr. Vickers defaulted on the CWR agreement he made with Ameren Missouri in January, Ameren Missouri appropriately charged him the amount required to reinstate the defaulted-upon CWR agreement pursuant to the Commission's rules. In fact, due to the timing of granting the extension of the due date for payment in March, and due to an error in calculation, Ameren Missouri agreed to charge less than what the CWR formula would have required. Ameren Missouri's discretion to charge less is permitted by the rule.

In his post-hearing brief, Mr. Vickers raises a new argument. Mr. Vickers contends that Ameren Missouri violated 4 CSR 240-13.055(11). This rule provides:

> If a utility refuses to provide service pursuant to this rule and the reason for refusal of service involves unauthorized interference, diversion or use of the utility's service situated or delivered on or about the customer's premises, the utility shall maintain records concerning the refusal of service which, at a minimum, shall include: the name and address of the person denied reconnection, the names of all utility personnel involved in any part of the determination that refusal of service was appropriate, the facts surrounding the reason for the refusal and any other relevant information.

Mr. Vickers claims that because Ameren Missouri threatened to refuse him service in March if he did not pay the amount required to reinstate his CWR agreement that Ameren Missouri's failure to maintain a tape recording of his January 6, 2011 phone conversation would be a violation of this rule. Again, Mr. Vickers is incorrect.

Commission Rule 4 CSR 240-13.055(11) only applies if service is actually refused, and only if the refusal is because of unauthorized interference, diversion or use of the utility's service situated or delivered on or about the customer's premises. Mr. Vickers has never been subjected to a disconnection of service despite the continual unpaid balance on his electric bill. Nor does Mr. Vickers' inability to pay his bill qualify as one of the reasons for refusal of service as specified in the rule. Finally, Ameren Missouri introduced the tape-recorded phone conversation that occurred on January 6, 2011. Obviously, this record was maintained. If Mr. Vickers is referring to the January 3, 2011 phone conversation, it is true that Ameren Missouri admitted that it did not have that recording.[87] However, Ameren Missouri did offer into evidence its exhibit 8, directly preserving the record of that conversation. Moreover, Ameren Exhibits 4, 5 and 6 all reference the original CWR agreement established on January 3 and provide a record of that phone conversation.[88] In any event, as previously noted, this rule does not even apply to Mr. Vickers' situation because Ameren Missouri never refused to provide Mr. Vickers electric service and never refused to provide service for a reason articulated under this rule.

The substantial and competent evidence in the record as a whole supports the conclusion that Ameren Missouri has not violated any Commission statutes, rules, orders or a Commission-approved company tariff as alleged by Mr. Vickers. It also does not escape the attention of the Commission that Mr. Vickers has only paid amounts toward his electric bills that he owes Ameren Missouri for electric service provided. He has never paid for a service he has not received and he remains in arrears on his electric bills.

87 Transcript, pp. 121-122.

88 Mr. Vickers did not object to the admission of Ameren Missouri's Exhibits 4, 5 and 6, The tape recorded conversations he had with Ameren Missouri representatives wherein he admits he defaulted upon the CWR agreement he entered into with Ameren Missouri on January 3, 2011.

III. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts, as it has found them, to the law to reach its conclusions, the Commission has reached the following final decision. The substantial and competent evidence in the record as a whole supports the conclusion that Mr. Vickers has failed to meet, by a preponderance of the evidence, his burden of proving that more likely than not Ameren Missouri violated any Commission statute, regulation, order or tariff provision in relation to the application of the Commission's CWR.[89] Mr. Vickers' complaint will be denied on the merits.

THE COMMISSION ORDERS THAT:

1. Eric E. Vickers' Complaint is denied.

2. This Report and Order shall become effective on January 20, 2012 .

3. This file shall close on January 21, 2012.

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur;
Stoll, C., not participating,
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 21st day of December, 2011.

[89] Ameren Missouri elucidates a defense in terms of any challenge that could be made as to whether the CWR agreement was a valid and enforceable contract. However, no contract claim has been brought before the Commission. Moreover, the Commission cannot enforce, construe nor annul contracts, nor can it enter a money judgment. The Commission also does not have the authority to do equity or grant equitable relief. *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm'n of State of Mo*., 116 S.W.3d 680, 696 (Mo. App. 2003); *May Dep't Stores Co. v. Union Elec. Light & Power Co.,* 341 Mo. 299, 107 S.W.2d 41, 49 (Mo.1937); *Am. Petroleum Exch. v. Pub. Serv. Comm'n,* 172 S.W.2d 952, 955 (Mo.1943).

DIGEST OF REPORTS

OF THE

PUBLIC SERVICE COMMISSION

OF THE

STATE OF MISSOURI

LIST OF DIGEST TOPICS

ACCOUNTING

ACCOUNTING

III. PARTICULAR ITEMS

§16 Deposits by patrons. Public utility's failure to comply with tariff provisions governing customer deposits was cause to require a refund of those deposits to customers.

§42. Accounting Authority Orders. Based on the Commission's independent and impartial review of the unopposed agreement, the Commission found that the agreement was consistent with the public interest and approved it. The Commission incorporated the terms of the agreement into the order. **21 MPSC 3d 159**

CERTIFICATES

CERTIFICATES

III. PARTICULAR ITEMS

§21 Grant or refusal of certificate generally. The Commission granted the applicant's unopposed application for a certificate of convenience and necessity to construct and operate natural gas facilities in Benton County, Missouri**. 21 MPSC 3d 56**

The Commission determined that provision of natural gas service to the service area described by The Empire District Electric Company (Empire) was in the public interest and the Commission granted a certificate of convenience and necessity. Empire agreed to conditions that the Commission found to be in the public interest, including maintaining separate records for the service area and performing a separate class cost of service and revenue requirement for that service area in the company's next general rate case. **21 MPSC 3d 163**

§43. Gas. The Commission determined that provision of natural gas service to the service area described by The Empire District Electric Company (Empire) was in the public interest and the Commission granted a certificate of convenience and necessity. Empire agreed to conditions that the Commission found to be in the public interest, including maintaining separate records for the service area and performing a separate class cost of service and revenue requirement for that service area in the company's next general rate case. **21 MPSC 3d 163**

DEPRECIATION

DEPRECIATION

No headnotes in this volume involved the question of depreciation.

DISCRIMINATION

DISCRIMINATION

No headnotes in this volume involved the question of discrimination.

ELECTRIC

II. JURISDICTION AND POWERS

III. OPERATIONS

IV. RELATIONS BETWEEN CONNECTING COMPANIES

ELECTRIC

III. PARTICULAR ITEMS

§6 Territorial agreement. The Commission approved an uncontested territorial agreement between an electric cooperative and a municipality. **21 MPSC 3d 109**

§14. Rules and regulations. The substantial and competent evidence in the record as a whole supported the conclusion that the complainant failed to meet, by a preponderance of the evidence, his burden of proving that more likely than not Ameren Missouri violated any Commission statute, regulation, order, or tariff provision in relation to the application of the Commission's cold weather rule. **21 MPSC 3d 187**

§20 Rates. At any time, the rate a utility recovers must match the tariff in effect. **21 MPSC 3d 14**

No tariff can authorize recovery of any amount for any period that is before that tariff's effective date. **21 MPSC 3d 14**

The Commission approved the true-up amount recommended by Staff regarding Ameren Missouri's Fuel Adjustment Clause. **21 MPSC 3d 33**

The Commission approved Ameren Missouri's tariff to implement a Fuel Adjustment Clause (FAC) rate adjustment and denied Missouri Industrial Energy Consumers' (MIEC) motion for FAC credits from off-system sales margins. **21 MPSC 3d 27**

§20.1 Fuel Adjustment Clause. Fuel Adjustment Clause amounts are always conditional and subject to adjustment. **21 MPSC 3d 14**

The Commission approved Staff's unopposed prudence review of the company's fuel costs to be recovered through its fuel adjustment clause. **21 MPSC 3d 40**

§42 Planning and Management. Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard

Compliance Plan. **21 MPSC 3d 60**

Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan. **21 MPSC 3d 62**

Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan. **21 MPSC 3d 64**

Because the company had not yet filed its report explaining how it actually complied with renewable energy requirements, the Commission declined to make any rulings regarding alleged deficiencies in the company's Renewable Energy Standard Compliance Plan. **21 MPSC 3d 66**

The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing. **21 MPSC 3d 94**

Missouri Department of Natural Resources (MDNR) and the Office of the Public Counsel failed to meet, by a preponderance of the evidence, their burden of proving that KCP&L Greater Missouri Operations Company (GMO) violated the Commission's Chapter 22 rules, the Non-Unanimous Stipulation and Agreement, or the Stakeholder Process Agreement. The Commission required GMO to address the concerns raised by the stakeholders in this proceeding in its April Integrated Resource Plan (IRP) filing. **21 MPSC 3d 76**

The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing. **21 MPSC 3d 97**

The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing. **21 MPSC 3d 101**

The Commission directed the electric utility to address specified planning issues in its next Integrated Resource Plan (IRP) filing. **21 MPSC 3d 105**

§43 Accounting Authority orders. An adverse ruling is not an unusual,

infrequent, abnormal, or extraordinary event sufficient to justify issuance of an accounting authority order. **21 MPSC 3d 14**

§101. Fuel Clauses. The Commission approved Ameren Missouri's tariff to implement a Fuel Adjustment Clause (FAC) rate adjustment and denied Missouri Industrial Energy Consumers' (MIEC) motion for FAC credits from off-system sales margins. **21 MPSC 3d 27**

There is no need to attempt to expedite recovery of alleged imprudently incurred over-collections when Staff's prudence review for the accumulation periods in question will begin in the current month. The Commission's rules and the statutory scheme embodied in Section 386.266, RSMo Supp. 2010, allow not only for the refund of any imprudently incurred cost, but also interest on those cost, the ratepayers will always be made whole through the established FAC mechanism. **21 MPSC 3d 27**

EVIDENCE, PRACTICE AND PROCEDURE

III. PRACTICE AND PROCEDURE

EVIDENCE, PRACTICE AND PROCEDURE

I. IN GENERAL

§1. Generally. The Commission found that a motion for clarification should be granted. **21 MPSC 3d 112**

The Commission found that a motion for clarification should be granted. **21 MPSC 3d 157**

§4 Presumption and burden of proof. Generally in a complaint case, the burden of proof is on complainant as the party asserting the affirmative on the issue of the utility's imprudence. **21 MPSC 3d 42**

§6. Weight, effect and sufficiency. When terms of an agreement allowed Ameren to change the company's tariff due to a change in circumstances, facts did not support Ameren's argument that a change of circumstances existed that justified changes to the utility's Energy Efficiency Program. Although Ameren argued that some of the program's measures were not cost effective, the evidence demonstrated that Ameren was aware of this prior to entering into the agreement. **21 MPSC 3d 112**

When terms of an agreement allowed Ameren to change the company's tariff due to a change in circumstances, facts did not support Ameren's argument that a change of circumstances existed that justified changes to the utility's Energy Efficiency Program. Although Ameren argued that some of the program's measures were not cost effective, the evidence demonstrated that Ameren was aware of this prior to entering into the agreement. **21 MPSC 3d 157**

§8. Stipulation. When interpreting an agreement, the Commission considers what the parties were attempting to accomplish. The Commission concluded that the requirement in a Commission-approved agreement for a utility to maintain an Energy Efficiency Program through December 31, 2012, was an attempt by the parties to gather data and evaluate the program. Therefore, a tariff sheet that prematurely cut the program's measures prior to the end of the evaluation period controverted the intent of the parties to the agreement. **21 MPSC 3d 112**

When interpreting an agreement, the Commission considers what the parties were attempting to accomplish. The Commission concluded that the requirement in a Commission-approved agreement for a utility to maintain an Energy Efficiency Program through December 31, 2012, was an attempt by the parties to gather data and evaluate the program. Therefore, a tariff sheet that prematurely cut the program's measures prior to the end of the evaluation period controverted the intent of the parties to the agreement. **21 MPSC 3d 157**

§24 Procedure, evidence and proof. The movant has the burden to prove that summary determination is proper. When the movant introduces facts showing a right to judgment as a matter of law, the burden then shifts to the non-movant, who must respond with countervailing evidence showing that there is a genuine dispute as to one or more of the movant's material facts **21 MPSC 3d 35**

Summary determination is appropriate where the respondent admits all allegations made in complaint. **21 MPSC 3d 167**

Although this case began as a complaint, by the terms of a prior stipulation and agreement, it was in effect a full prudence review of the company's fuel purchasing practices. Therefore the burden of proof shifted to the company when the complainant established a serious doubt as to the prudence of the expenditure. **21 MPSC 3d 42**

§26. Burden of proof. Missouri Department of Natural Resources (MDNR) and the Office of the Public Counsel failed to meet, by a preponderance of the evidence, their burden of proving that KCP&L Greater Missouri Operations Company (GMO) violated the Commission's Chapter 22 rules, the Non-Unanimous Stipulation and Agreement, or the Stakeholder Process Agreement. **21 MPSC 3d 76**

§30. Settlement procedures. Commission Rule 4 CSR 240-2.115 provides that if no objection is made to a nonunanimous stipulation and

agreement within seven days of its filing, a stipulation and agreement may be treated as unanimous. No party objected within the seven-day deadline, nor were any comments or responses filed by the response deadline. Because no party filed an objection to the agreement, the Commission deemed the agreement was unanimous. **21 MPSC 3d 90**

EXPENSE

§26. Accidents and damages
§27. Additions and betterments
§28. Advertising, promotion and publicity
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§31. Burglary loss
§32. Casualty losses and expenses
§33. Capital amortization
§34. Collection fees
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§37. Depreciation
§38. Deficits under rate schedules
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§44. Expenses of non-utility business
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§48. Financing costs and interest
§49. Franchise and license expense
§50. Insurance and surety premiums
§51. Legal expense
§52. Loss from unprofitable business
§53. Losses in distribution
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§60. Political and lobbying expenditures
§61. Payments to affiliated interests
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§63. Research
§64. Salaries and wages
§65. Savings in operation
§66. Securities redemption or amortization
§67. Taxes
§68. Uncollectible accounts
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§70. Engineering and superintendence expense
§71. Interest expense
§72. Preliminary and organization expense
§73. Expenses incurred in acquisition of property

EXPENSE

No headnotes in this volume involved the question of expense.

GAS

GAS

III. PARTICULAR ITEMS

§1 Generally. The Commission approved a revised tariff designed to comply with a previous Commission order. **21 MPSC 3d 139**

§6 Transfer, lease and sale. The Commission approved the proposed merger of two natural gas local distribution companies as being not detrimental to the public interest, based on the unanimous stipulation and agreement of the parties **21 MPSC 3d 53**

§17.1 Purchased Gas Adjustment (PGA). Fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction. **21 MPSC 3d 119**

Fair market value of a good or service can be defined as the price that a seller is willing to accept and a buyer is willing to pay on the open market in an arms-length transaction. **21 MPSC 3d 171**

Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions. **21 MPSC 3d 171**

§33 Billing practices. The Commission approved a stipulation and agreement that allowed a gas utility to assess security deposits against new customer with low credit scores on an experimental basis. **21 MPSC 3d 68**

§40. Transportation. Based on the Commission's independent and impartial review of the unopposed agreement and the draft interconnection agreement, the Commission found that the agreement was consistent with the public interest and approved it. The complaint filed by St. Louis Natural Gas Pipeline, L.L.C. on March 22, 2011 was dismissed with prejudice. **21 MPSC 3d 90**

§41. Pipelines. Based on the Commission's independent and impartial review of the unopposed agreement and the draft interconnection agreement, the Commission found that the agreement was consistent with the public interest and approved it. The complaint filed by St. Louis Natural Gas Pipeline, L.L.C. on March 22, 2011 was dismissed with prejudice. **21 MPSC 3d 90**

§78 Payments and affiliated interests. 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. **21 MPSC 3d 119**

The Commission's prudence standard applies when the Commission is evaluating the prudence of an affiliated transaction. **21 MPSC 3d 119**

Fair market price is set by the market, not by Staff's review of documents. **21 MPSC 3d 119**

Assuming the bidding process was fair and open, that bidding process established the fair market value for the affiliate transactions. **21 MPSC 3d 171**

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. **21 MPSC 3d 171**

The Commission's prudence standard applies when the Commission is evaluating the prudence of an affiliated transaction. **21 MPSC 3d 171**

Fair market price is set by the market, not by Staff's review of documents. **21 MPSC 3d 171**

MANUFACTURED HOUSING

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§4. Jurisdiction and powers of the State Commission
§5. Reports, records and statements

II. WHEN A PERMIT IS REQUIRED
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III. GRANT OR REFUSAL OF A PERMIT
§8. Grant or refusal generally
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IV. OPERATION, TRANSFER, REVOCATION OR CANCELLATION
§12. Operations under the permit generally
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§14. Modification and amendment of the permit generally
§15. Transfer, mortgage or lease generally
§16. Revocation, cancellation and forfeiture generally
§17. Acts or omissions justifying revocation or forfeiture
§18. Necessity of action by the Commission
§19. Penalties

MANUFACTURED HOUSING

III. PARTICULAR ITEMS

§19 Penalties. The Commission authorized its general counsel to file an action in circuit court seeking penalties against the respondent for violations of Commission regulations governing the sale of manufactured homes. **21 MPSC 3d 167**

PUBLIC UTILITIES

PUBLIC UTILITIES

§7. Jurisdiction and powers of the State Commission. The Commission dismissed the complaint for lack of jurisdiction. **21 MPSC 3d 59**

RATES

VIII. RATE DESIGN, CLASS COST OF SERVICE

§118. Method of allocating costs
§119. Rate design, class cost of service for electric utilities
§120. Rate design, class cost of service for gas utilities
§121. Rate design, class cost of service for water utilities
§122. Rate design, class cost of service for sewer utilities
§123. Rate design, class cost of service for telecommunications utilities
§124. Rate design, class cost of service for heating utilities

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RATES

§108. Gas. The Commission rejected Ameren's proposed tariff sheet changing the company's Energy Efficiency Program. The Commission determined the tariff sheet was contrary to a prior Commission-approved Stipulation and Agreement and that the proposed revisions were not in the public interest. **21MPSC 3d 112**

The Commission rejected Ameren's proposed tariff sheet changing the company's Energy Efficiency Program. The Commission determined the tariff sheet was contrary to a prior Commission-approved Stipulation and Agreement and that the proposed revisions were not in the public interest. **21 MPSC 3d 157**

SECURITY ISSUES

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§4. Conversion, redemption and purchase by a corporation
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II. JURISDICTION AND POWERS

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SECURITY ISSUES

No headnotes in this volume involved the question of security issues.

SERVICE

SERVICE

No headnotes in this volume involved the question of security issues.

SEWER

SEWER

No headnotes in this volume involved the question of security issues.

STEAM

STEAM

III. OPERATIONS

§20 Rates. The Commission approved a stipulation and agreement to allow the utility to implement a rate increase. **21 MPSC 3d 70**

§42 Planning and management. The purpose of a hedging program is

not to make money, nor is it to ensure that customers pay the lowest possible cost. Rather, the purpose of a hedging program it to mitigate the risk of price volatility. **21 MPSC 3d 42**

The prudence standard does not require a company to correctly foresee the direction a natural gas market will take. **21 MPSC 3d 42**

TELECOMMUNICATIONS

TELECOMMUNICATIONS

No headnotes in this volume involved the question of accounting.

VALUATION

VALUATION

No headnotes in this volume involved the question of valuation.

WATER

WATER

I. IN GENERAL

Water §4 Transfer, lease and sale. The Commission has no statutory authority to approve a sale of utility property retroactively. Such sale was approved effective with the Commission's order. **21 MPSC 3d 1**

The Commission approved the proposed transfer of the water company's assets as being not detrimental to the public interest. **21 MPSC 3d 7**

The Commission approved the proposed transfer of water and sewer system as being not detrimental to the public interest. **21 MPSC 3d 11**

The Commission cancelled the certificate of convenience and necessity of the defunct water company and granted a certificate to the acquiring company. . **21 MPSC 3d 118**